

1948

Heber O. Cronquist and Idella N. Cronquist v. Utah State Agricultural College : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HEBER CRONQUIST, aka HEBER
O. CRONQUIST, and wife, IDELLA
N. CRONQUIST,

Plaintiffs and Appellants

vs.

UTAH STATE AGRICULTURAL
COLLEGE, a corporation,
Defendant and Respondent.

FILED

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CLERK, SUPREME COURT, UTAH

RESPONDENT'S BRIEF

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Appeal from the District Court of the First Judicial
District of the State of Utah, in and for the
County of Cache.

IN THE SUPREME COURT OF THE STATE OF UTAH

HEBER CRONQUIST, aka HEBER
O. CRONQUIST, and wife, IDELLA
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vs.

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In order that the Court may better understand defendant's position in this matter, we desire to call attention to additional facts:

Olif Cronquist, being possessed of property worth approximately \$125,000.00, devises to his three children property worth approximately \$30,000.00 each. Exhibit A. pages 3-6: 29-38. The Cronquist farm, situated just north of the Utah State Agricultural College in Logan, and the only property of the testator under a lease (inventoried at \$27,000.00) was bequeathed to the Cache Valley Banking Company in trust for twenty years. Ex. A. pages 74, 108, 119. Olif Cronquist died on April 17, 1927.

One-third of the net rentals accruing between decedent's death and December 16, 1933, upon receipt there-of by the trustee, were paid to Heber Cronquist. Ex. A, 108, 119.

Beginning December 16, 1933, and continuing until November 25, 1939, Heber's share of the rentals were paid, by assignment, to one Fred Lundberg. Ex. A. pages 120, 140, 148, 155, 164. On March 10, 1940, on a second assignment, Heber's share was paid to the Cache Valley Banking Company. Ex. A. page 172. Between May 20, 1940, and March 29, 1947, Heber's share of the rentals was paid to The First Security Bank to apply on a note secured by mortgage on Heber's share of the trust. Ex. A, pages 172, 188, 196, 204, 212, 220.

The lease of the farm expiring in 1944, the College sought to purchase other property but in November 9th of that year, Heber Cronquist and his wife entered into an agreement with the Utah State Agricultural College for the purchase and sale of his one-third interest in the College farm for \$10,000.00. Tr. 079, 039. Four thousand and no /100 (\$4,000.00) was paid down and the balance was to be paid at the termination of the trust. Tr. 039. Between the time of the contract and the termination of the trust one-third of the rentals on the property was, under the contract, paid to Heber Cronquist, or assignee.

He accepted said rentals, retained the \$4,000.00 and made no protest until he heard that his brother and sister, some three years after the making of his agreement with the College, during a period of inflation, had sold their interest to the College for a higher price. Tr. 066. Then for the first time he protests and complains that he had no interest in the property and because of having no interest therein he could not contract to convey the same and his agreement with the College was void.

According to his brief, he bases this contention on two points: (1) The trust created was a spendthrift trust, and (2) That his interest in the said property being only a contingent remainder therein, he could not make a legal contract to assign the same. Tr. 007.

ARGUMENT AND AUTHORITIES

I

Dean Griswold of the Harvard Law School in his recent work "Spendthrift Trust" (1947) classes Utah as one of the five states of the Union where there is no statute or case on the subject of spendthrift trust. Pages 38-270. He points out that the doctrine of spendthrift trust is based on public policy and not on sound logic. Griswold: Spendthrift Trust page 634. See also 54 Am. Jur. 128; Kelley vs. Kelley 79 Pac. 2d, 1059.

In the instant case the Court is called upon, for the first time to determine a question of public policy. It should base its decision not only on the cases from other jurisdictions but also consider the result of a policy, contended by appellant, that would leave title to real property in such a condition as to make it impossible for an examiner of titles to determine when one had an assignable interest in real estate.

Plaintiff has cited a number of cases in support of his position that the will of Olaf Cronquist created a spendthrift trust. A grouping of these cases according to the states where the decisions were made and the time of the decision is helpful in determining the weight to be given them as precedents for our own count to follow.

Such grouping also gives to the court the advantage of the experience of other courts dealing with the problem of "Spendthrift Trusts." It should enable a court, dealing with the problem for the first time, to adopt a rule of construction that would not be subject to change.

PENNSYLVANIA

In an early Pennsylvania case, *In Re. Stambaugh*, 135 Pa. 585, 19 Alt. 1058 (1890) the court upheld a provision in a will as a spendthrift trust where its provisions did not expressly so state. In *Trask vs. Shaffer* (Pa.) 14 Alt. (2nd) 211, (1940) the will provided;

"To my son, Herman Shaffer, one-seventh of my estate, which part I direct that my executor place in a trust or other fund that will be completely administered. This fund to be established on basis that this heir, Herman Shaffer, receive the annual income earned by it; and in addition \$200.00 annually from the principal sum of the fund, or more if, in the judgment of the officers of the trust, such increase in the amount is needful and advisable."

At the death of Herman Shaffer, the remainder of the trust, created for his benefit, *was to be divided equally among his heirs*. Another son was given an identical trust and the five children of the testator each got a one-seventh share to be paid to them direct. The First National Bank was appointed trustee.

Plaintiff, holder of the judgment against Herman Shaffer, garnisheed the bank. The lower court held that

a spendthrift trust had been created and was not subject to garnishment, basing its decision on the early Stambaugh case.

