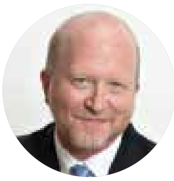


 by Eddy R. Smith

When a Revocable Trust is Not Revocable

"Nothing would be what it is because everything would be what it isn't. And contrariwise, what it is, it wouldn't be, and what it wouldn't be, it would. You see?"
– Alice in Lewis Carroll's *Alice's Adventures in Wonderland*

"Ya think that it is, it is; if not, it isn't."
– Run-DMC, "Down With the King"

A revocable trust is so called because someone (usually the settlor) has the power to revoke it. The Sixth Circuit U.S. Court of Appeals issued a Lee Corso-like "not so fast" in *JPMorgan Chase Bank N.A. v. Winget*, Case No. 21-1568 (6th Cir. 2022) (unpublished opinion).[1] The case is interesting mostly for its unusual facts[2] and prodigious procedural history[3], but with our wealthy clients increasingly looking for ways to protect assets from creditors, the opinion provides examples of steps that don't work.

JPMorgan Chase Bank ("Chase") sued both Larry J. Winget personally and the Larry J. Winget Living Trust on their guaranty of a $450 million loan made to Winget's holding company. The Sixth Circuit addressed whether Winget could revoke the Trust (of which he was settlor, trustee and sole beneficiary), making the trust assets unreachable to Chase. The court ruled he could not.

Facts

The company debtor filed for bankruptcy, triggering a default under the guaranty agreement and causing the debt to become due. The guaranty agreement limited Winget's personal liability to $50 million but did not similarly limit the Trust's liability.[4] Winget paid the $50 million owed in his personal capacity but the Trust was liable for the rest of the debt.

Nearly six years after Chase sued to recover the debt, Winget revoked the Trust and removed all trust assets, keeping the revocation secret from the court and Chase for over a year. During this time, the district court entered an amended final judgment establishing that the Trust owed Chase nearly half a billion dollars under the guaranty agreement, and the parties were actively litigating whether Chase could use the trust assets — which only Winget knew no longer existed — to satisfy that debt.

Winget then sought a declaratory judgment that, given the revocation, Chase had no further recourse against the assets that were once held in the Trust. Chase counter-claimed, arguing that the revocation was a constructively fraudulent transfer under the Michigan Uniform Fraudulent Transfer Act (MUFTA). The district court granted Chase's motion for judgment on the pleadings. Winget did not appeal the ruling, instead rescinding his revocation, thus retitling to the Trust all property that it held at the time of the revocation.

Before Winget rescinded the revocation, various LLCs previously held in the Trust distributed hundreds of millions of dollars in cash and [issued?] promissory notes to Winget.[5] When Chase learned about these distributions, it sued Winget for unjust enrichment. The district court granted Chase's motion for summary judgment, ordered Winget to place the cash and promissory notes in a constructive trust and dismissed Winget's action for declaratory judgment. After Winget reinstated the Trust, the district court enjoined Winget from further interfering with the trust property and entered a final judgment in Chase's favor on the fraudulent transfer claim, the unjust enrichment claim, and Winget's declaratory judgment action. Winget appealed all three rulings.

Legal Analysis

The court of appeals first analyzed the fraudulent transfer claim. Under MUFTA, a transfer occurs when a creditor has access to the assets and a debtor takes action to put those assets beyond the creditor's reach. The court concluded that the revocation of the Trust constituted such a transfer: "Before the revocation, the Trust had assets that creditors like Chase could take to fulfill the Trust's debt….[A]fter the revocation, those assets were placed beyond Chase's reach."[6]

Winget argued that, because he was the Trust's settlor and maintained the power to revoke, he — rather than the Trust — owned the property held by it and revoking the Trust didn't transfer anything; he simply maintained property he already owned. The court rejected that argument:

