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Herschel J. West, Jr., Richard L. West, and Carole A. West Edmunds as beneficiaries under the Herschel J. West and Hazel L. West trust v. Marilyn West, an individual, as personal representative of the estate :  
Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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IN THE MATTER OF THE ESTATE OF  
HERSCHEL JOSEPH WEST,  
Deceased.

HERSCHEL J. WEST, JR., RICHARD  
L. WEST, AND CAROLE A. WEST  
EDMUNDS as beneficiaries under  
the Herschel J. West and Hazel  
L. West trust,  
Petitioners and Appellants,

v.

MARILYN WEST, an individual,  
as personal representative of  
the estate,  
Respondent and Appellee.

Case No. 950307-CA

Priority 15

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BRIEF OF APPELLANTS

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Appeal from the Final Judgment of the  
Fourth Judicial District Court for Utah County  
Honorable Guy R. Burningham, Presiding

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APPEAL

## TABLE OF CONTENTS

STATEMENT OF JURISDICTION . . . . .	1
STATEMENT OF THE ISSUE . . . . .	1
DETERMINATIVE LAW . . . . .	2
STATEMENT OF THE CASE . . . . .	3
A. NATURE OF THE CASE . . . . .	3
B. COURSE OF THE PROCEEDINGS . . . . .	4
C. DISPOSITION OF THE TRIAL COURT . . . . .	5
D. STATEMENT OF THE FACTS . . . . .	6
SUMMARY OF THE ARGUMENT . . . . .	8
BRIEF ANSWER . . . . .	9
ARGUMENT . . . . .	9
I. The requisite elements of a valid joint trust existed . . . . .	9
A. Intent Based on the Language of the Trust . . .	10
B. Purpose of the Trust . . . . .	13
C. Type of Trust Created . . . . .	14
D. When the Beneficiaries' Interests Vested . . .	15
II. Herschel J. West, Sr. never had the power to revoke the joint trust unilaterally. . . . .	16
A. The Various Powers of Herschel J. West, Sr. . .	17
B. Revocation Requirements When Hazel West was Alive . . . . .	21
C. The Effect of Hazel West's Death . . . . .	21
III. Herschel J. West, Sr. did not meet the requirements of a valid termination of a joint trust under Utah law. . . . .	25
CONCLUSION . . . . .	27
ADDENDUM . . . . .	30

## TABLE OF AUTHORITIES

### FEDERAL CASES

<u>Noble v. Rogan</u> , 49 F. Supp. 370 (S.D. Cal. 1943) . . . . .	9
<u>Noble v. Rogan</u> , 49 F. Supp. at 370 . . . . .	10
<u>Noble v. Rogan</u> , 49 F. Supp. 370 . . . . .	19
<u>Noble v. Rogan</u> , 49 F. Supp. at 372 . . . . .	20

### STATE CASES

<u>Allen v. Allen</u> , 204 P.2d 485 (Utah 1949) . . . . .	9
<u>Ambrose v. First National Bank of Nevada</u> , 482 P.2d 828 (1971) . . . . .	3
<u>Baker v. Pattee</u> , 684 P.2d 632 (Utah 1984) . . . . .	9
<u>In Re Chemical Corn Exchange Bank</u> , 169 N.Y.S.2d 600 (1957) . . . . .	18
<u>Id.</u> . . . . .	18
<u>In Re Chemical Corn Exchange Bank</u> , 169 N.Y.S.2d 600 . . . . .	19
<u>In Re Chemical Corn Exchange Bank</u> , 169 N.Y.S.2d 600 . . . . .	21
<u>Clayton v. Behle</u> , 565 P.2d 1132 (Utah 1977) . . . . .	3
<u>Clayton v. Behle</u> , 565 P.2d 1132 (Utah 1977) . . . . .	22
<u>Croker v. Croker</u> , 192 N.Y.S. 666 (1921) . . . . .	19
<u>Croker v. Croker</u> , 192 N.Y.S. 666 . . . . .	19
<u>Croker v. Croker</u> , 192 N.Y.S. 666 . . . . .	20
<u>Culver v. Title Guaranty &amp; Trust Co.</u> , 58 N.Y.S.2d 116 (1945) . . . . .	19
<u>Culver v. Title Guaranty &amp; Trust Co.</u> , 58 N.Y.S.2d 116 . . . . .	20
<u>Culver v. Title Guaranty &amp; Trust Co.</u> , 70 N.E.2d 163 (N.Y. 1946) . . . . .	11
<u>Id.</u> at 165 . . . . .	12



<u>Culver v. Title Guaranty &amp; Trust Co.</u> , 70 N.E.2d 163 . . .	20
<u>Id.</u> At 165 . . . . .	21
<u>Downs v. Security Trust</u> , 194 S.W. 1041 (Ky.) . . . . .	19
<u>First Security Bank of Utah v. Creech</u> , 858 P.2d 958 (Utah 1993) 2	
<u>Gregerson v. Jensen</u> , 669 P.2d 396 (Utah 1983) . . . . .	24
<u>Hackley v. Farmer</u> , 234 N.W. 135 (Mich. 1935) . . . . .	19
<u>Hill v. Conover</u> , 191 Cal. App. 2d 171 (1961) . . . . .	15
<u>Id.</u> . . . . .	15
<u>Kelley v. Snow</u> , 70 N.E. 89 (Mass.) . . . . .	19
<u>Khan v. Khan</u> , 214 Cal. Rptr. 109 (1985) . . . . .	10
<u>Id.</u> . . . . .	10
<u>Khan v. Khan</u> , 214 Cal. Rptr. at 109 . . . . .	16
<u>Khan v. Khan</u> , 214 Cal. Rptr. 109 . . . . .	19
<u>Kahn v. Kahn</u> , 214 Cal. Rptr. 109 . . . . .	20
<u>In re Kline</u> , 59 A.2d 14 (N.J. 1948) . . . . .	17
<u>Matter of De Planche</u> , 318 N.Y.S.2d 194 (1971) . . . . .	17
<u>Mountain Fuel Supply Co. v. Salt Lake City Corp.</u> , 752 P.2d 884 (Utah 1988) . . . . .	2
<u>Richardson v. Stephenson</u> , 213 N.W. 673 (Wis.) . . . . .	19
<u>Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist</u> , 773 P.2d 1382 (Utah 1989) . . . . .	2
<u>Schug v. Michael</u> , 245 N.W.2d 587 (Minnesota 1976) . . . . .	17
<u>Solomons Trust Estate</u> , 2 A.2d 825 (Pa. 1938) . . . . .	19
<u>Solomons Trust Estate</u> , 2 A.2d 825 . . . . .	19

<u>Solomons Trust Estate</u> , 2 A.2d 825 . . . . .	21
<u>Id.</u> at 826 . . . . .	21
<u>Sundquist v. Sundquist</u> , 639 P.2d 181 (Utah 1981) . . . . .	3
<u>Sundquist v. Sundquist</u> , 639 P.2d 181 (Utah 1981) . . . . .	12
<u>Sundquist</u> , 639 P.2d 181 . . . . .	14
<u>Sundquist v. Sundquist</u> , 639 P.2d 181 . . . . .	22
<u>Sundquist</u> , 639 P.2d at 187 . . . . .	23
<u>Id.</u> . . . . .	23
<u>In Re Tunnells Estate</u> , 190 A. 906 (Pa. 1937) . . . . .	13
<u>Wheeler v. Mann</u> , 763 P.2d 758 (Utah 1988) . . . . .	17

#### MISCELLANEOUS

Bogert, <u>Trusts and Trustees</u> , § 1007 (2d ed. 1962) . . . . .	3
Bogert, <u>Trusts and Trustees</u> , § 164.1 . . . . .	11
<u>Id.</u> . . . . .	11
Bogert, <u>Trusts and Trustees</u> , § 1001 . . . . .	18
<u>Restatement Of Trusts 2d</u> , §§ 2, 17 . . . . .	12
<u>Restatement of Trusts 2d</u> , § 170 . . . . .	17
<u>Scott on Trusts</u> § 170 (1983) . . . . .	16
<u>Id.</u> . . . . .	17
<u>Id.</u> . . . . .	17
4 <u>Scott on Trusts</u> § 337 (3d ed. 1967) . . . . .	3
<u>U.C.A.</u> 75-7-404 . . . . .	17

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HERSCHEL J. WEST, JR., RICHARD  
L. WEST, AND CAROLE A. WEST  
EDMUNDS as beneficiaries under  
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Petitioners and Appellants,

v.

MARILYN WEST, an individual,  
as personal representative of  
the estate,  
Respondent and Appellee.

Case No. 950307-CA

Priority 15

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**STATEMENT OF JURISDICTION**

Jurisdiction in the Utah Court of Appeals is conferred by  
virtue of Rule 3 of the Utah Rules of Appellate Procedure.

**STATEMENT OF THE ISSUE**

The issue brought before this Court is whether the court  
below erred by allowing a joint trust to be revoked unilaterally  
after the death of one of the co-trustors.

The standard of review is "de novo" for an appeal based exclusively on a question of law and this Court reviews the decision below for correctness, giving no deference to the trial court's legal conclusions. First Sec. Bank of Utah v. Creech, 858 P.2d 958, 963 (Utah 1993); Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988).

#### **DETERMINATIVE LAW**

There is no Utah statute or case law dealing directly with unilateral revocation of a joint trust. However, well established treatises do speak on this issue. Additionally, many other states have firmly established the principle that a joint trust cannot be unilaterally revoked and becomes irrevocable at the time of death of any co-trustor. Such cases shall be persuasive in this matter.

Utah law has set forth the requirements for *termination* of a joint trust in Clayton v. Behle, 565 P.2d 1132 (Utah 1977), which is analogous. This rule is also supported by other cases, in addition to those cited in Clayton, including Sundquist v. Sundquist, 639 P.2d 181 (Utah 1981); Ambrose v. First National

Bank of Nevada, 482 P.2d 828 (1971); Bogert, Trusts and Trustees, § 1007 (2d ed. 1962); 4 Scott on Trusts § 337 (3d ed. 1967).

## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

This case centers on the attempted revocation of a joint trust by Herschel J. West, Sr. The property in trust was the family home of Herschel J. West, Sr. and his first wife, Hazel West. The Fourth Judicial District Court addressed this matter as it related to the probate of the estate of Herschel J. West, Sr. Appellants, "beneficiaries" below, claim the family home by virtue of a joint trust created by their parents. Appellee, "Personal Representative" below, claims the property by virtue of a deed created later by Herschel J. West, Sr., which could only be effective if his unilateral revocation of the joint trust in question was valid.

While matters relating to the sale of real property are, in some instances, analogous to the case at bar, it should be noted that this matter concerns trust property. Often, the requirements relating to transfers of property into trust differ from the requirements for transfers of property by sale, deed, or other conveyance. For instance, the time at which an interest in

trust property vests differs from the time at which an interest in property transferred by deed is actually delivered.

The Court may note that this brief will use the term "trustor" or "co-trustor" to refer to the person, or persons, who have created a trust. However, the terms "settlor" and "grantor" are often used interchangeably in case law and may be used in quotations. Any of these terms, in this case, refer to Herschel J. West, Sr. and/or Hazel West as the creators of the trust in question.

#### B. COURSE OF THE PROCEEDINGS

The trial court made a ruling on October 24, 1994 validating a trust of the deceased containing the home, which trust is the subject matter of this appeal. [R. 548]. Subsequently, Personal Representative Marilyn West filed a "Request for Clarification of Ruling and Enlargement" on November 2, 1995 requesting that the trial court clarify its position in regard to the termination of the joint trust of Herschel and Hazel West that Herschel West attempted to terminate and deed to his second wife, Personal Representative Marilyn West, after the death of his first wife and co-trustor, Hazel West. [R. 550]. The Court then made a second ruling on January 17, 1995 indicating that the trust was

valid but that it contained joint tenancy language. [R. 585].

The Court then opined

... upon the demise of one of the joint tenants, the surviving joint tenant, Herschel West, had full authority over the trust property and exercised that authority when he Quit Claimed it to himself and then to himself and Marilyn West as joint tenants. By making the above transfer he effectively revoked the valid trust, leaving the residence in joint tenancy with himself and Marilyn West and upon Herschel's demise, she became sole owner of the residence.

The Court then issued a final judgment based upon this ruling.

[R. 590]. Appellant contests in this appeal this determination, ruling and final judgment of the trial court.

#### C. DISPOSITION OF THE TRIAL COURT

In the final judgment of the Fourth Judicial District Court, Utah County, State of Utah, the Honorable Guy R. Burningham concluded that the trust

was a revocable trust and contained language to the effect that the surviving trustee shall continue as sole trustee succeeding to all the powers, duties and discretionary authority given to the trustees jointly. Therefore, upon the demise of Hazel L. West (one of the co-trustees) the surviving trustee (Herschel Joseph West) had full authority over the trust property and exercised that authority when he Quit Claimed it to himself and his wife, Marilyn West, as joint tenants. By making the above transfer, Herschel Joseph West effectively revoked the valid trust, leaving the residence in joint tenancy with himself and Mrs. West and upon his death, Mrs. West became the sole-owner of the residence by operation of law.

In its Final Judgment the court determined that the unilateral revocation by Herschel J. West, Sr. of the joint trust in question and his subsequent transfer of that property by deed to himself and Appellee was valid. While the subsequent deed might otherwise have been valid, this appeal raises the question of the validity of the unilateral revocation of the joint trust, which, if shown to be invalid would also invalidate the subsequent deed.

#### D. STATEMENT OF THE FACTS

1. The Decedent married his second wife, Marilyn West, the Personal Representative of the Estate, who is not the mother of the decedent's children, on November 18, 1989, two years before the death of the decedent on December 11, 1991. [R. 526].

2. On or about July 18, 1969, the deceased and Hazel A. West, the first wife of the deceased and the mother of the Appellants, conveyed their home located at 654 East 3750 North, Provo, Utah to the children in trust. [R. 524].

3. In affirmation of that trust, the deceased and Hazel L. West Quit-Claimed to the trust any interest in the home. [R. 524].

4. On or about January 16, 1991, Marilyn West, the Personal Representative of the Estate, recorded that deed with



the Utah County Recorder. [R. 524].

5. Subsequently, Marilyn West recorded the Affidavit of Death as Co-Trustee of Herschel J. West as entry no. 1646 in the records of Utah County Recorder. [R. 524].

6. On or about the same date as entry no. 1647 Marilyn West caused to be recorded a Quit-Claim Deed from the deceased to the deceased and the Personal Representative as joint tenants. [R. 524].

7. On October 25, 1994 the Honorable Guy R. Burningham made a ruling validating the trust containing the home and awarding that home to the children of the deceased and the Appellants' herein. [R. 548].

8. On November 2, 1994 Personal Representative Marilyn West filed a Request for Clarification requesting the trial court to clarify its decision. [R. 550].

9. In response to the Personal Representative's Motion, the Honorable Guy R. Burningham entered a Final Judgment on February 9, 1995. [R. 590].

10. Paragraph 6 of that Final Judgment recognizes the validity of the trust but indicates that the Trust

was a revokable trust and contained language to the effect that the surviving trustee shall continue as sole trustee succeeding to all the powers, duties and

discretionary authority to the trustees jointly. Therefore, upon the demise of Hazel L. West ( one of the co-trustees) the surviving trustee (Herschel Joseph West) had full authority over the trust property and exercised that authority when he Quit Claimed it to himself and his wife, Marilyn West, as joint tenants. By making the above transfer, Herschel Joseph West affectively revoked the valid trust, leaving the residence in joint tenancy with himself and Mrs. West and upon his death, Mrs. West became the sole-owner of the residence by operation of law.

#### **SUMMARY OF THE ARGUMENT**

I. Herschel and Hazel West intended to and, in fact, created a valid joint trust as co-trustors for the benefit of their three children.

II. The only method by which a joint trust may be revoked during the life of co-trustors is by the joint decision of both co-trustors. A joint trust then become irrevocable after the death of one of the co-trustors.

III. Herschel J. West, Sr. did not meet the requirements of a valid termination of a joint trust under Utah law. The only method by which the joint trust may be terminated after the death of one of the co-trustors is by a consent of all of the beneficiaries to the trust. The children of Herschel J. West, Sr., and the Appellants herein, never so consented.

### **BRIEF ANSWER**

At the time of their father's death, Appellants became owners of the property in question through the trust created for them by their parents jointly because, while the trust was revocable, Herschel J. West, Sr. could not unilaterally revoke the trust. The power to revoke is reserved for the *trustor*, not the *sole trustee*, which he became upon Hazel's death.

Appellants' interest in the trust property vested at the time of creation of the trust. Even if their interest did not vest at creation of the trust, it certainly did vest at the moment of their mother's death. Therefore, his attempted revocation through transfer of the deed to himself and Appellee was invalid and Herschel J. West, Sr. retained only a life interest as sole trustee, at most. Furthermore, even if he had the right to transfer the property, he never recorded the deed before his death and the transfer should fail on that ground. Therefore, Appellee has no interest in the trust property.

### **ARGUMENT**

#### **I. The requisite elements of a valid joint trust existed.**

When determining questions relating to a trust - as with any

written document, such as a contract or a statute - the Court generally first looks to the document in question. In the case at bar, the requisite elements existed to create the trust and it was written, signed and recorded. The fact that a valid trust in real property was created is not challenged by Appellee. However, it is important to examine the terminology and the expectations of the trustors to determine whether Herschel J. West, Sr. had the legal right to revoke the trust after the death of his first wife and co-trustor, Hazel West.

#### A. Intent Based on the Language of the Trust

The trustors did intend to create a trust for their children. That is apparent from the trust document.

The recording of a deed and placing the names of others on the property is somewhat in the nature of a public declaration that [the grantor] intended the instrument to become effective immediately. People as a rule do not deliberately put a flaw in the title to their property, thereby handicapping its later disposal, unless they really intend to transfer some interest to the person whose name is thus placed in the record.

Baker v. Pattee, 684 P.2d 632 (Utah 1984) (citing Allen v. Allen, 204 P.2d 458 (Utah 1949)). The Wests intended to create this trust and became the trustee of the property, holding it for the benefit of their children.

Furthermore, the plain language of the trust unambiguously indicates that it is a *joint* trust, consequently requiring *joint* revocation. Noble v. Rogan, 49 F.Supp 370, 372 (S.D. Cal. 1943). The trust itself uses terms such as "settlers", "ourselves", "our lifetime", "disposition by us", and "we as trustee". The use of the plural in discussing actions and powers clearly indicates that the two trustors intended a joint trust to be created and desired consent from both of them for subsequent actions.

The language of the revocation clause, specifically, makes it quite clear that joint consent was intended for revocation of the trust. The trust states:

*We reserve unto ourselves the power and right...during our lifetime to amend or revoke....The sale or other disposition by us of the whole or any part of the property held hereunder shall constitute as to such whole or part a revocation of this trust.*

"The revocation clauses spoke entirely in the plural, thereby evincing an intent...that revocation could only be accomplished mutually." Khan v. Khan, 214 Cal. Rptr. 109, 112 (1985). The co-trustors of the West trust similarly spoke in the plural and simply did not utilize language indicating a contrary intent, although they easily could have. "Had there been a contrary intent, the agreement would have provided: 'We reserve unto

ourselves or either of us...'" Id. (emphasis added). Absent from the language of the trust is any indication of individual rights among the co-trustors. No reservation of rights or control is left to the survivor either, which could easily have been expressed; thus, the intent for joint revocation is apparent. Noble v. Rogan, 49 F. Supp. at 370.

On the contrary, the language of the new deed created by Herschel J. West, Sr. for himself and Appellee did include language of survivorship. Mr. West was apparently aware of the power of this language if he included it in his second deed. To his misfortune however, he did not include language of survivorship in the joint trust. Therefore, even as the survivor, he had no individual power to revoke after the death of his co-trustor.

Hazel West's intent must also be considered. The circumstances surrounding the trust indicate that Hazel West intended her children to receive the family property. According to Bogert, "where a provision is ambiguous or uncertain in its meaning, resort may be had to extrinsic evidence to determine the terms of the trust". Bogert, Trusts and Trustees, § 164.1. Bogert suggests that the circumstances that may be considered include the situation of the trustor, the beneficiaries and the trustees;

their relations to each other; and the purposes for which the trust is created. Id. When considering that it would be extremely rare for a mother to approve a revocation taking property from her natural children and giving it to her husband's new wife, the Court may easily determine Hazel's intent as to the trust beneficiaries. In upholding Culver v. Title Guaranty & Trust Co., 70 N.E.2d 163 (N.Y. 1946), the court stated that the

deceased settlor may have departed this life secure in her belief that she had so arranged her affairs that her daughter would be benefitted....We think it fairer and more in consonance with legislative intent not to deprive her by reason of her death, of her right to refuse to consent to partial or total revocation.

Id. at 165. Hazel died assuming that her children would receive her interest in the family home. Her wishes should be carried out and the home should be offered to Appellants to meet the intentions of the trustors at the time the trust was created.

#### B. Purpose of the Trust

The Wests created this trust comprised of their family home for the benefit of their children. One clause of the trust includes language that specifies that if the trustors die, the successor trustee has the authority to expend trust money for the "maintenance, education, and support of the beneficiary" if they

are under 21 years old; otherwise the money was to be distributed to the beneficiaries and terminated. It is clear that the trustors created the trust for the purpose of providing for their children's "maintenance, education, and support" in the future.

### C. Type of Trust Created

Appellants contend that an inter vivos trust was created. "An inter vivos trust is created when a settlor, with the intent to create a trust for, or declares that he or she (the settlor) holds specific property in trust for, a named beneficiary." Sundquist v. Sundquist, 639 P.2d 181, 183 (Utah 1981) (citing Restatement of Trusts 2d, §§ 2, 17). In Sundquist, divorcing parents had created a trust for their children, which was to be held for them, but not actually given to them until years later. Similarly, the Wests intended to create a trust for their children and hold it for their later use. According to the holding in Sundquist, this was an inter vivos joint trust which could not be terminated by only one of the parents.

