

10-1-1959

Decedents' Estates and Trusts—Discretionary Power of Trustee to Invade Corpus

Buffalo Law Review

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Recommended Citation

Buffalo Law Review, *Decedents' Estates and Trusts—Discretionary Power of Trustee to Invade Corpus*, 9 Buff. L. Rev. 141 (1959).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol9/iss1/81>

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as a named individual. This is in accord with the dissent's viewpoint that a very strict construction of the term children is only required when the testator appears to be referring to his own immediate offspring as named individuals. Davids' *The New York Law of Wills*¹² states that there is a conflict between the presumption that the term children means immediate offspring, and the presumption that the testator did not intend to discriminate between his direct descendants, when either could apply in the same case. Other factors in the will may then be decisive in determining the meaning of the word "children." As previously stated, other provisions of the will appear to have thrown the balance in favor of an equality of distribution among direct descendants.

The majority in the instant case, fix the time, when the presumption is to be applied at the death of the life tenant, instead of at the death of the testatrix, or at the time the will was executed. This is contrary to the settled proposition that a will is not to be construed in the light of events taking place long after the death of a testator, but by what was probably in his mind when the will was executed.¹³ If the majority did not construe the testatrix' intention as of the death of the life tenant, it must then have held that at the time of execution, the testatrix intended to give a gift to the immediate issue of the life tenant, or in the alternative, a gift to grandchildren and more remote descendants if no immediate issue survive the life tenant, or further, in the absence of remote issue, to grandnephews and grandnieces. To arrive at such an extreme construction of the phrase "to any children surviving him" without the aid of a presumption can hardly be justified.

DISCRETIONARY POWER OF TRUSTEE TO INVADE CORPUS

"In the absence of an express grant of such power to the trustee, either by the settlor or by statute, the trustee has no power to modify or terminate the trust. His ordinary duty is to enforce the trust, not to end it. The settlor may lawfully vest in the trustee power to modify the trust or terminate it either in the discretion of the trustee or on the happening of certain events."¹⁴

It is not infrequent that the settlor gives the *cestui* power to end the trust or to demand a conveyance from the trustee.¹⁵

The exercise, by a trustee, of a power to encroach upon corpus, necessarily involves an authority to end the trust in whole or in part. In many instances, the extent to which a discretionary power in regard to corpus

12. Vol. 2, § 661 (1923).

13. In considering the effect of the codicil, we do not look to what happened, when it became operative. We seek for what the testator intended by it when arranging the disposition of his residuary estate. The intention of testator is to be ascertained not by what occurred long after the execution of his will, but by what was apparently, or presumably, in his contemplation, at the time he was making it. In *re Hoffman*, 201 N.Y. 247, 255, 94 N.E. 990, 993 (1911).

14. 4 BOGERT, TRUSTS AND TRUSTEES § 1000 (1948 ed.); see also, *Schreyer v. Schreyer*, 101 App. Div. 456, 91 N.Y. Supp. 1065 (1st Dep't 1905), *aff'd* 182 N.Y. 555, 75 N.E. 1139.

15. In *re Woollard*, 295 N.Y. 390, 68 N.E.2d 181 (1946); In *re Morse*, 280 App. Div. 171, 112 N.Y.S.2d 392 (4th Dep't 1952).

distribution will be construed as authorizing a termination of the trust *in toto*, will depend on the exact phrasing of such power.

In the recent case of *Kemp v. Paterson*,¹⁶ the Court of Appeals held (4-3), that a power to pay to the life income beneficiary "so much of the principal sums of the trust from time to time as the trustees may deem for her best interests" did not authorize a termination of the trust by payment to the *cestui* of the entire corpus. Adopting the rationale of the Appellate Division,¹⁷ the Court refused to imply a power of termination from the trust instrument.

"Where it is provided by the terms of the trust that the trustee in his discretion may or shall invade the principal for the benefit of the income beneficiary, the extent of the power or duty of the trustee to do so depends upon the terms of the trust."¹⁸

The intention of the grantor must be gleaned solely from the language of the trust deed.¹⁹ The Appellate Division read the trust deed to express as its purpose an assurance of the financial security of the grantor's daughter, and that the trustees power of invasion must be linked to and expressive of such purpose. If principal is to be expended in furtherance of trust objectives, the satisfaction of the daughter's needs during her lifetime,²⁰ then such invasion is in keeping with her best interests under the trust instrument. However, if the expenditure of principal is unnecessary since income of the *cestui* is adequate, or if the corpus is to be used for a purpose foreign to the trust, then such invasion is not in the best interests of the beneficiary.²¹

In finding that the *cestui* had adequate wealth of her own, and intimating therefore that no question of her need was present, the Court also found that the purpose for the desired distribution, to allow the beneficiary to make certain uses of the corpus, was not a valid trust purpose, since it would make the trustees a mere pipeline for a gift of corpus to the beneficiary.