> MUFTA's understanding of "transfer" does not turn on who owns the assets. Instead, it turns on how the revocation affected Chase's access to the assets…. The revocation placed the trust assets beyond Chase's reach. Thus, the revocation was a transfer.[7]

Having established that a transfer occurred, the court then considered whether, regardless of Winget's intention, the revocation was constructively fraudulent. Under MUFTA, a transfer of assets is constructively fraudulent if (1) the creditor's claim "arose before the transfer," (2) the debtor was insolvent at the time of transfer or "became insolvent as a result of the transfer," and (3) the debtor did not receive "a reasonably equivalent value in exchange for the transfer."[8]

The court found that all three elements were met. First, Chase's claim arose more than 10 years before Winget revoked the Trust. Second, the Trust was insolvent after the revocation because Winget revoked the Trust in its entirety and its assets were zero. Third, the Trust received nothing in exchange for the revocation. The court stated that the Trust had a duty to maintain value given its obligation to repay Chase, and that in turn determined whether the revocation was fraudulent.

Winget complained that this interfered with his contractual right to revoke the Trust at any time. The court's reply:

> [Winget's] right is not unlimited. [T]rusts — both revocable and irrevocable — can enter binding contracts…. A necessary consequence is that a trust's contractual obligation may affect the rights of third parties, like beneficiaries and settlors, even if they are not themselves parties to the contract. Here, the Trust guaranteed Venture's loan. So when Venture defaulted, the Trust had to pay Chase and could do so with the trust assets….Winget could no longer revoke the Trust since doing so after Chase's claim arose would (and did) deplete the trust assets, preventing the Trust from fulfilling its obligation to Chase…an obligation Winget himself assumed as trustee. [I]t appears Winget revoked the Trust just so Chase (an unsecured creditor) could not reach the trust assets. That's exactly the type of conduct MUFTA aims to prevent.[9]

Chase also contended that Winget was unjustly enriched by the LLC promissory notes and cash Winget received after he revoked the Trust and before he rescinded the revocation. The district court agreed and granted Chase summary judgment on the unjust enrichment claim, imposing as a remedy a constructive trust over the promissory notes and cash. The court of appeals reviewed the grant and the remedy.

The court noted that the doctrine of unjust enrichment is rooted in the idea that no one should be allowed to profit inequitably at another's expense. To maintain an unjust enrichment claim under Michigan law, a plaintiff must show (1) the defendant received a benefit from the plaintiff that (2) resulted in an inequity to the plaintiff. The remedy is restitution.[10]

CONTINUED ON PAGE 34 >

EDDY SMITH practices with Kennerly Montgomery in Knoxville. He focuses on planning, administration, and litigation related to trusts, estates, businesses and nonprofits. Smith is a fellow of The American College of Trust and Estate Counsel and served as chair of the TBA Estate Planning and Probate Section.

 CONTINUED FROM PAGE 33 >

The court found that Winget's draining of LLC value between revocation and restoration of the Trust unjustly enriched Winget at Chase's expense:

> Retracing this chain of events makes clear that Chase satisfied the elements of unjust enrichment: (1) Winget received a benefit (distributions from the membership interests) that (2) resulted in inequity to Chase. The inequity? Chase could no longer receive the distributions that it would have received with charging orders but for the fraudulent revocation.[11]

The court noted that the promissory notes were created after the trial court's relevant final judgment in favor of Chase.

The court also found that a constructive trust was an appropriate remedy:

> The plaintiff has a superior claim to property in the defendant's possession, so the defendant is simply "holding" the property for the plaintiff until it is returned….Winget obtained the promissory notes and cash distributions only because of his fraudulent revocation — precisely the behavior that justifies a constructive trust….Indeed, there was reason to believe that Winget — after secretly revoking the Trust — might try to pull another fast one on Chase. A constructive trust ensures he can't.[12]

Conclusions

This case boils down to trying to "have your cake and eat it, too." As it suited his purposes, Winget alternately treated the revocable trust as distinct from him and as his alter ego. There was a fundamental inconsistency in Winget arguing that Chase was limited to collecting $50 million from him personally while simultaneously arguing that he had unfettered access to the Trust assets through his power of revocation. The court would not play Winget's game, treating the trust as a legal entity separate from Winget. The court ruled that the generally revocable trust could not be revoked if doing so would work an injustice against the trust's creditor. III

NOTES

1. https://youtu.be/Qxa19wg5wOM; https://espnpressroom.com/us/bios/corso_lee/.

