

**[J-31-2007]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

JUDITH SCALFARO,	:	No. 127 MAP 2006
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court dated September 30, 2005 at No.
	:	2811 EDA 2004 reversing the Order of the
v.	:	Court of Common Pleas of Bucks County,
	:	Civil Division dated March 2, 2004 at No.
	:	0303916-13-5 and entered on December
RICHARD RUDLOFF AND JAMES	:	3, 2004
RUDLOFF,	:	
	:	884 A.2d 904 (Pa. Super. 2005)
Appellees	:	
	:	ARGUED: April 17, 2007

**DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: November 21, 2007**

In creating a trust for the ultimate benefit of their children, the Rudloffs used a form-book “living trust” document believed by the parties to have been obtained from a stationery store and executed without the benefit of legal advice. I respectfully differ with the majority’s conclusion that the instrument is clear and definite; rather, I believe that the document is poorly drafted and materially ambiguous.

For purposes of this appeal, the critical portion of the declaration of trust is the revocation provision contained in its paragraph five, as follows:

We reserve unto ourselves the power and right at any time during our lifetime to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of any beneficiary and without giving notice to any

beneficiary. The sale or other disposition by us of the whole or any part of the property held hereunder shall constitute as to such whole or part a revocation of this trust.

(emphasis added). I view the central question in this appeal as whether the Rudloffs believed that the phrase “during our lifetime,” as well as other plural forms contained within this express reservation of a power to revoke, authorized revocation within the period of time representing the intersection of their individual lifetimes (in which case the power of revocation would not terminate upon the death of one spouse) or the broader period of time representing the union of their individual lifetimes (in which case the power of revocation would persist until the death of the survivor).

There are a number of suggestions within the declaration of trust that favor the latter interpretation. Significantly, the declaration of trust also employs the same and similar plural forms in other contexts in which it is reasonably clear that the intent was to refer to either or both of the settlors. For example, in paragraph one, the instrument provides for the appointment of a successor trustee upon physical or mental incapacity of the settlor/trustees “during our lifetime,” and payment “to us” of income or principal “as may appear necessary or desirable for our comfort or welfare,” with the trust property being transferred to the beneficiaries “[u]pon the death of the survivor of us.” In paragraph four, the trust instrument reserves to the settlor/trustees the power and right “during our lifetime” to mortgage the premises and to collect rents and other income. Both of these paragraphs, in the context of the overall document, are reasonably read to convey a design to reserve the full benefit of the trust property to the surviving settlor, despite the use of the plural forms, as in the phrase “during our lifetime.” This suggests that the use of identical phraseology in paragraph five, with reference to the power of revocation, also was intended to encompass either or both of the settlors.

As Appellee observes, the construction of the trust instrument that the majority adopts requires the Court to discern an intent that, should one of the settlors become incapacitated or die, the other would be deprived of the ability to revoke the trust and dispose of the property to address his or her life circumstances, such as infirmity caused by aging. As Appellee also notes, these sorts of form-book documents are frequently utilized by lay persons in an effort (albeit ineffectual) to avoid inheritance taxation, and it seems counterintuitive that such persons would wish to divest their survivor of the full use of significant assets which might be essential to their care.

According to the majority, the survivorship issue is covered in paragraph seven of the declaration of trust. See Majority Opinion, slip op. at 6-7. Paragraph seven, however, is the trustee succession provision of the instrument. As Appellee stresses in his brief, trustees may terminate a trust, but only settlors have the power of revocation. Thus, I cannot agree with the majority that a provision explicitly addressed solely to trustee succession should also address itself to the power of revocation. Instead, paragraph five is explicitly the provision of the declaration of trust addressing the settlors' power of revocation, and I believe that the outcome of this case should be premised upon the resolution of the material ambiguity in that provision. Cf. Christian L. Barner, 17727 NBI-CLE 43, 95 (2004) ("Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors.").<sup>1</sup>

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<sup>1</sup> For the same reason, I also differ with the majority's suggested application of the doctrine of expressio unius est exclusio alterius to paragraph seven of the declaration of trust. See Majority Opinion, slip op. at 7 n.5. This canon of construction permits the exclusion of terms from an instrument by implication where other items of the same general character are expressed in the document, such that it would be reasonable to infer that the makers rejected the unmentioned terms. Again, however, the item addressed in paragraph seven (succession of trustees) is simply not of the same general character as that which the majority would exclude by implication (revocability by the settlors). Indeed, and again, the latter is actually addressed in another provision (continued . . .)

In the face of a material ambiguity within a trust document, parol or extrinsic evidence of the settlor's intent may be considered to resolve ambiguity. See Factor v. Getz, 442 Pa. 384, 387-88, 276 A.2d 511, 512 (1971). In the absence of a sufficient manifestation of intent, consistent with a majority of other jurisdictions, Pennsylvania's common law reflected a presumption of irrevocability. See In re Ingles' Estate, 372 Pa. 171, 176, 92 A.2d 881, 883 (1952). See generally 20 Pa.C.S. §7752 (Uniform Law Comment) ("Most states follow the rule that a trust is presumed irrevocable absent evidence of contrary intent.")<sup>2</sup> Notably, however, such common-law default rules are to

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(continued . . .)

of the declaration of trust, namely, paragraph five, albeit in an ambiguous fashion. Therefore, it does not seem reasonable to infer that the makers would have addressed revocability within the inapposite content of paragraph seven. Rather, had the makers apprehended the ambiguity, it seems far more likely that they would have clarified their intent within the relevant provision (paragraph five).

