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Trusts - Power of Settlor - Sole Beneficiary to Terminate an Irrevocable Trust - Johnson v. First National Bank of Jackson

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TRUSTS—POWER OF SETTLOR—SOLE BENEFICIARY TO TERMINATE AN IRREVOCABLE TRUST—*Johnson v. First National Bank of Jackson*, 386 So. 2d 1112 (Miss. 1980).

In 1976 Mary Moore Johnson, a 25 year old single woman, made an irrevocable[1] trust agreement with First National Bank of Jackson. The trust was to include a substantial inheritance she was due to receive from her father's estate.[2] In 1978 she sought to revoke the trust agreement, alleging she was the settlor and sole beneficiary, was *sui juris*, and under no incapacity.[3]

Trial testimony revealed she had established the trust on advice from her mother and the family accountant because she realized she lacked the ability to manage the large amount of money she was about to receive. Evidence was presented that she had made numerous and excessive demands for advances from the *corpus* of the trust and had poorly managed funds she received. Much attention was focused on her contributions of $30,000 to the Church of Scientology and the church's influence on her. Ms. Johnson testified that she was presently more responsible and able to handle her affairs[4], but she also admitted that if the trust were revoked, she planned to spend $57,648 on Scientology training.[5]

The chancellor dismissed Johnson's bill after finding the trust was irrevocable and termination would not serve Ms. Johnson's best interest.[6] On appeal, the Mississippi Supreme Court considered three main issues: whether the settlor-sole beneficiary could terminate an irrevocable trust; whether there were any reasons for not following the general rule which would permit termination; and whether there was any reason in the instant case for allowing termination. Since this was a case of first impression in Mississippi, the court examined the case law that had developed in other jurisdictions in regard to this problem. The court adopted as a general rule for Mississippi, the majority rule of trust law, which allows a settlor-sole beneficiary to revoke an irrevocable trust at any time.[7] It was the court's view that under this general

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[1]Paragraph 6 of the trust agreement read "This trust is absolute and irrevocable. The Trustor expressly declares that she shall have no power to amend, alter, or modify this trust agreement." Record, vol. 1, at 10, Johnson v. First Nat'l Bank of Jackson, 386 So. 2d 1112 (Miss. 1980).

[2]Ms. Johnson was to receive the income for life and upon her death the corpus and undistributed income were to go to her estate. The trustee had the right and sole discretion to invade the corpus to meet the reasonable needs of the trustor. Record, vol. 1, at 8, Johnson v. First Nat'l Bank of Jackson, 386 So. 2d 1112 (Miss. 1980).

[3]386 So. 2d at 1113 (Miss. 1980).

[4]*Id.*

[5]Brief for Appellee at 4, Johnson v. First Nat'l Bank of Jackson, 386 So. 2d 1112 (Miss. 1980).

[6]386 So. 2d at 1113 (Miss. 1980).

[7]*Id.*

rule, unless Ms. Johnson had been declared legally incompetent, which had not been done, she could revoke the trust. The chancellor's decision was reversed and revocation of the trust was permitted.[8]

TRUST TERMINATION

Since the 1930's the area of termination has increased in importance in trust law due to the Great Depression and a decrease in productivity of trust estates.[9] As fluctuations continue to occur in the economy, settlors and beneficiaries will continue to seek the help of the courts to obtain relief from unproductive or oppressive trusts or to obtain access to the trust *corpus* in order to meet increased financial needs. The brief survey of the general law regarding termination which follows, is necessary in order to view the instant case in its proper perspective.

As a general rule once a trust has been created, it is considered to be irrevocable, unless the settlor expressly reserved the power to revoke.[10] Contrary to the common law, a few states provide by statute that a trust is revocable unless it is expressly made irrevocable.[11] Where the power of revocation has been reserved, the settlor can revoke the trust only in the manner and to the extent to which such power has been reserved.[12]

Usually a trust instrument expressly provides the time for the termination of a trust, and it will not be terminated prior to that time.[13] Early termination may occur, however, as a result of various circumstances. The same reasons which allow rescission of contracts are applicable to trusts. Fraud, duress, undue influence, mistake of fact and incapacity are grounds to rescind a trust.[14] If the trust purpose is ac-

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[8] *Id.* at 1115.

[9] LeFever, *Termination of Trusts in Pennsylvania*, 96 U. PENN. L. REV. 305 (1948).

[10] *See* Watkins v. Watkins, 64 Ga. App. 344, 13 S.E.2d 100 (1941); Mortimer v. Mortimer, 6 Ill. App. 3d 217, 285 N.E.2d 542 (1972); Viney v. Abbot, 109 Mass. 300 (1872); Anderson v. Love, 169 Miss. 219, 151 So. 366 (1934) *modified* 169 Miss. 219, 153 So. 369 (1934); Nelson v. Ratliff, 72 Miss. 656, 18 So. 487 (1895); RESTATEMENT (SECOND) OF TRUSTS § 330 (1957); IV A. SCOTT, LAW OF TRUSTS § 330.1 (3d ed. 1967).

[11] *See* CAL. CIV. CODE § 2280 (West 1954) (applies to voluntary trusts created after Aug. 13, 1931); OKLA. STAT. ANN. tit. 60, § 175.41 (West 1930) (not limited to voluntary trusts); TEX. REV. CIV. STAT. ANN. art. 7425-41 (Vernon 1925) (every trust revocable by settlor in lifetime, unless expressly made irrevocable).

[12] *See* Downs v. Security Trust Co., 175 Ky. 789, 194 S.W. 1041 (1917); McClendon v. First Nat'l Bank, 299 So. 2d 407 (La. 1974); Hiserodt v. Hamlett, 74 Miss. 37, 20 So. 143 (1896); Billingslea v. Young, 33 Miss. 95 (1857); In Matter of Mordecai, 24 Misc. 2d 668, 201 N.Y.S.2d 899 (1960); RESTATEMENT, *supra* note 10, § 330, comment j.; BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1000.

