Missouri Law Review

Volume 48
Issue 2 *Spring 1983*

Article 11

Spring 1983

Contract to Make Trust for Minor Beneficiary

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CONTRACT TO MAKE TRUST FOR MINOR BENEFICIARY

McDaniel Title Co. v. Lemons[1]

When individuals in a divorce proceeding enter into a property settlement, they often provide expressly for the minor children of the marriage. If such provision includes an agreement to create a trust for the benefit of the children, difficult issues involving the law of trusts, contracts, and domestic relations arise. The Missouri Court of Appeals for the Western District grappled with these issues in a recent decision, *McDaniel Title Co. v. Lemons*,[2] where it held that divorced parents could not rescind a property settlement agreement that required the creation of a trust for the benefit of their minor children.[3] The most significant aspect of the case is the court's use, for the first time, of section 311 of the second Restatement of Contracts.[4] Also important are the legal issues and concepts that led the court to decide the case solely on contract law and to ignore the law of trusts and domestic relations—other possible avenues of decision.[5]

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1. 626 S.W.2d 686 (Mo. App., W.D. 1981).
2. *Id.*
3. *Id.* at 692.
4. RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981).
5. The court's discussion dealt primarily with the trust and contract elements in the case. This Note will also focus on those areas, but another interesting aspect of the case was the effect of the incorporation of an agreement in a property settlement into a divorce decree. The court considered the issue but did not discuss it:

> The parties have briefed and argued issues with respect to the nature of the trust and the effect of the November, 1977 stipulation and the trial court modification of the decree. Those issues need not be reached or decided in view of the scope of review and the findings of fact and conclusions of law entered by the trial court.

626 S.W.2d at 689-90. The terms of a divorce decree are enforceable as any other judgment in Missouri. MO. REV. STAT. § 452.325.5 (1978). It may be argued, then, that the children's rights under the property settlement agreement were vested because the property settlement merged into the decree of the court. As one commentator explains, "If the separation agreement is 'incorporated' in the divorce decree, the courts find that the contractual obligations of the agreement are converted into obligations based upon the decree by the process called 'merger.' " H. CLARK, THE LAW OF DOMESTIC RELATIONS § 16.12 (1968). The children's rights, in this view, flowed from the judgment of the court, not the intent of the parents. Courts, however, do not have the power to incorporate a property settlement into a divorce decree unless the specific provision is enforceable absent the stipulated property

The case began when Bill and Sharon Carnes entered into a property settlement, which was incorporated into their divorce decree.[6] Under the terms of the settlement, they held their marital home as tenants in common.[7] The home was to be sold when Sharon either remarried or no longer had custody of at least one minor child of her marriage to Bill. After the sale, Sharon would receive one-half of the proceeds, while the other half would be placed in trust for the benefit of the minor children.[8] Sharon was awarded custody of the children, and Bill was ordered to pay $100 a week in child support.[9] Bill became delinquent in his child support payments in the amount of $3,900. Subsequently, Sharon married Dale Lemons. Instead of selling the home—as required by their prior agreement—Sharon and Bill entered into a stipulation that Bill would convey his interest in the home to Sharon as consideration for a release of the past due child support payments.[10] Bill and his new wife executed a special warranty deed conveying their interest in the home to Sharon. In conjunction with this agreement, the circuit court issued an order modifying the divorce decree regarding the custody and child support of Bill and Sharon's children. The order was silent regarding the disposal of the marital home and merely rati-

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settlement. In Chappell v. Nash, 399 S.W.2d 253 (Mo. App., K.C. 1965), the court held that where the property settlement provided that the husband would make payments extending beyond his death, enforcement of the payments as alimony was beyond the scope of the court's authority. The wife's remedy was to enforce the settlement as a contract. *Id.* at 256-57. Because the court in *Lemons* found that the children were *donee* beneficiaries, the promise to create a trust was a gift to the children. Since it is doubtful that a court can compel the giving of a gift, the children could not enforce the trust as a decree of the court.

6. 626 S.W.2d at 688.