The Supreme Court reversed the decision of the Lower Court saying,

“There is no semblance of uniformity among other jurisdictions as to the rule of construction to be applied in determining whether a testamentary provision operates as a spendthrift trust. A rule of excessive liberality in favor of a spendthrift trust was applied In *Re: Stambaugh's Estate*, 135 Pa. 585. In *McCurdy vs. Bellefont Trust Company*, 292 Pa. 407, the Supreme Court referred to the case of *Stambaugh's Estate* as an extreme case, repudiated its doctrine, and arrested the trend in direction of liberality, retraced its steps and established the applicable rule firmly on conservative ground. The *Stambaugh* case is no longer reliable authority in Pennsylvania.”

Thus Pennsylvania, in adopting the rule of liberal construction contended for by appellant, was forced in the light of later experience, to reverse its early decision. Reversal of decisions, on matters affecting title to real estate, should be avoided where ever possible.

ILLINOIS

Plaintiff's brief places great reliance on three early decisions of the Supreme Court of the State of Illinois, namely, (1) *Bennett vs. Bennett*, 217 Ill. 434; 75 NE

339; 4 L.R.A.N.S. 470; and (2) Wallace vs. Foxwell, 250 Ill. 616; 95 NE 985; 50 L.R.A.N.S. 632, decided in 1911, and (3) Wagner vs. Wagner, (Ill.) 91 NE 66.

In Bennett vs. Bennett, (1905) the case arose on the petition of the beneficiary asking the Court to require the trustee to pay him the corpus of trust prior to the time designated in the will for such corpus to be paid. The Court refused the petition on the ground that it was a spendthrift trust.

In Wallace vs. Foxwell, (1911) the beneficiary had been adjudicated bankrupt, his interest in the trust property sold to the Second National Bank of St. Paul. The trustee asked for a direction from the Court as to whether the beneficiary or the bank was entitled to the income from the trust property. The Court decided that the trust was in the nature of a spendthrift trust and nothing passed to the bank from the bankruptcy sale.

In O'HARE vs. JOHNSTON (Ill.) 113 N.E. 127, (1916) the testator placed in trust, bonds of the value of \$100,000.00. He directed that the trustee collect the income and pay one-half to his son and the other half to his daughter. At the end of a 30 year period, if both children were living, the principal was to be divided equally between them. In the event of the death of either son or daughter, before the expiration of the trust period, leaving issue, the income and principal, at the end of the trust period was to be given to the issue.

The facts of the case are so similar to the facts in the Cronquist will, and appellant has placed such reliance on

the decisions of the Supreme court of Illinois, it may be wisdom to present a direct quotation from the decision of the Court in the matter.

“But it is further argued that the entire fourth clause of the will is a spendthrift trust provision for the testator’s children and grandchildren for a period of 30 years, and that fact argues strongly for the contingency of the gift. A spendthrift trust is created with a view of providing a fund for the maintenance of another and at the same time securing it against his own improvidence or incapacity. Directions against alienation by the voluntary act of the beneficiary or through legal process by creditors are the usual incidents of such trusts. (citing authorities.)

“There is nothing in the wording of the will itself as to this trust that indicates that it is of a spendthrift character. We find no restraint on alienation and no discretion as to the payment of the income or the principal. It is true there is evidence tending to show that the testator had expressed doubts as to the son settling down in business as to whether he would be able to take care of himself, and stating that the daughter while in school, had been accustomed to spend a good deal of money which the father had provided, that she was under age at the time the will was drawn; and that both son and daughter had depended on their father for support. But it is also true that this fund referred to the grandchildren as well as the children, and the testator, naturally, could

not form an idea as to whether they would need the protection of a spendthrift trust. It is the intention of the testator that decides, under the authorities, the character of the trust. If it is shown that his intention indicates a spendthrift trust, the court will not inquire whether the beneficiary is, if fact, a spendthrift. The will does not indicate that the testator thought his children were spendthrifts. He gave to each of them valuable real estate and a large amount of other property. In addition to this he gave them the income from the trust fund, which tends strong to show that he had no suspicions or apprehensions as to their ability to handle their own property."

Then came the case of Commissioner of Internal Revenue vs. Blair, 60 Federal 2nd, 340; decided in 1932:

"By his will decedent created a trust estate and named as trustees hereof his nephew Chauncey J. Blair and his son Edward T. Blair. By the terms of the trust the wife of the testator was to receive one-half of the net income of the trust estate during her life, and taxpayer (son of said testator) was to receive the other half during his life, and, after the death of testator's wife, taxpayer was to receive the whole net income of the trust during his life.

Clause 20 of decedent's will reads as follows: "I do hereby declare and direct that the income from trust fund and estate which is herein ordered to be,

from time to time as the same shall be received, paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.”

The son Edward T. Blair assigned his interest in the income from the trust property. The Board of Tax Appeals decided that the net income from the estate accruing subsequently to the assignment was not taxable to Edward T. Blair the assignor.

On appeal the ruling of the Tax Board was reversed, the Court holding that Edward T. Blair had no power to make an assignment of the income of the trust. It based its decision on the previous cases of *Bennett vs. Bennett*, *Wallace vs. Foxwell* (ante) and others.

