

## Question MEE 6 – February 2025 – Selected Answer 1

1. Is the trust revocable or irrevocable?

The issue is whether the trust is revocable or irrevocable.

An inter vivos trust is one created when the settlor is alive and not by will. The General rule is that an inter vivos trust is presumed to be revocable by the settlor unless the settlor expressly makes the trust irrevocable.

The facts here expressly provide that the trust is silent as to whether it is revocable or irrevocable.

Therefore, the general presumption that an inter vivos trust is revocable will stand because the trust is silent. this is a revocable trust.

There's also an issue of this being a self-settled trust, with the settlor naming herself as beneficiary. Depending on the jurisdiction, this might cause the trust not to be spendthrift, but it has no bearing on whether the trust will be revocable.

2. a) Does Shirley have an interest in the trust?

The issue is whether Shirley has an interest in the trust.

Generally, there are three types of people who hold interests in a trust. The first is the trustee, who holds legal title to the trust property. The second is the beneficiary, who holds equitable title to the trust property and are usually entitled to a benefit of the property in the present. The third are future interest holders, or remaindermen, who take possession of the trust property after the trust terminates.

Shirley has been given a future interest in the trust property because she is the one who takes possession of the principal upon Alice's death. She is therefore a future interest holder.

b) Assuming that Shirley has an interest in the trust, how is this interest characterized?

The issue is the categorization of Shirley's interest in the trust property.

The future interest of one who will take title to the trust property after the termination of the trust, however measured, usually has a "remainder." If the remainder is subject to a condition precedent, then the remainder is a contingent

remainder. If the remainder is certain to cause the future interest holder to take possession of the trust property, then the remainder is vested. And finally, if the remainder is subject to a condition subsequent which could cause the remainder to disappear, then the remainder is vested and subject to divestment.

Here, Shirley will take the trust property if Alice does not revoke the trust before her death, and after Alice dies. This likely causes the interest to be classified as a vested remainder subject to divestment.

Alice's death is guaranteed to cause Shirley to take possession of the principal - there are no further conditions precedent. However, because the trust is revocable, there is an implied condition subsequent that would cause the future interest to be divested from Shirley if Alice revokes the trust.

However, if the trust is irrevocable, then Shirley's remainder is a vested remainder, as it would be certain to cause her to take possession of the principal, and there would be no condition subsequent that could divest the remainder from Shirley.

But since the trust is revocable, Shirley most likely holds a vested remainder subject to divestment.

3. Assuming that Shirley has an interest in the trust, does she have a claim against the bank for making the imprudent investment?

The issue is whether Shirley has an interest in the trust giving rise to a claim against the bank for making a prudent investment.

The trustee generally owes a duty to the beneficiary to invest in a reasonably prudent manner, and by extension, a duty to a future interest holder to invest in a reasonably prudent manner and thereby not imprudently diminish the value of the principal. The trustee's first duty is to the beneficiary, but if the trustee breaches the duty to the future interest holder with no reasonable justification such as making payments to the beneficiary, then the trustee can breach its fiduciary duty to the future interest holder.

Here, Bank made an imprudent investment at the direction of Alice, settlor and beneficiary. While the investment would ordinarily cause there to be a breach of fiduciary duty, the settlor/beneficiary can authorize particular investments knowing that they are imprudent.

Because the Bank's duty to the beneficiary is prioritized over the Bank's duty to the future interest holder, Shirley is not likely to have a viable claim against the bank for making the imprudent investment because Alice authorized the investment.

4. Between Shirley and John, who has the legal authority to direct the doctor whether to remove Alice from the life-support system?

The issue is who has legal authority to direct the doctor to remove Alice from the life-support system.

the jurisdiction has a health-care power of attorney act, which allows sick people to execute a durable power of attorney. That express power of attorney will control despite the execution of any other documents, including a trust.

Therefore John is likely to have the legal authority to direct the doctor whether to remove Alice from life support.

Moreover, Alice is an interested party, as someone whose future interest only becomes possessory as of Alice's death. The law provides that in this situation, it would not be proper for Alice to have power over life support because she will profit from Alice's death. And so the durable power of attorney executed in John will control, and Alice's statements over the phone cannot override her durable power of attorney giving John the ability to make health care decisions for her in the express condition that she not be able to make decisions for herself.

John has the authority to direct the doctor on whether to remove Alice from the life support system.

## **Question MEE 6 – February 2025 – Selected Answer 2**

### **1. The trust is revocable.**

At issue is whether a trust under the UTC is presumed to be revocable.

