

2001

John Leach v. Norma B. Anderson and Valley Bank and Trust Company : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

BRIHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

JOHN LEACH,

Plaintiff and Respondent,

-vs-

NORMA B. ANDERSON and
VALLEY BANK AND TRUST
COMPANY,

Defendants and Appellants.

CASE NO.
13808

RESPONDENT'S BRIEF
Appeal from a Judgment of the
Third District Court of Salt Lake County,
Honorable James S. Sawaya, Judge

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Clerk, Supreme Court, Utah

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JOHN LEACH,

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-vs-

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COMPANY,

Defendants and Appellants.

CASE NO.
13808

STATEMENT OF FACTS

Omitting the various irrelevancies, innuendos and arguments contained in Appellants' statement of facts, a simple statement follows.

Norma Anderson, a business woman in her own right (R.155), as grantor, created an irrevocable trust with Valley Bank and Trust Company, as trustee, on November 12, 1968 (R.61-67). On that date she transferred to NAVALCO, the nominee of the trustee, the trust assets, both real and personal as set out in the schedules attached to the Trust Agreement (R.68-71).

The trust assets included all shares of Mrs. Anderson in the family corporations in which she owned a majority interest (R.171) and also her personal residence (R.183). The financial statement of Mrs. Anderson

dated July 6, 1968, showed her assets of about \$610,000.00, and a net worth of about \$465,000.00 (R.98).

On April 15, 1969 Mrs. Anderson guaranteed payment of a promissory note of Angi Corporation, one of the Anderson family enterprises, in favor of John Leach, respondent. On November 29, 1971 the District Court of Salt Lake County in Civil Action 192,293 awarded judgment to respondent for the principal amount of the note, interest, attorneys' fees and costs.

On March 24, 1972 respondent commenced his action against Mrs. Anderson and Valley Bank and Trust Company, as trustee, to collect the judgment (R.111). On August 7, 1974 District Judge James A. Sawaya gave judgment in favor of respondent against appellants for \$14,680.68, interest and costs (R.17). The Conclusions of Law on which this judgment was based recite (1) that the Anderson Trust Agreement was for the use and benefit of Norma Anderson, the Grantor; (2) that as to the personal property therein, the Trust Agreement is void as to respondent as a creditor under Section 25-1-11 U.C.A., and (3) that because of the spendthrift provision in the Trust Agreement which provides that no interest of Norma Anderson in the trust shall be liable to her creditors or subject to legal process, the trust is void as to the claim of respondent as a creditor (R.21).

Appellants have appealed from this latter judgment.

ARGUMENT

POINT I

AS TO THE PERSONAL PROPERTY THEREIN, THE ANDERSON TRUST IS VOID AS TO RESPONDENT AS A CREDITOR UNDER SECTION 25-1-11 U.C.A.

The District Court held that as to personal property in the Anderson Trust, the Trust Agreement was void as to respondent as a creditor of the grantor under Section 25-1-11 U.C.A., which follows:

“Trust for grantor void - All deeds, gifts, conveyances, transfers or assignments, verbal or written, of goods, chattels, or things in action made in trust for the use of the person making the same shall be void as against the existing or subsequent creditors of such person.”

This statute is a part of the Fraudulent Conveyance Act, Title 25, Chapter 1, UCA 1953, and it supplements the preceding sections of the act. Its purpose is to spell out protection for creditors of the grantor who has used the more devious route of debt avoidance by means of a trust. The title of the section is “Trust *for* Grantor Void”, and it is aimed expressly at the “trust for the use of the person making the same”. It makes such trusts void as to existing and subsequent creditors as to personal property in the trusts.

Section 25-1-11 UCA is a codification of the general principles of law as to trusts created for the benefit of the grantor. 93 ALR 1211. Protection of creditors, existing and subsequent, is the prime concern of the stat-

ute, and proof of fraudulent intent, insolvency or discretion in trustee are immaterial.

Scott on Trusts, Vol. 11, Sec. 156, p. 1092 states: "It is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it." *Scott*, p. 1094, specifically cites Sec. 25-1-11 UCA as a statutory embodiment of this general principle. The Anderson trust is in fact restated by *Scott* at Sec. 156.2, p. 1099:

"Where by the terms of the trust the trustee is to pay the settlor as much of the income and principal as the trustee may in his absolute discretion determine, and as to any income and principal not so paid there is a gift over to such persons as the settlor may appoint and in default of appointment to the settlor's estate, his creditors can reach the whole of the trust property. (Citing *Cooke Trust Co. Ltd. v. Lord*, 41 Hawaii 198 (1955) and *ALI Restatement of Trusts* 2d, Sec. 156). Clearly the policy which prevents a person from creating a spendthrift trust for his own benefit also prevents him from depriving his creditors of a right to reach the trust property by creating a discretionary trust."

