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Decedents' Estates and Trusts—Child en Ventre sa Mère not "Beneficially Interested" in Trust

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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.

trustee, however, refused to recognize the proposed amendment, contending that the child *en ventre sa mère* was a "person beneficially interested" under Section 23, and thus the child's consent was needed to amend. The Court, at Special Term, held that such consent was not required, and the Appellate Division unanimously affirmed, as did the Court of Appeals.

The Court's rationale lay in the trend in recent years to favor the revocability of trusts.[26] Such a policy would certainly be frustrated if revocation were made to depend upon the consent of persons yet unborn. To hold otherwise would force a determination as to whether a female settlor was pregnant at the time of amendment, and since no absolute determination can be made, future litigation is invited.

The Court further considered the intention of the legislature in drafting Section 23, and pointed out that the legislature has certainly recognized the possibility of such an occurrence as exists in the present case, and has provided for unborn children where policy so dictates.[27]

It has consistently been held that a child yet unborn is not a "person beneficially interested" under Section 23.[28] These cases, however, referred to situations where the unborn child was conceived and born after the amendment was executed. The present case is the first to reach the Court of Appeals where there existed a child *en ventre sa mère* at the time the amendment was executed. One lower court decision has held that the fiction of the law which affixes a legal personality to an unborn child,[29] should not be extended to cases of trust revocation.[30]

A line must be drawn somewhere and the courts generally do so at the time of birth. With no accurate method available to ascertain the exact time of conception, to extend the principle further can only result in chaotic disturbances to the judicial system.

Judicial Excision of Measuring Life from Trust to Avoid Rule Against Perpetuities

Until the recent amendment of the New York Personal Property Law Section 11,[31] the alienation of personal property interests in New York State could not be restrained for a period greater than that measured by two lives in being at the time of a gift, the testator's death, or the establishment of a

26. Report of N.Y. Law Rev. Comm. (1951) at 85.

27. Section 26 of the New York Decedent Estate Law provides that where a testator shall have a child born after the making of a last will, the child, if not mentioned, shall succeed to the same portion of such parent's real and personal estate as would have descended to the child had such parent died intestate; Section 83(12) of the New York Decedent Estate Law gives similar protection to after-born descendants and other distributees of the deceased; so also Section 56 of the Real Property Law provides protection for posthumous children capable of taking by descent.

28. Smith v. Title Guarantee and Trust Co., 287 N.Y. 500, 41 N.E.2d 72 (1942); County Trust Co. v. Young, 287 N.Y. 801, 40 N.E.2d 1019 (1942).

29. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

30. In re Wormser's Trust, 15 Misc. 2d 754, 185 N.Y.S.2d 677 (Sup. Ct. 1952).

31. N.Y. Sess. Laws 1958, ch. 152, effective Sept. 1, 1958.