1950

Hale v. Hale--Kentucky's Recognition of the Tentative Trust

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Recommended Citation


Available at: https://uknowledge.uky.edu/klj/vol39/iss2/9

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moved and the possibility of profit from a breach of the fiduciary relationship is extinguished. It has been well stated, however, that the true basis is to be found in the unfairness of a fiduciary taking advantage of any opportunity when the interests of the corporation justly call for protection. This calls for an application of ethical standards of what is fair and equitable to a particular set of facts.

In the final analysis any rule adopted should accomplish two things. In the first place it should encourage, not impede, legitimate business transactions, and in the second place it should accomplish justice to all parties. The rule in the Deutsch case would satisfy the loyalty requirement, but in many instances it may well be injurious to business. For example, if Deutsch had been precluded from purchasing the stock at the outset, Acoustic would have failed immediately. Although Acoustic later became bankrupt, there was a good chance of its survival. The liberal rule would allow directors, on proper occasions, to assist the corporation by taking over necessary contracts or transactions when the corporation was not financially able to do so. The same high degree of loyalty could be required and enforced through the exertion by the courts of clear and convincing proof of real financial inability. For these reasons it is submitted that financial inability should be allowed as a defense when clearly established, since it is the more practicable and equitable rule.

E. W. Rivers

HALE v. HALE—KENTUCKY'S RECOGNITION OF THE TENTATIVE TRUST

Where one deposits money in the bank in a savings account indicating an intention to be trustee of the money for another, the courts in a number of jurisdictions will find that he has created a "tentative trust" which may be revoked completely or which may be revoked in part by withdrawals during his lifetime. Therefore the trust is not final or complete except as to the amount in the account at the depositor's death. It is clear that such a trust is not testamentary and may be created without the formalities of execution required by the Statute of Wills. The Court of Appeals of Kentucky recently recognized and applied the tentative trust doctrine for the first time in Hale v. Hale. It is the purpose of this comment to direct attention to this case, to describe the essential characteristics of the doctrine and to suggest some of the more important implications in its recognition by the Kentucky Court.

In the principal case, Hale deposited in a savings account a sum of money to his own credit, and a bank employee, on Hale's orders, made an endorsement on the bank deposit record, which Hale signed, directing that the money be paid to Hale's named children if anything happened to him. There was uncontradicted testimony to the effect that Hale told others of the deposit and its purpose. About a year after the deposit Hale died, but on the day before his death he issued to his daughter a check against the account for the dual purpose of paying his expenses and making a gift to her of the balance of the check, if any. Although it was conceded that the memorandum on the bank record did not qualify as a will


1 313 Ky. 344, 231 S.W. 2d 2 (1950).
or as a gift *inter vivos*, the children contended that the fund was a parol trust created for them with Hale as trustee. It was further argued that the trust was irrevocable and that the check gave the daughter no claim against the fund. The court held that the directions given to the bank in making the deposit and the subsequent actions in reference to the deposit showed that Hale intended to and did create a tentative trust for the named beneficiaries which was not revoked within the lifetime of the settlor and that the amount remaining in the deposit passed to the beneficiaries. In addition, it was decided that the proof supported the daughter's claim to the balance of the check as a gift from her father.3

The tentative trust doctrine was first applied by the New York Court in the case of *In re Totten* and such a trust is often called a Totten trust. The Court of Appeals of New York described the nature of the trust as follows:

"A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."2

Other jurisdictions in following the New York authority have generally limited their application of the doctrine to the basic fact situation involving a deposit of money in a savings account by a person in his own name as trustee for another.4 In those states where the tentative trust is not recognized, such a deposit results either in no trust being created or in an irrevocable trust being created.

Since the facts in the *Hale* case follow closely the standard tentative trust situation it may be helpful to analyze them further in terms of the essential characteristics of this type of trust. First, there was deposit by Hale of his own money in a savings account. This is an essential but simple question of fact and can be determined by checking the deposit records of the bank. Second, Hale deposited the money in his own name with the intention to be a trustee of it. This necessary fact is sometimes rather difficult to prove directly, but it may be established from acts and statements which coincide with or follow the deposit.

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2 The court was careful to distinguish the case of *Turpin*'s *Adm* v. Stringer, 228 Ky. 32, 14 S.W 2d 189 (1929), where it was held on facts very similar to the *Hale* case that instructions to the bank as to the disposition of the account operated neither as a valid *inter vivos* gift nor as a testamentary devise, leaving the account to the deceased's estate. In the *Turpin* case, however, no claim was made that the deposit created a trust for the named party. Thus, it was not authority as to the issue in the *Hale* case.

3 There is a definite problem in the *Hale* case as to the validity of the gift to the daughter. It is not known if the question was raised before the Court of Appeals and the opinion sheds little light on the problem. However, it is not intended to discuss the question of gift in this comment.

4 *In re Totten, 179 N.Y. 112, 71 N.E. 748 (1904).*

5 *Id. at ___ 71 N.E. at 751.

6 1 SCOTT, TRUSTS 354 (1939); RESTATEMENT, TRUSTS sec. 58 (1935).

