Buffalo Law Review

Volume 13 | Number 1 Article 30

10-1-1963

Decedents' Estates And Trusts—Self-Dealing by Trustee's Attorney Did Not Vitiate Real Estate Sale

George P. Doyle

of confining uncooperative witnesses to lengthy confinements for non-compliance with court orders.[15]

Judge Van Voorhis in dissenting offered a logical common sense approach in rejecting the majority opinion, "It makes little difference whether a person is asked the same or related questions 17 times on one day, or on 17 different days. In each instance he should be found guilty of but a single criminal contempt."[16] The dissent was realistically concerned over the possible abuses that might result from zealous prosecutions, and the fundamental personal liberties that were being unnecessarily jeopardized by the majority's determination. According to Judge Van Voorhis any defendants confronted with successive criminal contempts ought to be granted a jury trial for perjury to finalize the issue.[17]

The instant case represents an inevitable, yet unfortunately common by-product of American jurisprudence—confusion. By an historically dictated method for splitting hairs between analogous factual situations the New York courts are now facing a dilemma: they must now uphold and defend opposing rules of law. At one extreme, a witness will only be in contempt once if the refusals to answer are confined to a single hearing.[18] If on the other hand an unfortunate witness, like defendant Cirillo, is recalled at a later date to testify he will be in danger of further incarceration.[19] Should this issue come before the courts again perhaps a closer scrutiny might help to amend the self imposed inconsistency.

Thomas E. Webb

DECEDENTS' ESTATES AND TRUSTS

SELF-DEALING BY TRUSTEE'S ATTORNEY DID NOT VITIATE REAL ESTATE SALE

The Chase Manhattan Bank petitioned Kings County Surrogate's Court to render and settle their intermediate account as sole surviving executor and trustee of the estate of Thomas A. Clarke. The Surrogate's Court confirmed the report of its appointed referee and dismissed the two objections of one of the beneficiaries. The two objections were that the sale of certain real estate by the executor was improvident and that the fee granted executor's attorney was improper. The basis of this latter charge was that the attorney had received a percentage of the brokerage commission. This improper payment to the attorney, however, was quite indirect. The property had been listed with one agent, Seward, with whom the attorney had agreed to split any commission. A second agent, Tilton, produced the ultimate purchaser but was nevertheless prevailed upon by the attorney to give part of his brokerage fee to the first agent, Seward, who, in

15. Instant case at 209, 188 N.E.2d at 140, 237 N.Y.S.2d at 712.
16. *Ibid.*
17. *Ibid.*
18. People v. Riela, 7 N.Y.2d 571, 166 N.E.2d 840, 200 N.Y.S.2d 43 (1960).
19. See cases at note 11 *supra.*

turn, split the amount with the attorney. The executor knew nothing of these payments until long after the actual sale. The sale was consummated directly between the bank as executor and Tilton's principal without the intercession of the attorney. The product of this direct dealing was an increase of 20% in sale price. In a per curiam decision, the Court of Appeals upheld the propriety of the land sale but refused to allow any fee for the attorney. When the executor took over negotiations and succeeded in raising the sale price considerably, the prior machinations of its attorney did not taint the sale of the land. The agreement of the attorney with the broker for a split of the commission, however, put him in a position of divided loyalty and he thereby breached his fiduciary duty and must be denied any compensation. *Matter of Clarke*, 12 N.Y.2d 183, 188 N.E.2d 128, 237 N.Y.S.2d 694 (1962).

A fiduciary is held to a higher standard than the morals of the market place.[1] Fraud is applicable to activity on the part of a fiduciary which would be innocent in a non-fiduciary setting.[2] A trustee, as fiduciary, has two basic duties: he must be prudent and diligent in his management of the trust[3] and he must have undivided loyalty to his cestui.[4] As to the requirement of prudence and diligence, the trustee must employ such diligence as prudent men employ in the management of their own affairs.[5] He is not, however, expected to be infallible.[6] The fiduciary's duty of undivided loyalty is particularly strong in the case of trustees.[7] The mere existence of a personal claim entangling the trustee's private interests with those of the beneficiaries' is frequently sufficient to warrant conduct being branded as a breach of the fiduciary duty.[8] The Court will always scrutinize very closely a trustee's conduct where he has an interest adverse to that of the beneficiary.[9] The determination of whether these standards have been met by a trustee, is one of facts to be found by the trial court.[10]

