Denver Law Review

Volume 35 | Issue 2 Article 11

January 1958

Case Comments

Dicta Editorial Board

Case Comments

CASE COMMENTS

Constitutional Law—Fourteenth Amendment—Failure to Appoint Counsel as Denial of Due Process

By PAULINE NELSON AND JAMES E. JACKSON

Pauline Nelson, a graduate of the University of Colorado, is a junior at the University of Denver College of Law and is Note and Comment Editor of DICTA. James E. Jackson received his A. B. degree in 1956 from the University of Missouri, where he was a member of Phi Beta Kappa. He is now a junior at the University of Denver College of Law.

Defendant, a seventeen-year-old Negro boy with a seventh-grade education, was arrested on October 26, 1938. Two days later, after questioning by police who apparently instilled in him a fear of mob violence, he confessed to the murder of an elderly white woman. On October 29, after pleading guilty, he was adjudged guilty of murder in the first degree, sentenced to life imprisonment and transferred to the state prison. At his arraignment he told the trial judge he did not want a lawyer, and none was appointed. Twelve years later, in 1950, he filed a delayed motion for a new trial. The trial court denied the motion, and the Supreme Court of Michigan affirmed. The United States Supreme Court reversed, holding that because of the defendants' age, his mental capacity, and the other circumstances of the case, he was not capable of intelligently and understandingly waiving his right to counsel. In accepting the guilty plea the trial court denied the defendant a fair hearing, contrary to the due process clause of the fourteenth amendment. *Moore v. Michigan,* 78 Sup. Ct. 191 (1957).

In a recent Colorado case the defendant, without benefit of counsel, pleaded guilty to a charge of kidnapping and was sentenced to twenty-five to twenty-nine years in prison. When sentenced the defendant was twenty-one years old, had only a sixth-grade education, and had served one previous reformatory sentence. He had never been represented by counsel and was unaware of his rights in this respect. Furthermore, he was without money or friends in Colorado, had allegedly signed a confession of assault and battery and attempted car theft, had at first protested when the trial court read a charge of kidnapping, and had a meritorious defense based on lack of intent. The arrest was made on April 15, 1945. He was sentenced on April 16. In 1953 a motion to vacate the judgment was denied by the district court, and the denial

was affirmed without written opinion by the Colorado Supreme Court.[1] In 1954, a petition for a writ of habeas corpus was denied by the district court. On writ of error the supreme court held that the allegations of denial of due process were not within the scope of inquiry in a petition for habeas corpus. In dictum the court stated that the defendant had been afforded due process since the record showed the information had been read to him, the consequence of his guilty plea had been explained, and evidence had been taken in aggravation or mitigation before sentence. *Freeman v. Tinsley,* 308 P.2d 220 (Colo. 1957).

In these two cases there is a clear illustration of the liberality of the federal courts, on the one hand, in finding that lack of counsel constitutes a denial of due process, and on the other hand the strictness of some state courts in holding that where the procedure was fair no error results from a failure to appoint counsel.

In the *Freeman* case the Colorado Supreme Court has placed a very narrow construction on the writ of habeas corpus. The matters to be considered in habeas corpus proceedings have been defined as (1) whether the petitioner was convicted in a court having jurisdiction over the person and subject matter, and (2) whether the sentence was within the statutory limits.[2] Although there are no Colorado decisions in point, the modern tendency has been to construe the question of lack of jurisdiction to include judgments which are void because fundamental constitutional rights have been violated. It has been said by the New Jersey Supreme Court that a court which denies due process destroys its own jurisdiction in the course of the proceedings.[3]

The effect of the *Freeman* case is to require a defendant who alleges conviction in violation of due process to present these questions in a writ of error to the original proceedings, at the risk of losing altogether his right to assert such questions. The *Moore* case, on the other hand, in requiring a new trial after twelve years, recognizes that the persons most in need of broader constitutional safeguards are petitioners who, like Moore and Freeman, find themselves in prison shortly after arrest, and only years later acquire an understanding of their constitutional rights.

