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by Elizabeth Barker Brandt

Muriel Kirk and companion Mr. Christopher.

A number of revoked wills and trusts, a trust that has been amended several times, substantial gifts to charity, the last trust amendment handwritten on the back of a Medicare check stub and beginning with the phrase "If anything happens to me on the trip to La Jolla...". Does this take you back to law school and to those twisted fact patterns that only a law professor could dream up? Well dream became reality in the case of *Estate of Kirk*[1] decided last year by the Idaho Supreme Court. The case involved very unusual facts and presented several important issues to the Supreme Court including the applicability of Idaho's former mortmain statute to an inter vivos trust, the admissibility of extrinsic evidence to interpret a trust, and the applicability of Idaho's statute dealing with the suspension of the power of alienation to charitable trusts.

Muriel Kirk was an unusual woman. Described variously in the court records as a "Renaissance woman" and as like "Auntie Mame", she was a lawyer who practiced law for a time in Oklahoma, a real estate agent, a pilot, an art collector, and a world traveler. In December 1989, she executed an inter vivos trust and pour-over will naming herself as trustee and life beneficiary of the revocable trust, and naming West One Bank as the successor trustee and personal representative of her estate. Her daughter, Diana, was named as the primary remainder beneficiary of the trust along with the Assistance League of Boise and the Milton Academy where Diana had gone to school. The trust was registered in Ada County and was funded. The trust instrument provided that it could be amended as follows:

> The Grantor may at any time during her lifetime amend the provisions of the MURIEL H. KIRK FAMILY TRUST by an instrument signed by the Grantor and delivered to the Trustee.[2]

Six months later, in June 1990, as a result of Diana's untimely death, Mrs. Kirk amended the trust for the first time eliminating the gifts to Diana and leaving the Assistance League and the Milton Academy as the only beneficiaries of the trust.

In October 1990, Mrs. Kirk amended the trust a second time eliminating the Milton Academy. In the amendment, she explained that Diana had been introduced to smoking while at school at the Academy which had eventually "ruined her life." In addition to eliminating the Milton Academy from the trust, this second amendment to the trust contained the following provision:

> After the death of the Grantor, the Trustee shall hold, manage and control the property comprising the Trust estate for beneficiaries to be named in an attached sheet, which will be added to from time to time.[3]

Both the first and second amendments to the trust were typed, formally executed by Muriel Kirk and delivered to West One Bank, the successor Trustee.

The same day that Muriel Kirk executed the second amendment to the trust she also drafted a list of dispositions of personal property to several people which was typed, signed, attached to the second amendment as provided by its express language and which she delivered to West One Bank.

As a result of the second amendment to her trust, Mrs. Kirk arguably left a gap in the disposition of her property. Although the typed list attached to the second amendment contained provisions disposing of certain personal property and the trust instrument disposed of certain leases to the Assistance League, the trust did not contain provisions disposing of the rest of Mrs. Kirk's real estate. Mrs. Kirk was aware of this potential problem and she was reminded of it on several occasions by Wes Seideman, the officer of West One Bank with whom she had been dealing.

In May 1990, Mrs. Kirk planned to drive to La Jolla, California. Apparently in anticipation of this trip and aware of the potential gap in her estate plan, she drafted a handwritten list of property dispositions on the back of a Medicare check stub and stapled this document to the second amendment to her trust. This handwritten instrument began with the phrase "If anything happens to me on the trip to La Jolla ..." and, after listing several dispositions of items of personal property contained the following provision:

> Donna and Joyce will take plenty of time to sell other property at proper prices [no rushed sale Brooks!] then 1/3 goes to law chair for Donna's Allen - 2/3 to Botanical Garden for English garden dedicated to Muriel and Diana.[4]

Mrs. Kirk returned safely from the trip to La Jolla but died unexpectedly two months later. An heir search conducted by West One Bank, the personal representative of her estate, located Fred Salfeety, her nephew. Salfeety barely knew Muriel Kirk. He testified at trial that he met her for the first time at his mother's funeral. His parents had been divorced and he had been raised by his father's family, and, as a result, knew little of his mother's family. He stated that he hadn't seen Muriel Kirk for twenty to thirty years.

