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TRUSTS - JUDICIAL SUPERVISION OF THE ADMINISTRATION OF TRUSTS

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TRUSTS — JUDICIAL SUPERVISION OF THE ADMINISTRATION OF TRUSTS — The last few years have witnessed an increasing tendency to use both the testamentary and inter vivos trust as a means for the distribution of estates.[1] Since this results in an avoidance of the normal procedure of probate and administration[2] and of supervision by the probate court, it becomes pertinent to inquire as to the extent to which the administration of trusts is subject to judicial control.

Although the functions of trustees and of executors and administrators are strikingly similar,[3] they are not equally subject to judicial supervision. The executor or administrator is an officer of the court,[4] and cannot safely act without its prior sanction or subsequent approval.[5] But the trustee's authority is derived solely from the settlor[6] and in the absence of bad faith or abuse of discretion he is not normally subject to judicial control.[7] There are, however, a number of cases in which the administration of a trust has been carried out under the active supervision of equity. Also, a number of statutes apparently give certain courts jurisdiction to exercise varying degrees of control

[1] See 1 POWELL, CASES ON TRUSTS AND TRUSTEES 51-55 (1933).

[2] In most states, by statute, a will must be probated in order to pass title to property. See 1 PERRY, TRUSTS AND TRUSTEES, § 93 (1929).

[3] See 1 BOGERT, TRUSTS AND TRUSTEES, § 12 (1935).

[4] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 10 (1923).

[5] 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, §§ 463, 519, 520 (1923), on sales of realty and payment of legacies and debts without a court order.

[6] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 10 (1923). And see Kramme v. Mewshaw, 147 Md. 535, 128 A. 468 (1925). 1 TRUSTS RESTATEMENT, § 17 (1935), outlines the various methods of creating trusts.

[7] 1 TRUSTS RESTATEMENT, § 187 (1935); 3 BOGERT, TRUSTS AND TRUSTEES, § 560 (1935).

over trusts. These cases and statutes constitute the subject of the discussion.

Before proceeding further, it will be helpful to define precisely the scope of the discussion. Briefly stated, it is this: to determine the extent to which the administration of trusts may be subjected to a judicial control approximating that exercised by probate courts over decedents' estates; more specifically, to ascertain whether a trustee may ever be required to obtain from the court a prior authorization or subsequent confirmation of his acts,[8] and, failing this, to determine what lesser degrees of control may be exercised. It cannot be too strongly emphasized that this does not refer to the remedial jurisdiction to prevent acts involving an abuse of discretion, but to the power to require judicial approval of the trustee's actions even though no maladministration is present or alleged.

The comment will not cover the statutes requiring a periodic accounting or governing investments by trustees,[9] the subject of bills for instructions,[10] nor the question of the appointment and removal of trustees.[11] These topics involve judicial intervention in trusts administration but are collateral to the stated problem.

[8] Notice that the requirement for an accounting does not cover this situation since that is merely a method of checking on the accuracy of the accounts of the trustee. See note 9, infra.

[9] 4 BOGERT, TRUSTS AND TRUSTEES, §§ 965-968 (1935), contains a compilation and discussion of the statutes on accounting. For a discussion of the statutes concerning investments by trustees, see Freifield, "Investment of Trust Funds," 5 UNIV. CINN. L. REV. 1 at 9 et seq. (1931).

[10] It is a generally accepted rule that a trustee who is in doubt as to his powers, rights and duties, may, by means of a bill for instructions, apply to the proper court for directions as to the execution of the trust, and is protected if he follows the instructions given. Thus he may petition the court to determine whether he has the power to invest trust funds, to discharge obligations, how to allocate expenses of administration, etc. But the trustee's ability to obtain such instructions is not unlimited. Not only must his doubt as to his duties, etc., be reasonable, but the question must concern his *immediate* duties. Instructions will not be given when the question presented concerns contingent future problems or past actions which could not be rectified even though found to be improper, nor will directions be given when the trustee's difficulty concerns a matter over which he was given the right to exercise discretion. On this topic, see the comment in 44 YALE L. J. 1433 (1935); 1 TRUSTS RESTATEMENT, § 259 (1935); 3 BOGERT, TRUSTS AND TRUSTEES, § 559 (1935). It should be noticed that the court, in entertaining a bill for instructions, does not acquire any great degree of supervisory control over the administration of the trust, since it cannot be expected that the court will determine any matters or difficulties which the trustee does not choose to present to it.

