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Missouri Takes a Stand: The Death of the Dead Hand in the Control of Trusts?

*Hamerstrom v. Commerce Bank of Kansas City*¹

I. INTRODUCTION

When the Missouri Legislature adopted Missouri Revised Statute section 456.590.2,² empowering courts to allow deviation from the distributive terms of a trust, the intent was to repeal, in part at least, the long-standing *Clafin* doctrine. That doctrine is a common law rule that refuses to allow deviation from the terms of the trust, even when all beneficiaries consent, if variation or termination would violate the purpose of the trust.³ Unfortunately, through oversight or poor drafting, the legislature left several issues open for judicial interpretation which will determine the extent to which the new statute overturns the *Clafin* doctrine.⁴

This Note analyzes the recent application of Missouri's new trust variation statute and addresses the interpretive issues that *Hamerstrom* settles. The Note briefly discusses the history of the *Clafin* doctrine and its adoption in the majority of American jurisdictions to provide a better understanding of the implications of the change in Missouri's approach to "dead hand" control.

II. FACTS AND HOLDING

Elizabeth Hamerstrom filed a petition on April 14, 1989 for deviation from the terms of a trust left to her by Mr. Erle H. Smith upon his death in

1. 808 S.W.2d 434 (Mo. Ct. App. 1991).

2. MO. REV. STAT. § 456.590.2 (1986). The statute was adopted in 1983. The section of the statute reads as follows:

2. When all of the adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries, vary the terms of a private trust so as to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provide for termination of the trust at a time earlier or later than that specified by the terms.

3. See Peter J. Wiedenbeck, *Missouri's Repeal of the Clafin Doctrine — New View of the Policy Against Perpetuities?*, 50 MO. L. REV. 805, 807 (1985).

4. *Id.*

1966.⁵ She also asked for reasonable attorney's fees.⁶ Essentially, the trust granted her monthly payments of \$150 for the duration of her life or until the corpus was exhausted.⁷ In the event of Mrs. Hamerstrom's death, the corpus was to pass to her husband, Davis Hamerstrom; if he predeceased her, the corpus was to pass in equal shares to their two sons, Eric and Edward, or the balance to the surviving brother.⁸ The value of the trust at the time of filing was \$425,000, which generated approximately \$26,000 in income annually.⁹ Mrs. Hamerstrom's requested deviation was to increase the \$150 monthly payment to \$2000.¹⁰

Mrs. Hamerstrom requested the increase in payments, alleging unforeseen changes in her family's economic and personal circumstances, including inflation, Mr. Hamerstrom's retirement, and increases in health care costs.¹¹ The petition named as defendants Commerce Bank of Kansas City (the trustee), Davis Hamerstrom, Eric Hamerstrom, Edward Hamerstrom, and the unknown and unascertained beneficiaries.¹² Davis, Eric, and Edward Hamerstrom all joined Mrs. Hamerstrom in consenting to the requested

5. *Hamerstrom*, 808 S.W.2d at 435. The pertinent part of Mr. Smith's devise creating the trust states:

My trustee shall hold said property so conveyed in trust for the benefit of ELIZABETH HAMERSTROM, Route 3, Roscoe, New York, and shall pay and turn over to said ELIZABETH HAMERSTROM the sum of One Hundred and Fifty Dollars (\$150.00) per month for so long as she shall live or until said trust fund shall be exhausted, whichever event shall first occur. In the event that the said ELIZABETH HAMERSTROM should die before said trust fund is exhausted, then the trust shall terminate at the time of her death and the trustee shall deliver all of the assets of the trust estate to DAVIS HAMERSTROM.

In the event that DAVIS HAMERSTROM predecease ELIZABETH HAMERSTROM, or if they should die as the result of a common disaster before said trust fund is exhausted, then the trust shall terminate at the time of the death of ELIZABETH HAMERSTROM and the trustee shall deliver all of the assets of the trust estate in two equal shares to ERIC HAMERSTROM and EDWARD HAMERSTROM, or the balance to the survivor of them.

Id. at 435 n.1.