[13] IV A. SCOTT, *supra* note 10, § 329A.

[14] Committee on Modification, Revocation and Termination of Trusts, *Early Termination of Trusts*, 2 REAL PROPERTY, PROBATE AND TRUST JOURNAL 303 (1967).

complished,[15] impossible of accomplishment,[16] illegal,[17] or against public policy[18] the result will be early termination.

Trusts are sometimes terminated due to the application of the doctrine of merger. If subsequent to the creation of a trust, one person becomes the owner of the legal interest and the entire beneficial interest, the equitable interest and the legal interest are merged and the trust terminates. There is also considered to be a merger of the equitable life interest and the equitable remainder interest when one person is both life beneficiary and the beneficiary entitled to the remainder interest.[19] Merger does not automatically terminate the trust, but termination is usually permitted unless ending the trust would prevent the accomplishment of a material purpose of the trust or would be inequitable.[20]

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[15]*See* Pillow v. Wade, 31 Ark. 678 (1877); Coughlin v. Seago, 53 Ga. 250 (1874); In Re Cornils' Estate, 167 Iowa 196, 149 N.W. 65 (1914) (trust for daughter's benefit which was created to protect her estate from her husband, and was to last for her husband's lifetime, was terminated when she obtained a divorce); Fidelity & Columbia Trust Co. v. Gwynn, 206 Ky. 823, 268 S.W. 537 (1925) (where trust created to protect settlor who suffered from epilepsy was terminated when he apparently regained his health); BOGERT, *supra* note 12 § 1992.

[16]*See* Black v. Bail, 142 Ark. 201, 218 S.W. 210 (1920) (allowing termination where it was impossible to make property which was the subject of the trust income producing); Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966) (trust for segregated park terminated when impossible of accomplishment due to United States Supreme Court decision that segregation could not be authorized under the U.S. Constitution): Brunswich v. Stewart, 215 Ga. 141, 109 S.E.2d 606 (1959) (where a will established a trust for niece and nephew until the youngest reached 21 but both were over 21 when testatrix died there was considered to be no trust); Ryan Estate, 404 Pa. 229, 172 A.2d 584 (1961); Fisher v. Harrison, 165 Va. 322, 182 S.E. 543 (1935); RESTATEMENT, *supra* note 10, § 335; BOGERT, *supra* note 12, § 1002.

[17]*See In re* Morse, 247 N.Y. 290, 160 N.E. 374 (1928) (trust legal when created, but subsequent statute made it illegal).

[18]*See* Graves v. First Nat'l Bank, 138 N.W.2d 584 (N.D. 1965) (a trust which provided as a condition precedent to receiving trust funds that the niece divorce her husband and terminate cohabitation with him was declared void), *Id. In re* Devlin's Trust Estate, 284 Pa. 11, 130 A. 238 (1925); RESTATEMENT, *supra* note 10, § 335, comment d; BOGERT, *supra* note 12 § 1002.

[19]*See* Atkins v. Atkins, 279 Mass. 1, 180 N.E. 613 (1932); Cunningham v. Bright, 228 Mass. 385, 117 N.E. 909 (1917); Healey v. Alston, 25 Miss. 190 (1852) (merger of legal and equitable interests); Citizen's Nat'l Bank v. Longshore, 304 So. 2d 287 (Miss. 1974); BOGERT, *supra* note 12, § 1003; IV A. SCOTT, *supra* note 10, §§ 337.1, 341.

[20]"Whenever it would work an injustice or defeat the intention of the donor, to work a merger, the two estates will be kept alive although they come together in one person." *In re* Estate of Washburn, 11 Cal. App. 735, 106 P. 415, 420 (1910). *See also* (held to be merger) Dare v. New Brunswick Trust Co., 122 N.J. Eq. 349, 194 A. 61 (1937); Gillogly v. Campbell, 52 Ohio App. 43, 2 N.E.2d 620 (1935); Nichols v. First Nat'l Bank, 199 Or. 659, 264 P.2d 451 (1953); *In re* Fitton's Will, 218 Wis. 63, 259 N.W. 718 (1935); *Contra*, (merger not applied) Trabits v. First Nat'l Bank of Mobile, 345 So. 2d 1347 (Ala. 1977); Bowlin v. Citizens' Bank and Trust Co., 131 Ark. 97, 198 S.W. 288 (1917); Wechter v. Chicago Title & Trust Co., 385 Ill. 311, 52 N.E.2d 157 (1944).

I. *Beneficiaries Lacking Settlor's Consent to Terminate*

If the beneficiaries attempt to revoke the trust without the consent of the settlor, the result depends on whether the court follows the majority or minority rule. This situation arises most often when it is impossible to obtain the settlor's consent because the settlor is dead.

American Rule

According to the American majority rule, termination without the settlor's consent is allowed if all the beneficiaries are competent, give their consent, and continuance is not necessary to fulfill a material purpose for which the trust was created.[21] Great importance is attached to the lack of material purpose requirement. Even though all the beneficiaries consent and none are under an incapacity, termination will be denied when it is necessary to continue the trust to carry out a material purpose.[22]

This rule, often referred to as the Claflin doctrine, resulted from the decision in *Claflin v. Claflin*.[23] According to the terms of the Claflin trust, the settlor's son was to receive $10,000 at the age of 21, $10,000 at the age of 25, and the corpus of the trust at age 30. When the son reached 21, he sought to receive the entire amount in the trust. In refusing to allow termination, the court stressed the right of the settlor to restrict his gift according to his desires and judgment. The rationale for refusing termination focused on the court's function in carrying out the settlor's intent where it was not against public policy to do so. Although there were no spendthrift provisions in the trust, the court appeared to compare the postponement of payment clause to a spendthrift clause. They seemed to view both clauses as the same type and felt both should be upheld in order to achieve the settlor's intent.[24]

Spendthrift Trusts

Spendthrift trusts contain provisions which restrict a beneficiary's interest so that it is not assignable by him, nor can it be reached by his creditors.[25] Spendthrift provisions impose a limitation on the consent

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[21]*See* Citizens Fidelity Bank & Trust Co. v. Schellberg, 238 S.W.2d 142 (Ky. 1951); Citizens Nat'l Bank of Meridian v. Longshore, 304 So. 2d 287 (Miss. 1974); Ampere Bank & Trust Co. v. Esterly, 139 N.J. Eq. 33, 49 A.2d 769 (1946); RESTATEMENT, *supra* note 10, § 337; BOGERT, *supra* note 12, § 1007.

