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Adoption - Consent of Natural Parents - Divorced Parent Deprived of Child's Custody but with Visitation Privileges

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CASE NOTES

ADOPTION — CONSENT OF NATURAL PARENTS — DIVORCED PARENT DEPRIVED OF CHILD'S CUSTODY BUT WITH VISITATION PRIVILEGES. W and H2 petitioned for the adoption of the minor child of W and H without obtaining the consent of H, W's divorced husband. The prior divorce decree had, in conformity with an oral agreement of H and W, awarded the custody of the child to W with visitation rights reserved to H. No alimony or support was awarded to W. The trial court denied the petition. On appeal it was held, that the judgment be reversed. The permission of H for the adoption was not necessary under the code provision which provided that ". . . the consent of both parents shall be given to such adoption unless . . . the parents are not married to each other. . . . If not married to each other, the parent having the care and providing for the wants of the child may give consent." Iowa Code, Sec. 600.3 (1946). Justice Mulroney and Chief Justice Wennerstrum dissented. *In re Chinn's Adoption*, 25 N. W. 2d 735 (Iowa, 1947).

The importance of the instant holding is especially noticed when the Iowa statute which was construed in this decision, is compared with the North Dakota Code provision: ". . . But the consent of a parent . . . who has lost custody through divorce proceedings . . . may be dispensed with." N. D. Rev. Code Sec. 14-1104 (1943). Where the divorce decree permanently deprives the parent of the custody of the child, statutes like the one in question are held to render the consent unnecessary, *Re Williams*, 102 Cal. 70, 36 P. 407, 41 Am. St. Rep. 163 (1894), but generally a divorce decree in so far as the custody of the children is concerned, is subject to modification and change. *In re Gustafson's Adoption*, 183 P. 2d. 787 (1947); *Oliver v. Oliver*, 151 Mass. 349, 24 N. E. 51 (1890); *Stone v. Duffy*, 219 Mass. 118, 106 N. E. 595 (1914). It has been held that a divorce decree which awarded the custody of the child to one parent did not terminate the other's parental rights, where the order respecting the custody of the child was temporary in nature and subject to revocation. *Pearce v. Harris*, 134 S. W. 2d 859 (Texas, 1940); *In re Brand's Estate*, 153 La. 195, 95 So. 603 (1922); also see *In re Jackson*, 28 P. 2d 125, 91 A.L.R. 1387 (Nev., 1935). Professor Richard Maxwell states: "Recent cases have recognized that a custody award does not destroy the parental relationship and that the parent who is deprived of the child retains at least the possibility of resuming parental control in the future." Maxwell, *Right of Natural Parents to Notice in Adoption Proceedings*, 24 N. D. Bar Briefs 192 (1948). For cases, see Maxwell supra p. 195, n. 14; also see Sayre, *Awarding Custody of Children*, 9 U. of Chi. L. R. 672 (1942). In *In re Lease*, 99 Wash. 413, 169 P. 816 (1918), the court said, that ". . . to enable one parent having custody and control of a child to effectually consent to its adoption by another, such custody and control must be of such an absolute and unconditional nature that the other parent's right in the child is extinguished . . . ." Where the right to visit the child at any reasonable time was reserved to the father in the divorce decree, the court said: "Upon its face the order in the divorce proceeding did not terminate all of the parental rights of the father. It expressly reserved

and granted to him the right to visit the child at any reasonable time." *Pearce v. Harris, supra;* also see *In re Lease,* 99 Wash. 413, 169 P. 816 (1918); *In re Force,* 113 Wash. 151, 193 P. 698 (1920); Wash. Rem. Supp. Sec. 1699—5 (1943). The power of the court in adoption proceedings to deprive a parent of his child is in derogation of his natural right, *In re Cozza,* 163 Cal. 514, 126 P. 161, Ann. Cas. 1914 A 214 (1912); *Caruso v. Caruso,* 23 N. Y. S. 2d. 239, 175 Misc. 290 (1941); *Re Jackson,* 55 Nev. 174, 28 P. 2d. 125, 91 A. L. R. 1381 (1934), and most courts follow the rule that adoption statutes should be strictly construed and every intendment taken in favor of the natural parent not consenting to adoption. *Smith v. Smith,* 180 P. 2d 853 (Idaho, 1948); *Bresser v. Saarman,* 112 Iowa 720, 84 N. W. 920 (1907); also see *Rodgers on Domestic Relations,* p. 407, n. 2. If the word "custody," in Sec. 14-1104 of the North Dakota Code, means absolute custody, our courts may be able to avoid the problem of the instant case and the proposed statutory revision which seems so necessary in Iowa. See Note, *Consent in Adoption in Iowa,* 33 Iowa L. Rev. 678 (1948). Statutory changes must take account of extreme situations where removing the custody provision from the statute would allow one natural parent to bar all adoption actions instituted by the other natural parent who has been awarded the custody of the child, and yet the statutory revision must not, in all cases, deprive a natural parent of his interest in the child merely because he has lost custody in a prior divorce decree. Possible legislative remedies may either enlarge the discretion of the judge and allow him to examine the individual custody award and thus meet each situation, or a statute might be drafted which expressly enumerates the rights and circumstances which constitute an adequate deprivation of custody, to warrant depriving a parent permanently of a child without his consent. See Wash. Rem. Supp. Sec. 1699—5 (1943).

