

WIFE AND DEPENDENT CHILDREN'S RIGHT TO INVADE THE CORPUS OF TRUST OF HUSBAND BENEFICIARY

Culver v. Culver

112 Ohio App. 100, 169 N.E.2d 486 (1960)

The husband-settlor established an inter-vivos trust under the terms of which the trustee bank was to pay him the net income for life. In addition, article 2 of the trust agreement provided that:

In addition to such income, the trustee is authorized, in its absolute and uncontrolled discretion, to pay to or for the benefit of the Grantor during his lifetime, parts of the principal of this trust, from time to time *in the event of an emergency affecting him, his wife or children.*¹ (Emphasis added.)

Thereafter, marital difficulties developed and as a result of a divorce action, the court ordered the husband to make support payments. The husband became in arrears in his payments, and the bank was ordered to pay the trust income to the wife. The income having been exhausted, the wife brought the present action asking the court to determine that an emergency existed as outlined in article 2 of the trust agreement and to apply the corpus of the trust against the arrearages. The trial court so ordered but the appellate court reversed, holding that the wife and children were not entitled to invade the corpus.

Both the majority and the dissenting opinion considered the vital issue to be whether the trustee had abused his discretion in failing to determine that an emergency existed. It is a well recognized principle that courts may substitute their discretion for that of the trustee where he has abused his or is guilty of bad faith.² The more pertinent inquiry is whether the court passed over the vital question when it concluded that this was a discretionary trust without identifying the characteristics of and the requirements necessary to establish such a trust. The point is particularly significant because recent Ohio cases suggest that were this trust not purely discretionary, the wife and children should be entitled to recover.

The rights of the wife and children to invade the trust corpus depend on the following considerations:

1. What type of trust was created?
2. If it is a spendthrift rather than discretionary trust, can the wife and children invade notwithstanding the valid restraints on alienation?

¹ *Culver v. Culver*, 112 Ohio App. 100, 103, 169 N.E.2d 486, 489 (1960).

² *In re Estate of Ternansky*, 141 N.E.2d 189 (Ohio Ct. App. 1957). See also numerous cases cited in the principal case.

A spendthrift trust is one which places a valid restraint on voluntary and involuntary transfer of the interests of the beneficiary.³ The beneficiary does have an interest but it cannot be reached by him or his creditors due to the valid restraints on alienation. A discretionary trust differs with respect to the interests of the beneficiary in that he has *no* interest which can be attached by creditors or aliened by him until the trustee exercises his discretion. It is the character of the beneficiary's interest rather than the settlor's intention to impose a restraint on alienation which protects the trust against invasion.⁴ The trustee must have the uncontrolled discretion *to determine whether to pay anything* to the beneficiary. In the principal case the trustee had discretion to determine the existence of an emergency and then presumably⁵ to pay something. Consequently, the vital characteristic of the discretionary trust is missing.

In the absence of any express restraints on alienation, it is not altogether clear that this is a spendthrift trust, but express language is unnecessary where the intent of the settlor can be gathered from the instrument as a whole.⁶ The wording of this instrument would support the conclusion that the settlor intended to protect himself and his family, and that, in order to achieve this purpose, he did not intend that creditors or others would be able to invade the interests created.

Directly in point are two recent Ohio cases which involved the same problem. In both cases the wife and children were attempting to reach the interest of the husband-beneficiary to satisfy his support payment arrearages. In the first, *McWilliams v. McWilliams*,⁷ although the court

³ Restatement, Trusts § 152 (2) (1959). Express recognition of the validity of spendthrift trusts in Ohio is found in *Frazier v. Wilkinson*, 18 Ohio C.C.R. 363, 10 Ohio C.C. Dec. 106 (1899); *Skillman v. Symes*, 14 Ohio C.C.R. 547, 7 Ohio C.C. Dec. 39 (1896).

Interest includes the beneficiary's right to receive principal as well as income. The majority of states have held that, in the absence of statute, the restraints on the beneficiary's right to receive principal in the future are valid. The *Skillman* case held that the restraints were valid with respect to income as well as principal.

⁴ *Scott*, Trusts 155 (2d ed. 1956). See also Restatement, Trusts § 155. Trusts of this type have been approved by the Ohio courts: *Moscowitz v. Federman*, 72 Ohio App. 149, 51 N.E.2d 48 (1943), *Morris v. Daeker*, 35 Ohio App. 394, *cert. denied*, 172 N.E.2d 540 (1929).