At common law, a trustee must expressly reserve the right to modify or revoke a trust in order for it to be considered revocable. However, the Uniform Trust Code (UTC) and some states presume that a trustor intended for a trust to be revocable regardless of whether the trust document specifically reserves this power. Further, it is generally presumed that, where the trustor is also the beneficiary of the trust, the trust is

intended to be revocable. A revocable trust will become irrevocable upon the trustor's death.

Here, the jurisdiction has adopted the Uniform Trust Code four years before Alice created the trust. The trust agreement itself is silent regarding the revocability of the trust. However, per the UTC, the trust will be presumed to be revocable absent an intent to the contrary demonstrated in the trust agreement. Alice also was the beneficiary of the trust.

Therefore, the trust is revocable per the UTC.

## **2. Shirley is the principal beneficiary of the trust.**

At issue is whether a future principal beneficiary of a revocable trust has a valid interest in the trust.

A beneficiary of a trust may be a future beneficiary, and such beneficiary may be the beneficiary of the principal or an income interest. That beneficiary is vested if there is no condition precedent to her taking the future interest and she is an ascertainable person. An interest in a revocable trust, however is subject to total defeasement until such trust becomes irrevocable.

Here, Alice's trust provides that she will be the income beneficiary of the trust, and, upon her death, the trust principal would be distributed to Shirley. Therefore, Shirley is the principal beneficiary of the trust. Additionally, as Shirley is an ascertainable person and there is no condition precedent to her receipt of her trust interest, she has a vested interest, but given that the trust is revocable (see above), it is subject to total defeasement until Alice's death, as Alice could revoke the trust and Shirley's interest at any time until then.

Therefore, Shirley is the principal beneficiary of the trust with a vested interest subject to total defeasement.

## **3. Shirley likely does not have a claim against the bank for the imprudent investment.**

At issue is whether the trustor/primary beneficiary may properly allow the trustee to invest imprudently, despite the trustee's fiduciary duties owed to all (including future) beneficiaries.

In general, the trustee of a trust owes a fiduciary duty to all beneficiaries of the trust, whether primary, future, or as yet unascertainable. This duty is of care and loyalty, and the duty to administer the trust in good faith, prudently, and impartially as to all beneficiaries. Additionally, the trustee's duty also includes the duty to preserve and protect trust property and make it productive. Under this latter duty, the trustee has the duty to invest trust property using the reasonable care, skill, and caution of a prudent investor. This is known as the prudent investor rule. As part of this duty, the trustee has a duty to diversify investments, and, if the trustee has a higher level of skill, exercise such skill. This duty is evaluated on a portfolio basis, so that the investment strategy as a whole is considered. The trustee generally may not diversify trust investments if the purposes and nature of the trust and the needs and expectancies of the beneficiaries would be better served by not doing so.

While this duty is owed to all beneficiaries, some courts and the UTC have held that, where the trustor is the primary beneficiary of the trust and the main purpose of the trust is to provide for the trustor, the trustor may properly authorize the trustee to dispense with the prudent investor rule if the trustor specifically authorizes doing so. The trustee would have to reasonably believe that the trustor was competent to make such a decision.

Here, Alice is both the trustor and the primary beneficiary of the trust. She is the sole beneficiary of the trust income, and Shirley only gets her interest upon Alice's death. While the bank owed all of the duties listed above to both Alice and Shirley, the UTC would allow the bank to make an investment at the direction Alice as both the trustor and the primary trustee. The facts indicate that Alice had approved the investment with the knowledge that it was imprudent. Further, the facts show that Alice was fully competent in making such a decision.

Therefore, it was proper for the bank/trustee to make the imprudent investment, and Shirley likely will not have a claim due to the investment, even though the bank owes her such a duty generally.

#### **4. John as the legal authority to direct the doctor to remove Alice from the life-support system.**

At issue is whether a durable health-care power of attorney is valid under the UTC and whether such document grants the named agent a power to remove the principal from life support.

Under most states and the UTC, a person may validly execute a durable health-care power of attorney that directs an agent to make healthcare decisions on behalf of the

principal. The power of attorney may be properly conditioned on the principal's inability to make such decisions personally. Under such a document, if a medical doctor properly finds that the principal is unable to make a health-care decision personally, the agent has the legal authority to do so on behalf of the principal.

The power of authority must be written, express, signed by the principal, and clearly identify the agent and scope of the authority to be valid. Some states require this document be either witnessed by competent witnesses or notarized to be proper. The agent is under a duty to the principal to use reasonable care in exercising the authority and to follow the directions of the principal in carrying out the authority. The agent must also exercise the utmost loyalty in exercising the power. Mere wishes or musings do not validly create a proper DPOA.