6. *Id.* at 435.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

deviation.¹³ The trustee neither opposed nor supported the requested deviation, but the guardian ad litem appointed by the trial court to protect the rights of the unascertained and unknown beneficiaries opposed the action, contending that the deviation was of no benefit to the contingent remaindermen.¹⁴

The trial court denied Mrs. Hamerstrom's request for deviation and held that the unnamed issue of Eric and Edward Hamerstrom were beneficiaries pursuant to Missouri Revised Statute section 456.590.2.¹⁵ The court also held that the proposed deviation failed to benefit the unnamed, unborn issue as the statute requires.¹⁶ In addition, the trial court refused Mrs. Hamerstrom's request that attorney's fees be paid from the fund, because the requested deviation failed to benefit the estate.¹⁷ The trial court based its decision¹⁸ on the 1956 Missouri Supreme Court's holding in *Thomson v. Union National Bank of Kansas City*.¹⁹ In *Thomson*, the court refused to modify a trust based on common law principles that do not permit deviation when it would frustrate a material purpose of the settlor.²⁰ The trial court

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 434, 439. The trial court stated that the traditional rule is that "a trust beneficiary may recover reasonable attorney fees from the trust estate if the efforts of the beneficiary result in *real benefit* to the estate." However, where deviation is requested solely to benefit the challenging party, attorney's fees are not payable from the estate. *Id.* at 438-39 (citing *St. Louis Union Trust Co. v. Kaltenbach*, 186 S.W.2d 578, 583 (Mo. 1945)) (emphasis added). For examples of "real benefit," see *First Nat'l Bank v. Danforth*, 523 S.W.2d 808, 823 (Mo.), *cert. denied*, 421 U.S. 992 (1975) (trustee's duties ambiguous resulting in suit for judicial construction); *Coates v. Coates*, 316 S.W.2d 875, 878 (Mo. Ct. App. 1958) (ambiguous trust instrument where two or more people can make adverse claims needing clarification).

18. *Hamerstrom*, 808 S.W.2d at 437.

19. 291 S.W.2d 178 (Mo. 1956). Mr. Thomson died in 1917 leaving all his personal property in trust. The income from the trust was to be paid to his wife for life, and in the event of her death, to his sons until they reached the age of forty when it would be divided in equal shares. The will also provided that if at the time of the division, if one or all the sons had died, then that son's share would go to his issue at the time when the corpus would normally be divided. If a son died without issue before reaching age forty, the share would revert to the testator's estate. *Id.* at 180-81. Mr. Thomson's will further provided that the trustee was limited to certain types of investments. These limitations caused the decline in income some forty years later. *Id.* at 183.

20. *Id.* at 182 (citing 4 GEORGE G. BOGERT, TRUSTEES § 1002, at 502-08 (1st ed. 1948)).

cited language from *Thomson* which stated that a court of equity does not have the power to extinguish or reduce the interests of other beneficiaries such as unnamed, unknown beneficiaries.²¹

On appeal, the Western District of the Missouri Court of Appeals reversed and remanded with directions to grant the deviation and award of attorney's fees.²² The court held that the term "beneficiary," pursuant to Missouri Revised Statute section 456.590.2, only applied to those individually identified by the testator in the testamentary trust and for whom there is an expressed intention to benefit.²³ The court also held that the statute gives a court jurisdiction to vary the terms of a private trust when all such beneficiaries are adults who consent and are sui juris (not under a legal disability).²⁴ The appellate court reasoned that because the statute allowed such deviation, it implicitly encompassed the power to grant attorney's fees to be paid from the fund, without the need to demonstrate benefit to the trust estate.²⁵

III. LEGAL BACKGROUND

Prior to the decision in *Clafin v. Clafin*,²⁶ American courts followed the English common law rule established in *Saunders v. Vautier*,²⁷ which held that if all adult beneficiaries consent and are sui juris, the court is authorized to terminate a trust without regard to whether such action would frustrate a material purpose of the settlor.²⁸ The English courts reasoned that control of beneficiaries' interests should be in their own hands, limited only

21. *Hamerstrom*, 808 S.W.2d at 437. The court also noted that the devise in *Thomson* expressly named the unborn, unascertained issue unlike the devise in *Hamerstrom*. *Id.*

22. *Id.* at 439.

