

Tulsa Law Review

Volume 3 | Number 1

1966

Trusts: The Discretionary Trust in Oklahoma

Timothy J. Crowley

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Timothy J. Crowley, *Trusts: The Discretionary Trust in Oklahoma*, 3 Tulsa L. J. 89 (1966).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol3/iss1/16>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

selling to its franchise dealers. The Commission had found the operation of the franchise plan to be akin to the operation of tying clauses that are generally held to be inherently anti-competitive.

In the *Atlantic* case, the Commission took a step toward the position that franchise agreements are inherently illegal. In *Firestone Tire and Rubber Co.*¹⁹, the Commission staff attempted to take another step. They sought an order restraining Shell Oil Company from using a sales-commission plan, a purchase-resale plan, or any other plan for distribution of TBA directly or indirectly to its dealers. However, the Commission entered an order similar to the Atlantic-Goodyear order which enjoined the use of a sales-commission plan. The Commission took the final step when it adopted the position that Brown Shoe's franchise plan is in itself illegal. The Eighth Circuit rejected this position but it is important to note that the Supreme Court has granted certiorari.²⁰ Perhaps the Supreme Court's decision in the *Brown Shoe* case will reveal what the Atlantic decision does not; namely, the degree of control, if any, that a large concern can exercise over its dealers without running afoul of section 5 of the Federal Trade Commission Act.

Cecil T. Beeson

TRUSTS: THE DISCRETIONARY TRUST IN OKLAHOMA

In the recent case of *First National Bank of Enid v. Clark*,¹ the plaintiff (defendant in error on appeal) was the former wife of the beneficiary under a discretionary trust. In July, 1961, the plaintiff filed an application for citation in the Superior Court of Garfield County seeking to have the beneficiary punished for contempt for failure to make child support payments. The trustee bank (plaintiff in error on appeal) was not made a party to this action. Judgment was rendered for the plaintiff. In February, 1962, the plaintiff filed suit in the District Court of Garfield County against the defendant bank seeking to compel the bank, as trustee of the trust created in the will of the beneficiary's mother, to satisfy the judgment obtained by the plaintiff against the beneficiary. This suit would further compel the bank as trustee to pay the sum of \$60.00 monthly for the support of the children.

The trial court entered judgment requiring the defendant bank as trustee to pay the judgment obtained by the plaintiff and to pay the monthly support for the two minor children. The defendant bank perfected an appeal therefrom.

The Supreme Court of Oklahoma decided that to the extent the judgment appealed from requires the trustee to pay over the "income"

¹⁹ 58 F.T.C. 371 (1961).

²⁰ Cert. granted, 34 U.S.L. WEEK 3003 (No. 1141, 1964 Term; renumbered No. 118, 1965 Term).

¹ 402 P.2d 248 (Okla. 1965).

from the trust estate to the payment of the judgment for child support and the order for child support, it is vacated and set aside, but to the extent that the trial court's judgment requires the trustee to pay over to the plaintiff, or guardian, any income which the trustee determines shall be paid to or for the beneficiary, the judgment is affirmed.

The principal case seems to be a case of first impression in Oklahoma and is unique as it was the first time that the Supreme Court of Oklahoma had ruled on the effects of a discretionary trust. The Supreme Court, in reaching its decision, recognized the distinction between a discretionary trust and a spendthrift trust.

The rules applicable to a discretionary trust are well settled in most jurisdictions.² If a trustee has the discretion whether to pay or apply income to or for a beneficiary, or to pay or apply nothing, the interest of the beneficiary before the trustee elects to pay or apply a given amount is not assignable nor reachable by his creditors. In a discretionary trust, it is the nature of the beneficiary's interest, rather than a provision forbidding alienation, which prevents the transfer of the beneficiary's interest. The transferee, or creditor, cannot compel the trustee to pay anything to him since even the beneficiary cannot demand receipt of the proceeds for application for his own benefit.³ Recognizing the nature of a discretionary trust and that the beneficiary has no vested interest until he has received something from the trustee, the courts with uniformity have determined that such trusts are not subject to invasion by claimants against the beneficiary. This is because no vested interest can be established in the beneficiary under a discretionary trust until the trustee first exercises its discretionary powers and makes a decision as to what proceeds the beneficiary shall have from the trust estate.⁴

In the *First National* case, the theory was advanced that the Oklahoma Legislature had seen fit to codify public policy and had created a statutory exemption from the rule of non-liability of a discretionary trust. This contention was based on Section 175.25(A) of Title 60, Oklahoma Statutes (1961).⁵ However, this conclusion cannot be advanced logically if consideration is given to Section 175.25(E) of Title 60, Oklahoma Statutes (1961); which provides:

Where the interest of the beneficiary of a trust is subject to the exercise of discretion by the trustee or by another, the provisions of this Act as to the rights of creditors and assignees shall apply with respect to any sums which

² *Foley v. Hastings*, 107 Conn. 9, 139 Atl. 305 (1927); *Funk v. Grulke*, 204 Iowa 314, 213 N.W. 608 (1927); *Todd's Ex'rs v. Todd*, 260 Ky. 611, 86 S.W.2d 168 (1935); *Calloway v. Smith*, 300 Ky. 55, 186 S.W.2d 642 (1945).

