1964

Surviving Spouse's Distributive Share of Amendable Trusts

John A. Humbach
Elisabeth Haub School of Law at Pace University

SURVIVING SPOUSE'S DISTRIBUTIVE SHARE OF AMENDABLE TRUSTS

Purcell v. Cleveland Trust Co.
200 N.E.2d 602, 28 Ohio Op. 2d 262 (P. Ct. 1964)

Approximately three years before her death in 1960, plaintiff's wife created an amendable and revocable inter vivos trust, naming defendant as trustee. The formally drawn instrument provided for pour-over from her simultaneously executed will, however, a specific bequest to the trust was apparently never made. After his wife's death, plaintiff, choosing to exercise his statutory prerogative of taking against his wife's will,[1] demanded that defendant trustee pay over to him from the corpus of the inter vivos trust the one-half share which he claimed was due him under Ohio law. Upon the trustee's refusal to accede, plaintiff brought an action in the Probate Court of Cuyahoga County asking for a declaratory judgment establishing his right to receive a distributive share from the trust corpus. The court sustained the right of plaintiff to one-half of the fund by virtue of his election to take against the will.[2]

This decision adds no certainty to an area of Ohio law long typified by uncertainty. Prior to 1921 an inter vivos trust was void unless the donor indicated an intention to part absolutely with dominion and control over, or benefit from, the property.[3] In that year an amendment to section 8617[4] of the General Code altered the effect of that section to permit the creation of trusts with substantial reservations of control and benefit in the settlor. The amendment was not greeted enthusiastically by the courts. In *Union Trust Co. v. Hawkins*[5] the Ohio Supreme Court initially expressed grave doubts concerning the wisdom of the legislation and was reluctant to interpret the amended statute as anything more than a restate-

---

[1] Ohio Rev. Code Ann. § 2107.39 (Page 1954).

[2] Purcell v. Cleveland Trust Co., 200 N.E.2d 602, 28 Ohio Op. 2d 262 (P. Ct. 1964).

[3] Worthington v. Redkey, 86 Ohio St. 128, 99 N.E. 211 (1912), found in the reservations of control or benefit a showing that the donor lacked the intent to part with the legal title. Failure to transfer the title was held to render the dispositions provided by the trust testamentary and therefore invalid unless the trust document was formally executed in compliance with the Statute of Wills.

[4] Ohio Rev. Code Ann. § 1335.01 (Page Supp. 1964):

> All deeds of gifts and conveyances of real or personal property made in trust for the exclusive use of the person making the same are void, but the creator of a trust may reserve to himself any use of power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend, or revoke such trust, and such trust is valid as to all persons [except creditors who may reach reserved beneficial interests or compel revocation if the power to revoke is reserved.]

Prior to its amendment the statute (29 Ohio Laws 218 § 1 (1810)) read substantially the same as the present version up to the first comma.

[5] 121 Ohio St. 159, 167 N.E. 389 (1929).

ment of the old rule. The court's misgivings apparently stemmed from fears that legalization of trusts for the use of the settlor would lead to their widespread use as a means of circumventing the fraud-preventive formalities of the Statute of Wills.[6] However, on rehearing the court accepted the more radical interpretation of the amendment noting that it was probably the one intended by the legislature and that it was, indeed, the only one which would "give the amendment any intelligent or practical application."[7]

Later, in a case involving a trust which was established prior to the effective date of the amendment and was therefore not governed by it, the court repudiated the notion set out in *Hawkins* that the new legislation was the sole available authority to support its upholding the trust.[8] Moving into concord with the bulk of authority elsewhere, the court held that the gift *in praesenti* of an equitable interest (the legal interest vesting simultaneously in a trustee) is not invalid because some control and benefit is retained by the donor. Naturally the present transfer of interests must actually take place, and the court warned that if the retained powers were too extensive, no transfer would be presumed—instead the trustee in such case would be regarded as a mere agent of the donor. The facts in each individual case are therefore crucial in determining the validity of an alleged trust.[9]

Subsequent cases increased the degree of permissible control by the donor to the level of almost complete dominion.[10] The validity of the trust litigated in *Schofield v. Cleveland Trust Co.*[11] was sustained even though the donor had relinquished almost no control or benefit.[12] Thus emerged an interpretation of the amendment evincing judicial confidence in and support of revocable, amendable trusts as valid gifts which, despite their qualified nature, vest a present interest in the donee.[13] By conditioning recognition of such a trust on presentation of clear and convincing evidence of its establishment, the likelihood of fraud had been alleviated and the original conflict with the Statute of Wills had thus been resolved, or at least rationalized.[14]

---

[6] Ohio Rev. Code Ann. § 2107.03 (Page 1954).