Granted, the right of revocation would have allowed the Wests to terminate their trust if they so chose, but that option was never utilized by the trustors in "their lifetime." Until the power of revocation is actually exercised, the trustors have



essentially promised to give away their ownership interest and act as trustees. "[A] trust inter vivos does not fail because a settlor declares that he holds the property in trust, with power to revoke and to receive the income during his life." In Re Tunnell's Estate, 190 A. 906, 909 (Pa. 1937).

#### D. When the Beneficiaries' Interests Vested

The children, as beneficiaries, probably gained an ownership interest in the property at the time the trust was created, but certainly gained an ownership interest when their mother died, thereby precluding their father's revocation. While Appellants contend that an inter vivos trust was created, their interest would have vested at the time of their mother's death even if it was a testamentary trust. In either case, their interest had vested before the alleged revocation took place, thereby precluding it.

When Herschel J. West, Sr. and Hazel West created the trust in question in 1986, they, as trustors, no longer retained their original ownership interest. They had passed some interest on to their children and became the trustee of the property. Possession was not required for the beneficiaries' trust interest to vest. Because the children's property interests had already

vested, the court below could not alter those rights.

In Sundquist, 639 P.2d 181, the Utah Supreme Court decided that even with the continuing jurisdiction to make subsequent changes relating to a divorce decree, "[t]hat power does not authorize the court to alter property rights already vested in other parties, such as in the children who are the beneficiaries of the trust..." Because there was trust property in existence at the time, the Court held that the beneficiaries' interests had already vested, precluding the alteration of the trust interests. Their trust was to be held until some years later, perhaps not being transferred to the beneficiaries until after the trustors' deaths. Likewise, although the West trust might not have been transferred until the deaths of both trustors, it included real property and was, in fact, in existence at its inception, causing an immediate property right to be vested in the beneficiaries. This has previously been held to preclude the alteration of a trust and should similarly preclude the changes allowed in the West trust.

**II. Herschel J. West, Sr. never had the power to revoke the joint trust unilaterally.**

#### A. The Various Powers of Herschel J. West, Sr.

Herschel J. West, Sr. - as co-trustor, sole trustee, survivor, or executor - never possessed the power to unilaterally revoke the joint trust.

##### 1. Trustor

Herschel J. West, Sr. was not an individual trustor; he was a co-trustor. Therefore, in order to revoke or amend the trust at any time, he needed the consent of Hazel, the other co-trustor. He, therefore, did not have the power to unilaterally revoke the trust through his position as trustor. In Hill v. Conover, 191 Cal. App. 2d 171 (1961), a husband argued that he was sole trustor after his wife's death and was therefore entitled to revoke the trust himself. However, the court found no merit in this contention and denied his attempted revocation, insisting that consent from both co-trustors was necessary. Id.

##### 2. Trustee

Neither did his position of trustee allow him to unilaterally revoke the trust. In the judgment below the court held that the trust "contained language to the effect that the surviving trustee shall continue as sole trustee succeeding to all the powers, duties and discretionary authority given to the trustees jointly," and therefore considered the unilateral

revocation valid. This decision cannot be supported, however. As earlier noted, Herschel J. West, Sr. and Hazel West had named themselves "the trustee", singularly. Again, her consent was required. Furthermore, the power to revoke is reserved for the trustor, not the trustee. Referring to similar revocation language in a joint trust, a California court determined that the right to revoke belonged to the trustors as trustors, not as trustees. Khan v. Khan, 214 Cal. Rptr. at 109. The West trust document states that in the case of the death of one co-trustor, the other would become the "sole trustee". This position, did not confer any greater powers to Herschel upon Hazel's death. The purpose of a trustee is to hold trust property for the benefit of others and the trustee's duties are fiduciary in nature, preventing him or her from wasting or disposing of the trust, especially for his own use.

A trustee is in a fiduciary relation to the beneficiaries of the trust....In some relations the fiduciary relation is more intense than in others; it is peculiarly intense in the case of a trust. It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries. He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.

Scott on Trusts § 170 (1983).

Scott also cites the Uniform Trusts Act, § 5, as stating

"[n]o trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate;...or from or to a relative, employer, partner, or other business associate". Id. Additionally, Scott states, "it is now, of course, well settled in the United States as well as in England that a sale by a trustee to himself individually can be set aside if it was made without the consent of the beneficiaries." Id. See also Schug v. Michael, 245 N.W.2d 587 (Minnesota 1976) (quoting Restatement of Trusts § 170); Matter of De Planche, 318 N.Y.S.2d 194 (1971); In re Kline, 59 A.2d 14 (N.J. 1948).

Similar language has been enacted in Utah:

Any sale or encumbrance to the trustee, the trustee's spouse, agent, attorney, or any corporation or trust in which the trustee has a substantial beneficial interest or any transaction, which if affected by a substantial conflict of interest on the part of the trustee, is voidable by any interested person, except one who has consented after fair disclosure, unless (a) the trust expressly authorized the transaction; or (b) the transaction is approved by the court after notice to interested persons.

U.C.A. 75-7-404. Rights of survivorship were not expressly authorized in the West trust, nor was the transaction transferring the property to Herschel J. West, Sr. and Appellee approved by the court upon notice to Appellants.

This section was cited by the Utah Supreme Court, which

stated, "absent authorization from a court with jurisdiction over the administration of the trust or consent of the beneficiaries, any transaction involving self-dealing by a trustee is not only prima facie invalid, but is voidable by the beneficiaries, regardless of any loss suffered by the trust estate, the payment of valuable consideration, or the existence of good faith."

Wheeler v. Mann, 763 P.2d 758, 760 (Utah 1988).

### 3. Survivor

As a survivor Herschel J. West, Sr. might have had greater power had the trust document so stated. But, if the trustors intended to offer the survivor individual power or control, they failed to include such language in the trust. "Where a power to revoke or amend is given by the settlors to be executed by mutual consent, the power is not exercisable by the survivor of them." Bogert, Trusts and Trustees, § 1001.

### 4. Executor

Even as the executor of Hazel's estate, Herschel did not gain her revocation power. In Re Chemical Corn Exchange Bank, 169 N.Y.S.2d 600 (1957), held that a husband and co-trustor of an inter vivos trust could not revoke the trust after the death of his wife, even though he was the executor of her estate.

Revocation required "mutual consent" during her life and that did

not change upon her death. Id. The situation is exactly the same in the case at bar. Therefore, Herschel could not forego Hazel's consent by offering it on her behalf as her executor. The executor cannot adopt a co-trustor's revocation right.

#### B. Revocation Requirements When Hazel West was Alive

When there are several trustors, all co-trustors must consent to the revocation of a joint trust. It is well established that a joint trust, if revocable, requires joint revocation. Solomon's Trust Estate, 2 A.2d 825 (Pa. 1938); Hackley v. Farmer, 234 N.W. 135 (Mich. 1935); Croker v. Croker, 192 N.Y.S. 666 (1921); Kelley v. Snow, 70 N.E. 89 (Mass.); Downs v. Security Trust, 194 S.W. 1041 (Ky.); Richardson v. Stephenson, 213 N.W. 673 (Wis.). If this were not so, no joint trust would be secure.

#### C. The Effect of Hazel West's Death

Well established treatise principles and the laws of other states firmly set forth the rule that a joint trust becomes irrevocable at the death of any co-trustor. Khan v. Khan, 214 Cal. Rptr. 109; In Re Chemical Corn Exchange Bank, 169 N.Y.S.2d 600; Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116

(1945) (upheld, 70 N.E. 2d 163 (1946)); Noble v. Rogan, 49 F. Supp. 370; Solomon's Trust Estate, 2 A.2d 825; Croker v. Croker, 192 N.Y.S. 666. This principle follows the logic that joint consent is necessary for a valid revocation, and because a dead co-trustor no longer has the ability to consent to revocation, the joint trust becomes irrevocable.

Referring to a joint trust created for the trustors' children, Noble v. Rogan ruled that amending a joint trust, even if to better benefit the children, simply cannot be done by one co-trustor after the death of the other. "Joint powers, not coupled with an interest, do not survive....It should not be in the power of either party after the death of the other to destroy the trust both created and both intended to subsist." Noble v. Rogan, 49 F. Supp. at 372 (citing Croker v. Croker, 192 N.Y.S. 666). Another California case is on point. In Kahn v. Kahn, 214 Cal. Rptr. 109, the issue presented was whether a co-trustor of a revocable joint trust could unilaterally revoke the trust. The Court held that one trustor could not unilaterally revoke the trust without the consent of the other trustor. That case is especially important in that the trust reviewed contained language very similar to the West trust.

Several New York cases also stand for the proposition that



one trustor may not revoke the trust after the death of a co-trustor. In Croker v. Croker, 192 N.Y.S. 666, the court would not allow a husband to revoke a trust after the death of his wife, when they were both trustors and the language of the trust evidenced an intent that the right of revocation should be exercised jointly. Similarly, in Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116, the court held that a trust established by multiple trustors could only be revoked by the joint consent of all the trustors. Because the consent of each would be required if all were living, the fact that one was dead did not confer upon the others the power to destroy the trust which was intended by the deceased to remain. In upholding this case, the Court of Appeals of New York in Culver v. Title Guaranty & Trust Co., 70 N.E. 2d 163 stated:

were all of the joint settlors living the consent of each to a revocation either in whole or in part, would be necessary. There appears to be equal reason for forbidding whole or partial revocation when one of them is dead or may not be heard.

Id. At 165.

In In Re Chemical Corn Exchange Bank, 169 N.Y.S.2d 600, a husband attempted to revoke a trust where he was a joint trustor with his wife. The court held that where the husband and wife, as joint trustors, provided in an inter vivos trust agreement

that they could not revoke or modify its terms except by written mutual consent, the husband had no power to do so after the death of his wife. Furthermore, the court held that a trustor's power to revoke a trust is personal to that trustor; it terminates upon his or her death and cannot be exercised by any one else.

Finally, in Solomon's Trust Estate, 2 A.2d 825, the Supreme Court of Pennsylvania held that a trust created by two trustors was such that it could only be revoked jointly. The Court stated succinctly:

It should not be in the power of either party after the death of the other to destroy the trust both created and both intended to subsist. If we held as appellant suggests that the power survived to the mother, it could be exercised to deprive the other children of their income. No trust jointly created would be secure under such a determination.

Id. at 826.

Accordingly, it is apparent from the case law provided that a surviving trustor may not revoke a trust after the death of another trustor. The language in the West trust certainly evidences the intent that the trust could only be revoked by joint action of both trustors. Under the circumstances of this case, the Court should consider the clear principle set forth by other states which would require it to find that Herschel J. West, Sr. failed in his attempt to revoke the joint trust simply

because the trust became irrevocable at the death of the other co-trustor.

**III. Herschel J. West, Sr. did not meet the requirements of a valid termination of a joint trust under Utah law.**

While the actions of Herschel J. West, Sr. appear to have been an attempt at unilateral revocation of a joint trust, there is no Utah case law directly on point. However, the Utah Supreme Court has addressed the issue of *termination* of a joint trust. In Clayton v. Behle, 565 P.2d 1132 (Utah 1977), the Supreme Court specifically established requirements for the unilateral termination of a joint trust. Generally, termination of a trust is accomplished by the beneficiaries or some third party. However, termination has been attempted by a joint trustor. Under the Clayton rule, termination can be accomplished "where: (1) all beneficiaries consent, (2) no beneficiary is under an incapacity, and (3) the continuance of the trust is not necessary to carry out a material purpose of the trust." Sundquist v. Sundquist, 639 P.2d 181 (citing Clayton).

Sundquist relied upon Clayton to determine there was no valid termination of a joint trust under circumstances similar to

those in the case at bar. A parent, and co-trustor, was attempting, during divorce proceedings, to terminate a trust created for their children. It might be claimed that Herschel J. West, Sr. attempted to terminate, rather than revoke, the trust. However, this argument would also fail because he did not gain consent from the co-trustor, or in her absence, all the beneficiaries; nor did he prove that the purpose of the trust had been met and the trust was no longer required.

First, all co-trustors must consent or if one will not consent, his or her consent may be substituted with the affirmative consent of all the beneficiaries. Sundquist, 639 P.2d at 187 (emphasis added). Obviously, Hazel West could not consent upon her death. Therefore, Herschel J. West, Sr. should have received the affirmative consent of all three beneficiaries, which he failed to do. Secondly, the party attempting to terminate must prove that there is "no unfulfilled purpose of the trust which could be carried out by its continuance." Id. Because the purpose of the trust was to provide for their children and retain the home within the family, Herschel J. West, Sr. could not prove that this purpose had already been carried out and there was no further reason to maintain the trust. However, he never made an effort to show either of these

requirements. Consequently, his failure to meet these requirements nullifies his attempted termination of the trust.

Additionally, while the second deed created after Herschel J. West, Sr. attempted to terminate the trust might otherwise have been valid, the trust was still in effect and takes priority over the second transfer of property. "[A]part from statute, transfers of the legal title to land rank, between themselves, according to priority in time." Gregerson v. Jensen, 669 P.2d 396, 399 (Utah 1983). Furthermore, Herschel J. West, Sr. never recorded the second deed, but Appellee caused it to be recorded after his death. That indicates that the property was never actually delivered and could, by itself, nullify the transfer.

### CONCLUSION

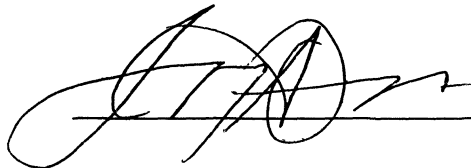
It is clear that the transfer of this trust property was invalid because Herschel J. West, Sr. never had the power to unilaterally revoke or terminate the joint trust he created with his first wife, Hazel West. The Court can reach this conclusion by considering the intent of the trustors, the plain language of the trust, the time at which the beneficiaries gained an interest in the property, the requirements that treatises and other states have set forth for revocation of a joint trust, or the

requirements established in Utah for termination of a joint trust.

Because the revocation was invalid, the court below erred in awarding the family home as part of the Personal Representative's property because it actually belongs to the West children by virtue of this trust.

Having expounded on the applicable rules of law, Appellants pray this Court to forthwith return to them their rightful property, with all of its fixtures and appurtenances. Appellants further pray this Court to remand to the trial court an evidentiary hearing for the purpose of establishing an award to Appellants for the equivalent of reasonable rental monies since the date of their father's death against the Personal Representative.

DATED this 5th day of October, 1995.

A handwritten signature in black ink, appearing to read 'J. Orr', is written over a horizontal line.

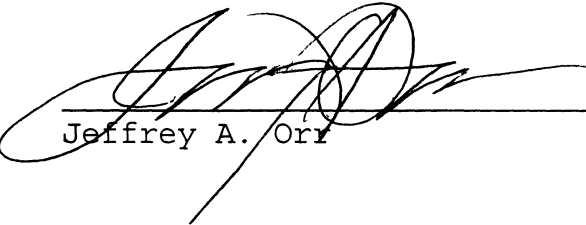
Jeffrey A. Orr  
Attorney for Petitioners and Appellants

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed two (2) copies of the foregoing Brief of Appellant on this 5th day of October, 1995

by first-class U.S. mail, postage prepaid, to the following:

Gregory B. Hadley  
2696 North University Avenue, Suite 200  
Provo, Utah 84604



Jeffrey A. Orr

## ADDENDUM

- A. Declaration of Trust
- B. Affidavit of Herschel J. West, Sr.
- C. October 25, 1995 Ruling
- D. Request for Clarification
- E. January 17, 1995 Ruling
- F. Final Judgment
- G. Noble v. Rogan, 49 F. Supp. 370 (S.D. Cal. 1943).
- H. Khan v. Khan, 214 Cal. Rptr. 109 (1985).
- I. Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116 (1945).
- J. Culver v. Title Guaranty & Trust Co., 70 N.E.2d 163 (N.Y. 1946).
- K. Hill v. Conover, 191 Cal. App. 2d 171 (1961).
- L. In Re Chemical Corn Exchange Bank, 169 N.Y.S.2d 600 (1957).
- M. Croker v. Croker, 192 N.Y.S. 666 (1921).
- N. Sundquist v. Sundquist, 639 P.2d 181 (Utah 1981).



"A"

## Declaration of Trust

WHEREAS, WE, Herschel J. West and Hazel L. West, of the City/Town of Provo, County of Utah, State of Utah, are the owners as joint tenants of certain real property located at (and known as) 654 E 3750 N. in the City/Town of Provo, State of Utah, which property is described more fully in the Deed conveying it from Nellie Marie Smith to Herschel J. West & Hazel L. West as "that certain piece or parcel of land with buildings thereon standing, located in said Provo, being

All of lot 1, Block 2, plat "A", Valli Hi Subdivision, Provo, Utah according to the official plat thereof on file in the office of the Recorder, Utah County, Utah. Subject to deed restrictions and easements.

Subject to a Declaration of Protective Covenants and Restrictions recorded in Book 937, page 312, as Entry No 5997 in the office of Utah County recorder.

Subject to a trust Deed executed July 10, 1963 by LeGrande G. Smith and Nellie Marie Smith to Pacific Mutual Life Insurance Company, recorded July 11, 1963 as Entry No 9290, in book 943, Page 385 of official Records. To secure \$15,500.00 of which the Grantees agree to assume and pay according to the conditions and terms therein.

Being the same premises earlier conveyed to the Settlers by an instrument dated 18 July 1969 and recorded in Vol. 692, Page 318 of the Provo Land Records.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we do hereby acknowledge and declare that we hold and will hold said real property and all our right, title and interest in and to said property and all furniture, fixtures and personal property situated therein on the date of the death of the survivor of us, IN TRUST

1. For the use and benefit of the following (3) Three persons, in equal shares, <sup>HTC H211</sup> ~~in the survivor of them per stirpes~~

1. Herschel J. West Jr) Our Son
2. Richard Lee West Our Son
3. Carole Ann West Edmunds Our Dauthter

If because of the physical or mental incapacity of both of us certified in writing by a physician, the Successor Trustee hereinafter named shall assume active administration of this trust during our lifetime, such Successor Trustee shall be fully authorized to pay to us or disburse on our behalf such sums from income or principal as appear necessary or desirable for our comfort or welfare. Upon the death of the survivor of us, unless the beneficiaries shall predecease us or unless we all shall die as a result of a common accident or disaster, our Successor Trustee is hereby directed forthwith to transfer said property and all right, title and interest in and to said property unto the beneficiaries absolutely and thereby terminate this trust; provided, however, that if any beneficiary hereunder shall not have attained the age of 21 years, the Successor Trustee shall hold such beneficiary's share of the trust assets in continuing trust until such beneficiary shall have attained the age of 21 years. During such period of continuing trust the Successor Trustee, in his absolute discretion, may retain the specific trust property herein described if he believes it in the best interest of the beneficiary so to do, or he may sell or otherwise dispose of such specific trust property, investing and reinvesting the proceeds as he may deem appropriate. If the specific trust property shall be productive of

directly for the maintenance, education and support of the beneficiary without the intervention of any guardian and without application to any court. Such payments of income or principal may be made to the parents of such beneficiary or to the person with whom the beneficiary is living without any liability upon the Successor Trustee to see to the application thereof. If such beneficiary survives us but dies before attaining the age of 21 years, at his or her death the Successor Trustee shall transfer, pay over and deliver the trust property being held for such beneficiary to such beneficiary's personal representative, absolutely.

2. Each beneficiary hereunder shall be liable for his proportionate share of any taxes levied upon the total taxable estate of the survivor of us by reason of the death of such survivor.

3. All interests of a beneficiary hereunder shall be inalienable and free from anticipation, assignment, attachment, pledge or control by creditors or by a present or former spouse of such beneficiary in any proceedings at law or in equity.

4. We reserve unto ourselves the power and right during our lifetime (1) to place a mortgage or other lien upon the property, (2) to collect any rental or other income which may accrue from the trust property and to pay such income to ourselves as individuals. We shall be exclusively entitled to all income accruing from the trust property during our lifetime, and no beneficiary named herein shall have any claim upon any such income and/or profits distributed to us.

5. We reserve unto ourselves the power and right at any time during our lifetime to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of any beneficiary and without giving notice to any beneficiary. The sale or other disposition by us of the whole or any part of the property held hereunder shall constitute as to such whole or part a revocation of this trust.

6. The death during our lifetime, or in a common accident or disaster with us, of all of the beneficiaries designated hereunder shall revoke such designation, and in the former event, we reserve the right to designate a new beneficiary. Should we for any reason fail to designate such new beneficiary, this trust shall terminate upon the death of the survivor of us and the trust property shall revert to the estate of such survivor.

7. In the event of the physical or mental incapacity or death of one of us, the survivor shall continue as sole Trustee. In the event of the physical or mental incapacity or death of the survivor, or if we both shall die in a common accident, we hereby nominate and appoint as Successor Trustee hereunder the beneficiary named first above, unless such beneficiary shall not have attained the age of 21 years or is otherwise legally incapacitated, in which event we hereby nominate and appoint as such Successor Trustee the beneficiary named second above, unless such beneficiary named second above shall not have attained the age of 21 years or is otherwise legally incapacitated, in which event we hereby nominate and appoint

(Name) Carole Ann West Edmunds, of  
(Address) Box 3441 Clearwater Florida 33515  
Number Street City State Zip

to be Successor Trustee.

8. This Declaration of Trust shall extend to and be binding upon the heirs, executors, administrators and assigns of the undersigned and upon the Successors to the Trustees.

9. We as Trustee and our Successor Trustee shall serve without bond.

10. This Declaration of Trust shall be construed and enforced in accordance with the laws of the State of \_\_\_\_\_

IN WITNESS WHEREOF, we have hereunto set our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

(First Settlor sign here) [Signature] L.S.

(Second Settlor sign here) [Signature] L.S.