The self-dealing trustee is open to several types of penalties for his misconduct. A surcharge equaling the difference between what should have been received and what was received may be levied against him.[11] He may be denied fees[12] or removed from office by the Surrogate.[13] With respect to specific transactions consummated by the self-dealing trustee, the beneficiary, assuming no

1. Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (one partner entered a new business).
2. See Costello v. Costello, 209 N.Y. 252, 103 N.E. 148 (1913) (constructive fraud).
3. King v. Talbot, 40 N.Y. 76, 85 (1869).
4. See Matter of Estate of Weston, 91 N.Y. 502 (1883).
5. King v. Talbot, 40 N.Y. 76, 86 (1869).
6. *In re* Baker's Estate, 249 App. Div. 265, 292 N.Y.S. 122 (4th Dep't 1936).
7. See 2 Scott, Trusts § 170 (1st ed. 1939).
8. See *In re* Bond & Mortgage Guar. Co., 303 N.Y. 423, 103 N.E.2d 721 (1952); Bogert, Trusts & Trustees §§ 543, 544 (2d ed. 1960).
9. See *In re* Peabody's Will, 198 Misc. 505, 96 N.Y.S.2d 556 (Sup. Ct.), *aff'd*, 277 App. Div. 905, 98 N.Y.S.2d 614 (2d Dep't 1950).
10. *In re* Hubbell's Will, 302 N.Y. 246, 258, 97 N.E.2d 888, 893 (1951).
11. See *In re* Bausch's Estate, 280 App. Div. 482, 115 N.Y.S.2d 278 (4th Dep't 1952).
12. See Matter of Bushe, 227 N.Y. 85, 124 N.E. 154 (1919); *In re* Hayes, 40 Misc. 500, 82 N.Y. Supp. 792 (Surr. Ct. 1903).
13. See *In re* Wechsler's Estate, 171 Misc. 738, 13 N.Y.S.2d 940 (Surr. Ct. 1939) (executor who was also retained as counsel removed by surrogate).

bona fide purchaser has entered the picture, has the choice of avoiding them or treating them as binding and effective.[14] Generally, the good intent of the trustee is irrelevant nor is it important whether the transaction attacked was fair and for an adequate consideraiton.[15] The attorney for a trustee is a fiduciary of the beneficiary and as such is bound by the same rule of undivided loyalty.[16] Counsel fees are allowable by the Surrogate only for faithful performance of his duty[17] and he must be denied all compensation when he has placed himself in a position of divided loyalty.[18] While a trustee could be charged with his attorney's malfeasance,[19] there is no basis for surcharge when there is no evidence of the executor's knowledge of or participation in this malfeasance. If this were not so, an innocent and diligent trustee could be held liable for the secret, independent and corrupt act of a delinquent associate.[20]

In order to prevent being called upon to render post facto analyses of trust real estate sales, the Court, in the instant case has refused to overturn the trial court's fact finding by holding a specific transaction improvident as a matter of law. Trust fund investments invariably involve prognosis by the trustee. To force the Court to attempt to determine the reasonableness of every such prognosis would be unduly burdensome. This is avoided by leaving this question to the jury subject only to review when the improvidence of the trustee is so clear as to be improvident as a matter of law.[21] The problem presented by the attorney's dealings was a more complex and perplexing one. A holding that the attorney had breached his fiduciary duty, thereby obviating his claim for a fee, could sustain a demand by objectant that the particular sale be invalidated.[22] The Court, however, resolved this difficulty by a two-step analysis. In the first step they held that the admitted relationship between the agent and the attorney placed the attorney in a position of divided loyalty.[23] This position is in itself sufficient to deny the attorney any compensation whatsoever.[24] In step two, however, the Court holds that the fact-finder was justified in finding that the attorney's machinations did not taint the sale and therefore the sale stands. Therefore, misdealing by a fiduciary insulated from a particular transaction does not invalidate the transaction.

