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HIGH COURT OF AMERICAN SAMOA  
FILED 8/26/80

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CLERK OF THE HIGH COURT  
OF AMERICAN SAMOA

IN THE HIGH COURT OF AMERICAN SAMOA  
LAND AND TITLES DIVISION

DOUGLAS C. KNEUBUHL,

Plaintiff,

-vs-

B.F. KNEUBUHL INCORPORATED  
an AMERICAN SAMOA CORPORATION,  
BENJAMIN KNEUBUHL, JR.,

Defendant.

Land & Titles No. 012-80

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

In August, 1960, Adeline Kneubuhl created a trust for the benefit of her children, designating her son-in-law trustee. (attached hereto as Exhibit "A"). The trust identified certain land as the corpus of the trust, including the land "Olo", which is the subject matter of this litigation. Under the trust, the trustee was given the power to manage the parcels of land in whatever manner he deemed necessary, but provided that the trustee could not sell the property without the approval of a majority of the beneficiaries. The trust instrument was recorded with the Territorial Registrar. In October, 1967, Adeline Kneubuhl executed a deed purporting to convey the land "Olo" to plaintiff. (attached hereto as Exhibit "B"). Thereafter, the trustor executed at least one will that purported to dispose of the same property.

Law Offices of  
HALL & ASSOCIATES

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DEFENDANTS' CONTENTIONS

1. Since the trust was irrevocable, any subsequent conveyance by the trustor of property placed into the trust was ineffective.

2. The trust does not violate the rule against perpetuities.

3. Plaintiff is not at least fifty percent Samoan, and therefore the deed purporting to convey the land in controversy to him is ineffective.

ARGUMENTS

I

Since the trust was irrevocable, any subsequent conveyance by the trustor of property placed into the trust was ineffective.

In the present case, Adeline Kneubuhl conveyed the property that is the subject matter of this litigation into a trust. The trust document contains no language allowing amendment or revocation of the trust except that upon the consent of a majority of the beneficiaries the trust property may be sold.

Initially, it should be noted that the trust was created without consideration, but it is settled law that a trust may be established and enforced without consideration. Trustees of Iowa College v. Baillie (1945) 236 Iowa 235, 17 N.W.2d 143, 146; Ketner v. Rouzer (1971) 11 N.C. App. 483, 182 S.E.2d 21, 25. The necessity for consideration depends upon whether the trust is executed or executory, the rule being that without consideration, a trust, like a gift, must be executed to be enforceable. Cullen v. Chappell (2nd Cir., 1941) 116 F.2d 1017, 1018; Pearson v. McCallum (1941) 26 Tenn. App. 413, 173 S.W.2d 150, 155. Where the trust is completely executed and nothing remains to be done

1 by the grantor to transfer the property into trust, then the  
2 trust is fully enforceable. Cullen v. Chappell, supra; Mahony  
3 v. Crocker (1943) 58 Cal. App.2d, 136 P.2d 810, 813-14. Where  
4 a conveyance is directed to a trustee and the conveyance has not  
5 yet been made, the trust is unenforceable. Cruse v. Kidd (1915)  
6 195 Ala. 22, 70 So. 166, 168. Before a trustee acquires title  
7 to real property, a deed must be executed and delivered to him.  
8 Hinton's Ex'r v. Hinton's Committee (1934) 256 Ky. 345, 76 S.W.  
9 2d 8, 10-11; Loring v. Hildreth (1898) 170 Mass. 328, 49 N.E.  
10 652, 653; Bogert, Law of Trusts (5th ed. 1973) at 107.

11 The American Samoa Code provides:

12 (a) No instrument shall be effective to  
13 pass title to any land or any interest therein...  
14 until such instrument has been duly registered  
with the Territorial Registrar. 27 ASC §601.

15 The instrument in the present case purported to be a con-  
16 veyance in trust. It recited with particularity the land to be  
17 transferred and was filed with the Registrar's office; conse-  
18 quently, it was effective to pass title to the trustee if it was  
19 delivered to him. See e.g. Hall v. Hall (1909) 109 Va. 117, 63  
20 S.E. 420, 420-421. The general rule is that once the trust is  
21 in force, it may be amended, altered or revoked only as speci-  
22 fically provided in the instrument creating the trust. Brown v.  
23 International Trust Co. (1954) 130 Colo. 543, 278 P.2d 581, 583;  
24 Pavish v. Pavish (1963) 29 Ill.2d 141, 193 N.E.2d 761, 766; Re  
25 Work Family Trust (1967) 260 Iowa 898, 151 N.W.2d 490, 495;  
26 Leahy v. Old Colony Trust Co. (1950) 326 Mass. 49, 93 N.E.2d  
27 238, 240. Unless the trustor specially reserves the power to  
28 amend, alter or revoke the trust, then he too is bound by its  
29 terms. Id.; Re Morgan's Will (1958) 13 Misc.2d 224, 177 N.Y.S.  
30 2d 892, 831; Re Jones Trust Estate (1925) 284 Pa. 90, 130 A.314,  
31 315. Any attempt by the trustor to alter or amend the trust when  
32 the instrument creating the trust does not give him that power is



1 ineffectual. Re Morgan's Will, supra.