The *Freeman* case was the second to be presented to the Colorado court in which charges of denial of due process have been based on lack of counsel. In *Kelley v. People*[4] the court denied a motion for a writ of error coram nobis on the ground that there had been no showing that a contrary result would have been reached if counsel had been appointed. The court reaffirmed this ruling in a case decided two months after the *Freeman* case, holding that there is no constitutional requirement that a defendant be informed of his right to counsel.[5]

The first United States Supreme Court case to hold that lack of effective counsel would constitute a denial of due process was *Powell v. Alabama,*[6] decided in 1932. Since that case the position of most courts has been that the totality of facts surrounding each case must be considered in determining whether counsel should have been appointed.[7] Some factors which courts have held might create a need for counsel are

[1] Freeman v. People, 128 Colo. 99, 260 P.2d 603 (1953); cert. denied, 346 U.S. 911 (1953).
[2] People ex rel. Metzger v. District Court, 121 Colo. 141, 215 P.2d 327 (1949).
[3] Ex parte Carter, 14 N.J. Super. 591, 82 A.2d 652 (1951).
[4] 120 Colo. 1, 206 P.2d 337 (1949).
[5] Vigil v. People, 310 P.2d 552 (1957).
[6] 287 U.S. 45 (1932).
[7] Betts v. Brady, 316 U.S. 455 (1942).

the defendant's youthfulness and lack of education or intelligence,[8] the complexity of the charges and possible defenses,[9] and the conduct of the prosecutor and trial judge.[10]

Under the latest rulings of many state courts[11] and of the United States Supreme Court, including the *Moore* case and others,[12] the key question is whether the defendant, in view of his individual capacity and the other circumstances surrounding the trial, could have properly defended himself. If not, lack of counsel would be a denial of due process regardless of whether the record shows error or prejudice.[13] The question then would be whether the trial was likely to be unfair. The rationale behind these rulings is based upon a universally recognized element of due process, the right to be heard. Where the defendant is under such an incapacity that he is unable to make an intelligent plea or properly defend himself, he is not given an effective opportunity to be heard, and only an appointment of counsel will eliminate this defect. Thus, due process guarantees not only the right to be heard, but also the means to be heard.[14]

On the other hand, a few courts have used a different basis for determining whether there is a right to counsel. These courts look to the record to see if a fundamentally fair trial has been granted.[15] The question becomes, did lack of counsel actually prejudice the defendant as a matter of record? The rationale of these courts is based on another universally recognized element of due process, the right to a fair trial. Where a defendant has received a fair trial, he should not complain of lack of counsel.[16] The main flaw in this reasoning is that a fair trial includes many factors which do not appear of record. It is much more difficult for an appellate court to weigh these external factors years later and determine the fairness of the trial than to determine if there were elements present which *could have* led to prejudice.

Colorado seems to have adopted the latter rule. The *Kelley* case stated that some showing must be made that appointment of counsel

[8] Powell v. Alabama, 287 U.S. 45 (1932).
[9] Williams v. Kaiser, 323 U.S. 471 (1945).
[10] Townsend v. Burke, 334 U.S. 736 (1948).
[11] McCarthy v. Hudspeth, 166 Kan. 456, 201 P.2d 658 (1949); Raymond v. State, 192 Md. 602, 65 A.2d 285 (1948); State v. Magrum, 76 N.D. 527, 38 N.W.2d 358 (1949); Ex parte Cook, 84 Okla. 404, 183 P.2d 595 (1947).
[12] Commonwealth ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951); Wade v. Mayo, 334 U.S. 672 (1948); Uveges v. Pennsylvania, 335 U.S. 437 (1948).
[13] Cases cited notes 11 and 12, supra.
[14] Massey v. Moore, 348 U.S. 105 (1954).
[15] Foster v. Illinois, 332 U.S. 134 (1947).
[16] Commonwealth ex rel. Ridenour v. McHugh, 178 Pa. Super. 69, 115 A.2d 808 (1955).

would have brought a different result. In the *Freeman* case no mention was made of the defendant's age, education or intelligence, nor of the complexities of the charge. Instead the finding was based on the trial judge's procedure, which the supreme court credited with adequately guaranteeing the defendant due process.