7. *Id.* In the absence of a settlement, courts usually may not leave the dividing parties as tenants in common because the Dissolution of Marriage Act requires a complete severance of all unity of property. MO. REV. STAT. § 452.330 (1978), *construed in* Davis v. Davis, 544 S.W.2d 259, 260-61 (Mo. App., K.C. 1976). The court may allow a tenancy in common, however, if the economics of the situation demand it. Corder v. Corder, 546 S.W.2d 798, 805 (Mo. App., K.C. 1977).

8. 626 S.W.2d at 688. The specific terms of the property settlement, as incorporated into the divorce decree, were as follows:

> The wife shall have the right to continue to live in the house so long as she remains unmarried and has custody of at least one of the unmarried minor children. At such time as the wife shall remarry or should no longer have custody of at least one unmarried minor child, the house shall be sold and the proceeds shall be divided as follows: One-half to the wife and one-half to Paul Warren, Trustee for the children born of the parties under the terms of the Trust set out in the next paragraph of this agreement.

Id.

9. *Id.*

10. *Id.* at 689. The relevant portion of this stipulation recites the terms of the original agreement and states that no trust was ever established under it.

fied the divorce decree in all other respects.[11]

Dale and Sharon later contracted to sell the house. McDaniel Title Co. (McDaniel) issued a preliminary title report subsequent to the earnest money contract but withheld title insurance coverage for claims that might arise out of the divorce.[12] The sale of the home was completed, and the proceeds came to $31,078. The new owners' mortgagee requested that McDaniel delete the exception from its final title insurance policy. Pursuant to this request, the mortagee deposited half the proceeds with McDaniel.[13] Following claims by several parties to the money, McDaniel filed an interpleader action[14] to determine who had rights to it.[15]

The first issue before the trial court was whether the property settlement agreement created an immediate trust for the benefit of the children. If so, the parents did not have the power to modify or revoke it. Once a trust has been created, the settlor does not have the power to modify it unless the terms of the trust so provide[16]—and the terms of the property settlement did not allow for modification of the trust by Bill or Sharon.[17]

To create a valid express trust (other than a self-declaration of trust) it is necessary that some interest or property be transferred to the trustee.[18] The rationale for this requirement may be found in the origins and develop-

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11. *Id.*

12. The preliminary title report issued by a title insurer states the requirements under which the insurer will agree to issue a policy. The insurer may list exemptions from the coverage if there are problems with the title. *See* MO. BAR C.L.E., INSURANCE PRACTICE § 8.13 (2d ed. 1976); MO. BAR C.L.E., REAL ESTATE PRACTICE § 14 (2d ed. 1972). In *Lemons*, McDaniel would not insure against claims that might arise out of the divorce, presumably because it believed that there was a significant chance that claims under the property settlement agreement could prevail. 626 S.W.2d at 688.

13. 626 S.W.2d at 688. McDaniel apparently requested the money before issuance of the policy to establish a fund from which it could satisfy any claims against the property arising out of the divorce.

14. Interpleader actions in Missouri are governed by MO. REV. STAT. § 507.060 (1978). The plaintiff—McDaniel, in this case—must be a disinterested stakeholder, have control of the fund, act in good faith, and have a real doubt as to which claimants are entitled to the fund. Clay County Court v. Baker, 210 Mo. App. 65, 70-71, 241 S.W. 447, 449 (K.C. 1922).

15. 626 S.W.2d at 688. The named defendants in the action were Sharon and Dale Lemons, Paul Warren (the trustee named in the original property settlement agreement), and the six children. The children, who were minors, were represented by guardians ad litem appointed by the court under MO. SUP. CT. R. 55.02.

16. *See* Watson v. Payne, 143 Mo. App. 721, 726, 128 S.W. 238, 240 (K.C. 1910); G. BOGERT & G. BOGERT, THE LAW OF TRUSTS § 145 (5th ed. 1973).

17. 626 S.W.2d at 688.