2  
3 Where the creation of a trust is not  
4 affected by fraud, duress, mistake or accident,  
5 and the power to modify or alter the trust is  
6 not expressly reserved, the settlor is without  
7 power to modify or alter it, even though it was  
8 created without consideration;...So, after an ex-  
9 press trust has been perfected and completely  
10 created, and the rights of the beneficiaries have  
11 thus become vested, the trust may not, in the ab-  
12 sence of a power of modification reserved, or unless  
13 a provision for such power was omitted by mistake,  
14 be changed, altered, or modify by the settlor with-  
15 out the consent of the beneficiaries, and this is  
16 true even though the trust is a voluntary one.

17 The settlor and trustee may not, without the  
18 beneficiaries' consent, modify the trust to the pre-  
19 judice of the beneficiaries, although it is permis-  
20 sible to modify the trust where the settlor surrenders  
21 privileges retained under the trust instrument; nor  
22 may a trust agreement be modified by agreement be-  
23 tween one of the settlors and the trustee, without  
24 the consent of some of the beneficiaries. The consent  
25 of some of the beneficiaries to change or to modifica-  
26 tion does not affect the the status of other beneficia-  
27 ries who do not consent. 89 C.J.S. "Trusts" §87, at  
28 893-94 (no cases cited to the contrary).

29 This rule is followed in virtually every jurisdiction. See  
30 Anno: "Trust---Amendment" 52 A.L.R. 686 et. seq.; Anno: "Trust  
31 ---Power to Amend" 62 A.L.R.2d 1412 et seq. (dealing with amend-  
32 ments when the right to revoke has been retained); Anno: "Trust  
33 ---Revocation by Creator" 38 A.L.R. 941 et seq. (citing more than  
34 two full pages of authority to support the general rule); Anno:  
35 "Trust----Revocation by Creator" 19 A.L.R. 102 et seq. (supple-  
36 menting 38 A.L.R. 941); Anno: "Trust---Revocation by Creator"  
37 131 A.L.R. 457, et seq. (supplementing 38 A.L.R. 941).

38 In addition, it is the general rule that the settlor may not  
39 amend or revoke the trust by acts or conveyances subsequent to  
40 the creation of the trust. 89 C.J.S., supra §88 at 899-900. A  
41 will created subsequent to a trust, in which the power of revoca-  
42 tion or modification has not been reserved, which purports to  
43 affect the same property that is subject to the trust is inef-  
44 fectual. Bryant v. Sevier (1945) 197 Miss. 457, 20 So.2d 582;  
45 584; Krause v. Krause (1933) 333 Mo. 509, 62 S.W.2d 890, 894-95;

1 Magoon v. Cleveland Trust Co. (1956) 101 Ohio App. 194, 134 N.E.  
2 2d 879, 882. This is true whether the will was executed one and  
3 a half years later (Bryant, supra), or the same day as the trust  
4 was executed (Krause, supra). In Magoon, supra, it was held that  
5 a settlor who had reserved the right to alter, amend or revoke  
6 the trust by giving written notice to the trustee could not  
7 revoke the trust by executing a last will and testament, since the  
8 trust may be affected only according to its terms. Id., at 882.

9 In the present case, the trustor did not reserve in herself  
10 the power to modify, revoke or amend the trust. Her transfer of  
11 the property into trust conveyed her interest in the land into  
12 the trust; and absent a provision permitting her to amend or re-  
13 voke the trust, that transfer into trust is binding on her. At  
14 the time of executing the deed and wills, she did not have title  
15 to the property that was transferred into trust; therefore, the  
16 deeds and wills can have no effect on the title to that property.

17  
18 II

19 The trust does not violate the rule  
20 against perpetuities.

21 The relevant language of the trust document provides that  
22 the property was to be conveyed in trust to the trustee:

23 To have and to hold the above enumerated  
24 parcels in and upon TRUST for the benefit and en-  
25 joyment of my beloved children, share and share  
26 alike: ALFRED JAMES PRITCHARD, JR., JOHN ALEXANDER,  
27 DOUGLAS CRANE, MARGRET ADELIN KNEUBUHL WOOD,  
28 FRANCIS EMILIE KNEUBUHL OPELL. Should any of these,  
29 my beloved children should expire, their share shall  
30 pass to their children.

31 While there are no statutes or case law on point, the rule  
32 against perpetuities has its foundation in English common law.



1 (See 70 C.J.S. "Perpetuities" §2, pp. 576-77). By statute, the  
2 High Court is to follow the common law of England. 1 ASC 1(4).

3 The rule against perpetuities provides generally that no  
4 interest within its scope is good unless it must vest, if at all,  
5 not later than twenty-one years after some life in being at the  
6 time of creation of interest. Middleton v. Western Coal & Min.  
7 Co. (W.D. Ark, 1965) 241 F.Supp. 407, 417, aff'd 362 F.2d 48.  
8 The purpose of the rule is to prohibit an attempted creation of  
9 estates in fee which depend for their vesting upon a contingency  
10 to take place some time in the future without limitation. Id.

