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REVOCATION OF INTER VIVOS TRUSTS—AMENDMENTS TO SECTION 23 OF NEW YORK PERSONAL PROPERTY LAW AND TO SECTION 118 OF NEW YORK REAL PROPERTY LAW

For a long period in the history of New York law, trusts, once established, were thereafter irrevocable, unless the power of revocation was expressly reserved by the settlor.[1] Necessarily, as a result of this rule, much property held in trust was rendered virtually inalienable. In an expression of public policy against this curtailment on the free alienability of property the New York Legislature enacted Section 23 of the Personal Property Law and Section 118 of the Real Property Law, authorizing the revocation of a trust upon the written consent of all persons "beneficially interested" in it.[2] The public policy embodied in these statutes is so strong that a trust might be revoked even though the settlor declared it to be irrevocable.[3]

In the application of these statutory provisions much emphasis was understandably placed on the construction of the words "beneficially interested." In *Pulsifer v. Monges* [4] it was decided that contingent remaindermen as well as vested remaindermen had a beneficial interest. Further definition occurred in the case of *Smith v. Title Guarantee and Trust Co.*[5] which held that where a trust was created for the benefit of the settlor's children, the unborn children were not persons beneficially interested. Consequently only the consent of the living members of the class was necessary for a revocation of the trust.

Although the above constructions are clear, a recurrent problem has arisen with respect to the construction of language used in the trust deed which directs that the principal of the trust be paid over to the "heirs at law or next of kin" of the settlor upon the termination of certain intermediate interests.

If the language is construed as creating a remainder interest in the living potential heirs, they have a "beneficial interest" and the settlor may not revoke the trust without their consent. If on the other hand, the language is construed as reserving to the settlor a reversion, his heirs take no interest in the trust property, and the settlor may revoke without their consent. Thus, it becomes important to determine whether the language of the deed creates remain-

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[1] Mabie v. Bailey, 95 N. Y. 206 (1884).

[2] N. Y. PERS. PROP. LAW § 23, passed in 1909, provides: "Upon the written consent of all the persons beneficially interested in a trust of personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof." N. Y. REAL PROP. LAW § 118, passed in 1932, has substantially the same provision.

[3] *See* Pulsifer v. Monges, 66 N. Y. S. 2d 367, 368 (Sup. Ct. 1946).

[4] 66 N. Y. S. 2d 367 (Sup. Ct. 1946).

[5] 287 N. Y. 500, 41 N. E. 2d 172 (1942).

ders in the heirs or a reversion in the settlor. This determination has presented a long lasting and difficult problem for the courts.

HISTORY OF THE PROBLEM

Common Law Rule of Property

The common law had adopted a hard and fast rule of property, known as the doctrine of "worthier title," with respect to the solution of the problem. The early cases consistently held that such language created a reversion in the grantor [6] and no interest in the heirs. The effect of these holdings was that the ultimate estate in the property had never left the grantor. The basis for the rule lay in the feudal system. Where property passed by descent, all the incidents of the feudal custom attached to the property continued in force; however, if the property passed by way of purchase these incidents were severed.[7] Naturally, the courts of the day entertained a great reluctance to facilitate the breakdown of this basic socio-political structure.

The common law rule was carried over to the United States and subsisted in all its vigor long after it had been abrogated in England.[8] The most fundamental basis for the rule in the United States is found in the maxim—*Nemo est haeres viventis*—namely, no one is heir to the living. If a living person had no heirs, there was no one in being who could take an interest under the deed; the heirs mentioned in the deed would take by operation of law upon the death in due course of the grantor. This was the law in New York until the case of *Doctor v. Hughes*.[9]

Substitution of a Rule of Construction

The case of *Doctor v. Hughes* [10] first intimated in New York a turning away from this hard and fast rule of property. In this case the settlor created a trust of real property, the income of which was payable to him for life, and directed that upon his death the property, or if sold, the proceeds, be conveyed to his heirs. The court held that a reversion was created by the trust and stated that the rule of "worthier title" ". . . was never applied in all its rigor to executory

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[6] Bedford v. Russel, Popham 3, 79 Eng. Rep. 1126 (K. B. 1593); Godbold v. Freestone, 3 Lev. 406, 83 Eng. Rep. 753 (K. B. 1694); Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (Ch. 1740).

