TRUSTS—Proof of existence of trust from circumstantial evidence of settlor's declaration results in enforceable oral trust

In 1929, Mr. and Mrs. Butler transferred all their property, worth approximately one million dollars, to their son, Robert. They died in 1931 and 1940. After Robert's death in 1956, his brother, Earle, and Margaret, widow of a third brother (Hubert) sued Robert's executor claiming that the transfer had been in trust for the benefit of the parents while they lived and then for the sons and their beneficiaries.[1] The trial Court dismissed both petitions. The parents had been concerned with preserving their property from estate and inheritance taxes and from claims from Hubert's creditors. Earle testified that his mother said in 1929 that Robert was to manage the property, take care of the parents and Hubert and Margaret during their lives, to divide the balance equally with Earle after their deaths, and to agree that Earle should have at least one-third of "Father's estates". Earle received a written statement in 1932 signed by himself and Robert, reciting the 1929 "gift" and agreeing to transfer at least one-third of the net proceeds remaining from the "gift". He testified this statement replaced a memorandum to substantially the same effect signed by Robert in 1929. Several years before his death Robert had transferred the property into trusts for his children, but Earle did not learn of this until after Robert's death.[2] Robert did support his parents during the remainder of their lives, and sent money to Hubert until 1941, when he stopped doing so.[3] Hubert then sued Robert in Illinois for his share of his father's property; this action was settled for $71,000, and the petition dismissed "with prejudice", Hubert and Margaret being aware of the 1929, but not the 1932, "agreement". After Mr. Butler's death the state of Illinois claimed the 1929 transfer was not an outright gift to Robert and that an inheritance tax was due the state. Robert denied to the Illinois Tax Commission that he had paid any of the income from the property to other members of the family, and Mrs. Butler submitted an affidavit to the effect the transfer to Robert was without limitation. No tax was found due in Illinois. When Earle asked Robert's Executor for his "share", he was told there were no provisions therefor in Robert's will or his trust. The trial court held there was no clear, convincing or satisfactory evidence that Robert took the property subject to an oral trust, and noted the lack of proof of an oral statement of trust by Mr. Butler. *Held,* as to Earle, *reversed:* "Neither a

[1] Prior to 1929 Mr. Butler had given properties to his sons with book values as follows: Robert, $914,302.93; Hubert, $517,874.95; Earle, $310,102.95.

[2] Several bankers testified that on various occasions between 1941 and 1946, in connection with estate planning for Earle, he told them he had a one-third interest in property held in trust with Robert.

[3] Butler v. Butler, 258 Iowa 1084, 1105, 114 N.W.2d 595, (1962). Robert had kept a separate set of books for these properties from 1930 to 1946 and a separate bank account. These show that, at the time he testified in the Illinois inheritance tax proceedings (referred to later in the statement of fact) that no income had been paid to others of the family, he had paid $18,900.93 to his parents and $38,282.34 to Hubert and Margaret.

statement nor a formal written declaration is essential to establish a trust."[4] The technical objections of the statute of frauds and the statute for the creation of trusts[5] can be met by treating the support paid to the parents as part performance, and the 1932 agreement as a "ratification" by the trustee of the oral trust. *Held*, as to Margaret, *affirmed*. The 1941 settlement and resulting dismissal is res judicata of her claim.[6] *Butler v. Butler*, 253 Iowa 1084, 144 N.W.2d 595 (1962).

Trusts in lands have been traditionally held to arise either by the intent of the settlor (express or resulting — "intent enforcing" — trusts) or as a judicial device to avoid unjust enrichment (constructive or "fraud-rectifying" trusts).[7] Proof of the settlor's manifested intent to bring a trust situation into being is essential to enforce an express trust.[8] The manifestation of intent must be shown by clear, convincing and satisfactory evidence[9] and, by legislative fiat, must be proved by a writing in most jurisdictions.[10]

The usually stated purpose of the writing requirement is the prevention

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[4] Id. at 1113, 114 N.W.2d 2 at 599. Authorities cited to support this statement include: Heiden v. Cremin, 66 Fed. 2d 943, (8th Cir. 1933); Hardy v. Daum, 219 Iowa 982, 259 N.W. 561 (1935); Neilly v. Hennessey, 208 Iowa 1138, 220 N.W. 561 (1928). These cases are standard examples of enforced oral trusts in Iowa; in each the settlor had made some oral statement indicative of a trust intent. The Court also cites Pap v. Pap, 247 Iowa 371, 73 N.W.2d 742 (1955), in which no oral statement was shown, but the Court (the same Justice writing the opinion as in the instant case) found an "implied trust", utilizing language from 89 C.J.S., Trusts § 313. It is apparent from other statements by the Court in *Pap* an "implied" trust in Iowa is not a constructive trust, but rather a variety of "express" trust. For example, the Court fits the case within one of the exceptions to the Statute of Frauds, which would not be necessary for a constructive trust. Also, 247 Iowa at 382 indicates that the Statute of Limitations does not apply against an express and continuing trust.

