



# PLAIN MEANING IN THE LAW OF PROPERTY

A SOCRATIC DIALOGUE

*John V. Orth*

**S**CENE: A classroom in a modern American law school. The school is neither at the top nor the bottom of the law school rankings. The room is well lit and has a white-board in front and plain white walls with high windows across the back. Student desks rise, row on row, to the rear. There is a raised platform in the front with a desk and podium. At the podium stands a young professor, aged about 35. He is just short of six feet tall, clean-shaven with dark hair and eyes. He is neatly but casually dressed in tan slacks and white shirt. His shirt collar is open and the knot of an undistinguished tie hangs about 4 inches below. He is addressing a class of about 40 students, although the room would seat two or three times that number.

*Professor:* Today we're going to have a brief discussion about trust construction, that is, the interpretation of the terms of a trust instrument, before we go on to consider the effect of inherited wealth on our society. Although we'll be talking about a trust, the lessons could apply to the interpretation of wills – or any other document, for that matter. Now, in the old days you would have been assigned

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a case to read, and we would have spent half the class working through the facts before we even got to the law. To save time, I've just cut the key paragraphs out of a recent Utah case, *Banks v. Means*,<sup>1</sup> and posted them on-line. You should have read them as part of today's assignment, and we can all look at them together on the screen:

*Projected on the screen behind the professor appears the following text:*

BETTY A. BANKS FAMILY TRUST

Article I, entitled PURPOSES, declares "This Trust is established for the primary benefit of the Undersigned during the Undersigned's lifetime, and for the Undersigned's family thereafter." The document then names Ms. Banks' family as Kenneth Alan Banks, Susan Banks Baker, and Bransford Michael Banks. Article IV, DISPOSITION ON THE DEATH OF THE UNDERSIGNED, designates the Banks children as joint beneficiaries of the trust estate upon Ms. Banks' death. Article VI, TRUSTEE PROVISIONS, names the Banks children as joint successor trustees. The trust agreement provides that the trust is revocable, and that Ms. Banks, as settlor, can amend certain portions of the trust, subject to the provisions of the trust language.

Article III, entitled AMENDMENT, REVOCATION AND ADDITIONS TO TRUST, provides:

3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee. On the revocation of this instrument in its entirety, the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property.

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<sup>1</sup> 52 P.3d 1190 (Utah 2002).

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3.2 Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustees named herein in their fiduciary capacity.

*Prof.*: Before we get to the construction problem, let's just get the big picture. The "undersigned," by the way, is the settlor of the trust, Betty A. Banks. This is a revocable inter vivos trust. Will someone please tell us what it means to be an inter vivos trust?

*Student 1, an intense looking young woman with dark hair and eyes*: It means the settlor, in this case Betty Banks, created the trust during her life.

*Prof.*: Well, when else could a person create a trust, if not while they're alive?

*S. 1*: At death – in their will. Then it would be a testamentary trust.

*Prof.*: Yes. Good. And the "revocable" part?

*S. 1*: This trust can be revoked by Betty.

*Prof.*: And after her death?

*S. 1*: Once Betty is dead, I guess her trust becomes irrevocable.

*Prof.*: Right. And who is the present beneficiary of this trust?

*S. 1*: Betty. It says it's for her primary benefit during her lifetime.

*Prof.*: Yes. And can you tell me who the trustee is?

*S. 1, after a brief pause*: It doesn't say.

*Prof.*: No, it doesn't. Would the trust fail if no trustee was named?

*S. 1*: No. "No trust fails for want of a trustee." A court would appoint one, if necessary.

*Prof.*: Right. I'm guessing this trust actually does name someone – probably it's somewhere else in the court's opinion. Can you guess who was named trustee?

*S. 1*: Probably Betty.

*Prof.*: That's my guess, too. I would guess that Betty, the settlor, who is the lifetime beneficiary, is also the trustee.

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*Student 2, a confused looking young man with dark hair and glasses:*  
Professor!

*Prof.:* Yes.

S.2: How can the same person be the trustee and the beneficiary? I mean, how can one person be holding property for his own benefit? That sounds like ownership to me.

*Prof., patiently:* We talked about this last week. If there was no other beneficiary, you would be right: the legal and equitable estates would merge and the trust would terminate. But in this case there is another beneficiary or beneficiaries. And who is that?

*S.1 again:* Betty's children.

*Prof.:* Right.

*S.2 again:* Professor!

*Prof.:* What is it?

S.2: The trust says any change in terms must be delivered in writing to the trustee. Does that mean she has to write a letter to herself?

