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How to Avoid the Supreme Court Voiding Your Attempt to Avoid Probate

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antee of freedom of speech are involved. Many state statutes previously thought to come within the guidelines established by *Chaplinsky* must now be reconsidered.

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How To Avoid the Supreme Court Voiding Your Attempt To Avoid Probate

Two years before her death, Virginia Miller executed two trust instruments describing parcels of land she held as trustee for her nephew, Arthur Huckaby. Miller was unmarried, and, therefore, there was no community property interest in the property. In these instruments, Miller reserved extensive powers over the trust corpus, including powers to (1) revoke or amend the trust, (2) enjoy income during her lifetime, (3) encumber the property with liens or mortgages, and (4) sell or otherwise alienate the corpus, all without the necessity of consent by the beneficiary. Miller designated Huckaby as her successor trustee, empowering him to administer the trust if she became incapacitated and to transfer legal title to himself as beneficiary when she died. At Miller's death, Westerfeld, her administrator, brought suit in an attempt to recover the parcels of land for her estate, alleging that the trusts were illusory and testamentary and, therefore, invalid. Both the trial court and the court of civil appeals upheld the trusts.[1] *Held, affirmed*: Retention by the settlor of powers to revoke and to invade the corpus, and the right to receive a beneficial life interest in a trust composed of non-community funds does not render that trust illusory or testamentary. *Westerfeld v. Huckaby*, 474 S.W.2d 189 (Tex. 1971).

I. THE TESTAMENTARY TRUST AND ILLUSORY TRUST DOCTRINES

The Testamentary Trust Problem. One of the main uses of a revocable *inter vivos* trust has been to avoid the necessity of executing and probating a will.[2] Courts have, however, traditionally attempted to limit this use.[3] In large part, this judicial impulse results from the existence in every jurisdiction of statutes regulating the formal execution of wills.[4] These statutes are designed to im-

[1] Westerfeld v. Huckaby, 462 S.W.2d 324 (Tex. Civ. App.—Houston [1st Dist.] 1970).

[2] *See, e.g.*, Berall, *Inter Vivos Trusts Are Still Excellent Estate Planning Tools, Despite Recent Changes*, 36 J. TAXATION 258 (1972); Budner, *Some Basic Reasons for the Use of Trusts*, 110 TRUSTS & ESTATES 346 (1971); Leaphart, *The Trust as a Substitute for a Will*, 78 U. PA. L. REV. 626 (1930).

[3] *See, e.g.*, Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 A. 139 (1939); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N.E. 716 (1925); Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904); Stone v. Hackett, 78 Mass. 228 (1858).

[4] Requirements vary from state to state but usually include some or all of the following: (1) expressions or evidence of testamentary intent; (2) subscription by the testator; (3) witnessing of the testator's signature by two or three witnesses; and (4) publication by the testator. *See, e.g.*, CAL. PROB. CODE § 50 (West 1956); NEB. REV. STAT. § 30-204 (1964); OKLA. STAT. tit. 84, § 55 (1970). Holographic wills and nuncupative wills are

press upon the testator the solemnity of his act, protect him from undue external influence, and provide evidence of his testamentary intention after his death.[5] The testamentary trust problem arises because a trust in which a settlor retains all important indicia of ownership of the trust corpus during life, and causes transfer of those indicia to a designated person at death is, in effect, a will. Such an instrument was regarded as invalid under the traditional view because it failed to comply with testamentary execution requirements.[6] In 1935 the *Restatement of Trusts* reflected this traditional view by deeming all trusts in which the settlor had reserved extensive control to be testamentary in so far as they were to take effect after the settlor's death.[7] The implied rationale was that by reserving such extensive control over the trust, the settlor, in effect, made the trustee his agent and gave up no real interest in the trust until death.[8]

After the 1935 *Restatement*, however, an increasingly large number of courts began to regard the testamentary use of trusts more favorably. Some of these courts avoided the testamentary problem by holding that the passage of any recognizable present interest to the beneficiary or trustee could prevent the trust from being strictly testamentary in nature. This was the case even though the settlor reserved vast powers to revoke and control the trust.[9] This shift in judicial opinion is reflected by the 1959 *Restatement of Trusts*, which permits the settlor not only to control the trust's administration, but also to reserve powers to revoke and modify the trust without creating a testamentary disposition.[10] The great weight of authority follows the 1959 *Restatement* in upholding the validity of such trusts.[11]

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sometimes permitted but are subject to different requirements. *See, e.g.*, TEX. PROB. CODE ANN. § 60 (1956).

