#L-640 8/28/84

Second Supplement to Memorandum 84-25

Subject: Study L-640 - Trusts (Comments on Oral Trusts)

Professor Jesse Dukeminier, a Commission consultant, has written the Commission expressing opposition to any attempt to abolish oral trusts. (A copy of his letter is attached as Exhibit 1.) It should be noted that the Commission is considering this question but has not yet made a decision. At the April meeting, the Commission asked for clarification of some points that came up in the discussion of the original memorandum on this subject; Memorandum 84-25 provides this additional background information.

Professor Dukeminier argues that oral trusts are needed to save defective gifts in limited circumstances by circumventing the delivery requirement where a gift would otherwise be invalid. At the conclusion of his discussion of Cochrane v. Moore, he asks whether Moore would win recognition of the gift to him of one-fourth interest in a horse if oral trusts were abolished. Working from the assumption that this case represents an important class of cases, we suggest that the disposition could be saved as a resulting trust if the court wanted to enforce the "intention" of Benzon to transfer the horse to Cochrane subject to the interest of Moore. If there is fraud on the part of Cochrane in later denying Moore's interest, then a constructive trust could be declared.

Treating the Cochrane v. Moore situation as a trust raises several puzzling questions. When did the trust arise? Was it when Benzon made the undelivered gift or only later when Cochrane was fool enough to say "all right"? What was the situation between Benzon and Moore before Benzon sold the horse to Cochrane? Did Cochrane take the horse free of any claims by Moore when he bought it from Benzon? Is Cochrane subject to the usual duties of trustees? Can Moore require accountings from Cochrane? Would Cochrane be liable for breach of trust if the horse died because of Cochrane's agent's negligence? The staff is not convinced that oral trust doctrine should be preserved in the hope that a court would apply it to do justice in the event that such a case arose in California.

That oral trust principles may fail to come to the rescue is illustrated by a Connecticut case discussed on page two of Professor

Dukeminier's letter. In this case the court treated an intended gift to charity as complete without recourse to oral trust doctrines, but Professor Dukeminier suggests that "it would have caused less distortion in the law to find the donor intended an oral declaration of trust than to hold the gift had been delivered because the donor thought it was effective." This case does not seem to lend much support to preservation of oral trusts in California; rather it suggests that in similar circumstances, California courts might save the gift without any need to "torture" an oral trust.

As to the question of constructive trust doctrine would provide sufficient means to avoid injustices that might result from requiring trusts to be in writing, Professor Dukeminier suggests that constructive trust doctrine "has enough to do now in rectifying a huge range of unjust enrichments. Why make it more complex?" The staff wonders whether there would be a significant demand for constructive trusts to save undelivered gifts, nor is it clear how the law would be made more complex.

One motive for suggesting elimination of oral trusts is to simplify the statutory trust law. Another is to avoid the invitation to fraud. A third reason, by no means insignificant, is to improve the law of trusts so that the intention of the trustor can be determined from the instrument. It seems odd to retain oral trusts in the body of trust law so that defective outright gifts can be saved in certain circumstances. Professor Dukeminier concludes by citing the expression "If it ain't broke, don't fix it." While the staff subscribes to this same wisdom, we also suspect that "broke" does not exhaust the categories of defects in the law calling for Commission attention.

Professor Dukeminier also commends "efforts to eliminate or limit intent-defeating rules." He finds elimination of oral trusts would be a step backward by "tightening up on the delivery requirement." The staff is sympathetic to this argument, but on the other hand, we do not allow oral wills. If inter vivos trusts, which are generally used as probate avoidance devices, are required to be in writing, then the law is at least consistent.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO SANTA BARBARA · SANTA CRUZ

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August 13, 1984

Mr. John De Moully
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Memorandum 84-25 - Oral Trusts

Dear Mr. DeMoully:

I am not sure why the Commission wants to abolish oral trusts of personal property, which seem not to have caused any serious problems. I should like to suggest you think harder about the effect of such an action upon the delivery requirement of gifts.

One of the primary functions of the oral trust concept is to permit the court to circumvent the delivery requirement under limited circumstances. The requirement of manual delivery ("handing over") of a gift of personal property is thought to serve important purposes: it brings home to the donor the fact that he is performing a legally binding act and it provides strong evidence of the alleged gift. But the requirement has important exceptions that experience has found desirable. These are constructive delivery, symbolic delivery, and oral trust. Where there is no manual delivery and the facts do not fit constructive or symbolic delivery (allowed only when manual delivery would be impracticable), the court may enforce the gift by finding an oral trust.

