

OHIO COURT HOLDS REVOCABLE INTER VIVOS TRUST VALID AS AGAINST THE SURVIVING SPOUSE

Smyth v. Trust Company
172 Ohio St. 489 (1961)

Walter B. Smyth established an inter vivos trust with the Cleveland Trust Company in 1949 whereby he transferred title to property having the approximate value of \$136,135.37, to be held in trust for the benefit of his wife for life. By the terms of the agreement, Smyth retained the right to revoke or amend the trust; to enjoy its entire income during his lifetime; to consume the principal to the extent necessary for his maintenance, comfort, and enjoyment, absolute discretion being vested in the trustee to determine the amount; and to control administration as to sales or purchases of securities whenever practical. Smyth died in 1954 leaving to his wife as sole legatee under his will a probate estate of \$2,385. In addition, he left joint and survivorship bank accounts of \$18,826.06 and life insurance in the sum of \$10,551.91, all of which became the property of Mrs. Smyth. Shortly after his death his widow filed a petition in the Common Pleas Court of Cuyahoga County alleging that the trust was illusory and void as to her; that the agreement was not executed in conformity with the Statute of Wills; that because so much control over the property was retained by the grantor a mere agency relationship was created which terminated on the death of Smyth; and that she was therefore entitled to a distributive share of the property. The common pleas court and the court of appeals found for petitioner following the Ohio Supreme Court decisions of *Bolles v. Toledo Trust Co.*¹ and *Harris v. Harris.*² On appeal to the Ohio Supreme Court the decision of the lower courts was unanimously reversed, and plaintiff was precluded from taking a distributive share in the decedent's estate.

The question before the court in this case was whether Smyth could use an inter vivos trust to disinherit his wife when the election statutes thwart any attempt to do so by will. The first question is whether the trust is valid under the Statute of Wills. If the transferor retains so much control over the property that no trust is created for failure to meet the formal requirements of the Statute of Wills, then the attempt to create a trust is abortive as to everyone³ and the special question of the spouse's share does not arise. The courts have in the past been notoriously reluctant to lay down precise standards for determining when the transferor has reserved so many powers that the trust is invalid. Although the courts are still reluctant to articulate precise standards, in recent years they have permitted the retention of more and more powers. Many states now allow the transferor to retain considerable powers without requiring the instrument of transfer to be executed in accordance with the Statute of Wills.⁴ It is fairly

¹ 144 Ohio St. 195, 58 N.E.2d 381 (1941).

² 147 Ohio St. 437, 72 N.E.2d 378 (1947).

³ 1 Scott, Trusts 56, 56.1, 57.2 (2d ed. 1956).

⁴ Especially, when the trust agreement though not executed in accordance with the

well settled that retention of a life interest, the power to revoke or modify, the power to consume the principal, and a limited power to control the trustee will not invalidate the trust.⁵ The Ohio courts have been extremely willing to enunciate precise standards by which to determine the validity or invalidity of a trust.⁶ They have been hesitant, however, to recognize as valid a trust in which the transferor retains some or all of the powers mentioned above.⁷

The primary concern in the case under review and in *Bolles* is not whether the trust is valid as tested by the Statute of Wills because in both cases it was expressly stated that the transfers were non-testamentary. In regard to the rights of a surviving spouse under an election statute, is the controlling test merely whether the trust is valid under the Statute of Wills? There are a number of jurisdictions where this appears to be the sole test in determining whether the spouse may take his elective share from the trust.⁸ In these states if the trust is valid under the Statute of Wills, it is automatically valid as to the surviving spouse and he or she is precluded from taking a share.

In other jurisdictions, however, the question is answered in the negative.⁹ In the New York case of *Newman v. Dore*,¹⁰ where the trust was held Statute of Wills, is a formal document. *Adams v. Fleck*, 171 Ohio St. 451, 172 N.E.2d 126 (1961).

⁵ *Farkas v. Williams*, 5 Ill. 2d 417, 125 N.E.2d 600 (1955); *Kelly v. Parker*, 181 Ill. 2d 49, 54 N.E.2d 615 (1899); *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944); *Rose v. Union Guardian Trust Co.*, 300 Mich. 73, 1 N.W.2d 458 (1942). It should be noted that in many of the cases the trust upheld was executed by a formal document though not in conformity with the Statute of Wills. 1 *Scott, op. cit. supra* note 4, at 572. *Contra, Burns v. Turnbull*, 266 App. Div. 779, 41 N.Y.S.2d 448 (1943).

⁶ *Bolles v. Toledo Trust Co.*, *supra* note 1; *Harris v. Harris*, *supra* note 2.

