

Washington Law Review

Volume 47 | Number 4

8-1-1972

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Recommended Citation

anon, Recent Developments, *Inter Vivos Trusts—The Washington Testamentary Anti-Lapse Statute Applied to an Inter Vivos Trust. In re Estate of Button*, 79 Wn.2d 849, 490 P.2d 731 (1971), 47 Wash. L. Rev. 743 (1972).

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INTER VIVOS TRUSTS—THE WASHINGTON TESTAMENTARY ANTI-LAPSE STATUTE APPLIED TO AN INTER VIVOS TRUST. *In re Estate of Button*, 79 Wn.2d 849, 490 P.2d 731 (1971).

Robert H. Button died in 1966, leaving two inter vivos trusts. A revocable trust executed in 1940 gave to Button a life estate with the remainder to his mother, Audrey A. Burg. There was no provision in the trust for disposition of the corpus in the event that Button's mother predeceased him. A second trust instrument, executed in 1964, was sent to Button's attorney with somewhat ambiguous instructions with regard to the revocation of the 1940 trust. To resolve the confusion created when Mrs. Burg predeceased Button by thirteen days, the trustee brought an action to determine its obligation under the two trusts. The Washington Supreme Court first found that the 1940 trust had not been revoked or modified by the 1964 trust. The court then held that R.C.W. 11.12.110,¹ the Washington anti-lapse statute, should be applied to prevent the lapse of a gift under an inter vivos trust. *In re Estate of Button*, 79 Wn.2d 849, 490 P.2d 731 (1971).

The supreme court was clearly correct in holding that the 1940 trust was unaffected by the 1964 instrument.² The main problem

1. WASH. REV. CODE § 11.12.110 (1967) provides:

When any estate shall be devised or bequeathed to any child, grandchild, or other relative of the testator, and such devisee or legatee shall die before the testator, having lineal descendants who survive the testator, such descendants shall take the estate, real and personal, as such devisee or legatee would have done in the case he had survived the testator

2. The supreme court, contrary to the holding by the court of appeals, found that the 1940 trust was still in effect. The court recognized that a trustor has the power to revoke a trust if he has reserved such a power under the terms of the trust, but the court stated that a trust can be altered only by the method of revocation or modification specified in the trust instrument. The 1940 Button trust required that an instrument of modification be signed by the trustor and delivered to the trustee. Button signed an instrument of revocation in 1964 and delivered to his attorney; however, he at no time gave his attorney specific instructions to deliver the instrument to the trustee bank. Button advised his attorney to "hang onto" the 1964 trust documents until "further word from him." That further word was not forthcoming.

Other factors indicated that Button did not intend to revoke the 1940 trust. He participated in the mortgaging of the trust property in the latter part of 1964 and signed an order directing the bank to execute the mortgage under the 1940 trust. *In re Estate of Button*, 79 Wn.2d 849, 851-53, 490 P.2d 731, 732-33 (1971). In addition, Button was in contact with the trustee several times after his execution of the 1964 instrument of revocation. It appears that at no time did he mention the revocation or the new trust. Brief for Appellant at 5, *In re Estate of Button*, 79 Wn.2d 849, 490 P.2d 731 (1971). The ambiguous acts of Button in 1964, coupled with his failure to resolve the matter when he

faced by the court, however, was the determination of Audrey Burg's interest under the 1940 trust. The court said that the gift under the 1940 trust was "in practical effect a legacy" and was saved by the policy of the Washington anti-lapse statute. In reaching its conclusion the court stated: "It was the rule at common law that a gift in trust lapsed upon the death of the beneficiary prior to the death of the trustor."³ This rule, assumed to be applicable in the *Button* fact pattern, was declared altered by the anti-lapse statute which saves any estate devised or bequeathed to any relative of the testator if the relative has lineal descendants who survive the testator. These descendants take the estate that the testator's relative would have taken if he survived the testator. Similar anti-lapse statutes, the court stressed, have been applied to prevent lapse of gifts under testamentary trusts. The court then concluded that a "gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an inter vivos instrument or in a will."⁴ Declaring that the anti-lapse statute is a statement of legislative policy against the lapsing of gifts to relatives, the court applied that policy to prevent Mrs. Burg's gift from reverting to the trustor's estate.⁵

With regard to the possibility that Mrs. Burg held a vested interest in the trust remainder the court stated:⁶

Whether or not the interest of Audrey A. Burg had vested prior to the death of the trustor, it was subject to be divested if she died before the trustor died, under the rule as existed prior to the enactment of R.C.W. 11.12.110. That statute alone, interpreted to apply to trusts as well as to wills, saves her interest for her heirs.

