Reservation of a Power to Revoke in a Living Trust — Non Testamentary

When men began to use the living trust as a device for the management and disposition of their property, difficult questions of law involving compliance with the Statute of Wills came before the courts. If the purported trustee was given little or no powers and the settlor reserved the power to revoke, a mere agency was created and dispositions in the instrument effective after death were void because the instrument was not properly executed. *McEvoy* v. *Boston Five Cents Savings Bank*, 201 Mass. 50 (1909). If, however, there was a sufficient delegation of power to the trustee, a valid trust was created, thus making the disposition of property after death effective, although the instrument was not executed as a valid will. *Jones* v. *Old Colony Trust Company*, 251 Mass. 309 (1925). The amount of control reserved by the settlor over the *res* is not the controlling element in determining whether there is a trustee-beneficiary relationship established or a mere agency, for recent cases, at least, have held that a reservation of a power to revoke will not invalidate an otherwise perfect trust. This view is also supported in the *Restatement of Trusts*, Section 57, by the American Law Institute. And certainly there could not possibly be any more control reserved over the *res* than the power to revoke the trust. The controlling feature, then, is how much power the settlor reserves over the trustee. The *McEvoy* case and the *Jones* case are distinguished on this point, for the amount of control over the *res* was the same in both cases. It is always important to bear in mind the distinction between controlling the *res* and controlling the trustee. The power to revoke part or all of the trust would be controlling the *res*, while the power to direct the trustee in the management of the estate, in investing and reinvesting trust funds, in the sale and transfer of property, in formulating policies, *etc.*, are all powers reserved over the trustee. A power reserved to direct the trustee to pay over to the settlor any part or all of the estate upon demand, is but another way of reserving the power to revoke, and should be thought of as a control over the *res* rather than the trustee. But this is not to say that there cannot be a certain amount of control over the trustee. In the recent case of *The Cleveland Trust Co.* v. *White*, 9 Ohio Op. 239 (1937), here under review, the court found a valid trust even though the settlor reserved the following rights: the income during his life; the free use and enjoyment of the estate during his life; the trustee should delegate to him, upon demand, the voting rights in certain stocks; the settlor to be consulted whenever practicable on matters relating to sales

and reinvestments. However, there was a virogous dissent in this case by Judge Lieghley, who believed that the settlor had given everything to the trustee and in the same breath took back everything but the bare legal title.

In *The Union Trust Co.* v. *Hawkins*, 121 Ohio St. 159, 167 N.E. 389 (1930), the supreme court, relying upon *Worthington* v. *Redkey*, 86 Ohio St. 128 (1912), held that the common law effect of a trust with a reservation of a power to revoke was to make the instrument testamentary in nature. An early leading case on the point was *Stone* v. *Hackett*, 78 Mass. 227 (1858). The court held in that case that a power reserved to revoke a trust was perfectly consistent with a valid trust and did not make the instrument testamentary. So there were two different views on the common law effect of a power reserved to a revoke a trust. While Marshall, C. J., positively denounces the holding of the *Hackett* case on the ground that a donor should not be able to reserve a power to revoke a gift made to a donee through the hands of a third person acting as trustee, when he clearly could not reserve such a power when making a gift directly to the donee, he, nevertheless, finds in favor of a trust in the *Hawkins* case because of the Amendment to Ohio G. C. 8617 which expressly allows for such power of revocation without defeating the trust.

In the *Hawkins* case, it should be noted that not only was there a reservation of a power to revoke, but there was a provision in the instrument that the trust was to terminate upon the death of the settlor if he had not revoked it before that time. The plaintiff claimed the effect of this was to make the instrument testamentary, but the court did not stress this fact, and dwelt upon the issue whether reserving the power to revoke defeated the trust or not.

The common law doctrine so strongly announced in the *Hawkins* case with respect to the effect of a reservation of a power to revoke may possibly be on the way out in Ohio because of *Cleveland Trust Co.* v. *White*, *supra*. The court in that case accepted the rule laid down in *Stone* v. *Hackett*, *supra*, so strongly condemned in the *Hawkins* case. In the *White* case it is significant that the court both cited and quoted from the *Hackett* case and from Section 57 of the *Restatement of Trusts* which adopts the rule of that case; and the court totally ignored the use of the Amendment to Ohio G.C. 8617 which was given a somewhat strained construction in the *Hawkins* case. But the problem in the *White* case was somewhat eased because there really was not a true reservation of a power to revoke, for the settlor had to get the consent of the trustees before he could revoke.

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