[7] See Note, *The Rule Favoring Title by Descent Over Title by Devise*, 46 HARV. L. REV. 993 (1933).

[8] Stephens v. Moore, 298 Mo. 215, 249 S. W. 601 (1923); Akers v. Clark, 184 Ill. 136, 56 N. E. 296 (1900); Harris v. McLaran, 30 Miss. 533 (1855). The rule was abrogated in England in 1833. 3 & 4 Will. 4c. 106, § 3.

[9] Buckley v. Buckley, 11 Barb. 43 (N. Y. 1850).

[10] 225 N. Y. 305, 122 N. E. 221 (1919).

trusts . . . which were moulded by the court as best to answer the intent of the person creating them. . . ." [11] However, the court used language which had a profound influence on the subsequent development of this area of the law: "But at least the ancient rule survives to this extent, that to transform into a remainder what would ordinarily be a reversion, the *intention* to work the transformation must be *clearly expressed.*" [12] What was intimated in *Doctor v. Hughes,* namely, that the courts should give effect to the clearly expressed intention of the settlor, was soon confirmed as a legal proposition.[13] Before long the doctrine of worthier title as qualified by the *Doctor v. Hughes* doctrine was applied to personal property.[14] Thus were the courts precipitated upon the task of intention-seeking. The case of *Whittemore v. Equitable Trust Co.*[15] represents one of the first successful attempts to spell out the requisite intent. Three settlors had set up a trust for two life beneficiaries. At the termination of the trust, the principal was to be returned to the settlors, but in the event that anyone of them predeceased the life tenants, the principal was to be distributed according to his will, or if no will, then according to the laws of intestacy. The court felt that the settlor's intention to create a remainder was clearly expressed, and pointed out four factors by which it was impressed: (1) no provision was made to pay the principal to the grantee or assignee of the settlor, (2) the settlor had made a full and formal disposition of the estate at the time of the instrument, (3) the settlor reserved only the right of testamentary disposition, and, (4) the trust principal could not be divested by deed or assignment of the settlor.

Although it is strongly arguable that all these elements may consistently be contained in a trust deed purporting to establish a reversion,[16] some courts have viewed the decision as a lucid process of determining the settlor's intent.[17] That it was something less may be seen by a view of some subsequent decisions.

Not long afterwards a case was decided which involved essentially the same ingredients as the *Whittemore* case. The settlor set up a trust, the income of which was payable to himself for life, the principal to be paid according to his will or by the laws of intestacy, if he left no will. The court held that the trust was revocable, distinguishing the *Whittemore* case by merely saying that there was no satisfactory evidence of an intent in the instant case to create a re-

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[11] *Id.* at 311, 122 N. E. at 222.

[12] *Id.* at 312, 122 N. E. at 222. [Emphasis added.]

[13] Gage v. Irving Bank and Trust Co., 222 App. Div. 92, 225 N. Y. Supp. 476 (2d Dep't 1927), *aff'd,* 248 N. Y. 554, 162 N. E. 522 (1928).

[14] Engel v. Guaranty Trust Co. of N. Y., 280 N. Y. 43, 19 N. E. 2d 673 (1939).

[15] 250 N. Y. 298, 165 N. E. 454 (1929).

[16] See Mariash, *Revocation of Inter Vivos Trusts in New York, A Study in Confusion,* 16 B'KLYN L. REV. 41, 45-9 (1949).

[17] *See* Hammond v. Chemung Canal Trust Co., 141 Misc. 158, 160, 252 N. Y. Supp. 259, 261 (Sup. Ct. 1931).

mainder.[18] That the *Whittemore* case settled little can further be seen by an evaluation of two cases decided by the Appellate Division, First Department, on the same day.

In *Davies v. City Bank Farmers Trust Co.*[19] the settlor set up a trust for herself for life, the principal to be distributed according to her last will and testament, or in the absence of such, then according to the laws of intestacy. The court held that this trust agreement created a reversion, and that the settlor could revoke without the consent of anyone.