After the earlier cases, a Mr. Kales of the Illinois Bar wrote a textbook on “Estates, Future Interests, and Restraints on Alienation in Illinois” in which he took issue with the decisions of the Illinois Courts in *Bennett vs. Bennett* and *Wallace vs. Foxwell* and offered some very pertinent and constructive criticisms of the doctrine of

spendthrift trust as interpreted by the Illinois Court¹. The Federal Court, however, in its decision declared it was only concerned with the law of the State of Illinois as the Illinois Courts had interpreted it, whether the interpretation be right or wrong was beside the question. It, therefore, adhered to the doctrine as expressed in *Bennett vs. Bennett* and *Wallace vs. Foxwell* (ante), and decided the will created a spendthrift trust.

Before paying the tax, however, the trustee, in the case of *Blair vs. Blair*, 274 Ill. App. 23, asked for declaratory judgment construing the will. This case was decided in 1934 and, therefore, represents the modern trend of the law of spendthrift trusts.

While the Illinois Court does not expressly repudiate the earlier decisions of *Bennett vs. Bennett* and *Wallace vs. Foxwell*, it declares that none of them involved an alienation of the trust fund by beneficiary.

The Court then adopts the theory of Mr. Kales by basing its opinion upon the following quotation from "Kales on Future Interests" at Page 861:

"A mere trusteeship, even though for the protection of the beneficiaries, ought not as a matter of

¹"Taken as a whole, the foregoing cases show as well marked as instances as any, where our Supreme Court actually interprets the instruments by finding not what the testator expressed in words but what was the intention of his inducement. The object and purpose of the inducement in these cases apparently made not merely the standard of interpretation but the very subject matter to be interpreted. This position has been taken without any apparent appreciation by the Court of a complete departure from the fundamental principles of interpreting writings which it involved." Kales Future Interests, Paragraph 748.

taste, if for no other reason, be called a spendthrift trust. Only where this is added to the trusteeship express restraints on alienation is it justifiable to call the creation a spendthrift trust. Whether restraints on alienation, voluntary or involuntary, or both, are added ought to be determined by the application of the usual principles of construction to the language used. If the restraints are not expressed, no amount of extrinsic evidence or speculation and conjecture as to the testators or settler's inducements ought to be 'permitted to it into the will or settlement.'"

The Court then continues:

"If the testator had intended to restrict voluntary alienation by his son, this could have been readily accomplished by the use of a very few words. That he did not use such words is strong evidence that he did not so intend. Words even of doubtful meaning should not be construed as to inject an intention into the will manifestly contrary to that of the testator."

The case then went up to the Supreme Court of the United States because of the conflict between the State Court in *Blair vs. Blair*, 274 Ill. App. 23, and *Commissioner of Internal Revenue vs. Blair*, 60 Federal 2nd, 343. Chief Justice Hughes delivered the opinion of the Court saying:

"Second. The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the

property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. *Spindle vs. Shreve*, Ill. U. S. 542, 547, 548, 28 L. ed. 512-514, 4 S. Ct. 522; *Uterhart vs. United States*, 240 U. S. 598, 603, 60 L. ed. 819, 821, 36 S. Ct. 417; *Poe vs. Seaborn*, 282 U. S. 101, 110, 75 L. ed. 239, 243, 51 S. Ct. 58; *Freuler vs. Helvering*, *supra* (219 U.S. p. 45, 78 L. ed. 641, 54 S. Ct. 308). It matters not that the decision was by an intermediate appellate court. Compare *Graham v. White-Phillips Co.* 296 U.S. 27, 80 L. ed 20, 56 S. Ct. 21, 102 A.L.R. 24. In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments. Nor is there any basis for a charge that the suit was collusive and the decree inoperative. *Freuler v. Helvering*, *supra*. The trustees were entitled to seek the instructions of the court having supervision of the trust. That court entertained the suit and the appellate court with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question

is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction."

"In the face of this ruling of the state court it is not open to the Government to argue that the trust "was, under the Illinois law, a spendthrift trust." The point of the argument is that, the trust being of that character, the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary. The ruling also detremines the validity of the assignment of the beneficiary of parts of his interest. That question was necessarily presented and expressly decided." Blair vs. Commission of Internal Revenue 300 U.S.S.,5 81 L. Ed. 465.

Would it not be wisdom, in interpreting the intention of the testator, Olif Cronquist, to adopt a rule of construction, that withstands the test of time.

CALIFORNIA

In Seymour vs. McAvoy, 53 Pac. 946 (1898), an action was brought to subject the interests in a certain trust to the claim of creditors. While the will creating the trust contained no express restriction against alienation, it did provide the following purposes:

"(2) To provide out of the income thereof for the comfort, support, and maintenance of my beloved wife.

"(1) To provide out of the income thereof for port and education of my two daughters."

The pertinent part of the decision is found in head-note No.2 which reads as follows:

“The author of a trust to pay to another the income of property may at common law provide that the interest of the beneficiary shall not be subject to the claims of his creditors, and such provision need not be expressed, but may be implied from the terms of the trust in the light of all the circumstances.”

While the case marks the beginning of a liberal interpretation in favor of spendthrift trusts in the State of California, it should not be authority to go beyond the terms therein stated.

In *Re Blakes Estate*, 108 Pac. 287, has more to do with the alienation of a contingent remainder and will be discussed later.

The case of *Fletcher vs. Los Angeles Trust & Savings Bank*, 187 Pac. 425, was an action to determine a trust. The real question involved was whether a woman of the age of 54 was presumed to be sterile. Such a presumption exists in England but not in the United States.

