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Trusts—Construction of Trust Instruments—Intention of the Trustor

Douglas C. Allen

TRUSTS—CONSTRUCTION OF TRUST INSTRUMENTS—INTENTION OF THE TRUSTOR—Trustor named as beneficiaries under the trust certain relatives or their surviving *issue*. Subsequently an original beneficiary adopted a son and then died, survived by the adopted son and a natural son. After the adoption trustor made a will in which she left the remainder of the estate to legatees described in the same manner as under the trust. The will also contained language stating that "the term issue herein . . . shall include the lawfully adopted child . . . of any [legatee]." The district court decree in an action by the trustee for instructions allowed the adopted child to share in the distribution of trust property. On appeal to the Montana Supreme Court, *held*, affirmed. The word *issue* is ambiguous and subject to explanation by parol to determine the true intent of the trustor. *Holter v. First National Bank & Trust Co.*, 336 P.2d 701 (Mont. 1959) (Chief Justice Harrison and Justice Castles dissenting).

In the construction of a trust, it is well settled that the intention of the trustor is controlling.[1] The intent of the trustor and the meaning of the trust are to be found from an examination of the instrument itself, and by the circumstances surrounding its execution.[2] Where the instrument is ambiguous, so that the intention of the trustor does not appear from an examination of it and the surrounding circumstances, Montana law provides for the examination of extrinsic evidence to determine the true intent of the trustor.[3]

The court in the instant decision found the word "issue" in the trust instrument ambiguous. This finding is contrary to two recent Montana cases. In the case of *In Re Miller's Trust*[4] Maude Miller set up a trust by will, the income to be paid to her sons until they reached age fifty. If they died before age fifty the corpus was to be distributed to the sons' "issue." The court held that an adopted child of settler's son could not benefit under the trust because the word "issue" is generally accepted as meaning natural children, not adopted children. The *Miller* case may appear to be distinguishable since in that case there was no subsequent will and the trustor died shortly before the adoption. However, these differences arose after the creation of the trust and, as the instrument is to be construed by its terms and the circumstances surrounding its execution,[5] neither variance from the instant case bears upon the question of ambiguity.

In the decision of *In re Kay's Estate*[6] the court adopted the following language: "To the layman as well as to the lawyer 'issue' has meant actual physical offspring.'"[7]

Thus in the *Miller* and *Kay* holdings, the Montana Supreme Court found no hint of ambiguity in the term "issue." On the contrary, both

[1] REVISED CODES OF MONTANA, 1947, §§ 93-401-13 to -18. See also Ephraim v. Metropolitan Trust Co. of Cal., 28 Cal. 2d 824, 172 P.2d 501 (1946); Comstock v. Dewey, 323 Mass. 583, 83 N.E.2d 257 (1949); First Carolinas Joint Stock Land Bank v. Deschamps, 171 S.C. 466, 172 S.E. 622 (1934).

[2] REVISED CODES OF MONTANA, 1947, §§ 93-401-13 to -18.

[3] REVISED CODES OF MONTANA, 1947, § 93-401-13.

[4] 133 Mont. 354, 323 P.2d 885 (1958).

[5] See statutes cited note 2 *supra*.

[6] 127 Mont. 172, 260 P.2d 391 (1953).

[7] *Id.* at 179, 260 P.2d at 394.

cases indicated that the meaning of "issue" was well settled. Faced with these decisions the majority of the court in the instant case stated: "The fact that a good argument could have been made on either side of the question, before these cases were decided, was sufficient to show that the term carried with it an ambiguity."[8]

It is submitted that this theory is without merit. As Mr. Chief Justice Harrison points out in his dissent in the instant case, the *Miller* and *Kay* cases defined "issue" in accord with the vast majority of cases. The opinions did not pretend to create a new interpretation, but merely re-affirmed an old one.[9]

Assuming arguendo that the finding of ambiguity could properly be made in the instant case, extrinsic evidence could then be considered to determine the intent of the trustor.[10] The majority opinion relies on the New York case of *In re Nicol's Trust*[11] to support its use of the trustor's subsequent will to show his intent to benefit the adopted child. The *Nicol* case held that subsequent declarations of the trustor are relevant to show his intention *at the time the trust was created.* The holding is in accord with the general rule that the construction given a trust instrument depends upon the trustor's intent at the time of creation, and not upon any second thoughts after the event.[12]