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EQUITY — REFORMATION OF A DEED — MUTUAL MISTAKE. P and D entered into a contract for purchase and sale of a house and lot through an agent of D. The agent was to sell, "the house and lot it stands on." P was taken on the land and shown the house by D's agent. The evidence showed that the agent did not point out the actual boundaries of the lot. In fact he did not know himself. However along the west side of the house, there was a grass lawn extending about 15 feet west to a group of trees. During the negotiations and in the contract the land was described as lot 7. Shortly after the conveyance was completed P found out that the house actually set partly on lot 7 and extended 6.7 feet west onto lot 8, which was also owned by D. P contends that there was a mutual mistake as to the land described in the deed and that he is entitled to all the land west to the trees. D contends that the intention was to sell lot 7 and because this was put into the contract, no reformation can be had. The court *held* for D. No reformation was allowed because the minds of the parties had not met as to what was to be sold. *W. J. Teutsch v. P. C.*

Hvistendahl, 29 N. W. 2d 389 (S. D. 1947), rehearing 31 N. W. 2d 566 (S. D. 1947).

It is an elementary rule of equity jurisprudence that courts of equity have power to reform written instruments wherein there is a mistake of fact. *Pomeroy's Equity Jurisprudence*, 5th Edition, Sec. 852; *Walsh on Equity*, Sec. 110. In South Dakota and North Dakota that power is statutory. S. D. C. 1939, Sec. 37.0601; N. D. R. C. 1943, Sec. 32-0417.

In order that a court of equity will exercise this power it is essential that there must be, (1) a mutual mistake or mistake and inequitable conduct or fraud, and (2) an agreement actually made to which the instrument can be reformed. *Pomeroy's Equity Jurisprudence*, 5th Edition, Sec. 1376; *McClintock on Eqiuty*, Sec. 92; *Hayes v. Travelers Ins. Co.*, CCA 10th, 93 F. 2d 568, 125 A. L. R. 1053 (1937); *Gibson v. Alford*, 161 Ga. 672, 132 S. E. 442 (1926); S. D. C. 1939, Sec. 37.0601; N. D. R. C. 1943, Sec. 32-0417.

Does the instant case have the essential elements necessary for reformation? The South Dakota Supreme Court, with one dissent, thinks not. The court admits that there was a mutual mistake. They say, however, that there was no agreement to which the contract could be reformed.

The following facts appear from the majority and minority opinions. There is no question that the plaintiff-vendee thought he was buying the land upon which the house stood and the land next to it for a distance of 15 feet to the trees west of the house. There is no doubt that the vendor's agent thought that he was selling the land upon which the house stood and at least 6 or 7 feet west of the house. See 29 N. W. 2d 389, 390. The question then arises what did the vendor intend to sell? It is true that whatever he intended to sell, he described as lot 7. But if he intended to sell more than that, then a mutual mistake of description was made and can be reformed in equity. *Crookston Imp. Co. v. Marshall*, 57 Minn. 333, 59 N. W. 294, 47 Am. St. R. 612 (1894).

In the first communication with his agent, the vendor offered to sell "the house and lot it stands on." Later the vendor wrote that he would "take $3600 for the house and 1½ lots." Later we find that after the contract was completed, the plaintiff took "possession of the house and the surrounding area." Nowhere in these facts, outside of the contract itself, does the vendor say he is selling lot 7. All through the communications he acts as if he is selling the "house and lot it stands on."