The theory of the *Freeman* case undoubtedly could have great effect upon trial judges in Colorado. In cases where the defendant does not request counsel, if the judge believes he can comply with the procedural requirements of a fair trial, no counsel need be appointed. This presents him with the choice of assuming he can conduct a fair trial and not appointing counsel, or assuming the trial he conducts will be unfair, necessitating counsel for the accused. In this predicament, it would seem likely that most judges would feel no compelling need for appointed counsel. However, the judge still must consider a possible hearing in federal courts, where the rule is based, not on procedural fairness but on the individual defendant's need for assistance.

Another possible effect could be to eliminate most appeals in Colorado based on denial of due process for lack of counsel. The court has said that (1) such matters must be presented on writ of error, and (2) error or prejudice must be shown. Thus, where error is shown the judgment will probably be reversed on the basis of this error, and not for denial of due process. Therefore, it would seem the right to counsel has no substantive value, but only serves to emphasize errors appearing on the record.

A comparison of the *Moore* and *Freeman* cases shows a striking similarity in the facts and a striking contrast in the result. Moore was a scared, uneducated youngster who wanted to "get it over with" and be safe in prison. Freeman was only slightly older, just as uneducated, and was without friends or relatives to advise him. Moore, the Court said, was incapable of intelligently waiving his right to counsel and therefore the failure to appoint counsel was a denial of due process. Freeman was unaware and uninformed of his right to counsel, and nevertheless was found to have been fairly convicted.

The Colorado court assumes that if a defendant does not insist on his right to counsel he waives it, although he has not been informed of his rights. Under the facts of the *Freeman* case, a court following the more liberal rule would question whether such a waiver was intelligently made, and in view of the defendant's capabilities and the complexity of the charge might very well have reached a contrary result.

Trusts—Revocable Inter Vivos Trusts—Accumulation of Reserved Powers as Effecting Validity

BY ANTHONY J. DEUTSCH

Anthony J. Deutsch was graduated from the University of Notre Dame in 1954 with the Ph. B. degree. He is a student at the University of Denver College of Law.

Cora Lee Von Brecht, administratrix of the estate of Gustavus Adolphus Von Brecht, brought an action against the Denver National Bank, to set aside a trust agreement executed by the plaintiff's intestate under which the bank was named trustee. In his intervivos trust, the settlor had retained a life interest in the income together with the right to disapprove any sale or purchase of investments, in excess of one thousand dollars, suggested by the trustee, and the right to revoke, modify or amend the trust agreement. Plaintiff contended that the sum of powers, rights, dominion and control reserved by the grantor rendered him the virtual owner of the property and constituted the trust an illusory and abortive attempt to evade the statute of wills.

In each of two memorandum opinions, the trial judge concluded that the trust was void because it was testamentary in nature and did not comply with the requisite formalities for execution of a will. In the second memorandum opinion the trial judge also held that the trust agreement created an agency, since the settlor retained virtual control and dominion over the trust property. The Colorado Supreme Court concluded that the sole matter for determination was the question of the accumulation of reserved powers, and, reversing the lower court, *held* that the reserved powers did not void the trust. *Denver National Bank v. Von Brecht,* 10 Colo. Bar Ass'n Adv. Sh. 165 (1958).