I, the undersigned legal spouse of one of the above Settlers, hereby waive all community property, dower or curtesy rights which I may have in the hereinabove-described property and give my assent to the provisions of the trust and to the inclusion in it of the said property.

(Spouse sign here) \_\_\_\_\_ L.S.

Witness: (1) [Signature]

STATE OF Utah

COUNTY OF Utah

Witness: (2) [Signature]

City or Town Provo, Utah

On the 5<sup>th</sup> day of Aug, 1986, personally appeared

\_\_\_\_\_ and \_\_\_\_\_

known to me to be the individuals who executed the foregoing instrument, and acknowledged the same to be their free act and deed, before me.

(Notary Seal)

[Signature]  
Notary Public

NOTARY PUBLIC 5/27/87

"B"

A F F I D A V I T

STATE OF UTAH           )  
                              : ss.  
COUNTY OF UTAH        )

ENT 31995 BK 2551 PG 510  
NINA B REID UTAH CO RECORDER BY AT  
1988 OCT 20 3:35 PM FEE 8.00  
RECORDED FOR HERSCHEL J WEST

Herschel J. West        being first duly sworn upon oath, desposes and says:

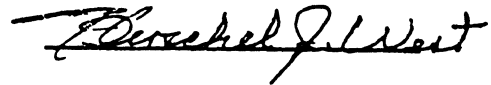
That he is a citizen of the United States of America and is over the age of  
21 years;

That he knows of his own knowledge that Hazel L. West  
who appears in the certified copy of Death Certificate attached hereto, is one  
and the same person as Hazel L West who appears as one of the Grantees and  
joint tenants in that certain Warranty Deed dated July 18, 1969nd recorded  
as Entry No. 43230 in Book 1692 at Page 318 in the office of the  
Recorder, Utah County, Utah.

Further affiant saith not.

DESCRIPTION:

All of lot, Block 2, Plat "A", Valli Hi Subdivision. Provo. Utah,  
according to the official plat thereof on file in the office of the  
county recorder.



Subscribed and sworn to before me, a Notary Public, this 10-20-88

My Commission Expires: MY COMMISSION EXPIRES





"C"

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

IN THE MATTER OF THE ESTATE OF HERSCHEL JOSEPH WEST,  Deceased.	CASE NO. 91-3400471  RULING
--	-----------------------------------

This matter comes before the Court, under Rule 4-501 on Personal Representative Marilyn West's Motion for Partial Summary Judgment. The Court has reviewed the file, weighed oral arguments, considered the memoranda of counsel, and upon being advised in the premises, now makes the following:

**RULING**

1. Pursuant to Sundquist v. Sundquist, 639 P.2d 181 (Utah 1981); Makoff v. Makoff, 528 P.2d 797 (Utah 1982); Larson v. Overland Thrift & Loan, 818 P.2d 1316 (Utah App. 1991); *George T. Bogert*, Trust § 11 (6th ed. 1987) and numerous other utah cases, Personal Representative's Motion for Partial Summary Judgment is GRANTED as to the following trusts: **Trusts ## 3, 4, 8, 9** [EXHIBITS D, E, I, J of Personal Representative's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment] are invalid.

2. Trust #3 is invalid because there is no cash account that exists with this number #414 15595; Trust #4 is invalid because the signature page is not the proper corresponding signature page; Trust #8 is invalid because there was no attached Schedule A; and Trust #9 is invalid because it does not have an attached Quit Claim Deed. Therefore,

the property or corpus of any of these four trusts must revert to Herschel West's estate in order to determine the percentage of Marilyn West's elective share.

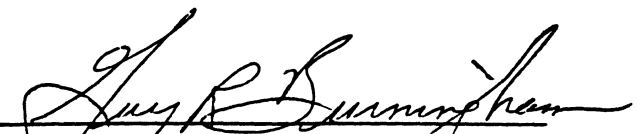
3. Personal Representative's Motion for Partial Summary Judgment is DENIED as to the following trusts: Trusts ## 1, 2, 5, 6, 7, 10, 11 [EXHIBITS B, C, F, G, H, and EXHIBIT L of Herschel West Jr.'s Memorandum in Opposition to the Motion for Partial Summary Judgment] are valid. Trust #11 is also valid under a Constructive trust theory analysis, but this theory only applies to this trust since Marilyn is currently possessing the property purported to be within this trust. Trust #2 only encompasses the surface rights and 1.25% of the mineral rights, and the remaining 98.75% mineral rights shall revert to Herschel West's estate.

//

Counsel for Personal Representative Marilyn West is to prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated this 25 day of October, 1994.

BY THE COURT:

  
GUY R. BURNINGHAM, JUDGE

cc: Gregory B. Hadley, Esq.  
Jeffrey A. Orr, Esq.



"D"

1  
2  
3  
4 GREGORY B. HADLEY (3652)  
5 Counsel for Personal Representative  
6 2696 North University Avenue, #200  
7 Provo, Utah 84604  
8 Telephone: (801) 377-4403

9  
10 IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

11 STATE OF UTAH

12 IN THE MATTER OF THE ESTATE  
13 OF HERSHCEL JOSEPH WEST,

14 Deceased.

15 REQUEST FOR  
16 CLARIFICATION OF RULING  
17 AND ENLARGEMENT

18 Probate No. 91-3400471

19 Judge Burningham

20 COMES NOW the Personal Representative and does hereby  
21 request the Court to clarify its' Ruling of October 25, 1994,  
22 and would therefore set forth the following:

23 1. The Personal Representative is unsure of the purpose of  
24 the Courts' language pertaining to "Marilyn West's elective  
25 share" as set forth on the top of page 2 of the ruling as the  
26 Personal Representative has not made the election.

27 2. The language of paragraph 3 of the ruling pertaining to  
28 trust 11 (Exhibit L to Objector's Memorandum) is confusing as  
the Personal Representative does not know to whom the Court has  
awarded her residence. Although the Court has ruled that this  
trust is valid, the Personal Representative has contended that  
Mr. West validly transferred the property from the trust 1)  
which he had the express authority to so do, 2) retaining

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4 counsel and drafting a revocation and transfer statement  
5 (Exhibit O to Objector's Memorandum) and 3) signing and causing  
6 to be recorded a Quit Claim Deed (Exhibit P to Objector's  
7 Memorandum) conveying the property from the trust to himself and  
8 his widow as joint tenants with full rights of survivorship.  
9 Further, the gratuitous constructive trust language is confusing  
10 as it appears it could be argued on behalf of either the  
11 Personal Representative or the Objectors.

12 3. Lastly, the Court did not address in its' Ruling the  
13 status of items 2 through 6 of Schedule C of the Inventory which  
14 is attached as "Exhibit A" to the Personal Representatives  
15 Memorandum.

16 WHEREFORE, the Personal Representative would ask the Court  
17 to clarify its ruling as set forth above and to enlarge the  
18 periods set forth in Rule 4-504 CJA until such time as so  
19 clarified.

20 RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of Nov.,  
21 1994.

22  
23   
24 GREGORY B. HADLEY

25 MAILING CERTIFICATE

26 I HEREBY CERTIFY that I personally mailed a copy of the  
27 foregoing on this 2<sup>nd</sup> day of November, 1994, by first-  
28 class, U.S. Mail, postage prepaid to the following:

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Jeffrey A. Orr, Esq.  
HILL, HARRISON, JOHNSON & SCHMUTZ  
3319 North University Avenue, Suite 200  
Provo, Utah 84604

Claudia N. Sipe  
Secretary

\\Word\\West\\Request2.cor

"E"

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

IN THE MATTER OF THE ESTATE OF  
HERSCHEL JOSEPH WEST,

Deceased.

CASE NO. 91-3400471

RULING

This matter comes before the Court, under Rule 4-501 on Personal Representative Request for Clarification of Ruling and Enlargement; Objector's Motion for Reconsideration and Objector's Request for Entry on Land and Inspection. The Court has reviewed the file, considered the memoranda of counsel, and upon being advised in the premises, now makes the following:

**RULING**

1. Personal Representative Request for Clarification of Ruling and Enlargement is GRANTED. Therefore, this court will clarify it's October 25, 1994 Ruling below.

2. Trust #11 is valid, however, it did contain Joint Tenancy language. Therefore, upon the demise of one of the joint tenants, the surviving joint tenant, Herschel West, had full authority over the trust property and exercised that authority when he Quit Claimed it to himself and then to himself and Marilyn West as joint tenants. By making the above transfer he effectively revoked the valid trust, leaving the residence in joint tenancy with himself and Marilyn West and upon Herschel's demise, she became sole owner of the residence.

3. Since there are not any trusts, that purport to contain the items listed in

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Schedule C, these five items are property of Herschel's estate.

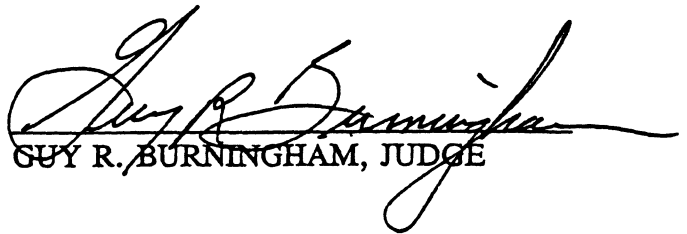
4. Pursuant to this Court's October 25, 1994 Ruling and in light of the discrepancies with the signature page and Quit Claim Deed, as offered by the children of the Deceased, Objector's Motion for Reconsideration is DENIED.

5. Pursuant to Ruling #1 above, Objector's Request for Entry on Land and Inspection is DENIED.

Counsel for Personal Representative Marilyn West is to prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature. All outstanding contrary issues that were not specifically dealt with, but which are related to the above Court's Ruling, are hereby MOOT.

Dated this 17 day of January, 1995.

BY THE COURT:



GUY R. BURNINGHAM, JUDGE

cc: Gregory B. Hadley, Esq.  
Jeffrey A. Orr, Esq.





1 GREGORY B. HADLEY (3652)  
2 Attorney for Personal Representative  
3 2696 North University Avenue, #200  
4 Provo, Utah 84604  
Telephone: (801) 377-4403

5  
6 IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY  
7 STATE OF UTAH

8  
9 IN THE MATTER OF THE ESTATE OF  
HERSCHEL JOSEPH WEST,

10 Deceased.

FINAL JUDGEMENT

11 Probate No. 91-3400471  
Judge Burningham

12 Pursuant to the Personal Representatives Motion for Partial Summary Judgement  
13 challenging the validity of 10 different trusts, her Motion for Judgement on the Pleadings  
14 challenging the validity of an additional trust and Objector 's Motion for Partial  
15 Summary Judgement, this court heard oral argument on September 23, 1994. After  
16 considering the various memorandum of counsel and having determined that there was  
17 no genuine issue as to any material fact and that the moving parties were entitled to  
18 judgement as a matter of law, the court entered a ruling on October 25, 1994. On  
19 November 2, 1994, the Personal Representative filed a Request for Clarification of  
20 Ruling and Enlargement and subsequent thereto the Objectors filed a Motion for  
21 Reconsideration and a Request for Entry on Land and Inspection. The court, having  
22 reviewed all memorandum pertaining to said Requests and Motion, entered its ruling on  
23 January 17, 1995.

24  
25 NOW THEREFORE THE COURT, expressly determining that there in no just  
26 reason for delay and directing the entry of final judgement in this matter and for good  
27  
28

1 cause appearing, does hereby ORDER, AJUDGE, AND DECREE as follows:

2  
3 1. The Personal Representatives Request for Clarification of Ruling and  
4 Enlargement is granted.

5 2. The Personal Representative Motion for Partial Summary Judgement is  
6 granted and Objector 's Motion for Partial Summary Judgement is denied as to trusts  
7 numbered 3, 4, 8, and 9 as trust #3 is invalid because there is no cash account that exists  
8 with the number #414 15595; trust #4 is invalid because there is no signature page and  
9 the one that is attached is not the proper signature page; trust #8 is invalid because  
10 there is no Schedule A identifying the trust property; and trust #9 is invalid as there is  
11 no Quit Claim Deed or other conveying instrument indicating said trust was ever funded.  
12

13 3. All of the cash and contracts set forth in Schedule C of the inventory filed by  
14 the Personal Representative are property of Herschel Joseph West 's Estate as there are  
15 no trusts that purport to contain these items.  
16

17 4. The Objector 's Motion for Partial Summary Judgement is granted and the  
18 Personal Representative 's Motion for Partial Summary Judgement is denied as to trusts  
19 numbered 1, 2, 5, 6, 7, and 10 as these trusts are valid on there face. However, trust #2  
20 only encompasses the surface rights and 1.75% of the mineral rights with the remaining  
21 98.25% mineral rights reverting to and becoming a part of Herschel Joseph West 's  
22 Estate.  
23

24 5. Therefore as to Schedule A of the Inventory filed by the Personal  
25 Representative items #1, as qualified under paragraph 4 above, through #13 are  
26 contained within valid trusts and therefore are not part of Herschel Joseph West 's  
27  
28

1 Estate. Items 1 through 6 as set forth in Schedule C of the Inventory and 98.25% of the  
2 oil, gas, and mineral rights in the following described property situated in Bighorn  
3 County, State of Wyoming are contained within and part of the Herschel Joseph West 's  
4 Estate as being administered by Marilyn West, the Personal Representative to wit:

5  
6 The Northwest Quarter of the Southeast Quarter  
7 (NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>) of section twenty three (23) Township 56 (56)  
8 North, Range 97 (97) West of the 6th. Principal meridian,  
Wyoming, containing 40 (40) acres more or less.

9 6. The Personal Representative 's Motion for Judgement on the Pleadings is  
10 granted. Although trust #11 is valid it was a revokable trust and contained language to  
11 the effect that the surviving trustee shall continue as sole trustee succeeding to all the  
12 powers, duties, and discretionary authority given to the trustees jointly. Therefore, upon  
13 the demise of Hazel L. West (one of the co-trustees) the surviving trustee (Herschel  
14 Joseph West) had full authority over the trust property and exercised that authority when  
15 he Quit Claimed it to himself and his wife, Marilyn West, as joint tenants. By making  
16 the above transfer, Herschel Joseph West effectively revoked the valid trust, leaving the  
17 residence in joint tenancy with himself and Mrs. West and upon his death, Mrs. West  
18 became the sole-owner of the residence by operation of law. Therefore, that certain  
19 Notice of Lis Pendens recorded in the offices of Utah County Recorder on November 3,  
20 1993, as entry number 79096 in book 3288 pages 331-2 is hereby released as it pertains  
21  
22  
23  
24  
25  
26  
27  
28

1 to the following described residential property located in Utah County, State of Utah to  
2  
3 wit:

4 All of lot 1, Block 2, plat "A", Valli Hi  
5 Subdivision, Provo, Utah according to the  
6 official plat thereof on file in the office of the  
Recorder, Utah County, Utah. Subject to deed  
restrictions and easements.

7 7. The Objector 's Motion for Reconsideration and their Request for Entry on  
8 Land and Inspection is denied.

9 8. All outstanding contrary issues that were not specifically dealt with, but which  
10 are related to this Final Judgement, are hereby moot.

11 DATED this \_\_\_\_ day of \_\_\_\_\_, 1995.

12  
13  
14 BY THE COURT:

15  
16  
17 \_\_\_\_\_  
JUDGE GUY R. BURNINGHAM

18 Approved as to form:

19  
20  
21 \_\_\_\_\_  
22 Jeffery A. Orr, Counsel for Objectors  
23 Herschel J. West Jr., Richard L. West  
24 and Carole A. West Edmunds.

25  
26 CERTIFICATE OF MAILING

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 25 day of January, 1995, by first-class, U.S. Mail, postage prepaid, addressed to the following:

HILL, HARRISON, JOHNSON & SCHMUTZ  
Jeffery A. Orr  
3319 North university Avenue, #200  
Provo, Utah 84604

  
Renee ' Maybon, Secretary

"G"

**NOBLE et al. v. ROGAN, Collector of  
Internal Revenue.  
No. 1413.**

District Court, S. D. California,  
Central Division.  
March 24, 1943.

**1. Trusts — 2**

A trust of movables created by an instrument inter vivos is administered by trustee according to law of state where instrument creating trust locates administration thereof.

**2. Trusts — 2**

Where declaration of trust fixed administration thereof in Pennsylvania, Pennsylvania laws governed.

**3. Trusts — 59(1)**

Where settlor reserves a power to revoke trust only in a particular manner or under particular circumstances, trust can be revoked only in such manner or under such circumstances.

**4. Internal revenue — 1044**

Where husband and wife created trust for a child and reserved right of revocation, use of the word "settlers" to designate husband and wife without a reservation to survivor of any right of control indicated that any subsequent amendment must be by joint action of both and trust became irrevocable on death of husband, so that declaration in subsequent writing by wife that trust was irrevocable was without legal effect and declaration that she waived any right to dispose of the trust principal by will under power of appointment was little more than a mere ministerial act from which no taxable "gift" resulted. Revenue Act 1932, § 501, 26 U.S.C.A. Int.Rev.Acts, page 580.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift" and "Settlor".

Action by Purdon Smith Hall against Nat Rogan, Collector of Internal Revenue for the Sixth District of California, to recover gift taxes alleged to be illegally and erroneously assessed and collected. During the pendency of the action, plaintiff died and Adaline Jane Noble and others, plaintiff's executors, were substituted as plaintiffs.

Judgment for plaintiffs.

Claude I. Parker, Ralph W. Smith, Ralph Kohlmeier, and Harriet Geary, all of Los Angeles, Cal., for plaintiffs.

Leo V. Silverstein, U. S. Atty., E. H. Mitchell, Asst. U. S. Atty., and Armond M. Jewell, Asst. U. S. Atty., all of Los Angeles, Cal., for defendant.

J. F. T. O'CONNOR, District Judge.

This is an action to recover gift taxes in the amount of \$3,819.69 averred to be illegally and erroneously assessed and collected.

This action was commenced by Purdon Smith Hall, who died during its pendency and on motion duly made, Adaline Jane Noble, Emily Purdon von Romberg Spreckels, and Bank of America National Trust and Savings Association, executor of the estate of Purdon Smith Hall, deceased, were substituted as plaintiffs.

On April 25, 1928, Purdon Smith Hall and her husband, William H. Hall, as settlors, and Purdon Smith Hall and William H. Hall and York Trust Company, a corporation organized under the laws of the State of Pennsylvania, as trustees, executed and entered into a trust agreement, the material portions of which provide: "That the Settlers have transferred to the Trustees one thousand (1,000) shares of the Four Dollar Cumulative Participating Preferred Capital Stock of Southeastern Power and Light Company, in trust, nevertheless, to hold the same and the proceeds thereof if sold and with power to sell with unanimous consent of the Trustees, and to pay the income thereof to Emily Purdon von Romberg, daughter of the Settlers, during the term of her natural life, free from anticipations, alienation or assignments or transfers by operation of law or otherwise, and upon her death to dispose of the principal thereof in the same manner as her interest in the respective estates of the Settlers shall be disposed of by their last wills and testaments, one-half of the trust fund to be disposed of under the will of each Settlor so that the interest of the said Emily under such will and the agreement shall be equalized with any interest given to her sister, Jane, by such will \* \* \*. It is the purpose of the Settlers that this trust agreement shall supersede by a more formal and detailed agreement and nothing herein contained shall be held or construed to prevent the Settlers from embodying in such formal trust agreement such provisions as to

vocation, management, beneficiaries and other matters as they shall determine, but unless and until this agreement is superseded, it shall be and remain in full force and effect."

Said Emily Purdon von Romberg Spreckels was born on the 31st day of January, 1908, and is now living. On March 19, 1930 said William H. Hall died without any change being made in the aforementioned trust agreement. On August 16, 1935, in the State of California, Purdon Smith Hall executed a certain document wherein she declared, inter alia: " \* \* \* that said trust shall be and is hereby made Irrevocable, and the same shall hereafter be administered under the terms of said original agreement as modified by the terms of this declaration \* \* \*. I hereby waive and release any right I might otherwise have to dispose of any or all of the principal of said trust by my last will and testament." In the gift tax return filed by Purdon Smith Hall for the year 1935, was included as part of the sum of \$415,253 disclosed on said return as the total value of gifts made by Purdon Smith Hall in said year, the amount of \$31,000 as a gift occurring by reason of the execution of the document dated August 16, 1935. Of the said \$31,000 the sum of \$21,890.34 represented the life estate of said Emily Purdon von Romberg Spreckels and the remainder of said \$31,000, to wit the sum of \$9,109.66, represents the remainder interest. On or before March 15, 1936, Purdon Smith Hall caused to be filed with the defendant, Purdon Smith Hall's duly executed donor's federal tax return for the calendar year 1935. On March 7, 1939, Purdon Smith Hall filed her written claim for refund of the federal gift tax purportedly overpaid by her in the amount of \$3,819.69 with interest as provided by law. The latter sum represents the gift tax on \$31,000 for the year 1935. Thereafter Purdon Smith Hall's claim for refund was rejected and she received notice of rejection of said claim on April 7, 1939.

The question for determination is:

[1-3] Where two individuals execute a declaration of trust, reserving the right of revocation, and are designated therein as "settlers", is the right to act joint, whereby the trust becomes irrevocable upon the death of one of said settlors, or has the survivor the right to amend or alter the trust? Section 501 of the Revenue Act of

1932, 26 U.S.C.A. Int.Rev.Acts, page 580 provided: "(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States."

