

Who Gets Voted Off The Island When Survivorship Is Ambiguous?

BRADFORD J. DEMEO*

In July of 2004 the Law Review Board at Empire College of Law published a case note covering an important California case that garnered little fanfare. *Burkett v. Capovilla*¹ on its face does not appear to be landmark material. However, a close look at the circumstances and dicta of the case provides significant insight into interpretation of revocable living trusts as will substitutes. For the practitioner the case provides rescue for a long standing problem: Is the revocable living trust a *will substitute* such that we use the doctrines of interpretation and construction applicable to Wills? Or, is it a *contract* requiring the use of contract doctrines for interpretation and construction of inter vivos documents?

Nature Of The Problem

In *Burkett*, the deceased settlor drafted a trust providing that the assets of the trust were to be distributed to her two children upon her death. The daughter predeceased the settlor and was survived by three children. The trust instrument required that beneficiaries survive for sixty days before they were entitled to receive a share of the trust estate. The trust instrument was ambiguous as to whether the beneficiaries had to survive for sixty days after execution of the instrument or sixty days after the settlor's death. Paragraph 5.02 of the trust instrument stated:

“Survivorship Requirements: For all gifts under this instrument, the beneficiary must survive for sixty (60) days before entitlement to such gifts.”²

The trial court ruled that the beneficiaries had to survive sixty days after execution of the instrument. The Court of Appeal reversed.³

* Bradford J. DeMeo is a practicing attorney in Sonoma County, California, and professor of law at Empire College School of Law.

1. *Burkett v. Capovilla* 112 Cal. App. 4th 1444 (Ca. 2003). (Hereinafter referred to as *Burkett*)

2. The trust, with its ambiguities, was drafted by a paralegal service using form documents. *Burkett*, supra, at 1447-1448.

3. *Burkett*, supra at 1447.

The California Court of Appeal, Second District, Division Six, led by Justice Yegan, reviewed de novo the issue of whether the survivorship requirement meant that a beneficiary of a revocable living trust was required to survive the *execution* of the inter vivos trust document, or survive the *death* of the Settlor. This seems to be a simple inquiry, and in the narrow context of a will, which does not take effect until the death, “survive” means survive the death of the Testator. The problem in the trust context is much more complicated.

As the Empire Law Students pointed out in their case note, traditionally, the courts have applied *contract law* to the interpretation and construction of trusts. The rules applied to interpretation of wills were, before *Burkett*, narrowly applied to wills only. Some probate courts saw the subtlety of the problem and began applying will interpretation rules to revocable trusts. This was grounded in the theory that revocable trusts are generally will substitutes and it follows that the primary purpose of the revocable trust is testamentary in nature. The popular goal in executing revocable living trusts is to avoid probate administration. The local probate courts understood that as a practical matter the revocable inter vivos or “living” trust for its primary purpose becomes effective on death. Prior to *Burkett* there was no legal precedent on the books to guide the practitioner lost on the island of interpretation and construction of revocable living trusts. Thus, drafting a survivorship provision has been similar to negotiating an obstacle course.

The rationale behind using contract law in the interpretation of trusts is that the basis for the trust is a contract between the settlor and trustee for the management and administration of assets for the benefit of a third party. A third party contract arrangement was recognized.⁴ This was a carry-over of the English Statute of Uses in which land barons turned over legal ownership of their lands to a person for management and control to avoid exorbitant taxes payable to the Monarchy. A trust arrangement was entered into in which the benefits of the land were given to the land baron by contract. Naturally, contract enforcement was paramount and the rules of contract interpretation and construction were traditionally applied. This makes sense in the context of contractual arrangements. However, the typical modern revocable trust is a self-created, self-managed tool which can be modified or revoked at will by the settlor anytime before her death. In most estate planning scenarios the primary purpose of the revocable trust is the transfer of assets upon the settlor’s death, i.e., testamentary in nature. Indeed, courts of other states and respected legal scholars recognize this

4. Professor Langbein argues that “. . . the deal between trustee and settlor “. . . is functionally indistinguishable from the modern third party beneficiary contract.” John J. Langbein, *The Contractarian Basis of the Law of Trusts* 105 Yale L.J. 625, 627 1995. Likewise supported by Professors Hausmann and Mattei, Henry Hausmann and Ugo Mattei *The Functions of Trust Law: A Comparative Legal and Economic Analysis* 73 N.Y.U L. Rev. 434 1998.

function of the revocable trust.⁵ This is similar to a will in many respects. Therefore, it makes sense to apply the rules of interpretation that look forward to the date of death, rather than back to the date of execution.

