#L-640 9/14/84

Fourth Supplement to Memorandum 84-25

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

Attached to this supplement is a copy of a letter from Professor Jesse Dukeminier on the subject of oral trusts.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

September 10, 1984

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

Re: More on Oral Trusts

Your staff should take a look at Elyachar v. Gerel Corporation, 583 F. Supp. 907 (S.D. N.Y. 1984). A father purported to give stock certificates to his sons but retained possession of them so as to exercise control over the corporations, which he controlled. He filed federal gift tax returns and changed ownership of stock on the corporation books, but he never delivered the stock. The court found that the father clearly intended to make an irrevocable transfer, but at the same time, by not delivering the certificates, he intended to retain voting and management control of the corporations. How could his intention be given effect? Answer: By holding that he created an oral trust. And the court so held, even though the father did not know the relationship which he intended to create was a trust. "The law will delineate a trust where, in view of a sufficiently manifested purpose or intent, that is the appropriate instrumentality, even though its creator calls it something else, or doesn't call it anything."

The court noted that an oral trust requires proof beyond a reasonable doubt of intention to create a trust, but held that the purpose of the rule was satisfied here in view of the strong proof of the donor's intent, which could be carried out only by a trust. If the transfer is treated as a delivered gift, the donor loses control of the corporations; if it is treated as an undelivered gift, the gift fails. Only the oral trust works, and the court, in a sensible and well-reasoned opinion, found one. I enclose a Xerox of pages 921-923 of the opinion.

Do you really want to deprive California courts of the opportunity to reach this sensible result?

Sincerely,

Jesse

Jesse Dukeminier
Professor of Law

JD:mrs
Enclosure

Misc.2d 877–78, 239 N.Y.S.2d 85 (Sup.Ct. Nassau Cy. 1963). The Colonel testified that he simply put the powers before his children and they signed, without any discussion or instruction. Tr. 931–32. This scenario, even if true, would at most authorize the Colonel to act only as a trustee in his childrens' interests. Finally, the Colonel failed to exercise whatever authority may have been conveyed by the powers. The powers remain unexercised, after a period of many years, and were not relied upon by the Colonel in his actual effort to cancel the gifts he made. Indeed, although he initially testified that he had not cancelled his gifts to his grandchildren, he later conceded that he had done so, even though they signed no stock powers authorizing him to take back or transfer their shares. Tr. 927–30.

D. *Implied Trust or Retained Life Interest.*

[14, 15] The question remains whether Colonel Elyachar could effectively withhold delivery of the power to control the corporate interests reflected by the certificates. Two equally plausible bases exist for upholding this effort on his part. First, nothing in property law prevents an owner from separating beneficial ownership from control. A person can convey an ownership interest in personal property—in effect the remainder interest—along with the right to receive all income or profits, while at the same time retaining a life interest in its use or control. "Not only may the donor defer the enjoyment of the donee until the death of the donor, but he may also reserve to himself the use and enjoyment of the property during his life without affecting the present character of the gift to the donee of the future enjoyment or invalidating the donation." Brown, *The Law of Personal Property* § 48, at 134 (2d ed. 1936); *see, e.g., In re Estate of Valentine*, 122 Misc. 486, 204 N.Y.S. 284 (Sur.Ct. N.Y.Cy.1924) (donor effectively made gift of ownership of stock upon his death to his wife and daughters by delivering document proving absolute gift, despite reservation of control and income for donor's life); *In re Estate of Hendricks*, 163 A.D. 413, 148 N.Y.S. 511 (1st Dep't 1914), *aff'd*, 214 N.Y. 663, 108 N.E. 1095 (1915) (gift of beneficial ownership in stock upheld, though voting power and control reserved); *In re Estate of Bullard*, 76 A.D. 207, 78 N.Y.S. 491 (3rd Dep't 1902) (gift upheld where donor transferred stock certificates to his grandson, but retained control, dividends, and voting power and held office for long periods by virtue of stock control).

Dividing the incidents of property in the manner contemplated by Colonel Elyachar is uncommon with respect to some forms of property, but entirely familiar in connection with ownership interests in corporations. The separation of ownership and control in corporate affairs is the rule rather than the exception in our economy, and stock ownership is often unaccompanied by meaningful authority other than the right to a due proportion of such payments as the corporate directors choose to order. W. Cary & M. Eisenberg, *Corporations* 208–11 (5th ed. 1980). The analogy to this case is obviously imperfect, but it is advanced here only to show that the Colonel's plan sought an allocation of property interests that is far from unusual in our society. In light of the Colonel's lifetime involvement with his buildings, moreover, his plan to give away interests in them, while retaining control, is an allocation of ownership interests that advances reasonable economic expectations in a manner consistent with property law principles.

[16] The Colonel's plan can also be upheld as an intervivos trust, in which he gave beneficial ownership of the shares to his children, while retaining physical possession of the certificates as trustee for his life or for such shorter period as he elected. A trust is "a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another." G. Bogert, *The Law of Trusts & Trustees* § 1 (2d ed. 1965). Usually the settlor delivers the trust res to a trustee pursuant to a written document describing the transfer. But a trust may be estab-

lished through an oral declaration or other conduct, even though the settlor does not use the words "trust" or "trustee":

> Although a trust is created only if the settlor properly manifests an intention to create a trust, it is immaterial whether or not he knows that the relationship which he intends to create is called a trust, and whether or not he knows the precise characteristics of the relationship which is called a trust. In many cases the owner of property in disposing of it has no very clear idea of the precise nature of the disposition which he intends to make.

1 *Scott on Trusts* § 23, at 191 (3d ed. 1967).