With respect to the will of George C. Kimball being interpreted by the Court, the Court declared:

“Where the trust is a spendthrift trust, or where the settlor made known, expressly or plainly, his intention that such power should not exist, or where discretion as to the amount of the income to be devoted to the needs of the beneficiary is vested in the

trustee, or where the effect of the trust is to direct accumulations of the income until a fixed time, the trust cannot be terminated by the court during the period fixed by the trustor, even where all the beneficiaries are sui juris and consent thereto. There is nothing, however, in the trust created by the will of George C. Kimball which brings it within any of the foregoing well-recognized limitations."

In *Re DeLano's Estate*, cited by appellant the testator twice used the word "Spendthrift Trust" in his will. The court in interpreting the will said:

"There was no provision against alienation by the beneficiary of their interest in the trust property nor did the will specifically declare that the trust was made for their support, maintenance and welfare but the purpose of the testator is no less clear because of these admissions. It was disclosed by the use of the terms 'Spendthrift Trust,' which has a well understood legal meaning."

The above named California cases cited by plaintiff should be supplemented by a very careful consideration of the case of *Kelley vs. Kelley*, 79 Pac. 2d 1059 (1938). In this case the beneficiary had made an assignment of his interest in a trust estate which had already been held by the Courts to be a spendthrift trust. The plaintiff brought suit on the assignment and the defendant set up the invalidity of the assignment on the grounds that it was a spendthrift trust. The Lower Court held for the defendant but the Supreme Court reversed the decision declaring:

“We find no requirement of public policy which preclude their application here or compel the protection of the proceeds of a spendthrift trust after they have reached the hands of the beneficiary from the incidents of an otherwise valid engagement entered into during the life of the trust.”

While California, has never extended its rule of construction to the liberal extent contended for by appellant, in the Kelley case it reveals an intent to limit even its conservative view by permitting an action for damages for breach of contract (on the part of beneficiary under an express spendthrift trust) to alienate his interest.

Thus the Courts of Pennsylvania, Illinois, and California, who in the early days of rugged individualism departed from the English rule and sustained the validity of spendthrift trust, and in such departure adopted the extreme view that the testator did not need to create the spendthrift trust by express words have in recent years repudiated their early decisions by holding that the intention to create the spendthrift trust ought *clearly* to appear in the instrument creating the trust.

The case of Jones vs. Harrison, 7 Federal 2nd, 461, on which plaintiff places such great reliance can be distinguished from the case at bar. In Jones vs. Harrison, a petition in bankruptcy was filed by the trustee to sequester for the benefit of creditors the interest of the bankrupt in the trust estate created by will. The petition was resisted by the trustees under the will. The Court granted the petition holding that the will created a spendthrift trust. It based its decision on three points:

(1) "Courts have held that the fact of placing property in the hands of a trustee evidences intent on the part of the testator to put it beyond the power of the beneficiary to alienate.

(2) Turning, now, to the will which is here under consideration, there is but a single item in its language which expresses an intent of the testator to impose restrictions upon the beneficiary's interest. That is found in the use of the word "direct," as to the income accruing between the beneficiary's twenty-fifth and thirty-fifth year. The will requires this income to be paid by the trustees to the beneficiary "direct." This fairly imports that such payments were not to be made to alienees or to creditors. This language, however, is not used with respect to the payment of any other income, or to the payments out of the capital of the trust.

(3) Looking now to the circumstances and to all the provisions of the will, the Court finds as a further ground in support of the restriction that a large part of the estate was placed absolutely under the son's control."

Two elements of the Cronquist will are similar to the will interpreted by the Court in Jones vs. Harrison: (1) The property was placed in the hands of the trustee, and (2) The testator bequeathed part of the property to the son absolutely and another part to a trustee.

The Cronquist will, however, does not contain the third element which to the Federal Court was the es-

sentential element, namely, that the money was to be paid *direct* to the beneficiary.

When we consider that the Federal Court in *Jones vs. Harrison* based its decision on the cases from Illinois and when we further consider that the Illinois Court, distinguishes between cases brought to set aside a contract by the beneficiary and an action to make the beneficiary's interest subject to his debts, and when we further consider that in *Jones vs. Harrison* the will provided that the money was to be paid *direct* to the beneficiary the case of *Jones vs. Harrison* is but little aid to a Court which is called upon to interpret the Cronquist will.

KANSAS

Plaintiffs cite two decisions from the State of Kansas in support of his position that the will of Olif Cronquist created a spendthrift trust. The first is *Everitt vs. Haskins*, 171 Pac 632. In this case the will provided:

“The share of my son William Henry, as provided herein, *shall not be given into his control, but shall be put into the hands of my executor, Wm. M. Peck, as trustee for my said son.* Said trustee shall invest and manage the same, as to him seems best, and pay to my said son the sum of three hundred dollars (\$300.00) per annum, in semi-annual installments of \$150.00 each, but *such amount may be increased to whatever may be considered necessary, by the trustee, by any change in condition of said William Henry, to an amount sufficient for his comfort.* Such amount to be paid by the executor, or

trustee, out of any money thus coming to him, whether income, increase, or the corpus of the estate so given; it being my intention that he shall have, as above provided, the said sum of three hundred dollars, or more if necessary, per year, so long as there shall remain any property herein given him from which to pay it. Should there be any of the estate herein given to my son William Henry remaining at his death, *it shall be paid over and conveyed by the trustee to the heirs of said William Henry. It is my will and I hereby direct, that in no event shall any of my estate ever be given to the husbands, either present or future, of my daughters, but shall be kept free from such husbands, during the life of my said daughters, and, if any remains of their respective shares at their death, it shall go to their heirs, other than their husbands*" (italics supplied)

That portion of the will in italics was taken by the Court to show an intention on the part of the testator to limit the power of *creditors* to levy on the beneficiary's interest. But no such provision is found in the Cronquist will. There is no intimation that the bequest is for the support of the plaintiff. Nor is there a provision that the part not needed for the support of Heber goes to another at the end of the trust period.