The *Beam v. Central Hanover Bank and Trust Co.*[20] case involved a very similar devise. The court, adopting the language of the *Whittemore* case that there was a full and formal disposition of the property, held that a remainder had been created. These decisions, based on apparently the same fact situations, clearly show that the court was subject to vacillation in the application of principles. The continued search for the settlor's intention further augmented the confusion. Rather artificial rules were conceived to ascertain intention, but, apparently, not even these received universal approbation.

Some Rules of Construction

A review of some of them will highlight the quandary in which the courts found themselves as a result of abandoning the doctrine of "worthier title." As a general proposition, it has been held that where the settlor retains the right to invade the corpus of the trust for his own benefit a reversion results.[21] This is a plausible construction under the rule enunciated in *Doctor v. Hughes* that the intention to create a remainder must be *clearly expressed.* Not only does the provision fail to negate the presumption in favor of a reversion, but lends force to it. Yet, in *Engel v. Guaranty Trust Co.*[22] the court adopted a similar provision as a basis for finding an intention to create a remainder. While it is true that in the *Engel* case the settlor did not specifically reserve the right to invade the entire corpus, the decision cast such doubt on the existing rule as to render it of little aid in construction.

Another test frequently resorted to by the courts was the determination of whether the class to take, although denominated heirs or next of kin, was in any way distinct from the ordinary distributees of the settlor. If it was, its members were deemed to take a remainder interest. This test led the courts to find remainder interests in heirs or next of kin who were, according to the trust deed,

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[18] Berlenbach v. Chemical Bank and Trust Co., 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dep't), *aff'd,* 260 N. Y. 539, 184 N. E. 83 (1932).

[19] 248 App. Div. 380, 288 N. Y. Supp. 398 (1st Dep't 1936).

[20] 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936).

[21] Matter of Gordon v. Chemical Bank and Trust Co., 272 App. Div. 565, 72 N. Y. S. 2d 914 (1st Dep't 1947).

[22] 280 N. Y. 43, 19 N. E. 2d 673 (1939).

to be identified by the laws of a state other than that in which the settlor died,[23] or to be ascertained at a time different from the date of his death.[24]

However, the efficacy of these tests was soon compromised, and a lack of decisional harmony once again evidenced itself. With respect to the first of the aforementioned tests, where a New York resident directs that the principal be distributed to his heirs according to the New York law of intestacy, it has been held that he has created a remainder, for he may die elsewhere and hence has in effect specified a class different from his normal distributees;[25] and contrariwise, under the same facts it has been held that such a direction does not of necessity create a remainder.[26] The second of the above tests was enigmatized by a holding that the ascertainment of the class of heirs at the end of the life estate rather than at the death of the settlor was not conclusive of the creation of a remainder interest.[27]

Attempts to Establish Policy

Contemporaneous with the confusion in applying specific rules, the appellate courts suffered from the inability to define the broad general principles.

After the statement of the rule in *Doctor v. Hughes* that the intention of the settlor must be *clearly expressed,* the case of *Engel v. Guaranty Trust Co.*[28] further qualified the ancient rule of "worthier title" by stating that the rule ". . . is with us no more than a *prima facie* precept of construction which may serve to point the intent of the author, when the interpretation of a writing like this trust agreement is not otherwise plain. . . . it must give place to a *sufficient expression* [emphasis added] by a grantor of his purpose to make a gift of a remainder to those who will be his distributees."[29] Thus the rule that the presumption in favor of a reversion could be offset only by a clearly expressed intention to create a remainder, was reduced to a mere rule of construction favoring the finding of a reversion where the evidence in favor of both reversion and remainder was substantially in balance. The coexistence of these two rules was so productive of confusion that a justice of the Appellate Division

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[23] Minc v. Chase National Bank, 263 App. Div. 141, 31 N. Y. S. 2d 592 (1st Dep't 1941); Hopkins v. Bank of New York, 261 App. Div. 465, 25 N. Y. S. 2d 888 (1st Dep't 1941).

[24] Hussey v. City Bank Farmers Trust Co., 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't 1932), *aff'd,* 261 N. Y. 533, 185 N. E. 726 (1933); *In re* City Farmers Trust Co., 69 N. Y. S. 2d 235 (Sup. Ct. 1947).

[25] Minc v. Chase National Bank of New York, 263 App. Div. 141, 31 N. Y. S. 2d 592 (1st Dep't 1941).

