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Trusts--Limitations on Distributions from Incompetent's Estate

David Gail Hanlon
West Virginia University College of Law

convictions, and if this is at the time defendant is being tried it must be filed at this time or the prosecuting attorney will be barred. In all cases if the prior convictions are not discovered by the time *D* is released from prison, prosecution under the habitual criminal act is barred. Of course if the defendant is convicted again, the habitual criminal act could be used against him. This would give the state an additional period of time while *D* is a prisoner to discover his prior criminal record. With modern police techniques and complete records of criminal convictions, this should not impose too great a burden on the state.

John Payne Scherer

Trusts—Limitations on Distributions from Incompetent's Estate

The trustee of an incompetent sought authority, as provided by statute, to make certain charitable contributions and gifts from the income and principal of his ward's estate. *Held,* permission granted. The evidence permitted the court to reach the factual conclusion that the action to be taken was such that the incompetent if capable would have done the same. *In the Matter of Trusteeship of Kenan,* 138 S.E.2d 547 (N.C. 1964).

Before discussing the issues that arise concerning the distributions from the surplus of an incompetent's estate a more detailed examination of the history and problem involved in the principal case is required. In 1955 Mrs. Kenan, age seventy-nine, a widow with no dependents or descendants, had an estate worth approximately 52,000,000 dollars. In that year she executed a will making charitable bequests totaling about 800,000 dollars. She provided other relatively small legacies for certain relatives and servants with the residue going to two nephews. In 1962 Mrs. Kenan was declared incompetent and one of the nephews was appointed her trustee.

In 1963 the North Carolina Legislature passed certain enabling acts, codified as N.C. GEN. STAT. § 35-29.1 to 35-29.16 (Michie Supp. 1963), which provide that the trustee of an incompetent's estate may, with court approval and if certain conditions are met, make gifts from income and principal to tax exempt institutions and to the incompetent's devisees and heirs.

Proceedings were instituted in 1963 to make certain gifts and donations from the estate. Permission was denied, in *In re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85, 91, on the grounds that, "A court may authorize a fiduciary to make a gift of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, . . . that the lunatic, if of sound mind, would make the gift." However, leave was granted to amend the petitions to allege that the authority sought was for something Mrs. Kenan would do if competent.

The value of the estate was approximately 128,000,000 dollars and under the plan approved in the principal case 1,000,000 dollars would be donated from current income to charities and 23,000,000 dollars from principal would be given to charities and to certain relatives named in the will. As a result of estate tax savings there would be a substantial increase in the residue of the estate to be received by the legatees.

From 1956 to 1962 Mrs. Kenan's charitable gifts had averaged 8,000 dollars per year. The largest gift made by her in the past twenty-five years had been 25,000 dollars. In no year had she given in excess of 50,000 dollars. It is obvious that the incompetent had not shown a great inclination toward making charitable donations before her incapacity.

The earlier cases on this subject were concerned with allowances to needy dependents or relatives of the incompetent. Only recently has the question of tax savings through estate planning entered the picture. In every circumstance the first requirement has been that the action taken can in no way jeopardize the well-being of the ward or completely dissipate the estate. The likelihood of either occuring when the estate is as large as that in the principal case is minute.

The spiritual ancestor of all cases in this area is, *Ex parte Whitebead*, 2 Mer. 99, 35 Eng. Rep. 878 (1816), in which the court granted an allowance to a niece of a lunatic, stating that it was not because the party was the next of kin of the lunatic, or had any right to an allowance, but because the court would not refuse to do for the lunatic's benefit that which it is probable he would have done himself had he the capacity to act. At this time the Chancellor's authority over an incompetent's property was governed by the Statute De Praerogitiva Regis, 1326, 17 Edw. 2. which pro-

vided the lands and tenements of lunatics should be kept without waste and destruction and that the lunatic and his household should be competently maintained with the profits.

This case has been said to stand for the so-called "substitution-of-judgment" doctrine, in that the court is less concerned with what the particular individual would have done had his mind remained sound than what an average person in like circumstances would do. This liberal view has been followed in allowing a pension to an old servant of the insane person upon his retirement, *In re Earl of Carysfort,* Cr. & Ph. 76, 41 Eng. Rpt. 418 (1840), and to discharge a moral obligation of the incompetent treated as a debt of honor, *In re Whitaker,* 42 Ch. D. 119 (1889). In *In re Strickland,* 6 Ch. App. 225 (1871), the court granted leave to make a donation of 250 pounds toward building a school and a like amount toward the construction of a church in the neighborhood of property owned by the lunatic, citing *Ex parte Whitebead* as authority. Neither building had been planned before the incapacity of the ward so that it could hardly have been argued that it was something the individual himself could have intended to do.