Here, Alice validly executed a DPOA in favor of John, granting him the legal authority to make healthcare decisions on Alice's behalf. Therefore, John has the legal authority to direct to the doctor to remove Alice from life support. Alice explicitly told John that she does not want to be on life support "if there is little or no hope for my recover." John owes Alice the duty of care that a reasonable person would exercise, and because the doctor has said "we will know more in a week," John would not act prudently to take Alice off the life support until he knows there is little or no hope for her recovery.

Although Alice shared her healthcare wishes with Shirley, she "mused" and shared them over the phone. There was nothing written and signed by Alice, and this communication was not an express grant of authority. Alice told Shirley she "never wanted to be connected to life support," but this was not a valid exercise of DPOA and Shirley has no authority here.

### **Question MEE 6 – February 2025 – Selected Answer 3**

#### **1. Is the trust revocable or irrevocable?**

The issue is whether or not when the trust was formed whether Alice expressly stated the trust was irrevocable.

When a valid trust is formed, there is a presumption that the trust is revocable unless expressly stated in the trust agreement otherwise.

Here, when Alice formed the trust, nothing in the trust agreement stated whether the trust was irrevocable or revocable. Because of that there is a presumption it is revocable.

Alice's trust is revocable.

## **2. a. Does Shirley have interest in the trust?**

The issue is whether Shirley as beneficiary of trust principal upon the death of Alice has an interest in the trust.

A remainder interest is an interest in the principal of trust that will cause the principal to pass to you upon the termination of the trust.

Shirley is the named individual who is set to receive the interest in the remaining trust principal upon the termination of the trust. The trust will terminate upon the death of Alice.

Because she is the remainderman, she has an interest in the trust.

## **b. Assuming Shirley has an interest in the trust, how is this interest categorized?**

The issue is whether or not Shirley has a vested or unvested interest in the trust principal.

For an interest to be vested, it must be received by the person without any conditions attached.

Here, Shirley has received an interest in the trust principal upon the termination of the trust, with no conditions attached as far as Shirley's conduct. This would normally satisfy and be classified as a vested interest. However, because this is a revocable trust, there is a condition on her interest. That condition is that Alice does not, revoke her trust prior to termination, which is still a possibility.

Once Alice passes away, the trust will become irrevocable and Shirley's interest will become vested, but **prior to that** this is an unvested interest.

## **3. Assuming that Shirley has an interest in the trust, does she have a claim against the bank?**

The issue is whether or not the bank was justified in not acting as a reasonably prudent investor.

Trustee's must operate with a duty of care to both the trust property and the beneficiaries. This duty requires that they make investments as a reasonably prudent investor. However there is an exception if the primary beneficiary waives this standard for the trustee.

Here the bank self-admittedly made imprudent investments with 30% of the trust assets, violating its duty of care. Normally, that would satisfy for the beneficiaries to have a claim against the trustee. However, this duty was waived for that particular investment because Alice, specifically directed the bank to make the investment knowing it was imprudent.

Shirley did not give approval or waive the standard of care for the investment, but because Shirley has only an unvested interest in the trust, she is not considered a beneficiary that the trustee has a duty towards. The bank would only owe Shirley duty once the trust was irrevocable and her interest vested.

Shirley does not have a claim against the bank for imprudent investments.

#### **4. Between Shirley and John who has the legal authority to direct the doctor whether to remove Alice from the life-support system?**

The issue is whether John or Alice are the durable health-care power of attorney.

To make decision on behalf of someone's medical care, you must have the authority of a properly executed durable health-care power of attorney.

Here, Alice had a stroke and has been connected to a life-support system. Her doctor has determined that Alice is no longer able to make her own health-care decisions. Alice, prior to her stroke, had had two separate conversations, stating her desire with varying degrees of forcefulness that she did not want to be placed on life support. Shirley wishes to follow those wishes and have Alice removed from life-support. However, John is Alice's health-care power of attorney, which in his case was expressly limited to become effective once Alice could no longer make health-care decisions for herself. Because Alice is no longer capable of making health-care decisions, John has the authority to as health-care power of attorney to direct the doctor on whether to remove Alice from life-support. Legally speaking, because John's power of attorney has no other specific limits beyond Alice's incapacity, it does not matter that Alice wished to be removed from life support. John is empowered in

the situation to make the judgment of whether or not Alice should remain on life-support. John waiting a week, under his best judgment, is not a violation of his duty as the health-care power of attorney.

John has the legal authority to direct the doctor.