[26] City Bank Farmers Trust Co. v. Miller, 278 N. Y. 134, 15 N. E. 2d 553 (1938).

[27] Fish v. Chemical Bank and Trust Co., 270 App. Div. 251, 59 N. Y. S. 2d 62 (1st Dep't 1945); Green v. City Bank Farmers Trust Co., 72 N. Y. S. 2d 442 (Sup. Ct. 1947).

[28] 280 N. Y. 43, 19 N. E. 2d 673 (1939).

[29] *Id.* at 47, 19 N. E. 2d at 675. [Emphasis added.]

admitted that there was great difficulty in distinguishing between reversions and remainders.[30] As further evidence of the interminable vacillation, the rule of *Doctor v. Hughes* was subsequently reaffirmed in *Matter of Scholtz v. Central Hanover Bank and Trust Co.*[31]

Perhaps laboring under the pain of exasperation, the Court of Appeals in *Richardson v. Richardson*[32] undertook the heroic task of reviewing the history of the problem for the purpose of clarifying the principles. After indicating an intention to follow the *Engel* case again, the court set down four indicia for determining intent, substantially the same as those found in the *Whittemore* case: (1) the settlor made a full and formal disposition of the trust property, (2) she made no reservation of a power to grant or assign an interest in the property during her lifetime, (3) she surrendered all control over the trust property except the power to make a testamentary disposition thereof, and (4) she made no provision for the return of any part of the principal to herself during her lifetime.

Following this decision came the case of *Matter of Burchell*[33] which virtually decimated the doctrine of *Doctor v. Hughes.* The settlor had established a trust with income payable to herself for life. Upon her death the principal was to go to the persons appointed by her will, or in lieu of a will, to the settlor's next of kin by the laws of intestacy. The deed further provided that the settlor as evidence of her consent and approval should join in certain conveyances by the trustees. Deeming this latter provision not to be controlling, the court went on to say: ". . . the presumption which exists from the use of the common-law doctrine as a rule of construction has lost much of its force since *Doctor v. Hughes.* . . . Evidence of intent need not be overwhelming in order to allow the remainder to stand."[34] The court also stated that the opinion in the *Richardson* case had indicated some criteria for finding the requisite intent, but it made particular reference only to one, namely, that the settlor had reserved only a testamentary power of disposition over the trust principal. This decision indicates the court's willingness to find a remainder where this is the only factor present. By its decision the court virtually obliterated all distinctions between reversions and remainders.

As a result of this decision, which has made the tests so tenuous, many a settlor will be entrapped into creating remainders. The rules are still not sufficiently clear to put a settlor on notice as to what he is creating by his deed of trust.

The Amendments

Because of the courts' inability to define clear-cut rules of construction, interminable litigation has occurred. Each trust deed,

[30] See opinion of Calahan, J., in Julier v. Central Hanover Bank and Trust Co., 272 App. Div. 598, 74 N. Y. S. 2d 262 (1st Dep't 1947).
[31] 295 N. Y. 488, 492, 68 N. E. 2d 503, 505 (1946).
[32] 298 N. Y. 135, 81 N. E. 2d 54 (1948).
[33] 299 N. Y. 351, 87 N. E. 2d 293 (1949).
[34] *Id.* at 360, 87 N. E. 2d at 297.

which a settlor attempted to revoke, had to be submitted as a matter of course to judicial scrutiny lest the trustee run the risk of liability to interested parties. Private persons on the basis of the decisional law could not venture a safe guess as to the ultimate construction of the instrument in question.

Additionally, the public policy favoring revocability of trusts has been largely hampered, if not frustrated, by the lack of harmony in the decisions. Whenever the heirs were declared to have a remainder interest, it became, in many instances, virtually impossible to identify them, much less successfully obtain the consents of all of them. Some of the courts, perhaps cognizant of this almost insurmountable difficulty, established the rule that only the consent of those who were heirs at the date of revocation was needed.[35] Such a rule was never universally followed and seems to have been finally repudiated in the case of *Engel v. Guaranty Trust Co.*[36] Thus, since it was impossible to ascertain a settlor's heirs in his lifetime and since a trust is irrevocable after his death, the operative effect of Section 23 of the Personal Property Law and Section 118 of the Real Property Law was largely curtailed.