11 In the present case, the trust creates life estates in cer-  
12 tain named children of Adeline Kneubuhl. Upon the death of the  
13 named children, their interest is to pass to their children. The  
14 fact that the grandchildren of Adeline Kneubuhl can not be ascer-  
15 tained with certainty at the time of the creation of the trust  
16 because of the possibility of after-born grandchildren does not  
17 violate the rule against perpetuities. The rule does not require  
18 that the persons ultimately to receive title to the property be  
19 known at the time of the creation of the instrument; only that at  
20 the death of the measuring life they are capable of being ascer-  
21 tained. Rekdahl vs. Long (S.Ct. Tex. 1967) 417 S.W.2d 387, 391.  
22 Thus, a gift to children, including future child, of a life in  
23 being cannot violate the rule, since such children must necessari-  
24 ly be born during the life time of their parent, or within the  
25 period of gestation thereafter. Holmes v. Connecticut Trust &  
26 S.D. Co. (1918) 92 Conn. 507, 103 At. 640, 641-42; Dewitt v.  
27 Searles (1932) 123 Neb. 129, 242 N.W. 370, 371-72; Camden Safe  
28 Deposit & T. Co. v. Scott (1937) 121 N.J. Esq. 366, 198 At. 653,  
29 657.

30 There is some difficulty in the terms that purport to termi-  
31 nate the trust. The document provides that the property is to be  
32 held in trust for the named children, and further: "Should any

1 of these my beloved children should expire, their share shall  
2 pass to their children." Arguably, this language indicates that  
3 the property should continue in trust to the grandchildren; how-  
4 ever, the controlling factor is the intent of the trustor. Ken-  
5 dall v. Kendall (1953) 43 Wash.2d 418, 261 P.2d 422, 425. Even  
6 when there are no terms for the duration of the trust explicitly  
7 set forth by the trustor, the courts will construe the trustor's  
8 intent to be that the trust will endure for the period necessary  
9 to accomplish the objectives of the trustor, and then terminate.  
10 Id.; Wood v. Continental Illinois Nat. B. & T. Co. (1952) 411 Ill.  
11 345, 104 N.E.2d 246, 250.

12 In In re Shaw's Estate (1941) 342 Pa. 182, 20 A.2d 202, the  
13 testator placed certain mineral leases in trust, with the provi-  
14 sion that the rents therefrom should go to the testator's child-  
15 ren, "that is to say, if any of my said children should die be-  
16 fore or after my decease, his or her share shall descend to his  
17 or her heirs at law." The court determined that the fact that  
18 this language did not explicitly terminate the trust upon a con-  
19 tingency, this did not violate the rule against perpetuities. It  
20 was the testator's intention as to when the trust should termi-  
21 nate that was the controlling factor.

22 He appears to have been concerned entirely  
23 with the welfare of his children to whom he  
24 gave his property in equal shares; he was  
25 apparently not interested in the class of un-  
26 named and unascertained "heirs" to whom the  
27 share of a deceased child would "descend".

28 Id., at 204.

29 The court then determined that the intent of the testator  
30 was that the trust should terminate upon the death of his child-  
31 ren.

32 Similarly, in the present case, the trustor used almost



1 exactly the same language, and it was obvious that she wa  
2 cerned that the trust be used by the children named in th  
3 ment, and that the purpose of the trust was to benefit th  
4 It is equally clear that the trustor was not interested :  
5 class of unnamed and unascertained grandchildren; consequ  
6 the court should construe the trust to terminate upon th  
7 of the children of the trustor.

8 In Hinds v. Hinds (1928) 126 Me. 521, 140 At. 189,  
9 was conveyed to a man and his wife as "trustees of E. Le  
10 Hinds, minor child of the said" trustees. There were no  
11 terminating the trust, but the court found that the obvi  
12 ~~tention of the trustor was to continue the trust only as~~  
13 the minority of the child, and then the trust was to ter

14 Additionally, it is important to note that the rul  
15 perpetuities is not concerned with the duration of a tru  
16 only with remote vesting of interests. Phelps v. Shrops  
17 (1966) 254 Miss. 777, 183 So.2d 158, 163; Mercantile Tru  
18 Hammerstein (Mo. 1964) 380 S.W. 2d 287, 290. Theoretica  
19 trust can continue forever without violating the rule.  
20 Shropshire, supra. It is the suspension of the power to  
21 otherwise dispose of property that is objectionable. Pu  
22 Livingston (1896) 89 Me. 359, 36 At. 635, 638. Where a  
23 has the power to dispose of trust property, the trust do  
24 violate the rule even if there is no provision for term  
25 since the property is considered to be vested. Moran v  
26 (Miss. 1950) 228 S.W.2d 682, 687. Where the beneficiar  
27 trust can terminate it or call for the sale of the trus  
28 then the trust property is considered to be vested in t  
29 the rule against perpetuities does not apply. McClary  
30 (10th Cir. 1943) 134 F.2d 455, 456; Pulitzer v. Livings  
31 at 639; Phelps v. Shropshire, supra.

32 In the present case, the trust document specifica