[22]*See* Shelton v. King, 229 U.S. 90 (1913); Clemenson v. Rebsamen, 205 Ark. 123, 168 S.W.2d 195 (1943); Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932); Downs v. Security Trust Co., 175 Ky. 789, 194 S.W. 1041 (1917); Ray v. Kelly, 82 Miss. 597, 35 So. 165 (1903); Rehr v. Fidelity-Philadelphia Trust Co., 310 Pa. 301, 165 A. 380 (1933); *In re* Baughman's Estate, 281 Pa. 23, 126 A. 58 (1924); RESTATEMENT, *supra* note 10, § 337.

[23]149 Mass. 19, 20 N.E. 454 (1889).

[24]*Id.* at 23, 20 N.E at 456. "It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that because the testator had not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect." *Id.*

[25]II A. SCOTT, *supra* note 10, § 151.

exception and generally prevent termination altogether.[26] When considering a question of termination, spendthrift trusts are considered as having a material purpose which has not been accomplished. If revocation were allowed it would lessen the protection the restraints on alienation provide the beneficiary, because as soon as he received the property it would become subject to his assignments and could be reached by his creditors.[27]

Minority Rule

The English or minority rule allows revocation when all the beneficiaries are ascertained and give their consent even though there are purposes unfulfilled.[28] This exception is based upon the rationale that there being no one else who has any interest in the property, there is no reason to deny termination.[29] In *Ambrose v. First National Bank of Nevada*[30] where facts were similar to Claflin, the court refused to apply the Claflin doctrine and ordered termination of the trust. The inter vivos trust had been created by the beneficiary's mother to prevent the settlor from squandering her assets. The trust was to continue after the mother's death and was to be distributed to the daughter as she reached certain ages. The daughter was permitted to terminate the trust after her mother's death, but prior to reaching the first specified age.[31] Merit can be found in an argument in favor of the minority position. If it is not a spendthrift trust and the court denies termination, beneficiaries can sell their interests, thus indirectly getting to the principal. They would usually have to sell at a discount but they could evade the inflexibility of the majority rule. Thus, one may question whether a rule which can be evaded and causes a loss to the beneficiaries is a rule which should continue to be enforced.[32]

II. *Beneficiaries with Settlor's Consent to Terminate*

If the beneficiaries and the settlor consent and all of the beneficiaries are legally competent, the trust will be terminated even though

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[26]*See* Clemenson v. Rebsamen, 205 Ark. 123, 168, S.W. 2d, 195 (1943); Moore v. Sinnott, 117 Ga. 1010, 44 S.E. 810 (1903); Maher v. Maher, 207 Ky. 360, 269 S.W. 287 (1924); Vines v. Vines, 143 Tenn. 517, 226 S.W. 1039 (1920); E. GRISWOLD, SPENDTHRIFT TRUSTS § 511, 517 (1936); RESTATEMENT, *supra* note 10, § 337.

[27]GRISWOLD, *supra* note 26, § 511.

[28]*See* Crumlish v. Delaware Trust Co., 29 Del. Ch. 503, 46 A.2d 888 (1946); Dodge v. Dodge, 112 Me. 291, 92 A. 49 (1914) (where a trust was created to insure beneficiaries against want in sickness and old age. Purpose would not be accomplished until all beneficiaries were dead but termination was allowed prior to that time); Spooner v. Dunalp, 87 N.H. 384, 180 A. 256 (1935); Newlin v. Girard Tr. Co., 116 N.J. Eq. 498, 174 A. 479 (1934); Huber v. Donoghue, 49 N.J. Eq. 125, 23 A. 495 (1892); RESTATEMENT, *supra* note 10, § 337. BOGERT, *supra* note 12, § 1008.

[29]IV A. SCOTT, *supra* note 10, § 337.

[30]87 Nev. 114, 482 P.2d 828 (1971).

[31]*Id.* at 120, 482 P.2d at 831.

[32]BOGERT, *supra* note 12, § 1008.

there are still purposes unaccomplished.[33] Even spendthrift trusts may be terminated with the consent of the settlor and all of the beneficiaries.[34] The rationale for the consent doctrine, which allows termination under these circumstances, is that there is no reason for continuing the trust if all the beneficially interested parties desire termination.[35] Some states statutorily recognize this right to termination.[36] The primary problem for the courts resulting from this rule is determining who all of the beneficiaries are.

III. *Settlor—Sole Beneficiary*

It is logical, in view of the consent doctrine, that a settlor who is also the sole beneficiary and under no legal incapacity could terminate a trust at any time, even if the original purpose of the trust has not been accomplished[37] and the trust instrument expressly states it is irrevocable.[38] This is the majority rule of trust law.[39] Under the majority

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[33]*See* Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n, 147 Cal. App. 2d 776, 305 P.2d 979 (1957); Dunnett v. First Nat'l Bank & Trust Co. 184 Okla. 2, 85 P.2d 281 (1938); Bowers' Trust Estate, 346 Pa. 85, 29 A.2d 515 (1943); Fowler v. Lanpher, 193 Wash. 308, 75 P.2d 132 (1938); RESTATEMENT, *supra* note 10, § 338; BOGERT, *supra* note 12, § 1005.