[5] These functions are known, respectively, as the ceremonial, the protective, and the evidentiary functions. There is substantial doubt, however, as to whether they are effectively carried out by the formal requirements of will execution statutes, and whether the harm of imposing formal requirements that invalidate numerous transactions exceeds their benefit. *See, e.g.*, E. SCOLES & E. HALLBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 96 (1965); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

[6] *See, e.g.*, Smith v. Ferguson, 90 Ind. 229 (1883); Russell v. Webster, 213 Mass. 491, 100 N.E. 637 (1913); McEvoy v. Boston Five Cents Sav. Bank, 201 Mass. 50, 87 N.E. 465 (1909); Darling v. Mattoon State Bank, 189 Wis. 117, 207 N.W. 254 (1926); Warsco v. Oshkosh Sav. & Trust Co., 183 Wis. 156, 196 N.W. 829 (1924).

[7] RESTATEMENT OF TRUSTS § 57(2) (1935).

[8] *Id. See also* Peterson v. Weiner, 71 S.W.2d 544 (Tex. Civ. App.—San Antonio 1934), *error ref.*

[9] *See* United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946), in which the settlor retained the powers to sell, assign, and transfer the corpus, revoke the trust at will, and the right to enjoy a life estate. The court held the trust valid, reasoning there was a present transfer of interest to the beneficiary as evidenced by the trust instrument. This present interest was revocable, however, by the exercise of the enumerated powers by the settlor. *See also* Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942).

An even more liberal application of this present-transfer-of-interest test as applied to a trustee occurred in Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955). In this case the settlor, in addition to making himself trustee, retained powers to revoke the trust, to enjoy a beneficial life estate, and to invade the corpus. The court, however, refused to hold that this extensive reservation of rights during the settlor's lifetime rendered the trust testamentary. It reasoned that since the settlor held these powers in his capacity as trustee and not as settlor, that he had in fact made a present transfer of interest. The court did not consider it significant that the settlor transferred this interest to himself.

[10] RESTATEMENT (SECOND) OF TRUSTS § 57 (1959).

[11] G. BOGART, TRUSTS AND TRUSTEES § 104, at 536 (2d ed. 1965); 1 A. SCOTT, THE LAW OF TRUSTS §§ 57.1-57.2 (3d ed. 1967). *See, e.g.*, Roberts v. Roberts, 286 F.2d 647 (9th Cir. 1961); Nickson v. Filtrol Corp., 262 A.2d 267 (Del. Ch. 1970); Rose v.

The Illusory Trust Problem. Although the illusory trust doctrine frequently arises in connection with the testamentary trust doctrine, and is almost as frequently confused with that doctrine,[12] the illusory trust doctrine is a result of an entirely separate problem. It is a response to the attempted use of the trust concept in ways that frustrate statutory provisions for financial protection of the family at death.[13] The illusory trust doctrine is best illustrated by the early case of *Newman v. Dore.*[14] In this case the settlor created a trust in which he retained complete control over the trustee, power to revoke the trust, enjoyment of income during his life, and power to invade corpus. Upon his death, legal title to the corpus vested in named beneficiaries outside his family. The settlor's express purpose in creating this trust was to avoid the New York law which provided a share of the husband's estate upon his death to his wife.[15] New York had passed this forced share law in order to provide an adequate portion of the matrimonial property for the widow and children, even if the decedent had attempted to disinherit them by will.[16] Noting this statutory purpose, the court conceded that the settlor could effectively diminish his estate by gifts or other bona fide transfers of his property during his lifetime. He could not do so, however, in frustration of the statute by a transfer that was less than an actual "good faith" divestiture of ownership.[17] Based on

St. Louis Union Trust Co., 99 Ill. App. 2d 81, 241 N.E.2d 16, *aff'd*, 43 Ill. 2d 312, 253 N.E.2d 417 (1968). Some jurisdictions even sanction the revocable *inter vivos* trust as a will substitute by statute and thus avoid the uncertainty of whether such a trust is valid. IND. ANN. STAT. §§ 29-1-5 to -9 (1972); WIS. STAT. § 231.205(1) (1957).

