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Executors and Trustees: Improper Exercise of Discretionary Power to Sell Real Estate

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the defamed person was a public official but also that a significant public issue was present. Whether or not the Court would think the profits at a public ski hill was a public issue significant enough to allow the inferential remarks made by the defendant is doubtful. The definition would also prevent the random selection of people employed in a beauracracy from being as freely attacked.

CONCLUSION

With the *Times* case, the Supreme Court federalized the libel laws pertaining to public officials and ruled that a head of a police department was a public official, and therefore any remarks made about him, regardless of the truthfulness or falsity, were privileged provided they were not motivated by actual malice. The three concurring Justices wanted the "public official" designation abolished completely.¹³

The *Rosenblatt* case reaffirmed the *Times* decision and began the refinement of the term "public official" by finding the superintendent of the ski area a public official and by saying that at the very least, the definition covers those who have or appear to the public to have control over conduct of governmental affairs.¹⁴

The future may find the majority linking the term "public issue" to the definition. Decisions will also pinpoint more exactly how far down the line of governmental officials the Court will go. Finally, cases involving sports figures,¹⁵ entertainers, etc., where the problem becomes whether "public men," "public institutions," and "public issues" are to be included in the "public official" definition will have to be decided. The *Rosenblatt* case indicates the need for a more precise and limited definition of who falls under the *Times* rule of a public official.

JAMES P. LONSDORF

Executors and Trustees: Improper Exercise of Discretionary Power to Sell Real Estate: In *Estate of Scheibe*¹ the will declared a residuary trust and gave the "executors and trustees full power of sale of any interest which I may have in any real estate without special court authority."² The testator died on March 11, 1958, and among

¹³ See Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903 (1960). The concurring Justices for absolute privilege were Black, Douglas and Goldberg. Green develops their theory.

¹⁴ See Note, 113 U. PA. L. REV. 284, 287 (1964), where it was suggested that it was already virtually certain that the immunity will include statements about politically appointed as well as elected officials like a justice of the peace or a village clerk, whose exercise of power is restricted to very small communities.

¹⁵ E.g., *Spahn v. Julian Messner, Inc.*, 43 Misc.2d 219, 250 N.Y.S.2d 259, 534, 535 (1964).

¹ 30 Wis.2d 116, 140 N.W.2d 196 (1966).

² Brief for Respondent, p. 3, *Estate of Scheibe*, 30 Wis.2d 116, 140 N.W.2d 196 (1966). In situations where there is no express power of sale in the governing instrument, no statutory authorization and no inherent power to sell, the fiduciary must seek court permission to sell and will obtain this only if there

the assets of the residuary trust was a parcel of real estate appraised by court appointed appraisers at \$27,500 as of the date of death. In November, 1963, the executor sold this parcel of land to his sister for 12,800, the same amount as an appraisal made a few months earlier for loan purposes.

The beneficiaries objected to the executor's accounts and sale, but the trial court approved the executor's conduct because "it was satisfied the executor was honest in his sale to his sister and had received a price in keeping with the market value as disclosed by the appraisal . . ."³ The supreme court of Wisconsin reversed the trial court and remanded the case for consideration of whether the executor should be surcharged or the sale set aside.

The supreme court found the duty of the executor in exercising his power of sale to be more than simple good faith or honesty: namely, to act "in a prudent and businesslike manner with a view to obtaining as large a price as he might with due diligence and attention have obtained."⁴

Although an executor is not technically a trustee, when the testator gives his executor additional duties that he normally would not have to perform, it is generally held that the executor's responsibilities are the same as a trustee's with respect to the additional duties.⁵ In *Scheibe*, the court held that if an additional power is granted to an executor, it may be considered a power held as trustee and that "[t]he power of sale without special court authority is a trust power. . . ."⁶ Thus the executor in *Scheibe* was held to be acting as a trustee with respect to his power of sale.