[34]*See* Botzum v. Havana Nat'l Bank, 367 Ill. 539, 12 N.E.2d. 203 (1937); IV A. SCOTT, *supra* note 10, § 338; GRISWOLD, *supra* note 26, § 528.

[35]IV A. SCOTT, *supra* note 10, § 338.

[36]*See* MONT. CODE ANN. § 72-23-502 (1979); CAL. CIV. CODE § 771 (West Supp. 1981); N.D. CENT. CODE §59-02-18 (1959); S.D. COMP. LAWS ANN. § 55-3-6 (1967); WIS. STAT. § 701.12 (West 1957).

[37]"Since no one but the settlor has any beneficial interest in the trust, if he is not under a legal disability, he should be permitted to do with it as he wills, regardless of the prudence of its creation." Manice v. Howard Sav. Inst., 30 N.J. Super. 267, 270, 104 A.2d 74, 75 (1954). *See also* Vlahos v. Andrews, 362 Ill. 592, 1 N.E.2d 59 (1936).

[38]*See* Stewart v. Merchants Nat'l Bank of Aurora, 3 Ill. App 3d 327, 278 N.E.2d 10 (1972) (termination was permitted even though the trust was expressly irrevocable due to a clause in the trust instrument in addition to having unaccomplished purposes). *See also* Weymouth v. Delaware Trust Co., 29 Del. Ch. 1, 45 A.2d 427 (1946) (termination permitted even though irrevocable clause in trust instrument).

[39]*See* Bixby v. California Trust Co., 33 Cal. 2d 495, 202 P.2d 1018 (1949); Weymouth v. Delaware Trust Co., 29 Del. Ch. 1, 45 A.2d 603 (1946); H.M. Byllesby & Co. v. Doriot, 25 Del. Ch. 46, 12 A.2d 603 (1940); Woodruff v. Trust Co. of Georgia, 210 S.E. 2d 321 (Ga. 1974); Moore v. First Nat'l Bank & Trust Co., 218 Ga. 798, 130 S.E.2d 718 (1963); Stewart v. Merchants Nat'l Bank of Aurora, 3 Ill. App. 3d 327, 278 N.E.2d 10 (1972); Vlahos v. Andrews, 362 Ill. 593, 1 N.E.2d 59 (1936); Raffel v. Safe Deposit & Trust Co., 100 Md. 141, 59 A. 702 (1905); Brillhart v. Mish, 99 Md. 477, 58 A. 28 (1904); Stephens v. Moore, 298 Mo. 215, 249 S.W. 601 (1923); Cole v. Nickel, 43 Nev. 12, 177 P. 409 (1919); Manice v. Howard Sav. Inst., 30 N.J. Super 267, 104 A.2d 74 (1954); Doyle v. Bank of Montclair, 9 N.J. Super. 586, 76 A.2d 41 (1950); Sack v. Chemical Bank & Trust Co., 54 N.Y.S.2d 19 (1945); Schellentrager v. Tradesmans Nat'l Bank & Trust Co., 370 Pa. 501, 88 A.2d 773 (1952); Bowers' Trust Estate, 346 Pa. 85, 29 A. 519 (1943); Waldron v. Commerce Union Bank, 577 S.W.2d 669 (Tenn. 1978); O'Brien v. Holden, 104 Vt. 338, 160 A. 192 (1932); Bottimore v. First & Merchants Nat'l Bank, 170 Va. 221, 196 S.E. 593 (1938); RESTATEMENT, *supra* note 10, § 339; IV A. SCOTT, *supra* note 10, § 339.

rule the settlor-sole beneficiary can terminate the trust even if the original purpose in creating the trust was to prevent himself from mismanaging his property.[40]

Brillhart v. Mish[41] is a good example of the rationale for allowing revocation. In that instance the life tenant of six parcels of real estate had put his interests in trust for his own benefit due to his health. Later the remaindermen, with the settlor's consent, petitioned for partition but the trustee objected. The court held that legal control of the trustee was equivalent to a revocable power to manage and control property. Since this power was not coupled with an interest in the property, it was interpreted to be revocable at will in spite of any provisions against revocability.[42]

It has also been held that the relationship between the settlor and the trustee does not create a contractual obligation. Therefore the trustee does not acquire an interest in the fees he would receive for administering the trust which would allow him to prevent termination. A trust will not be continued soley for the trustee's benefit, and he does not have any interest that will deny revocation.[43]

The fact situation faced by the court for the first time in *Johnson v. First National Bank of Jackson*[44] had confronted the Georgia Supreme Court twice in the past two decades. One of the Georgia cases, *Moore v. First National Bank & Trust Co.*,[45] involved an irrevocable trust, while the most recent case, *Woodruff v. Trust Co. of Georgia*,[46] involved a trust which was revocable only with the trustee's consent. Both cases ultimately resulted in a holding allowing revocation.

In *Moore* the court relied on the idea that since the settlor was the only one interested in the property, she had a right to retake and manage her own property.[47] Since she had the right to terminate the trust, she had a right to revoke the clause that made it irrevocable.[48] The court stated in *Woodruff* that the settlor-sole beneficiary's right to terminate is not derived from the terms of the trust, but is an inherent right that exists outside of the trust agreement. It was reasoned that

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[40]RESTATEMENT, *supra* note 10, § 339.

[41]99 Md. 447, 58 A. 28 (1904).

[42]*Id.* at 456-57, 58 A. at 31 (1904).

[43]"The fact that the trustee is entitled to additional commission by the continuance of the trust is not sufficient grounds to deny termination." Bower's Trust Estate, 346 Pa. at 87, 29 A.2d at 520 (1943). *See also* Moore v. First Nat'l Bank & Trust Co., 218 Ga. 798, 130 S.E.2d 718; RESTATEMENT, *supra* note 10, § 337, comment b; IV A. SCOTT, *supra* note 10, § 338.

[44]386 So. 2d 1112 (Miss. 1980).