[4] If the right to amend or act with reference to the trust or any portion thereof survived in the survivor, then the government's contention that a taxable gift was consummated by executing the instrument of August 16, 1935, must be sustained. "A trust of movables created by an instrument inter vivos is administered by the trustee according to the law of the state where the instrument creating the trust locates the administration of the trust." Rest. of the Law, Conflict of Laws, sections 297, 299, pp. 397, 381; Hughes v. Commissioner of Internal Revenue, 9 Cir., 104 F.2d 144; Helvering v. Stuart, November 16, 1942, 317 U.S. 154, 63 S.Ct. 140, 87 L.Ed. —. Here, the administration of the trust was in Pennsylvania, therefore its laws should govern. The only Pennsylvania case cited is In re Solomon's Trust Estate, 1938, 332 Pa. 462, 2 A.2d 825, 826, which is adverse to the position of the government. There "Appellant's parents set up an inter-vivos trust, the income to be paid to the settlors' three children for life, one-third to each child. It further provided: 'The Donors shall have the power, at any time during their lifetime, by an instrument in writing delivered to the Trustee, to modify, alter or amend this agreement in whole or in part; \* \* \*.' By letter the donors directed the trustee to 'pay to us the one-third' of the net income which had been paid to appellant. The trustee complied with this direction. Later the father died, and his widow thereafter directed the trustee to resume payment to appellant. After complying with this direction, the trustee was advised it could not legally pay this income to the son. To an account filed complying therewith, the son filed exceptions which were dismissed." In response to the appellant's contention that both parents merely

wished to punish the son "temporarily, and intended to restore the income to him, but had neglected to do so," the court declared: "The letter itself determines the legal status of appellant; it is clear and unambiguous. The power to revoke is specifically referred to, and it is indicated clearly that the parents were exercising that very power. The words 'until further notice' meant, of course, joint notice of mother and father. \* \* \* Joint powers, not coupled with an interest, do not survive. \* \* \* It should not be in the power of either party after the death of the other to destroy the trust both created and both intended to subsist. \* \* \*" Croker v. Croker et al., 117 Misc. 558, 192 N.Y.S. 666, is cited by the Solomon case, supra, where the views of the court in the latter case are confirmed. State Street Trust Co. v. Crocker, 306 Mass. 257, 28 N.E.2d 5, 128 A.L.R. 1173. Conceding the correctness of the government's assertion that the question is one of intent, Rest. of the Law, Trusts, section 4d, yet the provisions of the trust manifesting the Settlor's intention do not support the defendant's claim. It is clear that Purdon Smith Hall and her husband intended to create a trust requiring the joint action of both in any subsequent amendment or revocation. This is apparent from the use of the word "Settlers", and the ultimate disposition sought without reserving to the survivor any right of control, which might easily have been expressed. "If the settlor reserves a power to revoke the trust only in a particular manner or under particular circumstances, he can revoke the trust only in that manner or under those circumstances." Rest. of the Law, Tr. section 330 j. The instrument executed by Purdon Smith Hall declaring the trust irrevocable, was of no legal effect. While a power of appointment existed, to be exercised by Purdon Smith Hall after the death of her husband, William Hall, the exactness in which the appointees were designated and the mode in which distribution was to be accomplished left little more than a ministerial act to be performed. The instrument executed on August 16, 1935 was merely an affirmation of the disposition intended by the settlors in the original declaration of trust. It did not create or transfer any right to or interest in the corpus of the trust nor affect the status of the parties which had been theretofore established by operation of law.

The court finds that there was no gift as contemplated by section 501 of the Revenue

Act of 1932 and the tax was illegally assessed. The instrument executed by Purdon Smith Hall dated August 16, 1935 was void and of no effect, as Purdon Smith Hall had no power to change the terms of the trust agreement dated April 25, 1928.

Plaintiffs will recover the amount of the tax illegally paid to the government.



In re ULRICH.  
In re SAUBER.  
Nos. 1828, 1950.

District Court, D. North Dakota.  
March 1, 1943.

#### 1. Bankruptcy ⇐4

Since Bankruptcy Act provision relating to redemption by farmer-debtors is not clear, courts must construe Congressional intent so that it can be administered with practicality and fairness to bankrupts and creditors. Bankr. Act § 75, sub. s, 11 U.S.C.A. § 203, sub. s.

#### 2. Bankruptcy ⇐38

An original appraisal of farmer-debtor's property does not become "final" and binding on all parties for purposes of redemption after expiration of four months, and hence creditors may have a reappraisal after farmer-debtor declares intention to redeem notwithstanding creditors' failure to object to original appraisal within four month period, as against contention that after expiration of four months either party may show only an appreciation or depreciation in value between time of original appraisal and time of reappraisal. Bankr. Act § 75, sub. s(3), 11 U.S.C.A. § 203, sub. s(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Final Appraisal".

In Bankruptcy. In the matter of Frank J. Ulrich and William J. Sauber, bankrupts, wherein the bankrupts petitioned for right to redeem at appraised value and creditors objected and requested a reappraisal and the Commissioner held that

the parties were bound by the value fixed at time of the original appraisal to which holding the creditors objected.

Orders of Commissioners set aside and cases remanded to the Commissioners with instructions.

F. E. McCurdy, of Bismarck, N. D., for bankrupt.

A. L. Quilling, of St. Paul, Minn., for Federal Land Bank of St. Paul.

VOGEL, District Judge.

The question before the court in these cases is whether or not an original appraisal under Subsection s of Section 75 of the Bankruptcy Act, 11 U.S.C.A. § 203, sub. s, becomes final and binding on all parties for the purposes of redemption after the expiration of four months, with the exception only of either party being able to show upon reappraisal that there had been an appreciation or depreciation in value between the time of the original appraisal and the time of the reappraisal.

Subsection s provides: "\* \* \* Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: Provided, That in proceedings under this section, either party may file objections, exceptions, and to take appeals within four months from the date that the referee approves the appraisal."

Paragraph (3) of Subsection s provides for reappraisal as follows: "At the end of three years, or prior thereto, the debtor may pay into court the amount of the ap-

praisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution \* \* \*." (Italics for emphasis.)

The question raised will affect a large number of cases now pending before conciliation commissioners and before this court. The facts in the Ulrich case will serve as an example. In the Ulrich case the original appraisal was had on March 2, 1942. The amount of the appraisal was \$960. The creditors made no objections, took no exceptions or appeals therefrom, and more than four months expired before the debtor made his petition to redeem. The debtor then petitioned for the right to redeem the real property at the appraised value, \$960. Upon receiving notice thereof the creditors objected and requested a reappraisal or hearing on value in accordance with paragraph (3) of Subsection s, quoted above. Hearing on such petition was had on October 26 and 27, 1942, at which time the creditors and bankrupt presented evidence with reference to value, such hearing being before the Commissioner. The Commissioner found from such evidence that there had been no change in the value of the property between the date of the original appraisal and the date of the hearing on value, and held that all parties were bound by the value fixed at the time of the appraisal, he taking the position that the parties were limited in the hearing on value to a showing of appreciation or depreciation in value subsequent to appraisal, and that they could not attack the original appraisal as being improper after more than four months had expired subsequent to such appraisal. The Commissioner filed his memorandum opinion upon which he based his action. He adopted the theory that the reappraisal or hearing on value provided for in the law was only for the purpose of showing an increase or decrease in values, not for the purpose of disturbing the ac-



"H"

Estate of FRANK M. KHAN, Deceased. MARIGOLD E. KHAN,  
Petitioner and Appellant, v. CLIFTON KHAN, as Co-executor,  
etc., et al., Objectors and Respondents

Civ. No. B003654

Court of Appeals of California, Second Appellate District,  
Division Five

168 Cal. App. 3d 270; 214 Cal. Rptr. 109

May 16, 1985

RIOR HISTORY:

Superior Court of Los Angeles County, No. WEP18586, Jacqueline L. Weiss, Judge.

DISPOSITION: The judgment is reversed.

COUNSEL: E. C. Mathews for Petitioner and Appellant.

William J. Allard for Objectors and Respondents.

JUDGES: Opinion by Feinerman, P. J., with Ashby and Eagleson, JJ., concurring.

OPINIONBY: FEINERMAN

OPINION: [\*271]      [\*\*110]      ~~the appeal presents the issue: Can~~  
~~the cotrustor of a revocable trust unilaterally~~?

The issue arises in the following context. Frank M. Khan (Frank) and  
Appellant, Marigold E. Khan, husband and wife, owned two parcels of real  
estate which, although ~~located in the same community~~  
~~property~~. On July 22, 1981, they mutually executed two separate, but  
identical, trust agreements, one with respect to each parcel of real estate.  
On the same date, by quit claim deeds, they conveyed title to each parcel of  
real property to themselves as trustees of the respective trusts. The quit  
claim deeds provided: "~~and as~~  
~~or heirs or assigns shall have or make any~~  
property," (Italics added.)

The trust agreements provided that they would hold the "said real  
property and all our right, title and interest in and to said property and  
all furniture, fixtures and personal property situated therein on the date of  
the death of the survivor of us, In Trust" for the benefit of their two  
children. n1 [\*272] The agreement reserved to the trustors the income from  
the trust during their lifetime. The agreements contained the following  
revocation clause: "We reserve unto ourselves the power and right at any time  
during our lifetime to amend or revoke in whole or in part the trust hereby  
created without the necessity of obtaining the consent of any beneficiary and  
without giving notice to any beneficiary. The sale or other disposition by us  
of the whole or any part of the property held hereunder shall constitute as to  
such whole or part a revocation of this trust." (Italics added.)

-Footnotes-

n1 It is not contended that conveyance to the trust altered the community status of the property, and, of course, the presumption is that it did not. *Matz v. United States* (9th Cir. 1967) 382 F.2d 723.)

- - - - -End Footnotes- - - - -

In September 1981, appellant instituted dissolution proceedings. In November 81, a restraining order was issued in the dissolution proceeding prohibiting disposing, selling, encumbering or transferring the parties' community property. On January 25, 1983, [redacted] "Notice of Revocation of Trust" which he [\*\*111] addressed to "Frank M. Khan and Marigold E. Khan, Trustees," wherein he declared that he revoked "both of the aforesaid trusts, as to his one-half (1/2) undivided interest of the aforesaid trust estates and hereby notifies the trustees . . . that he holds his one-half (1/2) undivided interest of said trust estates, as his separate property as a tenant-in-common with Marigold E. Khan, Trustee of the other one-half (1/2) undivided interest . . . ."

The notice of revocation was sent to appellant's then counsel in the dissolution proceeding, Jean Wong (Wong). No copy of the notice was sent to appellant. Thereafter, on January 25, 1983, [redacted] a will in which he left his entire estate in trust for his children, the corpus to be distributed to them when the youngest reached 25. Frank died [redacted] prior to the trial of the dissolution.

Frank's will was filed for probate. Appellant petitioned to set aside the estate to herself as surviving spouse pursuant to Probate Code section 640. n2 It was stipulated that if the revocation was ineffective, the estate was minimal and would be subject to the provisions of Probate Code section 640. n3 [redacted] In appellant's petition, [redacted] respondent, estate of Frank Khan, offered to testify that he spoke to Wong two weeks after [redacted] appellant her the notice of revocation, and that she acknowledged receipt of it and said that everything was fine. Counsel for appellant objected to the proffered testimony, and the testimony was not taken. Counsel for appellant offered to [redacted] appellant testify that she never received any notice of intention to revoke and never consented to it. The court never made a formal ruling, but it stated that no claim was being made that the notice had ever been sent to appellant, thereby implying that appellant's testimony would be unnecessary. She did not testify.

- - - - -Footnotes- - - - -

n2 At the time of Frank's death, Probate Code section 640 provided: "If the decedent leaves a surviving spouse or minor child or minor children, and the net value of the whole estate, over and above all liens and encumbrances at the date of death and over and above the value of any homestead interest set apart out of decedent's estate under Section 660 or Section 661 of this code, does not exceed the sum of twenty thousand dollars (\$ 20,000), the same may be set aside to the surviving spouse, if there be one, and if there be none, then to the minor child or minor children of the decedent."

n3 Respondent asserts in its brief to this court that the only other property in the estate is an automobile worth considerably less than \$ 20,000

- - - - -End Footnotes- - - - -



~~accomplished pursuant to~~ a contrary intent, ~~the agreement would~~  
 be provided: "We reserve ~~to ourselves or either of us~~ . . . ." Such a  
 meaning cannot be read into the language actually employed. ~~Such a~~  
 enforced by the quoted language in the quit claim deeds ~~that they~~  
 make any demands on the property "as individuals."

Respondent argues that the trial court upheld the revocation on a theory of  
 ratification and estoppel. This argument does not find support in the record.  
 The trial court declined to give a statement of reasons for its decision,  
 despite the urging of counsel for both parties that such a statement was  
 essential in the light of other pending litigation between the parties. n6 To  
 the extent that the basis of the trial court's ruling is discernible, it clearly  
 is something other than a theory of ratification or estoppel. The motion was  
 based on stipulated facts and the operative documents. Counsel for appellant  
 objected to proffered testimony as to what Wong had told counsel for respondent  
 about the notice of revocation. The objection was well-taken as the testimony  
 would have been hearsay. The evidence was that Wong represented appellant in  
 the dissolution action. There was no evidence that she represented her in  
 appellant's capacity as a trustee. The court dismissed as unnecessary the offer  
 to have appellant testify. The record does not sustain the conclusion that the  
 trial court found ratification or estoppel, nor would the record have supported  
 such a finding.

- - - - -Footnotes- - - - -

n6 Since trial of the matter lasted less than a full day, and no request for  
 statement of decision was made prior to the submission of the cause, the court  
 was not obliged to give a statement of reasons. (Code Civ. Proc., § 632.)

- - - - -End Footnotes- - - - -

At the time he executed the notice of revocation, Frank and appellant were  
 engaged in dissolution litigation. The notice of revocation represented an  
 attempt by him to transmute community property into separate property in  
 violation of an existing restraining order. Given the existence of that order,  
 the pendency of the dissolution litigation, the legal ineffectuality of the  
 unilateral effort to revoke, and the fact that the record title to the real  
 estate continued to be in the name of the trustees, appellant's mere silence  
 could not act as an estoppel to enable Frank to do that which the law rendered  
 him powerless to do. *death=silence — CANNOT act as estoppel*

[\*275] The judgment is reversed.

"I"

IRMA A. CULVER et al., Plaintiffs, v. TITLE GUARANTEE AND  
TRUST COMPANY, as Trustee under an Agreement Made by MARY  
CLARK DE BRABANT and Others, Defendant.

Supreme Court of New York, Appellate Division  
First Department

269 A.D. 627; 58 N.Y.S.2d 116

November 2, 1945

FOR HISTORY:

MISSION of a controversy pursuant to sections 546-548 of the Civil Practice  
t.

ADNOTES: Trusts - revocation - (1) plaintiffs and another established inter  
vivos trust with income to one plaintiff for life, then to other and, on death  
both, principal to go as directed by third settlor or, in default of  
direction, to her daughter if living, if not, to daughter's issue; ~~revocation~~  
~~revocation reserved~~; after death of third settlor without designation of  
disponent of principal, plaintiffs, daughter of third settlor and her children  
ought to revoke trust; judgment directed for trustee - (2) two of three  
settlers of living trust may not, with consent of beneficiaries, revoke  
same after death of third - ~~section 23 of Personal Property Law~~ ~~authorizing~~  
revocation of trust upon consent of all persons interested requires consent of  
settlor - (4) where more than one settlor, consent of all essential; death of  
one confers on survivors no power to destroy trust - (5) statute requires  
consent of "creator", singular number includes plural - (6) consent of daughter  
of deceased settlor ineffective; power of revocation not descendible - (7) trust  
in property conveyed by surviving settlors may be revoked by separate instrument  
in writing.

1. Plaintiffs and another, as joint settlors, established an inter vivos  
trust of real and personal property, plaintiffs transferring to defendant  
trustee property of a certain value and the third settlor contributing a larger  
sum in cash. Under the instrument, the income was payable to one plaintiff for  
life and then to the other. if she should survive the first, and, on the death  
of both, the principal was to be turned over to those specified by the third  
settlor in writing or, in default of such direction, to the latter's daughter  
if she was then living, to the daughter's lawful issue. ~~Revocation~~  
~~revocation was reserved~~. Some years after the death of the third settlor who  
died without designating anyone to receive the principal of the trust but named  
her daughter as residuary legatee under her will, the trustee was requested to  
convey the principal of the trust to plaintiffs and the said residuary legatee,  
by a document which purported to revoke said trust and which was signed by  
plaintiffs, the daughter of the third settlor and the said daughter's two living  
children. In this submission of a controversy, judgment is directed for  
defendant trustee which refused to recognize the validity of the attempted  
revocation.

2. Two of three settlors of a living trust may not, subsequent to the death  
of the third, revoke the trust with the consent of the persons ~~beneficially~~  
interested.

3. Section 23 of the Personal Property Law (coextensive, in effect, with the Real Property Law, § 118) provides that, on written consent of all persons officially interested in a trust of personal property, or any part thereof, the settlor of such trust may revoke the same as to the whole or such part thereof, whereupon the estate of the trustee shall cease. Under this statute consent of a settlor is essential. If the approval of the beneficiaries alone is sufficient, the inalienability of their estate is destroyed and section 15 of the Personal Property Law effectively nullified.

4. ~~Nothing says the purpose to authorize the revocation of trusts jointly stated by consent of less than all the settlors. The consent of each would be required were all living and the death of one does not confer upon the others power to destroy the trust which was intended by the deceased to remain.~~

5. Furthermore, the statute itself requires the consent of the "creator" and the Legislature has declared that in all its enactments the singular number includes the plural (General Construction Law, § 35).

6. The consent of the daughter as residuary legatee under the will of the deceased settlor adds nothing. ~~A power of revocation, reserved in a will, is neither alienable nor~~

7. An instrument of revocation may be given ~~partial significance as affecting the abrogation of the trust of the property~~. As the instrument in question, however, purports to revoke the entire trust, the trustee is entitled to a writing, in proper form, revoking so much of the trust as consists of the property originally conveyed by the surviving settlors.

COUNSEL: Henry L. Kanter for plaintiffs.

William T. Griffin of counsel (Joseph V. McKee with him on the brief; attorney), for defendant.

OPINION BY: WASSERVOGEL

OPINION: [\*629] [\*117] WASSERVOGEL, J. In January, 1926, Mary Clark de Brabant and the plaintiffs, Irma A. Culver and Henry B. Culver, as joint settlors, established an inter vivos trust of real and personal property. The Culvers transferred to the defendant trustee real property and securities valued at \$60,000. Mary Clark de Brabant paid \$60,000 in cash into the trust, and, in March, 1927, contributed an additional \$40,000.

Under the trust instrument, the income is payable to Henry B. Culver for life, then to Irma A. Culver for her life, if she should survive him. Upon the death of both, the principal is to be turned over to such person or persons as Mary Clark de Brabant may by instrument in writing direct. In default of such direction, the corpus of the trust is to go to Katherine Culver Williams, the daughter of Mary Clark de Brabant, or, if she shall not then be living, to her lawful issue, per stirpes and not per capita. Upon the termination of the trust, the trustee is authorized, in its discretion, to divide the trust res among the persons then entitled, either in cash or in kind, as to the trustee may seem just. No power of revocation is reserved in the instrument.



Mary Clark de Brabant died in December, 1939, without having designated any son to receive the principal of the trust, though by her will, her daughter, Katherine Culver Williams, was named residuary legatee.

On May 19, 1945, a document purporting to revoke the trust was addressed to the trustee. It was signed by Henry B. Culver and Irma A. Culver, Katherine Culver Williams and the two living children of the latter, Louise C. Culver and Edith C. Williams. The notice requested the trustee to convey to Henry B. Culver, Irma A. Culver and Katherine Culver Williams the principal of the trust. On June 13, 1945, the trustee notified the plaintiffs' attorney that he refused to recognize the validity of this attempted revocation.

~~It is to be determined in a first instance whether one of the~~  
~~three creators of a living trust may, subsequent to the death of the third~~  
~~settlor, revoke the trust, with the consent of the persons beneficially~~  
~~interested. In the event that this may not be done, we are to decide whether~~  
~~there may be revocation [\*630] of so much of the trust as represents the~~  
~~contribution made by the surviving settlors.~~

The controversy turns upon the significance of the relevant statute (Personal Property Law, § 20, as amended, in effect, with Real Property Law, § 118): "Upon the written consent of all the persons beneficially interested in a trust of personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof."

Prior to the enactment of the statutes referred to, both living and testamentary trusts of rents and profits had been "indestructible" for almost a century (*Douglas v. Cruger*, 80 N.Y. 15, 19; *Personal Property Law*, § 15; *Real Property Law*, § 103). Once established, a trust of rents and profits could not be recalled or revoked, either by the court or the parties (*Lent et al. v. Howard et al.*, 89 N.Y. 169, 181). This restraint on the alienation of so-called "spendthrift trusts", bitterly attacked as indicative of a disastrous trend towards paternalism (*Gray on Restraints on the Alienation of Property*, p. ix), was first introduced into the law of New York in 1828 as part of the thoroughgoing revision of the statutes then undertaken.

While the revisers noted that "the power of the owner to fetter the alienation" of estates "should be confined within certain limits" (3 Rev. Stat., 1st ed., 570), recognition was nevertheless extended to the legitimate purposes of the settlors of trusts to provide for the education of minors, the separate use of a married woman, or the support of spendthrifts. As to such trusts, the interest of the beneficiary was to be inalienable (Rev. Stat. of N.Y., 1st ed., 1st II, ch. I, tit. II, § 63). The indestructibility of these estates was the inevitable result of the inalienable character thus impressed upon them by statute. As was said in *Lent et al. v. Howard et al.* (89 N.Y. 169, 181, per *ANDREWS, Ch. J.*): "Whatever view may be taken of the general jurisdiction of courts of equity, in the absence of any statutory or legislative policy, to brogate continuing trusts, created for the purpose of providing a sure support for the widow or children of a testator, or other beneficiary, the indestructibility of such trusts here, by judicial decree, results, we think, from the inalienable character impressed upon them by statute."

It was apparent that the salutary purpose for which the inalienability of trusts had been enacted into law was exceeded by the consequences of the isolation. The mischief had been [\*631] outstripped by the remedy and a new difficulty created. The legislative purpose had been to enable [\*\*119] the settlor to provide a "sure support" for the natural objects of his bounty. It had not been intended to render forever unalterable a provision once made, where change seemed advisable in the view of all concerned, including the settlor upon whose judgment and discretion the original arrangements rested (3 Scott on trusts, | 338).