Faced with the realization that its previously announced mandate had been frustrated in the courts, the New York Legislature undertook to reassert its disposition in favor of revocability of trusts by amending both sections of the law.[37] The amendments, identical in language, read as follows: "For the purposes of this section, a gift or limitation, contained in a trust created on or after September first, nineteen hundred fifty one, in favor of a class of persons described *only* as heirs or next of kin or distributees of the creator of the trust, or by other words of like import, does not create a beneficial interest in such persons." (Emphasis added.)

This legislative declaration in effect states that heirs, not being beneficially interested, are no longer persons from whom the settlor must solicit consents in order to revoke the trust. By legislative direction they are not to be deemed remaindermen, that is, they take no interest in the trust property by purchase under the deed. This is, in effect, a hearkening back to the strict common law rule extant before the case of *Doctor v. Hughes.* No room is left by the statute for giving effect to the settlor's intention to create a remainder interest. If he wishes to create a remainder, he must classify the persons to take other than as "heirs or next of kin or distributees," for the amendment states that if he describes them "only" in that fashion they shall not take beneficial interests.

A question arises as to the construction of the word "only." A case may arise in which the settlor employs the terms heirs or next

[35] Thatcher v. Empire Trust Co., 243 App. Div. 430, 277 N. Y. Supp. 874 (1st Dep't 1935); Corbett v. Bank of New York and Trust Co., 229 App. Div. 570, 242 N. Y. Supp. 638 (1st Dep't 1930).

[36] 280 N. Y. 43, 19 N. E. 2d 673 (1939).

[37] Laws of N. Y. 1951, c. 180. [Emphasis added.]

of kin but adds a qualification which would distinguish the persons who are to take from those who would ordinarily take under the laws of intestacy. Such a qualification might be that the heirs or next of kin be ascertained at a time other than the death of the settlor or according to the laws of a jurisdiction other than that in which the settlor dies. Such qualifying language has in the past been interpreted by the courts as creating a remainder.[38] It would seem that insofar as the statute employs the word "only," a proper construction might be that the added qualification would take the situation out of the injunction of the statute. To the extent that this is so, the effectiveness of the amendment might be diminished. But by and large, except where the settlor has adopted this obvious language, the statute ought to have a salutary effect in that a uniform construction will be given to a trust whose beneficiaries are identical with the intestate distributees of the settlor.

Conclusion

The problem of distinguishing between reversions and remainders is not restricted to actions under the revocation statutes, although most cases do arise under their provisions.[39] Since the amendments herein discussed are limited by sound rules of statutory construction in their operative effect to actions brought to revoke trusts,[40] the problem of construction is still extant.

As the legislature has arbitrarily resolved the difficulty in revocation actions, it is conceivable that the courts may be inclined to establish a judicial rule in other types of cases that would accord with the expressed legislative attitude. However, it is believed that the rules of construction are too deeply imbedded in our decisional law to be uprooted by anything less than further legislative action.[41]

Notwithstanding that the new amendments do not completely eliminate the problem, they do much to minimize its recurrence. Additionally, they dispense with the necessity of employing artificial rules to ascertain the settlor's intention. Certainty among settlors as to the ultimate distribution of their property is promoted. Property subject to trusts may be more easily freed and alienated. In these accomplishments the new enactments will have an efficacious and welcome effect.

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[38] See Minc v. Chase National Bank, 263 App. Div. 141, 31 N. Y. S. 2d 592 (1st Dep't 1941); Hopkins v. Bank of New York, 261 App. Div. 465, 25 N. Y. S. 2d 888 (1st Dep't 1941); Hussey v. City Bank Farmers Trust Co., 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't 1932), *aff'd*, 261 N. Y. 533, 185 N. E. 726 (1933); *In re* City Bank Farmers Trust Co., 69 N. Y. S. 2d 235 (Sup. Ct. 1947).

[39] See Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919).

[40] See Tompkins v. First Nat. Bank of Penn Yan, 18 N. Y. Supp. 234 (Sup. Ct. 1892).

[41] See Matter of Burchell, 299 N. Y. 351, 87 N. E. 2d 293 (1949); Richardson v. Richardson, 298 N. Y. 135, 81 N. E. 2d 54 (1948).