Aside from the eccentric facts, the *Kirk* case is notable for several reasons. For the first time in a reported opinion since 1945, the Idaho Supreme Court addressed the interpretation of Idaho's mortmain statute. The Court also addressed for the first time whether Idaho's perpetuities substitute applies to charitable gifts. Finally, and possibly most importantly, the Court decided several questions regarding the admissibility of extrinsic evidence to interpret a trust provision.

For the first time in a reported opinion since 1945, the Idaho Supreme Court addressed the interpretation of Idaho's mortmain statute.

Mortmain

Because the handwritten dispositions on the back of the check stub to the Law School and to the Botanical Gardens were written within 120 days of Muriel Kirk's death, the question was raised whether this disposition violated the mortmain statute.[5] At the magistrate level, Judge Patricia Flanagan originally ruled the dispositions did not violate the mortmain statute because that statute only appled to dispositions by will or by a testamentary trust. The handwritten dispositions in the *Kirk* case were amendments to an inter vivos trust, and consequently were not governed by the statute.[6]

On appeal to the District Court, Judge Newhouse affirmed the ruling of Judge Flanagan on the mortmain statute on different grounds. Judge Newhouse reasoned that because the inter vivos trust was, for all intents and purposes, the same as a disposition by will or by testamentary trust, the mortmain statute applied. He held, however, that the mortmain statute violated equal protection principles and was, therefore, unconstitutional.[7]

The Supreme Court adopted Judge Flanagan's narrow reading of the statute holding that, by the its express language, the statute only applied to wills and testamentary trusts. The Supreme Court declined to address the constitutionality question.[8]

Despite the fact that Idaho repealed the mortmain statute in question in Kirk in 1994, the Court's narrow reading of it and the questionable constitutional status of the statute has significance for Idaho's statute restricting devises to nursing homes and residential home operators. That provision, Idaho Code § 15-2-616, was added to the code in 1989 and is in some ways a specialized mortmain statute for nursing homes and their operators. The nursing home statute imposes a rebuttable presumption that any "devise or bequest" to an owner, operator, or employee of a nursing home within one year of the testator's death is the result of undue influence.

Like the mortmain statute at issue in Kirk, the nursing home provision is limited in its applicability to "devises and bequests". A strong argument could be made that the same narrow interpretation of this statutory language should apply to the nursing home statute. And, like mortmain statutes generally, the nursing home provision amounts to a restriction on the testator's power of disposition even under circumstances where undue influence could not actually be proved. The only difference between the nursing home provision and a traditional mortmain statute is that the nursing home provision imposes only a rebuttable presumption that covered dispositions are invalid, whereas most mortmain statutes conclusively declare covered dispositions invalid. Whether this distinction is enough to save the nursing home provision is open to debate.

Suspension of the Power of Alienation

The trust instruments in the Kirk case provided that certain oil leases owned by Muriel Kirk should not be sold but should

be maintained to provide income to the charitable beneficiaries. Salfeety argued that this violated Idaho's perpetuities substitute statute. That statute provides that the "absolute power of alienation of real property" cannot be suspended for a period of longer than "the continuance of the lives of the persons in being at the creation of the limitation or condition, and 25 years thereafter." Because the trust expressly provided for holding the oil leases in perpetuity, the question was whether this violated the statute.

Section 55-111 of the Idaho Code expressly provides that "there shall be no rule against perpetuities" and has traditionally been viewed as a substitute for the rule against perpetuities in this state. The code provision is narrower than the traditional rule, primarily in the fact that it does not require vesting within the specified period, it does not apply to personal property and that it expressly provides that instruments shall be construed to avoid violating the statute. Despite the apparent intent on the part of the Idaho Legislature to repeal the rule against perpetuities in Idaho, the Idaho courts have looked at how other states have approached the rule against perpetuities in interpreting the Idaho statute. In Kirk, the court did just that in concluding that the statute did not apply to charitable trusts.

Applying the Idaho statute to charitable trusts would have seriously limited the usefulness of those instruments. The purpose behind the traditional rule against perpetuities was to limit the unproductive dead hand control of private property that would take that property out of productive use and apply it for potentially arcane purposes. Most charitable gifts are not made to a particular individual but are rather to an entity and the goal of the donor is that property should be maintained for the benefit of the charity for a significant period of time. Dead hand control of private wealth is not as much of an issue where the testator has already alienated property outside his or her family and applied it to quasi-public charitable purposes. Moreover, charitable trusts, unlike private trusts, are modifiable under the doctrine of cy pres. For these reasons, charitable trusts have often been treated as outside the traditional rule against perpetuities.