Against this background, the intent of section 23 of the Personal Property Law is unambiguous. The settlor, with the consent of the beneficiaries, was authorized to revise his original dispositions. But the consent of the settlor was clearly a cardinal requirement. If the approval of the beneficiaries alone was to suffice, then the inalienability of their estates is destroyed and section 23 of the Personal Property Law effectively nullified.

~~The question here stems from the fact that the settlor, by the terms of a trust instrument, a power of revocation has been reserved to the joint settlors of a trust, all must concur in the execution of the instrument to effect revocation. Where death has intervened the will of one attempted revocation by the survivors is a nullity; Blomon's Trust Estate, 332 Pa. 462; Clark v. Freeman, 121 N.J. Eq. 35; Richardson v. Stephenson, 193 Wis. 89; Noble v. Rogan, 49 F. Supp. 370; Croker v. Croker, 117 Misc. 558).~~

~~Nothing in the origin of the legislation, however, considered the possibility of the settlor's power to authorize the revocation of a trust by the consent of less than all the settlors. Clearly, the consent of each would be required, if all living. It does not appear how the death of one operates to confer on the others a power to destroy the trust the deceased intended to subsist.~~

~~This result, too, follows from the statute itself, which requires the consent of the "creator". The Legislature has declared that in all its enactments the singular number includes the plural (General Construction Law, | 35).~~

The consent of Katherine Culver Williams, as residuary legatee under the will of the deceased settlor, adds nothing. A power of revocation, reserved in a trust instrument or arising by operation of law, is neither alienable nor assignable. (See Restatement, Trusts, | 338, Comment a; Jones v. Clifton, 101 S. 225, 230.)

A different question is presented by the suggestion that the instrument of revocation may be given partial significance as effecting the abrogation of the trust of the property conveyed [\*632] by the surviving settlors. Here the purpose of the statute is accomplished, since the consent of those who made the disposition is obtained. On this point the parties are in agreement and authority for this determination may be found in Guaranty Trust Co. of New York v. Armstrong (43 N.Y.S. 2d 897, affd. 268 App. Div. 763, 294 N.Y. 666).

[\*\*120] The instrument of revocation, however, purports to revoke the entire trust. The defendant trustee is entitled to a writing, in proper form, revoking so much of the trust as consists of the property originally conveyed by the surviving settlors.

Judgment is directed for defendant, with costs.

MARTIN, P.J., DORE, COHN and CALLAHAN, JJ , concur.

Judgment unanimously directed for defendant, with costs. Settle order on ice.

"J"

IRMA A. CULVER et al., Respondents, v. TITLE GUARANTEE AND TRUST COMPANY, as Trustee under an Agreement Made by MARY CLARK DE BRABANT and Others, Appellant.

Court of Appeals of New York

296 N.Y. 74; 70 N.E.2d 163

Argued October 7, 1946.

November 21, 1946, decided

HISTORY:

v. Title Guar. & Trust Co., 270 App. Div. 394, reversed.

by permission of the Court of Appeals, from a unanimous judgment of the  
late Division of the Supreme Court in the first judicial department,  
dated March 15, 1946, upon the submission of a controversy pursuant to  
Sections 546-548 of the Civil Practice Act.

POSITION: LOUGHRAN, Ch. J., LEWIS, DESMOND, THACHER, DYE and FULD, JJ.,  
J.

gment accordingly.

OTES: Trusts - revocation - (1) plaintiffs and another created trust with  
e to one plaintiff for life, then to other and, on death of both, principal  
as third settlor should direct in writing and, in default of direction, to  
s daughter if living and, if not, to daughter's issue; no such  
ation made; after death of third settlor, plaintiffs sought to revoke  
as to share representing their contribution and settlor's daughter and her  
consented thereto; judgment in favor of plaintiffs reversed - (2)  
tion by less than all of trust settlors, where one is dead, not authorized  
itions 23 of Personal Property Law and 118 of Real Property Law, permitting  
or" of trust to revoke in certain cases - (3) deceased settlor should not,  
brived of right to refuse consent to total or partial revocation - (4)  
to revoke given by statutes to "creator" of trust to be construed in  
meaning of the settlors (General Construction Law, § 35) - (5) Guaranty  
Co. v. Armstrong (294 N.Y. 666), distinguished.

Plaintiffs and another, as joint settlors, created a trust and delivered defendant trust company, as trustee, certain real and personal property, the income from which was to be paid to one plaintiff for life, then to the other if she should survive the first and, on the death of the survivor, the principal was to be paid to such person as the third settlor might direct in writing and, in default thereof, to the latter's daughter or, if the daughter be dead, to the daughter's issue per stirpes. The third settlor failed to make such designation. Several years after such settlor's death plaintiffs served notice on defendant trustee purporting to revoke the trust as to the fractional share of the assets representing their contribution to which the deceased settlor's daughter and the latter's two adult daughters, her only children, consented. To the submission of this controversy to determine the right of plaintiffs to partial revocation of the trust agreement, judgment in their favor should be reversed.

Sections 23 of the Personal Property Law and 118 of the Real Property Law provide that, on the written consent of all persons beneficially

vested in a trust or any part thereof, "the creator of such trust may revoke same" as to the whole or such part thereof, ~~as he may authorize partial~~  
~~revocation by less than all of the settlors where one of several joint settlors~~  
~~had and the survivors attempt to revoke only as to their own contribution,~~

~~For all of the joint settlors living, the consent of each to revoke~~  
~~in whole or in part would be necessary and there appears to be equal~~  
~~power for forbidding either whole or partial revocation when one of them is~~  
~~The deceased settlor should not be deprived of her right to refuse to~~  
~~consent;~~

Under section 35 of the General Construction Law "words in the singular  
include the plural" and the word "creator" in the sections quoted above  
be read as meaning all of the settlors who make an agreement such as this.  
~~all must join to effect partial revocation.~~

The case of Guaranty Trust Co. v. Armstrong, 244 N.Y. 666 wherein this  
Court upheld the revocation of a trust by the surviving settlor, as to the one  
of the trust property contributed by her, is not in conflict. In that case  
two settlors, a husband and wife, retained in themselves complete control  
of the funds during their joint lives and vested in the survivor complete  
beneficial interest during life, together with all remainder and reversionary  
interests therein; No remainder had been there created as in the instant case  
where a vested remainder in the daughter of the third settlor came into  
existence on the death of her mother. Furthermore, in that case the deceased  
settlor had no power under the agreement to dispose of the principal of the  
trust by will as that was granted only to the survivor.

NSEL: William T. Griffin and Joseph V. McKee for Appellant. I. Proper  
Constructive construction compels the conclusion that the term "creator" as used in  
the statutes means all the settlors when there are more than one. (Personal  
Property Law, § 23; Real Property Law, § 118.) II. The trust indenture in suit  
is not only a trust agreement between the settlors and the trustee, but also a  
contract between the settlors. Personal Property Law (§ 23) and Real Property  
Law (§ 118) do not apply to such contracts, and partial revocation by one  
settlor of his contribution is not permitted without the other settlors'  
consent. (Rastetter v. Hoenninger, 214 N.Y. 667.)

Henry L. Kanter for respondents. I. The notice of November 17, 1945, was  
sufficient to revoke the trust created by the agreement dated January 29, 1926  
as to 60/100ths thereof. (Personal Property Law, § 23; Waters & Co. v. Gerard,  
9 N.Y. 302; Bryan v. Knickerbocker, 1 Barb. Ch. 409; Haines v. Healy, 15 Barb.  
3; Graff v. Bonnett, 31 N.Y. 9; Matter of Wentworth, 190 App. Div. 829, 230  
N.Y. 176; Smith v. Title Guarantee & Trust Co., 287 N.Y. 500; People ex rel.  
Y.C.R.R. Co. v. Woodbury, 208 N.Y. 421; O'Hagan v. Kracke, 155 Misc. 4, 253  
App. Div. 632; Hoskin v. Long Island Loan & Trust Co., 139 App. Div. 258, 203  
N.Y. 588; Smith v. Title Guarantee & Trust Co., 287 N.Y. 500; Baker v. Fifth  
Avenue Bank of New York, 225 App. Div. 238; Guaranty Trust Company of New York  
v. Armstrong, 43 N.Y.S. 2d 897, 268 App. Div. 763, 294 N.Y. 666; Doctor v.  
Ghes, 225 N.Y. 305; Aranyi v. Bankers Trust Co., 201 App. Div. 706.) II. No  
question of contract obligation is involved. (Van Cott v. Prentice, 104 N.Y.  
3; Streat Coal Co., Inc., v. Frankfort Gen. Ins. Co., 237 N.Y. 60; Rose v.  
Hastol, 174 App. Div. 15; Ward v. Union Trust Co., 172 App. Div. 569; City of  
New York v. Interborough R.T. Co., 257 N.Y. 20; Schwartz v. Fulton Trust Co.,  
9 Misc. 831.)

ICNEY: CONWAY

ION: [\*76] [\*\*\*194] CONWAY, J. In January, 1926, one Mary Clark de Brabant as party of the first part, the plaintiffs as parties of the second part and the defendant trust company as party of the third part entered into an agreement in writing under which Mary Clark de Brabant paid and delivered to the defendant \$50,000 in cash and the plaintiffs paid and delivered real and personal property of the stated value of \$60,000, in trust, to collect the same and to pay it to one plaintiff for life, then to the other if she should survive the first and, on the death of the survivor, to pay over and deliver the principal to such person or persons as Mary Clark de Brabant might by an instrument in writing direct and, in default of such direction, to her daughter, Katherine Culver Williams, or if she should not at that time be living then to the lawful issue of Katherine Culver Williams per stirpes.

Subsequently Mary Clark de Brabant added to the trust the further sum of \$10,000 pursuant to an option to increase the principal contained in one of the paragraphs of the agreement.

In 1939 Mary Clark de Brabant died leaving a will in which her daughter, Katherine Culver Williams, was named as residuary legatee. She did not during her lifetime designate any person or persons to receive the principal of the trust.

On the 17th day of November, 1945, Katherine Culver Williams and two adult daughters, her only issue, were alive. On or about that date a notice was served upon the defendant whereby the plaintiffs as two of the creators of the trust purported to revoke it as to the 50/160ths fractional share of the assets representing their contribution and Katherine Culver Williams and her two daughters consented thereto.

[\*77] ~~This~~ is thus presented for determination ~~the question whether~~ Personal Property Law, section 23, and Real Property Law, section 118, permit partial revocation by less than all of the settlors ~~in the absence of~~ [165] joint settlors is dead and the surviving settlors ~~to revoke~~ ~~the trust~~ their own contribution.

Personal Property Law, section 23, and Real Property Law, section 118, so far as any construction is necessary here, are substantially the same. The former reads as follows: "§ 23. Revocation of trusts upon consent of all persons interested.

"Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof."

When, originally, an attempt was made to revoke this trust in its entirety, the Appellate Division properly directed judgment for the defendant (see *Guar. & Trust Co.*, 269 App. Div. 627) and pointed out in the course of its opinion, citing cases, that, were there no applicable statutes and had a power of revocation been reserved to the joint settlors of the trust, ~~in the~~ ~~the~~ case here - all would be required to join in the revocation and ~~that~~ ~~the~~ ~~trust~~ ~~had~~ ~~occurred~~ ~~as to one~~ ~~the~~ ~~survivors~~ ~~would be unable to effect it~~ ~~the~~

~~which that a different rule has been made applicable to the~~  
~~ed to where revocation is sought by the surviving settlors~~ were all of  
joint settlors living, the consent of each to a revocation either in whole  
part would be necessary. There appears to be equal reason for forbidding  
or partial revocation when one of them is dead and may not be heard. The  
deceased settlor may have departed this life secure in her belief that she had  
arranged her affairs that her daughter would be benefitted, if alive, by the  
gift of a principal sum contributed not only by her but by other settlors and  
if her daughter were not alive her grandchildren would receive such  
fit. We think it fairer and more in consonance with legislative intent not  
to deprive her by reason of her death of her right to refuse [\*78] to  
consent to partial or total revocation. If the Legislature desires to provide  
otherwise it may do so by explicit enactment. The two property statutes to  
which we have made reference use the word "creator". By General Construction  
section 35 "words in the singular number include the plural, and in the  
plural number include the singular." We read the word "creator" in the statutes  
meaning all of the settlors who make an agreement such as the one presented.  
Thus all must join to effect partial or total revocation.

The case of Guaranty Trust Co. v. Armstrong (294 N.Y. 666) is not in conflict  
with these views. There a husband and wife transferred property to the  
plaintiff trust company to be held in trust under an agreement by which the  
trustee was to pay over the income "to the parties of the first part jointly  
during their lives, and upon the death of, either, to the survivor of them  
during his or her life." The settlors agreed that the trust might be terminated  
any time by them during their joint lives, authorized the trustee to retain  
dividends and securities in which the trust fund might be invested when delivered to  
and limited the power of the trustee to sell such securities to instances  
where written consent was obtained by it from both parties during their joint  
lives, or thereafter, from the survivor. The agreement further provided that  
the principal should be distributed upon the death of the survivor as directed  
in his or her last will and testament. It then read: "If the survivor shall  
fail to dispose of the said trust fund by his or her last will and testament,  
the trust fund shall go to and be distributed among his or her next of kin in  
accordance with the Statute of Distributions of the State of New York." In other  
words the two settlors retained in themselves complete control of the funds  
during their joint lives and vested in the survivor, during his or her life,  
the principal together with all remainder and reversions in the trust  
interest. After the death of her husband the surviving wife purported by  
instrument to revoke the trust under section 23 of the Personal Property Law as  
to the one half of the trust property contributed by her. No remainder had been  
previously created as in Whittemore v. Equitable Trust Co. (250 N.Y. 298) and in  
Matter of Blake v. Guaranty Trust Co. (280 N.Y. 43) or as in the instant case where a  
vested remainder in the daughter of Mary Clark de Brabant came into existence  
[9] upon the death of her mother. The deceased settlor had had no power  
under the agreement to dispose of the principal of the trust by last will and  
testament. That was granted only to the survivor. Clearly with respect to the  
deceased settlor's contribution this was not a "spendthrift trust" within the  
contemplation of Personal Property Law, section 15 (Schenck v. Barnes, 156 N.Y.  
5; Matter of Blake, 226 App. Div. 580, affd. 252 N.Y. 613) and that statute  
expressly authorized alienation of her beneficial interest therein. We held the  
revocation to be a valid one; that the surviving wife had a reversion in that  
portion of the corpus of the trust contributed by her, as a person in,  
and beneficially interested therein (indeed she had never relinquished complete  
control of it) and thus was entitled in her own right to demand and receive



return of that which she had contributed (see Doctor v. Hughes, 225 N.Y. Matter of Scholtz v. Central Hanover Bank & Trust Co., 225 N.Y. 488; Central Park Bank v. Billings, 144 App. Div. 536, 541, affd. on opinion below N.Y. 556; Wells v. Squires, 117 App. Div. 502, affd. upon opinion of SCOTT, 191 N.Y. 529; Matter of Bloodgood, 184 App. Div. 798, 801).

The judgment should be reversed and the matter remitted to the Appellate Division for proceedings not inconsistent with this opinion, with costs in this Court and in the Appellate Division payable to the defendant out of the fund.

"K"

VIVIAN HILL, Individually and as Executrix, etc., Appellant,  
v. NAOMI CONOVER, Respondent

Civ. No. 24780

Court of Appeals of California, Second Appellate District,  
Division One

191 Cal. App. 2d 171; 12 Cal. Rptr. 522

April 13, 1961

SEQUENT HISTORY: A Petition for a Rehearing was Denied May 5, 1961, and Appellant's Petition for a Hearing by the Supreme Court was Denied June 6, 1961.

OR HISTORY:

Appeal from a judgment of the Superior Court of Los Angeles County. Joseph M. Ball, Judge.

Action to have a trust agreement declared invalid, to have it declared to have been revoked, to quiet title to property referred to in trust agreement, to rescind and cancel such agreement.

POSITION: Affirmed. Judgment for defendant affirmed.

COUNSEL: Arthur D. Guy and Charles F. Legeman for Appellant.

Ball, Hunt & Hart and Clark Heggeness for Respondent.

JUDGES: Wood, P. J., Fourt, J., and Lillie, J., concurred.

WRITING: WOOD

FACTS: [\*172] [\*523] Plaintiff sought a judgment (1) that a trust agreement made by M. O. Conover and his wife, defendant Naomi Conover, was valid, (2) that the trust agreement had been revoked by Mr. Conover, (3) that the trust agreement was of no force and effect for the reason that it was induced by the fraud and undue influence of defendant, and (4) that plaintiff's title to the trust agreement property be quieted.

Judgment was in favor of defendant.

[\*173] Plaintiff appeals from the judgment and contends, among other things, that certain findings are not supported by the evidence.

On July 14, 1941, M. O. Conover and Naomi Trolinger entered into a prenuptial agreement which stated that Mr. Conover thereby conveyed to Naomi a market building in Twin Falls, Idaho, a cocktail bar in Long Beach, California (known as the Crystal Bar), a bank account of approximately \$ 2,500, a 1940 Buick automobile, and a policy of life insurance in the amount of \$ 1,000. The agreement provided further that in the event Naomi did not marry Mr. Conover, the agreement would be of no force and effect; that the conveyance was conditioned upon the agreement of Naomi to pay to Mr. Conover's daughter, Vivian Laird (now Vivian Hill), the sum of \$ 8,000 in four equal annual installments commencing one year after the death of Mr. Conover; that Mr.

ver, during his lifetime, should have control of, and the income from, all property, except that Naomi should have control of the cocktail bar and the right to dispose of the bar and the revenue therefrom. The property referred to in the agreement was all the property which Mr. Conover owned, or in which he had an interest, except a half interest in a ranch in Idaho. On the same day, April 14, 1941, Mr. Conover executed a deed whereby he conveyed the market building in Idaho to Naomi. That deed was not recorded. On July 17, 1941, a few days after the execution of the trust agreement, they were married in Las Vegas, Nevada. At that time he was 70 years of age and she was 44 years of age. He had two daughters by a previous marriage -- Thelma Greenhall and Vivian Laird (Vivian Hill). Naomi had a son by a previous marriage.

The Crystal Bar had been purchased by Mr. Conover in May 1941. According to the testimony of Vivian Hill (plaintiff), the purchase price of the bar was \$10,000; she lent Mr. Conover \$3,500 for use in purchasing the bar; he repaid the loan about a year later. According to the testimony of Naomi, she and Mr. Conover borrowed about \$5,000 from her sister for use in purchasing the bar.

After the marriage, and prior to April 1945, Mr. Conover and Naomi purchased several parcels of real property. Title to those parcels was taken in the name of Naomi as her separate property. According to Naomi's testimony, the first parcel (dwelling house) was purchased by paying \$500 of her own money as a down payment and by using income from the [\*174] Crystal Bar. The second parcel (dwelling house) was purchased with the proceeds from the sale of the first parcel and with money from a joint account. The third parcel (apartment house) was acquired by an exchange of the second parcel. The other parcel (service station) was purchased with money from a joint account. The money in the joint account was income from the Crystal Bar and "income from Twin Falls."

About April 10, 1945, the market building in Idaho was sold for \$27,500, and the proceeds from the sale were deposited in Mr. Conover's bank account in Idaho. On April 10, 1945, Mr. Conover gave Naomi a check (on that bank account) for \$1,000. On April 11, 1945, Mr. Conover, as purchaser, and Irwin Stevens, seller, signed escrow instructions regarding the purchase and sale of property in Long Beach, hereinafter referred to as the Apple Valley property. The purchase price of the property was \$35,000, which was payable as follows: \$10,000 through the escrow, and the balance by a note for \$25,000 secured by a first deed on the property. The escrow instructions provided that title to the property [\*\*524] was to be vested in Mr. Conover as his separate property. On April 13, Mr. Conover and Naomi signed an amendment to those instructions, which amendment provided that title to the property was to be vested in Mr. Conover, "a married man." On April 19, Mr. Conover gave the bank, as escrow agent, a check (on the bank account in Idaho) for \$25,000. Mr. Conover executed a note in the amount of \$25,000 and executed a trust deed on the property to secure the note. The note represented the balance of the purchase price. (The record does not show whether Naomi also signed the note and the first deed. Naomi states in her brief that the trust deed was "executed by both parties," apparently meaning Mr. Conover and Naomi.) The Apple Valley property consists of a commercial building and a parking lot. At the time Mr. Conover purchased the property it was rented to a firm engaged in the cleaning and janitorial business. On July 31, 1945, Mr. Conover, as lessor, leased the property for a term of five years for use as a restaurant, cocktail bar, and parking lot. According to Naomi's testimony, \$5,000 was paid from the joint account for improvements on the building at that time.

On April 1, 1946, Mr. Conover made a will by the terms of which he gave the Apple Valley property to his daughter Vivian (plaintiff), gave \$ 100 "out of the value" of the Apple Valley property to his daughter Thelma, and gave the remainder [\*175] of his estate "including my [his] interest in the Crystal Bar to Naomi. The will included the following statement: "SIXTH: I further declare that the property particularly described herein is my sole and separate property." He also stated therein that Thelma "has been provided for by County land [the ranch] in Twin Falls, Idaho." The Bank of America was named as executor of that will, and Julian Van Dyke (who prepared the will) was named as attorney for the executor.

Sometime between April 1, 1946 (the date of the will referred to above), and August 12, 1946, Mr. Conover and Naomi purchased property referred to in the wills as the Army and Navy Club. Title to that property was taken in the name of Naomi as her separate property. According to Naomi's testimony the property was purchased with money received from sales of the Crystal Bar and the apartment house referred to above.