[11] The list of subjects excepted might well include the question of the power of equity to give trustees powers not conferred by the trust instrument. Also, it should be mentioned that the discussion will not include the cases in which the court itself executed the trust.

I.

Maryland is the only jurisdiction which has recognized the complete supervision of trusts by equity as a common-law doctrine. Under the Maryland cases[12] the circuit court in equity can acquire jurisdiction in the following situations: (1) when there is a provision in the trust instrument directing administration in equity;[13] (2) when the court appoints the trustee;[14] (3) when the trustee submits to the jurisdiction of the court;[15] (4) when a bill in equity involving the trust has been filed, on the basis of which a decree has been entered.[16] The court's control becomes complete, so that it is the duty of the trustee to obtain the court's approval of his acts.[17] The trustee may, however, obtain a subsequent confirmation of his acts if the court would have authorized them had its prior approval been sought.[18] The effect of the Maryland practice is summarized in *Kramme v. Mewshaw*,[19] where the court states:

> "The position of a conventional trustee over whose trust the court has not assumed jurisdiction is that he is the special agent of the creator of the trust . . . while a trustee under a decree is an officer or arm of the court. . . . [And] if the court for any reason should assume jurisdiction of the trust, the situation of the conventional trustees 'is thereby so far changed that they must thereafter secure the sanction or ratification of the supervising court for the successive steps of their administration of the trust.'"

In other jurisdictions, equity has directed the administration of a trust when a substitute trustee was appointed for one who refused to assume the duties.[20] The same has been done when a suit involving the trust was begun,[21] or the trustee voluntarily submitted to super-

[12] A recent statute [Md. Ann. Code (Bagby Supp. 1929), art. 16, § 267A] provides for administration in equity when it is requested by a "person . . . interested."

[13] Whitelock v. Dorsey, 121 Md. 497, 88 A. 241 (1913); Art Students' League v. Hinckley, (D. C. Md. 1929) 31 F. (2d) 469.

[14] Penn v. Brewer, 12 Gill & J. (25 Md.) 79 (1841).

[15] Gottschalk v. Mercantile Trust Co., 102 Md. 521, 62 A. 810 (1906); Latrobe v. American Col. Soc., 134 Md. 406, 106 A. 858 (1919); McCrory v. Beeler, 155 Md. 456, 142 A. 587 (1928).

[16] Baer v. Kahn, 131 Md. 17, 101 A. 596 (1917). The requirement, differently stated, is that the bill must present facts sufficient to invoke the jurisdiction of the court. For a list of English cases involving judicial supervision in the same situation, see 2 PERRY, TRUSTS AND TRUSTEES, § 474 (1929).

[17] Kramme v. Mewshaw, 147 Md. 535, 128 A. 468 (1925).

[18] Johnson v. Webster, 168 Md. 568, 179 A. 831 (1935); McCrory v. Beeler, 155 Md. 456, 142 A. 587 (1928).

[19] Kramme v. Mewshaw, 147 Md. 535 at 547, 128 A. 468 (1925).

[20] Prince v. Barrow, 120 Ga. 810, 48 S. E. 412 (1904).

[21] Fisher v. Seattle Trust Co., 109 Wash. 257, 186 P. 649 (1920).

vision by the court.[22] And when, in an action involving the trust, it appeared that the exercise of the trustee's discretion involved a difficult question of judgment[23] or might conflict with the trustee's interests as cestui,[24] the court directed the execution of the trust. And finally, when the trustee had so abused his discretion as to result in a total perversion of the purposes of the trust, equity required that the trust be executed under its orders.[25] These cases are, however, few in number.

2.

There are three groups of statutes involving judicial supervision of trusts. They are as follows: (1) statutes allowing the court to exercise some measure of control at the request of the trustee or an interested party; (2) those conferring jurisdiction over testamentary trusts; (3) statutes conferring jurisdiction over trustees appointed by the court.

Statutes in Maryland, Minnesota, North Dakota and South Dakota[26] allow equity to supervise the trust at the request of the trustee or an interested party.[27] The degree of control so conferred varies in the different states. Only in Maryland[28] and, very questionably, in South Dakota[29] may it be so complete as to require that the trustee ob-

[22] Cromey v. Bull, 4 Ky. L. Rep. 787 (1887) (jurisdiction not here assumed because the trust instrument gave the trustee absolute discretion).

[23] Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810 (1893).