18. The trial court in *Lemons* explained it this way:

> [A] trust must arise at the time it is attempted to be created, instead of being brought forth by subsequent and independent circumstances . . . . In order to create a valid express trust it is necessary that some estate or

ment of the trust device. A trust is a relationship between two persons in which one, the trustee, holds property for the benefit of the other, the beneficiary.[19] The ancestor of the modern trust was the "use," which was developed in England in the thirteenth century.[20] The owner of real property would enfeoff (transfer) the land to the feoffee to uses (the trustee) who would hold the land for the benefit of the cestui que use (the beneficiary).[21] The trustee had seisin in the property, while the beneficiary had the use of the property.[22] The use was first generally employed when property was conveyed to the use of Franciscan friars, but by the fifteenth century, conveying property for the use of others had become common practice in England.[23] The beneficiary escaped the expense associated with holding legal title,[24] and, since the use was enforced by courts of equity, he had the benefits of ownership.[25] Because the transfer to the use of another was a conveyance of an estate in land, legal title had to be vested in the trustee. This took place upon the transfer of the property to the trustee. Thus, the modern requirement developed that as a prerequisite to the creation of an express trust, the trust property be immediately transferred to the trustee.[26]

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interest be conveyed to the trustee, and when the instrument creating the trust is other than a Will, that estate or interest must pass immediately.

McDaniel Title Co. v. Lemons, No. CV180-76CC, slip. op. at 3 (Clay County Cir. Ct. Aug. 15, 1980) (quoting Trouty v. Lemp, 329 Mo. 580, 596, 46 S.W.2d 135, 138 (1932)), *rev'd*, 626 S.W.2d 686 (Mo. App., W.D. 1981). *See also* State *ex rel.* Union Nat'l Bank of Springfield v. Blair, 350 Mo. 622, 623, 166 S.W.2d 1085, 1086 (1943); Brannock v. Magoon, 141 Mo. App. 316, 125 S.W. 535 (K.C. 1910).

19. Shelton v. Harrison, 182 Mo. App. 404, 414, 167 S.W. 634, 636 (Spr. 1914).

20. G. BOGERT & G. BOGERT, *supra* note 16, § 2; 1 A. SCOTT, THE LAW OF TRUSTS § 1.3 (3d ed. 1967). For a discussion of the development and use of trust devices, see generally Fratcher, *Uses of Uses*, 34 MO. L. REV. 39 (1969).

21. 1 G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 2 (2d ed. 1965).

22. "Seisin" meant possession, but it involved "much more than what we ordinarily think of as possession"—including a wide variety of feudal rights and duties. Bordwell, *Seisin and Disseisin*, 34 HARV. L. REV. 592, 593 (1921). The use, on the other hand, "was a personal right against the feofee to uses or his successors. More fundamentally, it was something that charged his conscience." *Id.* at 597.

23. 1 A. SCOTT, *supra* note 20, § 1.3.

24. Under the feudal law in force in medieval England, the overlord was entitled to primer seisin or relief, usually a payment in money, when the title to the land descended to the heir of the person seised. If the tenure was military and the heir was a minor, the overlord was entitled to possession and the rents and profits during the minority of the heir and could control the heir's remarriage. Only the death of the holder of the legal title, the feoffee to uses, gave rise to these obligations; no feudal dues arose on the death of the owner of the equitable estate, the cestui que use. G. BOGERT & G. BOGERT, *supra* note 16, § 2.

25. 1 A. SCOTT, *supra* note 20, § 1.4.

26. To be enforceable, a trust must be fully executed, i.e., the property comprising the trust res must be transferred to the trustee in such a fashion as will effectively pass title. State *ex rel.* Kansas City Theological Seminary v. Elliston, 216

The *Lemons* trial court held that no trust was created by the property settlement agreement because there was no transfer of property to the trustee.[27] The court of appeals agreed, concluding that it was evident from the facts that the trust did not arise immediately when the property settlement was entered into.[28] The court reasoned that although half the sale proceeds were to constitute the res of the trust, these proceeds could not have been transferred into the trust when the property settlement was executed, because at that time the proceeds did not exist.[29]

Having decided that the children had no claim under trust law, the trial court turned to contract theory. It held that the children were not beneficiaries of the third party beneficiary contract, which it characterized as gratuitous, and therefore had no right of enforcement.[30] The court of

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S.W. 967, 969 (1919). In a self-declaration of trust, where the donor is himself the trustee, no transfer of title is required. *Id. Lemons* did not involve a self-declaration.