A settlor or testator certainly is permitted to confer a power of sale on a fiduciary and, thus, in the situations where he does confer such a power, he should be able to control, to an extent, the test which the courts will apply in examining the fiduciary's exercise or nonexercise of that power. Express trust powers may either be mandatory or discretionary.⁷ So long as the power is expressed, the fiduciary need not seek court permission to sell the asset, nor must he notify the beneficiaries of his intention to sell unless that is made a condition precedent to his exercise of the power.⁸

is an implied power of sale in the governing instrument or statutory provision empowering the court to confer such a power on a fiduciary under specified conditions. For an example of the situation where courts will imply a power of sale, see *Will of Walker*, 258 Wis. 65, 45 N.W.2d 94 (1950), and for statutory authority see WIS. STAT. §231.31 (1965).

³ *Estate of Scheibe*, 30 Wis.2d 116, 118, 140 N.W.2d 196, 197-198 (1966).

⁴ *Id.* at 121-122, 140 N.W.2d at 199.

⁵ RESTATEMENT (SECOND), TRUSTS §6, comment b (1959).

⁶ *Estate of Scheibe*, 30 Wis.2d 116, 119, 140 N.W.2d 196, 198 (1966).

⁷ BOGERT, TRUSTS AND TRUSTEES §741 (2d ed. 1962).

⁸ *Estate of Friedman*, 251 Wis. 180, 28 N.W.2d 261 (1947); *Estate of Fritsch*, 259 Wis. 295, 48 N.W.2d 606 (1951). See also cases cited in BOGERT, TRUSTS AND TRUSTEES §741, at 558 (2d ed. 1962).

Where the fiduciary is given a mandatory power, he *must* exercise that power. Thus, in *Estate of Cullen*,⁹ the court found against the trustee without discussing the reasonableness of his actions, but simply because he failed to exercise his power of sale: "The direction to convert, together with the permission to retain certain investments, leaves no doubt that the land is to be sold and turned into cash or other property readily divisible in kind."¹⁰

Where the fiduciary is given a discretionary power, the *Restatement of Trusts* takes the position that the courts must find an abuse of the fiduciary's discretion before they can interfere with his exercise or non-exercise of the power.¹¹ This abuse of discretion test, however, is dependent upon the *extent of discretion* conferred on the fiduciary and the *Restatement* has classified the extent of discretion as either simple or extended.¹² In the case of a simple discretionary power, the *Restatement* asserts there would be no particular words in the creating instrument extending the fiduciary's discretion,¹³ and the fiduciary would be "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. . . ."¹⁴ An extended discretionary power, however, would be "indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion."¹⁵ The effect of extending the fiduciary's discretion in the exercise or non-exercise of a power is to relax the duty of reasonable care he is under with a simple discretionary power. The *Restatement* describes the duty the fiduciary is under with an extended discretionary power as only to act "in a state of mind in which it was contemplated by the settlor that he would act. . . . Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment."¹⁶ The problem one encounters in distinguishing between the simple discretionary power and the extended discretionary power is one of construing the words in the clause granting the power, for the extent of discretion conferred depends upon the intent of the creator.¹⁷

⁹ 231 Wis. 292, 285 N.W. 759 (1939).

¹⁰ *Id.* at 297, 285 N.W. at 761.

¹¹ RESTATEMENT (SECOND), TRUSTS §187 (1959). See also SCOTT, TRUSTS §187 (2d ed. 1956); BOGERT, TRUSTS AND TRUSTEES §560 (2d ed. 1960).

¹² For a discussion of a number of cases rejecting the Restatement's classification of discretionary powers and holding all fiduciaries exercising a discretionary power to a standard of reasonable care, see BOGERT, TRUSTS AND TRUSTEES §560 (2d ed. 1960).

¹³ RESTATEMENT (SECOND), TRUSTS §187, comment *j* (1959).

¹⁴ RESTATEMENT (SECOND), TRUSTS §174 (1959).

¹⁵ RESTATEMENT (SECOND), TRUSTS §187, comment *j* at 408 (1959).

¹⁶ *Id.* at 408-409.