The decision appears to do justice to the particular litigants involved. In so doing, the Court has not required the executor to be clairvoyant nor has it

14. See 2 Scott, *op. cit. supra* note 7, § 170.2.
15. See Bogert, *op. cit. supra* note 8, § 543.
16. *In re* Bond & Mortgage Guar. Co., 303 N.Y. 423, 430, 103 N.E.2d 721, 725 (1952).
17. *Cf.* Chatfield v. Simonson, 92 N.Y. 209, 215 (1883); Klein v. Twentieth Century Fox Int. Corp., 201 Misc. 132, 108 N.Y.S.2d 767 (Sup. Ct. 1951).
18. See *In re* Jones Estate, 8 N.Y.2d 24, 28, 167 N.E.2d 336, 200 N.Y.S.2d 638, 641 (1960).
19. See, *e.g.*, *In re* Hayes, 40 Misc. 500, 82 N.Y. Supp. 792 (Surr. Ct. 1903); *In re* Remsen, 255 App. Div. 810, 7 N.Y.S.2d 350 (2d Dep't 1938).
20. See *In re* Wechsler's Estate, 171 Misc. 738, 13 N.Y.S.2d 940 (Surr. Ct. 1939).
21. See Purdy v. Lynch, 145 N.Y. 462, 40 N.E. 232 (1895).
22. See 2 Scott, *op. cit. supra* note 7, § 170.2.
23. See *In re* Bond & Mortgage Guar. Co., 303 N.Y. 423, 103 N.E.2d 721 (1952).
24. See *In re* Jones' Estate, 8 N.Y.2d 24, 167 N.E.2d 336, 200 N.Y.S.2d 638 (1960).

allowed a fiduciary who maintained something less than undivided loyalty to be compensated. The background of facts support strongly the Surrogate's finding that the attorney's machinations did not taint the sale of the land. The attorney was the husband of one of the four beneficiaries.[25] It is unlikely that his design would be to effect a quick sale of the property in order to realize an immediate $800.00 where he faced the possibility of a larger commission should the property sell for more. By urging such a quick sale, the attorney would also jeopardize his wife's interest by an amount approximating $7,500, *i.e.*, ¼ of $30,000, the amount by which the executor was able to increase this offer. However, assuming that the lawyer had such a design, it does not follow that the executor thwarted that design by stepping in late in the negotiations. There was ample evidence to show that the executor's evaluation of the property was strongly influenced by the attorney, who had been entrusted by the executor with the investigation of the local real estate market and an on-site evaluation of the property. It would appear then that the Court may have engaged in an amelioration of the rule of undivided loyalty. It may no longer be sufficient to show that the agent of a fiduciary breached his trust but additionally proof as to the agent's connection with a particular transaction appears now to be necessary.[26] That such a change is desirable in order to avoid the hazards of post facto analyses of the propriety of certain real estate sales by executors remains highly dubious.

George P. Doyle

IRREVOCABLE ASSIGNMENT OF TRUST INCOME TO WIFE NOT VIOLATIVE OF SPENDTHRIFT RULES IN CERTAIN CASES

In 1931 Mrs. Anna Knauth created an income trust for the benefit of her son Oliver. Sixteen years later, pursuant to the terms of a voluntary support agreement, Oliver made an "irrevocable assignment" to his wife of all said trust in excess of one hundred dollars per month in lieu of his duty to support his wife and the issue of their marriage. In an action by the trustees for a judicial accounting, Oliver attacked the assignment as violative of the rule against alienability of income trusts. From an adverse ruling of a referee appointed by Supreme Court, Special Term and the Appellate Division,[1] Oliver appealed to the Court of Appeals, *held*, affirmed, one Judge dissenting. Such an assignment did not violate the rule against alienation of spendthrift trust income in view of the beneficiaries sufficient remaining means to provide for his own maintenance. *In Matter of Knauth*, 12 N.Y.2d, 259, 189 N.E.2d, 482, 238 N.Y.S.2d, 942 (1963).

25. Compare *In re* Dutchers Estate, 251 App. Div. 184, 295 N.Y. Supp. 643 (2d Dep't 1937).

26. *But see, e.g.*, Wendt v. Fischer, 243 N.Y. 439, 154 N.E. 303 (1926); Albright v. Jefferson County Nat'l Bank, 292 N.Y. 31, 53 N.E.2d 753 (1944), *In re* Lewisohn, 294 N.Y. 596, 63 N.E.2d 589 (1945); *In re* Ryan's Will, 291 N.Y. 376, 52 N.E. 909 (1943).

1. In the Matter of Knauth, 15 A.D.2d 778 (1st Dep't 1962).