⁵ It must be stated as presumably because the trustee actually had two areas in which to exercise discretion. He had discretion to determine whether an emergency existed and discretion to determine how much to pay out of the principal to alleviate the emergency. It would seem that the settlor intended that some amount was to be paid if the trustee determined that an emergency existed.

⁶ *Adair v. Sharp*, 49 Ohio App. 507, 199 N.E. 399 (1934); Restatement, Trusts § 152, comment c (1957). In *Adair v. Sharp*, the trustee had discretion to withhold income and principal altogether from the beneficiary. The court held it to be a valid spendthrift trust, but the reasoning they used was typical of that used in denying persons the right to invade the interests created in a discretionary trust.

⁷ *McWilliams v. McWilliams*, 74 Ohio L. Abs. 535, 140 N.E.2d 80 (C.P. 1956).

held that a valid spendthrift trust was created, the reasoning used in denying the wife and children the right to recover was that applicable to rights and interests involving discretionary trusts. The court held that the wife and children could not maintain an action because the husband had *no interest* within the state thus giving the court no jurisdiction. There were included in the trust agreement express restraints on alienation, and the better reasoning would have found that the restraints, which the court recognized as valid, protect the beneficiary's interest even against the wife and children.

McWilliams also announced an important policy consideration. The court put great weight on the right of a private person to dispose of property as he sees fit by saying "we believe that a person having the absolute title to property, money, or personal property has the right to dispose of it as he wishes . . . through proper testamentary disposition."⁸ However, this policy argument was firmly denounced in *O'Connor v. O'Connor*⁹ decided a year later. The settlor had included restraints on alienation and provisions for forfeiture in the trust agreement. The husband-beneficiary was receiving nothing at the time the action was brought; but, upon the death of the person enjoying the life estate, the trustee would have had to pay the beneficiary the monthly income from the time of death and different amounts of principal at certain designated ages of the beneficiary. The court, holding that the beneficiary's interest in the spendthrift trust could be reached by the wife and children, stated that the majority of states have recognized exceptions to the general rule upholding restraints on alienation, and that it would be against public policy to deny the dependents the right of invasion.¹⁰

Since the public policy consideration is to say the least arguable, one further point merits consideration. In the *McWilliams* and *O'Connor* cases, the beneficiary was a third person. The argument favoring the

⁸ *Id.* at 538, 140 N.E.2d at 82.

⁹ 75 Ohio L. Abs. 420, 141 N.E.2d 691 (C.P. 1957).

¹⁰ *Supra* note 9. The following portions of the opinion are pertinent:

While the restraint here imposed would be respected in many jurisdictions and an ordinary creditor would be precluded from invading the trust, the distinct weight of authority makes some exceptions, especially in favor of a claim by the beneficiary's wife and children.

In our view it would be clearly against public policy to deny dependents the right of invasion. On the contrary, it seems clear there is an affirmative public policy authorizing invasion for the benefit of the wife and children.

We therefore find and hold that the majority rule as quoted from the Restatement of Trusts applies here and the husband's interest may and should be subjected to the claims of the divorcing wife and dependent children.

For the view that the wife should not be entitled to invade corpus see *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489 (1961). Although the case involved the wife's right to a distributive share of trust property when taking against the husband's will, it is relevant in that the husband's discretionary trust could not be invaded by the wife.

unhindered disposition of property when the husband-settlor includes himself as beneficiary seems less plausible.¹¹

The following argument thus emerges in support of the rights of the wife and children to invade the beneficiary's interest in the principal case. The trust involved is not purely discretionary. The majority cited *Athorne v. Athorne*¹² in support of the conclusion that the trust they were dealing with was a discretionary one. However, in that case the trustee had discretion as to whether to pay anything at all. In the principal case the trustee had no such discretion.¹³ If, instead, a spendthrift trust was created, the *McWilliams* case cannot stand as authority for the proposition that the restraints are valid as against the wife and children because the case was not decided on that basis. The *O'Connor* case does represent the majority view that in cases where actual spendthrift trusts are created, the restraints on alienation are ineffective with respect to the beneficiary's dependent wife and children.

¹¹ Omitted from consideration is the legality of the question. Research disclosed no Ohio cases directly in point, but see generally, Scott, Trusts § 156 (2 ed. 1956).

¹² *Athorne v. Athorne*, 100 N.H. 413, 128 A.2d 910 (1957).

¹³ *Supra* note 6.