¹⁷ Lueft v. Lueft, 129 Wis. 534, 109 N.W. 652 (1906). The theory behind the relaxed duty of a fiduciary with an extended discretionary power is:

The Wisconsin Supreme Court has held the fiduciary with a simple discretionary power to a duty of reasonable and prudent conduct whether he exercises the power or not.¹⁸ But in *Estate of Teasdale*¹⁹ the trust instrument provided: "In the carrying out of this provision the determination by my said trustees of any and all values of my property shall not be open to review, but final and conclusive."²⁰ The court explicitly recognized the trustee's power as an extended discretionary power and accepted the *Restatement's* "state of mind" test for judging the fiduciary's conduct:

The words do dispense with the standard of reasonableness in judging the trustee's conduct but do not permit him to act dishonestly or *act in a state of mind in which the trustor did not contemplate he would act*. The courts will not permit him to act dishonestly or from some motive other than the accomplishment of the purposes of the trust.²¹ (Emphasis added.)

Again, in *Estate of Koos*,²² the clause granting the fiduciary his power was clear as to the intent of the creator; it provided that the trustees shall "be clothed with absolute rights, powers, and discretions. . . ."²³ While construing this clause, the court reiterated and emphasized that it had adopted the *Restatement's* classification and tests for discretionary powers:

It is the rule in this state that when under a will a fiduciary is granted absolute or conclusive powers and discretions, the test of "reasonableness" or "reasonable judgment" is not applicable. A court may not exact the standard of "reasonable judgment" from such fiduciary invested with such authority. The court may interfere only with the bad faith, fraud or mere arbitrary action of such fiduciary.²⁴

Recently, however, the Wisconsin Supreme Court has not clearly indicated whether it still makes the distinction as to the classification of discretionary powers. In *Will of Clarenbach*²⁵ a bare majority of the court found an abuse of discretion by the trustees of their power to

The settlor has created a trust to accomplish certain objectives. When he gives his trustee great freedom of action in the administration of the trust, he surely must intend the qualification that the trustee shall act with some regard to the purposes of the trust, and not make decisions which frustrate the accomplishment of the settlor's intent; and also that he shall employ his discretion deliberately and with some thought and not recklessly or capriciously, and furthermore in a spirit of good faith and honesty. BOGERT, TRUSTS AND TRUSTEES §560, at 119 (2d ed. 1960).

¹⁸ BOGERT, TRUSTS AND TRUSTEES §552, at 16 (2d ed. 1960).

¹⁹ 261 Wis. 248, 52 N.W.2d 366 (1952).

²⁰ *Id.* at 252, 52 N.W.2d at 368.

²¹ *Id.* at 261, 52 N.W.2d at 372.

²² 269 Wis. 478, 69 N.W.2d 598 (1955).

²³ *Id.* at 483, 69 N.W.2d at 601.

²⁴ *Id.* at 492, 69 N.W.2d at 605.

²⁵ 23 Wis.2d 71, 126 N.W.2d 614 (1964), noted in 48 MARQ. L. REV. 262 (1964).

allocate receipts to principal or income. The trust clause the trustees were relying on provided:

(G) I hereby grant to my executors the power to determine how all receipts, whether realized or accrued (inclusive of stocks, rights, securities received upon reconversion or upon reorganization, or other securities) and all disbursements, whether paid or accrued, shall be charged or apportioned as between income and principal in making current or final distributions, *and the decision of the executors shall be final and not subject to question by any court or by any beneficiary hereof.*²⁶ (Emphasis added.)