Insofar as the reservation of powers affects the validity of revocable intervivos trusts, the courts are generally agreed that a reservation of the power to amend, modify and revoke the trust agreement will not make the trust testamentary.[1] Reservation of a power to withdraw, consume[2] or dispose of[3] the principal or corpus of the trust property does not invalidate the trust. Nor does the reservation of a beneficial life interest.[4] Where the settlor reserved control over the trustee in matters of investment, management and administration of the trust estate, the trust was held not testamentary in character.[5] These reserved powers have been treated as conditions subsequent which may operate to defeat the interests of the beneficiaries, but which, unexercised, do not prevent the vesting of equitable title.[6]

One area of powers which has given rise to much litigation is that dealing with the degree of control the grantor exercises over the trustee. Is the trustee a bona fide trustee with important duties to perform or is he merely an agent of the settlor of an illusory trust?[7]

---

[1] Farmers' Loan & Trust Co. v. Bowers, 29 F.2d 14 (2d Cir. 1928); American Bible Society v. Mortgage Guarantee Co., 217 Cal. 9, 17 P.2d 105 (1932); National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Whalen v. Swircin, 141 Neb. 650, 4 N.W.2d 737 (1942); Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938).

[2] United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); Whalen v. Swircin, supra note 1.

[3] Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942).

[4] Cribbs v. Walker, 74 Ark. 104, 85 S.W. 244 (1905); Rose v. Rose, supra note 2; Whalen v. Swircin, 141 Neb. 650, 4 N.W.2d 737, 739 (1942).

[5] Lewis v. Hanson, 128 A.2d 819 (Del. 1957); Keck v. McKinstry, 206 Iowa 1121, 221 N.W. 851 (1928); Leahy v. Old Colony Trust Co., 326 Mass. 49, 93 N.E.2d 238 (1950).

[6] United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946).

[7] This question was forcefully set out in Stouse v. First Nat'l Bank, 245 S.W.2d 914, 917 (Ky. 1952).

Divergence of legal opinion on this problem has narrowed to two general views, the conservative or New York rule, and the liberal or Massachusetts view.[8] An examination of the cases, however, proves this categorization to be general only, since each case presents its own peculiar reasoning.

The New York rule of *Newman v. Dore*[9] represents the conservative viewpoint. A more liberal policy favoring "living trusts" originated in the Massachusetts case of *National Shawmut Bank v. Joy*[10] and has been appropriately labeled the Masschusetts rule. The decision in the *Von Brecht* case follows the Massachusetts rule.

The Liberal View

National Shawmut, the case most frequently cited in support of revocable inter vivos trusts, contained a trust agreement which included powers to alter and amend or to make payments from principal if necessary, and reserved a power of appointment as well as a life interest. In addition, the bank trustee was specifically directed to hold, retain, invest and reinvest the property solely in accordance with written instructions of one Neville, a securities dealer. The legatees contended that this grant of power to Neville, in effect reserved the power over investments to the grantor himself. The Massachusetts court held the trust instrument valid. Against each attack based on a reservation of power the court ruled that the reservation did not invalidate the trust, and for each conclusion cited a long list of cases. The only reasoned conclusion concerned the investment supervision of Neville. Here the court held that the powers given to Neville did not make the trust a passive one because important duties were left to the trustees.[11] This conclusion holding revocable inter vivos trusts valid has been followed by the majority of court albeit for a variety of reasons.

In *Cleveland Trust Co. v. White,*[12] the Ohio Court held that certain reserved powers were not sufficiently broad to destroy the trust or to reduce the trustee to a mere agent of the settlor. Here the exercise of reserved powers was made dependent upon the trustee's acquiescence. Against the appellants' contention in a Kentucky case[13] that the trustee was an agent of the grantor, the court held the trust valid. In so doing, the court meticulously set forth the specific, well defined powers of the trustee and specially noted that the grantor, unless she chose to revoke the trust, could exercise no control over the assets except by giving directions within the terms of the trust instrument.