Appellants have argued that the Anderson Trust created vested interests in children and grandchildren and that those interests should be superior to and insulated from the claims of creditors of Mrs. Anderson. Sec. 25-1-11 UCA looks solely at the grantor's lifetime benefits and use of trust property, and disposition on death of grantor is immaterial under the statute. In any event, under the Anderson Trust, the grantor re-

tained the option to vary final disposition by the provisions of Paragraph VI of the Trust Agreement (R.92). There on sale of family stocks, as approved by the grantor, the grantor could then determine whether the sale proceeds should go to one or another of different classes of beneficiaries. Under this provision there could be no vesting of any interest since the Grantor retained a future option.

Defendants have cited *DiMaria v. Bank of California*, 23 Cal. App. 2d 254, 46 Cal. Rptr. 924, (1965) as a case on all fours with the Anderson Trust because of a weak grantor with a profligate child in each situation. The *DiMaria* case was an attempt by a creditor, who had been the attorney of the grantor, Mrs. Walton, in an unsuccessful action by the grantor to avoid her irrevocable trust, to reach trust assets for payment of his fee. No statute such as Sec. 25-1-11 UCA was involved and no spendthrift clause was in the Walton Trust. The California court allowed *DiMaria*, the creditor, to reassert his claims on a proper showing of discretionary powers in the Trustee. The court, in fact, reasserted the law regarding grantor's benefit trusts as set out in *Greenwich Trust Co. vs. Tyson*, *infra*, and Sec. 156, *ALI Restatement of Trusts* 2nd, *infra*, saying:

“Under these circumstances it is understandable why the court should conclude that the trustee was a mere subterfuge to insure against the unbridled financial demands of the settlor and at the same time insulate his estate against the just claims of creditors.”

Vesting was not at issue or involved in the *DiMaria* case.

Sec. 21-1-11 UCA is crystal clear in its language and meaning. Respondent is a subsequent creditor, and under the statute he should be able to reach trust assets to the extent of the personal property included.

POINT II

THE TRUST AGREEMENT PROVIDES FOR THE PRIMARY USE AND BENEFIT OF THE GRANTOR

The Trust Agreement gives the grantor full lifetime benefits from the trust property. The instrument speaks for itself.

The following clear cut benefits and uses for Norma Anderson, the grantor, of the trust estate are set out in the following cited paragraphs of the Trust Agreement (R.88-97).

1. Paragraph II. "Trustee shall pay to or for the benefit of the Grantor such portions of the income and principal of this trust as may be necessary to maintain the grantor in a reasonable standard of living after taking into consideration other income received by the grantor. In determining the standard of living to be maintained, the Trustee shall use as a rule of guide the standard of living of the grantor of the date of the execution of this agreement." (R.88).

2. Paragraph II. "Trustee shall provide for a new automobile for the grantor approximately every two or

three years, and then *only on the request of the grantor.*" (Emphasis ours) (R.88).

3. Paragraph II. "Trustee shall further provide for vacations for the grantor and a companion to be selected by the grantor." (R.88).

4. Paragraph II. "Trustee shall provide sufficient funds to maintain grantor's home." (R.88).

5. Paragraph II. "With relation to the home of Grantor, the Trustee shall sell said home at such time as *requested to sell by the grantor* and thereafter provide for the grantor reasonable accommodations after taking into consideration grantor's health and the degree of care that may be required to maintain her in a comfortable and reasonable standard. Distributions shall be made from time to time as trustee deems provident, but not less frequently than quarterly." (Emphasis ours) (R.88).

6. Paragraph VI. "The trustee shall retain grantor's family home *until Grantor shall indicate* that she no longer desires to live in the same or until it would be provident in Trustee's sole discretion to remove grantor permanently from the home and place her in surroundings where proper care can be administered." (Emphasis ours) (R.92).