It seems stretching things to say that a will drawn twelve years later and after a significant change in circumstances is any reliable indication of the intention of the trustor at the time he created the trust. To be realistic it is almost certain the trustor simply did not contemplate the possibility of adoption. If he had thought of adopted children he would almost certainly have included them. The decision is enforcing what the trustor *would* have intended if he had been thinking of the possibility of adopted children, not what he intended in fact. This may work fairness in an individual case such as this, but abandons the fundamental striving of the law for certainty. In the instant case it would be equally logical, though not as probably true in the usual case, for the court to find that the word "herein" in the will voices a desire of the trustor to limit the adopted child to that which is granted him in the will.

The instant case has created uncertainty in an area where heretofore in Montana uncertainty did not exist. The *Kay* and *Miller* cases are not overruled but their application has been limited by this decision. Hence it is now almost impossible to predict what construction will be given the word "issue" in future cases involving wills and trust instruments. Furthermore, by failing to recognize that subsequent declarations of the trustor may be used only insofar as they realistically indicate his intent at the time of the execution of the trust, the court has significantly departed from established trust doctrines. If some later intent of a trustor may be considered in resolving ambiguities in trust instruments, the door is open to great uncertainty and endless litigation.

[8]Instant case at 703.
[9]Instant case at 704.
[10]See note 3 *supra.*
[11]3 Misc. 2d 898, 148 N.Y.S.2d 854 (1956).
[12]Brock v. Hall, 33 Cal. 2d 885, 206 P.2d 360 (1949); First Carolinas Joint Stock Land Bank v. Deschamps, 171 S.C. 466, 172 S.E. 622 (1934). See also 90 C.J.S. *Trusts* § 161a (1955).

It is hoped that when this case is noted in the future, it will be recognized that the court was anxious to reach what it considered a desirable result.[18] Such recognition will avoid undue weight being placed on the rules of law and construction adhered to in this decision.

DOUGLAS C. ALLEN

WRIT OF PROHIBITION—JURISDICTION OF DISTRICT COURTS—POWER TO RESTRAIN MINISTERIAL ACTS—The Montana Livestock Sanitary Board issued an order declaring Rosebud County a "disease control area" and ordered the respondent to present his cattle for brucellosis testing. Respondent obtained an alternative writ of prohibition from the district court. The Board moved to quash the writ on the ground that prohibition was not the proper remedy to test its orders which were ministerial in nature and were within its statutory jurisdiction. The motion was denied and, after hearing, a peremptory writ issued. On appeal to the Montana Supreme Court, *held,* judgment reversed and motion to quash granted. The statute permitting a district court to issue the writ of prohibition is unconstitutional insofar as it applies to ministerial acts. *State v. Montana Livestock Sanitary Board,* 339 P.2d 487 (Mont. 1959).

The first Montana statute defining prohibition was enacted in 1877 but did not mention ministerial acts.[1] The Montana constitution was adopted in 1889. Subsequently the statute was amended to its present form. It provides:[2]

> The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

That the Supreme Court of Montana is powerless to issue the writ of prohibition to restrain ministerial acts has been settled. In *State ex rel. Scharnikow v. Hogan*[3] the petitioner sought a writ of prohibition to restrain the Secretary of State from certifying a Democratic nominee for district judge. The court held that it did not have the power, notwithstanding the statute, to restrain ministerial functions. Rather the court felt bound by the constitution to the scope of the writ as it existed at common-law. For authority the court relied upon two California decisions, *Maurer v. Mitchell*[4]

[18]As before suggested it is questionable whether the court actually did reach a desireable result; for if the word "herein" in the will is a word of limitation the court has defeated the trustor's intention by this decision.

[1]Laws of the Territory of Montana, 1877, § 561, at 184.

[2]REVISED CODES OF MONTANA, 1947, § 93-9201.

[3]24 Mont. 379, 62 Pac. 493 (1900).

[4]53 Cal. 289 (1878).