23. *Id.* at 438.

24. *Id.* Sui juris is defined as "[o]f his own right; possessing full social and civil rights; not under any legal disability, or the power of another, or guardianship. Having capacity to manage one's own affairs; not under legal disability to act for one's self." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

25. *Hamerstrom*, 808 S.W.2d at 439.

26. 20 N.E. 454 (Mass. 1889). In *Clafin*, the testator's will and codicil created a trust to benefit testator's minor son and provided that he receive \$10,000 at age twenty-one, \$10,000 at age twenty-five, and the balance at age thirty. The son received the first installment. After reaching the age of majority and prior to receiving the second installment, the son sued for termination of the trust and immediate transfer of the remainder of his interest in the trust estate. *Id.* at 455.

27. 4 Beav. 115, *aff'd*, 41 Eng. Rep. 482 (1841).

28. See Wiedenbeck, *supra* note 3, at 808.

by the interests of others in the same estate.²⁹ These courts have also held that the settlor cannot tie the beneficiaries' hands by making their interests inalienable.³⁰ In addition to these English common law decisions are two parliamentary acts which have governed English trust law for some time.³¹ The first authorizes the trustee to make administrative deviations if beneficial to the trust as a whole.³² The second act, on which the Missouri statute at issue is based, authorizes distributive deviation without court intervention if all adult beneficiaries who are sui juris consent.³³ Missouri courts initially followed the common law approach in the absence of any statutory authorization.³⁴

The Massachusetts Supreme Judicial Court created a new approach to trust deviation and/or termination in its decision in *Clafin* by holding:

[t]he strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support; and *we see no good reason why the intention of the testator should not be carried out.*³⁵

Thus, recognition of the settlor's purpose became controlling. American courts began following this principle, and it soon became the majority rule in this country.³⁶ In *Shelton v. King*,³⁷ the United States Supreme Court

29. See 4 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 337 (4th ed. 1987).

30. *Id.*

31. See Wiedenbeck, *supra* note 3, at 806 n.3, 813-14.

32. *Id.* at 806 n.3 (citing Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19, § 57 (Eng.)). Missouri Revised Statute § 456.590.1 is taken directly from this legislation. *Id.*

33. *Id.* at 813-14. See also English Variation of Trusts Act 1958, 6 & 7 Eliz. 2, ch. 53 (Eng.); see *infra* note 82 for the text of this Act.

34. In *Peugnet v. Berthold*, 81 S.W. 874 (Mo. 1904), the court said, "[I]t is contrary to the spirit of our law to hinder a person *sui juris* in the management of property that is altogether his own." *Id.* at 876. See also *Rector v. Dalby*, 71 S.W. 1078, 1080 (Mo. Ct. App. 1903) (court expressly rejected the *Clafin* doctrine in favor of the English rule because it was supported by "sounder reason."); *Dado v. Maguire*, 71 Mo. App. 641, 645 (1897) (court saw no reason to force the beneficiary into selling his contingent interest in the corpus by refusing to terminate the trust).

35. *Clafin*, 20 N.E. at 456 (emphasis added).

36. See RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1008 (rev. 2d ed. 1983); SCOTT & FRATCHER, *supra* note 29, § 337; Wiedenbeck, *supra* note 3, at 807-08.

37. 229 U.S. 90 (1912).

supported the doctrine wholeheartedly.³⁸ Missouri courts subsequently adopted the *Clafin* doctrine and have applied it consistently until the recent adoption of section 456.590.2.³⁹ The permanence of the rule is reflected by its adoption in section 337 of the *Restatement (Second) of Trusts*.⁴⁰

The difference between the English and the American approaches can be explained not only by the differing attitudes as to whether the settlor or beneficiary should yield control of the property interest, but also by each country's differing attitudes toward spendthrift trusts.⁴¹ In that American courts, unlike their English counterparts, have consistently permitted the settlor to limit the beneficiary's ability to alienate trust interests, it follows that American courts would limit the right to terminate a trust or deviate from its terms.⁴² The *Shelton* court expressly rejected the idea that it is against public policy to bequeath property and restrict it from alienation and the reach of creditors.⁴³ Case law and many state statutes support this right.

