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Trusts

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the defendant had started business as the United Lamp Company in 1910. The plaintiff had continuously operated as the United Electric Fixture and Supply Company either as a corporation or partnership since 1913. The United Lamp Company had changed its name to United Electric Supply Company in 1954 in order that its corporate name might be more descriptive of its wholesale business, without any purpose to deceive the public or divert any of the plaintiff's business. While some evidence of slight confusion was presented, the court found no direct evidence or reasonable inference from the facts to establish any financial loss or probability of future damage resulting to plaintiff from the defendant's use of the new corporate name. Thus, finding no evidence of real confusion or damage, the court held that under principles of equity there was insufficient basis for granting an injunction.⁹ Two important facts which influenced the court were the long use of the word "United" by both parties and the type of customers dealing with both parties, namely persons and organizations which purchase at wholesale.

The court distinguished a line of Ohio cases¹⁰ dealing with actions against defendants who were competing with the plaintiffs in business done with the public in general, indicating that transactions with the general public should be distinguished from the type of dealing indicated in the principal case. But the most important lesson to be drawn from unfair competition cases is the necessity of deciding each case upon the basis of the particular facts involved.

MAURICE S. CULP

TRUSTS

Surviving Spouse: Invasion of Inter Vivos Trust

In *Darrow v. Fifth Third Union Trust Co.*,¹ a husband created a valid, amendable, inter vivos trust. In essence the trust agreement provided that, upon the death of the settlor, his widow was to receive a life estate

⁹ The court held that OHIO REV. CODE § 1701.08 could not apply since the defendant acquired its corporate name first and there was no evidence that the plaintiff had reserved its name. The plaintiff therefore had to base its case upon principles of equity and the statutes providing for relief by injunction.

¹⁰ *Cleveland Opera Co. v. Cleveland Civic Opera Ass'n, Inc.* 22 Ohio App. 400, 154 N.E. 352 (1936), in which an injunction against the use of the name "Cleveland Civic Opera Association, Inc." was granted because the use thereof would amount to unfair competition, despite the fact that defendant's organization had not been completed and no attempt had been made to transact business; *Stern Furniture Company v. Stern*, 83 N.E.2d 804 (Ohio Ct. App. 1948), enjoining a retailer-defendant from using the names "Stern," "Stern Furniture," "Stern Brothers," or "Stern Brothers Company" in connection with the defendant's retail furniture and household appliance business within the plaintiff's retail trading area.

consisting of the income from the corpus of the trust, and upon her death the principal was to be paid to the University of Michigan. There were not sufficient funds in the estate *outside* the inter vivos trust funds to pay the widow's year's allowance² in full. She elected to take against the will of her husband. In an action for judgment declaring the widow's rights in the inter vivos trust, the court held:

(1) The Ohio Supreme Court has stated the rule in the *Bolles* and *Harris* cases³ that, the widow, having elected to take against the will and under the law, may assert her rights to a distributive share of the property in the inter vivos trust. Further, that the balance due on the widow's year's allowance was to be paid from the corpus of the trust, and paid before her distributive share was taken from the trust.

(2) The life interest of the widow under the trust ceased when she elected to take against the will, and

(3) The remainder interest of the University of Michigan accelerated and became payable immediately.

Critics of the doctrine which permits a surviving spouse to reach the property of a revocable or amendable inter vivos trust often object on the ground that it is illogical to treat the trust as testamentary insofar as the surviving spouse is concerned, but as a valid inter vivos trust as to all others. However, it would not seem to be a question of logic, but a matter of policy; a matter of deciding whether a spouse is to be allowed to retain the ownership of property for all practical purposes during his or her lifetime and yet have the relict deprived of the statutory share upon the death of the other spouse. An analogy is provided by the provisions of the Federal Estate Tax Law wherein various interests retained by a decedent in his lifetime are held part of his gross estate for estate tax purposes, even though these interests do not pass from him by testate or intestate succession.⁴

Spendthrift Trust: Invasion of Beneficiary's Interest By Wife and Children

Whether the interest of a beneficiary of a spendthrift trust may be reached by his wife and children to enforce their claims against him for alimony and support is a matter upon which two Ohio common pleas courts reached different conclusions. In *McWilliams v. McWilliams*,⁵

¹139 N.E.2d 112 (Ohio C.P. 1953).

²See OHIO REV. CODE § 2117.20.

³*Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944); *Harris v. Harris*, 147 Ohio St. 437, 72 N.E.2d 378 (1947).

⁴68A STAT. 382, 383, 26 U.S.C. §§ 2037-38 (1954).

⁵140 N.E.2d 80 (Ohio C.P. 1956).

the court held that the interest of a husband under a spendthrift trust could not be reached by the wife and children, including funds which were due and owing to the husband but which had not yet been paid over by the trustee to the husband-beneficiary. In *O'Connor v. O'Connor*,⁶ the spendthrift provision was held not to prevent the subjection of the husband's interest to the claims of his wife and children for alimony and support in a trust in which the husband would enjoy benefits upon the death of his mother. Since the husband's interest would not mature until after the death of his mother, the court made no attempt to fix the amounts of alimony and support payments, but continued the cause until such beneficiary's death.