[7] Union Trust Co. v. Hawkins, *supra* note 5, at 180, 167 N.E. at 395.

[8] Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938).

[9] *Id.* at 9-10, 15 N.E.2d at 630.

[10] Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E.2d 119 (1939); Central Trust Co. v. Watt, 139 Ohio St. 50, 38 N.E.2d 185 (1941). In the latter case a three-judge minority opined that the "trustee" was in reality a mere agent of the donor, *i.e.*, no valid trust was created.

[11] *Supra* note 10.

[12] The donor retained, among other things, the right to income from the property, the right to insist that his approval of sales and purchases of property be obtained, and the right to revoke the arrangement.

[13] See First Nat'l Bank v. Tenney, 165 Ohio St. 513, 138 N.E.2d 15 (1956).

[14] Adams v. Fleck, 171 Ohio St. 451, 172 N.E.2d 126 (1961). The court expressly did *not* hold that a formal document would be singularly capable of providing the clear and convincing evidence required to establish the terms of the trust agreement, although it noted that such a document has always been present in the past. See 1 Scott, Trusts § 57.2 (2d ed. Supp. 1960).

Parallel to the development of this line of cases supporting the revocable, amendable trust, two cases, *Bolles v. Toledo Trust Co.*[15] and *Harris v. Harris*,[16] were decided in which the court refused to respect the finality of contributions to trusts if those contributions depleted the estate from which the spouse's statutory share was to be derived. To permit such gifts seemed to amount to a fraud on the spouse. Evasion of the Statute of Wills via these trusts was bad enough, but emasculation of the election statute was intolerable. Invasion of the corpus of an established inter vivos trust to permit the spouse to recover her statutory share thereof was ordered. In *Bolles* the court decided that the statute authorizing revocable, amendable trusts[17] had no effect on the rights of a spouse in the decedent's estate. That the purpose of the statute was to alter traditional policies in this regard was dismissed without comment.[18] The trust was considered to be otherwise valid; no "mere" agency was created. The result was a strange phenomenon: property of which the deceased had divested himself during his lifetime appeared in the hands of his administrator for distribution to his spouse, while ownership of the property remained wholly in the intended donees, *i.e.*, the trustee and the beneficiary. Three years later in *Harris* the principles enunciated in *Bolles* were again applied, though this time with only a bare majority concurring.[19]

Recently the court has again seemed inclined to favor and support revocable, amendable trusts,[20] a trend which has culminated with *Smyth v. Cleveland Trust Co.*[21] in which that portion of *Bolles* which authorized the invasion of an inter vivos trust to obtain a statutory share thereof was expressly overruled. Now one possessed of virtually all incidents of ownership at death may, by taking the proper steps, dispose of that property upon his death so as to put it absolutely beyond reach of his spouse.[22] It is true that the plaintiff spouse in *Smyth* was otherwise generously provided for; preserving the trust would not have left her penniless, and indeed, she willingly participated in transfers of realty to the trust,[23] which facts negate implications of fraud or unsavory motives on the part of the deceased. It does not seem, however, that the case rested on such equitable considera-

---

[15] 144 Ohio St. 195, 58 N.E.2d 381 (1944).

[16] 147 Ohio St. 437, 72 N.E.2d 378 (1947).

[17] *Supra* note 4.

[18] 144 Ohio St. at 213, 58 N.E.2d at 391.

[19] See in particular the dissenting opinion of Zimmerman, J., who anticipated future doctrine. 147 Ohio St. at 446, 72 N.E.2d at 382.

[20] First Nat'l Bank v. Tenney, *supra* note 13; Adams v. Fleck, *supra* note 14.

[21] 172 Ohio St. 489, 179 N.E.2d 60 (1961).

[22] He may apparently do it even for the express purpose of depriving his spouse of his bounty, although a good faith intent to effect an actual transfer must be present. Some care must be taken to clarify this intent, for where bad faith regarding the spouse is evident, the courts have been disposed to call the transfer a sham, the intent to make a gift not being present. See Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

[23] Smyth v. Cleveland Trust Co., *supra* note 21 at 502-03, 179 N.E.2d at 69.

tions.[24] Nor does the fact that the trust was executed on a formal document, also mentioned as a makeweight by the court, seem to have been crucial to its decision.[25] Controlling, rather, was the court's considered revaluation of the amended statute.

