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Trusts - Management and Disposal of Trust Property - Investments - May a Court Authorize Deviation from Express Terms to Accomplish the Dominant Intention of the Donor

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the exercise of their discretion in allowing specific questions on *voir dire* examination.

It appears that the factual situation of each case would greatly determine the extent to which North Dakota trial courts would allow specific questioning regarding possible prejudice or bias. In all probability the discretion of the trial court, if reasonably exercised, would be controlling.

WILLIAM H. BROWN

TRUSTS — MANAGEMENT AND DISPOSAL OF TRUST PROPERTY — INVESTMENTS — MAY A COURT AUTHORIZE DEVIATION FROM EXPRESS TERMS TO ACCOMPLISH THE DOMINANT INTENTION OF THE DONOR? —Beneficiary petitioned for orders authorizing trustees of two separate trusts to deviate from restrictions on investments contained in the instruments. The trusts were created in 1917 and 1919; the settlor died in 1939. Investment provisions in both trusts provided, generally, that the trustees should manage, care for and protect the fund in accordance with their best judgment and discretion, and invest in certain described property, "but not real estate nor corporate stock". The Supreme Court of Minnesota, *held*, that because of changed conditions due to inflation since the trusts were created,¹ if deviation from authorized investments was not permitted, accomplishment of the dominant intention of the donor to prevent a loss of the principal of the trusts would be substantially impaired. *In re Trusteeship Under Agreement With Mayo*, 105 N.W.2d 900 (Minn.).

Courts have considered actual and clear necessity to be the test for deviation from the express stipulations of the trust.² This becomes a question of fact which must be determined by the court in view of the surrounding circumstances and the dominant intention

1. In the instant case the Court said: "In support of the petition, evidence was submitted that an inflationary period, which could not have been foreseen, had commenced shortly after the donor's death in 1939; that it had reduced the value of the trust assets by more than 50 per cent; that a further inflationary period or a permanent "creeping inflation", which the donor could not have foreseen, must be expected, . . ."

2. RESTATEMENT (Second), TRUSTS § 167, comment c (1959) "Where by the terms of the scope of investments which would otherwise be proper is restricted, the court will permit the trustee to deviate from the restriction, if, but only if, the accomplishment of the purposes of the trust would otherwise be defeated or substantially impaired. Thus the court will permit the investment if owing to changes since the creation of the trust, such as the fall in interest rates, the danger of inflation, and other circumstances, the accomplishment of the purposes of the trust would otherwise be defeated or substantially impaired. Where by the terms of the trust the trustee is not permitted to invest in shares of stock, the court will not permit such an investment merely because it would be advantageous to the beneficiaries to make it."; see Scott, *Deviation from the Terms of a Trust*, 44 Harv. L. Rev. 1025 (1931).

of the settlor taken from the instrument as a whole.³ Deviation from the specific terms of a trust agreement will sometimes be allowed upon the theory that if the testator had foreseen such a situation he would not have denied the trustee the right to act in the manner contemplated but, in all probability, would have authorized it.⁴

This consideration is to be distinguished from the problem of construction of general, vague or ambiguous terms in the instrument where ascertainment of the settlor's dominant intention must be gleaned from the circumstances under which the agreement was drafted. In *Smith v. Commissioner* the instrument provided that the trustee "shall be empowered in his sole discretion" to use the principal and income for the beneficiaries' education. The Court held it to the donor's dominant intention that the trustees were bound to make the payments despite the unrestrictive language employed.⁵

It is the primary duty of the courts to enforce the provisions of the trust and when the language of the instrument is clear, a court will normally not allow deviation,⁶ notwithstanding a subsequent statutory enactment⁷ authorizing an investment in securities which are prohibited by the trust.⁸ This primary duty may be circumvent-

3. *Johns v. Montgomery*, 265 Ill. 21, 106 N.E. 497 (1914) (Beneficiaries of a trust comprised of farm realty petitioned for platting and sale of the land, held petition denied; the mere circumstances of proximity to a city due to its growth and a consequential increase in value of the land will not warrant modification merely because it would be advantageous to the beneficiaries. But subsequently, when the farm land was wholly surrounded by the inhabited portion of the city, the court of equity authorized platting and sale of the land due to the manifest change in circumstances, *s.p.*, taxes and special assessment would evoke a complete destruction of the trust.); *Trust Co. of New Jersey v. Glunz*, 19 N.J. Eq. 73, 181 A. 27 (1935); see *Stanton v. Wells Fargo Bank and Union Trust Co.*, 150 Cal. App. 763, 310 P.2d 1010, 1015 (1957) (disallowed, will modify if necessity demands); *Rogers v. English*, 130 Conn. 332, 33 A.2d 540, 542 (1943) (same); *Thompson v. Union Nat'l Bank*, 291 S.W.2d 178, 183 (Mo. 1956) (same).