27. McDaniel Title Co. v. Lemons, No. CV180-76CC, slip. op. at 3 (Clay County Cir. Ct. Aug 15, 1980).

28. 626 S.W.2d at 688.

29. *Id.* It is evident that the property settlement agreement did not create a valid express trust of one-half of the proceeds, because the proceeds were not transferred immediately to the trustee. Sharon and Bill, had they desired to do so, could have structured the property settlement to create an immediate trust. "A trust may be created by . . . a promise by one person to another person whose rights thereunder are to be held in trust for a third person." RESTATEMENT (SECOND) OF TRUSTS § 17(e) (1959). A trustee of an enforceable promise which is to be performed at some future date can hold that promise in trust for a third person. Bill and Sharon could thus have structured the settlement so that the trustee would receive a present trust of the promise (the contract right) that upon the sale of the house, one-half the proceeds would be transferred to him as trustee for the children. In this situation, the trust property is the promise itself.

> If a person makes an enforceable promise to pay money or to make a conveyance of property to another person as trustee a present trust is created, the rights of the promisee being held by him as trustee, provided that the person creating the trust manifested an intention to create an immediate trust of the promisee's rights, and not merely to create a trust of the money when paid or of the property when conveyed.

Id. § 26 comment n. It is clear that Bill and Sharon did not intend to create a present trust of the promise contained in the property settlement. The settlement language was conditional: "*If* the trust established . . . comes into existence." 626 S.W.2d at 688 (emphasis added). The language does not indicate any intent of the parties that there was to be a present trust of the promise.

30. McDaniel Title Co. v. Lemons, No. CV180-76CC, slip. op. at 4 (Clay County Cir. Ct. Aug. 15, 1980). The trial court noted that "an expectation or hope of receiving property in the future cannot be held in trust." *Id.* (quoting Edgar v. Fitzpatrick, 377 S.W.2d 314, 317 (Mo. 1964)). The court continued:

> Under the facts of this case, the only interest the children had in the proceeds from the sale of the house were those interests able to be passed from Mr. Warren as the prospective trustee onto them. Since Mr. Warren was unable to hold (for the children) in trust any interest of receiving property

appeals, in reversing this determination, found that the children were, in fact, third party donee beneficiaries of the contract and had the right to enforce the trust.[31]

A promise to transfer property in trust at some future date is enforceable if the promise meets the requirements of an enforceable contract.[32] A contract to create a trust is thus enforced under general contract principles.[33] In order to enforce a contract, there must be sufficient consideration for the promises given between the parties.[34] Consideration that will support an ordinary contract will also support a contract to create a trust.[35] The *Lemons* court held that the property settlement was supported by consideration, finding it in the mutual promises and undertakings of Bill and Sharon.[36] The contract was valid.

The court next turned to the question whether the children had the right to enforce the contract. Sharon's remarriage fulfilled one of the conditions precedent[37] to the sale of the home and the creation of the trust. The trial court decided that the only beneficiary[38] of the property settlement

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in the future the children could not have been beneficiaries of the gratuitous third party beneficiary contract.

Id.

31. 626 S.W.2d at 690-92.

32. Penny v. White, 594 S.W.2d 632, 638 (Mo. App., W.D. 1950); Taylor v. Welch, 168 Mo. App. 223, 234, 153 S.W. 490, 493 (K.C. 1913); RESTATEMENT (SECOND) OF TRUSTS § 30 (1959); 1 G. BOGERT, *supra* note 21, § 204.

33. 1 A. SCOTT, *supra* note 20, § 14.1. English courts take a different approach concerning enforceability of contracts for the benefit of third parties. In England, a third party beneficiary ordinarily may not enforce the contract because he gave no consideration for it. *Id.* § 14.4. *See also* Matheson, *The Enforceability of a Covenant to Create a Trust*, 29 MOD. L. REV. 397 (1966).

34. *See* Miller v. Bennett, 237 Mo. App. 1285, 1293, 172 S.W.2d 960, 963 (K.C. 1943). Consideration for a promise is either a benefit or advantage received by the promisor from the promisee or a detriment sustained by the promisee. *See* Brountow v. Wollard, 66 Mo. App. 636, 641-42 (K.C. 1896).