[45]218 Ga. 798, 130 S.E.2d 718 (1963).

[46]210 S.E.2d 321 (Ga. 1974).

[47]218 Ga. at 802, 130 S.E.2d at 721.

[48]*Id.* at 802-3, 130 S.E.2d at 721-22.

this right existed because no one else had any interest in the trust.[49] The court relied on the earlier *Moore* decision and concluded that because the settlor had a right to terminate the trust, she also had a right to eliminate the limitation requiring the trustee's consent. The court's view was that the terms of a trust instrument in regard to consent and revocation are immaterial when the settlor is the sole beneficiary.[50]

Waldron v. Commerce Union Bank,[51] a recent Tennessee case, illustrates the fact that settlor-sole beneficiary who is under no incapacity is entitled to terminate a trust. This is true even if it was established for protection from the beneficiary's own financial irresponsibility, unfulfilled purposes remain, and termination would not be in the settlor's best interest. The settlor in *Waldron*, Mrs. Peay, was an alcoholic who had created a trust to protect her from squandering her assets. Mrs. Peay transferred large sums of money to her checking account from her trust. After her daughters were appointed her conservators, they sued to collect the money transferred. Relying on *RESTATEMENT (SECOND) OF TRUSTS* § 339 (1957), the court held that since Mrs. Peay was not under any incapacity when the money was transferred, as sole beneficiary she could revoke or modify the trust, so the transfers were permissible.[52]

The consequence of a spendthrift provision in a trust when a settlor-sole beneficiary attempts to revoke the trust was also discussed in *Waldron*.[53] The court emphasized that a settlor cannot create a spendthrift trust for his own benefit. Regardless of the provision, in such circumstances the settlor's interest can be reached by his creditors and may be subject to assignment.[54] It has been held to be against public policy to allow a person to deal with his property in such a way that he retains the enjoyment of the property, but creditors are prevented from reaching it.[55] If creation of such a trust is attempted, the spendthrift clause will be held void in regard to the settlor's creditors. His interest is alienable, but the trust will be valid with respect to all other parties. This was the position taken by the Mississippi Supreme Court in *Deposit Guaranty National Bank v. Walter E. Heller Co.*[56] in which a creditor filed suit to collect a judgment against the administrator of the settlor's estate. The trust in that case provided that the settlor was to receive the income from the principal for his lifetime,

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[49]210 S.E.2d at 323-24.

[50]*Id.* at 324.

[51]577 S.W.2d 669 (Tenn. App. 1978) *(cert. denied, Feb.* 26, 1979).

[52]*Id.* at 673-74.

[53]*Id.* at 674.

[54]*Id. See also* RESTATEMENT, *supra* note 10, at § 339, comment a. (Quoted by the court in Waldron); I A. SCOTT, *supra* note 10, at § 156.

[55]IV A. SCOTT, *supra* note 10, at § 156.

[56]204 So. 2d 856 (Miss. 1967).

then upon his death the trust was to terminate and the principal was to be distributed to a nephew. The settlor retained the right to withdraw from the principal of the trust up to twenty-five percent per year of the fair market value of the trust estate. The trust instrument also contained a provision protecting the trust from creditors.[57] After execution and recordation of the trust, the settlor borrowed money listing the trust funds as an asset. Upon application of the creditor the trust estate was held liable for payment of the judgment. This resulted from the court's view that a debtor should not have funds available to him and yet be able to keep creditors from reaching those funds.[58] This decision recognized the validity of spendthrift trusts in Mississippi, but restricted these trusts to those created for one other than a settlor-sole beneficiary.[59]

Determination if Settlor is Sole Beneficiary

Most of the litigation in the settlor-sole beneficiary area concerns the determination of whether the settlor is in fact the sole beneficiary, or if he has created an interest for anyone else. In certain circumstances it is very clear that the settlor is the sole beneficiary. One example of this situation arises when the settlor provides for the income to be paid to him for a set term with the principal to be returned to him at the expiration of the term. Another situation arises when the income is to be paid to the settlor for life and the principal is to be distributed to his estate or his personal representatives. A third is when the income is to be paid to the settlor for life with no provisions for the distribution of the principal upon his death because the trustee will hold upon a resulting trust for the settlor or his estate.[60]

It is sometimes obvious when the settlor is not the sole beneficiary. An example of this circumstance arises when the settlor is to receive the income for life and the principal is to be distributed to his children, issue, or descendants. He has created a remainder interest and is therefore not the sole beneficiary.[61]

Often the settlor creates a trust which pays the income to him for life and on his death conveys the trust property to his heirs or next of kin. This situation raises the question of whether the settlor has a life interest with an interest in remainder given to people who become his heirs, or whether the settlor has a life interest plus a reversionary interest so that he is the sole beneficiary of the trust.[62] Some courts rely on

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[57]"The trust shall not be subject to attachment or garnishment or execution by reason of any debt or other obligation of Grantor." *Id.* at 858.

[58]*Id.* at 862.

[59]Jones, *Spendthrift Trusts in Mississippi*, 1 MISS. C.L. REV. 135, 153 (1979).

[60]RESTATEMENT, *supra* note 10, at § 127. *See also* II A. SCOTT, supra note 10, § 127.1.

[61]*Id.*

[62]*Id.*

the Doctrine of Worthier Title to answer this question. This doctrine holds that a disposition in favor of the heirs of the settlor creates a reversion in the settlor and not a remainder in his heirs. This old common law rule is treated as a rule of construction in the United States today.[63] The settlor's intent is the key factor, and there is an inference that the settlor does not intend to create an interest in his heirs unless a clear contrary intention is stated.[64] The results of the application of this doctrine to a trust is that the settlor is made the sole beneficiary. *Doctor v. Hughes*[65] is a good illustration of the application of this doctrine. The settlor had created a trust reserving the income to himself with distribution to his heirs at law upon his death. While the settlor was living, a judgment creditor brought suit to reach the settlor's daughter's interest in the trust. Judge Cardozo held that the daughter had no interest at that time which could be attached.[66]

The trend in recent cases has been to rely on *RESTATEMENT (SECOND) OF TRUSTS* § 127 (1957). This section provides definitions of the situations in which the settlor will be considered the sole beneficiary.[67]

Best Interest Doctrine

There is a minority view in regard to settlor-sole beneficiaries which refuses to allow the settlor-sole beneficiary to revoke the trust if the court finds termination would not be in the best interest of the settlor.