³ *Brahmey v. Rollins*, 87 N.H. 290, 179 Atl. 186 (1935).

⁴ *Roorda v. Roorda*, 230 Iowa 1103, 300 N.W. 294 (1941).

⁵ "Notwithstanding a provision in the terms of a trust restraining the alienation of the interest of a beneficiary, such interest shall be entitled to be reached in the satisfaction of claims to the following extent: 1. All income due or to accrue in the future to the beneficiary shall be subject to enforceable claims under the laws of this State for, (a) support of a husband, wife, or child of the beneficiary, (b) necessary services rendered or necessary supplies furnished to the beneficiary, or (c) a judgment based on any such claim under (a) or (b)."

the trustee of such person determines shall be paid to or for the beneficiary.

In reading this subsection in conjunction with subsection A, it is evident that the Legislature intended to limit the invasion of a discretionary trust to the amount that a trustee of a discretionary trust might decide to pay to the beneficiary. It should be noted that the Legislature made no mention in subsection E of making an exception of the specific claimants referred to in subsection A of said statute, specifically, a husband, wife, or child of a beneficiary.

However, the rights of one making a will and the disposition made thereby may be altered by statutory rule. If the statute permits a creditor to reach the rights of a beneficiary under a trust, then a testator could not prevent the rights of these creditors. But, such rights would be enforceable only as allowed by statute. It has been recognized in Oklahoma that statutes restricting the right to make a will and to dispose of one's property will be strictly construed.⁶

Thus, because the trustee bank in the *First National* case was ordered to pay a specific sum by the lower court before it had exercised its discretion, as provided for in the testatrix's will, there would be an invasion of the trust estate contrary to the clear intent of the testatrix and would have the effect of preventing her from disposing of her property as expressed in her will. Because the bank had never exercised such discretion in favor of the beneficiary, it could certainly not be compelled by the court to satisfy the judgment of an outside creditor from the corpus or income of the trust estate. This contention is based on an Oklahoma case holding that courts have no power to control the individual's right to do with his own property as he pleases by will if he possesses testamentary capacity.⁷ It has also been determined that in construing a will, the intent of the testator must be ascertained and given effect if such intent does not attempt to effect something the law forbids.⁸ It is evident that the testatrix did not violate any laws of the state when she created a discretionary trust because the Oklahoma statute itself recognizes trust of this nature.⁹

The lower court's opinion would have had the effect of directing said trustee to make specific payments to the plaintiff prior to its determination of how much was to be paid to the beneficiary. This would put the court in the position of exercising the trustee's discretion, thus ignoring the basic principles of trust law as they apply to a discretionary trust. It would be difficult to predict what effect a decision of this nature would have had on future testamentary acts in Oklahoma. As it would be of great importance to persons who execute wills, the Supreme Court, without a doubt, gave consideration to the far-reaching effects of its decision and the basic fundamentals of trust law. It is also evident that the court showed great consistency in view of its own past expressions upholding

⁶ *Carothers v. Carothers*, 196 Okla. 640, 167 P.2d 899, 906 (1946).

⁷ *Parnacher v. Mount*, 207 Okla. 275, 248 P.2d 1021 (1952).

⁸ *Parnacher v. Hawkins*, 203 Okla. 387, 222 P.2d 362 (1950).

⁹ 60 OKLA. STAT. § 175.25(E) (1961).

the expressed desires of a testator when his wishes are not contrary to the laws of this state.

From the decision in this case, it can be presumed that the prevailing rule is that when the beneficiary is given an enforceable interest in the property devised, that interest may be subject to his debts to the extent provided for by statute. When such an interest has been given and a specific sum is directed to be paid to the beneficiary, the payment of this sum can be legally enforced. An interest may also be subject to payment of the beneficiary's debt when the language creating the interest is sufficient to give the beneficiary an interest in the property devised. But when neither of these is given and the sum which he is to receive is discretionary with the trustee, no interest is created which may be subjected to the payments of his debts until the trustee elects to use his discretion and pay a certain sum to the beneficiary.

Timothy J. Crowley