[5] IOWA CODE, § 557.10, is a lineal descendent of the English Statute of Frauds, 27 Hen VIII c. 16 (1535) § 7: "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect." The Iowa version seemingly requires a more formal writing: "Declarations or creations of trusts or powers in relationship to real estate must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law." IOWA CODE, § 622.32, the "Statute of Frauds" provides: "Except when otherwise specially provided, no evidence of the following enumerated contracts is competant, unless it be in writing and signed by the party to be charged or by his authorized agent: . . . 3. Those for the creation or transfer of any interest in lands except leases for a term not exceeding one year. . . ."

[6] This holding is beyond the scope of this comment, as is an interesting dictum at 253 Iowa 1129 that the possibility of the interests under the trust not vesting within 21 years is so "iffy" as to preclude the operation of the rule against perpetuities. This dictum indicates perhaps that the court may be wavering toward application of the "wait and see" doctrine to the vesting of perpetuities.

[7] *See, e.g.*, RESTATEMENT OF TRUSTS 2d, § I(e), p 5; RESTATEMENT OF RESTITUTION, § 160, p 640; Costigan, 27 HAR. LAW REV. 437, 462.

This distinction has occasionally escaped the Iowa Courts. See note 40 IA. LAW REV. 107, 115.

[8] Scott, TRUSTS, §23, p 179 (2d Ed.); 1 Bogert, TRUSTS AND TRUSTEES, §45, p 289.

[9] DeJong v. Huyser, 233 Iowa 1215, 11 N.W.2d 566 (1943); Freeseman v. Hendricks, 233 Iowa 27, 6 N.W.2d 138 (1945) ("More than a fair preponderance"); Nolan v. Guggerty, 187 Iowa 980, 179 N.W. 706 (1919) ("distinct"); Ratigan v. Ratigan, 181 Iowa 860, 162 N.W. 580 (1917) ("clear and strong").

[10] See note 8, *supra*. Also, Scott, TRUSTS, §40 et seq. p 290 (2nd ed.).

of fraudulent claims of trust,[11] particularly after the settlor's death, but a more persuasive apology for the statutes is that they coerce settlors into memorializing their intention thus avoiding uncertainty in the performance of the trust and in litigation.[12]

The broad scope of the statutes, applying to all 'express' trusts—including those where the 'trust' is founded in a close human relationship and those where it is based on the availability of legal enforcement—has given rise to a judicial dilemma. While giving lip service to these statutes[13] the courts, in recognition of the uneradicable human tendency to entrust property to close friends and relatives without resort to legalities and writings,[14] have managed to devitalize the statutes by encrusting them with case law severely limiting their scope and vigor.[15] The result, however, has not been the demise of the oral trust,[16] but in addition to the inherent problems of proof of oral trusts, the imposition of the burden of meeting the "technical objections" of the statutes of frauds by judicial artifice.

The instant holding that trusts may be proven by circumstantial evidence from which a statement of trust will be inferred is a clear example of the enforcement of clearly shown, oral trusts in contravention of the rationale underlying these statutes. The Iowa courts have been most liberal in this regard by recognizing numerous exceptions to these statutes. Enforcement is refused only those trusts which are not shown by some formal or informal writing signed by the settlor or trustee, and which have not been fully or partially performed by the trustee or beneficiary,[17] and for which no "lost memorandum" can be shown by parol evidence.[18] If any of these requirements are satisfied, Sections 632.32 and 557.10 will not act as a bar. The instant case illustrates the diligence employed by the courts in detecting grounds for avoiding the application of the statutes. The court holds the agreement of 1932 a 'ratification' or admission of the trust by the trustee, satisfying the Statute of Frauds, and satisfying the statute for the creation of trusts, even though the plain meaning of that statute is that such declarations of trust must be executed in the same manner as deeds of conveyance, whether made by the trustee or settlor.[19] In the same vein the court's finding

[11] 1 Scott, TRUSTS, §40, p 292 (2nd ed.): "The purpose of the Statute of Frauds is to prevent false claims."

[12] Llewellyn: *What Price Contract*, 40 YALE L. J. 704, 747.

[13] Hardy v. Daum, *supra*, and Neilly v. Hennessey, *supra*, are standard authorities for the proposition that express trusts in land cannot be proven by oral evidence, but in both cases such trusts were proven by parol.