I also have difficulty with implementing such a tenuous application of the expressio unius canon in a situation in which the instrument under review appears to be a generic, stationary-store document frequently purchased by lay persons with the single-minded purpose of attempting to avoid inheritance taxation. It does not appear to me to be reasonable to infer that persons in such circumstances intended to reject the prospect of a continuing power of revocation in their survivors merely because they acceded to a generic trustee succession provision.

<sup>2</sup> A contrary approach has emerged, which reverses the presumption in favor of revocability, as reflected in the Uniform Trust Code, approved and recommended by the National Conference of Commissioners on Uniform State Laws, and as adopted by the Pennsylvania General Assembly as Section 7752 of the Pennsylvania Uniform Trust Act. See 20 Pa.C.S. §7752. The Uniform Law Comment explains, however, that such reversal applies "only for trusts created after [the] effective date," see id. (Uniform Law Comment), which, in this case, is November 6, 2006, well after the creation of the trust in issue.

be resorted to only where the courts are unable to discern a sufficient manifestation of intent of the settlors.<sup>3</sup>

Here, I conclude that, although the trust declaration is poorly drafted and ambiguous, the reasonable inferences arising from language used throughout the document, as discussed above, are sufficient to overcome the common-law default presumption of irrevocability. Again, in light of the inadequate drafting of the declaration of trust, I reiterate that there remains a fair amount of uncertainty. My conclusion, to this point, is merely that the greater weight of the inferences concerning the Rudloffs' intentions that may reasonably be drawn from the document militate in favor of Appellees' position and, accordingly, the common-law presumption of irrevocability which would otherwise attach should not, in and of itself, control.

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<sup>3</sup> As explained by a court of common pleas:

[S]tarting some years ago, our Supreme Court has progressively diminished the effect of artificial [judicial] canons of construction, or presumptions of intent, and has mandated our courts to determine, from the document itself and from other circumstances known to a testator, his intent as expressed by the most natural and reasonable meaning of the words used: Jessup Est., 441 Pa. 365, 276 A.2d 499 (1970). The problem with [judicial] canons of construction and arbitrary presumptions was that one which led to one result could always be met by one which led to the opposite result[.]

In re Deacon Estate, 2 Pa. D.&C.3d 711, 713 (C.P. Montgomery 1977).

Parenthetically, absent some constitutional infirmity, the courts are bound to apply statutory rules of construction concerning wills and trusts where they are implicated to the full extent intended by the Legislature. See, e.g., In re Estate of Burger, 587 Pa. 164, 178, 898 A.2d 547, 555 (2006) ("Given . . . difficulties associated with presumptions [concerning testator intent], we find it most appropriate to adhere to the direction of the representative branch of government, where it is available.").

In light of the ambiguity, however, I believe that the common pleas court should have considered the extrinsic evidence offered by Appellant in its evaluation of Mr. and Mrs. Rudloff's intentions. See Factor, 442 Pa. at 387-88, 276 A.2d at 512. See generally In re Scheidmantel, 868 A.2d 464, 488 (Pa. Super. 2005) (explaining that "the polestar in every trust is the settlor's intent and that intent must prevail" (quoting Restatement (Second) of Trusts §2 (1957))). In this regard, Appellant testified that her parents created the trust strictly to thwart any possibility that any of their children would be divested of his or her share of the trust property, since, according to Appellant, Mrs. Rudloff had been unfairly deprived of her own inheritance upon her mother's death. See N.T., March 1, 2004, at 6. While this evidence was facially self-serving, the task of determining Appellant's credibility was initially for the common pleas court as fact finder. Additionally, although the testimony appears to have been hearsay, it was admitted into evidence without objection. Thus, the common pleas court should have assessed both the credibility and weight of the testimony in determining the Rudloffs' intentions concerning the potential for revocation of the trust by a surviving spouse. The court, however, circumvented this task by finding that the terms of the trust declaration were explicit in vesting the power to revoke only in the Rudloffs jointly. Since I differ with the common pleas court's (and the majority's) conclusion in this regard, I would return the matter to that court to complete the appropriate fact finding.

Finally, I recognize the policy indicated in In re Solomon's Estate, 332 Pa. 462, 2 A.2d 825 (1938), and highlighted by Judge Kelly, that "[i]t should not be in the power of either party after the death of the other to destroy the trust both created and both intended to subsist." Id. at 464, 2 A.2d at 826. I do not read Solomon's Estate, however, as overturning the longstanding principle that settlors may reserve the power to revoke in the trust instrument under any such terms and conditions as they may

desire, within the bounds of legality, to include a conferral of individual power. Rather, I believe that Solomon's Estate reflects a resolution of the particular controversy before the Court and an affirmation of the common-law presumption of irrevocability, in the absence of a sufficient manifestation of intent to the contrary.

Mr. Justice Eakin joins this dissenting opinion.