*Prof.:* Yes, it would, if she is the trustee. That's not quite as strange as it sounds. It's often the case that trust instruments require that amendments have to be in writing and delivered to the trustee, and the wording is often carried over into self-settled trusts. You certainly want a written record if any changes were made. And if the writing is in the settlor's possession, it means they intended it. Okay, moving on . . . , I'm going to put up the change Betty made a few years later. I assume it was in writing and "delivered" to her – that is, her lawyer drafted it and she signed it and kept it with the original document.

*Projected on the wall behind the Professor now appears the following text:*

Article IV, DISPOSITION ON THE DEATH OF THE UNDERSIGNED, now designates Ms. Banks' sister, Nancy A. Means, as sole beneficiary of the trust estate upon Ms. Banks' death, and Article VI, TRUSTEE PROVISIONS, names Nancy A. Means as sole successor trustee.

*Prof.:* By the way, the reference to a successor trustee suggests that Betty was the original trustee. At her death a successor trustee

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takes over. Remember that it's handy to name the remainder beneficiary as the successor trustee. She did that when her kids were the remainder beneficiaries, and when she substituted her sister Nancy, she named Nancy successor trustee too. Anyway . . . , you can probably guess what happened next since this is the “course in unhappy families.” We've seen children suing parents, brothers suing sisters, and so forth. Betty died and the Banks kids sued their Aunt Nancy. What you might not have been able to guess is that the Utah Supreme Court ruled in favor of the kids! Can anyone see how that was possible?

*Silence.*

*Prof.:* Well, I'll tell you. Look back at the trust terms. See where it says under 3.2 *Interests of the Beneficiaries*, “The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked.” Believe it or not, the learned judges said: Well, Betty never revoked the trust, she only amended it. So the kids' interests were never divested and they win!

*A student has raised his hand.*

*Professor, irritated at the interruption:* Did you want to ask a question?

*Student 3, a balding older student with a bookish air:* Yes, sir. What does it mean when it says “revoked or terminated other than by death”?

*Prof. sharply:* Where does it say that?

*S.3:* At the end of the sentence you just read: “The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked *or terminated other than by death.*”

*Prof.:* Oh, yeah. Well, it's obvious, isn't it? At Betty's death, the trust will terminate because the beneficiary will get everything. So, that sentence just means that the trust continues until it is revoked or terminated by Betty – or until Betty dies.

*S.3, puzzled:* But if the trust terminates at Betty's death, why does she name a successor trustee?

*Prof., somewhat hurriedly:* Just to make things easier. We just

talked about that. The only thing the successor trustee will do is transfer legal title to the beneficiary – in this case, herself. Now . . . , back to where we were: the court’s reasoning, such as it is. The justices thought because Betty never revoked or terminated her trust, the kids’ interest remained vested. All Betty did was amend the trust! Believe it or not, judges used to do things like that all the time, and a few of them still do. The instrument says she had to revoke or terminate the trust in order to change the beneficiaries and all she did was amend it! That’s the so-called “plain meaning rule.” If a trust instrument has a so-called plain meaning, then the judges will apply that, even if there is good evidence that the settlor intended something else. You can see why it’s not called the plain intention rule! Betty’s intention is plain as day. She changed her mind and wanted her sister to take her property instead of her kids. She said that plainly enough. Nowadays we’ve abandoned the old literal approach in favor of simply doing the right thing . . . . Oh, and one other thing, that bit about the kids’ interest in the trust being “vested subject to divestment” needs to be taken with a big grain of salt today. Originally, it was inserted to show that a “present interest” passed, even if it was subject to divestment, in order to show that the trust wasn’t a will, which would need two witnesses. Nowadays we recognize that an inter vivos trust really operates just like a will – or, as we usually say, a “will substitute” – even though it doesn’t need to be executed with all the formalities of a will. What sense does it make anyway to say that the beneficiaries’ interest is vested when it can be divested at the whim of the settlor? The beneficiaries’ interest in a revocable inter vivos trust is really just like the interest of a person named in a will while the testator is still alive and able to change it. One modern court that “gets it” put it this way: a beneficiary’s interest in a revocable inter vivos trust is “contingent at most,”<sup>2</sup> which means it isn’t much of an interest at all, pretty much like an “expectancy” under a will. All right, class, the take-away lesson is that today we interpret documents to let people do what they want with their own property, to give effect to plainly

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<sup>2</sup> *Linthicum v. Rudi*, 148 P.3d 746 (Nev. 2006).

