

Instructor: Mr. Freeman

1. Sally, the owner of Blackacre, transferred Blackacre "to Terry to permit and suffer Allen to have, receive, and take the rents and profits for Allen's life; at the death of Allen, Terry is to receive the rents and profits and apply them to the use of Allen's children and their heirs."

BEST ANSWER

The issue here involves the Statute of Uses. Sally has attempted to create a trust for Allen's use during Allen's life and for Allen's children upon Allen's death, but the Statute of Uses will execute the use such that both the legal and equitable interests vest in the person to whom Sally intends to give the use if the trustee has no active duties to perform.

The transfer to Terry for Allen's life for Terry to permit and suffer Allen to have, receive and take the rents and profits for Allen's life is a use that the Statute of Uses will execute. The trust is passive. Terry has no active duties to perform, the profits simply go to Allen, with no duties for Terry to perform, no discretion upon Terry's part. So, the interest first transferred by Sally is executed by the Statute of Uses such that Allen takes the legal and equitable interest during Allen's life.

The trust upon Allen's death, which Sally set up with Terry as trustee for the use of Allen's children is active; however, so the interests upon Allen's death will change. The Statute of Uses will not execute this use because Terry has active duties to perform. The rents and profits upon Allen's death came to Terry and Terry has the duty of applying them to the use of Allen's children. Terry here will have powers, actions to take, duties to perform, and because of this, the use is outside the Statute of Uses. The active trust is an exception to the Statute of Uses – it is the modern trust. When Allen dies, Terry will have the legal interest, wherein the equitable interest will lie with Allen's children.

2. Sam, the owner of Blackacre, conveyed Blackacre "to Tammy to hold in trust for the benefit of those persons whose identity I have communicated to Tammy." The conveyance was made by Sam in reliance on Tammy's oral promise to hold Blackacre in trust for Alice. Tammy originally intended to perform the promise, but changed her mind after the conveyance to her.

BEST ANSWER

This is an *inter vivos* trust. It is a transfer of trust to Tammy of an unknown beneficiary. Since it is a transfer of land, it must satisfy the Statute of Frauds. Orally expressing a beneficiary to Tammy does not satisfy the Statute of Frauds. Therefore, it is necessary to see if we can circumvent it. This is an express trust without a beneficiary. To see if it is a resulting trust we must determine if the express trust fails in whole or part – yes, it does. Even though the conveyance was made by Sam to Tammy because of reliance of Tammy's promise, no constructive trust arises for Alice. For an *inter vivos* constructive trust to be imposed, there must be something more than mere promise and reliance. There must be evidence of fraud, a confidential relationship, a tortious act, or an involuntary sale. Fraud does not apply here since when Tammy accepted the trust, she originally, in good faith, intended to hold the property for Alice. Therefore, the property will not go to Alice on a constructive trust. However, since the document sold in trust, Tammy knew this was not an absolute conveyance to her and she was holding the property in trust for someone. So it is a resulting trust (since the express trust fails for lack of beneficiary) and goes back to Sam's estate.

3. In 1994, Smith executed an instrument in which he declared himself trustee of \$500,000 "for the benefit of myself for my life, then to Tyson in trust to pay the income to Albert for life, then to distribute the principal to Albert's children." Smith also reserved the power to modify, amend, and revoke the trust, leaving his wife Wilma and a net probate estate valued at \$100,000. Smith never had any children. Wilma wants some or all of the corpus of the trust.

BEST ANSWER

This is a valid *inter vivos* trust. A trust is valid as an *inter vivos* transfer so long as a beneficial interest is created in a person other than the settlor. The mere fact that the Settlor reserves the right to modify, amend, and revoke the trust and that the beneficial interest in the trust will not go to anyone other than the settlor until his death does not make the trust an invalid *inter vivos* transfer.*

Valid *inter vivos* trusts are sufficient to protect the trust corpus from a surviving spouse's right to elect against a will. The spouse only has access to the probate estate and all assets in the trust are protected from the spousal election against the will. Here, Wilma can only elect to take against to the extent of the probate estate of \$100,000.00.

*Here Smith has done just this. He has reserved broad powers and he is the beneficiary of the trust for his life. However, he has created an interest in the trust in one other than himself (Albert) and, thus, created a valid *inter vivos* trust.

4. Susan, a widow, was survived by two adult children, Theresa (age 65) and Arthur (Age 63). Theresa had a family and was regarded by all who knew her as a responsible pillar of the community. Arthur was a neer-do-well who never held a significant job and went through his life on his charm and Susan's money. Susan died, and in her will, divided her estate into two equal shares. One share was given to Theresa absolutely. The other share was given "to Theresa in trust to pay the income to Arthur for life; principal after Arthur's death to go to Teresa or her heirs absolutely." The will also provided that "if, in the judgment of Theresa, Arthur shall require any part of the principal for his comfort and support, I direct Theresa to pass the same over to him at such time and in such amounts as in her judgment is proper." Arthur filed suite to remove Theresa as trustee.

BEST ANSWER

This fact pattern is analogous to *In Re Loree*. In that case, the court held that the trustee should be removed due to the discretion to pay principle to the trust beneficiary and the conflict of interest that arises from such discretion. (The trustee in that case, as here, was to receive the principle of the trust at the death of the beneficiary.) *In Re Loree*, however, is a minority decision. Most courts will not remove a trustee for acts that may occur but have not yet occurred. Obviously, the settlor knew of the potential conflict and set up the trust even in light of possible misconduct by the trustee. Normally, a court will only remove the trustee if he acts in bad faith or abuses his discretion. Here, Theresa will not be removed unless at some time in the future, Arthur can prove to the court that such bad faith or abuse has in fact occurred. Also, courts are reluctant to remove trustees that the settlor has appointed specifically, rather than successor trustees that the court appoints.