38. *Id.* at 100-01. Here, the trust was to supply income for its beneficiaries until the youngest reached age twenty-five. *Id.* at 92. The Court stated, "[I]f the testatrix saw fit to have this fund accumulate in the hands of trustees, and thereby postpone the enjoyment of her gift, why shall her will be disregarded?" *Id.* at 95. The Court felt "[t]here is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid." *Id.* at 101.

39. See generally *St. Louis Union Trust Co. v. Conant*, 499 S.W.2d 761 (Mo. 1973); *Thomson v. Union Nat'l Bank of Kansas City*, 291 S.W.2d 178 (Mo. 1956); *Evans v. Rankin*, 44 S.W.2d 644 (Mo. 1931); *Shaller v. Mississippi Valley Trust Co.*, 3 S.W.2d 726 (Mo. 1928); *Owen v. Gilchrist*, 263 S.W. 423 (Mo. 1924); *Hamilton v. Robinson*, 151 S.W.2d 504 (Mo. Ct. App. 1941); *Easton v. Demuth*, 162 S.W. 294 (Mo. Ct. App. 1914); cf. *Smith v. Smith*, 70 Mo. App. 448, 451 (1897) (would frustrate purpose of settlor, as well as lack of consent from the unascertained beneficiaries).

40. RESTATEMENT (SECOND) OF TRUSTS § 337 (1959). The section provides:

(1) Except as stated in Subsection (2), if all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination of the trust.

(2) If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination.

41. See SCOTT & FRATCHER, *supra* note 29, § 337. "'Spendthrift trust' is the term commonly applied to those trusts that are created with a view to providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection." GEORGE T. BOGERT, TRUSTS § 40 (6th ed. 1987) (quoting *Wagner v. Wagner*, 91 N.E. 66, 69 (Ill. 1910)).

42. See SCOTT & FRATCHER, *supra* note 29, § 337.

43. *Shelton*, 229 U.S. at 97.

In *Thomson v. Union National Bank of Kansas City*,⁴⁴ the Supreme Court of Missouri applied the *Clafin* doctrine beyond "generally acceptable limits."⁴⁵ According to Professor William Fratcher, the purpose of the will in *Thomson* was to enable enjoyment of the property by successive beneficiaries and postpone distribution of the property until the testator's sons reached the age of forty.⁴⁶ Both of these components had been satisfied, but the court still refused to terminate the trust, despite the property's declining income.⁴⁷ The court reasoned that to destroy the trust would "defeat the explicit purposes so plainly stated in Mr. Thomson's will."⁴⁸ However, the court failed to clearly point out what material purposes still needed to be carried out, and the result was a wooden application of the *Clafin* doctrine. This illustrates one of the main problems of the doctrine: it is often difficult to determine whether early termination would defeat a material purpose of the settlor.⁴⁹

In his article, which strongly criticizes *Clafin* and the result in *Thomson*, Professor Fratcher points to a second flaw:

The purported purpose of the *Clafin* rule is to carry out the intention of the settlor but, because it is only a rule depriving the beneficiaries of the power to *compel* the trustee to terminate the trust, it does not effectively accomplish this purpose except in the rare case where the trustee chooses, for sentimental reasons, to abide by the settlor's manifestation of intention. In the absence of spendthrift restraints on alienation, if the trustee *willingly* conveys the trust property to the beneficiaries, the trust is terminated even though its material purposes are thereby defeated. The real effect of the *Clafin* rule is to enable the trustee to set its own price for consent to termination.⁵⁰

44. 291 S.W.2d 178 (Mo. 1956). See *supra* note 19 for the essential facts of the case.

45. William F. Fratcher, *Trusts and Succession*, 22 MO. L. REV. 390, 393 (1957).

46. *Id.*

47. *Id.*

48. *Thomson*, 291 S.W.2d at 183.

