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Trusts--Validity of Revocable Trusts--Vested Remainder

Norman S. Jeavons

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The court referred to other authorities,⁸ wherein escape was defined as voluntary departure without force from *legal custody*, to support its interpretation of the statute in question. The court shed light on a hidden ground for its decision, when it stated that the defendant's right to freedom was absolute. The prosecution argued that even if the defendant was *illegally* confined, he should have used a writ of habeas corpus to secure his release. The court agreed that if the defendant had applied for such a writ it could not have been denied, but it went on to say that the defendant was not limited to this remedy. Thus the defendant was allowed to use self-help to perpetrate his escape.

The Ohio court, in following cases from other jurisdictions, seems to ignore the policy considerations inherent in this problem. In permitting the use of self-help, the court is placing an undue hardship and hazard on the guards of our penal institutions. The court is accordingly weakening our legal system by allowing an illegally held prisoner to escape, rather than compelling him to rely on the legal process of habeas corpus, which was designed to remedy cases where a person is illegally confined.

The writer submits that because of these unresolved questions of public policy, the court was in error in ruling as it did. Had the court given these policy arguments proper consideration, it might well have reached a different conclusion. The escapee in this case had a legal solution to his dilemma by the use of habeas corpus. During the feudal era the doctrine of self-help was necessary, since the writ of habeas corpus was not well defined. But today a dynamic legal system has reached a point where self-help is no longer desirable in this area. The prisoner should have been forced to rely on habeas corpus for his release. The continued use of self-help in effecting escape from illegal confinement subverts the constitutional and statutory provisions which protect the rights of the individual.

SHELDON P WEITZMAN

TRUSTS — VALIDITY OF REVOCABLE TRUSTS — VESTED REMAINDER

A trust agreement was executed by which the settlor was to receive the income for life, and which designated the First National Bank of Cincinnati as trustee. The settlor reserved the power to revoke, alter or amend the trust. Upon the death of the settlor, all of the trust assets were to be delivered to the settlor's sister. No alternate beneficiary was named.

⁸ 16 OHIO JUR., *Escape and Rescue* § 3 (1931). "In such a case the right to liberty is absolute, and he who regains it, is not guilty of the technical offense of escape."

Several months later the settlor also executed a will in which she bequeathed all her property to her sister; no alternate legatee was named.

The power to revoke was never exercised and the beneficiary predeceased the settlor. The First National Bank, in its capacities of trustee and executor of the wills of the settlor and the beneficiary, brought an action in probate court to secure directions in the performance of its duties. The residuary legatee under the will of the beneficiary contended that the trust created a vested interest in the remainderman, which was part of her estate. The heirs of the settlor contended that the remainderman did not take a vested interest, because the interest was subject to the conditions precedent of non-revocation and survival of the remainderman. Since the remainderman predeceased the settlor, the settlor's heirs argued that a resulting trust arose in their favor. The probate court held that the trust corpus and accumulated income should be distributed to the estate of the beneficiary, but that the devise in the settlor's will had lapsed¹ and the property mentioned in the will should be distributed to the heirs of the settlor. The court of appeals affirmed the decision of the probate court and the settlor's heirs appealed the ruling concerning the distribution of the trust estate to the supreme court. The Supreme Court of Ohio disposed of two related problems in unanimously affirming the decision of the lower courts.²

The underlying issue was whether a purported trust, in which the settlor reserves both the power to revoke and the life income, constitutes a mere agency because of the retention of control. If it were an agency, legal and equitable title would have remained in the alleged settlor, and the corpus of the purported trust would constitute part of her estate. The heirs of the settlor, however, conceded the existence of a valid trust in the instant case. The court emphatically observed that this concession indicated that the law of revocable trusts in Ohio is finally consistent with the law of all other states.³

Ohio has had a turbulent history of decisions concerning revocable trusts. In *Worthington v Redkey*,⁴ the supreme court held that a purported trust which reserved the right to revoke was void. After the passage of an amendment to the statute of frauds,⁵ the supreme court

¹ See OHIO REV. CODE § 2107.52. The residuary legatee does not qualify under the anti-lapse statute.

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

³ 4 BOGERT, TRUSTS AND TRUSTEES § 994 (1948); 1 SCOTT, TRUSTS § 57.1 (2nd ed. 1956); 1 RESTATEMENT, TRUSTS § 57 (1935).