Kentucky exemplifies a state which adheres to the minority rule. Case law of that state holds that if a settlor-sole beneficiary creates a trust to protect himself from his own bad habits, he cannot terminate

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[63]II A. SCOTT, *supra* note 10, at § 127.1. The Doctrine of Worthier Title does survive as a rule of construction in Mississippi. *See* West Tennessee Co. v. Towns, 52 F.2d 764 (N.D. Miss. 1931); Williams V. Green, 128 Miss. 446, 91 So. 39 (1929); Boone v. Baird, 91 Miss. 420, 44 So. 929 (1907); Harris v. McLarun, 30 Miss. 533 (1855).

[64]RESTATEMENT, *supra* note 10, at § 127.

[65]225 N.Y. 305, 122 N.E. 221 (1919).

[66]*Id.* at 312, 122 N.E. at 221. He stated "But at least the ancient rule survives to this extent: That to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such purpose." *Id.* at 312, 122 N.E. 222.

[67]*See* Woodruff v. Trust Co. of Georgia, 210 S.E.2d 321, 323 (Ga. 1974) "Where the owner of property, whether real or personal, transfers it in trust to pay the income to himself for a period of years and at the expiraton of the period to pay the principal to him, he is the sole beneficiary of the trust. He is likewise the sole beneficiary where he transfers property in trust to pay the income to himself for life and on his death to pay the principal to his estate, or to his personal representatives. So also, he is the sole beneficiary where he transfers property in trust to pay the income to himself for life with no provision as to the disposition of the property on his death, since the trustee will hold upon a resulting trust for him or his estate, in the absence of evidence of a contrary intention." RESTATEMENT, *supra* note 10, at § 127, comment b.

it so long as the habits exist.[68] *Downs v. Security Trust Co.*[69] is perhaps the best illustration of the principle. Downs, suffering from drunkeness and deeply in debt, created a trust for his support to prevent his estate from being squandered. He later attempted to revoke the trust. Since Downs was still an alcoholic at the time of attempted revocation, the court found the objects of the trust unsatisfied and denied revocation.[70] There are, however, some Kentucky cases which allow termination if the purpose for creating the trust is fully accomplished, and the settlor would benefit from revocation. In Kentucky it appears that in order for the settlor-sole beneficiary to terminate a trust, three requirements must be met. In addition to the consent of all beneficially interested parties, the whole object of the trust must have been accomplished, and the termination must be to the beneficiary's advantage.[71] The Kentucky courts seem to view each case on its particular facts and then rule according to what is felt would be most beneficial to the settlor.

Although Kentucky appears to adhere to the minority or best interest rule, *Fidelity & Columbia Trust Co. v. Gwynn*[72] is often cited in support of the majority rule, which allows termination because the settlor is also the sole beneficiary. This appears, however, to be the result of an apparent misreading of the case. Gwynn had created a trust for himself because he had epilepsy. When he no longer suffered epileptic seizures, he tried to revoke the trust. The court allowed revocation since it was felt that the purpose of the trust had been fulfilled. However, the court specifically refused to rule on the settlor-sole beneficiary question.[73] Therefore, though the court allowed revocation it in no way adopted the principles of the majority rule.

Until 1943 Pennsylvania, like Kentucky, followed the minority rule on the subject of revocation by a settlor-sole beneficiary. If the settlor-sole beneficiary created the trust for his own protection from his bad habits, termination was not permitted.[74] In *Reidy v. Small*[75] a trust cre-

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[68]*See* Downs v. Security Trust Co., 175 Ky. 789, 194 S.W. 1041 (1917); Coleman v. Fidelity Trust & Safety Vault Co., 28 Ky. 1263, 91 S.W. 716 (1906).

[69]175 Ky. 789, 194 S.W. 1041 (1917).

[70]*Id.* at 797, 194 S.W. at 1044.

[71]*See* Fidelity & Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W.2d 814 (1937); Haldeman's Trustee v. Haldeman, 239 Ky. 717, 40 S.W.2d 348 (1931).

[72]206 Ky. 823, 268 S.W. 537 (1925).

[73]"However, as the question is presented by this appeal, it seems unnecessary to determine it. Appellant has under the other rule been granted all necessary relief. Its decision would be only to settle an abstract question of law." (The other rule referred to is the accomplishment of purpose doctrine.) *Id.* at 827, 268 S.W. at 539.

[74]Long v. Tradesmen Nat'l Bank & Trust Co., 108 Pa. Super. Ct. 363, 165 A. 56 (1933).