[24] Washington Bldg. & Loan v. Buser, 61 W. Va. 590, 57 S. E. 40 (1907); Rogers v. Rogers, 111 N. Y. 228, 18 N. E. 636 (1888); Irving v. Irving, 21 Misc. 743, 47 N. Y. S. 1052 (1897).

[25] Coker v. Coker, 208 Ala. 354, 94 So. 566 (1922). See also In re Van Becar, 49 Misc. 39, 98 N. Y. S. 309 (1905); Collister v. Fassitt, 7 App. Div. 20, 39 N. Y. S. 800 (1896); Manning v. Sheehan, 75 Misc. 374, 133 N. Y. S. 1006 (1911); Thompson v. Denny, 78 Ind. App. 257, 135 N. E. 260 (1921).

[26] Md. Ann. Code (Bagby Supp. 1929), art. 16, § 267A; Minn. Stat. (Mason Supp. 1936), § 8100-11 et seq.; N. D. Laws (1935), c. 250, superseding N. D. Laws (1931), c. 122; S. D. Comp. Laws (1929), §§ 1233A, 1233B and court rules in 46 S. D. ix.

[27] In Maryland and South Dakota such application may be made by a "person . . . interested" or "party in interest," respectively. In North Dakota, either the trustee or an interested party may request supervision, while in Minnesota, only the trustee is given such right under the statute.

[28] The statute is very general, stating only that the trust may be "administered under the supervision of a court of equity" at the request of an interested person, but it is assumed that the practice under the statute does not vary from that established by the Maryland decisions.

[29] Rule XI of the rules for trust administration (46 S. D. ix) provides that "Application to control or supervise the acts of a trustee may be made by any party in interest, and the court shall, by order, appoint a hearing thereon and provide therein for notice of such hearing to the trustee and such other persons as may be proper. . . ." The writer has been unable to determine whether this rule permits the court to require trustees to submit their actions to it, or whether, assuming such power exists, it is ever exercised.

tain judicial sanction for his acts. The North Dakota law specifically states that no court order shall be required to make an act of the trustee valid but that the purpose of the law is to provide for a conclusive approval or confirmation of such acts if the same be properly requested.[30] The Minnesota act provides only for conclusive directions upon request by the trustee and plainly does not make such sanction a requirement.[31] It should be noticed that these latter statutes cannot be said to provide for a complete judicial supervision because the submission of one act to the court, for approval or confirmation, does not create the requirement that acts subsequent thereto be also passed upon.

Iowa appears to be the only state in which the court will, by virtue of a statute, require the testamentary trustee to obtain the court's approval of his acts. The Iowa statute[32] gives the district court jurisdiction over "the management and disposition of the property . . . of . . . [testamentary trust] estates." Although an earlier case construed the statute so as not to provide for complete supervision,[33] it is stated in a recent case that the trustee must obtain the court's approval of his acts.[34] It is not, however, a particularly strong decision.[35] In New York, the surrogate court probating the will is given jurisdiction "To direct and control the conduct, and settle the accounts, of executors, administrators and testamentary trustees"[36] but the statute has been held not to require the court's approval.[37] The California probate code[38] allows the testamentary trustee to petition the superior court for instructions, and to report his acts to it, but neither measure is required. Statutes in

[30] N. D. Laws (1935), c. 250, § 12.

[31] Minn. Stat. (Mason Supp. 1936), § 8100-13.

[32] Iowa Code (1931), § 10764. See also § 11876.

[33] In re Trusteeship of Clark, 174 Iowa 449, 154 N. W. 759 (1916).

[34] In re Estate of Skinner, 215 Iowa 1021, 247 N. W. 484 (1931). While this case did not involve a testamentary trustee, but one appointed by the court, the case is relevant since testamentary trustees and trustees appointed by the court are subject to the same control under § 11876. See also, In re Trusteeship of Lawson, 215 Iowa 752, 244 N. W. 739 (1933); Blain v. Blain, 215 Iowa 69, 244 N. W. 827 (1932).

[35] The decision is considerably weakened by the fact that the trustee, who was surcharged because he had not obtained the court's approval for his investments (loans to self), obviously could have been held liable on several other grounds. It is, of course, hazardous to allege that a judicial practice exists on the basis of such unsatisfactory authority. But it would appear that the statute is broad enough to authorize such a practice, for § 11876 states that testamentary trustees "shall be subject to control" by the court "in the same manner" as executors and § 10764 states that the court shall have jurisdiction over the estates held by *executors and trustees.* This manner of grouping trustees and executors is significant.