35. Taylor v. Welch, 168 Mo. App. 223, 233, 153 S.W. 490, 493 (K.C. 1913). This is not the case in England. The High Court of Chancery would not enforce a contract to create a trust unless there was fair consideration. *See In re* Ellenborough, [1903] 1 Ch. 697, 700; 1 A. SCOTT, *supra* note 20, § 86.1.

36. 626 S.W.2d at 690 (citing Penny v. White, 594 S.W.2d 632, 638 (Mo. App., W.D. 1980)). The consideration did not arise merely from Bill's relinquishment of his right to a share of the sale proceeds. It was, instead, the actual separation of the marital property and the surrender of rights arising from the marriage contained in the property settlement agreement. Sharon Carnes also contributed to the trust by making all mortgage payments on the property. Since this property division and surrender of rights was the consideration for the promise to create a trust, the contract was no longer executory. The consideration for the promise had already been given.

37. *See* RESTATEMENT OF CONTRACTS § 250 comment c (1932).

38. It should be noted that the term "beneficiary" is used in two different ways

was the trustee, so only he could enforce the contract.[39] The court of appeals, however, held that the children were third party donee beneficiaries of the contract and had a right to enforce it.[40]

A third party donee beneficiary is a person who may enforce a contract for his benefit, even though he is not a party to the contract and has provided no consideration for the benefit he receives.[41] The donee beneficiary's right to enforce the contract and recover against the promisor rests on the promisee's intent that the third party should receive the beneficial performance of the contract as a gift.[42] Therefore, a third party may enforce a contract that is for his benefit.[43] The test for an enforceable third party beneficiary contract is whether the promisee intended to make a gift of the benefits of the contract to the third party.[44] Employing this analysis, the court of appeals pointed out the error in the trial court's decision: the fundamental nature of a trust is the division of legal and equitable title.[45] It is "in the very nature of the contract to make an express trust that there will

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by the court in this discussion. The court refers to the trustee as the *contract* beneficiary; the court believed that the children, the *trust* beneficiaries, were not, in fact, the contract beneficiaries of the property settlement agreement.

39. McDaniel Title Co. v. Lemons, No. CV180-76CC, slip. op. at 3 (Clay County Cir. Ct. Aug 15, 1980).

40. 626 S.W.2d at 690.

41. Stephens v. Great Southern Sav. & Loan Ass'n, 421 S.W.2d 332, 335 (Mo. App., Spr. 1967). RESTATEMENT OF CONTRACTS § 133 (1932) provides that a person is a donee beneficiary

> if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.

42. LaClede Investment Corp. v. Kaiser, 596 S.W.2d 36, 41 (Mo. App., E.D. 1980).

43. *See* Rogers v. Gosnell, 58 Mo. 589, 590 (1875); Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 483, 182 S.W.2d 624, 626 (1944). RESTATEMENT OF CONTRACTS § 135(a) (1932) provides that "a gift promise in a contract creates a duty of the promisor to the donee beneficiary to perform the promise, and the duty can be enforced by the donee beneficiary for his own benefit." For a general discussion of third party contracts in Missouri, see Comment, *Third Party Beneficiary Contracts in Missouri*, 25 MO. L. REV. 71 (1960).

44. Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 485, 182 S.W.2d 624, 626 (1944); RESTATEMENT OF CONTRACTS § 133(1)(a) (1932).

45. 626 S.W.2d at 690. In an express trust, there is a separation of the legal and beneficial ownership of the property. The legal interests in the trust res are held by the trustee for the benefit of the trust beneficiary. The beneficiary owns an equitable interest in the res, which is the right to receive the benefits he is entitled to under the terms of the trust. *See* Farmers State Bank of Fosston v. Sig Ellingson & Co., 218 Minn. 411, 416, 16 N.W.2d 319, 322 (1944).

be dual beneficiaries of the contract, the trustee as to the legal title and the beneficiaries as to the equitable title."[46] Therefore, the parents' intention that their children benefit from the contract gave the children the right to enforce it.