49. See Wiedenbeck, *supra* note 3, at 810-11. This situation commonly occurs when a court tries to decide whether the settlor wanted to preserve the principal of the trust for the enjoyment of the remainderman by creating a life estate in the current beneficiary. If this is the case, it would not defeat a material purpose of the settlor to allow the consent of both beneficiaries to terminate the trust before the life beneficiary dies. However, if the settlor postponed distribution of the principal to protect the life beneficiary from her own mismanagement of the property, termination would defeat a material purpose of the settlor. *Id.*

50. Fratcher, *supra* note 45, at 392-93.

Thomson represents the extreme application of the *Clafin* doctrine to honor the wishes of the settlor when a trustee opposes termination. Some courts will honor the wishes of the settlor even when the settlor himself would probably not want them to be honored.

The adoption of Missouri Revised Statute section 456.590.2⁵¹ is an attempt by the Missouri legislature to overturn the *Clafin* doctrine in this state by authorizing the court to vary the beneficiaries' interests in a private trust, change the times and amounts of payments, or terminate the trust prior to its specified time.⁵² Authorization is subject to only two conditions:

1. All the adult beneficiaries who are not disabled must consent to the variation, and
2. The court must find that the variation will benefit the disabled, minor, unborn and unascertained beneficiaries.⁵³

Missing from the statute is any requirement to show the proposed change will not defeat a material purpose of the settlor.⁵⁴ Professor Wiedenbeck notes three interpretive issues that the language of the Missouri statute does not answer:

First, does a court have jurisdiction to approve the proposed variation where all adult beneficiaries who are not disabled consent and there are no disabled, minor, unborn, or unascertained beneficiaries of the trust? Second, in determining whether disabled, minor, unborn, and unascertained beneficiaries will 'benefit,' will the court, mindful of the settlor's desires, find the requisite benefit only if the proposed change is consistent with the purposes underlying any restrictions, conditions, or limitations imposed by the settlor? Third, will the courts take into account the material purposes of the settlor in the exercise of their discretion?⁵⁵

This Note analyzes *Hamerstrom's* clear answer to the first question and its answer to the third question, at least in the case where there are no disabled, minor, unborn, or unascertained beneficiaries. In addition, the Note addresses the Court's failure to discuss the second question. Finally, it explores the Court's discussion of how to define the term "beneficiary" as used in the statute.

51. MO. REV. STAT. § 456.590.2 (1986).

52. *Id.*

53. *Id.* See also Wiedenbeck, *supra* note 3, at 812-13.

54. See Wiedenbeck, *supra* note 3, at 813.

55. *Id.*

IV. THE INSTANT DECISION

Read literally, section 456.590.2 limits a court's jurisdiction to apply the statute to situations where there are *some* disabled, minor, unborn, or unascertained beneficiaries.⁵⁶ The court quickly discarded this interpretive problem, stating the statute authorizes courts to vary or terminate the trust with the agreement of all adult beneficiaries who are not disabled when no other protected beneficiaries are identifiable.⁵⁷ It did not doubt its jurisdiction to apply the statute despite the absence of a class of protected beneficiaries.

The major point of contention in the case revolved around the definition of the word "beneficiary" as applied by the statute and whether it included the unnamed, unborn, and unascertained potential survivors of Eric and Edward Hamerstrom.⁵⁸ The court noted that states are divided over the definition of "beneficiary."⁵⁹ Some have adopted a broad definition in accordance with the *Uniform Probate Code*⁶⁰ which provides that a trust beneficiary includes any person with a present or future interest, vested or contingent.⁶¹ Even though no provision was made in the trust devise for protection of unborn, unascertained individuals, the trustee and guardian ad litem wanted to broaden this definition even more by including Eric's and Edward's possible unborn issue.⁶² Those unborn issue would have, at best, only an expectancy to take

56. John L. Sullivan, *Modification, Revocation and Termination*, MO. GUARDIANSHIP AND TRUST LAW § 10.13 (Mo. Bar Supp. 1990) (citing Wiedenbeck, *supra* note 3).