In one of the letters to the agent the vendor states, "If the parties are others, with whom I have no contact, I will take $3600 for the house and 1½ lots." What meaning can be gotten from this statement? It means that the vendor has raised his price if the agent is to deal with someone that he has not already dealt with. His first price was $3500. But for what has he raised his price? Certainly he has raised his price for the house and *land* which he already had in mind, and in his letter he admits that possibly the land, which he has always had in mind, (the lot plus 15 feet west to the trees) is a lot and ½, not just a lot.

Two more factors stand out to show that the vendor intended to sell the land upon which the house was situated plus the land to the trees

west of the house. First, as stated in the dissent, (31 N. W. 2d 566, 567) "He (vendor) also knew better than Teutsch (plaintiff) that the area upon which the house stood was identified and its boundaries marked by grade, lawn, trees, and shrubbery as approximately the east half of the tract." Secondly, a photograph of the house and lot shows that the grass west of the house to the trees, had had care. Here then, we have a vendor who is acquainted with the lay of the land, who knew that the house was surrounded by this grassy plot which extended west from the house to the trees, and who did not know the extent of lot 7. Can it not reasonably be said then, that what the vendor had in mind when he was selling this land, was all the land upon which the house stood, and the grassy plot west to the trees? Certainly he did not have in mind the limits of lot 7, because he did not know those limits. If the vendor did have in mind the land west to the trees, that is what the plaintiff thought he was buying, and the contract should have been reformed to show that intent. Furthermore, the plaintiff was allowed to take possession of the house and surrounding area, the area on which the photo shows was grass that had had care.

It seems the dissenting justice is correct when he says, "This evidence established the following facts: That the vendor intended to sell the house including the ground contiguous thereto and which is necessary to the ordinary enjoyment of the house . . . ."

We have then a mutual mistake and an agreement to which the contract can be reformed; an agreement to buy and sell the house and the land upon which it stands and the land west to the trees. As pointed out above these are two essential elements necessary for equity to reform a contract.

The dissenting justice points out that the *Crookston Imp. Co. Case, supra,* and the case of *Chilstrom v. Enwall,* 168 Minn. 293, 210 N. W. 42 (1926) lay down the following rule: "But, when the facts are clear deeds may be reformed not only where the mistake consists in the omission or insertion of language contrary to the intention of the parties, but also in cases where they understood the language used therein but believed the description to correspond with the actual boundaries intended and were mistaken therein." This rule and the case of *McGinnis v. Boyd,* 279 Ill. 283, 116 N. E. 672 (1917) cover our instant case. In the *McGinnis Case,* McGinnis bought a building and the north ½ of a lot from Boyd. The deed described the land as the north ½ of the lot. McGinnis took possession of the north ½ of the lot and building. Later Boyd discovered that the building extended approximately 3 feet onto the south ½ of the lot. Boyd sought ejectment and McGinnis brought suit in equity for reformation. The court held for McGinnis, saying, "We think it is evident from the testimony that what McGinnis desired to purchase from the plaintiff in error, what he thought he was buying and what the plaintiff in error thought he was selling was that part of lot 10 upon which the building stood." It is difficult to see any difference between the situation in which McGinnis found himself and the situation in which the plaintiff here has found himself.

The system of equity jurisprudence came into being because of the harshness of the Common Law. Since the establishment of courts of equity, equity has acted to give relief in cases of hardship caused by mistake, and although it is admitted that there are certain essential elements necessary to invoke the aid of equity, we need not assume a single fact in order to meet those requirements in this case.

The plaintiff here must either seek cancellation of the contract (which he may not be able to obtain, see 31 N. W. 2d 566, 568); or he may move his house onto lot 7 and pay the costs thereof; or he may seek to buy part of lot 8 from the vendor on the vendor's own terms. When we realize that equity acts to prevent injustice, *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775 (1878), one cannot help but feel that the *Crookston Imp. Co. Case*, the *Chilstrom Case* and the *McGinnis Case* are better examples of the administration of equitable principles.