⁷ In *Worthington v. Redkey*, 86 Ohio St. 128, 99 N.E. 211 (1912), the court held that an attempted transfer, where the settlor retained the income for life and the right of revocation, was invalid. In 1921 an amendment of Section 8617, General Code, now Ohio Rev. Code § 1335.01 validated the freely amendable and fully revocable living trust subject only to the right of creditors of the settlor to enforce the revocation in their behalf; while recognizing the force of this statute in *Union Trust Co. v. Hawkins*, 121 Ohio St. 159, 167 N.E. 389 (1929), the court, in dicta, frowned upon this type of trust; in *Cleveland Trust Co. v. White*, 134 Ohio St. 1, 15 N.E.2d 627 (1938), the Supreme Court again upheld the trust, but here the revocation could be exercised only with the consent of the trustee; in *Central Trust Co. v. Watt*, 139 Ohio St. 50, 38 N.E.2d 185 (1941), the court upheld a trust though the transferor retained an extensive control of the fund through his lifetime. The court upheld as non-testamentary a fully revocable trust in *Bolles v. Toledo Trust Co.*, *supra* note 1.

⁸ *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945); *Jones v. Somerville*, 78 Miss. 28 So. 940 (1900); *McKean Estate*, 366 Pa. 192, 77 A.2d 447 (1951).

⁹ *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944); *Schnakenbert v. Schnakenbert*, 262 App. Div. 234, 28 N.Y.S.2d 840 (1941); *President and Directors of Manhattan Co. v. Janowitz*, 179 Misc. 290, 14 N.Y.S.2d 275 (Sup. Ct. 1939); *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937); *Harris v. Harris*, *supra* note 2; *Bolles v. Toledo Trust Co.*, *supra* note 1.

¹⁰ *Newman v. Dore*, *supra* note 9.

illusory as to the surviving spouse, the test advocated to determine the validity of the transfer was whether the transferor divested himself of the ownership of the property in good faith. However, the court did not decide whether the trust was testamentary or not, but merely assumed without deciding that except as to the wife the trust would be valid. In holding that the trust was illusory as to the spouse, the court recognized that the measure of control retained by the transferor which will invalidate a trust as to a surviving spouse may be less than is necessary to invalidate it under the Statute of Wills.¹¹ Even in New York, however, when no power of control over administrative details is retained by the transferor, the surviving spouse is barred from a distributive share.¹²

There is a view in other states that even if a trust is non-testamentary, the spouse's rights may not be defeated by an inter vivos transfer made with the intent to deprive the spouse of property from which he or she could not be precluded by will.¹³ Such a transfer is considered fraud upon the marital rights of the spouse and will be set aside to the extent of the spouse's elective share.

Still another approach to the problem is that taken by Maryland. Although the earlier cases mention the retention of control theory and the test of fraud on the marital rights,¹⁴ the courts have more recently decided the cases on equitable doctrines without deciding on the validity of the trust as such. The courts see how much property the surviving spouse owns, how much she would take under the will irrespective of the trust, and the value of the trust corpus. If the court believes the spouse has been adequately provided for, the trust is valid as to the spouse; otherwise, it is invalid to the amount of the elective share.¹⁵

It is argued in favor of the Statute of Wills test that if the transfer is valid as between the transferor and the transferee then, *a fortiori*, it must also be good as to all third parties concerned. Thus, it is reasoned that it is logically impossible for a transfer to be valid and invalid at the same time. On the other hand, it has been said:

When, however, the basis upon which this concept rests is understood, it seems quite logical. That basis is simply a recognition of the fact that the policy underlying the election statute is stronger in regard to the degree of divestment of control necessary for the

¹¹ In *Bolles v. Toledo Trust Co.*, *supra* note 1, the court decided that the trust was valid under the Statute of Wills, but was invalid as to the surviving spouse where the right to income and the power to revoke were reserved by the transferor.

¹² *Marine Midland Trust Co. v. Standord*, 9 N.Y.S.2d 648 (App. Div. 1939).

¹³ *Payne v. Tatum*, 236 Ky. 306, 33 S.W.2d 2 (1930); *Ibey v. Ibey*, 93 N.H. 435, 43 A.2d 157 (1945); *Evans v. Evans*, 78 N.H. 32, 100 Atl. 671 (1917); *Thayer v. Thayer*, 14 Vt. 107 (1842). This is also the theory taken by the Model Probate Code.

¹⁴ *Rabbitt v. Gaither*, 67 Md. 94, 8 Atl. 744 (1887).

¹⁵ *Mushaw v. Mushaw*, 183 Md. 511, 39 A.2d 475 (1944); *Bullen v. Safe Deposit and Trust Co.*, 177 Md. 271, 9 A.2d 581 (1939); *Sturgis v. Citizens National Bank*, 152 Md. 654, 137 Atl. 378 (1927); *Brown v. Fidelity Trust Co.*, 126 Md. 175, 94 Atl. 523 (1915).

validity of an inter vivos transfer than is the policy underlying the Statute of Wills. This position appears sound, for it is a surviving spouse alone who cannot be deprived by wills of a share in the estate of the decedent.¹⁶

There may be, however, no such overriding public policy in Ohio in favor of the surviving spouse.¹⁷ This is evidenced by the fact that except for the spouse's year's allowance and mansion house rights, secured creditors, by statute, come ahead of the surviving spouse in the distribution of a decedent's estate. There is also an existing Ohio statute which makes revocable trusts "valid as to all persons" except creditors.¹⁸ It should be noted that no exception was made for spouses. Furthermore, joint and survivorship bank accounts¹⁹ and life insurance policies²⁰ have been upheld in Ohio against the claims of the surviving spouse.