Nebraska has upheld a revocable trust on the basis that if the fund, or any part of it, is permitted by the settlor to remain in existence, the beneficiaries have the right to enforce the trust as against the trustee.[14] A federal court in Arkansas ruled that transfers of present interests to the beneficiaries were effected and that powers reserved were in the nature of

---

[8] See Restatement, Trusts § 57 (1) (1935), covering the reservation rule. The details of administration—agency rule are covered in § 57 (2). See also 1 Bogert, Trusts and Trustees §§ 103-04 (1951); 1 Scott Trusts §§ 57.1, 57.2 (2d ed. 1956).

[9] 275 N.Y. 371, 9 N.E.2d 966 (1937).

[10] National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944).

[11] 53 N.E.2d at 125.

[12] 134 Ohio St. 1, 15 N.E.2d 627, 630 (1938).

[13] Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1952).

[14] Whalen v. Swircin, 141 Neb. 650, 4 N.W.2d 737 (1942).

conditions subsequent.[15] Since the powers remained unexercised the beneficiaries were entitled to have the trusts administered.

The important duties of the trustee in *Rose v. Rose*[16] had been cut down by a supplemental agreement made by the grantor five years after he executed the original instrument. Yet the Michigan court held the trust valid; for the trustee still had duties while the settlor lived, and was to see that, after his death, inheritance taxes were paid from funds made available for the latter purpose.

A 1950 Massachusetts case followed the precedent of the *National Shawmut* case, decided six years earlier. In *Leahy v. Old Colony Trust Co.*,[17] the court found that the trustee was authorized, but not required, to act under the grantor's direction. The trust was upheld since the trustee had not been reduced to impotence, but retained important powers, including that of deciding whether or not to follow the grantor's directions.

A more complete and thorough reason for upholding a living trust appeared in a 1951 Pennsylvania decision.[18] There the trustees were to pay the settlor's children the net income or profits derived from the property. Because there was a large measure of discretion incident to paying some of the charges before arriving at net income, it was held that the trustees had been given active duties to perform, by necessary implication. Further, the court held that even if the trust had been passive, the settlor would not thereby have retained title since the trust would have been executed by the Statute of Uses which is force in Pennsylvania. In resolving the agency aspect of the attack on the trust, the court relied on the fact that the transaction was formally executed.

In spite of extensive powers of control reserved by the settlor in an early Illinois case,[19] the trust agreement was upheld because land was the subject matter of the trust and there was a formal agreement. An extreme position was taken by the Iowa court in *Keck v McKinstry*.[20] There the trustor retained active management of the property during his lifetime, and the performance of active duties by the trustee, besides being postponed until after the trustor's death, was contingent upon the trustee's surviving the trustor. The court held that there was no semblance of an agency either in name or purpose since the acts of the trustee would not be acts of the trustor but would be the trustee's own acts in his own name as trustee.

An eminent scholar has criticised the courts for the extremely liberal stand taken in construing inter vivos instruments to be valid deeds and not invalid attempted wills.[21] He has deounced the vesting of legal or equitable interests as too nebulous to be recognized because the trust can be revoked and all interests are subject to divestment. Rather, he suggests analogizing the problem to certain tax-developed principles[22]

[15] United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946).

[16] 300 Mich. 73, 1 N.W.2d 458 (1942). The Michigan Court refused to follow the New York rule, finding that the grantor had not transferred property so as to fraudulently deprive his wife of dower rights. The court found that the defendant husband provided liberally for her, transferring a large part of his property to her inter vivos by joint deeds and joint bank accounts.

[17] 326 Mass. 49, 93-N.E.2d 238 (1950).

[18] In re Sheasley's Trust, 366 Pa. 316, 77 A.2d 448 (1951).

[19] Kelly v. Parker, 181 Ill. 49. 54 N.E. 615 (1899). The Kelly case, along with another early case, seemed to firmly align Illinois as liberal in upholding living trusts. But see: Smith v. Northern Trust Co. 322 Ill. App. 168, 54 N.E.2d 75 (1944) (instrument held colorable and illusory citing the Newman case and following the New York rule).

[20] 206 Iowa 1121, 221 N.W. 851 (1928).