57. *Hamerstrom*, 808 S.W.2d at 436, 438. "The statute provides a mechanism for 'adult beneficiaries who are not disabled' to vary, extend or eliminate a trust under circumstances where the settlor's purpose is not considered." *Id.* at 438. Professor Wiedenbeck states that this decision would be construing section 456.590.2 as if it read: "When all adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries, [if any,] vary the terms of a private trust . . ." Wiedenbeck, *supra* note 3, at 814-15 n.34. He suggests that states enacting similar legislation should use this wording to avoid "jurisdictional ambiguity." *Id.*

58. *Hamerstrom*, 808 S.W.2d at 436.

59. *Id.* at 437.

60. UNIFORM PROBATE CODE § 1-203(3) (1990). The court quoted the pertinent part of the Code: "[b]eneficiary", as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer. . . ." *Hamerstrom*, 808 S.W.2d at 437 (quoting UNIFORM PROBATE CODE § 1-203(3) (1990)).

61. *Hamerstrom*, 808 S.W.2d at 437.

62. *Id.* at 437.

by descent.⁶³ The court felt this definition would force consideration of *every potential heir*, including those of the testator; for if the trust failed to vest in Davis, Eric, or Edward (the contingent remaindermen), the testator's heirs would have a reversionary interest.⁶⁴ The effect of this interpretation would result in section 456.590.2 "restricting virtually any proposed deviation of a trust and, thus, denies the statute any substantive effect . . . any proposed deviation would diminish the potential interests of unnamed, unborn, and unascertained remaindermen."⁶⁵ The court's rationale makes sense when compared with a long-established principle of property law: a devise of land to John Doe and his heirs is a devise to John Doe in fee simple, and the heirs have no right or interest in the land.⁶⁶

Other states have adopted a narrower version of "beneficiary" within a trust declaration, applying the term only to those receiving income, even excluding the remaindermen.⁶⁷ The rationale for this position is that beneficiaries receive enjoyment of property while another holds legal possession; the remaindermen receive no benefit from the trust. Remaindermen only take legal possession of the corpus upon the death of the life beneficiary.⁶⁸ This narrow interpretation is not authorized by the statute because it specifies protection of the disabled, minor, unborn, and unascertained beneficiaries.

The court, in construing section 456.590.2, presumed that the legislature intended a logical and reasonable result with substantive effect.⁶⁹ The court noted that when construing a will, "the testator's intention must be determined by what the will actually says and not by what might be imagined the testator intended to say or would have said if he had decided to further explain his intentions."⁷⁰ Applying this logic to a trust provision, the court defined a beneficiary as any person, including unborn or unascertained issue, individually named or included in a named class identified by the testator.⁷¹ In

63. *Id.* at 436-37.

64. *Id.* at 438.

65. *Id.* (emphasis added).

66. English common law established this principle in *FitzRoger v. Arundel*, Bracton N.B. Pl. 1054 (1225), destroying the need to join the grantee's heirs in a conveyance of land in fee simple, thus making land more easily alienable.

67. *Hamerstrom*, 808 S.W.2d at 437 (citing *Lenzner v. Falk*, 68 N.Y.S.2d 699, 704 (Sup. Ct. 1947)).

68. *Id.*

69. *Id.* (citation omitted).

70. *Id.* (citing *Boone County Nat'l Bank v. Edson*, 760 S.W.2d 108, 111 (Mo. 1988)).

71. *Id.* at 438. The court stated that "[t]his definition gives the statute substantive effect and protects those individuals the testator intended to benefit as evidenced by

addition, an intent to benefit the person must be expressed in the testamentary instrument.⁷² The court thus held that the trust only named Davis, Eric, and Edward as the remaindermen; neither Eric's nor Edward's issue had a right to take by the trust instrument, because if one predeceased the other, the survivor took all; and because all of the beneficiaries were present and consenting, the court granted the deviation in accord with Missouri Revised Statute section 456.590.2.⁷³