Conversely, it might be argued, particularly in those states where the election statute operates in lieu of dower, that the statute, generally considered to be an enhancement of the rights of the surviving spouse rather than a restriction, should protect the spouse against inter vivos transfers as did common law dower in real property. Similarly, the growing tendency of the legislatures and courts to award alimony and support to the wife in divorce actions even though she is the party at fault²¹ may be considered a manifestation of a public policy to preclude a spouse (women in particular) from becoming a public charge.

The basic criticism of the fraud upon the marital rights test is that it merely states a result, not the means of arriving at the result. It has also been argued that in those states which set aside the transfer where there is proof of intent to defraud the marital rights of the spouse but no retention of control by the settlor, the courts are giving protection to the spouse not contemplated even by those who give a liberal construction to the election statutes. Such a rule is clearly in conflict with the policy of free alienation of property. Moreover, where the transferor transfers without an intent to defraud, the transfer is valid though almost complete control over the property is retained. Therefore, under certain circumstances the strict use of this test may produce undesirable results.

Perhaps the most just result can be obtained in cases of this nature by using equitable tests which take cognizance of the extrinsic facts involved instead of merely the intention of the transferor to defraud, his intention to

¹⁶ Bensing, "Inter Vivos Trusts and the Election Rights of a Surviving Spouse," 42 Ky. L.J. 616, 623 (1954).

¹⁷ Goldman, "Rights of Spouse and Creditor in Inter Vivos Trusts," 17 U. Cinc. L. Rev. 1 (1948).

¹⁸ Ohio Rev. Code § 1335.01 (1953).

¹⁹ Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636 (1940).

²⁰ Katz v. Ohio National Bank, 127 Ohio St. 531, 191 N.E. 782 (1934).

²¹ Ohio Rev. Code § 3105.18 (1953) has been interpreted as meaning that a wife is entitled to alimony in certain circumstances even though the husband is awarded the divorce decree. It appears that a "continuing support" theory is overshadowing the notion of fault in Ohio alimony and divorce actions. De Milo v. Watson, 166 Ohio St. 443, 133 N.E.2d 581 (1947); Gage v. Gage, 165 Ohio St. 452, 136 N.E.2d 56 (1956).

divest himself completely of the property, or the mechanical test of the Statute of Wills. It is believed that a needed flexibility can thus be obtained in the result of the cases with less, or at least no more, confusion in the reasons for reaching it. As indicated above, the fact that no other provision has been made for the spouse would appear to be a legitimate reason for setting aside the inter vivos transfer as to the spouse.²² Conversely, where the survivor has been reasonably provided for by other means, the transfer should be held valid as to all parties involved.²³ Other facts to be taken into consideration are whether the surviving spouse has funds of his own on which he can draw whether the transferor was abandoned or otherwise mistreated by the surviving spouse, whether the surviving spouse gave his consent to the inter vivos transfer, and the actual needs of the surviving spouse.²⁴

It would appear that the outcome of the *Smyth* case was correct. However, the court's reasoning in arriving at its conclusion is not so clearly expressed as would be desirable. The court appears to have based its decision on the finding that the trust was non-testamentary—applying its validity under the Statute of Wills as a test. It also appears that considerable weight was given to Ohio Revised Code section 1335.01 which states that revocable trusts are "valid as to all" except creditors. The court proceeds, however, and states that Smyth "advised his wife of his decision" that "she accompanied him to the Cleveland Trust Company to make arrangements" that the trust was created "five years before the settlor's death" and that "later additions to the trust were made, in at least one of which the wife joined in a conveyance of real estate which was conveyed to a trustee."²⁵ From this language it would appear that the test being applied is that of fraud upon marital rights, and that since there was no fraud, the wife deserved no elective share. However, the fact that the spouse was a beneficiary of the trust and substantially provided for aside from the trust was noted. This directs the conclusion that the equitable test was also used.

What criterion is the court advocating for the determination of whether the surviving spouse is entitled to an elective share? The court has joined the majority of jurisdictions not only in its decision on the effect of such an inter vivos transfer, but also in its reluctance to lay down a precise rule on the subject. As stated before, the result obtained in the instant case was the only one tenable under any of the three mentioned tests. However, it would be most difficult to predict on the basis of the *Smyth* decision what result would be reached in a case where, though the trust was non-testamentary as evidenced by the intent of the settlor to divest himself of title prior to death no provision was made for the spouse, and the circumstances presented the possibility of fraud upon his or her marital rights.

²² *Mushaw v. Mushaw*, 183 Md. 511, 39 A.2d 552 (1944); *Jaworski v. Wisiewski*, 149 Md. 109, 131 Atl. 40 (1925).

²³ *Rose v. Rose*, 300 Mich. 73, 1 N.W.2d 458 (1942).

²⁴ *Sykes*, "Inter Vivos Transfers in Violation of Rights of Surviving Spouses," 10 Md. L. Rev. 1 (1949).

²⁵ *Smyth v. Trust Co.*, 172 Ohio St. 489, 502, 503 (1961).