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FREEDOM OF SPEECH — NATIONAL LABOR RELATIONS ACT — INTERPRETATION — APPLICATION — EFFECT, TAFT-HARTLEY ACT. In the spring of 1944 the C. I. O. began an organizing campaign seeking to establish the United Automobile, Aircraft, and Agricultural Implement Workers of America as the sole bargaining agent for the respondent's employees. Prior to this time the respondent company had, for several years, bargained with an "independent" organization of its employees known as Employees Association, Inc., of Clark Bros., Co., hereafter referred to as the Independent. On January 19, 1945, the Board conducted an election at which neither the Independent nor the C. I. O. obtained a majority. Consequently, the Board ordered a run-off election to be held on February 8, 1945. Immediately after the election of January 19, the respondent began conducting an aggressive campaign, by letters and speeches to its employees, showing its hostility to the C. I. O., and urging its employees to defeat the "outside" union at the run-off election. One hour before the run-off election, during working hours, the respondent shut down all operations, compelled its employees to assemble at various points in the plant, and, through its loudspeaker, delivered anti-C. I. O. speeches, at the same time informing the assembled workers that they were free to vote as they pleased without fear of discrimination. The Board found that through the compulsory attendance the employer had, independently of other possible unfair labor practices, interfered with, restrained, and coerced the employees in the exercise of their right to self organization as granted them in the National Labor Relations Act. *Clark Bros. Co., Inc.*, 70 N. L. R. B. 802 (1946). On petition to enforce the order of the Board, it was *held*, that the order was affirmed. The court did not, however, adopt the Board's theory relating to "captive audiences," and strongly indicated that under circumstances where the union was provided an equal opportunity to address the workers there would be nothing upon which to base a finding of unfair labor practice. *N.L.R.B. v. Clark Bros. Co., Inc.*, 163 F. 2d 373 (C. C. A. 2d 1947).

As an abstract proposition, it is now generally agreed that the employer, in the exercise of his right to free speech, may express any opinion he may have so long as the expression of that opinion does not interfere with, restrain, or coerce the employees in the exercise of rights granted to them under the above Act. *N.L.R.B. v. Electric and Power Co.*, 314 U. S. 469 (1941); *Continental Box Co. v. N.L.R.B.*, 113 F. 2d 93 (C. C. A. 5th 1940); *N.L.R.B. v. American Tube Bending Co.*, 184 F. 2d 983, 146 A.L.R. 1017 (C. C. A. 2d 1943), certiorari denied 320 U. S. 768 (1943); *N.L.R.B. v. Ford Motor Co.*, 114 F. 2d 905 (C.C.A. 6th 1940), certiorari denied 312 U. S. 689 (1941); *N. L. R. B. v. Montgomery Ward and Co.*, 157 F. 2d 486 (C. C. A. 8th 1946); *Press Co. v. N.L.R.B.*, 118 F. 2d 937, 73 App. D. C. 103 (1940), certiorari denied, 313 U. S. 594 (1941). However, freedom of speech is not an absolute right exercisable at all times and under all conditions, ". . . it has its seasons . . ." *N. L. R. B. v. Federbush Co.*, 121 F. 2d 954 (C. C. A. 2d 1941). The courts in applying the general rule find it difficult to distinguish between what amounts to the mere expression of opinion privileged under the First Amendment, and what conduct or words have the prohibited effect of interfering with, restraining, or coercing employees. The difficulty experienced by the courts is well illustrated in the instant case where the decision was so limited as to provide suitable precedent only in a case having almost, if not, identical facts. The test is not the motive or effect of the employer, but whether it might reasonably be said that the employer has infringed upon the freedom of the employees in exercising their rights. *N. L. R. B. v. Illinois Tool Works*, 153 F. 2d 811 (C. C. A. 7th 1946). In the case under discussion the Board did not base its holdings against the respondent on any exceptionable remarks made in the address to the employees, but said, in effect, that it was the respondent's conduct in compelling an audience for the speech which constituted an unfair labor practice, inasmuch as the employer controlled the manner in which the employees should spend their time during working hours, and that the employees were not, therefore, free to consent or to refuse to listen as they should be. The court, in refusing to adopt the Board's theory, substituted, instead, the test of whether or not the union had been given an equal opportunity with the employer. This raises the question as to who is the proper beneficiary of the Act. It could not be contended that the employer might interfere with, restrain, or coerce his employees so long as the union was permitted to do likewise, for the intent of the Act is not to grant power to the union, but to protect the employee. *N. L. R. B. v. Schwartz*, 146 F. 2d 773 (C. C. A. 5th 1945). On this basis it seems that the question of the validity of the employer's conduct, in compelling his employees to listen to a speech relating to the formation of a bargaining agent for the employees, should be viewed independently of, and not in relation to, what is permitted or denied to the union in that respect. In *N. L. R. B. v. Montgomery Ward and Co., supra*, the court said that compulsory attendance at a meeting held during working hours, where a speech was given relating to union activities, did not constitute coercion since freedom of speech does not protect the right of privacy, nor does it require that the auditor shall have volunteered to listen. The court