[21] 1 Bogert, Trusts and Trustees §§ 103-04 (3d ed. 1952).

[22] See, e.g., Int. Rev. Code of 1954, § 2038(a)(1) (estate tax provision governing revocable transfers).

under which settlors of revocable trusts are considered the owners of the trust corpus for purposes of federal income and estate taxation. Another author has disagreed with this reasoning and patterned his views along the lines of the Massachusetts rule.[23]

Divergent views of the supreme courts of two states met head-on in *Lewis v. Hanson*.[24] In that case the grantor, a Pennsylvania resident, entered into a trust agreement with a Delaware trustee in 1935. In 1944 the grantor moved to Florida where she was domiciled at her death in 1952. The Florida court ruled the trust invalid while the Delaware court upheld its validity. The main thrust of the attack was based on limitations of the trustee's power to act only with the consent of a trust advisor. The trustor reserved power to name and change the advisor.[25] The Delaware Supreme Court held that the powers of the trust advisor did not prevent the trustee from exercising independent judgment.[26] Apparently the Florida court based its decision on the theory that each exercise of a power of appointment[27] was an amendment and republication of the original agreement, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of the grantor domiciled in Florida, the validity of those remainder interests was to be tested by Florida law.[28]

The Conservative View

Conservative jurisdiction, i.e., those following the New York rule, have held purported trusts invalid on two distinct grounds. One is that the transaction is illusory because it violates the spouse's right to the property. Such was the case in *Newman v. Dore*.[29] Illinois followed *Newman v. Dore* in a 1944 case,[30] holding the transfer of title to the trustee, although absolute in form, was merely colorable and illusory.

The second ground relied on by conservative jurisdictions in holding purported trusts testamentary, is the element of intent on the part of the grantor. After an exhaustive survey on the definition of words, the supreme court of Missouri concluded that the grantors did not intend to pass title in praesenti,[31] and held a trust instrument void ab initio. In a four to three 1955 decision the Virginia court, held that a transfer of life insurance policies was testamentary since the settlor had said in unequivocal language that no interest was to pass during his lifetime.[32]

Dunham v. Armitage[33] presented the first case in Colorado in which a living trust and the question of the sum of powers retained by the grantor was before the court. The court held that the reservation and control over the property in addition to the right to revoke at the pleasure

---

[23] 1 Scott, Trusts § 57.2 (2d ed. 1956).

[24] 128 A.2d 819 (Del. 1957).

[25] The facts of the case and the circumstances are similar to National Shawmut and the court here followed the Massachusetts rule.

[26] 128 A.2d at 828.

[27] The grantor exercised the power of appointment on two occasions. 128 A.2d at 828.

[28] This case comment expresses no opinion on the question of conflict of laws or on applicability of the full faith and credit clause.

[29] The court cited and relied on Restatement, Trusts, § 57(1)(2) (1935); 1 Bogert, Trusts and Trustees §§ 103-04 (3d ed. 1952); 1 Scott, Trusts § 57.1, 57.2 (2d ed. 1956).

[30] Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944).

[31] Atlantic Nat'l Bank v. St. Louis Union Trust Co., 357 Mo. 770, 211 S.W.2d 2 (1948).

[32] Bickers v. Shenandoah Valley Nat'l Bank, 197 Va. 145, 88 S.E.2d 889 (1955).

[33] Dunham v. Armitage, 97 Colo. 216, 48 P.2d 797 (1935). The Dunham case, on which the lower court relied as controlling in Von Brecht, and Smith v. Simmons, note 36 infra, stood for the proposition that purported trust agreements are testamentary where control over the corpus has been retained by the settlor. The Simmons case was not cited in the supreme court's opinion in Von Brecht.

of the creator made the instrument testamentary in character. Although there was no specific right to withdraw or consume the principal, the lesser powers, added to the power of revocation, convinced the court that the instrument was testamentary and not a valid living trust. Further scrutiny of the court's opinion shows that the decision did not rest solely on the question of powers retained by the grantor. The grantor had stated that, in the absence of revocation, upon her death the real estate was to become the property of the plaintiff in error. From this the court concluded that the grantor had not intended the trust to be effective for any purpose prior to her death.