7. Paragraph VI. The Trustee shall retain as investments stock in Chuck Wagon Corporations and Anderson Enterprises, Inc., in which corporations Norma Anderson has admitted to have owned controlling in-

terests. If it becomes necessary to liquidate either of those shares “the trustee shall so advise grantor and sell the same *if grantor approves* of the sales terms.” (Emphasis ours) (R.92)

8. Paragraph VI. On sale of Chuck Wagon or Anderson Enterprises stock by trustee, the proceeds of sale will become a part of the residue of the trust estate, which would be distributed on Mrs. Anderson’s death to her grandson and her daughter under Paragraph IV(5) and (6) of the Trust Agreement (R.92). But, Mrs. Anderson may indicate that the sale proceeds shall be substituted for the assets sold and ultimately distributed to the different distributees who would have received those shares of stock under Paragraph IV (3), (4), (5) and (6) of the Trust Agreement (R.92). In other words, Mrs. Anderson can vary at a future time the testamentary disposition of the trust assets.

9. Paragraph VI. “So long as reasonably provident, Trustee shall vote stock held by it so as to maintain grantor as an officer, director and employee of Anderson Enterprises, Inc., and Andy’s Chuck Wagon Corporation and related corporations.” (R.92).

10. Paragraph VII-9. Grantor may appoint a successor trustee upon Valley Bank’s resignation (R.93).

11. Paragraph VIII. The Spendthrift provision provides “No payment or share of the Grantor or any ‘Beneficiary’ shall in any manner be liable to the creditors thereof or subject to legal process, and the Trustee is

directed in all events to make payments directly to grantor or Beneficiary or for their benefit." (R.94).

We submit that under the Trust Agreement grantor has every lifetime use and benefit from the trust property that she had before creating the trust, plus the protective and prudent hand of the trustee to guide her in her continuing business enterprises. Her high standard of living and enjoyment is directed to be continued by the trustee. She has continuing control of the family corporation affairs (R.171), including receipt of a generous salary from those corporations. (R.159-161). She has retained an option as to choice of the ultimate beneficiaries on her death, in the event of liquidation of stocks; thus there was no possible vesting of those interests. All of these uses and benefits of the trust assets are retained in Mrs. Anderson at the expense of her creditors, existing and subsequent, by way of the spendthrift provision (R.94). No other beneficiaries can have any uses or benefits until Mrs. Anderson's death.

Appellants argue that the trustee has discretions as to payments or benefits to be made to Norma Anderson. However, appellants ignore the fact that the trustee is bound to consider and honor the matters for decision as retained by the grantor, namely, (1) request for a new automobile, (2) request to sell her residence, (3) change her place of residence, (4) her approval of sales of family stocks, and (5) her variance of disposition on her death of proceeds of sales of stocks. The trustee is directed to maintain the grantor in the same standard

of living as at the time of the creation of the trust. There was no real change in her enjoyment or the use of her properties.

POINT III

THE TRUST HAS, IN FACT, OPERATED FOR THE PRIMARY USE AND BENEFIT OF THE GRANTOR.

Testimony of Mrs. Anderson and Rex Guymon, Valley Bank trust officer, showed that the following disbursements have been made to or for the use and benefit of Norma Anderson:

1. \$1,000.00 paid to Norma Anderson for her attorney's fee (R.176).
2. \$5,000.00 paid to Norma Anderson to pay a debt and to protect her interest in Chuck Wagon stock (R.176).
3. \$500.00 paid to Norma Anderson to buy a new automobile (R.177,182).
4. Payment by trustee of taxes (R.181-182), insurance and other expenses of maintenance, improvements (R.184) and mortgage payments (R.181-182) on the personal residence of Norma Anderson at 1050 Millbert Avenue (R.82).
5. Mrs. Anderson has continued to have free use of her residence at 1050 Millbert Avenue. (R.183).
6. A salary of between \$1,000.00 and \$1,200.00 per month has been paid directly to Norma Anderson by

Andy's Enterprises, one of the corporations controlled by the trustee (R.161).

An objective full view of the trust certainly shows that its purpose was to give the grantor all of the benefits and uses of the trust property that she had before its creation. She has, in fact, used the residence by continuing to live there, with the trustee paying all expenses of its maintenance. She has continued to have all of the use of the family stocks by her personal control and salary provision, as provided in the Trust Agreement. She has all of the continuing uses and benefits during her lifetime. "Use", "benefit" and "advantage" are shown as synonyms in *Websters Third International Dictionary*. Mrs. Anderson in addition was protected from the demands and indiscretions of her son, David, and from the rights of her creditors, existing and subsequent.

We submit that Section 25-1-11 UCA in being entitled "Trust for Grantor" and in pointing at a "trust for the use of the person making the same" refers to "use" as in the definition in *Black's Law Dictionary*, 3rd Edition, p.1788:

"The 'use' of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof. Use also means usefulness, advantage, productive of benefit."