[36] N. Y. Code Civ. Proc. (Parsons 1920), § 2510, subd. 3.

[37] McQuaide v. Perot, 223 N. Y. 75, 119 N. E. 230 (1918). And see, In re Kohn's Estate, 158 Misc. 853, 286 N. Y. S. 930 (1936); In re White's Will, 125 Misc. 901, 212 N. Y. S. 267 (1925).

[38] Cal. Prob. Code (1931), § 1120.

Utah[39] and Wisconsin[40] provide, respectively, that testamentary trusts be executed "subject to the orders" and "under the direction" of the court probating the will, while the Missouri act[41] states that the circuit court appointing a trustee for a testamentary trust "may in its discretion make orders . . . to conserve the estate or cause the same to be properly administered." The Utah and Missouri statutes hardly involve more than a restatement of the common-law rule, and were, no doubt, primarily enacted to create and make exclusive the remedial jurisdiction of the probating or appointing court.[42]

There are, in the case of the trustee appointed by the court, several statutes which appear to authorize the court to supervise actively the execution of the trust.

Alabama, California, Montana, North Dakota and South Dakota[43] have statutes[44] stating that: "When a trust exists without any appointed trustee, or when all the trustees renounce, die or are discharged the court of the county where the trust property, or some portion thereof, is situated, must appoint another trustee, *and direct the execution of the trust.* . . ." (Italics added.)

In Michigan, Minnesota, New York and Wisconsin[45] a similar statute reads: "Upon the death of the surviving trustee of an express trust . . . the trust, if then unexecuted, shall vest in the [equity] court . . . and shall be executed by some person appointed for that purpose, *under the direction of the court.*"[46]

There are several additional statutes. A recent Virginia act[47] provides that when a trusteeship becomes vacant because of the death, resignation or incapacity of the trustee, the court may appoint a

[39] Utah Rev. Stat. (1933), § 102-12-32.

[40] Wis. Stat. (1933), § 323.01.

[41] Mo. Rev. Stat. (1929), § 3147.

[42] State v. Johnson, 229 Mo. App. 16, 68 S. W. (2d) 858 (1934). See also, Cell v. Robinson, (Mo. App. 1935) 79 S. W. (2d) 489; Matter of Pinckney, 115 Misc. 602, 189 N. Y. S. 49 (1921). It should be noticed that these statutes operate to give the probate court the power normally exercised by equity.

[43] Ala. Code (1928), § 10436; Cal. Civ. Code (1931), § 2289; Mont. Rev. Code (1921), § 7927; N. D. Comp. Laws (1913), § 6318; S. D. Comp. Laws (1929), § 1233.

[44] The statute is based on Field's Draft, N. Y. Civil Code, § 1215, Stats. (1867-1868), p. 170.

[45] 3 Mich. Comp. Laws (1929), § 12990; Minn. Stat. (Mason 1927), § 8103; 49 N. Y. Consol. Laws (McKinney 1923), § 111 [This section refers to trusts of realty. The statute concerning trusts of personalty does not include the provision concerning direction by the court. 40 N. Y. Consol. Laws (McKinney 1923), § 20. The similar Indiana statute also omits that provision. Ind. Stat. (Burns 1933), § 56-617.]; Wis. Stat. (1933), § 231.24.

[46] Italics ours.

[47] Va. Acts (1936), § 6298-a, p. 548, superseding Va. Code (Supp. 1934), § 6298-a.

substitute trustee to execute the trust "under such conditions as to judicial supervision, as may be directed by the appointing court." An Indiana statute provides for appointment by the circuit court when the trustee dies or refuses to act and states that the "trustee . . . shall be at all times under the equitable control of the court."[48] In Iowa, the statutes applying to testamentary trustees apply as well to trustees appointed by the court.[49]

It would appear that these statutes, especially the ones in the first group, could serve as the basis for a complete supervision of this class of trustees. But this jurisdiction has not generally been exercised. This conclusion is based on the absence of cases interpreting the statutes. For if the courts required these trustees to obtain directions or a confirmation of their acts, there surely would be a number of cases in the reports in which the failure to obtain such judicial sanction, or the propriety of the court's grant of it, had been made the subject of litigation.[50] (Such cases as have been found are grouped in the notes.[51]) In other words, it may be concluded that these statutes have not resulted in an enlargement of the jurisdiction as exercised

[48] Ind. Stat. (Burns 1933), § 56-629. This statute does not appear to enlarge the jurisdiction of the court over that exercised at common law.