The court's statements effectively dissolve the previously clear distinction between testamentary and inter vivos gifts. There was no reason

had several opportunities to do so, made it easy for the court to conclude that the 1940 trust had not been revoked.

The strict rule of revocation requires a trustor to conform to the formalistic requirements of the trust instrument in order to effect revocation. *See: Phelps v. State Street Trust Co.*, 330 Mass. 511, 115 N.E.2d 382 (1953) (trustor held to requirement that modifying instrument be acknowledged); *Parish v. Parish*, 29 Ill. 2d 141, 193 N.E.2d 761 (1963) (where trustor reserves the power to modify the trust in writing, his attempted oral modification was of no force or effect); RESTATEMENT (SECOND) OF TRUSTS § 331, § 330, comment *j* at 139 (1959).

3. *In re Estate of Button*, 79 Wn.2d 849, 853, 490 P.2d 731, 734 (1971).

4. *Id.* at 854, 490 P.2d at 734.

5. *Id.* at 855, 490 P.2d at 734.

6. *Id.* at 855, 490 P.2d at 735.

to do so, since the court could have reached the same result by treating Mrs. Burg's interest as a vested remainder instead of applying the anti-lapse statute. The purpose of this note is to show how a vested remainder analysis could have been used in *Button*, to demonstrate the error in the court's reasoning which caused it to apply the anti-lapse statute, and to compare the difference in result as between these two analyses in other trust situations.

It is a settled rule that courts will exercise a presumption in favor of construing a future interest as vested rather than contingent.⁷ A beneficiary who, as Audrey Burg, holds a remainder in a trust which is subject to revocation or modification by the trustor, holds a vested remainder subject to defeasance.⁸ At the creation of the trust, the remainderman gains an interest which would put him into possession if the trustor died and the interests remain as created. The remainderman can only lose his interest by the occurrence of a condition subsequent; thus he holds a vested rather than contingent remainder.⁹ The interest vests on creation of the trust.¹⁰ The reserved power to revoke, modify or invade the principal, which may be exercised so as to cut off the remainderman, merely makes the vested remainder subject to defeasance.¹¹ A vested remainder subject to defeasance can pass to

7. The Washington Supreme Court has stated this rule on several occasions and it is clearly a part of the law of this state. In *Shufeldt v. Shufeldt*, 130 Wash. 253, 227 P. 6 (1924), the court discussed the doctrines dealing with early vesting and the preferred status of a vested rather than contingent construction where it is consistent with the intention of the testator. The court applied these principles and other rules of construction and concluded that although a remainderman died before the termination of a prior life estate, his interest had vested and passed to his heirs who took it at the conclusion of the prior life estate. See also *Horton v. Board of Education*, 32 Wn.2d 99, 201 P.2d 163 (1948); L. SIMES AND A. SMITH, *THE LAW OF FUTURE INTERESTS* § 573 (2d ed. 1956) [hereinafter cited as *SIMES AND SMITH*].

8. *First National Bank of Cincinnati v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15 (1956). See notes 13 and 14, and accompanying text, *infra*.

9. *In re Gochmour's Estate*, 192 Wash. 92, 72 P.2d 1027 (1937). *SIMES AND SMITH*, *supra* note 7, at § 138.

10. See note 7, *supra*.

11. The first clear exposition of this rule was in *Lambert v. Thwaites*, L.R. 2 Eq. Cas. 151 (1866) (although one of the residuary beneficiaries failed to survive the termination of the preceding estate, the court held that the property was vested in all the residuary beneficiaries subject to be divested by the execution of a power of appointment; as the power was not exercised, the representatives of the predeceased residuary beneficiary were entitled to his share of the proceeds; the power of appointment was held not to make the residuary interest contingent). See *In re Gochmour's Estate*, 192 Wash. 92, 72 P.2d 1027 (1937) (where a testamentary trust created a life estate in the husband with an absolute power of disposal and remainder to sisters and nieces, the nieces held a vested remainder); *Seattle First National Bank v. Crosby*, 42 Wn.2d 234, 254 P.2d 732 (1953) (estate of trust beneficiary which was to become possessory at age 35 was termed

others by will or through intestacy on the death of the remainderman.¹²

In *First National Bank of Cincinnati v. Tenney*,¹³ a case nearly identical to *Button*, the Ohio Supreme Court held that upon the creation of a revocable inter vivos trust the remainderman acquired a vested interest subject to defeasance. When the remainderman predeceased the trustor, her interest passed under her will and the remainderman's legatee took subject to the same possibility of defeasance.¹⁴ In future interest relationships similar to those found in *Button*, the Washington court has held that the remainderman's interest was vested.¹⁵ In *re Ivy's Estate*¹⁶ involved a trust in which the trustor-life tenant retained the power to invade the principal and, with the approval of the trustee, to amend or revoke the trust. The court held that the interests of the remaindermen were vested for inheritance tax purposes, although these interests were later defeased by action of the surviving life tenant.