[12] Compare the following definitions: "[I]f . . . the husband retains the power of revocation, it is fallacious, illusive, and deceiving, and will be considered a fraud on the rights of the widow where she is deprived of her distributive share." Ackers v. First Nat'l Bank, 192 Kan. 319, 387 P.2d 840, 851 (1963). "[S]uch [illusory] trusts may not be used as a device to deprive the widow of her distributive share of the property possessed by her husband at the time of his death." Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381, 390 (1944).

A third doctrine, which is also often misinterpreted, is that of the "colorable" trust. This designation is applied when a settlor executes a seemingly valid trust but secretly agrees with the trustee that he or she as settlor may continue to control the trust. Holmes v. Mims, 1 Ill. 274, 115 N.E.2d 790 (1953); Wright v. Holmes, 100 Me. 508, 62 A. 507 (1905). As an example of how the colorable trust doctrine has been misinterpreted, one court has held that it "means merely that the conveyance or gift must be one legally binding on the settlor or donor, accomplished in his lifetime, and not testamentary in its effect." Kerwin v. Donaghy, 137 Mass. 559, 59 N.E.2d 299, 306 (1945).

[13] *See* Bell, *Community Property Trusts—Challenges By the Non-Participating Spouse*, 22 BAYLOR L. REV. 311 (1970); Comment, *Land v. Marshall—The Illusory Trust Comes to Texas*, 20 BAYLOR L. REV. 408 (1968); Comment, *The Illusory Trust and Community Property: A New Twist to an Old Tale*, 22 SW. L.J. 447 (1968).

[14] 275 N.Y. 371, 9 N.E.2d 966 (1937). Earlier decisions declaring such a trust illusory were decided on the basis of whether the settlor had the intent to defraud his or her spouse at the time the trust was created. Payne v. Tatem, 236 Ky. 306, 33 S.W.2d 2 (1930); Walker v. Walker, 66 N.H. 390, 31 A. 14 (1891). Some states provide for an "intent-to-defraud" test by statutory codification. *See, e.g.*, MO. REV. STAT. § 474.150 (1956), which invalidates all transfers "in fraud of the marital rights of [a] surviving spouse."

[15] N.Y. DECED. EST. LAW § 18 (McKinney 1930), *as amended*, N.Y. DECED. EST. LAW § 18 (McKinney 1966).

[16] *See* ch. 229, § 20, [1929] N.Y. Laws 519, in which the New York legislature declared that its intention in enacting the Decedent Estate Law was "to increase the share of a surviving spouse, either in a case of intestacy or by an election against the terms of the will of the deceased spouse thus enlarging property rights of such surviving spouse . . . ."

[17] The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer. The "good faith" required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect

this reasoning, the court labelled the trust "illusory," held it invalid, and returned the corpus to the estate so that the wife could get her full statutory share.

Newman v. Dore has been followed not only in New York, but also in numerous cases in other jurisdictions throughout the country.[18] In spite of this widespread use of the illusory trust doctrine, its first significant application to a trust that attempted frustration of community property interests occurred in the recent Texas case of *Land v. Marshall*.[19] The settlor had created a trust funded with community property. He had reserved a life income with extensive powers over the trust corpus. In addition, he had directed that a life interest should go to his wife upon his death, and the corpus to other named beneficiaries. Citing *Newman v. Dore*, the Texas Supreme Court held this trust illusory and, therefore, invalid. Even though the husband had the power of management and control over the property and the right to alienate it by a bona fide transfer,[20] he did not have the right under Texas law to dispose of the wife's community property by will.[21] Thus, the court concluded that the surviving spouse could demand that any *inter vivos* trust having the effect of decreasing the deceased spouse's estate must have contained some genuine present transfer of interest.

