

Trusts--Revocation--Persons Beneficially Interested--Unborn Children as Contingent Remaindermen (Smith v. Title Guarantee and Trust Co., as Trustee, and Irene M. H. Farrell, et al., 287 N.Y. 500 (1942))

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makes alternative dispositions,¹¹ and as Mrs. Price had provided for a gift over of the property should her first desire be defeated, "*cy pres*" could not be applied here. Since inadequacy of resources could not affect the validity of the trust in the case we are discussing,¹² the plan which the testatrix prescribed should be carried out to the extent of the available funds.¹³ It is true that the Welfare Board must approve the organization of homes supported by private subscriptions;¹⁴ still, as that body lacks jurisdiction in the monetary affairs of these projects,¹⁵ it cannot justify a refusal of its consent for any financial reasons.¹⁶ Equity is adverse to defeat gifts to charity which are not impossible to be realized. When a decedent's intent is clearly evidenced, the law will substitute no different use which an outside intelligence might dictate.¹⁷

H. G. S.

TRUSTS—REVOCATION—PERSONS BENEFICIALLY INTERESTED—UNBORN CHILDREN AS CONTINGENT REMAINDERMEN.—In January, 1929, the plaintiff executed a deed of trust and delivered it, with the property therein described, to the defendant, the trustee named in the deed. The deed of trust provided that the income should be applied for the benefit of the settlor's daughter, Irene M. Hanlon, and that

¹¹ *In re Fletcher's Estate*, 280 N. Y. 86, 91, 19 N. E. (2d) 794, 795 (1939), 14 C. J. S., Charities § 52, 10 AM. JURIS., Charities § 124, *motion denied*, 280 N. Y. 800 (1939). Judge Hill's dissenting opinion as well as the majority holding in the principal case concur with this theory. *But cf.* notes 7, 8, 9, *supra*.

¹² *In re Nelson's Estate*, 143 Misc. 843, 258 N. Y. Supp. 667 (1932); *Taylor v. Columbia University*, 226 U. S. 126, 33 Sup. Ct. 73, 57 L. ed. 152 (1912); *accord*, note 13, *infra*.

¹³ *Wilson v. First Nat. Bank of Independence*, 164 Iowa 402, 145 N. W. 948, Ann. Cases 1916D 481 (1914); *cf.* note 12, *supra*. Judge Hill, however, dissented in the instant case because he feared lest the home become a burden on the state.

¹⁴ SOCIAL WELFARE LAW § 35; "no certificate of incorporation shall hereafter be filed which has for its purpose the establishment or maintenance of any home or institution for invalid, aged or indigent persons, except with the written permission of the board and of a justice of the supreme court endorsed on or annexed to the certificate of incorporation." *Cf.* note 15, *infra*. *But see* note 16, *infra*.

¹⁵ SOCIAL WELFARE LAW § 21, subd. 2; N. Y. CONST. Art. XVII, § 2: "As to institutions not in receipt of public funds . . . the state board of social welfare shall make inspections, but *solely* as to matters directly affecting the health, safety, treatment and training of their inmates." *Cf.* note 14, *supra*. *But see* note 16, *infra*.

¹⁶ Capricious denial of incorporation would be subject to Supreme Court review. *Accord*, notes 14, 15, *supra*.

¹⁷ *Accord*, notes 3, 4, 5, 12, 13, *supra*. *But see* the dissenting opinion in the case we are discussing.

the principal was to be paid over to her upon the death of the settlor. In the event that the daughter should predecease the settlor, then, under the provisions of the trust, at the death of the settlor, the principal was to be paid over to P. Edward Hanlon, the son of the settlor, if living, but if dead, then to his lawful issue, if any, but if he should die without issue, then the principal was to be paid over to the legal representatives of the settlor. The settlor, having reserved no power of revocation, has obtained the consent in writing of the daughter and the son, both of whom are living and unmarried, and has given notice to the trustee of her intention to revoke the trust.¹ The trustee, whose consent is not required to effect a revocation,² has contested the application on the ground that children that P. Edward Hanlon might have, who would take contingent remainders under the terms of the deed of trust, and the legal representatives of the settlor have beneficial interests in the trust and have not consented. *Held*, that all parties beneficially interested in the trust have consented to its revocation. *Smith v. Title Guarantee and Trust Co., as Trustee, and Irene M. H. Farrell, et al.*, 287 N. Y. 500, 41 N. E. (2d) 72 (1942).