Under the facts in *Button*, a vested remainder analysis would show that Audrey Burg held a vested remainder subject to defeasance. When she predeceased the trustor, the vested interest would pass by intestacy to her descendants, becoming possessory on the trustor's death. In applying anti-lapse statute policy to a vested future interest

a vested remainder subject to complete defeasance if beneficiary dies before reaching the age of 35); *Edwards v. Edwards*, 1 Wn. App. 67, 459 P.2d 422 (1969) (where A devises her estate to B for life, with the power to consume and at B's death the remainder to C in trust for D, the court held that the testatrix created a life estate and a vested remainder in D). *Randall v. Bank of America*, 148 Cal. App.2d 249, 119 P.2d 754 (1941) (the words "shall vest" in beneficiary at death of trustor of revocable inter vivos trust were held not inconsistent with a present transfer of a vested interest to the remainderman beneficiary).

SIMES AND SMITH, *supra* note 7, § 113, at 96-98 n.58 provides the following example: if land be conveyed to T, trustee, for the benefit of A for life, and then for the benefit of B and his heirs, provided that T may expend all of the corpus of the estate for the benefit of A, the remainder of B is vested subject to complete defeasance.

See RESTATEMENT OF PROPERTY § 157, comment *p* at 554 (1936); Annot., 61 A.L.R.2d 477 (1958).

12. "If the estate devised . . . filled the description of a vested remainder it was assignable, descendable, and devisable." *Shufeldt v. Shufeldt*, 130 Wash. 253, 269, 227 P. 6, 11 (1924). SIMES AND SMITH, *supra* note 7, §§ 1883, 1902; RESTATEMENT OF PROPERTY § 165, at 616 (1936).

13. 165 Ohio St. 513, 138 N.E.2d 15 (1956).

14. The court relied upon the Restatement of Property and the presumption favoring early vesting to reach the conclusion that the interests were vested. The power of revocation in the trustor was deemed a defeasing condition subsequent and hence merely made the remainder vested subject to defeasance rather than contingent.

15. See note 11, *supra*.

16. 4 Wn.2d 1, 101 P.2d 1074 (1940).

case, the court embarked on a line of thinking which will leave several areas of the law of trusts unsettled.

Prior to *Button*, an anti-lapse statute had rarely, if ever, been considered a statement of public policy by the legislature. The language of the Washington anti-lapse statute had been strictly confined to testamentary gifts. Illustrative of this is *In re Roberts' Estate*,¹⁷ where the supreme court said that the predecessor¹⁸ of the present statute applied only to estates devised by will. Most of the *Button* court's supporting authority deals specifically with testamentary transfers and is inapplicable to inter vivos gifts. The court was simply incorrect when it stated that Mrs. Burg's vested remainder would lapse because she predeceased the trustor.¹⁹ The authority cited by the court for this proposition involved testamentary trusts, not inter vivos trusts.²⁰ The critical difference is that under a testamentary trust no future interest is presently created, while under an inter vivos trust a vested future interest may be, and in this case, was created.²¹ The court tried to restate their lapse thinking in terms of vesting when they stated that Mrs. Burg's gift, vested or not, was subject to be divested if she predeceased the trustor. This would have been true had there been a testamentary trust,²² but not an inter vivos trust in which Mrs. Burg held a vested remainder subject only to the trustor's power to revoke. Her vested remainder could pass by intestacy through the statute of descent and distribution to her heirs if the trustor's power was unexercised.²³

17. 84 Wash. 163, 146 P. 398 (1915).

18. REM. & BAL. CODE § 1328 (1910) read as follows:

When any estate shall be devised to any child, grandchild, or other relative of the testator, having lineal descendants, and such devisee shall die before the testator, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator.

This statute is practically identical to the anti-lapse statute now in effect.

19. See notes 8-16 and accompanying text, *supra*.

20. *In re Estate of Button*, 79 Wn.2d 849, 853-54, 490 P.2d 731, 734 (1971), citing: 2 A. SCOTT, THE LAW OF TRUSTS § 112.3, at 882 n.3 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 112, comment f, at 259 (1959) and Annot., 118 A.L.R. 559 (1939). This authority applies to situations in which the beneficiary predeceases the creation of the trust or where the trust is testamentary. It is inapplicable to an inter vivos trust such as *Button's*.

21. Prior to the death of a testator, the prospective beneficiary of a testamentary trust has nothing but a bare expectancy. SIMES AND SMITH, *supra* note 7, § 391. This expectancy is not generally considered to be a future interest. *Id.* §§ 393, 402-03. See note 25, *infra.*, for authority which discusses the inability of a holder of an expectancy to gratuitously transfer same. A vested future interest can be willed. See note 12, *supra*.