The decision of the Colorado court rested more clearly on the question of control retained by the grantor in *Smith v. Simmons.*[34] In this case the disposition was held to be testamentary. No power to revoke was reserved. The court apparently took the position that no valid trust was created because of the complete power of the purported settlor over the property constituting the corpus. Emphasis was placed upon the right of the alleged settlor to request and receive all or part of the corpus at her pleasure.

Another living trust case appeared in *Brown v. International Trust Company.*[35] There the trust was upheld but no light was shed on the present problem since the only issue to be decided was the manner in which the power of revocation was reserved. The court refused to alter or amend the trust on the basis of the trust being a contract between the grantor and the trustee.

Reservations of power were not in issue in *Richard v. James,*[36] where an irrevocable trust which had been recorded the day after its execution was upheld in the Colorado Supreme Court against a fraud charge by the wife. The trust, in effect, was subject to a power of revocation since the trust deed explicitly made the corpus subject to taxes and lawful debts incurred by the grantor during his lifetime, if his estate should be unable to pay them.

In addition to the administratrix's contention in *Von Brecht* that the sum of powers reserved to the settlor amounted to absolute control, two further attacks on the instrument had prevailed in the lower court. The district court held that *Dunham v. Armitage* was controlling. In *Dunham* the trust instrument had been held testamentary in nature because of its reservation of possession, full control and the power of revocation. However, the supreme court refused to be persuaded that *Dunham* controlled *Von Brecht.* Rather the high court distinguished the cases on the ground that a fact vital in *Dunham,* the reservation of possession, was not present in *Von Brecht.*

Finally, there appeared in *Von Brecht* a threat to revoke the trust unless the settlor's request for a certain investment was complied with. In the lower court's first memorandum opinion, it was held that this threat of revocation, in addition to the cumulative effect of the retained powers, made the trustee a mere agent of the settlor. However, the supreme court stated that the mere threat of revocation did not amount to a revocation, citing *Brown v. International Trust Company.*[37]

[34] 99 Colo. 227, 61 P.2d 589 (1936).
[35] Brown v. International Trust Co., 130 Colo. 543, 278 P.2d 581 (1954).
[36] Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956).
[37] 130 Colo. 543, 278 P.2d 581 (1954).

Conclusion

The opinion in the *Von Brecht* case firmly sets forth two important features of the law of revocable inter vivos trusts in Colorado.[38] In the decision, the supreme court reiterated its holding in the *Brown* case to the effect that if a particular method of revocation is specified, that procedure must be strictly followed in order to make the revocation effective. Secondly, in regard to the accumulation of reserved powers, the court ruled that the *Von Brecht* instrument was not testamentary, holding that the settlor did not go too far in reserving the so-called veto power concerning investments proposed by the trustee and further, that no agency relation existed.

In summary, it is clear that the question whether an instrument is valid as a revocable inter vivos trust or void as testamentary in character raises persistent difficulties. As a review of the cases and authorities reveals, there exists but a fine line of demarcation. To resolve the problem many courts have struggled, unsuccessfully, to reach some kind of reliable standard. The minds of the judiciary, in the majority of cases, have arrived at similar conclusions but for varied reasons. A possible solution is the development of a multiple standard based on a consideration of intent, interests and instrument. If the settlor shows a bona fide *intention* to create a trust under which present or future *interests* vest in the beneficiaries through the use of a formal *instrument,* the possibility of attack as a testamentary instrument should be reduced if not completely dismissed.

[38] The Von Brecht case was reversed and remanded with directions to hear and determine several issues presented by the pleadings only one of which was resolved by the summary judgment order. Rehearing in the supreme court was denied March 24, 1958.