As a collateral issue, the court had to decide whether to apply a common law requirement: to recover reasonable attorney's fees from the trust estate, the action of the beneficiary had to result in some *real benefit* to the estate.⁷⁴ No such benefit to the trust estate could be established, because the requested deviation over the estimated life of Mrs. Hamerstrom would diminish the estate in excess of \$300,000.⁷⁵ The court found that with the broad powers provided by the statute to vary or terminate a trust, the authority to pay attorney's fees from the trust fund was implicitly encompassed within these extensive powers.⁷⁶ The court concluded all the beneficiaries of the trust expressed a desire to modify the terms to increase payments to Mrs. Hamerstrom; therefore, they could modify the terms of the trust for payment of the attorney's fees under the same agreement.⁷⁷

V. COMMENT

A persistent criticism of the *Clafin* doctrine is that it fails in its purported purpose to carry out the intentions of the settlor. Absent spendthrift provisions, the beneficiary can either sell her interest in the trust to a third party or persuade the trustee with money or pleas to transfer the property to her.⁷⁸ The obvious result is that the trustee gains extortion powers if the beneficiaries really want a deviation or early termination of the trust, and the settlor is no longer around or refuses to add his consent. Professor Fratcher noted that the spread of the *Clafin* doctrine paralleled the rise and spread of trust companies whose business it is to manage trusts for profit.⁷⁹ It follows that if statutes make it easier to vary and terminate trusts, these companies

his efforts to identify individuals or a class within the instrument." *Id.*

72. *Id.*

73. *Id.* at 437-38.

74. *Id.* at 438.

75. *Id.* at 439.

76. *Id.*

77. *Id.*

78. See BOGERT & BOGERT, *supra* note 36, § 1008; Fratcher, *supra* note 45, at 392-95 and text quoted.

79. Fratcher, *supra* note 45, at 393.

will see a decline in those profits. A person's desire to control their own interests in property to garner more immediate income or to better manage the property in light of the ebb and flow of the economic tide is certainly understandable. It would seem more logical to leave this control to the living and not to the agents of the dead, because these agents are mainly concerned with their own balance sheets.

Enactment of section 456.590.2 placed Missouri in the unique position of being the first American state to authorize trust variation by statute.⁸⁰ This statute is based on the English Variation of Trusts Act of 1958.⁸¹ Application of the English Act as well as the underlying case law would aid in interpreting the statute. *Hamerstrom* is a case of first impression. It

80. Julie A. Anderson, *A Proposal for a Variation of Trusts Statute in Washington*, 8 U. PUGET SOUND L. REV. 625, 626 (1985).

81. John L. Sullivan, *Modification, Revocation and Termination*, MO. GUARDIANSHIP AND TRUST LAW § 10.13 (Mo. Bar 1985, 1987). The English Act provides:

1. (1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or

(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or

(c) any person unborn, or

(d) any person in respect of any discretionary interest of his under protective trust where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

English Variations of Trusts Act, 1958, 6 & 7 Eliz. 2, ch. 53, § 1(1) (Eng.).

clarifies interpretation of the Missouri statute by authorizing courts to approve a trust deviation or termination even when there are no beneficiaries whose interests need protection by the court. The only real remaining difference between the English Act and the Missouri statute, if all beneficiaries are alive, consent, and are sui juris, is that Missouri would require judicial approval of the deviation.⁸² The result relieves the beneficiaries from having to resort to a forced sale of their trust interests to avoid the *Clafin* doctrine's effect.

The instant decision also implicitly adopts the English common law position established in *Saunders v. Vautier*⁸³ that when all adult beneficiaries who are not disabled are in agreement, they may compel termination of a trust without looking to see if it frustrates a material purpose of the settlor.⁸⁴ The instant decision perfunctorily dismisses any need to consider the purposes of the settlor in creating the trust—at least when the court does not have to consider the interests of disabled, minor, unborn, or unascertained beneficiaries.⁸⁵ Whether courts will completely ignore the settlor's intent in authorizing changes will probably depend on the particular circumstances of each case and the courts' willingness to shake seventy-seven years of precedent. The possibility also exists that a settlor's intent will play an implicit role in a court's decision-making process.