Neither the majority nor the minority clearly identified the trust power as one of simple discretion or extended discretion, but the language of the granting clause is unmistakably similar to the language of the clause in *Teasdale* which would place the power in the extended discretionary area. Although the majority and minority differed on the factual determination of the trustees' conduct, the test applied by the majority would indicate that the court was still following the *Restatement's* test: "We consider that the account filed by the trustees . . . clearly establish that the trustees did not make a good-faith decision that the \$10,000 of profits constituted income and not principal."²⁷

In *Will of Mueller*²⁸ the court was faced with construing two testamentary trusts and an *inter vivos* trust. When the appellant petitioned the court for approval of the accounts, the beneficiaries of all the trusts objected, and, in the final analysis, the supreme court treated all the trusts on an equal basis with respect to the trustees' duty to diversify. All three trusts contained this provision: "my said trustees to retain among the assets of said trust estate all of the stock of said L. J. Mueller Furnace Company, with express authority to purchase additional common stock of said corporation."²⁹ As to this provision, all the trusts provided:

[Article FIFTH](c) Said trustees may in their discretion participate in and make any payments required by any proceedings for the reorganization, refinancing, dissolution, or other transactions, including the acquisition of stock rights when offered, *and may accept substituted or distributed stocks and securities*, in respect of any corporate securities subsisting in said trusts.³⁰ (Emphasis added by the court.)

The appellant contended that these provisions alone would not authorize the trustees to retain substituted stock as the sole asset of the trusts, but that the testamentary trusts contained an additional provision,

²⁶ Will of Clarenbach, 23 Wis.2d 71, 74, 126 N.W.2d 614, 615-616 (1964).

²⁷ *Id.* at 76, 126 N.W.2d at 617.

²⁸ 28 Wis.2d 26, 135 N.W.2d 854 (1965), noted in 49 MARQ. L. REV. 642 (1966).

²⁹ Will of Mueller, 28 Wis.2d 26, 34 n. 2, 135 N.W.2d 854, 858, n. 2 (1965).

³⁰ *Id.* at 34, 135 N.W.2d at 859.

not included in the *inter vivos* trust, which would sanction such retention:

My trustees shall have power in their discretion to take, receive, hold, administer, collect, invest and reinvest the assets of said trust estates, with full power to bargain, sell, and convey at such prices and upon such terms as to them may seem best, or to exchange or otherwise realize upon any or all of the assets of said trust estates as and when said trustees, in their discretion, deem it advisable. . . .³¹ (Emphasis added by the court.)

The court stated that the provisions of the testamentary trusts did give the trustees the authority to retain the original assets intact, but because the corporation whose stock constituted the entire original corpus of the trusts was reorganized and the new corporation was different in size, management, and production, the new stock was not substantially equivalent to the original stock, and, therefore, the trustees were under a duty to diversify the assets of the trusts. Apparently the court viewed the additional provision in the testamentary trusts as only granting simple discretion to the trustees and therefore imposed the reasonable care duty on the trustees with respect to their power to retain assets.

Now, in *Scheibe*, the court again failed to explicitly distinguish between extended and simple discretion. Literally read, *Scheibe* even seems to indicate that the court will hold a fiduciary with a power to a duty of reasonable care regardless of the extent of discretion conferred on him by the governing instrument, at least a fiduciary with a power of sale. The clause in the will giving the executor the power of sale³² appears to be one of the simple discretionary type, while the language of the court appears to label the power of sale as one of extended discretion. In discussing the executor's duty under his power of sale, the court stated:

In granting an *unlimited power of sale*, we do not believe the testator intended his executor to be relieved from the duty of acting as a reasonably prudent man with loyalty to beneficiaries. Quite the contrary, the necessity of court approval and its safeguards are dispensed with as needless because of the testator's trust in the executor to act with loyalty and as an *ordinary prudent man*.³³ (Emphasis added.)

And: "Consequently, an executor with an *unqualified power of sale* must exercise the diligence and caution which a *careful and prudent*

³¹ *Id.* at 35, 135 N.W.2d at 859.

³² "I give to my executors and trustees full power of sale of any interest which I may have in any real estate without special court authority." Brief for Respondent, p. 3, *Estate of Scheibe*, 30 Wis.2d 116, 140 N.W.2d 196 (1966).