There is respectable authority outside Ohio supporting the view of both cases. The matter is simply one of policy, which perhaps could best be decided by the legislature.⁷

Although forfeiture for alienation clauses were present in both cases, the possibility of forfeiture was not discussed in the *McWilliams* case. In the *O'Connor* case, in holding that no forfeiture resulted, the court stated:

. . . at any rate, there is no difficulty in their [wife and children beneficiary] enforcing their claims for support against the trust estate if the settlor did not show an intent to exclude them. . . . In this respect they stand in the beneficiary's shoes. They are in *pari statu* with him [the beneficiary]. His rights are their rights. If he should attempt to assert his rights it would not invoke the forfeiture clause. Neither would it if his wife and children attempted to assert *his* rights, which are also theirs. This obtains by virtue of the nature of the duty to support and the legal and social consequences of failure to support, and it adheres in the majority rule allowing invasion by dependents despite attempted restraints.⁸

The writer feels the reasons set forth by the court to support their decision are somewhat illusory. Simpler and more direct reasons appear to exist. A restraint upon alienation by means of a spendthrift clause is a *direct* restraint. A provision for forfeiture upon alienation or attempted alienation is *indirect*. Once it is determined that a provision directly restraining alienation, (i.e., a spendthrift clause which prevents the wife and children from enforcing their claims for alimony or support against the trust estate) is against public policy, it should follow that a provision indirectly restraining alienation, such as a forfeiture clause, is invalid.

Discretionary Trust

A testamentary trust directed that the trustee pay over the whole or any part of the trust corpus to the beneficiary, at such times and in such

⁶ 141 N.E.2d 691 (Ohio C.P. 1957).

⁷ Several states have enacted legislation permitting the wife and children to reach the beneficiary's interests. See GRISWOLD, SPENDTHRIFT TRUSTS, § 341 (2d ed. 1947).

⁸ 141 N.E.2d 691, 696 (Ohio C.P. 1957).

amounts as the trustee might deem advisable. The objection was made that the payment or nonpayment was left entirely to the whim of the trustee and as a result the courts were powerless to enforce any payment even in the face of bad faith, since the trustee was relieved of the duty of ever paying anything to the beneficiary. The court held the trust to be a valid discretionary trust, declaring that:

courts are not powerless to enforce this trust. Trustees must always act in good faith and always act fairly and reasonably, and a court of equity will and can require such behaviour. Where a trustee is given uncontrolled discretion, as here, he acts much as a judicial officer and is duty bound to exercise sound discretion under the circumstances. A court of equity will not tolerate abuse of sound discretion and in a proper case will compel the exercise of discretion.⁹

Revocation of Trust: Burden On Trustee To Prove Donor's Incapacity

Where the settlor of a revocable inter vivos trust "revokes" the trust, prima facie the revocation is valid and the burden of proving settlor's incompetency is upon the trustee when the settlor brings an action against the trustee for reconveyance of the property. This was the rule set forth in *Kemmerer v. Kemmerer*,¹⁰ notwithstanding the fact that the settlor had previously attempted to revoke the trust and the court had found that he had mistaken the import of the prior revocation.

Appeal by Trustee: When Unauthorized

An appeal by one in a representative capacity, such as a trustee, is not authorized unless the order or judgment appealed from adversely affects or prejudices the estate which he is administering. A trustee who is given instructions relating to the trust, who appeals therefrom, and on appeal advocates a position of law contrary to the best interests of the beneficiary of the trust violates the first precept of a trustee: loyalty to the beneficiary. In the case of *In re Trustee Under Yost's Will*,¹¹ the court held that this conduct was such that the beneficiary's interest demanded removal of the trustee from office. In addition, attorneys' fees for the prosecution of the appeal were disallowed, and all costs incurred by the trustees in the appeal were charged against them personally. The opinion by Judge Hunsicker represents judicial writing at its best.

⁹ *In re Ternansky's Estates*, 141 N.E.2d 189 (Ohio Ct. App. 1957).

¹⁰ 139 N.E.2d 84 (Ohio Ct. App. 1956).

¹¹ 141 N.E.2d 176 (Ohio Ct. App. 1956).

Stock In Possession of Foreign Executor: Ohio Court Has No Authority to Impress Trust

The effect of the Uniform Stock Transfer Act¹² is to embody the shares in an Ohio corporation in the certificate for such shares, and the situs of the shares is that of the physical location of the certificate, even though the location is in a foreign state. Consequently the Supreme Court in *Brownell v. Columbus Clay Mfg. Co.*¹³ held that, in an action to engraft a trust upon such shares of stock, the subject of the action is the certificate for such shares, and where it is outstanding and under the previously invoked jurisdiction of a court in another state, an Ohio court is without jurisdiction to order the corporation to transfer the interest.

Member of Stock Voting Committee Denied Counsel Fees and Expenses Although Action For His Removal Defeated.

*Whiting v. Bryant*¹⁴ has a history. Prior to the present case, Whiting and others brought an action for the removal of Bryant as one of the persons designated to vote shares of stock of the Austin Company (of which Bryant was president) held by the Cleveland Trust Company, as trustee, for the benefit of Whiting and others, who were plaintiffs in the removal action and in the present case.¹⁵ The plaintiffs claimed conflict of interests on the part of Bryant. He successfully defended the action for removal.¹⁶

The present action is upon the application of Bryant for allowance of counsel fees and expenses incurred by him in defending the removal action. The court held that Mr. Bryant's conduct had been to the disadvantage of the trust beneficiaries and any enhanced value or increased income from trust shares was incidental and insignificant in comparison to personal benefit and advantage gained by him. Fees and expenses were denied. Judge Skeel dissented, pointing out that the plaintiff-beneficiaries were objecting to charging the trust with expenses created by them as a necessary result of their unsuccessful effort to remove Mr. Bryant. A compelling argument!

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¹² OHIO REV. CODE §§ 1705.01-21.

¹³ 166 Ohio St. 324, 142 N.E.2d 511 (1957).

¹⁴ 144 N.E.2d 240 (Ohio Ct. App. 1957).

¹⁵ For a report of the removal action, see the 1956 Survey of Ohio Law, 8 WEST. RES. L. REV. 379 (1957).

¹⁶ 131 N.E.2d 425 (Ohio Ct. App. 1956).