In other instances English courts have used a narrow construction of their authority, saying the court should not "deal benevolently" with the surplus income. In the case of *In re Darling,* 39 Ch. D. 208 (1888), the court refused to make an allowance to needy cousins of the incompetent, who were also his next of kin, because of insufficient evidence that the incompetent would have made such an allowance.

29 HALSBURY'S LAWS OF ENGLAND, *Persons Mentally Disordered* Par. 1052 (3d Ed. 1960), states that the modern English practice is to exercise reasonable generosity in making such allowances out of surplus income particularly when, as a result of the income tax laws, the benefit to the relative is much greater than the net cost to the estate.

In the United States the courts may be divided into two classes: (1) those which view their power over the estates of incompetents as strictly limited by statute and which tend to construe such statutes narrowly against an allowance and (2) those courts giving a broad interpretation to their authority and what they consider the best interests of the estate.

In, *Binney v. Rhode Island Hospital Trust Co.* 43 R.I. 222, 110 Atl. 615 (1920), the court refused to order the conservator of an estate to continue making payments for the upkeep of property of which the incompetent was the life tenant but which was and had been in the possession of her husband's nephew. In so holding the court stated that the state statute empowered them to pay the incompetent's debts and the expenses of supporting him and his family and to make sales when necessary, but that it failed to confer any discretion to grant or continue donations which the incompetent was not obligated to make or continue.

A leading New York case in this area, *In re Flagler,* 248 N.Y. 415, 162 N.E. 471 (1928), granted a relatively small allowance to the second cousin of the incompetent, holding the court's power to dispose of the incompetent's income was not plenary and that the court could only give such weight to moral or charitable considerations as it found the incompetent would have given them. Similar language was used in *Kemp v. Arnold,* 234 Mo. 154, 113 S.W.2d 143 (1938), where provisions for the incompetent's elderly widowed mother were authorized, the court indicating that only if they were convinced from all the facts that the incompetent if sane would wish to assume such obligation would the court approve it.

In *Lewis v. Moody,* 149 Tenn. 687, 261 S.W. 673, (1924), it was held that the authority of a court of chancery over the estate of an incompetent was purely statutory and that they were not authorized to make appropriations to persons other than the children and descendants of the incompetent. This statute was amended in 1927 (remaining basically the same today), TENN. CODE ANNO. § 34-501 (Supp. 1964), to allow payments for the support of other named relatives including brothers and sisters if they were dependent on the incompetent for support prior to his disability, "or are at the time of the application . . . actually dependent, and have a legal or moral right to claim support from the incompetent were he in full possession of his faculties." The Tennessee court in interpreting this section in *Mounds v. Dugger,* 176 Tenn. 550, 144 S.W.2d 761 (1940), refused to make an allowance to brothers and sisters of the incompetent saying that it was still necessary for the court to do only those acts which the incompetent if sane would do, since for the court to satisfy a naked moral obligation would violate the incompetent's right to due process under the 14th Amendment as well as under the Tennessee Constitution. The first *Kenan* case,

supra, relied upon the holding and reasoning of the Tennessee court in refusing to grant the trustee's original request. The dissenting opinion in the principal case is based upon the rationale that although many people testified that they would advise the incompetent to do these particular acts if she were still sane, the fact remained that she had never shown any great inclination to behave as the majority said they were now convinced she would.

The broader approach is represented by *In re Buckley's Estate,* 330 Mich. 102, 47 N.W.2d 33 (1951), in which the court in making allowances to the incompetent's brothers and sisters said that the term "family" as used in the statute was to be broadly interpreted and that provision could be made for such collateral relatives upon the theory that the insane person would in all probability have made the payments had he been of sound mind.

In *Sheneman v. Manning,* 152 Kan. 780, 107 P.2d 741 (1941), the court granted an allowance to the indigent adult daughter of the incompetent, who was also his only heir, even though prior to his insanity the father refused to allow the daughter in his home. The court stated that what a normal father ought to do and probably would do under the circumstances should be the proper attitude for the father's guardian to take when the father was unable to act for himself.