4. *Stephens v. Collins*, 274 Ill. 389, 113 N.E. 691 (1916); Gray, *The Nature and Sources of the Law*, 316 (1909) "When the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation."

5. 131 F.2d 254 (8th Cir. 1942) (so the 16 and 19 year old beneficiaries were deemed to have received a present interest; gift exclusion allowed); *Denegre v. Walker*, 214 Ill. 113, 73 N.E. 409 (1905) (99 year lease construed to be proper); *Hamlen v. Rednalloh Co.*, 291 Mass. 119, 197 N.E. 149 (1935) (words construed in ordinary sense); *Upham v. Plankinton*, 152 Wis. 275, 140 N.W. 5, 8 (1913) "In respect to the dignity of the trust, the supreme test is, what did the testator intend? That being discovered it is the law of that trust."

6. *Rogers v. English*, 130 Conn. 332, 33 A.2d 540 (1943); *Thompson v. Union Nat'l Bank*, 291 S.W.2d 178 (Mo. 1956); *Reiner v. Fidelity Union Trust Co.*, 127 N.J. Eq. 377, 13 A.2d 291 (1940); see 3 BOCERT, TRUSTS § 561 (1960).

7. Minn. Stat. Ann. § 501.125 subd. 1 (1945) "... a trustee is authorized to acquire . . . every kind of investment, specifically including, but not by way of limitation, bonds, debentures and other individual or corporate obligations, and corporate stocks, . . ."

8. *Stanton v. Wells Fargo Bank and Union Trust Co.*, 150 Cal. App. 763, 310 P.2d 1010 (1957); *In re Jones' Will*, 202 Minn. 187, 277 N.W. 899 (1938) *Aff'd* 221 Minn. 524, 22 N.W.2d 633 (1946).

ed, as in this case, by the court declaring that the real duty is to secure for the *cestui que trust* the benefits intended by the settlor and to accomplish this purpose deviation may be necessary.⁹

The principle is well settled that courts will allow deviation when the provisions of the trust involve illegality,¹⁰ impossibility¹¹ or where the purpose of the trust has been achieved.¹²

In the instant case the Court allowed the trustee to invest in corporate stocks, not on the basis of advantage to the beneficiary, but because of changed economic conditions. If deviation were not permitted, accomplishment of the purposes of the trusts would be substantially impaired. This holding seems to be justified on the basis of the necessity involved and it should have no adverse effect on future litigation since each case must be decided on its own merits.

Admittedly then the expressed intention of the settlor is not immutably controlling as is commonly asserted. Examination reveals that the court of equity possesses appreciable discretion in passing on the intangibles of necessity and so-called dominant intention. Further, court authorized modification creates an inconsequential effect on future litigation for each case must be decided on its own merits with the measure of the court varying as did the traditional "foot of the chancellor".

RALPH MELLOM

UNEMPLOYMENT COMPENSATION — LABOR DISPUTE DISQUALIFICATION — INTERPRETATION OF THE "ESTABLISHMENT" CLAUSE. During the course of collective bargaining negotiations, the employees of two stores of a nine store food market chain voted to strike. The employees of all nine stores were represented by the same local union. The stores were all branch stores and situated within the metropolitan area, the general office and all managerial depart-

9. *Hoffman v. First Bond and Mortgage Co.*, 116 Conn. 320, 164 A. 656 (1933); *Mass v. Reed*, 184 Ill. 263, 56 N.E. 306 (1900); *Trust Co. of New Jersey v. Glunz*, 119 N.J. Eq. 73, 181 A. 27 (1935); *In re Pulitzer's Estate*, 139 Misc. Rep. 575, 249 N.Y.S. 87 (1931); *Ruggles v. Tyson*, 104 Wis. 500, 79 N.W. 766, 768 (1899) (The Court provided a good statement of the general rule: "Rather than that the scheme of the creator of such estate shall entirely fail by reason of some circumstance not foreseen by him and provided for, the court may intervene, but only for the purpose of, and so far as necessary, to preserve the property.").

10. See *Stout v. Stout*, 192 Ky. 504, 233 S.W. 1057 (1921) (after prohibition, co-operation was infeasible, held deviation allowed); cf. *Gouy Shong v. Chew Shee*, 254 Mass. 484, 150 N.E. 225 (1926); RESTATEMENT (Second), TRUSTS § 166 (1959).

11. *In re Young's Will*, 178 Misc. 378, 34 N.Y.S.2d 468 (1942); see *Sturgeon v. Stevens*, 186 Pa. 350, 40 A. 488 (1898); RESTATEMENT (Second), TRUSTS § 165 (1959).

12. *Simmons v. Northwestern Trust Co.*, 136 Minn. 357, 162 N.W. 450 (1917).