II. WESTERFELD V. HUCKABY

In *Westerfeld v. Huckaby* the Supreme Court of Texas began its opinion by restricting the illusory trust doctrine as set forth in *Land v. Marshall* to cases in which the trust corpus is composed of community funds. *Westerfeld* made clear that the *Land* trust failed not because the settlor retained too much control over his own share of the trust property, but because he frustrated his spouse's marital property interests. The court pointed out that the illusory

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> his wife, but to the intent to divest himself of the ownership of the property. . . .'

9 N.E.2d at 969.

[18] *See, e.g.*, Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Ackers v. First Nat'l Bank, 192 Kan. 319, 387 P.2d 840 (1963); Van Devere v. Moore, 242 Minn. 289, 67 N.W.2d 664 (1954); Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 209 (1941); Rouston v. Hovis, 60 Ohio App. 536, 22 N.E.2d 209 (1938). Much confusion, however, followed the *Newman v. Dore* decision, of which the Ohio situation is illustrative. Prior to 1961, Ohio case law was clearly in line with *Newman v. Dore*. *See* Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944). In Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961), the court expressly overruled *Bolles*, relying heavily on precedent established by Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938). *White*, however, concerned a testamentary trust problem and had nothing to do with marital property rights.

[19] 426 S.W.2d 841 (Tex. 1968); *cf.* Epperson v. Mills, 19 Tex. 66 (1857), and Crain v. Crain, 17 Tex. 81 (1856), in which parents' attempts to transfer their property and thus circumvent an heirship statute giving shares of the parents' estates at death to their children were struck down as being illusory transfers.

[20] When the *Land* case was decided in 1968, TEX. REV. CIV. STAT. ANN. art. 4619 (1960) permitted the husband sole management and control over all community property. This article was repealed in 1969. As of 1969, TEX. FAM. CODE ANN. tit. 1, § 5.22 (1972) permitted each spouse to have management and control over the community property he or she brings into the marriage.

[21] *See, e.g.*, Langehennig v. Hohmann, 139 Tex. 452, 163 S.W.2d 402 (1942); Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935). The surviving spouse in this situation may elect to take either under the will, or one-half the community property. Wright v. Wright, 153 Tex. 138, 274 S.W.2d 670 (1955); Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

trust doctrine did not directly invalidate the portion of the *Land* trust composed of the husband's property. The transfer of the wife's property, however, was illusory. Such an illusory transfer defeated the purpose of the trust and, therefore, invalidated the entire trust.

Since the issue was not involved in *Westerfeld*, the court never expressly dealt with the reason behind permitting one spouse to have management and control over the community property during life,[22] and not have similar control in directing its disbursement at death. A probable explanation is that in the *inter vivos* management of community property, one spouse will be restrained from pauperizing the other by large disbursements because such property also provides for his own needs. In contemplation of death, however, mutual benefit is no longer a factor.

The main thrust of the court's opinion dealt with the possible testamentary nature of the *Westerfeld* trust. The court first recognized that Texas statutory law has taken a very liberal stance as to how much power a settlor may retain without having his trust declared testamentary. A settlor under the Texas Trust Act not only may revoke a trust at will,[23] but also may appoint himself trustee and thus exercise complete control over the administration of the trust.[24] In keeping with the spirit of the Texas Trust Act, the court stated that it considered the 1959 *Restatement of Trusts*[25] to represent the correct trend of the law. The court even hinted it might go as far as upholding any "inter vivos trust no matter how extensive the powers over the administration by the settlor."[26]

To support its conclusions, the court looked to the trust instruments themselves. In both declarations, Miller had used the word "hereby" in the sentence "I hereby nominate as successory trustee, Arthur Huckaby." "Hereby," according to the court, was a word which signified that whatever act or event it modified was accomplished at the time the word was used. It further signified that the act was a result of some prior act or event. Thus, the court reasoned, if Miller had intended to appoint a successor trustee when she made the declarations, it must have been a result of her intending to create a trust that would be operative at the time the trust declaration was made. The court found indications of present intent to create an *inter vivos* trust in the provision for Huckaby, as successor trustee, to administer Miller's beneficial life estate should she ever become unable to manage her own affairs. According to the court, this could only indicate that the settlor contemplated her trust would be a living, useful instrument at the time of its creation.

