Buffalo Law Review

Volume 9 | Number 1 Article 83

10-1-1959

Decedents' Estates and Trusts—Judicial Excision of Measuring Life from Trust to Avoid Rule Against Perpetuities

Buffalo Law Review

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.

trust.[32] New York courts have utilized numerous devices to ameliorate the harshness of this rule.[33] Among these devices is excision of portions of the instrument in question which are violative of the rule, but not essential to the settlor's purpose.

In *In re Philipson's Trust*[34] the Court of Appeals, by a 4-3 memorandum decision, upheld the excision of a measuring life of a trust and thus upheld the trust. Settlor upon divorce from his first wife established a trust for her benefit and the benefit of his six year old son and three year old twins. The duration of the trust was measured by the wife's life and that of the survivor of the twins. The Appellate Division excised the wife's life as a measuring life, and upheld the remainder of the trust on the theory that the trust was for the benefit of the family unit and the possibility that the wife would survive both of the twins was remote.[35] Therefore, they held that the wife's life could be excised without defeating the settlor's dominant purpose. The dissenting minority in the Court of Appeals reasoned that the wife's life as a measuring standard was an essential part of the trust and that the Court was legislating retrospectively where the legislature had seen fit only to do so prospectively.[36]

The problem which this case places in focus is one of how far the courts will go in sustaining a trust which on its face violates the rule against perpetuities. It has been held that a trust violative of the rule which is severable into subordinate trusts which do not violate the rule may be severed and the separate trusts upheld.[37] In addition the courts have excised invalid provisions and upheld the remaining valid provisions if the dominant purpose of the trust is not affected by so doing.[38] Here, however, the trust duration is measured by specified lives, not the lives of all of the beneficiaries, and the defect cannot be cured by severing certain interests. Neither can any separate provision be eliminated and the trust upheld. The measuring standard must be re-drafted by the Court if the trust is to stand. If this is done a substantive change is effected in the rights of one of the beneficiaries. The Appellate Division, and apparently the majority in the Court of Appeals, rested their decisions to excise the wife's life on the latitude suggested in *In re Durand's Will*[39] concerning the effectuation of the settlor's or testator's dominant purpose.[40] In that case, however, the Court excised a severable invalid provision and not words from a single controlling provision as is done in the present case. The holding there does not seem to support the Court's excision in the instant case.

32. N.Y. PERS. PROP. LAW § 11.
33. See RESTATEMENT, PROPERTY, app. §§ 47-59 (1944) for a discussion of the devices so used.
34. 5 N.Y.2d 920, 183 N.Y.S.2d 281 (1959).
35. 4 A.D.2d 245, 164 N.Y.S.2d 379 (1st Dep't 1957).
36. In re Philipson's Trust, *supra* note 34 at 924, 183 N.Y.S.2d 284.
37. Corse v. Chapman, 153 N.Y. 466, 47 N.E. 812 (1897); In re Horner's Will, 237 N.Y. 489, 143 N.E. 665 (1924); see also Kahn v. Tierney, 135 App. Div. 897, 120 N.Y. Supp. 663, *aff'd* 201 N.Y. 516, 94 N.E. 1095 (1911).
38. In re Durand's Will, 250 N.Y. 45, 164 N.E. 737 (1928).
39. *Id.* at 53, 54, 164, N.E. 740.
40. In re Philipson's Trust, *supra* note 35 at 248, 164 N.Y.S.2d 382.

The effect of this case on the substantive law of future interests is eliminated concerning future dispositions by the recent amendment to the Personal Property Law.[41] The case does stand, however, as an example of the lengths to which the Court will go in upholding trusts which apparently violate the rule against perpetuities.

DETERMINATION OF UNDUE INFLUENCE

Undue influence in the execution of wills is a concept that does not lend itself to any precise definition. Generally the courts regard it as something that amounts to a destruction of free agency.[42] Thus, it presents a subjective question in each case,[43] which seldom, if ever, is capable of proof by direct evidence. This being true, it is generally recognized in New York, as well as other jurisdictions, that undue influence may be proved by circumstantial evidence.[44] Therefore, under our jury system, the question that usually faces appellate courts is whether the evidence was sufficient to support a finding of undue influence.

This precise question was before the Court in *In re Walther's Will.*[45] Here, the testatrix was an elderly spinster who became afflicted with senile psychosis several years prior to her death. She was declared incompetent and her sister, the proponent and chief beneficiary of her will, was appointed committee. During this period the testatrix was removed from her apartment and spent her last days in her sister's home except for several intervals of confinement to a nursing sanitarium. Sixteen months prior to her death she executed a will to which a nephew objected on probate on the ground that it was the product of undue influence exercised by the sister. The Appellate Division affirmed the jury finding of undue influence,[46] and the Court of Appeals (5-2) reversed and remanded for probate.[47]

The majority, in holding that there was insufficient evidence to sustain the jury finding, placed a great deal of emphasis on the fact that the beneficiary was not the unnatural object of the testatrix's bounty. It pointed out that the sister was probably her most intimate companion while the contestant was an inattentive nephew.

The majority was aided in their finding of insufficiency of evidence by two rules of evidence followed by New York courts. The first of these is that in an allegation of undue influence the burden of proof is upon the party who

41. *Supra* note 31.

42. Children's Aid Society of City of New York v. Loveridge, 70 N.Y. 387 (1877); Rollwagen v. Rollwagen, 63 N.Y. 504 (1875); Smith v. Keller, 205 N.Y. 39, 98 N.E. 214 (1912).

43. ATKINSON, HANDBOOK ON THE LAW OF WILLS § 55 (2d ed. 1953).

44. In re Dowdle, 224 App. Div. 450, 231 N.Y. Supp. 320 (4th Dep't 1928), *aff'd* 256 N.Y. 629, 177 N.E. 169 (1931).

45. 6 N.Y.2d 49, 188 N.Y.S.2d 168 (1959).

46. 6 A.D.2d 858, 175 N.Y.S.2d 1008 (4th Dep't 1958).

47. *Supra* note 45.