The question then became whether the contract, though enforceable, could be rescinded by the parents. In its decision, the court focused on two key factors which caused the contract to be irrevocable: the status of the beneficiaries as minors and the intent of the parents when they executed the agreement.[47]

The general common law rule is that parties to a third party beneficiary contract can rescind or modify the contract at any time before the third party beneficiary accepts the contract or acts upon it to his detriment.[48] The majority view is that the beneficiary's rights become vested upon his acceptance of the contract, and it cannot be rescinded without his consent.[49] However, there is a strong minority view that the donee beneficiary's rights become indefeasible immediately upon the making of the contract.[50] Earlier cases are not clear as to which approach is followed in Missouri.[51]

There is an exception to the majority view in cases where the third

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46. 626 S.W.2d at 690.

47. *Id.* at 691-92.

48. *See* Hannan v. Murphy, 198 Iowa 827, 831, 200 N.W. 418, 420 (1924); Morrison v. Barry, 10 Tex. Civ. App. 22, 27, 30 S.W. 376, 377-78 (1895).

49. *See, e.g.*, James v. Pawsey, 162 Cal. App. 2d 740, 747, 328 P.2d 1023, 1028 (1958); Rhodes v. Rhodes, 266 S.W.2d 790, 792 (Ky. 1953); Spates v. Spates, 267 Md. 72, 78-79, 296 A.2d 581, 584 (1972).

50. 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 396 (3d ed. 1959). *See* Tweeddale v. Tweeddale, 116 Wis. 517, 526, 93 N.W. 440, 443 (1903). This approach supposes that a third party donee beneficiary contract is analogous to a gift of property. Because a gift is a pure benefit to the donee, his acceptance is presumed, thus denying the contracting parties the right to rescind the contract. *See* Page, *The Power of the Contracting Parties to Alter a Contract for Rendering Performance to a Third Person*, 12 WIS. L. REV. 141, 183-84 (1937); *Contracts—Third Party Beneficiary Contract—When a Right Vests in a Donee Beneficiary*, 44 KY. L.J. 470, 473-74 (1956).

51. Before *Lemons*, there were apparently only two Missouri cases dealing with the problem of when a third party beneficiary's rights become fixed and are no longer subject to modification by the contracting parties without the beneficiary's consent. In Rogers v. Gosnell, 58 Mo. 589 (1875), the court stated that "it is a presumption of law that when a promise is made for the benefit of a third person he accepts it, and to overthrow this presumption a dissent must be shown." *Id.* at 591. This is similar to the minority approach outlined in note 50 *supra*. In the more recent case of Schoen v. Lange, 238 S.W.2d 902, 905 (Mo. App., St. L. 1951), the court held that the defendant could no longer rescind the third party beneficiary contract because the beneficiary had accepted it. This appears to imply adoption of the majority rule that parties may rescind the contract until its acceptance by the beneficiary. *See* Comment, *supra* note 43, at 77. The *Lemons* court implicitly returned to the minority approach of *Rogers*, since under the majority rule the parents

party beneficiary is a minor. The child's acceptance of the contract benefits is presumed, which prevents the original parties from rescinding the contract[52] unless the right to rescind was specifically reserved in the contract.[53] Applying this rule, the *Lemons* court found that, since the parents did not reserve the right to modify or rescind the contract and the beneficiaries were minor children, the contract was irrevocable.[54]

The court found an additional basis for its decision in section 311 of the second Restatement of Contracts. Section 311 provides that parties to a contract for the benefit of a third party may rescind the contract at any time prior to the third party's acceptance, unless there is a specific term in the contract to the contrary.[55] Failure of a party to secure an adult beneficiary's acceptance of the contract may indicate that the contract was intended to be revocable,[56] but an infant's inability to contract renders this approach inappropriate since he is unable to effectively accept. The Restatement solution is to rely on the manifested intention of the original parties, i.e., whether they intended that the contract be irrevocable.[57] Under this analysis, the parents would retain the power to rescind the contract unless it was their intention when they entered into the settlement that the trust provision be irrevocable.

The *Lemons* court found that the parents had intended the agreement to be complete and irrevocable.[58] The court noted that there are circumstances that would rebut the inference that a minor beneficiary's rights

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would have lost their right to revoke immediately upon the making of the contract, and the court would not be required to analyze the issues further.