POINT IV

BECAUSE OF ITS SPECIFIC SPEND-
THRIFT PROVISION, THE TRUST IS VOID
AS TO RESPONDENT AS A CREDITOR
OF THE GRANTOR

The Anderson Trust Agreement specifically insulates Mrs. Anderson and the trust property from her creditors, past, present and future, with the following provision:

“VIII. Spendthrift Provision. Neither Grantor nor any ‘Beneficiary’ of this trust shall have the power to anticipate, transfer, sell, assign or encumber any payment, distribution or interest in this trust, and any attempt to so do shall be void and ineffective. No payment or share of the Grantor or any ‘Beneficiary’ shall in any manner be liable to the creditors thereof or subject to legal process, and the Trustee is directed in all events to make payments directly to the Grantor or ‘Beneficiary’ or for their benefit.” (R.94).

The law is clear and public policy is firmly opposed to the possibility of the beneficial owner of property placing that property beyond the reach of his creditors. A spendthrift trust for the benefit of the grantor himself is uniformly held entirely illegal, and the creditors can reach all of the trust property. 37 *Am.Jur* 2d 720, Sec.27.

The general rule is stated at 89 C.J.S. 745, Section 26:

“A spendthrift trust for the benefit of the donor, during life, is invalid, both as to past and future creditors, (citing *Nelson v. California Trust Co.*, and *Greenwich Trust Co. v. Tyson*, 129 Conn. 211, 27 A2d 166 (1949), even though there is a provision for a contingent remainder in a third person.”

Following are general statements of the rule:

“A man cannot put his own property beyond the reach of creditors and at the same time reserve substantial interests in it or control over it.” *Griswold, Spendthrift Trusts*, p.543.

“The cases are uniform in holding that quite apart from statute, a person cannot create a spendthrift trust for himself which shall be effective against the rights of his subsequent creditors.” 44 *Harvard Law Review* 205 (Erwin Griswold).

“Even in jurisdictions in which spendthrift trusts are permitted, the settlor cannot create a spendthrift trust for his own benefit. It is immaterial that in creating the trust the settlor did not intend to defraud his creditors. It is immaterial that he was solvent at the time of creation of the trust.” *Scott on Trusts*, Vol. II, Sec. 156, p. 1092.

Bogert, Trusts and Trustees, (2d Ed.), Sec. 223, at p. 665, states: “If a settlor creates a trust for his own benefit and inserts a spendthrift clause, it is void as far as then existing or future creditors are concerned, and they can reach his interest under the trust.” Cited are

McColgan v. Walter Magee, Inc. and *State ex rel. v. Nashville Trust Co.*, both *infra*; also, *Spring Street Corp. v. Walsh*, 101 P.2d 783 (Calif., 1940).

The above general statements of the law and public policy are followed in many cases set out in the notes to 119 ALR 35 and 34 ALR 2d 1342. The cases cited uniformly hold that the grantor cannot by a direction to the trustee avoid or hinder his own creditors by a provision as in the Anderson Trust.

Nelson v. California Trust Co., 33 Cal.2d 501, 202 P.2d 1021 (1949), is a case on all fours with the Anderson Trust. The judgment creditor sought to reach the assets of a spendthrift trust created by his judgment debtor. The debtor contended that he had no interest in the property except to receive the net income and that the creditor was in no better position than he was. The California court held that all of the trust property was subject to the claim of the creditor, and it said:

“It is against public policy to permit a man to tie up his property in such a way that he can enjoy it but prevent his creditors from reaching it, and where the settlor makes himself a beneficiary of a trust any restraints in the instrument on the involuntary alienation of his interest are invalid and ineffective.”

Cited with approval in the *Nelson* case is *McColgan v. Walker Magee, Inc.*, 172 Cal. 182, 155 P. 995 (1916), where the California court held that a spendthrift trust attempted to be created in the settlor's own favor is invalid, even though he had no fraudulent intent toward

his creditors. See also *In re Camm's Estate*, 76 Cal. App. 2d 104, 172 P.2d 547 (1946), and *In State ex. rel. Caldwell v. Nashville Trust Co.* 23 Tenn. App. 388, 190 SW 2d 785 (1944). The Tennessee court distinguished a spendthrift trust for the benefit of third parties from a trust for the benefit of the grantor, saying:

“But the case is very different when one takes his own property and undertakes to put it into a trust for his own benefit beyond the reach of his creditors. Such a trust would take from them what they would have had a right to look to for payment of their debts. It violates not only the general principle that one's property is liable for his debts but also the law of fraudulent conveyance. All the authorities say that one cannot create a spendthrift trust with his own property for his own benefit.”