went on to say that freedom of speech is concerned with thought and expression not with the conditions under which the listeners receive the message, that the employer is as free to speak at one time as another, that the occasion on which he speaks is not an element of coercion, and that under the First Amendment the communication of ideas is guaranteed rather than prohibited. The decision relied heavily on three cases: *Martin v. City of Struthers*, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943) (dealing with city ordinance prohibiting the house-to-house distribution of handbills); *Thomas v. Collins*, 328 U. S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (passing upon statute requiring union organizers to register before soliciting members); and *N. L. R. B. v. Ford Motor Co., supra*, (dealing with dissemination of printed material, where the employee could, presumably, dispose of the material without reading it), hardly situations in which the employer has exerted his economic power over his employees to compel an audience for one of his speeches. The statement of the Board on this point is more than a little persuasive: "the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment. Such freedom is meaningless, however, unless the employees are also free to determine whether or not to receive such aid, advice, and information." The words of the Board would appear to have been given added force by the language of the Taft-Hartley Act in which appear the words, "Employees shall have the right to self organization, . . . to engage in concerted activities, . . . and shall also have the right to refrain from any or all such activities . . . ." 29 U. S. C. A. sec. 157; and in *LeBaron, Regional Director v. Kern County Farm Labor Union et al.*, 80 F. Supp. 151 (1948) the court used words readily adaptable to the instant case. There the court said, "These freedoms [speech, press, religion, petition and assembly], it seems to me, include the right of any individual to be free from such speech, or products of the press, or religion, or petitions, or assemblies as he, in the exercise of his intellect and spirit, may choose."

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TRUSTS — SPENDTHRIFT TRUSTS — POWERS — EFFECT OF POWER OF APPOINTMENT VESTED IN BENEFICIARY OF A SPENDTHRIFT TRUST. A, deceased, provided by will that one-half her residuary estate be devised to Michigan Trust Co. and B, in trust, and to pay the net income thereof to B, for his natural life, and at his death the principal of said fund to go and be disposed of as he, B, may, by his last will and testament, appoint, and in default of such appointment, to his issue. B went into bankruptcy and the trustee in bankruptcy sold B's interest as trustee of the trust in question and any right, title or interest which B may have in the trust, to claimant. B renounced his power of appointment, and claimant, upon the death of B, filed a claim to the corpus of one-half of the estate of A, on the ground that B's voluntary bankruptcy was an exercise of his power to appoint and constituted an appointment of the trustee

in bankruptcy, of a fee in the property covered by the power, and so far as his creditors and purchasers are concerned, B was the possessor of a fee absolute at the time of his bankruptcy. The lower court gave judgment for the defendant, and on appeal it was *held* that the judgment be affirmed. B was assumed to be the beneficiary of a spendthrift trust, and it was determined that the claimant acquired no interest in the corpus of the trust fund, as the combination of interests in B did not create a fee simple absolute. *In re Peck's Estate*, 320 Mich. 692, 32 N.W.2d 14 (1948).

In analyzing the decision in the present case, there are two areas of law which must be examined. The case involves the law of trusts and the law of powers, and the result is no doubt determined by the relationship existing between the two.

The trust in question is a spendthrift trust, that is, a trust intended to secure the trust fund against the improvidence of the cestui que trust by protecting it against his creditors and rendering it inalienable by him before payment. *Cregg v. Brown*, 35 N.Y.S. 2d 738, 264 App. Div. 824 (1943). Such trusts have generally been upheld as valid; *In re De Lano's Estate*, 62 Cal. App. 808, 145 P. 2d 672 (1944), not out of any consideration for the beneficiary, but out of consideration for the right of the donor to control his bounty and dispose of his property in any manner in which he sees fit, provided it is not repugnant to law. *In re Morgan's Estate*, 223 Pa. 228, 72 A. 498, 25 L.R.A. (N.S.) 236 (1909); *Greenwich Trust Co. v. Tyson*, 129 Conn. 166, 27 A. 2d 166 (1942). Certain prerequisites are needed for a spendthrift trust. (1) It is essential to the existence of a trust of this character that there be some restraint on, or immunity of, the interest or benefit of the cestui que trust from voluntary or involuntary alienation. *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936). (2) It must comply with the requisites and essentials pertaining to the creation, existence and validity of trusts generally. (3) The beneficiary cannot be endowed with the entire disposition and control of the trust property. *In re Morgan's Estate, supra.* (4) The trust must be an active one in order not to be executed into a legal estate or interest. *Lynch v. Lynch*, 161 S.C. 170, 159 S.E. 26, 80 A.L.R. 997 (1931). It has generally been held that it is not necessary to denominate the beneficiary, a spendthrift. *L'Hommedieu v. L'Hommedieu*, 98 N.J. Eq. 554, 131 A. 302 (1925). N. D. Rev. Code sec. 59-0310 (1943) indicates that a spendthrift trust would be upheld, at least as to the amount necessary for the education and support of the person for whose benefit the trust was created. Any surplus therefrom may then be reached by the creditors of the beneficiary. *Canfield v. Security First Nat'l Bank*, 13 Cal. 2d 1, 87 P. 2d 830 (1939). If a spendthrift trust is otherwise valid, the circumstance that the beneficiary is also a trustee does not affect its validity, where the same person is not both sole beneficiary and sole trustee. *Julian v. Northwestern Trust Co.*, 192 Minn. 136, 255 N.W. 622 (1934).