The effect of the doctrine of independent significance is to dispel the cloud of invalidity which would otherwise surround a bequest made to an amendable, revocable inter vivos trust where the terms or beneficiaries of the trust were later changed. Hence, the disposition of testamentary property may be altered subsequent to the formal execution of the will without the formality of executing a new will or codicil.[26] The rationale seems to be that such acts are independently significant in that they also affect the disposition of the property comprising the inter vivos trust. If the variation of the future state of things is accompanied by a variation in the present state of things, the difficulty of perpetrating fraud will be enhanced.

Until 1963, no clear-cut authority supporting application of the doctrine of independent significance to trusts existed in Ohio,[27] but in that year the General Assembly enacted a statute giving it formal legislative approval.[28] The statute provided that its terms were not to have the effect of qualifying the right of a surviving spouse to the statutory share of the testator's estate; that is, a bequest to an inter vivos trust is, like all other bequests, subject to the rights of the surviving spouse. A probable moving force behind enactment of the statute was fear that the rule of the recently decided *Smyth* case would be extended to legacies to established inter vivos trusts,

---

[24] It has been suggested that equitable considerations may play a fairly important determinative role. See generally 23 Ohio St. L.J. 581 (1962).

[25] The court did feel that the formality was helpful in determining that a trust, not a mere agency, had been created, perhaps again echoing the predisposition to substitute for the fraud-discouraging provisions of the Statute of Wills only measures which themselves have some "fraud-proofing" built in.

[26] See generally 1 Scott, Trusts § 54.3 (2d ed. 1956).

[27] In *Bolles* the court, noting the doctrine's unacceptability in some other jurisdictions, intimated that such a case "may" come up in Ohio, though it concluded that *Bolles* was not it. Bolles v. Toledo Trust Co., *supra* note 15, at 215-16, 58 N.E.2d at 391.

[28] Ohio Rev. Code Ann. § 2107.63 (Page Supp. 1964):

> A testator may by will devise, bequeath, or appoint real or personal property, or any interest in such property, to a trustee of a trust which is evidenced by a written instrument executed by the testator or any other person either before or on the same date of the execution of such will and which is identified in such will.
>
> The property or interest . . . shall be added to and become a part of the trust estate, shall be subject to the jurisdiction of the court having jurisdiction of such trust, and shall be administered in accordance with the terms and provisions of the instrument creating such trust, including, unless the will specifically provides otherwise, any amendments or modifications thereof made in writing before, concurrently with, or after the making of the will and prior to the death of the testator. . . .
>
> This section shall not affect any of the rights accorded to a surviving spouse [by the election statute] . . . .

barring the right of the spouse to the bequest as well as the corpus. At any rate, the apparent meaning of the statute is to proscribe such extension.

The facts of the instant case are essentially the same as those of *Smyth*, on whose authority one would expect it to be decided. The probate court, however, in dissatisfaction with the abandonment of *Bolles*, concluded that the newly enacted statute concerning independent significance represented a legislative overruling of *Smyth* to the extent that it modified *Bolles*. By interpreting the enactment as an abrogation of *Smyth*, a justification was found to apply what was felt to be the more acceptable rule. But only property originally transferred to the trust *inter vivos* seems to be subject to adjudication here,[29] while the statute apparently deals only with testamentary property, stipulating that it may be lawfully bequeathed to an amendable trust. No intention to affect the rules governing inter vivos arrangements is apparent. The ironic result is that the court, in allowing the invasion of the inter vivos created corpus, seems to have confounded the laws regarding inter vivos vis-à-vis testamentary transfers of property by uncommonly interpreting the statute calculated decisively to distinguish the two. Rather than blocking extension of the *Smyth* rule to preclude the spouse's rights against the decedent's estate, the statute has been used in the instant case as a conduit for regression to the pre-*Smyth* rule.

[29] It was not made entirely clear in the opinion whether or not testamentary gifts to the trust were included in the corpus. However, it is certain that even if there were any, there was most assuredly inter vivos property included with it and treated by the court as indistinguishable from it. The presence of pour over from the will should not affect the disposition of the inter vivos gifts in any case.