22. *Id.*, assuming the non-existence of an anti-lapse statute.

23. See note 12, *supra*.

A vested remainder approach would have avoided several major problems created by the *Button* decision. By applying the court's reasoning in other contexts the inconsistency of the results under a vested interest as opposed to an anti-lapse analysis can be clearly seen. First, suppose Audrey Burg had bequeathed her vested interest in the 1940 trust to a stranger or someone who was not her descendant.²⁴ Under the vested remainder doctrines, this trust interest can be devised to the non-descendant. Using only the *Button* court's analysis, however, the remainderman's desire would not be achieved. The anti-lapse statute would cause the property to go instead to the remainderman's descendants or, if the remainderman died without descendants, the interest would revert to the trustor. The reason for the contrary results is that the anti-lapse statute operates independently of the beneficiary's intention; it does not contemplate any attempt by a beneficiary to devise or bequeath property which might be willed to him. Until a testator's death, a beneficiary under a will has only an expectancy which cannot be gratuitously transferred.²⁵ However, a vested interest, such as that held by Mrs. Burg, is more than a mere expectancy and can be willed.

A second inconsistency arises where a trustor creates, by inter vivos trust, a beneficial interest in a non-relative: the vested remainder analysis preserves the gift while application of the anti-lapse statute does not. Under future interest law the gift would be considered vested on the creation of the trust and transferable by will or intestacy when the remainderman predeceased the trustor. But the anti-lapse statute saves only gifts made to relatives; hence the gift would revert. Moreover, in a situation where a non-relative beneficiary made a will devising his vested interest to a non-descendant, the internal limitations of the statute would raise two barriers to the intended transfer of the interest.

A third situation in which the court's line of reasoning leads to results contrary to present law is that involving a Totten or tentative

24. Audrey Burg may have been unaware that she held a vested interest which might be specifically devised. However, if she had left a will, it would certainly have contained a residuary clause which could have effectively devised the trust interest.

25. *In re Ellenbrough*, [1903] 1 Ch. 697, (Gratuitous transfer of property that transferor might have become entitled to upon the death of a sibling held to have no effect). See SIMES AND SMITH, *supra* note 7, at § 395; T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 131 (2d ed. 1953); Annot., 121 A.L.R. 450 (1939). See also I A. SCOTT, *THE LAW OF TRUSTS* § 86.1, at 718 (3d ed. 1967); *RESTATEMENT (SECOND) OF TRUSTS* § 86, comment *a* (1959). The discussions relating to the existence of a valid trust *res* hold true for any type of gratuitous transfer of the expectancy.

trust. Totten trusts, permitted in Washington by statute,²⁶ are revocable inter vivos trusts in which the beneficiary takes upon the death of the trustor. Under the *Button* reasoning, a remainder interest in a Totten trust could be treated as a legacy. If so, when the beneficiary of a Totten trust died before the settlor, the gift could be saved by a court through the public policy expressed in the anti-lapse statute. Such a result would be clearly contrary to present law, as it has been held that when a beneficiary predeceases the trustor the fund reverts back to the trustor.²⁷ The remainder beneficiary's interest under a Totten trust is considered contingent rather than vested.²⁸ *Button* seems to put the Totten trust rule in question, not because of its inconsistency with future interest law, but because it is adverse to public policy.

The Washington Supreme Court in *Button* initiated a needless public policy snipe hunt by construing the testamentary anti-lapse statute as evincing a legislative policy against letting some inter vivos gifts lapse. The same result should have been reached by applying future interest law. While the law of vested remainders is more complex, it is doctrinally firm and allows donors to plan their estates with the confidence that there will be no judicially created changes in the law. The *Button* decision introduces unnecessary confusion into estate planning.

26. WASH. REV. CODE § 30.20.035 (1961) provides:

When a deposit has been or shall hereafter be made in any national bank . . . by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust have been given in writing to such corporation, in the event of the death of the trustee, the deposit or any part thereof together with the interest or the dividends thereon may be paid to the person for whom the deposit was made.

See *In re Madsen's Estate*, 48 Wn.2d 675, 296 P.2d 518 (1956), noted in 32 WASH. L. REV. 141 (1957).

27. 1 A. SCOTT, THE LAW OF TRUSTS § 58.4, at 535-37 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 58, comment c (1959).

28. *United States v. Williams*, 160 F. Supp. 761 (D.N.J. 1958) (beneficiary merely had a contingent remainder which dissolved on his death; the tentative trust terminated on the beneficiary's death and the corpus was held by the bank for the trustor).