2. The following description of the facts and summary of the legal analysis borrow heavily from the language of the opinion. (Many words are not mine.) For additional information, see www.aftermarketnews.com/venture-owner-winget-resigns-from-board/; www.plasticsnews.com/article/20180823/NEWS/180829948/former-venture-owner-back-in-court-for-more-than-410m-commercial-dispute. Defendant Larry J. Winget, something of a litigation pit bull, should not be confused with Larry Winget, the "Pitbull of Personal Development" (https://larrywinget.com/).

3. The procedural history is noted by the dissenting opinion: "During the past 15 years, this dispute has generated over 50 judicial opinions: nine in this court and more than 40 in the district court."

4. Without a negotiated limitation of the debtor's personal liability, the trust assets clearly would be available to a creditor of the settlor under Michigan's statute, which reads the same as *Tenn. Code Ann.* § 35-15-505(a)(1): "During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors." Because the Trust (trustee) rather than the settlor was the debtor here, Chase and the court relied on fraudulent transfer and unjust enrichment analysis.

5. The opinion uses the verb "distributed," but given the recitation of the facts it appears that the LLCs issued promissory notes to document debts they allegedly owed to Winget.

6. *JPMorgan Chase Bank N.A. v. Winget*, Case No. 21-1568, at *4. The language of Mich. Comp. Laws Serv. § 566.31(s), defining the term "transfer," is similar to the language of Tennessee's version of the Uniform Fraudulent Transfer Act ("TUFTA")/*Tenn. Code Ann.* § 66-3-302(12).

7. *JPMorgan Chase Bank N.A. v. Winget*, Case No. 21-1568, at *5.

8. TUFTA recognizes a cause of action for fraudulent transfer and utilizes language similar to MUFTA (Mich. Comp. Laws Serv. § 566.34(1)) in *Tenn. Code Ann.* § 66-3-305(a)(2). The elements to establish a claim of fraudulent transfer under MUFTA/Mich. Comp. Laws Serv. § 566.35(1) are the same as those under TUFTA/*Tenn. Code Ann*. 66-3-306(a).

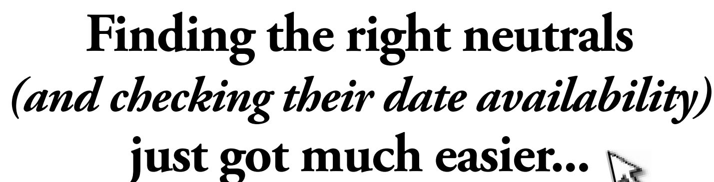
9. *JPMorgan Chase Bank N.A. v. Winget*, Case No. 21-1568, at *8.

10. In Tennessee, "[t]he elements of an unjust enrichment claim are: 1) '[a] benefit conferred upon the defendant by the plaintiff'; 2) 'appreciation by the defendant of such benefit'; and 3) 'acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.'" *Wilson Bank & Tr. v. Consol.* Util. Dist., No. M2021-00167-COA-R3-CV, 2022 Tenn. App. LEXIS 228, at *26 (Tenn. Ct. App. Jun. 10, 2022) (quoting *Freeman Indus. LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005)).

11. *JPMorgan Chase Bank N.A. v. Winget*, Case No. 21-1568, at *12.

12. *Id*. at *17.

The National Academy of Distinguished Neutrals



America's Premier Mediators & Arbitrators Online at www.NADN.org
Tennessee Chapter at www.TennesseeMediators.org