[75]154 Pa. 505, 26 A. 602 (1893). "But a trust created by an old man in a lucid interval, in terror of impending hereditary insanity, all the more probable because of vicious personal habits, from its very purpose should be irrevocable." *Id.* at 515, 26 A. at 604.

ated by an aged man fearing hereditary insanity was held to be irrevocable even though he was the sole beneficiary. The "best interest" rationale was applied to deny a mentally weak, but legally competent, settlor-sole beneficiary the power to terminate the trust in *Neal v. Black*.[76] The rationale of the minority rule was also applied by the Pennsylvania courts to situations involving a settlor-sole beneficiary with a spendthrift trust. As with past holdings, revocation was denied.[77] Since a spendthrift trust cannot be created by a settlor for himself, the courts must have meant that if the settlor's interest is not alienable or cannot be reached by his creditors, termination will be denied even though the spendthrift provisions are invalid.[78] In *Rehr v. Fidelity-Philadelphia Trust Co.*[79] the court refused to look at the settlor-sole beneficiary issue since there were spendthrift provisions in the trust. The court neglected to notice authority that a settlor cannot create a spendthrift trust for himself.[80]

Bowers' Trust Estate[81] changed Pennsylvania trust law. In *Bowers* a woman who had set up a spendthrift trust for the benefit of herself and her son was allowed to revoke the trust after she obtained full interest in the trust benefits through assignment of the son's interest. In this decision the Pennsylvania Supreme Court adopted the rule of *RESTATEMENT (SECOND) OF TRUSTS* § 339 (1935) which permits termination of a trust when the settlor is the sole beneficiary.[82] Prior Pennsylvania decisions, as previously reviewed, had denied termination if the trust was created to protect the settlor from himself or was a spendthrift trust thus qualifying allowance of termination.[83] In this decision the court recognized a distinction it had ignored in the earlier line of cases. In the prior decisions the difference between a testamentary trust, where no consent for termination could be obtained and the inter vivos trust, where the settlor could consent, had not been noticed.[84] Upon making the distinction, the court recognized since it was their function to see that the wishes of the settlor were followed, it

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[76]177 Pa. 83, 35 A. 561 (1896). *See* 177 Pa. at 101-105, 35 A. at 568-69 for discussion of previous line of cases establishing principles by which this case was determined.

[77]*See* Long v. Tradesmens Nat'l Bank & Trust Co., 108 Pa. Super Ct. 363, 165 A. 56 (1933); Appeal of Merriman, 134 Pa. 114, 19 A. 479 (1890).

[78]IV A. SCOTT, *supra* note 10, § 339.

[79]310 Pa. 301, 165 A. 380. (1933).

[80]*See* Nolan v. Nolan, 218 Pa. 135, 67 A. 52 (1907). *See also* Manice v. Howard Sav. Inst. 30 N.J. Super. 267, 104 A.2d 74 (1954); GRISWOLD, *supra* note 26, § 474; RESTATEMENT, *supra* note 10, § 156 for authority subsequent to the *Rehr* decision.

[81]346 Pa. 85, 29 A.2d 519 (1943).

[82]*Id.* at 86, 29 A.2d at 520.

[83]*See* 91 U. PENN. L. REV. 672, 673 n.4 (1943).

[84]346 Pa. at 86, 29 A.2d at 520.

would not be proper to restrict living settlor-sole beneficiaries from revoking a trust.[85]

Pennsylvania courts, however, have found it difficult to give up the pre-Bowers' reasoning. In *Palermo Trust*[86] the court, using the rationale from the early Pennsylvania cases, refused to terminate a trust when petitioned for such relief by the settlor-sole beneficiary. As authority for denial the court proclaimed that the settlor who creates a spendthrift trust for himself becomes a "ward of the court" and needs the court's approval to terminate the trust.[87] Undoubtedly the "best interest" rule was a primary factor in the decision, as the settlor was a paraplegic who created the irrevocable spendthrift trust with the proceeds of her railroad accident claim. The court attempted to distinguish *Palermo* from *Bowers'* by showing that there was a lack of accomplishment of purpose in the paraplegic's trust.[88] In contrast, the mother's trust in *Bowers'* left no material pupose unaccomplished. It should be noted, however, that the rule adopted in *Bowers'* specifically stated that it would apply "although the purposes of the trust have not been accomplished."[89]

An attempt was also made to rely on the exception in *RESTATEMENT (SECOND) TRUSTS* § 339 that a person under an "incapacity" cannot join in a termination of the trust.[90] This was a misapplication of the exception as it is clear that § 339 is referring to legal incapacity and not a physical incapacity or a lack of ability to manage business affairs wisely.

Settlor's Intent

A strong argument in support of the majority view permitting termination by the settlor-sole beneficiary is found in many courts' insistence in carrying out the settlor's intent. This appears to be any court's focus in regard to all termination decisions. If the settlor changes his mind after creating the trust, it is his present intent and not his original intent which should be carried out. It is in actuality the settlor's own property, and he should have the right to determine how he will enjoy it.[91]

On the other hand, the "wisdom versus folly" argument is often advanced in an attempt to deny termination. According to this view the settlor created the trust for his protection in a moment of wisdom

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[85]*See also* rule reaffirmed in Schellentrager v. Trademens Nat'l Bank & Trust Co., 370 Pa. 501, 88 A.2d 773 (1952).

[86]15 Pa. Fiduc. 74 (Philadelphia Orphans' Ct. 1963).

[87]*Id.* at 83-84.

[88]*Id.* at 81-82.

[89]346 Pa. at 86, 29 A.2d at 520.

[90]RESTATEMENT, *supra* note 10, § 339.

[91]G. BOGERT, *supra* note 12, § 1004.

and should not be allowed to destroy that protection in a moment of folly. This argument overlooks the fact that since the settlor cannot create a spendthrift trust for himself, he really has not protected himself against his folly. The creation of the trust could have been an act of folly instead of an act of wisdom. Whether folly or wisdom, since the settlor holds the only beneficial interest in the trust, it should be his property to manage however he chooses.[92] The question remains who should determine what is folly and what is wisdom in regard to the settlor's property. The answer lies either with the judiciary system or the settlor. In *Johnson v. First National Bank of Jackson*[93] the Mississippi Supreme Court explored this question and weighed the implications of accepting either alternative answer.