The trend of the Kansas Court is in the same direction as the the Courts of Pennsylvania, Illinois, and California.

In *Re Watts* Kan. 162 P. (2nd) 82 (1945), the will of Mary D. Watts provided for the creation of a trust and directed that the trustees pay Corwin Grant Watts at such

times as to them may seem necessary such sums of money as shall in their judgment be necessary for the proper maintenance, support, and education of the said Corwin Grant Watts and at the age of 21 years, corpus of the property was to be turned over to Corwin Grant Watts if in the judgment of the trustees he had attained sufficient business judgment to handle the property. The Court pointed out that as the will created a discretionary trust as distinguished from a spendthrift trust and that the trust property was not liable to satisfy a judgment against Corwin Grant Watts for alimony.

The decisions of the Kansas courts, will be further discussed under Part III of this brief where they properly belong, but this observation is now pertinent. Had the Kansas Court in the early case of *Everitt vs. Haskins* fully appreciated the distinction between a 'spendthrift' and a 'discretionary' trust the case of *Everitt vs. Haskins* could never be referred to in a discussion of the subject of spendthrift trusts.

Summing up the authorities cited by plaintiff in his brief, we are willing to admit that the American Courts generally sustain the validity of spendthrift trusts when the trust instrument clearly expresses such an intention. We can further concede that there is some authority to the effect that the restraint against alienation by the beneficiary need not be stated in express terms. **WE VIGOROUSLY CONTEND, HOWEVER, THAT THERE IS NOTHING IN THE CRONQUIST WILL FROM WHICH IT MAY BE EVEN INFERRED THAT THE TESTATOR INTENDED TO LIMIT THE**

POWER OF HIS BENEFICIARIES TO AGREE TO CONVEY THEIR INTEREST IN THE TRUST ESTATE.

Many cases could be cited to support our position but for sake of brevity we quote from text writers who have reviewed all the cases and conclude as follows:

“But there is a noticeably tendency in the decisions of today, as compared with those of a generation ago, to require that the intention to create a spendthrift trust appear clearly in the instrument.” Griswold, “Spendthrift Trusts,” page 300.

“Courts have occasionally held that trusts were spendthrift trusts when it was exceedingly difficult if not impossible to find an indication in the terms of the trust that the settler intended any such limitation on the interest of the beneficiary. *These cases deserve no following.* The intention to establish the spendthrift trust ought clearly to appear in the instrument creating the trust, for, as more than one court has observed, any other rule, ‘would in effect saying that all life estates of like character, given in trust, are incapable of being alienated.’ There should be specific language declaring the trust a spendthrift trust or language from which such interest might reasonably be inferred. *A mere trusteeship is not enough to make a spendthrift trust.* Griswold, “Spendthrift Trusts,” pages 303-304.

“An intention to create a spendthrift trust which the beneficiary cannot assign nor any of his creditors

disturb is manifested by a provision to the effect that all moneys paid to any beneficiary shall be paid into his hands and not into the hands of any other person, without the right of anticipation, a provision for payment to the beneficiary for his support on his receipt, and that the beneficiary should have no power to charge, encumber, or anticipate the income; a provision for payment into the hands of the beneficiary and not upon any written or verbal order or upon any assignment or transfer; or by a provision that the beneficiary shall not be entitled at any time to alienate, anticipate, or encumber his share of the income or principal, and that the same shall not be liable for his debts. *But no intention to impose a restraint on the alienation of income is to be found, it has been ruled, merely from a direction that the trustee should apply it to the support and maintenance of the beneficiary.*" 54 Am. Jur. 125.

"There is no presumption that every trust to pay over income is a spendthrift trust." Bogert on Trusts, Vol 1, Par. 225.

"To create a valid spendthrift trust the language of the founder must be clear and unequivocal to that effect." 25 R. C. L. page 357.

"Every alleged spendthrift trust must be judged on its own facts. No formula is needed to create such a trust, and no prescription can be given for establishing one, except the use of clear and simple language prohibiting alienation of the cestui's interest." Bogert Trusts, Vol. 1, page 739.

“The general rule that the extent or interest of the cestui que trust will be controlled by the provisions of the trust instrument applies to spendthrift trusts but there is a presumption against the creation of a spendthrift trust unless either words to that effect are set forth or the clear and undoubted intention to the same end is manifested by the terms of the instrument. Where the property is conveyed to the trustee in fee simple in trust for the beneficiary until he arrives at a certain age, at which time it is conveyed to him absolutely, no spendthrift trust is created.” 65 C. J. 542.

We supplement these statements by: *Trash vs. Shaffer* (ante); *Blair vs. Blair* (ante); *Kelley vs. Kelley* (ante), and the following other cases:

NEWELL v. TUBBS, (Colo.) 84 Pac. 2d, 820, (1939).