52. James v. Pawsey, 162 Cal. App. 2d 740, 747, 328 P.2d 1023, 1028 (1958); Waterman v. Morgan, 114 Ind. 237, 240, 16 N.E. 590, 592 (1888); Rhodes v. Rhodes, 266 S.W.2d 790, 792-93 (Ky. 1953); Spates v. Spates, 267 Md. 72, 78-79, 296 A.2d 581, 585 (1972); Quinn v. Thigpen, 266 N.C. 720, 724, 147 S.E.2d 191, 194 (1966); Plunkett v. Atkins, 371 P.2d 727, 731-32 (Okla. 1962); Brill v. Brill, 282 Pa. 276, 283, 127 A. 840, 843 (1925). The rule stems from the minor's lack of capacity to contract. RESTATEMENT (SECOND) OF CONTRACTS § 311 comment d (1981).

53. Spates v. Spates, 267 Md. 72, 78, 296 A.2d 581, 585 (1972).

54. 626 S.W.2d at 692.

55. RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981) provides:

> (1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.
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> (2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.
>
> (3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

56. *Id.* § 311 comment d.

57. *Id.*

58. 626 S.W.2d at 692.

under a contract are irrevocable, including the situation where the consideration for the promise is executory.[59] From that proposition, the court apparently concluded that the reverse is true: a third party beneficiary's rights are vested when the consideration for the contract is executed. Because the property settlement involved a bargain fully performed, the consideration was not executory.[60] The court therefore concluded that the parties intended the agreement to be irrevocable.[61] When the home was sold, the court said, a trust consisting of half the proceeds arose for the children.[62]

While the *Lemons* court purported to rely on section 311 of the Restatement only in the alternative, it really seems to be using this approach to formulate a new framework for dealing with the problems presented in this type of case. The court specifically pointed out that section 311 has decided advantages over the common law approach, chiefly in avoiding the unintended and inequitable results it believed were attendant upon the older rule.[63] Section 311 also gives a court greater flexibility to examine each case individually and arrive at a fair result rather than relying on a broad rule that can result in inequity in specific cases. This very flexibility may be

59. RESTATEMENT (SECOND) OF CONTRACTS § 311 comment d (1981). Illustration 4 to the comment is taken from Lehman v. Stout, 261 Minn. 384, 112 N.W.2d 640 (1961), in which the parents of an infant boy moved onto the farm of the father's uncle. They entered into a contract that the father would care for the uncle until his death. In return, the uncle would pay the father a salary and would convey a specific portion of the farm to the son when he reached 21. The uncle later conveyed a part of the farm to the father in satisfaction of his obligation under the agreement. The court held that the son had no vested interest in the contract and the contract could be rescinded since the consideration was still executory. *Id.* at 393-94, 112 N.W.2d at 646.

60. *See* note 36 *supra*.

61. 626 S.W.2d at 692.

62. *Id.* Although this is what the court said, it is inaccurate. A trust does not arise merely because there is a contract to make one. It arises—except in cases of self-declaration—only when the transfer is made. But the contract to make a trust may be specifically enforced. *See* 1 A. SCOTT, *supra* note 20, § 26.5. The trust in *Lemons* would actually arise when the court specifically enforced the agreement in the property settlement.

63. 626 S.W.2d at 692. In some instances, presuming acceptance of the contract by an infant would lead to inequity. An example, given by the court, is when parents provide for their children's benefit by contract. The old rule would prohibit parents from altering or rescinding that contract even if more children are born or there are other important changes in the family situation. *Id.* Under § 311, however, the parents could modify the contract to meet new contingencies unless the court finds that they intended the contract to be irrevocable. RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981). The Reporters Note to this section provides its own reason for the rule: there should be no distinction between donee beneficiaries and creditor beneficiaries with respect to the power of the promisor and promisee to vary the contract.

a drawback, however, since it can cause uncertainty for contracting parties.[64] On the whole, the adoption of section 311 in Missouri will enable courts to reach results consistent with both fairness and the intent of the parties.

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64. This uncertainty, however, does not weigh strongly against the new approach because the contracting parties can clearly manifest their intentions in the contract itself by stating whether the contract is or is not subject to modification or revocation.