By the terms of the trust deed, children that P. Edward Hanlon might have, took contingent remainders.³ A contingent remainder is a beneficial interest as defined in the Personal Property Law.⁴ In order to effect a revocation, the plaintiff contended that P. Edward Hanlon, by representation, could consent to the revocation for himself and also for any children he might have.⁵ But although a person can consent to the destruction of a beneficial interest that he may have in a trust and in so doing deprive his heirs of an expected benefit, he cannot by his consent destroy an interest, even of his own descendants, derived directly from the trust instrument and not from the ancestor by succession.⁶ If, therefore, there were contingent remaindermen, who, being unascertained, could not consent to the revocation, then the trust must stand. The court, however, seriously ques-

¹ N. Y. PERS. PROP. LAW § 23. "Upon the consent in writing of all the persons beneficially interested in a trust in 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." *In re Carnegie's Estate*, 203 App. Div. 91, 196 N. Y. Supp. 502, *aff'd*, 236 N. Y. 517, 142 N. E. 266 (1st Dep't 1922). See also N. Y. REAL PROP. LAW § 118.

² "The incidental benefit that the trust company may derive from commissions is not of such a character as gives it a vested right to the continuance of the trust." *Aranyi v. Bankers Trust Co.*, 201 App. Div. 706, 194 N. Y. Supp. 614 (1st Dep't 1922); *Phelps v. Thomson, et al.*, 119 Misc. 875, 193 N. Y. Supp. 320 (1922).

³ N. Y. REAL PROP. LAW § 40.

⁴ *Robinson v. N. Y. Life Ins. Trust Co., et al.*, 75 Misc. 361, 133 N. Y. Supp. 257 (1911).

⁵ *Tonnele v. Wetmore, et al.*, 195 N. Y. 436, 88 N. E. 1068 (1909); *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 N. E. 704 (1892).

⁶ *Schoellkopf v. Marine Trust Co. of Buffalo*, 267 N. Y. 358, 196 N. E. 288 (1935).

tioned the proposition that unborn contingent remaindermen had beneficial interests that required their consent to the revocation.⁷ This proposition has often been discussed in the lower courts,⁸ but recent decisions in the Court of Appeals have purposely avoided the issue.⁹ Following the rule set down in the lower courts, it was held here that persons as yet unborn had *no* beneficial interest in the continuation of the trust and that the trust could be revoked with the consent of all parties beneficially interested therein who were in being. The lack of consent of these unborn remaindermen was the primary cause motivating the trustee's opposition to the revocation. No serious objection was raised over the absence of consent of the personal representatives of the settlor. These, of course, could not be ascertained until the death of the settlor, as no one is heir to the living.¹⁰ The difficult question as to whether the settlor reserved a reversion in herself or created a contingent remainder in her personal representatives was not raised. Under the common law, a remainder to the grantor's own heirs created a reversion in him in every instance.¹¹ However, in New York today, this rule has become one of construction and is followed only where there is an absence of clarity and intent in creating the remainder.¹²

P. J. H.

WILLS—EFFECT OF PENAL LAW § 511 ON DECEDENT ESTATE LAW § 83.—In July, 1937, Marguerite Lindewall, the decedent, married one Paul Bathelt in the State of New York. They resided in New York City until June, 1938, when Bathelt pleaded guilty to murder in the second degree and was sentenced to imprisonment for

⁷ In the principal case, Lehman, J., states at p. 504, "The words 'persons beneficially interested' must be strained beyond their usual and natural meaning if construed to include those *not in being* who might in some contingency be entitled to an estate."

⁸ *Bearn v. Central Hanover Bank and Trust Co.*, 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936); *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); *Cram v. Walker*, 173 App. Div. 804 (1st Dep't 1916).

⁹ *Engel v. Guaranty Trust Co. of New York*, 280 N. Y. 43, 19 N. E. (2d) 673 (1939); see note 6 *supra*.

¹⁰ *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919). *But see Moore v. Littel*, 41 N. Y. 66 (1869).

¹¹ *Co. Litt.* 22b; *Robinson v. Blankenship*, 116 Tenn. 394, 92 S. W. 854 (1906).

¹² *Berlenbach v. Chemical Bank and Trust Co.*, 260 N. Y. 539, 184 N. E. 83 (1932); *Doctor v. Hughes*, cited *supra* note 10. For cases holding that a remainder was created see *Engel v. Guaranty Trust Co. of New York*, cited *supra* note 9; *Whittemore v. Equitable Trust Co. of New York*, 250 N. Y. 298, 165 N. E. 454 (1929); *Gage v. Irving Bank and Trust Co.*, 248 N. Y. 554, 162 N. E. 522 (1928).