On December 12, 1946, Mr. Conover made a new will by the terms of which he gave the Apple Valley property to Vivian, and directed her to pay \$ 100 to Thelma "out of the value" of that property, and he gave the remainder of his estate to Naomi. Vivian was named as executrix of that will. He also stated therein that Thelma "has been provided for by County land [the ranch] in Twin Falls, Idaho."

Late in 1947, Naomi learned that Mr. Conover had executed the wills referred to above, and she "ordered" him to leave their residence. He left the residence and lived in an apartment for several months. According to Naomi's testimony, he visited her every day during the time he was living in an apartment. After several months he returned to the residence. The record is not clear as to the date he returned.

On December 10, 1948, Mr. Conover made a new will by the terms of which he gave an undivided one-half interest in the Apple Valley property to Vivian, gave an undivided one-half interest in that property to Naomi, and gave the remainder of his property to Vivian and Naomi, "share and share alike." Vivian and Naomi were named as executrices of that will. The will included the following statement: "I declare that all property of which I die possessed is my separate property." He also stated therein that he omitted to provide for Thelma for the reason he had made gifts of substantial value to her during his lifetime.

On February 2, 1949, Mr. Conover moved from the family residence to an apartment. According to Naomi's testimony, [\*176] she ordered him to leave the house because he had been to Idaho and he "did not keep his word" and [\*525] "put the name back on the checking account" (apparently the checking account in Idaho).

On February 4, 1949, he made a codicil to the 1948 will. Under the terms of that codicil, he gave to Naomi the income from the Apple Valley property for a period of three years after his death, and he confirmed the December 10, 1948, will as modified by the codicil.

On May 5, 1949, Mr. Conover and Naomi executed a deed conveying the Apple Valley property to Mr. Conover and Naomi as trustees. On that same day they executed a declaration of trust which provided that they should jointly manage

control the trust property; that after the death of either trustee, the survivor should manage and control the property; that during the lifetime of Mr. Conover the trustees should use the income from the property for the payment of taxes, costs of maintenance, and payments of principal and interest on any encumbrances then, or thereafter placed, against the property; that after the payment of the items last referred to, the balance of the income should be paid to Mr. Conover as his separate property. The declaration of trust provided further that upon the death of either trustee, the surviving trustee should be vested with the rights of both trustees and should terminate the trust and distribute the trust estate as follows: In the event Mr. Conover was the survivor he should "execute and deliver to the administrator or executor of the estate" of Naomi the promissory note of "said trustee" and Mr. Conover in the sum of \$ 10,000 payable in three equal annual installments commencing one year after the death of Naomi. The note should be secured by the entire trust estate, and "thereupon" the trustee should convey and transfer all the trust estate to Mr. Conover. "In the event the said Naomi Conover shall be the survivor the said trustee shall execute and deliver to Vivian Hill, the daughter of said M. O. Conover, if said Vivian Hill shall be then surviving, and if she shall not be then surviving then to Shirley Greenhalgh and Helen Greenhalgh [Greenhalgh], the grandchildren of said M. O. Conover, the promissory note of the said trustee and of the said Naomi Conover in the total principal amount of \$ 10,000, . . ." The note should be secured by the entire trust estate, and thereupon the trustee should convey and transfer all the trust estate to Naomi. Upon the death of either trustor, the surviving trustee might, [\*177] but should not be required to, use any of the assets or proceeds of the trust estate for the payment of any debts of such deceased trustor which the surviving trustee might elect to pay. All expenses of litigation and attorney's fees, incurred by the trustees or either of them in connection with the administration and interpretation of the declaration or the rights of the parties under the agreement, should be a charge against the trust estate.

Naomi testified as follows: Mr. Conover suggested, prior to the time that the trust agreement was made, that she see Mr. Farr, an attorney in Los Angeles. She saw Mr. Farr and told him that she and Mr. Conover wanted "this property [the Apple Valley property] fixed where neither one -- we will be able to be in to both." Mr. Farr prepared an agreement and mailed it to them. Mr. Conover objected to said agreement for the reason that a provision that he was to have the income from the property during his lifetime had been "left out" of the agreement. On May 5, 1949, they went to Mr. Farr's office and signed the agreement after it had been redrawn to include the provision regarding income. Thereafter, checks for the rental of the property were deposited by Mr. Conover into the joint bank account.

Joseph A. Ball, called as a witness by plaintiff testified that he met Mr. Conover in 1946, and he rendered legal services for him and Naomi at various times after that date "within a year" after the trust agreement was executed they were in his office and Mr. Conover described the trust agreement briefly to him; about a week later, Mr. Conover came to the office alone and [\*526] brought a copy of the trust agreement with him. Defendant's attorney asked Mr. Ball questions regarding the conversation between Mr. Ball and Mr. Conover. Plaintiff objected to the questions on the ground that the conversation would be hearsay evidence. The objection was sustained.

On June 30, 1950, Mr. Conover made another codicil to the 1948 will. In that codicil he stated that it was his wish, and he requested, that his body be

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at Twin Falls, Idaho; that except as modified by that codicil, he  
formed and republished the 1948 will and the 1949 codicil to that will.

On April 8, 1952, a policy of fire insurance covering the building on the  
Apple Valley property was issued to Mr. Conover. Prior to April 1955, the  
following endorsement or amendment was attached to that policy: "It is  
understood and agreed that the name of the insured under this policy [\*178]  
is hereby corrected to read as follows: 'M. O. and Naomi Conover, trustees, May  
1949, recorded July 29, '53.'" In 1955 Mr. Conover obtained a new policy of  
insurance on the building. M. O. and Naomi Conover, as trustees, were named as  
"insureds" under that policy. Naomi testified that the premiums on the  
policies were paid from the joint account.

In 1953 Naomi sold "100 feet" (a substantial part) of the Army and Navy Club  
property to Vivian Hill (plaintiff). Naomi testified that she and Mr. Conover  
paid "\$ 100,000 or more" on the Army and Navy Club property.

On November 17, 1956, Mr. Conover died. The will of December 10, 1948, and  
codicils of February 4, 1949, and June 30, 1950, were admitted to probate.  
Naomi declined to act as an executrix, and Vivian was appointed executrix.  
Thereafter Naomi offered to pay to Vivian "the first installment" of the \$  
100,000 which under the trust agreement was payable by Naomi to Vivian. Vivian  
refused to accept the offer, and on April 11, 1957, she commenced this action.

There were four causes of action in the complaint. In the first cause of  
action plaintiff sought a judgment declaring the trust agreement invalid. In  
the second cause of action plaintiff sought a judgment declaring that Mr.  
Conover had revoked the trust agreement by the 1950 codicil. In the third cause  
of action, plaintiff sought to quiet title to the property referred to in the  
first agreement. In the fourth cause of action, plaintiff sought to rescind and  
cancel the trust agreement.

The court found as follows: The Apple Valley property was not acquired and  
owned by Mr. Conover as his separate property but was acquired by the use of the  
separate property of Naomi and the community property of Mr. Conover and Naomi,  
and it was thereafter held by Mr. Conover and defendant as community property  
until May 5, 1949. (The date the trust agreement and deed were executed.) Mr.  
Conover did not revoke or rescind the grant deed conveying the property to Naomi  
and him as trustees, and he did not revoke the trust agreement. The trust  
agreement is valid, and by reason of the death of Mr. Conover Naomi will own the  
Apple Valley property as her separate property after paying the sum of \$ 10,000  
to Vivian as provided in the trust agreement. After the execution and delivery  
of the trust agreement, M. O. Conover collected the rents from the property but  
did not remain in exclusive possession of the property. All rents from said  
property were treated and considered by Mr. Conover [\*179] and Naomi as  
community property. After the execution of said documents, Mr. Conover did not  
claim or intend to hold said property as his separate property and exclude Naomi  
from all right to the property. The grant deed and the trust agreement are not  
testamentary in character, and those documents were intended by Mr. Conover and  
Naomi "to become, and were, operative during their lifetime." The trust  
agreement and deed are not ambiguous, uncertain, or unintelligible, and the  
beneficiaries can be ascertained "during the lifetime" of Mr. Conover and Naomi.  
The last will and testament and codicils of Mr. [\*527] Conover did not  
revoke the deed or trust agreement. "Defendant [Naomi] never harbored any  
intent, secret or otherwise, to divest M. O. Conover of any property owned by

Defendant did not misrepresent any facts to M. O. Conover, did not exert undue influence upon M. O. Conover and did not take any advantage of M. O. Conover." Within one year after the execution of the trust agreement Mr. Conover sought legal advice concerning said grant deed and trust agreement and he knew the contents and legal effect thereof.

The judgment was as follows: The grant deed and the trust agreement are hereby annulled; upon the payment by Naomi of \$ 10,000 to Vivian Hill (plaintiff), "individually," or by the deposit of said sum in any bank "in favor of" Vivian Hill before November 17, 1959, Naomi shall convey the Apple Valley property to herself as her separate property; upon payment of \$ 10,000 by Naomi to Vivian Hill, Vivian shall have no further interest in the property; Vivian, "individually, or as executrix of the estate of M. O. Conover, shall recover nothing further from defendant Naomi Conover"; defendant shall recover her costs against Vivian, "individually, and as executrix.

Appellant contends that the trust agreement is invalid for the reason that M. O. Conover and Naomi were trustors, trustees, and beneficiaries of the trust. Appellant states that it is fundamental that a person cannot be trustor, trustee, and beneficiary of his own trust. In Fry v. McCormick, 170 Kan. 741 [228 P.2d 727], the plaintiffs sought to set aside an oil lease which they had executed as trustees. In affirming a judgment for defendant, it was said: "Appellants' main contention is the trust agreement is invalid because it appoints the trustors of the property as the trustees thereof. They insist a sole beneficiary of a trust cannot be the sole trustee thereof and conversely that a sole trustee of a trust cannot be the sole beneficiary thereof, citing Restatement, Trusts, § 99(5) and § 115(5). That statement need not be labored. It is sound. It is based on the established principle that if the rule were otherwise the legal title and the entire beneficial interest would be merged in the same person who could fully dispose of the property as any other owner. In other words there would be no separation of the legal and beneficial interest and hence no trust relationship.

"That, however is not true under the terms of the present instrument. Here there are four trustees. True they are also beneficiaries but each is a trustee only of his own beneficial interest but also for the beneficial interest of each of the others. Here each of the beneficiaries has an equitable interest which is separate from the legal interest held by the whole group. No one of the trustees without the concurrence of the others could properly transfer an undivided legal interest in the property free of the trust. The same sections of the text from Restatement on Trusts relied upon by appellants state the rule applicable to the present case. Section 99(4) reads: 'If there are several beneficiaries of a trust, the beneficiaries may be trustees.'

"In § 115(4) the principle is stated conversely as follows: 'If there are several trustees of a trust, the trustees may be beneficiaries of a trust.'"

In the present case there were two trustees, Mr. Conover and Naomi. Neither trustee was sole beneficiary, and the legal title and the entire beneficial interest in the property was not merged in them or in either of them. Mr. Conover was to receive the net income from the property during his lifetime. Either trustee could have transferred the property without the concurrence of the other trustee. The trust was to terminate upon the death of either trustee. The surviving trustee could not properly transfer the property, or interest therein, free of the trust prior to the execution of the note referred to in



agreement. The persons who were to receive the note, Vivian, if Mr. Conover first, and Naomi. There was no merger of the legal and equitable titles.

Appellant contends that the trust agreement is invalid for the reason that it is testamentary in nature and [\*181] it was not subscribed by two witnesses. She argues that the evidence and the agreement "overwhelmingly demonstrated" that Mr. Conover and Naomi intended that the agreement should take effect only at the death of one of them. In connection with that argument she refers to the following provisions of the agreement: Mr. Conover was to receive the net income from the property during his lifetime; he and Naomi were to manage and control the property; the survivor was to receive the property and execute a deed for \$ 10,000 (payable to Vivian in the event Mr. Conover died, or payable to the representative of Naomi's estate if Naomi died). In *Nichols v. Emery*, Cal. 323 [41 P. 1089, 50 Am.St.Rep. 43], it was said, at page 330: "[To] the creation of a valid express trust it is essential that some estate or interest shall be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. [Citation.] In such a trust, therefore, something of the settler's estate has passed from the settler and into the trustee for the benefit of the cestui, and this transfer of interest is a present one and is nowise dependent upon the settler's death. But it is important to note the distinction between the interest transferred and the payment of that interest. The enjoyment of the cestui may be made to commence in the future and depend for its commencement upon the termination of an existing life or lives or of an intermediate estate." In the present case, Mr. Conover and Naomi executed a grant deed conveying the property to themselves as trustees. The entire legal estate in the property passed to them as trustees. The provisions of the trust agreement that the trustees were to pay the net income from the property to Mr. Conover during his lifetime, that Mr. Conover and Naomi were to manage the property, and that the survivor was to receive the property upon the execution of a note as referred to in the agreement, did not make the trust agreement testamentary. There was an immediate transfer of legal title. Furthermore, the provisions of the deed (conveying the property to Mr. Conover and Naomi as trustees), the amendment of the fire insurance policy issued in 1952, changing the name of the insured from Mr. Conover to the trustees, and the new policy (issued in 1955, naming the trustees as "the insured"), constituted substantial evidence that Mr. Conover and Naomi intended that the deed and the trust agreement should become effective immediately.

[\*182] Appellant contends that Mr. Conover revoked the trust agreement by executing the codicil of June 30, 1950. She argues to the effect that since Mr. Conover owned the Apple Valley property as his separate property when the trust agreement was made, he was the only trustor and therefore he could revoke the trust agreement; that since the codicil of June 30, 1950, reaffirmed the will of September 10, 1948, wherein he gave the Apple Valley property to appellant (Vivian) and Naomi, the effect of the codicil was to dispose of the property contrary to the provisions of the trust agreement and to revoke that agreement. There was evidence that the Apple Valley property was of record in the name of Mr. Conover, a married man, when the trust agreement was made. There was also evidence that the purchase price of the property was \$ 35,000; that \$ 25,000 of that amount was paid from the proceeds of the sale of the market building in which Mr. Conover had transferred to Naomi under the prenuptial

ement; that the balance of the purchase price (\$ 10,000) was represented by ste and trust deed; that rentals from the Apple Valley property were osited in the joint bank account; and that payment of \$ 5,000 for ovements on the property and payments on [\*520] the note were made from . account. The court found that the Apple Valley property was not acquired fr. Conover as his separate property but was acquired by the use of the irate property of Naomi and the community property of Mr. Conover and Naomi. evidence above stated was substantial evidence to support that finding. tion 2280 of the Civil Code provides: "Unless expressly made irrevocable by nstrument creating the trust, every voluntary trust shall be revocable by rustror by writing filed with the trustee. When a voluntary trust is oked by the trustor, the trustee shall transfer to the trustor its full title he trust estate." Mr. Conover was not the only trustor; he and Naomi were trustors named in the trust agreement and they were the trustees. There was evidence that Naomi signed any document revoking the trust agreement or that Conover gave her the original or a copy of the codicil of June 30, 1950, or t he "filed" any writing with her revoking the agreement. The trust eement and deed were executed in 1949. Mr. Conover died in 1956. There was evidence that Mr. Conover or Naomi, as trustees, or otherwise, transferred property, or any interest therein, to Mr. Conover or to Naomi or to any one e. after the trust agreement was executed.

[\*183] Furthermore, Mr. Ball testified regarding the execution of the icil of June 30, 1950, as follows: Mr. Conover came to Mr. Ball's office and d that he and his wife were going to Central America; if he died down there wanted to be buried in Twin Falls; he wanted it in writing; he wanted to make ill. He (Mr. Ball) replied that "we will make a codicil." He called a retary and told her what Mr. Conover wanted. The secretary prepared the icil, Mr. Conover signed it and left the office. The trust agreement was not tioned at that time.

The court found that the last will and codicils of Mr. Conover did not revoke deed or trust agreement. There was substantial evidence, as above stated, support that finding.

Appellant contends that the evidence does not support the findings that Naomi er harbored any intent to divest Mr. Conover of any property owned by him, t Naomi did not misrepresent any facts to him or unduly influence him or take advantage of him. She argues that a confidential relationship existed ween Mr. Conover and Naomi; that the Apple Valley property was the separate erty of Mr. Conover; that by the trust agreement Naomi obtained an advantage r him in that she succeeded in obtaining the entire fee to the property eas it was his desire, as shown by the will of December 10, 1948, to give a f interest in the property to her (appellant) and a half interest to Naomi. argues further that by reason of the confidential relationship, and the antage gained by her, Naomi had the burden of showing that the transaction fair, reasonable, and free from undue influence, and that Naomi did not sent such evidence. As above stated, there was evidence that the Apple ley property was acquired with the proceeds from th- sale of the market lding in Idaho which Mr. Conover had transferred to Naomi under the nuptial agreement; that payments on the note (note given for balance of chase price) were made from the joint account; that the rentals from the erty were deposited in that account. There was no evidence that a fidential relationship existed between Mr. Conover and Naomi at the time the nuptial agreement was executed.

Mr. Ball testified that Mr. Conover was "very active mentally," and he was "very keen" mentally.

Appellant (Vivian) testified that Mr. Conover was competent to take care of business; his mind was keen; and he was fairly active and vigorous "for 86" years of age.

\*184] The evidence was sufficient to support the findings.

The judgment is affirmed.

"L"

In the Matter of the Accounting of Chemical Corn Exchange  
Bank, as Trustee of Trust Made by John H. Race and Another

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Special Term, New York County

9 Misc. 2d 155; 169 N.Y.S.2d 600

December 2, 1957

POSITION: The application to judicially settle and allow the accounting for period from July 1, 1949 to June 14, 1956 and for the other relief requested granted in accordance with the stipulation agreed to by the various parties. The order.

~~NOTES: The joint trust agreement, which was a joint trust agreement, provided that the settlors could modify its terms. The settlors had no power to do so after the death of either.~~

~~When the settlors, John H. Race and his wife, provided in an inter vivos trust that the trust could be revoked or modified by written mutual consent, the settlors had no power to do so after the death of his wife.~~

1. That the deceased settlor, John H. Race, appointed the surviving settlor, her executor did not give the survivor the right to revoke or modify. A settlor's power to revoke a trust under the Personal Property Law (§ 23) is personal to the settlor and terminates on his death.

USEL: Lowenstein, Pitcher, Spence, Hotchkiss, Amann & Parr for trustee.

James P. Hoopes for cross petitioners.

Debevoise, Plimpton & McLean for Robert Dongdon.

Donnele & Bedford for Genevieve Macfarland.

Robert Konove for Henry L. Race and another.

Andrew Eckel for Lulu Race.

SES: Owen McGivern, J.

WIONBY: MCGIVERN

WION: [\*155]      [\*\*601]      This is an application for a judicial settlement in account of a trustee of an inter vivos trust and for a construction.

The settlors herein are John H. Race and his wife, Alice Bannister Race. They created four inter vivos trusts, hereinafter called Race-Duluth Trust, Race-T. G. & T. Trust, Race-Corn Exchange Trust and Race-Chattanooga Trust. All trusts terminated upon the death of the survivor of the donors.

[\*156]      Alice Bannister Race died April 22, 1940, a resident of New York, leaving a will wherein she devised and bequeathed all her property to her

and, also naming him executor. On August 18, 1940 and again on October 26, John W. Race executed instruments modifying or amending the Race-T. G. & T. Trust. The first modification called for the appointment of Grier C. Morgan as trustee in the event E. Demarest Race, the original trustee named, deceased him. The second modification called for certain changes in the names of some of the group II beneficiaries named in the Race-T. G. & T. Trust.

~~There is no provision for modification of the Race-Chattanooga Trust.~~ The Race-Chattanooga Trust is irrevocable by its terms. The Corn Exchange Trust, however, is revocable by the trustors and the survivor of them. Consequently, it is apparent that the settlors deliberately made different provisions as to the right to alter, modify, amend or revoke the respective trusts.

Paragraph Eighth of the Race-T. G. & T. Trust indenture did contain a provision of a power to modify the terms of the instrument. Paragraph Eighth is as follows. "~~Eight. It is understood and agreed that the Donors herein by mutual consent and by means of a properly executed instrument modify and~~ the terms of this trust instrument, and that they may at any time cancel or annul this trust instrument ~~by written request to the trustee that the same be cancelled or annulled.~~"

The question thus involved is whether the foregoing paragraph Eighth should be construed as permitting the power of revocation, modification, cancellation or amendment to be exercised by John W. Race as surviving donor after death of his wife, Alice Barnard Race or whether such power could be exercised only by the mutual act of both donors during the lifetime of both of them and could no longer be exercised by the surviving donor after the death of ~~of the donors.~~

~~Whether a trust may be revoked, altered or amended depends upon the language of the trust instrument relating thereto.~~ (3 Scott on Trusts, ¶ 330.)

The donors specifically provided that the trust instrument could be modified by mutual consent of the donors, to be set forth in a properly executed instrument. The language used thus contemplated a modification executed by both of them.

~~In Croker v. Croker~~ (147 Misc. 558) ~~the court~~ held that where the trust instrument provided that it could be altered, modified, revoked or changed by instrument signed by the joint settlors, the husband, one of the settlors, had power so to do after his ~~death~~ <sup>[1457]</sup> ~~if the other settlor had died.~~ (See, also, Noble v. Rogan, 49 F. Supp. 370, Matter of Solomon, 332 Pa. 462.)

In Culver v. Title Guar. & Trust Co. (269 App. Div. 627, 634) the court said. "In the absence of statute, where by the terms of a trust instrument, a power of revocation has been reserved to the joint settlors of a trust, all must join in execution of the instrument to effect revocation. Where death has preceded the will of one, attempted revocation by the survivors is a nullity".