Two recent cases have been concerned with the possible tax savings that can be achieved if distributions are made from the estate prior to the incompetent's death. The earlier case, *Bullock's Estate,* 10 Pa. D.&C.2d 682 (1956), found the court refusing to make an allowance for tax avoidance purposes on the basis that the Pennsylvania law did not authorize such a distribution nor did the court have any implied powers to make it. The court went on to say that incompetency was not the equivalent of death nor was tax avoidance a sufficient legal ground for making such a distribution.

The later case reached the opposite view. In re DuPont, 194 A.2d 309 (Del. 1963). As in the principal case, a sizeable estate was involved and there was no contention of need on the part of the children and grandchildren, who were to be the distributees, the tax saving being the only concern. The court allowed the gifts on the basis of the resulting tax saving since the remaining estate would be more than enough to care for the incompetent's needs,

and the court was satisfied that the plan was one the incompetent himself would probably have instituted had he been capable. The court stated that, DEL. CODE ANNO. § 12-3705 (Supp. 1964), which provides, "A trustee may in the name of the mentally ill person do whatever is necessary for the preservation and increase of his estate", along with the usual statute concerning making distributions to the relatives of the incompetent, empowered the trustee to invoke the so-called substitution-of-judgment doctrine. It should be noted that prior cases have looked only to statutes which give authority to make distributions to certain named parties. Delaware seems to have been the first to use a statute concerning the preservation and increase of the estate as a basis. It is reasonable to assume, particularly when large estates are involved and there is no need on the part of the distributees, that other courts may use this theory when tax savings are the reason the distribution is desired.

In the first *Kenan* case the court refused to accept a liberal substitution-of-judgment rule, even though the legislature had provided, N. C. GEN. STAT. § 35-29.3 (Michie Supp. 1963). The court stated in the first case that, "The judge shall not withhold his approval merely because the incompetent prior to becoming incompetent, had not made gifts to the same donee or other gifts similar in amount or type"—the court still adhering to the principle that the action to be taken must be something that the particular incompetent would do in order to avoid depriving the incompetent of property without due process.

In theory the North Carolina court gives a strict construction to its authority to allow a distribution; however, in view of the evidence deemed sufficient, in the principal case, to prove that this action was something Mrs. Kenan would do if able. North Carolina is more nearly in accord with those jurisdictions which look to what an average person would do under the circumstances and not necessarily the particular incompetent.

One of the major objections raised by the dissenting opinion in the principal case was that the decision was an open invitation for expectant heirs, devisees, and organized charities, dissatisfied with the method of distribution set up by the incompetent, to seek changes on the theory of this case. Abuses could well result if the courts fail to use the utmost caution in this area.

The powers and duties of an incompetent's committee in West Virginia are set out in W. VA. CODE ch. 27, art. 11, § 4 (Michie 1961), which provides, "He shall preserve such estate and manage it to the best advantage; shall apply the personal estate . . . to the maintenance of such person, and his family, if any; . . ." The West Virginia court has stated that the powers conferred by this statute are broad, *McDonald v. Jarvis,* 64 W. Va. 62, 60 S.E. 990 (1908), and that the management of the estate is transferred for preservation and wise expenditure as may be most beneficial to the incompetent owner. *Gapp v. Gapp,* 126 W. Va. 874, 30 S.E.2d 530 (1944).

Apparently the question of making expenditures for other than support payments to the incompetent or his family has not arisen in West Virginia. However, in view of the statute's broad language, a West Virginia court might well sanction the substitution-of-judgement doctrine to the point of making distributions for tax avoidance purposes, if of course, it is something a reasonable person would do under the circumstances and it is clearly shown that the recovery of the incompetent is unlikely and that his comfort and well being will not be endangered.

David Gail Hanlon

Wills—Equitable Conversion

T, who owned two farms, entered into a specifically enforceable contract to sell farm number one. Later, he executed a will in which he devised his personal property to *A,* a life estate in the farms to *A,* and the "balance" in the farms to *B.* At *T's* death the contract was unperformed but still specifically enforceable. *A* contends that *T's* rights under the contract to sell the farm passed with *T's* personal property. *B* contends that *T's* rights under the contract to sell the farm passed under the specific devise of the farms. The issue presented was whether a devise of land in which the testator has naked legal title sufficient to pass his personal, equitable interest in that land. *Held*: yes, a general or specific devise passes the interest of the testator in the land which he had contracted to sell prior to the execution of the will. The fact that the testator was mistaken as to the legal nature of his interest in the land will not be allowed to defeat his intent to give the benefit