In some respects the testator's intent and mindset on the date of execution of a will are very important to the interpretation of will language.⁶ However, when the ambiguity creates a temporal issue, i.e., the testator's meaning of survivorship, the rules were inconsistent and inconsistently applied. In the trust context contract rules were applied and "survive" meant survive the execution of the document. This was important because a beneficiary who survived execution attained a vested gift and if she predeceased the settlor her issue or estate beneficiaries would take her share of the trust. If the beneficiary was required to survive the settlor's death, the gift would not vest if she predeceased the settlor. The gift would lapse and fall into the residue of the trust estate to be redistributed to others. This was the problem in *Burkett*. The result was tribal warfare in the Probate Court.

The *Burkett* Solution

The California Court of Appeal in *Burkett* used a common sense approach in its decision to interpret the survivorship requirement to mean survive the settlor's death. It referred to the common definition of survive from Webster's dictionary, as well. The Court concluded that in the context of the revocable inter vivos trust "the terms "survive" or "survivorship" connote living past the date of another's death."⁷ Implicit in the Court's rationale is the idea that the revocable inter vivos trust is a will substitute with its primary purpose testamentary in nature. This opens the door to a much more sensible approach to the interpretation and construction of the words used in will substitutes, such as revocable inter vivos trusts. Most average citizens who have executed revocable trusts would follow this logic, and expect the same result as in *Burkett*. As always we strive to achieve the settlor's intent. The average settlor cannot

5. In *Wasserman v. Cohen*, 414 Mass. 172, the Supreme Judicial Court of Massachusetts said: "We have held that a trust, particularly when executed as part of a comprehensive estate plan, should be construed according to the same rules traditionally applied to wills. In *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985), we reasoned that "[t]reating the components of the decedent's estate plan separately, and not as parts of an interrelated whole, brings about inconsistent results." We also quoted one commentator who wrote, "The subsidiary rules [of wills] are the product of centuries of legal experience in attempting to discern transferors' wishes and suppress litigation. These rules should be treated as presumptively correct for will substitutes as well as for wills." *Id.* at 1093, quoting Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1136-1137 (1984)."

7. Incorporation by reference of a separate document, mistake of fact, and mistake in the inducement are doctrines of interpretation that require inquiry into the testator's intent at the time of execution of the will.

8. *Burkett*, supra at 1450

be expected to know the history of the Statute of Uses and to understand the subtleties of legal draftsmanship and semantics. It has been this writer's experience that non-lawyers believe a "trust" to be a "will" that does not go through probate, and the "executor" is the person in charge of the trust when they die.

A case like *Burkett* gives practitioners legal precedent for using the subsidiary laws of wills for interpretation in the context of a revocable living trust, or similar will substitutes. But, there is no replacement for accuracy. Any one word can change the meaning of a clause, provision or an entire document. This can result in a person receiving a substantial inheritance which the settlor never intended. When needed, *Burkett* is a guidepost to solving ambiguities most likely consistent with the average settlor's intent.

However, *Burkett* will not logically support the same approach to interpretation in the context of irrevocable trusts. Very few irrevocable trusts are drafted with active administration beginning at the death of the settlor. Contrary to the revocable living trust, an irrevocable trust generally has some current purpose other than will substitute. A clear example is an irrevocable trust for the benefit of a person with special needs. Typically, a settlor will transfer assets to a trustee with conditions and limitations on how the assets are to be utilized for the benefit of a disabled person. Income and principal may be used for the beneficiaries "special needs" without impacting his qualification for public benefits. Another example is the irrevocable life insurance trust set up to remove life insurance from the taxable estate of a settlor. It can be used as a tax reduction tool. Thus, the arrangement between settlor and trustee is something akin to the arrangement born out of the English Statute of Uses, or a third-party beneficiary contract.

Drafting wills and trusts is difficult work. The practitioner must be a wordsmith. Reliance on old forms, canned forms, or simple language is a straight path to ambiguity. The best way to avoid interpretation and construction issues is to carefully choose the appropriate words to express the client's intent, and to use as much context as possible. Otherwise, the intended beneficiary may find herself voted out at the tribal council. The drafter may not be granted immunity, and may be subject to malpractice claims. In *Burkett* the daughter's heirs did not win the ultimate prize. They were voted out.