After the decision by the Appellate Division in that case, an instrument was executed which purported to revoke the trust only to the extent of the share of the trust originally contributed by them. The Appellate Division upheld the validity of this partial revocation in Culver v. Title Guar. & Trust Co. (270 App. Div. 394). However, the Court of Appeals reversed (296 N. Y. 74) and held ~~that partial revocation could not be made after the death of one of the~~

inal settlors who created the trust. Judge Conway, at page 77, said: ~~where~~  
of the joint settlors living, the consent of each to a revocation either in  
s or in part would be necessary. There appears to be equal reason for  
adding whole or partial revocation when one of them is dead and may not be  
in"

It is contended that since the deceased donor made the surviving donor her  
utor, he had the right to revoke or amend. The donor's power to revoke the  
t under section 23 of the Personal Property Law was personal to her and  
enated upon her death. It cannot be exercised by her executor or legatee  
ver v. Title Guar. & Trust Co., 296 N. Y. 74, supra; Cook v. City Bank  
ers Trust Co., 3 A D 2d 634).

\*603] In Culver v. Title Guar. & Trust Co. (269 App. Div. 627, 631,  
a) the court said: "~~power of revocation reserved in a trust instrument or~~  
ing by operation of law is neither alienable or descendable."

he intent of the donors is clear from the quoted article Eighth of the  
T. G. & T. Trust indenture. It is not ambiguous.

he court, for the foregoing reasons, concludes that the purported  
fications dated August 18, 1948 and October 26, 1951, were legally  
fectual to accomplish such purpose.

he application to judicially settle and allow the accounting for the period  
July 1, 1949 to June 14, 1956 and for the other relief requested is granted  
ccordance with the stipulation agreed to by the various parties. Settle  
r.

"M"



CROKER v. CROKER et al.

[NO NUMBER IN ORIGINAL]

Supreme Court, Special Term, New York County

117 Misc. 558; 192 N.Y.S. 666

December, 1921

SEL: McCombs & Ryan, of New York City (Frederick R. Ryan and Max D. Steuer, of New York City, of counsel), for plaintiff.

eventritt, Cook, Nathan & Lehman, of New York City (Harold Nathan, of New York City, of counsel), for defendant Richard Croker.

aurice Steiner, of New York City, and Edward M. Salley, of Jersey City, N. J., for defendant Florence C. Morris.

annon, Selbert & Riggs, of New York City (R. E. T. Riggs, of New York City, of counsel), for defendant Howard Croker.

oses Miller, of Port Chester, for defendant Ethel C. White.

IONBY: DAVIS

ION: [\*560]      [\*\*667]

AVIS, J. This action is brought by plaintiff, as trustee under a certain t agreement, for a judicial settlement of his accounts as trustee and for ce and instructions as to his future administration of trust. Plaintiff is uestee under an instrument executed April 20, 1909, by Elizabeth Croker and ard Croker, Sr., the parents of the plaintiff. The defendants are Richard er, Sr., father of plaintiff; Ethel C. White and Florence C. Morris, ntiff's sisters; Howard Croker, brother of plaintiff; and Ethel C. White, an utrix under the will of her mother Elizabeth Croker, deceased. Under this ement Elizabeth Croker and Richard Croker, Sr., sold, assigned, and sferred to the plaintiff certain property, consisting of mortgages amounting 98,000 and \$ 20,359.26 in money, in trust, to collect the income, and to st and reinvest, and to pay the net income in equal shares to Elizabeth er and Richard Croker, Sr. In the event that one-half of the income should amount to \$ 5,000, the trustee is directed to pay to Elizabeth Croker an tional sum sufficient to make \$ 5,000 per annum, and to pay the balance of me over \$ 5,000 to Richard Croker, Sr. The trust agreement further provides upon the death of either Elizabeth Croker or Richard Croker, Sr., the ivor shall receive the entire net income, and upon the death of the survivor principal and all accumulations of income shall be paid over in equal shares he children then living of Elizabeth Croker and Richard Croker, Sr., other the plaintiff, who waived for himself and his heirs all right of icipation in the trust fund.

laintiff accepted the trust and has continued to discharge the duties dent thereto without compensation. The nature and extent of the account to ended by the plaintiff will depend largely upon the effect of the

owing provision of the trust [\*561] agreement:

It is expressly agreed and made part of this instrument that the terms and conditions hereof and of the trusts and estates herein created or any of them from time to time be revoked, modified, or changed in any particular, by instrument in writing, duly signed and acknowledged by the parties of the first part and delivered to the party of the second part or his successors in the part.

It is claimed by the defendant Richard Croker that he revoked the trust agreement of April 20, 1909, by an instrument in writing according to the terms of the trust agreement. ~~The plaintiff Croker claims that he obtained~~ ~~the trust after the death of Mrs. Croker.~~ Thus, as a counterclaim, the defendant Richard Croker, Sr., alleges that the bonds and mortgages described in the [\*668] trust agreement were the proceeds of assets belonging to him, and that the money mentioned therein was also owned by him and were assigned and paid over to the plaintiff without any valuable consideration, in trust for the purposes set forth in the trust agreement; that Abeth Croker died on the 6th day of September, 1914; that thereafter, and on about August 2, 1917, defendant Croker executed and caused to be delivered to plaintiff an instrument in writing, duly acknowledged on said date, revoking said trust agreement of April 20, 1909, and all the trusts and estates created thereby, and directing and requiring plaintiff to convey and return to defendant Croker all of the original trust fund and its proceeds. The instrument of August 2, 1917, is duly acknowledged, and, after recitals referring to the deed of trust, proceeds as follows:

Now, therefore, I, the said Richard Croker, do hereby revoke the said instrument hereinbefore referred to and all of the trusts and estates created therein. I further direct and require the said Richard Croker, Jr., that he do, immediately [\*562] upon receipt of notice of this revocation, convey and return to me all of the original trust fund, cash, notes, bonds, mortgages, other securities, and all investments or reinvestments of the same, or of income or proceeds thereof, together with all of the income derived from trust funds, or of the investment or reinvestment thereof, not heretofore lawfully disbursed by the said Richard Croker, Jr.'

One of the other parties to this action acquiesced in this attempted revocation. ~~The question to be determined at the outset is whether the~~ ~~defendant Richard Croker, Mrs. Croker being then dead, had power under the~~ ~~terms of the trust agreement of April 20, 1909, to revoke the trust thereby~~ ~~made~~

~~the plaintiff~~ ~~that the power to revoke the trust did not survive the~~ ~~death of Mrs. Croker; and that by the terms of the trust agreement~~ ~~and be effected only by the joint act of Mr. and Mrs. Croker, or the other~~ ~~parties; the defendant Richard Croker, Sr., claims that the trust agreement~~ ~~reserved to the grantors the power of revocation, as permitted by section 144 of~~ ~~Real Property Law (Consol. Laws, c. 50), and that the execution of the power~~ ~~of revocation is therefore governed by section 166 of the same law. Section 144~~ ~~provides that --~~

The grantor in a conveyance may reserve to himself any power, beneficial or otherwise, which he might lawfully grant to another; and a power thus reserved shall be subject to the provisions of this article, in the same manner as if

ted to another.'

section 166, Real Property Law, is as follows:

Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the same may be executed by the survivor or survivors.'

In my opinion, the purpose of section 166 is to prevent the failure of a trust through the death of one or more of the donees of the power in trust. It aims to preserve the trust. The defendant Richard Croker invokes the effect of this provision to destroy the trust, not to uphold it. For this reason, I think it has no application to this case. Moreover, this section (166) is written in most general terms, and would not be controlling where the intention of the testator that the right of revocation should be exercised either jointly or separately by the surviving donees is so clearly expressed as here. At the date of the execution of the trust agreement in question Mr. and Mrs. Croker were living apart. It is satisfactorily established by the evidence that a considerable part of the property constituting the trust fund had belonged to Richard Croker, and that it was the purpose of both Mr. and Mrs. Croker to provide through the medium of the trust agreement an income for Mrs. Croker during her life, and upon the death of both to cause the trust fund to go to their children, except the plaintiff. Thus the agreement provides that, upon the death of either Mrs. Croker or Richard Croker, Sr., the net income should be paid to the survivor for life, and upon the death of the survivor the trustee is directed to pay over the entire principal, with all accumulations of income thereof, to the children of Mr. and Mrs. Croker who may then be living, in equal shares, other than the plaintiff. By the same instrument plaintiff waived all right to a share in the trust fund as well as all commissions.

From the evidence that the trust was created and the language of the trust agreement it leads either to give the other the right to revoke the trust is favor of the children in the event of the death of either. This conclusion is supported by the language of the revocation clause. The revocation was made by the instrument in writing duly signed and acknowledged by the parties of the first part. \* \* \* To hold that either party to the trust agreement could revoke the trust upon the death of the other would defeat one of the important purposes of the trust, to wit, the intention of Richard Croker in the children of Mr. and Mrs. Croker, and would be subversive of the intent expressed in the revocation clause. It is therefore my view that the defendant Richard Croker has no right of revocation of the trust agreement after the decease of Mrs. Croker. The revocation, to be effective, had to be the joint act of Mr. and Mrs. Croker.

There remains the question as to whether plaintiff has properly disposed of the income of the trust fund. During Mrs. Croker's lifetime she was entitled to live and did receive the income of the fund up to \$ 5,000 a year, and the balance belonged to Mr. Croker. It is satisfactorily shown by the evidence that Richard Croker instructed the plaintiff to add his share of the income to the corpus of the trust fund, his expressed desire being to increase the fund for the benefit of his children, and it was so disposed of by plaintiff. The defendant Richard Croker contends that such a direction would be void and in violation of section 16 of the Personal Property Law (Consol. Laws, c. 41). I think section 16 has no application to the present case. It refers solely to directions for accumulations of income contained in an instrument in writing. In my opinion

question of unlawful accumulation of income under section 16, Personal Property Law, is not involved in this case. Here the instructions were oral, they disposed of personal property belonging to defendant Croker, which he fit to use to increase the trust fund for the benefit of his children. He has a perfect right to increase the corpus of the trust fund, [\*\*570] and whether it were done from his share of income or from his property derived from other sources is immaterial. Central Trust Co. of New York v. Falck, 177 App. Div. 501, 509, 164 N. Y. Supp. 473. The plaintiff acted upon the instructions of defendant [\*\*565] Richard Croker, and paid over to the other defendants their designated shares of the income for a long period until May 21, 1920, and the evidence shows that the defendant Richard Croker, from time to time, approved of plaintiff's course.

The defendant Florence C. Morris by her answer seeks to surcharge the plaintiff personally with \$ 2,133.33, which she claims as her share (one-third) of the total income at the rate of \$ 5,000 a year from December 20, 1914, to July 1, 1916. I think Mrs. Morris must fail in this contention, as the evidence shows that she was excluded from participation during this period by the express directions of her father. Later in June, 1916, the defendant Richard Croker directed the plaintiff to make an equal distribution of the \$ 5,000 of income among his three children. This direction was given in a letter received by the plaintiff from his father in June, 1916. Plaintiff was unable to find the letter in question, and was allowed to state its contents from his recollection, his testimony on this point was corroborated to some extent by Exhibit 9, read by defendant Richard Croker December 11, 1916, and in which he confirms his former verbal direction and states that the income is thereafter to be divided equally among his three children, Florence, Ethel, and Howard. Pursuant to these directions of his father the plaintiff made equal distributions of the income up to \$ 5,000 among the three children named, making the first payment to his sister Florence on July 1, 1916, and he continued to make these payments until the latter part of December, 1919. Thereafter he ceased making payments of income to anybody, because he received written directions from his father, dated May 21, 1920, to pay the entire income of the trust fund to him, about \$ 1,667 thereof, which the latter directed plaintiff to pay each year to his daughter Florence C. Morris.

It is my [\*\*566] opinion that the trustee has properly disbursed the income of the trust fund; and in adding the excess of income over \$ 5,000 to the principal the plaintiff acted under authority of the owner of the excess. The plaintiff cannot now, after many years of acquiescence in that course, and after the income derived from the principal so increased has been paid over to the beneficiaries designated by the owner of the excess, disavow plaintiff's action or charge him personally with the payments so made, and with the additions to the principal fund of the trust. The payments of interest were properly made, and the additions to the principal cannot now be taken therefrom. The principal of the trust fund has been augmented by contributions to it by defendant Richard Croker of his share of the income. At his direction the plaintiff paid the \$ 5,000 of income from the fund so increased to the three children, but ceased to make payments by order of his father on May 21, 1920, and he asks for instructions as to his future administration of the trust. Shall he continue to use of the income as formerly and at the death of Richard Croker, Sr., pay [\*\*571] over the principal to the three children, or must he obey the direction of Mr. Croker, and henceforth pay all the income to him during his life, and thereafter distribute the principal of the trust among the three children?

he plaintiff and defendants Ethel C. White and Howard Croker claim that in , 1916, the defendant Richard Croker made an agreement with the plaintiff defendants Mrs. White and Howard Croker, by the terms of which the ntiff, during the lifetime of Mr. Croker, should pay over to his children l, Florence, and Howard, share and share alike, all of the income of the trust estate to the extent of \$ 5,000 annually. The alleged agreement, it laimed, further provided that all sums over \$ 5,000 should be added to the cipal of said trust estate and made [\*567] part thereof, and it is ged in the answers of these defendants, Howard Croker and Mrs. White, that een July 1, 1916, and the 31st of August, 1919, payments were made to the e children pursuant to this agreement. In none of the pleadings is any ideration alleged for the making of the agreement as pleaded nor do I find ne testimony sufficient evidence upon which to base a finding that such an ement was ever made. On the contrary, it seems clear to me that Mr. Croker a gift of this income to his children as a voluntary act, to continue, not ssarily during his lifetime, but during his pleasure.

t therefore follows that the whole income from the trust fund since the date which he directed it to be paid to him belongs to defendant Richard Croker, ot the amount directed by him to be paid to his daughter Florence. Findings act and conclusions of law as proposed have been passed upon. Other ings should be proposed in accordance with the views expressed in this ion.

ordered accordingly.

"N"

76-3-406; Const. Art. 8, § 9; U.S.C.A. Const. Amendments 5, 14.

2. Criminal Law — 189

Statutory prohibition against "more severe" second sentence precludes justifying increase in the element of sentence by reference to decrease in another element, since possibility of such trade-off could act as deterrent to appeal by individual defendant. U.C.A. 1963, 76-3-406; Const. Art. 8, § 9; U.S.C.A. Const. Amendments 5, 14.

3. Criminal Law — 193

After defendant's original conviction for theft, which carried sentence of one to 15 years in penitentiary, with stay of execution and placing of defendant on two years' probation on condition that he serve six months in jail and pay full restitution, was returned and defendant was convicted for second time on remand, second sentence of one to 15 years with no restitution, but with stay of sentence to begin without delay, was more severe than first, and violated statute prohibiting more severe second sentence and impaired constitutional right to appeal. U.C.A. 1963, 76-3-406; Const. Art. 8, § 9; U.S.C.A. Const. Amendments 5, 14.

4. Criminal Law — 1183

After defendant was convicted on remand, which his original conviction was reversed, but second sentence was more severe than first sentence, on remand for sentencing, in imposing his third sentence, court was not required to be constrained by terms of invalid second sentence, but was only to assure that sentence imposed was no more severe than first sentence. U.C.A. 1963, 76-3-406; Const. Art. 8, § 9; U.S.C.A. Const. Amendments 5, 14.

Francis Bergeson, Salt Lake City, for defendant and appellant.

Donald L. Wilkinson, Atty. Gen., Craig L. Anderson, Atty. Gen., Salt Lake City, for plaintiff and respondent.

3. Criminal Law — 193

After the first conviction for theft was reversed for trial errors, State v. Sorenson,

Utah, 617 P.2d 383 (1980), defendant was re-tried and a jury again convicted him of theft. Defendant concedes that the second trial was free from error. His sole argument on this appeal is that the second sentence was illegal.

In *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Supreme Court held that the process of law requires that a defendant be freed from the apprehension that if he appeals his conviction successfully and is then convicted at a second trial the trial judge can retaliate by giving him an increased sentence. Consequently, the Court held, the sentence imposed after re-trial cannot be more severe than the original sentence, unless the reason for the increased sentence, based on identifiable conduct by the defendant, following the original trial, appears in the record.

In 1973, our Legislature implemented that requirement in a more stringent fashion that allows for no exceptions. So far as pertinent to this appeal, U.C.A., 1963, § 76-3-406 provides that where a conviction has been set aside on direct review, "the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence. . . ." In *Chess v. Smith*, Utah, 617 P.2d 841, 348 (1980), we held that section 76-3-406 also prevents the Utah constitutional right to appeal (Article VIII, § 9) from being impaired "by imposing on a defendant who demonstrates the error of his conviction the risk that he may be penalized with a harsher sentence for having done so."

Following his first conviction, defendant was sentenced to 1 to 15 years in the penitentiary, but execution of that sentence was stayed and he was placed on two years' probation on the condition that he serve six months in the Salt Lake County jail and pay full restitution (approximately \$45,000). After his second conviction, defendant was sentenced on May 5, 1981, to 1 to 15 years. No restitution was required, but service of sentence was ordered to begin without delay. By December 18, 1981, when this case

was submitted for decision by this Court, defendant had been confined for more than the six months he would have served under the first sentence.

Defendant argues that he is entitled to be resentenced to not more than six months, which would result in his immediate release. This title argues that the second sentence is not "more severe" so long as it gives credit in its maximum term for time already served under the first sentence (note, in this case) and so long as the combination of elements in the second sentence does not outweigh the combination in the original sentence. We find the state's arguments unpersuasive.

[1, 2] In the context of the due process requirement of *North Carolina v. Pearce*, *supra*, which seeks to assure that there is no chilling or deterring of the criminal defendant's exercise of his basic constitutional right to appeal, and in light of the Utah constitutional constraint against impairing the right to appeal, as articulated in *Chess v. Smith*, *supra*, we think the meaning of our statutory prohibition against a "more severe" second sentence is clear. The second sentence cannot exceed the first in appearance or effect; in the number of its elements; U.C.A., 1963, § 76-3-201, or in their magnitude. This means that no new element of sentence can be added and that no element can be augmented in magnitude. It also precludes justifying an increase in one element of a sentence by reference to a decrease in another element (in this case, elimination of restitution while increasing actual time to be served). This is because the possibility of such a tradeoff could act as a deterrent to appeal by an individual defendant.

[3, 4] Because the increase in time of commitment made the second sentence in this case more severe than the first, the sentence was contrary to section 76-3-406, and also invalid as impairing the constitutional right to appeal as explained in *Chess v. Smith*, *supra*. Because the record contains no reason for the increased sentence, it is also contrary to the due process requirement articulated in *North Carolina v.*

Utah rule for determination of trust  
def. by defendant or intervenor trust  
SUNDQUIST v. SUNDQUIST  
Utah 181

Cite as, Utah, 639 P.2d 181

*Pearce, supra*. The sentence is therefore vacated and the case is remanded for resentencing in conformity with section 76-3-406, as construed in this opinion. Although that statute requires the court to deduct "the portions of the prior sentence previously satisfied," which would include time served under the second sentence, in imposing his third sentence the court need not be constrained by the *second* sentence, but need only consider that the defendant's first sentence imposes a no more severe than the first sentence.

In view of the special circumstances of this case, the penitentiary of this Court will issue instantly notwithstanding the normal rule of Utah R. Civ. P. 76(d).

So ordered.

HALL, C.J., STEWART and HOWE, JJ., and CHRISTINE, DUREAN, District Judge, concur.



Donald Theodore SUNDQUIST, Plaintiff and Appellant,

Mary Alice SUNDQUIST, Defendant and Respondent,

No. 17807, 1981

Supreme Court of Utah  
Dec. 28, 1981

Former wife filed request for termination of educational trust established by herself, and former husband as, divorcing, set-aside for benefit of their children and distribution of its proceeds in equal shares to parties, and former husband objected. The Second District Court, Davis County, Thornley K. Swann, J., entered judgment

that trust had not been created in first place, and former husband appealed. The Supreme Court, Oake, J., held that: (1) by reference to "income derived" and use of "should" in property settlement agreement between divorcing settlors whereby they agreed to create educational trust for benefit of children, parties made clear that they were not creating present trust but only imposing obligation to create trust thereafter, and that subject matter of trust was not to be property then owned but income installments to be received in future, and thus no trust was created at that time as to non-owned property and as to future income installments; (2) trust automatically came into existence as to each installment of income from property owned at time of divorce as parties received each installment; (3) former wife had failed to prove consent by all of beneficiaries to termination of trust; (4) former wife had failed to prove that there was no unfulfilled purpose of trust which could be carried out by its continuance; and (5) trustee who has successfully defended trust from depletion is entitled to have corpus of trust pay reasonable attorney's fees incurred in such defense.

1. Affirmed in part, reversed in part and remanded.

2. *Boyle*, J., concurred in part and dissented in part, and filed opinion in which Tibbels, Justice, concurred.

3. *Trusts* — 307(1)

4. Inter vivos trust is created when settlor, with intent to create trust, transfers property to trustee in trust for, or declares that settlor holds specific property in trust for, a named beneficiary.

5. *Trusts* — 307(1), 307(1)

6. Settlor need not sign formal trust instrument or employ any particular form of words to create inter vivos trust.

7. *Trusts* — 312(2), 28(1)

8. To create inter vivos trust, settlor must have intent to create presently enforceable

trust, trust property must be clearly specified and set aside, and essential terms of trust must be clear enough for court to enforce equitable duties that are sine qua non of trust relationship

9. *Trusts* — 312(2)

10. Requirement of clarity in essential terms of trust is met if beneficiaries are identified and nature of their beneficial interests and duties of trustee are specified orally or in writing, or are clearly ascertainable from circumstances or dictated by law of trusts.

11. *Trusts* — 317(3)

12. To be enforceable against objections, trust in real property must be created by writing signed by settlor or his agent. U.C.A. 1953, 28-6-1.