[14] 1 Scott, TRUSTS, §40 p 292 (2nd ed.): "Unfortunately, however, men are by nature trustful and confiding creatures and are not so easily driven to reduce these transactions to the paper form as they ought to be."

[15] 2 CORBIN ON CONTRACTS, § 275, p 4: "The statute has been set up as a defense in many thousands of cases; and it has been interpreted so strictly and applied so narrowly that its meaning as applied can now be determined only be a complete study of the cases. . . ."

[16] Although the statutes undoubtedly have some effect in this direction; *id*, p 13: "It can hardly be doubted the statute renders some service by operating in terrorem to cause important contracts to be put in writing. . ."

[17] Pap v. Pap, Hardy v. Daum, Nolan v. Guggerty, Neilly v. Hennessey, *supra*, Andrew v. State Bank of Blairsburg, 209 Iowa 1149, 229 N.W. 819 (1930).

[18] Butler v. Butler, p 1116; 1 Scott, TRUSTS, §49, p 346 (2nd ed.).

[19] The Iowa Court construes the words "in the same manner as deeds of conveyance" to mean any writing making reasonably certain reference as to property, objects and beneficiaries of the trust. Heiden v. Cremin, *supra;* see also instant case at p. 116.

of past performance sufficient to satisfy both statutes is founded on the equivocal act of the trustee in supporting his parents. The Court accepts the existence of a lost memorandum on the basis of testimony by one of the plaintiffs asserting the trust, and reverses the lower court finding that the trust was not proved by clear, convincing and satisfactory[20] evidence despite the sworn statement by the trustee and the settlor's wife that no trust was intended by the settlor.

This straining by the Court indicates the criteria used to reach a decision went beyond the words of the opinion. It indicates the favored status of the family unit in that the family wealth was preserved from the taxing authorities and creditors. It indicates the reluctance of the Court to apply inflexible legal standards to the essentially equitable and "conscience"—based process of adjudicating intra-family trust situations, or to be limited by such standards in its use of evidence. Furthermore, the process of avoiding the statutes by such legal legerdemain does not eliminate the possibility of fraud in the case of a clearly shown oral trust, the evidence of which is forbidden by the statutes because no performance, admission or memorandum is present.[21] It should be observed that because trust cases are the exclusive province of equity, and all evidence is examined by the Judge, there is less possibility of a fraud being perpetrated on a credulous Judge through false testimony, than there is of a fraud resulting from an overzealous application of the Statute of Frauds. Clearly the tendency of modern law is the elimination of such rules restricting the use of evidence.

One alternative solution is the broadened application of the constructive trust by which the strictures of the Statute of Frauds can be avoided[22] where the non-performance by the trustee would amount to fraud, actual or 'constructive'. The latter predicates a duty owing from the alleged trustee growing out of a 'confidential relationship' which will support a trust for the benefit of the cestui.[23] In a family trust situation, it is obvious that the relation between the settlor and his trustees (the father and son, in the present case, for example), gives rise to a higher duty than exists between strangers or business associates. Unfortunately, the courts refuse to give this relationship the status of 'confidential' — that is, one which will in itself support a constructive trust — reciting that to do so would circumvent the Statute of Frauds.[24]

Of course, the ultimate solution would be the legislative revamping of the statutes to emphasize the equitable basis of any oral trust rather than the technical requirement of a writing for purposes of proof. Legislatures have been reluctant to tamper with these statutes despite the weight of

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[20] For a discussion of interpretation of words in the Iowa Courts see Hudson, *"When a Vending Machine is Not a Vending Machine,"* 11 DRAKE LAW REVIEW 3.

[21] Willis v. Robertson, 121 Iowa 380 (1903), cited in Ames, *Oral Trusts in Land*, 20 HARV. LAW R. 549, 553. See also, 2 CORBIN ON CONTRACTS, §401, p 371.

[22] Note 5, *supra*, for the saving clauses of §622.32 and §557.10.

[23] 1 Scott, TRUSTS, §45.2, p 336, (2nd ed.), note 1 for list of authorities by state.

[24] "There is no constructive trust arising out of breach of promise." Ostenson v. Severson, 126 Iowa 197, 101 N.W. 789 (1904); Gregory v. Bowlsby, 115 Iowa 327, 88 N.W. 822 (1902). 2 CORBIN ON CONTRACTS 3401, p 374.See 1 Scott, TRUSTS, §45, p 331, 2nd ed. note 1 for list of authorities by state.

authority which through the years has emphasized their shortcomings;[25] and for the time being the courts are forced to use the clumsy expedient of restricting their application by judicial artifice.

CLARK HOLMES (June 1966)

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25 2 CORBIN ON CONTRACTS, §275, p 8., footnote 9, citing a compendious list of authorities.