7 1 SCOTT, TRUSTS 355 (1939); RESTATEMENT, TRUSTS sec. 58 (1935); 1 BOGERT, TRUSTS and TRUSTEES 342 (1935).
and may be inferred to some extent from the nature of the deposit itself. In the principal case, for instance, there was an endorsement on the account record plus oral statements to others. Third, Hale intended the trust resulting from the deposit to be revocable, rather than irrevocable. This is the feature of the tentative trust which is difficult to reconcile with the characteristics of an ordinary express trust because in the usual situation it is clear that a power to revoke must be reserved. In the tentative trust situation, however, the only evidence on whether the depositor actually intended to reserve, expressly or impliedly, a power to revoke is the nature of the deposit itself. The nature of the deposit alone is the basis for inferring a reserved power to revoke and this inference is really the critical determination in any finding that a tentative trust has been created.

The evidence in the *Hale* case on the matter of revocability is somewhat confusing. The court stressed five factors: (1) there was no evidence to contradict the testimony of the mother and son that Hale specifically told them of the deposit and that it was for the benefit of the named children; (2) there was no evidence of any instructions to the bank as to the account other than the memorandum in reference to the children; (3) there was no evidence of Hale expressly retaining any right to draw on the account; (4) the deposit was in a savings as distinguished from a checking account; (5) the deposit remained intact for almost a year, except for the single check drawn just prior to the death of Hale. Considering these facts, the court drew the following conclusion:

"he put this deposit in the bank specifically for the benefit of his three named children and he thereby intended to create a trust fund for their use with himself as trustee. Even if he reserved the right to withdraw on the deposit for his own use, of which there is no evidence here, he created a tentative trust enforceable on his death."

It is submitted that the court might well have construed these facts standing alone to indicate an intention for the trust to be irrevocable. On the other hand, if this evidence served only to show an intent to create a trust and has no bearing on the irrevocability of the trust, the conclusion of the court is sound and it could properly declare that the daughter had prior claim to the balance of the check as a gift and still recognize the deposit as a trust fund for the named children.

The concept of the tentative trust seemingly runs contrary to at least two other basic trust principles. It appears to be testamentary, but the general authority is that it is not testamentary because the trust actually arises on the opening of the account and not on the death of the depositor. It is not subject to a condition precedent of death but, rather, to a condition subsequent in the form of a power of revocation. Also, retention of absolute administrative control over the trust res usually results in the invalidity of a trust. This power of control is to be

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1 Scott, Trusts 354 (1939); Cf. 1 Bogert, Trusts and Trustees 202 (1935).

2 Restatement, Trusts sec. 58, comment a (1935); 1 Scott, Trusts 354, 361 (1939). Scott has a footnote referring to cases cited in his sections 58.2 and 58.3 to the effect that although a revocable trust was held to be created, many of the cases had indications of depositor's intent to create a revocable trust in addition to the form of the deposit. Cf. 1 Bogert, Trusts and Trustees sec. 47.

3183 Ky. at 350, 281 S.W. 2d at 6.

4 Scott, Trusts 360 (1939); 1 Bogert, Trusts and Trustees 220 (1935).
distinguished from the power of revocation. Seemingly, a tentative trust is subject to the absolute control of the depositor which would result in there being no trust. Actually, however, the depositor does not have a power of direct control over the res but only a power to revoke in part or in whole. The existence of a power to revoke does not prevent the creation of a present existing trust, and the power of revocation, until exercised, has no effect upon the trust.

Thus, it is seen that the tentative trust is a convenient method of disposing of money. The requirements of the laws of testamentary disposition, gifts, and trusts do not have to be complied with to secure execution of the depositor's intent. The will involves the formality of execution and the expense of administration and probate. The gift inter vivos requires the party to deliver and surrender control of the property. The gift once executed cannot be recalled. The trust requires the separation of legal and beneficial interest, and to guarantee validity, the settlor can retain only limited control. Even the power of revocation has to be clearly reserved to exist, for if an irrevocable trust is created the settlor cannot recall. The tentative trust is not bound by any of these restrictions. The only requirement is for the deposit to be made so as to raise the tentative trust. The depositor retains the power to revoke to such an extent that he actually has control of the property. He can make any use of the deposit he desires, raising or lowering the amount at will. No particular formalities are required in revoking where the intent to revoke appears. Kentucky, in accepting the tentative trust, has recognized a method of disposing of money that permits the donor to retain control over the money.

DEMPSEY A. COX

HUGHETT v. CALDWELL COUNTY — MEASURE OF DAMAGES FOR INNOCENT CONVERSION OF MINERALS

In the recent Kentucky case of Hughett v. Caldwell, a mineral lease of an abandoned right of way was executed to the defendants. The defendants did not begin mining operations until the title to the strip had been determined by the circuit court to be in Caldwell County, the lessor. Later, after the defendants had mined and sold a considerable quantity of fluorspar, the Court of Appeals held that title to the strip was in the plaintiffs. Suit was then brought by the plaintiffs to recover the value of the fluorspar which the defendants, as innocent trespassers, had removed. The trial court, following the rule laid down by prior decisions of the Court of Appeals, allowed the plaintiffs to recover only the reasonable and customary royalty for the privilege of mining. On appeal the upper court expressly overruled its former decisions and held that the correct measure

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Ibid.

1 1 Scott, Trusts 362 (1939); Restatement, Trusts sec. 58 (1935). Evidently, the court construed the check drawn by the depositor on the account as a revocation pro tanto. The nature and validity of the instrument may be subject to question but a revocation in some manner is a requirement of the decision.

2 913 Ky. 85, 230 S.W. 2d 92 (1950).

3 Hughett v. Caldwell County, 288 Ky. 89, 155 S.W. 2d 481 (1941).