13. *Husband and Wife* — 279(1)

14. By reference to "income derived" and use of "should" in property settlement agreement between divorcing settlors whereby they agreed to create educational trust for benefit of children, parties made clear that they were not creating present trust but only imposing obligation to create trust thereafter and that subject matter of trust was not to be property then owned but income installments to be received in future, and thus no trust was created at that time as to then-owned property and as to future income installments.

15. *Husband and Wife* — 279(1)

16. *Trusts* — 14

17. Where divorcing settlors had made enforceable agreement to create trust in installments of future income from then-owned property, and since equity would treat trust as having been perfected when income was received, educational trust for benefit of their children automatically came into existence as to each installment of income from property as parties received each installment.

18. *Divorce* — 254(2)

19. District court's continuing jurisdiction in divorce proceeding to make such subsequent changes or new orders with respect to distribution of property as shall be reasonable and necessary does not authorize

Case 2:04-cv-00181

20. court to alter property rights already vested in other parties, such as in children who are beneficiaries of trust created by divorcing settlors in income already received and deposited in trust account. U.C.A. 1953, 30-8-5.

21. *Divorce* — 254(2)

22. Statute conferring continuing jurisdiction upon district court in divorce proceeding to make such subsequent changes or new orders with respect to distribution of property as shall be reasonable and necessary authorizes divorce court to reallocate property rights between parties to divorce, such as by modifying earlier decrees as to parties' interest in then-owned property including installment payments of income on that property not yet received. U.C.A. 1953, 30-8-5.

23. *Trusts* — 317(3)

24. Former wife failed to prove consent by all beneficiaries to termination of educational trust created by herself and former husband as divorcing settlors for benefit of their children where former husband, who owned beneficial interest in remainder, testified termination, and although one of parties' children consented to termination, other two beneficiary children did not affirmatively consent to termination.

25. *Trusts* — 317(3)

26. It is not sufficient for purposes of rule requiring consent of all beneficiaries for termination of trust that beneficiaries have no objection to its termination or take no position on matter; all beneficiaries must consent.

27. *Trusts* — 317(3)

28. Former wife had failed to prove, for purpose of trust's termination, that there was no unfulfilled purpose of educational trust established by herself and former husband as divorcing settlors for benefit of their children which could be carried out by its continuance where, at time of attempted termination, none of three children had yet graduated from college although all had attained some college, none had yet attained age when majority of young people who aspire to advanced or college educa-

29. tions have satisfied such aspirations, and two of three beneficiaries gave evidence expressing strong aspirations for further higher education.

30. *Trusts* — 246

31. Trustee has fiduciary duty and concomitant power to defend trust from depletion of its assets by decrees of termination or invalidity. U.C.A. 1953, 28-6-1(3)(a), 75-7-402(1), (3)(c), x, y.

32. *Trusts* — 246

33. Trustee who has successfully defended trust from depletion of its assets by decrees of termination or invalidity is entitled to have corpus of trust pay reasonable attorney's fees incurred in that defense. U.C.A. 1953, 28-6-1(3)(a), 75-7-402(1), (3)(c), x, y.

34. David M. Swope, Salt Lake City, for plaintiff and appellant.

35. John Lowe, Salt Lake City, for defendant and respondent.

36. OAKS Justice:

37. The issues in this appeal are (1) whether an express trust was created, (2) if so, whether the trial court correctly decreed termination of the trust on the ground that its purposes had been fulfilled, and (3) whether attorney's fees incurred by the trustee can be paid from the trust corpus.

# 1. CREATION OF TRUST

38. [1-3] The principles governing the creation of a trust are well settled. An inter vivos trust is created when a settlor, with intent to create a trust, transfers property to a trustee in trust for, or declares that he or she (the settlor) holds specific property in trust for, a named beneficiary. *Boyle*, 201 Utah 21, 917 P.2d 17. The settlor need not sign a formal trust instrument or employ any particular form of words. *Capps v. Capps*, 110 Utah 468, 175 P.2d 670 (1946); *Acott v. Tomlinson*, 9 Utah 2d 71, 387 P.2d 720 (1963); *Bogert, Trusts & Trustees*, § 45 (2d ed. 1950). *Restatement of Trusts* 2d § 24. But the settlor must have



ultimate question of the creation of the trust, are challenged by appellant. We must therefore review the evidence to see if it clearly preponderates against the findings of the trial court. *Jensen v. Brown*, 639 P.2d 138 (1981); *Crimmins v. Simons*, 636 P.2d 478 (1981). The evidence is essentially uncontested.

Appellant and respondent were husband and wife. In the complaint, respondent, appellee, requested a property settlement, including the creation of a trust of specified property. "Not the education of the children of the parties." Respondent, answer, agreed to this proposal, which was then embodied in a Property Settlement Agreement and Stipulation signed by the parties on October 16, 1978. That document contains the following paragraph, which is essentially identical to their pleadings:

That both Plaintiff and Defendant agree that income derived from the interest held by the parties in the real estate hereby known as the Big Bear Property in San Bernardino County, California, should be established as a family trust known as the Sundquist Family Trust Fund with the Plaintiff and Defendant as Trustees with the restriction and requirement that said funds be accumulated for the education of the minor children of the parties and at such time as the children have reached or terminated their advanced education, any sums remaining in said trust funds should be equally divided between the Plaintiff and Defendant and during the administration of the trust if additional monies are necessary for the education of the children, the parties should be ordered to equally contribute to the trust fund.

That both Plaintiff and Defendant agree that income derived from the interest held by the parties in the real estate hereby known as the Big Bear Property in San Bernardino County, California, should be established as a family trust known as the Sundquist Family Trust Fund with the Plaintiff and Defendant as Trustees with the restriction and requirement that said funds be accumulated for the education of the minor children of the parties and at such time as the children have reached or terminated their advanced education, any sums remaining in said trust funds should be equally divided between the Plaintiff and Defendant and during the administration of the trust if additional monies are necessary for the education of the children, the parties should be ordered to equally contribute to the trust fund.

The parties proceeded as ordered. By January 24, 1979, \$1,104.58 had been deposited in a savings account in the Continental Bank and Trust Company of Salt Lake City in the name of the "Sundquist Family Trust." This bank account, for which an IRS number had been assigned, apparently required the signatures of both parties. No formal, written trust agreement was in evidence, and presumably none was signed, but on January 25, 1979, the parties signed a one-page document titled "Addendum to Trust Agreement," which recited that "The parties do hereby modify and clarify the trust agreement on the SUNDQUIST FAMILY TRUST." The modifications pertained to the definition of "education" and the type of expenses that would be paid by the trust. During the remainder of 1979, the trust account allowed deposits of interest, income, and a \$1,154.02 invoice, literally withdrawn of \$485 for the educational expenses of one of the parties' children. Similar deposits and withdrawals were shown for the year 1976 through 1978.

The district court found as a fact that the parties attempted to set up a trust agreement to the requirement in their divorce decree but none was created. The language states: "There is no document in evidence creating a trust; the terms of any such trust are too 'ambiguous'; the time and manner of any trust which might have been created is uncertain and a reason for such failure for duration of the trust has not been stated. [The parties have not stated] the terms and conditions of any trust and the court has no basis upon which to find that the terms of any trust might be stated; the parties intended to create a trust; and a conclusion of law on the

In 1976, because of conflict between the parties over which educational expenses were to be paid from the trust, appellant petitioned the district court, having jurisdiction of the original divorce proceeding, for an order that respondent sign blank withdrawal slips for appellant's use, or, in the alternative, that respondent be removed as co-trustee. This controversy was settled on May 21, 1976, by a stipulated order which (1) directed respondent to remove herself as a joint signatory of the bank account; (2) established further definitions concerning the type and amount and documentation of educational expenses that would be paid by the trust; and (3) directed appellant to give respondent quarterly reports of the disbursements made by the trust. This order refers repeatedly to "the trust," "this trust," or "the Sundquist Family Trust Fund." Despite this clarification, conflict over the amount or type of disbursements appellant made for the children's education continued.

On October 11, 1979, respondent filed in the original divorce proceeding under the heading of "order to show cause" a request for the termination of the trust, and the distribution of its proceeds in equal shares to the parties. In support, she recited the ages and current occupations of the three children of the marriage and alleged that there is no need for a continuation of the children's education. Appellant objected, and a hearing was held on February 5, 1980, at which respondent requested for the first time, and the district court held, that there had not been created in the first place AS to the \$5,912.28 balance of the trust account on deposit in the bank on February 5, 1980, the district court's findings are as follows: "The parties agreed to create a trust for the education of their children, and which they were to be trustee and to which they were to deposit the income derived from specified property. The agreement designated the purpose and beneficiaries of the trust: to provide education for the parties' children with a remainder interest in the parties themselves. On the sufficiency of these terms, the facts in this case are practically identical to those in *Loos Credit Union v. Reed*, 85 N.M. 729, 516 P.2d 1112 (1978), which sustained the validity of an educational trust created in a bank account by a property settlement agreement for the benefit of the children of the divorcing parties. We agree with the New Mexico Supreme Court's declaration on this subject) 4, 516 P.2d at 1116.

The rights and duties of the trustees are set forth in the law of trusts. The use to be made of the trust property is clearly stated in the written instrument evidencing the creation of the trust. Minute details, as to the precise items for which funds in an educational trust must be used, are not necessary for the trust's validity.

To the same effect is *Shawyer v. Shawyer*, 228 Meas. 306, 185 N.M. 17 (1980), which held that a device of sums to family members "to be used only for educational purposes" created a valid trust even though the

the parties intended to create a trust; and a conclusion of law on the

the parties intended to create a trust; and a conclusion of law on the

will gave no additional guidance on how the educational trust was to be administered.

[6] When the parties signed their Property Settlement Agreement in 1978, they fulfilled all the requirements for the creation of a trust (summarized earlier) except the existence of the trust property. Even the property requirement would have been fulfilled if the parties had transferred or declared a trust of the interest they owned in the Big Bear Property. But the agreement evidences no intent to do this. Instead, the parties agreed "that income derived from the interest held by the parties in the . . . Big Bear Property should be established as a family trust." By this reference to "income derived" and this use of "should" in the sense of duty, the parties made clear that they were not creating a present trust but only imposing an obligation to create a trust thereafter, and that the subject matter of the trust was not to be the property then owned but the income installments to be received in the future. The installments of income were future property in 1978 and thus could not have been the subject matter of a present creation of trust. *Brainard v. Commissioner*, 51 P.2d 890 (7th Cir. 1937); *Bogert, Trusts & Trustees*, § 113 (2d ed 1965), and authorities cited therein. Viewing the matter just after the October, 1973, agreement, the parties had an enforceable agreement to create a trust, but no trust had been created. Consequently, as to the Big Bear Property and as to future income installments, we agree with the district court's conclusion that no trust was created.

[7] However, as the parties received each installment of income from the Big Bear Property, the trust automatically came into existence as to that installment. This is a consequence of the fact that the parties had made an enforceable agreement to create a trust in those installments of income, and the fact that equity would therefore treat the trust as having been perfected when the income was received. As *Bogert* explains: "When the subject-matter came into existence and into the hands of the intended settlor, it would at

once be deemed to be held in trust, without any act of appropriation by the intending settlor," *Bogert, Trusts & Trustees*, § 113 (2d ed 1965), and authorities cited therein. The parties' deposit of these income installments in the properly labeled trust account in the bank is further confirmation of their performance of their agreement to create a trust and of the existence and validity of the trust as to those deposits.

If our conclusion about the creation of this trust admitted of any doubt, it would surely be resolved by the parties' signature on a formal "Addendum to Trust Agreement," by their performance of the trust by deposits and disbursements for educational purposes over a period of five years, and by the fact that the existence of the trust was, in effect, confirmed by periodic orders of the court that had approved the original agreement and supervised the performance of what the court's orders repeatedly referred to as "the trust" or "the Sundquist Family Trust."

[8, 9] For the reasons set out above, a valid trust was created and exists as to the \$5,914.28 balance of the bank account, but not as to the parties' interest in the Big Bear Property or in the future installments therefrom. Under Utah Code Annotated, 1953, § 30-3-5, the district court in a divorce proceeding has "continuing jurisdiction to make such subsequent changes or new orders with respect to the distribution of the property as shall be reasonable and necessary." That power does not authorize the court to alter property rights already vested in other parties, such as in the children who are the beneficiaries of the trust in the income already received and deposited in the trust account. Cf. *Hills v. Hills*, Utah, 638 P.2d 516 (1981). But section 30-3-5 does authorize the divorce court to reallocate property rights between the parties to the divorce, such as by modifying the earlier decree as to the parties' interest in the Big Bear Property, including installment pay-

ments not yet received.<sup>1</sup> This matter can be pursued on remand.

## II. TERMINATION OF TRUST

In *Clayton v. Behle*, Utah, 565 P.2d 1132 (1977), this Court approved and applied the general rule that even though its prescribed duration has not passed, the beneficiaries can require a court of equity to decree the termination of a trust where: (1) all beneficiaries consent, (2) no beneficiary is under an incapacity, and (3) the continuance of the trust is not necessary to carry out a material purpose of the trust. This rule is supported by a multitude of authorities, including, in addition to those cited in *Clayton v. Behle*, *supra*; *Ambrose v. First National Bank of Nevada*, 87 Nev. 114, 482 P.2d 828 (1971); *Bogert, Trusts & Trustees*, § 1007 (2d ed. 1962); 4 *Scott on Trusts* § 387 (3d ed. 1967), and authorities cited therein.<sup>2</sup>

In its findings of fact, the district court stated that "one of the children of the parties desires that any trust should be terminated and the other two have no objection to such termination." There were no findings of fact on whether the continuance of the trust was necessary to carry out a material purpose of the trust, except as implied by the district court's conclusions of law: "the purpose of any possible trust has been accomplished; the children, beneficiaries, have no objection to its termination and the trust should be terminated."

[10-12] At the conclusion of evidence in support of respondent's request for termination, appellant moved to dismiss. That motion should have been granted because respondent's request for termination failed of proof in two essential respects.

(1) Respondent failed to prove consent by all of the beneficiaries. Appellant, who

owned a beneficial interest in remainder, resisted the termination. Moreover, although one of the parties' children consented that the trust be terminated, the other two beneficiary-children did not affirmatively consent to the termination. As *Bogert* states, "[I]t is well settled that the court will not end the trust as a whole on the request of a part only of the beneficiaries." *Bogert, Trusts & Trustees*, § 1007 (2d ed. 1962). It is not sufficient for purposes of this rule that beneficiaries "have no objection to its termination" or take no position on the matter. All beneficiaries must consent. *Clayton v. Behle*, *supra*; *A.B. v. Wilmington Trust Co.*, 41 Del.Ch. 191, 191 A.2d 98 (1968); *Hills v. Travelers Bank & Trust Co.*, 125 Conn. 640, 7 A.2d 662 (1939); *Closset v. Burtchell*, 112 Or. 585, 230 P. 554 (1924).

(2) Respondent also failed to prove that there was no unfulfilled purpose of the trust which could be carried out by its continuance. Indeed, the contrary is clear from the evidence. The purpose of the trust created by the parties was to provide education for their children, with the remaining trust property to be divided equally between the parties "at such time as the children have received or terminated their advanced education . . ." At the time of the attempted termination, the three children beneficiaries were ages 19½, 22½, and 24½. All had attended some college, but none had yet graduated from college, and none had yet attained the age when a majority of young people who aspire to "advanced" or college educations have satisfied those aspirations. Two of the three beneficiaries gave evidence expressing strong aspirations for further higher education; one was then enrolled part time in a university, and the other was in the army, but expressed his desire to continue his college

1. The record contains testimony that nine or ten future annual payments were then expected, in the total amount of approximately \$18,000 to \$20,000.

2. A corollary rule, also referred to in *Clayton v. Behle*, *supra*, that all beneficiaries can terminate a trust even though its continuance is necessary to carry out a material purpose of

the trust when the settlor(s) consent to its termination, *Fowler v. Lanpher*, 183 Wash. 308, 75 P.2d 132 (1936); *Bogert, Trusts & Trustees*, § 1006 (2d ed 1962); 4 *Scott on Trusts*, § 338 (3d ed 1967), is inapplicable to this case because appellant, one of the settlors, resisted termination.

education part time on active duty and later as a civilian. In view of these facts, we cannot see how it can be said that the educational purposes of this trust have been fulfilled or that the appropriate and reasonable duration for performance of this trust for "advanced education" has passed. Consequently, the trust could not be terminated. *Clayton v. Behle, supra; Lafferty v. Sheets*, 175 Kan. 741, 267 P.2d 962 (1954); *Closset v. Burtchaell, supra*.

For each of these two reasons, we hold that this trust could not be terminated on the evidence before the district court in this proceeding.

### III. ATTORNEY'S FEES

At the hearing, appellant sought an order directing the payment of his attorney's fees from the corpus of the trust. Appellant's attorney represented that he had expended 15 hours in preparing to resist the proposed termination, plus his time in the hearing in the district court. These fees were denied, and appellant challenges this on appeal.

[13, 14] A trustee has the fiduciary duty and the concomitant power to defend the trust from the depletion of its assets by decrees of termination or invalidity. U.C.A., 1953, § 75-7-402(1) and (3)(x) and (y); *In re Hart's Estate*, 51 Cal.2d 819, 337 P.2d 73 (1959); *Van Gorden v. Lunt*, 234 Iowa 332, 18 N.W.2d 341 (1944). A trustee who has done so successfully is entitled to have the corpus of the trust pay the reasonable attorney's fees incurred in that defense. U.C.A., 1953, § 22-3-14(3)(a), § 75-7-402(3)(t); *In re Hart's Estate, supra; Van Gorden v. Lunt, supra; Nelson v. Mercantile Trust Co., Mo.*, 385 S.W.2d 167, 175 (1960). As we said in *Walker v. Walker*, 17 Utah 2d 53, 60, 404 P.2d 253 (1965), "a trustee is entitled to reimbursement for all expenses properly incurred in discharging the responsibilities of his trust." On remand, the court should therefore review the fees for legal services rendered to the trust in this matter and order the payment of reasonable fees from the trust corpus.

Insofar as it holds that no trust was created in the parties' interest in the Big

Bear Property, including their interest in installments not paid as of February 8, 1980, the decree of the district court is affirmed. In all other respects, the decree of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion. No costs awarded.

HALL, C. J., and STEWART, J., concur.

HOWE, Justice (concurring and dissenting):

I concur that a trust was created as payments were received and that the court can modify the divorce decree to provide that no more payments should come into the trust.

I dissent from the balance of the holding of the majority opinion. I believe it to be error to require that the trust continue as to the funds on hand just because all the beneficiaries did not consent to its termination, or because its purpose was not fulfilled. Under § 30-3-5, U.C.A.1953, the district court has broad powers to change the funding of education for minor children from one source to another, or to discontinue funding completely. (Incidentally, both parents here offered to personally pay any expenses if their children desired further education). The formal rules of trust law should not be applied to perpetuate the trust in view of the power of the court under § 30-3-5 to terminate it.

I also dissent from the statement in the majority opinion that the balance on hand, \$5,914.28, has "vested" in the children. This amount belongs to the parents upon termination of the trust under the terms of their stipulation and the divorce decree entered in 1973.

TIBBS, District Judge, concurs in the opinion of HOWE, J.



Eldon P. BILLINGS, Plaintiff  
and Appellant,

v.

Weldon H. BROWN and Gerda H.  
Brown, Defendants and  
Respondents.

No. 17348.

Supreme Court of Utah.

Dec. 23, 1981.

Judgment creditor appealed from an order of the Fourth District Court, Duchesne County, Allen B. Sorensen, J., quashing his execution upon judgment on ground that execution had not been issued within eight years after creditor had obtained judgment. The Supreme Court, Howe, J., held that: (1) creditor could not have been prejudiced by not being present at hearing which resulted in granting of motion to quash execution and there was no abuse of discretion by trial court, and (2) after creditor failed to comply with rule requiring that writ of execution issue on judgment within eight years after its entry, creditor was not entitled to additional year in which to obtain writ because noncompliance was due to clerical error in stating on form of writ that judgment had been rendered in Duchesne County instead of Uintah County.

Affirmed.

Oaks, J., concurred specially and filed opinion.

### 1. Execution — 163

Judgment creditor could not have been prejudiced by not being present at hearing which resulted in granting of motion to quash execution and there was no abuse of discretion by trial court, where judgment debtors' counsel did not make any oral argument and case was decided by district court on basis of memoranda submitted by both counsel, as was creditor's original desire, and creditor did not claim he could offer testimony showing that statute of limitations had been tolled.

### 2. Execution — 75

After judgment creditor failed to comply with rule requiring that writ of execution issue on judgment within eight years after its entry, creditor was not entitled to additional year in which to obtain writ on ground that noncompliance was due to clerical error in stating on form of writ that judgment had been rendered in Duchesne County instead of Uintah County. U.C.A. 1953, 78-12-40.

Daniel A. Stanton, Stephen L. Johnston, Salt Lake City, for plaintiff and appellant.

Dennis L. Draney, Roosevelt, for defendants and respondents.

HOWE, Justice:

Plaintiff appeals from an order quashing his execution upon a judgment on the ground that the execution had not been issued within eight years after he had obtained the judgment.

Plaintiff recovered a judgment against the defendants in the district court of Uintah County on December 9, 1970. As authorized by statute, the judgment was thereafter docketed in Duchesne County. Plaintiff's counsel allegedly mailed a form designated "Execution" to the clerk of the district court of Duchesne County on November 29, 1978 with the request that she sign and issue the same. Due to a clerical error, the form contained the heading "District Court of Salt Lake County" rather than "District Court of Duchesne County." The clerk in Duchesne County observed the error and returned the form to plaintiff's counsel.

Plaintiff's counsel allegedly corrected the error and re-submitted the execution. It was again returned to him because of a further error in the form which recited that the judgment had been rendered in Duchesne County instead of in Uintah County. Counsel remedied the second error and forwarded to the clerk the corrected form. She issued the execution about January 11, 1979 and on March 23 the Duchesne County