Action by Newell against Tubbs to annul an assignment by plaintiff to defendants of plaintiff's interest under a trust. The will provided that the income from the trust estate was to be used for the education of the great-grandchildren of the testator, the principal ultimately to be divided among the beneficiaries.

Teseator died in 1925, Newell, a great-grandson, on February 7, 1934, for a valuable consideration, executed a written assignment of his interest in the trust estate to Tubbs.

Court found in favor of the defendant saying, “A spendthrift trust is ‘a trust created to provide a fund for

the maintenance of the beneficiary, and at the same time to secure it against his improvidence or incapacity.' 65 C. J. 230. Clear and unequivocal language is necessary to create such a trust or, in the absence of such language, the intention to create must clearly appear from the language of the entire instrument. 65 C. J. 265. In the document under consideration in the instant case we find none of these requisites."

POOL vs. CROSS COUNTRY BANK, 199 Ark 144, 133 S.W. 19, (1939).

Cross Country Bank brought suit to foreclose trust deed executed by John D. and Anne B. King, given to secure note of grantors. Property came to King by will of his mother which provided:

All property to trustees to hold for son, J. D. King. Pay son \$100.00 per month or more if sick, income free from debts. If son dies and leaves issue, then income to son. All parties interested had quitclaimed to son.

Held no restraint on alienation. "A mere trusteeship, even though it is for the protection of the beneficiaries, ought not, as a matter of taste, if for no other reason, be called a spendthrift trust. Only where there is added to the trusteeship express restraints on alienation, it is justifiable to call the creation a spendthrift trust."

Foreclosure was permitted.

MILLER vs. MARYLAND CASUALTY COMPANY, (Ark.) 180 S. W. 581, (1944).

“Although one may limit the grant, presumption of law in that he has not done so unless there are express words, or a clear and undoubted intention is expressed in the will.”

BAKER vs. KEISER, 75 Md., 332, 23 Atl. 735.

In trust to daughter for life, then to children. Action by creditors for income.

In the opinion the court used this language:

“Without importing words into that will which are not there, and imputing an intention to the testator of which he has given no intimation by any verbal expression, we cannot say that the income was not and is not assignable by the life tenant; and if it is, there was error in holding it to be beyond the reach of creditors. Any other construction of this will and ruling in this case would be in effect saying that all life estates of like character, given in trust, are incapable of being alienated.”

PICKENS vs. DORRIS, 20 Mo. App. 1,

Here property given trustee to pay income to children.

The Court refused to impose a restriction upon the trust saying:

“There is nothing in the will itself which would indicate that trust thus created was in the nature of a spendthrift trust and to seek in the surrounding

circumstances a reason for declaring it to be such, the authorities do not warrant and sound policy forbids.”

NUN vs. FITCHE-GOETTENGER, 245 S. W. 421.

“According to great weight of authority, however, where instrument creating the trust contains no expressive words of restraint and nothing on its face declaring that the purpose of the trust is to provide a support of the beneficiary or furnish him with the comforts of life, and where it is declared that and where it requires that the income from the trust shall be paid directly to the beneficiary without any discretion in the trustee as to time or amount of payment or the purpose for which they shall be applied, such revenue may be anticipated or assigned by the beneficiary.”

We may conclude that the modern decisions are unanimous in holding that a mere trusteeship is insufficient to show an intention to create a spendthrift trust.

II.

In as much as the third subdivision of appellant's brief is more closely related to the first subdivision than the second, I shall discuss part III before part II.

Part III of Appellant's brief approaches the very core of the question in this case, viz;

What provisions in the Cronquist will evidences an intent on the part of the testator to prevent his children

from selling or contracting to sell, their interests in the trust property? But it is only an approach—plaintiff does not follow through.

Throughout plaintiff's brief only two provisions of the will are cited to show that the testator intended to prevent his children from alienating the trust property.

First: The provision that the property was placed in trust. (Appellant's Brief pages 26 and 27.) This contention has already been disposed of.

Second. The provision that part of the property was given to the children direct and part placed in trust. (Brief, page 10.)

It is true that two other arguments are made. One that the testator created an estate of such nature that made it unassignable. That argument will be answered in Part III of this brief. The other is that the very fact that the children tried to sell their trust estate after the death of the testator. This final argument is not based on the will itself but springs from facts outside of the will.

This last contention has such little weight that it may be disposed of at this time. In fact in his brief, appellant, provides his own refutation. (Brief pages 10 and 11.) If the "mere circumstance that the plaintiff survived the trust period cannot be permitted to alter the testator's intent" it would be just as true that the mere circumstance that the plaintiff tried to borrow money six years after the death of the testator should not be permitted to alter

the intent of the testator at the time he made his will. One cannot change a testamentary intent of date of April 11, 1927 by showing an act of a third person on Dec. 16, 1933.

The second provision found in the will itself, from which appellant argues for a spendthrift trust is stated as follows:

“The very fact that testator gave each of his three children a substantial portion of his estate and put the balance, also a substantial portion, in trust,” shows an intent on his part to limit their powers to sell the same. But we must remember that the portion that was placed in trust was the only property of the testator under lease. The Cronquist farm (or trust property) had been leased to the Utah State Agricultural College for a long time and the lease had many years to run. The rental on this lease was to be split three ways. Someone had to be appointed to collect the rent and distribute the income. the most likely person to make such distribution was the Cache Valley Banking Company, the person named as executor.