⁴ 86 Ohio St. 128, 99 N.E. 211 (1912).

⁵ OHIO REV. CODE § 1335.01. This section now reads: "All deeds of gifts and conveyance of real property or personal property made in trust for the exclusive use of

tended to sustain the validity of revocable trusts.⁶ Later, a decision upheld a revocable trust which was executed before the passage of the amendment, on the basis of common law trust principles.⁷ However, after 1940 it seemed that the Ohio courts might not sustain revocable trusts. In the 1941 case of *Woodside Co. v. Norton*,⁸ dicta indicated that the court would not uphold revocable trusts. In the same year in *Central Trust Co. v. Watt*,⁹ three judges dissented on the ground that revocable trust created a mere agency. In the same case one judge concurred solely because the interested parties had accepted the trust agreement for thirty years. Further confusion was added to the general controversy in two cases which involved a widow's claim to her dower interest in the trust property. These claims were granted because the settlor had not parted absolutely with dominion over the property.¹⁰ It would seem that the court's statement in the present case — that the rule against accepting the validity of revocable trusts has been laid to rest¹¹ — better represents a desirable rule for future similar cases than it does an accurate summation of prior case law. Nonetheless, the present case clearly does establish in Ohio the validity of a trust which reserves the life benefits and the power of revocation in the settlor.

Having established the existence of an inter vivos trust, the court turned to the question of the nature of the interest which was created in the remainderman. Does such a trust create a presently vested interest in the remainderman which is subject to defeasance by revocation? Or is it a gift of the remainder which is not presently vested because it is subject to the conditions precedent of non-revocation by the settlor as well as survival of the remainderman? The heirs of the settlor contended that since the remainderman predeceased the settlor, a resulting trust arose in their favor. However, the court held that the remainderman took a *vested* interest subject to defeasance by revocation, stressing the absence of a condition precedent which must be met before the benefits of the interest may be enjoyed. This interest was bequeathed by her and her legatee took

the person making same are void, but the creator of a trust may reserve to himself any use of power, including the power to alter, amend, or revoke such trust, and such trust is valid to all persons. ”

⁶ *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 21 N.E.2d 119 (1939); *Union Trust Co. v. Hawkins*, 121 Ohio St. 159, 167 N.E. 389 (1929).

⁷ *Cleveland Trust Co. v. White*, 134 Ohio St. 1, 15 N.E.2d 627 (1938).

⁸ 138 Ohio St. 469, 35 N.E.2d 777 (1941).

⁹ 139 Ohio St. 50, 38 N.E.2d 185 (1941).

¹⁰ *Harris v. Harris*, 147 Ohio St. 437, 72 N.E.2d 378 (1947); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944).

¹¹ *First Nat'l Bank v. Tenney*, 165 Ohio St. 513, 515, 138 N.E.2d 15, 18 (1956).

subject to the same condition.¹² Since the power of revocation was never exercised the vested interest became indefeasible in the legatee.

Although the Ohio Supreme Court has never faced this exact issue before, this result was anticipated.¹³ Also, as other states have not ruled on this particular point, the court looked to similar situations in which vested remainders are created subject to complete defeasance in *legal estates*.¹⁴ In addition, it was noted that the law favors early vesting.¹⁵ Since a trust speaks from the date of execution, it seems logical that a power of revocation should operate as a condition subsequent upon the equitable interest of the beneficiary. To have held otherwise would have permitted the settlor's heirs to prevail even though the settlor failed to exercise the power of revocation.

NORMAN S. JEAVONS

¹² See OHIO REV. CODE § 2131.04. Remainders are devisable.

¹³ 4 BOGERT, TRUSTS AND TRUSTEES § 994 (1948); 1 SCOTT, TRUSTS §§ 57.1, 84, 86.1 (2nd ed. 1956); Goldman, *Rights of the Spouse and the Creditor in Inter Vivos Trusts*, 17 U. CIN. L. REV. 3 (1948).

¹⁴ First Nat'l Bank v. Tenney, 165 Ohio St. 513, 517, 138 N.E.2d 15, 19 (1956)

¹⁵ See Ohio Nat'l Bank v. Boone, 139 Ohio St. 361, 40 N.E.2d 149, 144 A.L.R. 1150 (1942).