[17, 18] In New York a trust in personal property can be created or proved by parol, and no requirement exists that particular words be used. "The law will delineate a trust where, in view of a sufficiently manifested purpose or intent, that is the appropriate instrumentality, even though its creator calls it something else, or doesn't call it anything." *In re Will of Douglas*, 195 Misc. 661, 665, 89 N.Y.S.2d 498, 503 (Sur.Ct. Broome Cy.1949); *see* 61 N.Y.Jur. *Trusts* § 57 (1968) ("the court will find that a trust is created where it appears that such was the intention of the parties, and where the nature of the transaction justifies or requires it"). To protect the alleged donor, however, New York law requires that his intent to create a trust must be established beyond any reasonable doubt. The words and acts relied upon must be unequivocal in nature and admit of no other interpretation than that the property was to be held in trust. There must be either an express declaration of trust or facts and circumstances which show that the putative settlor intended to create a trust relationship. *In re Estate of Fontanella*, 33 A.D.2d 29, 31, 304 N.Y.S.2d 829, 831 (3d Dep't 1969) (beyond reasonable doubt); *Beaver v. Beaver*, 117 N.Y. 421, 428, 22 N.E. 940, 941 (1889).

In this case the Colonel's intention to create a trust is "implied from [his] acts or words ... [and] arises as a necessary inference therefrom and is unequivocal." *Wadd v. Hazelton*, 137 N.Y. 215, 219, 33 N.E. 143, 144 (1893). His acts and words established his intention to give beneficial ownership, presently and absolutely, to those in whose names he issued certificates and to whom he paid dividends as shareholders. At the same time, his acts and words also established his intention to retain the power to control the corporations involved. These intended objectives strongly indicate a desire on his part to manage the property for the ultimate benefit of the beneficial owners. Furthermore, his conduct until his recent attempt to repudiate the gifts was entirely consistent with that of a trustee. He paid out all dividends to the beneficial owners, and when his sons protested his attempt to withhold a dividend, he acquiesced and paid the dividend declared. Some years before this litigation, Daniel instinctively described the nature of his interest in the corporations when he stated in a financial report that "[n]o New York Property has been included in this Statement, as it is involved with a large Family Trust, presently controlled by father, J.R. Elyachar." DX 1071; *see* Tr. 496.

The rule requiring proof beyond a reasonable doubt of an intention to create a trust has been satisfied here, if trusts may truly be implied from conduct without regard to form. To the extent any doubt exists, moreover, the rule must be applied with a view to its purpose rather than in a mechanical manner. That purpose is to avoid the instability to titles and the danger of perjury that would occur if courts could convert imperfect gifts into valid declarations of trust. *See Young*, 80 N.Y. at 437; *see also Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891); *Tsai v. Tsai*, 39 A.D.2d 652, 331 N.Y.S.2d 691, 692 (1st Dep't 1972); *Fontanella*, 33 A.D. at 31, 304 N.Y.S.2d at 831. To apply the rule here, and thereby to invalidate the trust, would serve no such purpose. The gifts made by Colonel Elyachar were intended, delivered, and accepted so they have become present and irrevocable. A trust is implied in this case not to save a future or revocable gift but to give

effect to the Colonel's equally clear intent to reserve to himself powers of management and control, powers that would be lost under these circumstances if no trust (or life interest) were implied. The dangers of fraud and perjury that exist when purported donees claim they were delivered property in trust are therefore not present in this case. While the situation is apparently one of first impression, it appears reasonable to assume that the courts of New York would more readily find a trust in order to effectuate a donor's intent to reserve a property interest than to render complete at a donee's behest an intended but undelivered gift.

IV. *Conclusion*

In light of the findings and conclusions recited above, Daniel and Ralph Elyachar are each hereby declared the beneficial owners of 20% of the outstanding shares of Gerel Corporation, 20% of the outstanding shares of Huguel Corporation, 20% of the outstanding shares of Timston Corporation, and 21.9% of the outstanding shares of Ruradan Corporation. Defendants are ordered to prepare the necessary documents and certificates properly to reflect plaintiffs' interests, which must be accomplished within thirty days of the entry of final judgment in this case, after all appeals are exhausted. Colonel Elyachar will continue to manage and control these corporations for his life, as fiduciary or trustee for the beneficial owners. The request that the certificates be surrendered to plaintiffs is therefore denied. The Court retains jurisdiction to enforce this judgment through appropriate proceedings and decrees.

SO ORDERED.

James BAILEY, Plaintiff,

v.

John E. BINYON and Binyon's Incorporated, Defendants.

No. 83 C 3312.

United States District Court, N.D. Illinois, E.D.

March 30, 1984.

Former employee of restaurant brought action under statute prohibiting discrimination in employment and statute guaranteeing equal rights under the law against restaurant and officer of restaurant seeking various forms of relief for defendants' alleged racial discrimination. Defendants moved to dismiss for failure to state claim. The District Court, Plunkett, J., held that: (1) employee sufficiently alleged defendants treated him differently than their white employees because of his race, and (2) whether employee was constructively discharged was question for jury.

Motion denied.

1. Civil Rights ⇐43

In racial discrimination in employment action based upon disparate treatment theory, plaintiff must prove discriminatory intent or motive on part of defendant.

2. Civil Rights ⇐13.13(1)

In order to establish violation of statute guaranteeing equal rights under the law, plaintiff must show intentional discrimination. 42 U.S.C.A. § 1981.

3. Civil Rights ⇐44(1)

Where employer openly discriminates against employee on basis of latter's race, employee, in order to establish prima facie case of discrimination, is not required to demonstrate, pursuant to the *McDonnell Douglas* formula, that he was member of racial minority, that he was qualified for job he was performing, that he satisfied normal requirements of his work, that he