³³ *Estate of Scheibe*, 30 Wis.2d 116, 122, 140 N.W.2d 196, 199-200 (1966).

owner would observe in the sale of his own property.³⁴ (Emphasis added.) Further, the court states:

A trustee or an executor, in whom there has been imposed a special trust or confidence, must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.³⁵ (Emphasis added.)

The court's reference to such terms as "unlimited" and "unqualified" and "good faith" certainly implies that it is dealing with an extended discretionary power of sale, but in each case the court follows such terms with a statement of the duty of reasonable care. Although misleading and seemingly inconsistent with the *Teasdale* and *Koos* cases, the language of the court is not so clear as to support the conclusion that the court has jettisoned the distinction between simple and extended discretionary powers. However, since *Koos* in 1955, the only recognition of the *Restatement's* classification of express discretionary powers has been implied from the duty the court held the fiduciary to in *Clarenbach* and *Mueller*.

If it is assumed the misleading language of *Scheibe* can be attributed to an overgeneralization or to simply loose language, the facts could have supported a finding against the executor on either his duty of reasonable care or his duty of loyalty. This would mean the court only found the executor to have a simple discretionary power of sale, and then the *Scheibe* decision would be consistent with prior Wisconsin law. Once the court found the duty of the executor to be that of reasonable care, it found the executor's exercise of the power of sale unreasonable. The price he received for the real estate, alone, was suspicious, for he sold the real estate for \$12,800 while the tax assessed value of it was \$13,400, and the appraised value as of the date of death of the testator was \$27,500. The court combined the price issue with the fact that the executor made no effort to consult or hire a real estate broker and stated that "[u]nder the facts we believe the executor did not act in a prudent and businesslike manner with a view to obtaining as large a price as he might with due diligence and attention have obtained. The executor failed in his trust."³⁶ This would indicate that when a fiduciary has a simple discretionary power of sale, he should be quite diligent in ascertaining the price at which he sells the real estate.

Although the court discussed the duty of loyalty, it did not seem to rest its decision on it. The duty of loyalty is a separate duty from

³⁴ *Id.* at 120, 140 N.W.2d at 199.

³⁵ *Id.* at 119, 140 N.W.2d at 198.

³⁶ *Id.* at 121-122, 140 N.W.2d at 199.

the duty of reasonable care and requires the fiduciary to act "solely in the interest of the beneficiary."³⁷ The fiduciary has a duty of loyalty regardless of the extent of discretion conferred on him, but the duty can be reduced by specific statements allowing the fiduciary to act for his own account with reference to his fiduciary duties.³⁸ No such relaxation of the duty of loyalty was given the executor in *Scheibe*. The court cited *Noonan Estate*³⁹ in connection with its discussion of the duty of loyalty and could have used the test for loyalty set forth therein to have found against the executor in *Scheibe*: "The test of forbidden self-dealing is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it might have affected his judgment in material connection."⁴⁰ Certainly a combination of the facts in *Scheibe* could have supported a finding of "forbidden self-dealing", for the executor sold the parcel of real estate in issue to his sister and after such sale he stopped paying the \$90 per month rent he had been paying to the estate for living there.

Had the court explicitly found against the executor for a violation of the duty of loyalty, the distinction between simple and extended discretionary powers would have been irrelevant for the duty of loyalty would be the same under either discretionary power. But since the court seemed to rest its decision on the duty of reasonable care and simultaneously labeled the power of sale exercised by the executor as "unlimited" and "unqualified", there is some doubt whether the Wisconsin Supreme Court still recognizes the distinction between simple and extended discretionary powers of sale.

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³⁷ RESTATEMENT (SECOND), TRUSTS §170, at 364 (1959).

³⁸ "By the terms of the trust the trustee may be permitted to sell trust property to himself individually, or as trustee to purchase property from himself individually, or to lend to himself money held by him in trust, or otherwise to deal with the trust property on his own account." RESTATEMENT (SECOND), TRUSTS §170, comment *i* at 372 (1959).

³⁹ 361 Pa. 26, 63 A.2d 80 (1949).

⁴⁰ *Id.* at 29, 63 A.2d at 83.