ANALYSIS BY THE COURT

Johnson v. First National Bank of Jackson was a case of first impression in Mississippi, as the state supreme court had not previously ruled on the question of whether an irrevocable trust could be revoked at any time by the settlor who was the sole beneficiary of the trust.[94] Lacking any Mississippi authority directly on point, the court relied on basic trust law citing *RESTATEMENT (SECOND) OF THE LAW OF TRUSTS* § 339 (1959) and *G. BOGERT, TRUSTS AND TRUSTEES* § 1004 (2d ed. 1962).[95] In adherence with majority rule, the court adopted a general rule that "a settlor who is the sole beneficiary of a trust may have the trust revoked and set aside even though it was initially set up in the form of an irrevocable trust."[96]

The court had to deal with two public policy issues in conflict in the case. Judicial protection of the individual in regard to financial folly had to be balanced against freedom of the individual to deal with his property as he chooses. By allowing revocation of the trust, the court refused to adopt a parental role as a proper function for any court in Mississippi. Citing Justice Jackson's dissent in *United States v. Ballard*,[97] the court affirmed the right of individuals to deal with their money as they choose as long as they are under no legal disability.[98] It was further stated that equity should not attempt to guard persons from their own folly using societal standards where there was no showing of legal disability.[99]

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[92]Waldron v. Commerce Union Bank, 577 S.W.2d 669, 674 (Tenn. App. 1978).
[93]386 So. 2d 1112 (Miss. 1980).
[94]*Id.* at 1114.
[95]*Id.*
[96]*Id.*
[97]322 U.S. 78, 94.
[98]386 So. 2d at 1115.
[99]*Id.*

Although not an issue in the instant case, it was stressed that Johnson could not have created a spendthrift trust for herself.[100] The court appeared to take advantage of the opportunity to reaffirm its previous decision in *Deposit Guaranty National Bank v. Walter E. Heller & Co.*[101] which held that a spendthrift trust for the grantor's benefit is void as to creditors.[102] It was pointed out that even if it had been judicially decided it would be against Ms. Johnson's best interest to revoke the trust, from a practical standpoint she could still take actions that would amount to the functional equivalent of revocation. This would be possible if she borrowed money equal to the corpus of the trust and gave it to the Church of Scientology. Her creditors could have then collected her debt from the corpus of the trust.[103]

CONCLUSION

The Supreme Court in this progressive decision defined a previously undecided question in Mississippi and moved the state in line with the prevailing majority view accepted by both trust law authorities and developed case law concerning the issue. Adoption of the majority rule could primarily be attributed to the public policy issues involved with this case. At first glance the issue appeared to be whether the court would allow Ms. Johnson to squander her money or would protect her from her own financial irresponsibility. When the facts were examined more closely, it became apparent that the court really did not have a choice. Unless she could create a spendthrift trust for herself, which a previous ruling foreclosed,[104] there was no way to keep the corpus from her creditors. For all practical purposes, nothing would have been accomplished by refusing to allow Ms. Johnson to revoke the trust. By refusing to allow revocation, the court could have indirectly in effect overruled their decision in *Deposit Guaranty National Bank v. Walter E. Heller and Co.*[105] This would then have allowed an individual to set up a spendthrift trust for himself in regard to his creditors. This would not only be contrary to the prevailing majority rule of trust law, but also against public policy. Individuals should not be permitted to tie up their property in such a way that they can enjoy it, and still keep their creditors from reaching it.[106]

A major consideration involved was how much control a court should be allowed to exert upon an individual's decision making. Public policy strongly favors allowing people to do what they wish with

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[100] *Id.*
[101] 204 So. 2d 856 (Miss. 1967).
[102] *Id.* at 862.
[103] 386 So. 2d at 1115.
[104] 204 So. 2d 856 (Miss. 1967).
[105] *Id.*
[106] IV A. SCOTT, *supra* note 10, § 156.

their own property whether it is prudent or foolish. Courts do not reform contracts because it appears one party made a bad bargain, but require the presence of fraud or mutual mistake before they will interfere.[107] As a corollary, it would be against public policy for the courts to judicially determine the wisdom or folly of an individual's decision regarding how he manages his property.

Since a major portion of the record concentrated on the issue of donations to a church considered by many to be unorthodox, failure to allow revocation could have also interferred with Ms. Johnson's freedom of religion. A first amendment question could have become an issue which would have required further litigation to resolve.

By not following the minority rule the court avoided having to define "best interest". If the minority view had been chosen, the lower courts should have been given some basis for determining "best interest". It would be very difficult to develop definitions or guidelines without applying societal standards, which the court felt should not be done.[108] If the "best interest" rule had been applied, it is conceivable that this decision would have allowed the Mississippi Supreme Court to be flooded with cases requiring the determination of "best interest", not only from trusts but from other areas of law, such as, contracts.[109]

Some problems, however, may appear in the wake of this case. The question of when a settlor is the sole beneficiary has been the major issue involved in much of the litigation regarding this type of trust. Since in the instant case the fact of whether Ms. Johnson was the sole beneficiary did not appear as an issue, the court did not define when a settlor will be considered a sole beneficiary. Future litigation in which this might be an issue would have been avoided had the court also adopted a definition of settlor-sole beneficiary. Mississippi may choose to remedy this oversight statutorily as some states have done. However, since the Doctrine of Worthier Title is still applied in Mississippi as a rule of construction, this could prevent the settlor-sole beneficiary definition from becoming the major problem it has been in other states.

With any trust there is always a possibility that unforeseen circumstances will make it impossible to fulfill the purposes for which the trust was originally created. This fact makes trusts an area of law which requires that flexible equitable principles be applied. In this decision the court has permitted the settlor to exercise a degree of flexibility concerning how she will enjoy her property.

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[107]Committee on Modification, Revocation and Termination of Trusts, 2 REAL PROPERTY, PROBATE AND TRUST JOURNAL 303.

[108]386 So. 2d at 1115.

[109]Rebuttal brief for Appellant at 14, Johnson v. First Nat'l Bank of Jackson, 386 So. 2d 1112 (Miss. 1980).

The major interest of this case will be for trust officers throughout the state. Many officers have been giving opinions regarding this issue based only on general trust law. They now may rely on a Mississippi decision which clarifies this previously unsettled question of Mississippi law.

Judith Ford Anspach