We also call attention to the fact that in *O'Hara vs. Johnson*, (Ill.) 113 NE 127, the Court reasons:

“Inasmuch as the testator gave each of them valuable real estate and a large amount of other property. In addition to this he gave them the income from the trust fund which tends strongly to show that he had no suspicion or apprehension as to their ability to hold their own property.”

See *Black vs. Jones* 264 Ill. 548, 106 N.E. 462.

The reasoning of plaintiff on this point deserves the criticism that Mr. Kales gave the Illinois Courts. See Note 1, page 10.

To say that because the testator gave part of his property in trust and part direct shows that he did not trust his children and then to reason that the lack of confidence in the financial ability of his children was an inducement to give part in trust and part direct and from that conclude that the testator intended to create a spendthrift trust, may trick one to a conclusion based on confusion. But it should not stand in the way of clear thinking and be used to show that testator did not want his children to sell their interest. If he wanted to restrict them, why did he not say so? Words to show such an intention were at his command.

III.

Part two of plaintiff's brief discloses another question, namely, Apart from any question as to the intention of the testator to prohibit alienation by a beneficiary of his interest, did the testator create an estate of such a nature that it could not be alienated? Plaintiff's answer to this question is as follows:

"One of the determining factors in a case of this kind is, whether the testator has devised the legal title in the trust property to the trustee to hold during the trust period. If that fact definitely appears from the language of the trust instrument then the

Courts hold that the beneficiary has no vested interest in the trust res, which he can alienate or dispose of during the trust period. In *Re: Blakes Estate*, (Cal.) 108 Pac. 287; *Meek vs. Briggs*, 98 Iowa 610; *Richardson vs. Warfield*, 148 N. E. 141; *Everett vs. Haskins*, (Kan.) 171 Pac. 632; *Watts vs.*

McKay, (2nd) (Kan. 162 P. 82); *Jones vs. Harrison* 7 F. (2d) 467.

This statement does violence to the fundamental law of trusts and it is not even supported by the authorities quoted.

“In absence of provisions in the trust instruments or statutes to the contrary, the cestui trust may alienate his interests as freely as he might a legal estate or interest. The consent of trustee is not necessary.” *Bogert Trusts*, Vol. 1 Paragraph 188.

“Both in England and in the United States today it is clear that the beneficiary of a trust, unless he is under legal incapacity, can transfer his interest under the trust, unless his interest is made unalienable by the terms of the trust or by statute. He can transfer his interest to a third person, to a co-beneficiary, or to the trustee. As was said by the court in New Jersey; “Trust estates are subject to the same incidents, properties, and consequences as, under like circumstances, belong to similar estates in law. They are alienable, devisable, and descendable, in the same manner.” *Scott on Trusts*, Vol. 1, Par. 132.

“On the whole, it seems probable that, in except a very small number of jurisdictions, contingent remainders and executory interests of all kinds, are freely alienable. *McAdams vs. Bailey*, 82 N.E. 1057; 169 Ind. 518, 13 L.R.A.A.N.S. 1003; *Beacom vs Amos*, 77 S.E. 407; 161 N.C. 717; *Lee vs. Oates*, 171 N.C. 717 Ann. Cas. 1917A 514; *Habgood vs. Habgood*, 86 S. E. 189; 171 N. C. 485; *Love vs. Lindstedt*, 147 P. 935 76 Ore. 66, Ann. Cas. 1917A 898; *Jerman vs. Nelson*, 135 Ore. 126; 293 Pac. 592; *Re Robbins Estate*, 49 A. 233, 199 Pa. 500.” *Simes “Future Interests,”* (1936) Vol. 3, page 159. Par. 714.

“It thus appears that, whether there be any applicable statute or not, any variety of future interests in land may be conveyed by release, by estoppel, or by contract, specifically enforceable in equity, if there is any person capable of executing a deed who may be said to have a future interest.” *Simes “Future Interests”* Vol. 3 Par. 710, page 150.

In *Blair vs. Commissioner of Internal Revenue*, 300 U. S. 5, 81 L. Ed. 465, the will provided for the creation of the trust estate and for the payment by the trustees of the income from the estate to the son of his testator.

The Court in commenting on the right of the beneficiary to assign his interest said:

“The will creating the trust entitled the petitioner during his life to the net income of the pro-

perty held in trust. He thus became the owner of an equitable interest in the corpus of the property. *Brown v. Fletcher*, 235 U. S. 589, 598, 599, 59 L. ed. 374, 378, 35 S. Ct. 154; *Irwin v. Gavit*, 268 U. S. 161, 167, 168, 69 L. ed. 897, 898, 899; 45 S. Ct. 475; *Senior v. Braden* 295 U.S. 422, 432, 433, 79 L.ed. 1520, 1525, 1526, 55 S. Ct. 800, 100 A.L.R. 794; *Merchants' Loan & T. Co. vs. Patterson*, 308 Ill. 519, 530, 139 N.E. 912. By virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. The interest was present property *alienable* like any other, in the absence of a valid restraint upon alienation. *Commissioner of Internal Revenue vs. Field* C.C.A. (2d) 42 F. (2d) 820, 822; *Shanley v. Bowers* C.C.A. (2d) 81 F. (2d) 13, 15. The beneficiary may thus transfer a part of his interest as well as the whole. See Am. Law Inst. Restatement, Trusts, vol. 1 Par. 130, 132, et. to seq. The assignment of the beneficial interest is not the assignment of a chose in action but of the "right, title and estate in and to property."