The difficulty with the rationale of the Appellate Division is that they are in effect superimposing a restriction upon the trustees which in fact rewrites the trust instrument, something they felt the trustees could not do. They would allow distributions of trust corpus, prompted by unusual or emergency needs not present in the instant case, such as personal needs of the beneficiary, thus in fact, bringing the power of invasion within discretionary standards

16. 6 N.Y.2d 40, 188 N.Y.S.2d 161 (1959).

17. 4 A.D.2d 153, 163 N.Y.S.2d 245 (1st Dep't 1957), *rev'g* — Misc. 2d —, 158 N.Y.S.2d 870 (Sup. Ct. 1956).

18. 4 SCOTT, TRUSTS 949 (2d ed. 1956).

19. *In re Durand*, 250 N.Y. 45, 164 N.E. 732 (1928).

20. "Specific provision is made for the payment of income to the beneficiary during her natural life. This is the dominant purpose of the trust." *Supra* note 17 at 158.

21. *In re May*, — Misc. —, 112 N.Y.S.2d 847 (Surr. Ct. 1952), *aff'd without opinion*, 283 App. Div. 786, 129 N.Y.S.2d 229 (1st Dep't 1954); where the trust instrument made the income thereof payable to grantors wife for life, and granted the trustee a power of invasion, "at any time in its sole absolute and unimpeachable discretion . . . invade the principal of said trust and pay to my wife or apply for her benefit any part thereof." The Court held that the trustees had no power to pay out corpus to enable the beneficiary to make a gift thereof, since this was not a valid trust purpose. See also, *Terry v. Rector*, *St. Stephan's Church*, 79 App. Div. 527, 81 N.Y. Supp. 119 (4th Dep't 1903).

often used in trust instruments, such as support and maintenance, comfort and well being, or personal needs.²² It may well be that within these standards such payments of principal will result in eventual termination of the trust by an exhaustion of the principal. However, it does not seem that such a restricted standard can fairly be imported into the trust instrument present here, since to do so would be restricting the trustee in a manner not contemplated by the grantor.

There is no question of the trustees acting other than honestly and in good faith. To the contrary, the dissent felt that utmost regard should be given to the determination that such a distribution was in the best interests of the beneficiary. In viewing the attendant circumstances, and the favorable tax advantages resulting from a total distribution, both to the income beneficiary and the remaindermen, the grantors intent would best be served by a termination of the trust.

The only apparent justification for the decision of the majority, and it is a strong one, is that the Court, in the interest of giving the fullest weight to the grantor's intent, will be hesitant in implying a power of termination absent a clear indication in the trust instrument.²³ There is little doubt that such a policy accords with sound judicial reasoning. However, there is a wide area between narrowly restricted discretion and that which would allow a termination. While the Court's policy in not implying a power of termination upon such general language as was present here is sound, it is fairly apparent that the grantor contemplated vesting the trustees with a broader degree of discretion than that within the standard imposed by the Court. Thus, the trustee has been placed in a position where he can neither terminate the trust, nor distribute enough of the principal to alleviate the unfavorable tax situation present.

CHILD EN VENTRE SA MÈRE NOT "BENEFICIALLY INTERESTED" IN TRUST

In *In re Peabody*²⁴ Judith Peabody created an irrevocable trust with the Chase National Bank as trustee. Mrs. Peabody, then childless, directed the trustee to pay income to her for life, and, upon her death, the corpus was to go to her surviving issue, and if none be living at that time, to other designated living persons. Four years later she became pregnant, and wishing to amend the trust, she obtained the consent of all the living persons designated as beneficiaries as required by Section 23 of the Personal Property Law.²⁵ The

22. In re Woolard, *supra* note 15; In re Morse, *supra* note 15; In re Clark, 280 N.Y. 155, 19 N.E.2d 1001 (1939).

23. In re Ahrens, 193 Misc. 844, 84 N.Y.S.2d 486 (Surr. Ct.), *aff'd on this ground*, 301 N.Y. 701, 95 N.E.2d 53 (1950); In re Bisconti, 306 N.Y. 442, 119 N.E.2d 34 (1952); In re Mollenhauer's Will, — Misc. 2d —, 158 N.Y.S.2d 809 (Surr. Ct. 1956).

24. In re Peabody, 5 N.Y.2d 541, 186 N.Y.S.2d 265 (1959).

25. Upon the written consent 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.