The court did not discuss the desirability of having formal requirements such as those for wills[27] for the essentially testamentary *Westerfeld* trust. Instead, it emphasized the advantages this type of trust could offer a person planning an estate. The court pointed out, for example, that such a trust

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[22] *See* note 20 *supra.*

[23] TEX. REV. CIV. STAT. ANN. art. 7425b-41 (1960).

[24] *Id.* art. 7425b-7.

[25] RESTATEMENT (SECOND) OF TRUSTS § 57 (1959).

[26] 474 S.W.2d at 271, quoting from 1 A. SCOTT, THE LAW OF TRUSTS § 57.2 (3d ed. 1967).

[27] *See* note 2 *supra*, and acompanying text.

permits appointment, without time-consuming court proceedings, of a person who the settlor has confidence will manage the trust and provide a regular income should the settlor become physically or mentally incapacitated.[28] The court also recognized that the lag between the death of a testator and the probating of the will can be lengthy.[29] During this time, a small business can fail, and property interests can become seriously jeopardized by lack of proper management. The *inter vivos* trust, with a provision for disbursement of the corpus at the settlor's death, provides a relatively simple solution to this problem.

Although the court did not expressly so state, it appears a significant dissatisfaction with the present probate system is behind the court's approbation of the practical advantages of the *Westerfeld* trust.[30] It is even possible that such a dissatisfaction was the moving force behind the entire opinion.

III. CONCLUSION

Westerfeld was the first confrontation of the Texas Supreme Court with the problem of a trust funded with non-community property in which the settlor had retained extensive powers of control over the corpus. The distinction the opinion makes between applying the illusory trust doctrine solely to trusts composed of community funds and the testamentary trust doctrine solely to trusts composed of non-community funds is a valid one. First, the distinction is supported by an impressive line of legal authority, beginning with *Newman v. Dore*. Second, each doctrine has a different rationale. The illusory trust doctrine is based on the public policy of protecting the rights of a spouse in community property, while the testamentary trust doctrine rests on the questionable necessity of preventing a settlor from circumventing the formalities of the wills statutes. Thus, each doctrine should be attacked, supported, and understood in light of its own separate rationale.

The reasoning of the opinion itself, however, is open to criticism. The heavy emphasis on the technical aspects of the language of the trust declaration in construing it as a presently operative instrument weakens the applicability of the opinion to future cases in which such language is not employed. Instead of rejecting the testamentary trust doctrine outright, which is the import of the opinion, the court preferred to find a present interest in the trust even though its effect was overwhelmingly testamentary. As a result, it will be interesting to see if the Texas courts continue to strain to find a presently

[28] *See, e.g.*, Meyer, *Non-Tax Advantages of the Revocable Trust (With Emphasis on Use as Will Substitute)*, 37 DICTA 333 (1960); Miller, *Advantages Available to Client and Counsel from Use of Inter Vivos and Testamentary Trusts*, 29 TEX. B.J. 1019 (1966); Roth, *Estate Planning in Florida: The Revocable Inter Vivos Trust*, 16 U. FLA. L. REV. 34, 34-35 (1962).

[29] Professor Atkinson estimates that 13 to 14 months are required as a minimum time period for settling an estate. T. ATKINSON, WILLS 575 (2d ed. 1953). *See* Bostick, *The Revocable Trust: A Means of Avoiding Probate in the Small Estate*, 21 U. FLA. L. REV. 44 (1968).

[30] In expressing this dissatisfaction the court is not alone. *See, e.g.*, Bostick, *supra* note 29; Wellman, *The Uniform Probate Code, Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1969); Wellman, *The Lawyer's Stake in Probate Reforms*, 47 MICH. ST. B.J. No. 3, Mar. 1968, at 10. Non-legal criticism of probate proceedings has also been prolific in recent years. *See, e.g.*, N. DACEY, HOW TO AVOID PROBATE (1965).