While our own court has not passed directly on the question in *Latimer vs. Holliday*, 103 Utah 152; 134 Pac. (2d) 183, it ruled:

"Where the assignment of an expectancy is fair, made, supported by fair consideration, equity will enforce it if not contrary to public policy."

Even the cases cited by plaintiff do not justify the conclusion that the mere vesting of title in the trustee

prevents the beneficiary from disposing of the same during the trust period.

In *Re: Blakes Estate* (ante), the testator gave property to trustees to hold for his two daughters and a granddaughter. When each of the beneficiaries attained the age of 30 years, they were to receive from the trustees one-third of the property. The granddaughter died at the age of 27 and the Court was called upon to determine whether her one-third share would pass to her children. The Court gave the property to the children of said decedent holding that even though the granddaughter died before she attained the age of 30 years, her children would take her share as purchasers under the will.

The trust created in the cases of *Meeks vs. Briggs*, *Everitt vs. Haskins*, and *Watts vs. McKay* are all discretionary trust and are disposed of in *Re Watts vs. McKay* as follows:

“To the same effect, it is said in Vol. 1, Scott on Trusts, page 774; “Where by the terms of the trust a beneficiary is entitled only to so much of the income or principal as the trustee in his uncontrolled discretion shall see fit to give him, he cannot compel the trustee to pay to him or to apply for his use any part of the trust property. In such a case, an assignee of the interest of the beneficiary cannot compel the trustee to pay any part of the trust property, nor can creditors of the beneficiary reach any part of the trust property. This is true even in jurisdictions where spendthrift trust are not permitted. *If the*

beneficiary himself cannot compel the trustee to pay over any part of the trust fund, his assignee and his creditors are in no better position. It is the character of the beneficiary's interest, rather than the settlor's intention to impose a restraint on its alienation, which prevents its being reached." (italics supplied). Also see 26 R.C.L. 1268; 65 C. J. 557. Certainly the instant trust is purely discretionary as to the principal, since—in the absence of abuse of discretion—the trustee may withhold it altogether from the beneficiary if in his judgment the beneficiary is not capable of handling it. The trustee's testimony as to lack of capacity was not controverted and no showing made that the trustee had abused his discretion."

There is nothing in the will of Olif Cronquist that imposes any discretion on the part of trustee and the trust therein created could not be classed as a discretionary trust.

In *Richardson vs. Warfield*, (ante) the will provided that the real and personal property given to the trustee "shall not be subject to any assignment, sale, or draft," and the Court simply held "the clause in the will providing that the property given to the trustees should not be subject to any assignment, sale, or order, made it impossible for George A. Willis to pass any title by the assignment which he undertook to make. Thus the estate of the beneficiary was an equitable one and inalienable under the terms of the will." Inalienable because of the express terms of the will and not, as contended for by appellant, inalienable because of the very nature of the trust.

The final point contended for by the appellant and pleaded in his complaint (Tran. 007) is that the estate of the plaintiff being a contingent remainder only could not be alienated. This point is not argued in plaintiff's brief. Either the point has been abandoned or purposely omitted to mis-lead respondent.

Neither can it be said that the provision in the will for the estate to go to the grandchildren on the death of a child created in the child a contingent remainder that could not be alienated. The expression "or to their heirs at law per stirpes and not per capita" is one favored by the testator. He uses it not less than eleven times. (See paragraphs 2, 4, 5, 6, 7, 8, 9, 12, and 13 of the will.)

Paragraph 7 of the will provides; "To my sons Heber and Elam, or to their heirs per stirpes and not per capita I give, devise and bequeath my farm machinery. Because of this provision could it be said that Heber had only a contingent remainder in the farm machinery and he could not sell the same?

Likewise in paragraph 5, of the same will the testator devises to Elam and Margaret, "or to their heirs per stirpes and not per capita," certain real estate. Does appellant contend that the interest of Margaret and Elam in said real estate could not be assigned?

Why then should these same words show that the testator had a different intent simply because they are found in paragraph 3?

Instead of arguing that such expression created an estate that could not be sold why not seek a more consistent explanation.

In *Gibbens v. Gibbens* 140 Mass. 102, 3 N.E. 1 the court declares: "An argument in favor of contingency is drawn from the use of the words the issue of the deceased child standing in the place of the parent. It is argued that such issue, if there were any, would take at all events; that the parent could not have disposed of his or her share, to their exclusion and that therefore the interest of the parent was not an absolute vested one. It is quite natural and probable to infer that the words above quoted were used for the purpose of showing clearly that the testator did not intend the devise to lapse in case of the death of one of his children leaving issue. Words to the effect that the issue of deceased children shall take by right of representation are not uncommon in wills, when strictly speaking, they are entirely unnecessary; and the use of so familiar and common expression does not carry with it is strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised."

CONCLUSION

We therefore submit; (1. that because no spendthrift was created and 2. the interest of plaintiffs in the trust property could be alienated) that the District Court did not err when it ruled that the Plaintiff and Appellant should be bound by his contract to convey to the Defendant his undivided one-third interest in the property. That the

Defendant having paid \$4,000.00 on the contract and by stipulation having deposited the balance of \$6,000.00 with the First Security Bank of Logan, as per stipulation of the parties, (Tr. 019-22) is now entitled to a deed to the property.

Respectively submitted

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