[49] Iowa Code (1931), §§ 10764, 11876. See supra notes 34 and 35, and text corresponding.

[50] Observe the number of Maryland cases under the Maryland practice.

[51] As previously indicated, the case material is highly insufficient. (1) There is but one relevant case to the California practice under § 2289 of the Civil Code. In Hallinan v. Hearst, 133 Cal. 645, 66 P. 17 (1901), a case involving another point, the court observed by way of dictum and without referring to § 2289, that the trustees, who were appointed by the court and administered the trust under the directions of the court, were protected, in their management, by its orders. This case may be taken for whatever it is worth. (2) The cases on the Iowa practice under § 10764 and § 11876 are collected in notes 34 and 35. (3) In the Michigan case of Michigan Trust Co. v. Bank of Ionia, 241 Mich. 146, 216 N. W. 472 (1927), involving § 12990 of the Michigan statutes, and concerning the right of a concurrent jurisdiction to affect property in the hands of a court-appointed trustee, the court stated (241 Mich. at 149) that "The property involved in this litigation is in the hands of the [appointing] court . . . acting through its appointee as trustee." In spite of this and similar language, it is doubtful whether the decision meant to do more than state emphatically that the jurisdiction of the appointing court is exclusive. (4) It is difficult to determine the effect given to § 111 of the New York Real Property Law. In Matter of Gueutal, 97 App. Div. 530 at 531, 90 N. Y. S. 1105 (1904), the court stated, in a dictum, that under § 111 the court "has power to appoint someone as its hand and representative to execute the unexecuted parts of a trust, with all the powers and duties of the original trustee, but under the direction of the court. . . ." And statements are made in a number of cases, indicating that under § 111 the court itself may execute the trust. See, for example, Robinson v. Schmitt, 17 App. Div. 628, 45 N. Y. S. 253 (1897), and Kirk v. Kirk, 137 N. Y. 510, 33 N. E. 552 (1893). If this were done, and the trust were of any duration, no doubt an officer of the court, acting as trustee but controlled by its order, would be appointed. However, no conclusion as to the New York practice can be forwarded.

under the common law. Their only effect must then be to settle the question as to which of the concurrent jurisdictions shall exercise remedial control. This is, of course, one of the purposes for which they were enacted.[52] Nevertheless, in view of the positive character of the language in some of the statutes, and in spite of the fact that this contention is weakened by their generality, it is arguable that a residue of power remains which the courts could exercise if they wished. Reiterating, there is no apparent reason why these statutes should not serve as the basis for rules subjecting the trustee to a judicial control similar to that exercised over executors and administrators.

Another interesting and potentially important group of statutes has been enacted in Alabama, Michigan, Minnesota and Wisconsin.[53] These provide that when a trustee is removed or resigns, the court may, in its discretion, appoint a new trustee "or cause the trust to be executed by one of its own officers under its direction."[54] Irrespective of the provision concerning direction by the court, if the trust is executed by an officer of the court it is rather unlikely that he would be allowed to administer it without being subjected to some degree of supervision, which might very possibly be as complete as that exercised over executors and administrators.

Summarizing briefly, the following generalizations may be made: (1) Except for a few scattered cases and a single state, equity's common-law jurisdiction over the administration of trusts is purely remedial. (2) The statutes permitting the trustee or interested party to bring a question of administration before the court for directions or a subsequent confirmation do not uniformly operate to force the trustee to obtain judicial approval for his acts subsequent thereto. (3) There are few statutes dealing with the judicial control of testamentary trusts and only two of them[55] appear to enlarge the jurisdiction of the court. The remainder merely serves to transfer jurisdiction to the court probating the will and to make it exclusive. (4) There are a number of statutes seemingly broad enough to permit a judicial control over court-appointed trustees, comparable to that exercised over executors and administrators, but this jurisdiction remains inoperative.

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[52] See Michigan Trust Co. v. Bank of Ionia, 241 Mich. 146, 216 N. W. 472 (1927), and note 42, supra.

[53] Ala. Code (1928), § 10451; 3 Mich. Comp. Laws (1929), § 12993; Minn. Stat. (Mason 1927), § 8106; Wis. Stat. (1933), § 231.27.

[54] The language of the several statutes varies somewhat, so that the particular statute should be examined.

[55] Iowa and California.