We have found no Utah law regarding spendthrift provisions which place the grantor's property beyond the reach of his creditors. In *Cronquist v. Utah State Agricultural College* 114 U. 426, 201 P.2d 280 (1949), the court had before it the propriety of a voluntary alienation by a testamentary trust beneficiary, not the grantor. No creditors' rights were involved. The Utah court raised questions of semantics - what is a spendthrift trust and what language creates one? The court entirely by-passed the question of the validity of spendthrift trusts, particularly regarding the rights of creditors of a grantor, in saying:

“This opinion is not to be construed as a holding by implication that spendthrift trusts are

valid in Utah to any extent. As to that question, we express no opinion. It must await an occasion where a spendthrift trust was intended to be created.”

There are two separate facets to the spendthrift trust. We are not questioning the right to make property not subject to voluntary alienation. The other facet, the provision for the shield against creditors, we do attack and contend is illegal. We are not suggesting that the entire trust agreement is invalid because of the spendthrift provision, as Appellants suggest (Ap.Br. 9,22). The grantor can do ultimately whatever she wishes with her property, but she *cannot* beat her creditors by a secret trust, or with a direction to the trustee not to pay her creditors. There will be no revolution in the trust business after this decision as Appellants suggest (Ap.Br.22), only an affirmation of the rights of creditors.

The general rule as to creditors' rights is refined in *ALI Restatement of Trusts* 2nd Sec. 156, p. 326, as follows:

“156 WHERE THE SETTLOR IS A BENEFICIARY.

(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interests.

(2) Where a person creates for his own benefit a trust for support or a discretionary

trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.”

The very inclusion of the spendthrift provision in avoidance of grantor’s creditors makes the trust fraudulent and invalid as to subsequent creditors and a part of a scheme with a clear purpose of placing property beyond the reach of his creditors. See 93 ALR 1213. In the Anderson Trust the spendthrift provision is expressly for the protection and insulation of the grantor as against her own creditors. By the terms of the trust all of the assets can be used and have been used for the benefit of the grantor, and the entire trust is void as against respondent as a creditor of the grantor.

POINT V

RESPONDENT IS NOT BARRED, EITHER UNDER SECTION 25-1-11 UCA OR THE SPENDTHRIFT PROVISION, BY ANY STATUTE OF LIMITATIONS.

Appellants argued that respondent should in some way be barred by the three year limitation in Section 78-12-26(4) UCA which provides:

“(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.”

They urge that respondent should have made investigation to determine whether Mrs. Anderson had di-

vested herself of her assets into a trust and finally that recording of the Anderson deeds to the trustee should have given constructive notice to respondent and thereby bar him.

Section 78-12-26(4) UCA is in no way applicable to respondent's cause of action under Section 25-1-11 UCA. That statute does *not create* a cause of action or liability within the meaning of Sec. 75-12-26(4). Sec. 25-1-11 UCA simply declares certain transactions *void*.

Respondent commenced his action, both under Sec. 25-1-11 UCA and to avoid the spendthrift trust provision as soon as he had information regarding the existence of the trust and when he found he could not collect his prior judgment otherwise personally from Mrs. Anderson. The Anderson Trust was indeed a secret trust, as shown by the testimony of Rex Guymon, Valley Bank trust officer, that even if respondent had called the bank inquiring as to the existence of any trust with Mrs. Anderson, respondent would not have been advised if anyone, including Mrs. Anderson, had a trust, because of the policy of the bank (R.184).

The record shows that the Anderson real property was, in fact, transferred to NAVALCO, the nominee of of the Trustee, with no designation of NAVALCO as a trustee for anyone (R.175,184). Recording of those deeds could not possibly be construed as notice to respondent of the existence of a trust as to either real or personal property.

CONCLUSION

Judge Sawaya should be affirmed in his decision that:

1. The Anderson Trust Agreement was, in fact, for the use and benefit of Norma Anderson, the grantor.

2. As to personal property, therein, the Trust Agreement is void under Sec. 25-1-11 UCA as to respondent as a creditor of the grantor.

3. Because of the spendthrift provision in the Trust Agreement, the trust is void as to respondent as a creditor of the grantor.

4. Judgment for \$14,680.68, interest and costs should be affirmed to respondent.

RESPECTFULLY SUBMITTED

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