WALSH in his *Commentaries of the Law of Real Property*, vol. 3, p. 262, defines a power as "a right in any person created by the deed or will of the owner of real property, by virtue of which the donee of the power is authorized to create an estate or interest in the land, or to create a lien upon it, or to convey it for any purpose provided by the donor of the

power." The distinguishing feature of a power is that it operates when it is exercised and the resulting estate or interest arises, not by virtue of the deed or will made in execution of the power, but by the force and effect of the original instrument by which the power was created. This is more clearly explained by SIMES in the *Law of Future Interests*, vol. 1, sec. 33 (1936), "After the Statute of Uses, the theory of the power of appointment was substantially this, 'Since an executory interest involves the shifting of the seisin on the happening of an event, we may, if we wish, make the event on which the seisin shifts, the act of making an appointment. Accordingly, the exercise of a power of appointment was not looked upon as a conveyance, but as an event on the happening of which the property would shift from one person to another.'" There are two broad classes of powers, general and special. RESTATEMENT, PROPERTY, vol. 3, sec. 320 (1940) defines a general power as one which can be exercised wholly in favor of the donee if it is exercisable before his death, or wholly in favor of his estate if it is testamentary; and a power as special if it can be exercised only in favor of certain persons, not including the donee, who constitutes a group not unreasonably large, and the donor has not manifested an intention to create the power primarily for the benefit of the donee. It is clear that these are approximate tests only, and not inflexible canons, because they will not cover all possible powers. Generally, for a court to hold that a power has been exercised, the evidence of such intent must be clear and distinct. *Funk v. Eggleston*, 92 Ill. 515 (1879). In *Blagel v. Miles*, (Mass. 1841), Judge Story stated, "There are three classes of cases which have been held to be specific demonstrations of an intended execution of a power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property which is the subject on which the power is to be executed; (3) or where the provision in the will ... would otherwise be ineffectual." All courts hold that a power is not an estate nor does it imply ownership of an estate. *Beatson v. Bowers*, 174 Ind. 601, 91 N. E. 922 (1910). The decisions that a life estate accompanied by a general power of disposition does not enlarge into a fee, are based upon two general reasons: (1) The intention of the testator should be controlling. *Venatta v. Carr*, 223 Ill. 160, 79 N.E. 86 (1906). They find that the intention of the testator is to create only a life estate by the express gift of a life estate, and that proof of such intention is strengthened by the gift by way of remainder to his heirs or children. (2) That granting the intention might be overcome by merger of the power and life interest, the merger cannot take place because a power being only an authority cannot merge with the life interest, which is an estate or property. *Beatson v. Bowers, supra.* However, North Dakota and Michigan take the opposite view; by statute, in either state, if the holder of a particular life estate or estate for years, is accompanied with an absolute power of disposition, such estate is changed into a fee. The exception being, if the power is accompanied by a trust. N.D. Rev. Code sec. 59-0539 (1943).

Applying the above principles to the instant case, it appears that the deceased, B, held a life estate in a spendthrift trust, with a general power of appointment. However, the combination of the two did not enlarge his

estate into a fee. N. D. Rev. Code sec. 59-0539 (1943); Mich. 3 C.L. sec. 13003 (1929). B was also a trustee and beneficiary of the trust, but this circumstance does not affect its validity. *Julian v. Northwestern Trust Co., supra.* The power was never exercised, *Blagel v. Miles, supra,* therefore, the claimant has no interest in the estate of the decedent, A.

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