This case raised another issue of interpretation that had not been considered in discussions on application of the statute.⁸⁶ The court had to decide whether the term "beneficiary," as used in the statute, applied to those unnamed, unascertained remaindermen who were not specifically identified in the trust provision. The court necessarily narrowed the definition of "beneficiary" in order to give the statute substantive effect.⁸⁷ The court reasoned that legislatures do not engage in lawmaking to waste the time of taxpayers and courts.⁸⁸ Legislators want the laws they pass to have effect, and a very narrow interpretation would frustrate this intention. This kind of rationalizing led the *Hamerstrom* court to conclude that a court should not look outside of the language of the testamentary provision to find intended beneficiaries of a trust.⁸⁹ Certainly, this is a logical conclusion in light of the

82. See Wiedenbeck, *supra* note 3, at 813-14.

83. 4 Beav. 115, *aff'd*, 41 Eng. Rep. 482 (1841).

84. See Wiedenbeck, *supra* note 3, at 813.

85. *Hamerstrom*, 808 S.W.2d at 436.

86. See generally Wiedenbeck, *supra* note 3. Professor Wiedenbeck recognized three distinct issues that Missouri courts would have to address in interpreting the statute. However, he did not discuss whether the term beneficiary applied to unnamed, unascertained remaindermen who were not specifically identified in the trust provision.

87. *Hamerstrom*, 808 S.W.2d at 437.

88. *Id.*

89. *Id.*

majority position in the interpretation of wills, namely that the testator's intent must be determined only by the language of the will if there are no ambiguities.⁹⁰

Because the facts of *Hamerstrom* did not include any class of beneficiaries with interests that the court needed to protect, the issue of the applicable standard of evaluation in a situation where there are disabled, minor, unborn, or unascertained beneficiaries is left unanswered. Two questions will have to be addressed when a court is faced with the right fact situation:

1. Does the benefit that the court is required by statute to find include only pecuniary benefit or can it include indirect, non pecuniary benefits created by the variation?
2. Should the court take into account the purposes of the settlor in determining benefit to the protected class, or should it base its decision exclusively on the court's evaluation of the best interests of the beneficiaries, uninfluenced by the settlor's purpose?⁹¹

If the courts continue to follow English precedent as in *Hamerstrom*, the answer to the above questions will be relatively easy. English courts have adopted a very broad definition of "benefit" to include even social and psychological benefits to the protected class as a basis for approving trust variation.⁹² In addition, English courts do not require certainty of financial benefit and will authorize variation even though there are risks of human judgment attached.⁹³

In answer to the second question, the English courts generally regard the purposes of the settlor only as a factor to be considered in deciding a variation for a protected class of beneficiaries, but the court may disregard those purposes if the interests of the beneficiaries outweigh their consideration.⁹⁴ Missouri courts have the authority to go this far, because the legislature chose not to require the settlor's purposes be controlling in this instance. It is unlikely, however, that courts will go this far after years of following the *Clafin* doctrine.⁹⁵ The extent to which the courts will consider the settlor's purpose in establishing the trust when deciding a variation issue with a

90. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 319-20 (4th ed. 1990).

91. See Wiedenbeck, *supra* note 3, at 815-20.

92. See Wiedenbeck, *supra* note 3, at 818-19 (citing *Re Zekelman*, 19 D.L.R. 3d 652, 654 (Ont. High Ct. 1971)).

93. *Id.* (citing *Re Cohen's Will Trusts*, 3 All E.R. 523, 524 (1959)).

94. *Id.* at 823.

95. *Id.*

protected class of beneficiaries will determine the amount of control that remains in the hands of the dead.⁹⁶

Hamerstrom goes a long way towards answering application issues raised by the enactment of section 456.590.2. The instant court used broad interpretive powers to apply the statute in this particular situation despite the ambiguity in the language of the statute. It could be supposed that in further applications of the statute, courts will continue to follow the lead of the English courts and parliament. Furthermore, the issue as to whether a testator can avoid the application of section 456.590.2 by including spendthrift provisions in the trust was not addressed.⁹⁷ Until the remaining issues are resolved, we will not know if the dead hand control of trusts has actually taken its last breath in Missouri.

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96. *Id.* at 824.

97. Sullivan, *supra* note 56, § 10.13.