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expressed intention, and not to let a literal reading get in the way. This should be so obvious that I wouldn't take class time on it, except you need to be aware of how the old "plain meaning rule" could defeat intention. Oh . . . , and also notice what a crummy job Betty's lawyer did as well. There was no need for a simple change like this to require litigation all the way to the state supreme court. If she wanted to stick with the vested-interest bit, all she needed to say was that the interest continued until the trust was revoked or terminated *or amended*. Now, for the rest of the hour . . . .

*A student's hand is raised, and the Professor, impatient at the interruption: Did you have a question?*

*Student 4, a young man with short blond hair and a gold earring in his left ear: I'm not convinced that the result was wrong.*

*Prof., sharply: Why not?*

*S.4: Well, first, the judges are right about what the trust instrument says. Just read the words. Betty didn't revoke or terminate her trust. And she never changed the first article which says that the trust is for the primary benefit of herself for life and then for her family, defined as her kids. And it says that the kids' interests are vested until the trust is revoked or terminated. I was reminded of the case you mentioned the other day about the old woman who was so harassed by her greedy kids that she made a new will leaving everything to them and then, while they watched, she burned up a will – only it wasn't the old will, it was the new one. She seemed to know just what she was doing. And it bought her peace and quiet until her death, when the truth came out. I think you said something like: "The old woman fooled them all."*

*Prof., hurriedly: Yes, you're right about that. That was the Heibut Case.<sup>3</sup> We were talking about revocation and revival of wills.*

*Prof., continuing after a pause: And since you brought it up, I guess we'll have to take a few minutes for a quick review. In some states, like the state where Heibut arose, revocation of a new will brings back, "revives," the last will. Remember, that's not true in all states, so the old lady got lucky. When she burned the new will, the old*

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<sup>3</sup> Estate of Heibut, 653 N.W.2d 101 (S.D. 2002).

will come back to life. But you don't seriously think Betty "amended" her trust in favor of her sister, knowing it would not in fact work, do you?

S.4: We don't know what she really wanted or knew. All we know is what the trust says.

Prof.: Yes, okay. But it seems too far-fetched to me. Well, let's go on.

S.4 raises his hand again.

Prof.: What?

S.4: Well, I went and read the case, and it got me thinking.

Prof., with mild sarcasm: That's good.

Laughter.

S.4, undeterred: This case included an undue influence claim and a claim of lack of capacity. Betty changed the trust only a few weeks before she died. And Nancy, her sister, was described as Betty's older sister. I was wondering if Nancy had recently moved in with Betty, who was probably a widow, and talked her into changing the trust right before she died. Maybe Nancy got greedy. Or maybe she was just an old woman who was afraid of running out of money.

Prof.: Well, so what? I mean, the court must have dismissed the undue influence and lack of capacity claims – or they wouldn't have gotten to the construction question.

S.4: No, they didn't dismiss them, they just said they didn't need to decide them. The judges might have thought that there was a real chance that there had been undue influence, or that Betty was really unable to know what she was doing. And another thing: Nancy was determined to keep Betty's lawyer from giving evidence. That seemed pretty suspicious to me. Maybe the judges thought it would be too messy to go into all that – you know, the nephews and nieces calling their Aunt Nancy a liar. By deciding the case the way they did, they could avoid that – and give the property to the kids.

Prof.: But that's what not what Betty really wanted.

S.4: We don't know what she really wanted. We only know what she really said.

After a pause, the Professor, in a determined tone: Well, we only have a few minutes left, but we can at least begin to get to the policy dis-



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cussion . . . .

*S.4, interrupting:* May I ask one more question?

*Prof., resigned:* You may as well. We're almost out of time anyway.

*S.4:* If Aunt Nancy had won this case, what would have happened to the property when she died? After all, she was older than Betty, who had three grown children, so Nancy couldn't have too long to live herself.

*Prof.:* Obviously the trust property would have been Nancy's to dispose of as she saw fit.

*S.4:* So, she could have left it to her kids, if she had any. Or to a friend, or a charity. Or, whatever.

*Prof.:* Of course. But I don't know how any of that matters. If Betty wanted Nancy to have everything, then Nancy should have gotten everything, and then she could have done whatever she wanted with it.

*S.4:* Yes, but maybe the judges thought Betty would have preferred her kids to get her property after Nancy.

*Prof.:* Well, if that's what she wanted, she should have said that. She didn't say "to Nancy for life, then to my kids." She just said "to Nancy." Anyway, we can't try to guess what the judges really thought. We can only go by what they said.

*S.4:* That's just the point. Maybe we should just go by what Betty said, and not try to guess what she thought.

*An awkward silence is broken by the bell, and the students begin noisily closing their laptops and pushing back their chairs.*

*Over the noise, the Professor shouts:* Well, we've run out of time. We'll have to try to catch up tomorrow.

