

outsider. He also refused to repurchase Edward's shares, without Edward's explicit acknowledgement of the "oral trust." Soon, full-blown litigation ensued. This greatly embarrassed the family, especially Edward's mother, Belle, who urged Edward to settle. The litigation finally settled, with Edward able to sell two-thirds of his stock to NAI and agreeing that his other third "had always been held by Edward, 'for the benefit of his children ... in trust and not as beneficial owner.'" NAI purchased two-thirds of Edward's interest for \$5 million. In addition, Edward executed an "irrevocable declaration of trust ... for the benefit of his children" and all parties signed the customary releases. The agreement was filed with the Massachusetts Superior Court and the Court "issued a Final Decree incorporating the terms of the Settlement Agreement."

Three weeks after the Final Decree was issued, Sumner, in support of his father's wishes, "executed irrevocable declarations of trust for the benefit of his two children" and transferred a similar amount of shares to this trust in a manner similar to what Edward had done under the Final Decree. Sumner, like Edward, never filed a gift tax return.

O'Connor Litigation

At Edward's death, the IRS received his 706 filing and Googled his name. The result of the Google was the discovery of the O'Connor litigation.^[5]

In 2006, almost four decades after the Final Decree settlement, further litigation arose in which various family trusts argued that more shares should have been transferred to the children's trusts as a result of the oral agreement. In other words, the math didn't work. The differential between the 48 percent of assets contributed by Mickey and the one-third of the stock he received was supposed to go to the grandchildren under the "oral trust" argument espoused by Mickey. If there was an "oral trust," more shares should have gone to the grandchildren than what was provided for in the Final Decree. In the O'Connor trial, Sumner was adamant that this may be true for Edward, but his gifts were voluntary and not part of the oral agreement. Sumner testified,

I voluntarily set up an arrangement - call it what you will - where my own children would get a third of the stock. ... I wanted to do the same thing that my brother did, only he did it as a result of litigation. I did it voluntarily.

The Tax Court's Decision

In Edward's trial, the Court declared,

All the elements of arm's-length bargaining existed here. There was a genuine controversy among Edward, Mickey, and Sumner; they were represented by and acted upon the advice of counsel; they engaged in adversarial negotiations for a protracted period; the compromise they reached was motivated by their desire to avoid the uncertainty and embarrassment of public litigation; and their settlement was incorporated in a judicial decree that terminated the lawsuits.

As a result, the Court concluded that there was no gift made by Edward.

However, at Sumner's trial, the Tax Court stated,

There is no evidence that any dispute existed in 1971-1972 concerning ownership of Sumner's stock or that Mickey was determined to withhold any of Sumner's shares from him. To the contrary: the evidence showed that Mickey and Sumner were working in concert to drive Edward out of the company and that the "oral trust" theory was a weapon they deployed against Edward in an effort to achieve that goal. Because no demand was ever placed on Sumner's shares, no negotiations ever occurred concerning his ownership of those shares. Sumner never filed a lawsuit, and he received no release of claims from Mickey upon transferring his stock. ... [Moreover, the Final Decree] had been finally executed three weeks *before* Sumner made his transfer. ... By its terms, the [Final Decree] imposed no obligations on Sumner except that he execute releases in exchange for reciprocal releases from each of the other parties. [emphasis added]

Once the Court determined that a gift had been made, the issue of valuation was easily settled as the