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In re Frei Irrevocable Trust, 133 Nev. Adv. Op. 8 (Mar. 2, 2017)

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TRUST LAW: MODIFICATIONS TO IRREVOCABLE SPENDTHRIFT TRUSTS

Summary

The Nevada Supreme Court adopted the Restatement (Second) of Trusts § 338 (Am. Law Inst. 1959). It held trusts are modifiable by a settlor and beneficiary as long as any non-consenting beneficiaries' interests are not prejudiced.

Background

Emil Frei, III, and his wife, Adoria, created a spendthrift trust (1996 Trust) that named their ten children as equal beneficiaries. Their son Stephen Brock modified the trust (2009 modification) to allow any beneficiary the right to compel distribution of his or her share of the trust, and made Premier Trust Inc. a co-trustee.

Stephen's father and siblings sued Stephen for mismanagement of an alternate family trust. Stephen agreed to pay \$415,000 through monthly payments to the alternate family trust (2010 Settlement). As security for his payment obligation, Stephen pledged his interest from the 1996 spendthrift trust. However, Stephen only made one payment from the 2010 settlement.

When Emil died, his other nine children received their trust shares and demanded that Stephen's share of the 1996 trust pay the money he owed to the alternate family trust. Premier paid \$300,000 to the alternate family trust before Stephen stopped the payments. Stephen filed a petition for repayment of the \$300,000 and remove Premier as a Trustee. The district court denied the petition.

Discussion

The 2009 modification was a valid modification of the 1996 Trust, and the 2010 settlement is valid

Nevada law does not categorically preclude the modification of an irrevocable trust

Irrevocable trusts are modifiable. A trust is irrevocable unless the settlor expressly reserves the right to amend or revoke the trust.² However, in certain circumstances, a trust may be amended or terminated.³

Nevada law does not provide that the death of a settlor precludes modification

The court held Stephen's modification to the 1996 spendthrift trust and the subsequent 2010 settlement stemming from the alternate family trust were valid. As an issue of first impression, the court adopted the following Restatement (Second) of Trusts § 338 (Am. Law Inst. 1959), including comments d and h, regarding trust modification. If the settlor and all beneficiaries consent, a trust may be modified.⁴ Further, a trust may be modified without all the

¹ By Angela Lee.

² NEV. REV. STAT. § 163.004(2)

³ See, e.g., *Ambrose v. First Nat'l Bank of Nev.*, 87 Nev. 114, 119, 482 P.2d 828, 831 (1971).

⁴ RESTATEMENT (SECOND) OF TRUSTS § 338(1) (AM. LAW INST. 1959).

beneficiaries consent if the nonconsenting beneficiaries' interests are not prejudiced.⁵ A spendthrift clause does not prevent modification.⁶ Moreover, a spendthrift clause can be removed with the consent from the beneficiary and settlor.⁷ Emil and Stephen consented to the 2009 modification and 2010 settlement without prejudicing the other children as beneficiaries.

The spendthrift clause became invalid upon modification in 2009

The court held that a spendthrift clause becomes invalid once the beneficiary is entitled to compel distribution of his or her share of the trust. Thus, the spendthrift clause became invalid when Stephen agreed to use his share of the 1996 spendthrift trust to make payments in the 2010 settlement.

The district court properly determined that Stephen was estopped from arguing that he lacked the power to modify the trust in this case

Estoppel is proper where a party presents inconsistent positions as an attempt to obtain an unfair advantage.⁸ Five factors are necessary to satisfy estoppel: 1) party took two positions, 2) the positions are inconsistent 3) judicial proceedings, 4) party's first position was successfully asserted, 5) the first position was taken as a mistake. The first four elements are not at issue. The court further decided the fifth element is also satisfied because Stephen modified the trust using sound judgement and legal advice. Thus, Stephen was properly estopped from arguing that he should not have been able to modify the trust in the first place.

The district court properly determined that Premier did not breach its fiduciary duty

In spendthrift trusts, the trustee must not make payments on behalf of the beneficiary without court direction. Further, if the beneficiary sues the trustee for breaching fiduciary duties, the beneficiary must show the trustee acted in bad faith. Since the spendthrift provisions became invalid when Stephen modified the trust, there was no valid spendthrift clause when Premier paid the \$300,000. Premier made the payments under the direction of the court signed 2010 settlement. Further, premier did act in bad faith. Thus, Premier did not breach its fiduciary duties.

Conclusion

Therefore, the 2009 modification and the 2010 settlement were valid. Additionally, Stephen was properly estopped from presenting two opposing arguments. Further, Premier did not breach its fiduciary duty. The district court is affirmed.

⁵ *Id.* § 338(2).

⁶ *Id.* § 338 cmts. d, h.

⁷ *Id.* § 338 cmt. h.

⁸ *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 469 (2007).