The leading case of Cochrane v. Moore, 25 Q.B.D. 57 (1890), is one of the earliest examples of using the oral trust to circumvent the delivery requirement. There one Benzon made an oral gift to Moore of a one-fourth interest in a horse. Later Benzon sold the horse to Cochrane. Moore claimed a one-fourth undivided interest in the horse. The court held this was not a valid gift because Benzon had not delivered the horse to Moore. Of course, manual delivery of an undivided fourth interest in a horse is rather difficult, as is constructive delivery (handing over the means of obtaining the undivided quarter interest). Benzon could have used a sealed instrument of gift (symbolic delivery), but he did not. The court came to the rescue and held that Cochrane, who, upon being told by Benzon of Moore's interest in the horse, had said that was "all right," had thereby declared himself a trustee for Moore. Thus, by the rather fictional finding of an intended trust, Moore ended up with a one-fourth undivided equitable interest in the horse. This is what the parties intended, and justice was served. If you abolish oral trusts, will Moore win in California?

Professor Scott does not like turning an imperfect (undelivered) gift into a declaration of trust. He would prefer that the delivery requirement be modified or that the gift fail. Rather than have courts find a trust was intended upon fictitional evidence, Scott is willing for an intended gift to fail, in spite of the fact that the primary purpose of the law is to carry out a person's intent. Fortunately, I think, many judges have not been so conceptualistic, so unwilling to bend a concept to do justice, and have found an "intent to create an oral trust" upon the slimmest (or what Scott would call nonexistent) evidence. 1/

A recent case illustrates what I think is the weakness of Scott's position. In Hebrew University Assn. v. Nye, 148 Conn. 223, 169 A.2d 641 (1961), the widow of a distinguished Hebrew scholar decided, after her husband's death, to give his library to Hebrew University in Jerusalem. She made a trip to Israel, and at a lunch given in her honor, she announced the gift of the library to the university. Thereafter she stated orally, as well as in letters to the university and others, that she "had given" the library to the university. After her trip to Israel, the widow began arranging and cataloguing the library for crating and shipment to Israel, but she died before the shipment was made. The Connecticut Supreme Court held that there was no delivery, actual or constructive, and that an imperfect gift (for want of delivery) cannot be turned into a declaration of trust. It followed Scott's view. Upon remand, and a change of lawyers, the superior court found for the university, giving as a reason that where a donor dies believing that a gift to a wife or child or charity was effective, a court of equity will treat the gift as completed. 26 Conn. Supp. 342, 223 A.2d 397 (1966). I submit it would have caused less distortion in the law to find the donor intended an oral declaration of trust than to hold the gift had been delivered because the donor thought it was effective. This latter holding is likely to cause a lot more mischief than a factual finding that the widow intended a trust.

In a recent article Professor Love makes a persuasive case against the Scott view, arguing that an oral declaration of trust is a useful device to circumvent delivery where there is clear and convincing evidence of intention to make a gift and the testator intended the consequences of a declaration of trust even if he did not intend a trust. Love, Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly, 67 Ky. L.J.

1/ In section 31 of his treatise Scott pokes fun at Lord Eldon for his "extraordinary mental powers" in construing the actions of the donor in Ex parte Pye, 18 Ves. 140 (1811), to constitute an oral declaration of trust. Perhaps it is good to have scholars like Scott try to keep the categories neat and the judges honest, but all judges know that occasionally it is necessary to stretch a category by slipping into it facts that do not comfortably fit.

309 (1979). The problem I have with Scott's view is that it ignores how people actually behave and, without sufficient reason, penalizes those who do not behave in the desired manner. If people use the magic words--if the widow above had announced in Jerusalem that she held the library "in trust" instead of saying "I give"--all is well. (But all would not be well in California if you abolish the oral trust and the widow announced in Palo Alto she held the books in trust for Stanford!) However, people don't always know the magic words and they don't always put it in writing, and the law should think twice about penalizing people whose actions are clear and intent unmistakable just because they don't say and do the "right things."

The delivery requirement is rather like the Statute of Frauds in serving a channeling function. They tell people that if they "hand the thing over" or "put it in writing" they can be sure their wishes will be carried out. But experience has required us to carve exceptions in the Statute of Frauds to deal equitably with human behavior: part performance and estoppel. Similarly, with delivery we have had to invent constructive delivery, symbolic delivery, and oral trust. I might also add that although Scott does not like an undelivered gift "tortured" into an oral trust, he does not suggest that the oral trust should be abolished.

If the oral trust is abolished, it is probable that courts will expand constructive trust doctrines to give effect to intention. I see no gain, and possible loss, in this. Constructive trust doctrine has enough to do now in rectifying a huge range of unjust enrichments. Why make it more complex? It is not as easily tailored to avoiding the delivery requirement as is the oral declaration of trust.

In recent years courts and legislatures have made a commendable effort to carry out the intention of parties and to eliminate or limit intent-defeating rules. If you abolish the oral declaration of trust you are tightening up on the delivery requirement, which makes symbolism more important that intention. I think this is the wrong way to go.

As the popular expression goes, "If it ain't broke, don't fix it."

Sincerely,

Jesse Dukeminier
Professor of Law

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