The decision of the Idaho Supreme Court in Kirk is consistent with the result in traditional perpetuities cases and with the purpose of the Idaho statute. To the extent that the Idaho rule regarding the suspension of the power of alienation is different than the traditional rule against perpetuities, it was intended to make the rule against perpetuities less broad in Idaho than it had traditionally been. It would be outside the spirit of the Idaho rule to interpret it to place greater restrictions on the power of disposition than would the traditional rule against perpetuities.

Admission of Extrinsic Evidence

The opinion in Kirk is also interesting for its holding on the admission of extrinsic evidence. This is an area of probate law that is in some flux. The traditional approach to the admission of extrinsic evidence in the interpretation of a will or trust is the "plain meaning rule." Under this

rule, courts have refused to admit extrinsic evidence that adds to or contradicts the testator's will. Extrinsic evidence will not come in to explain a patent ambiguity — one that appears on the face of the document, but will be admissible to cure a latent ambiguity — one that does not appear on the face of the will, but instead appears when the will is applied to the testator's property or beneficiaries. The Court in Kirk applied this traditional rule and expressly held that the ambiguity involved in the interpretation of Muriel Kirk's documents was a latent ambiguity and that extrinsic evidence was therefore admissible to resolve the ambiguity.

The latent/patent distinction for the admissibility of extrinsic evidence is problematic, at best. The *Kirk* case illustrates the problem. Arguably the ambiguity in *Kirk* was patent. One did not have to apply the will to Kirk's property and beneficiaries to see that she had not specified what should happen to her property if she returned from La Jolla, or to know that she altered and changed beneficiaries in a potentially incomplete and contradictory way.

Rather than continuing to struggle with this confusing and often unhelpful distinction between latent and patent ambiguities, some jurisdictions have adopted an alternative approach to the admission of extrinsic evidence. Focusing on the goal of discovering the testator or settlor's intent, these courts have reasoned that extrinsic evidence of the circumstances surrounding the execution of the will should be considered by the court, and evidence that tends to establish a reasonable interpretation of the will should be admitted regardless of whether the ambiguity is latent or patent.[9] This rule would not have resulted in a different outcome in the *Kirk* case, but would have helped resolve future extrinsic evidence cases and would tip the balance toward the admission of extrinsic evidence to interpret wills and trusts.

Conclusion

Even with a number of years of practice making up law school exams, I don't know that I have ever come up with an exam as interesting as the real facts of *Kirk*. One thing I am constantly struck by in the area of trusts and estates is that no fact pattern can be considered too unusual. Come to think of it, I might use the facts of *Kirk* for the next exam I write for my Wills and Trusts class!

ENDNOTES

[1] 127 Idaho 817, 907 P.2d 794 (Idaho 1995).

[2] Id. at 825, 907 p. 2d at 802.

[3] Id.

[4] Id. at 821, 907 p. 2d at 798.

[5] The statute, formerly codified at Idaho Code § 15-2-615(a) provided:

> No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least one hundred twenty (120) days before the death of the testator; and if so made at least one hundred twenty (120) days prior to such death, such devise or legacy, and each of them, shall be valid; provided, however, that the foregoing limitation shall not apply to wills of persons whose death is caused by accidental means and whose wills are executed prior to the accident which results in death.

The statute was repealed in 1994, see S.L. 1994, ch. 359 § 1.

[6] Estate of Kirk, Case No. 3P-15062 at 15-16 (4th Dist., Mag. Div., June 16, 1993).

[7] Kirk, 127 Idaho at 8723, 907 P.2d at 800.

[8] The constitutionality of the mortmain statute is again being presented to the Court in the currently pending case of Estate of Ott, Case No. 3P-15090 (4th Dist. Mag. Div. Mem. Dec. Filed Mar. 20, 1995). See John R. Mag. Div. Mem. Dec. Filed Mar. 20, 1995). See John R. Cunningham, Mortmain Statutes: The Dead Hand Still Survives, 27 Idaho L. Rev. 49 (1991)(discussing the possible constitutional problems with mortmain statutes).

[9] For examples see W. McGovern, et al. supra note 10, 6.1, at 238-243.

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