

Trusts and Estates

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Essentially, the court has balanced the right of the individual to know he is being confronted by a police officer, with the need for disguised, under-cover officers in crime prevention. It held that the officer has a duty to make reasonable efforts to inform the citizen of his identity before the officer takes further action. A reasonable attempt to inform does not amount to actual knowledge on the part of the citizen, but does require a showing by the officer that the citizen had reason to know or that a reasonable attempt to so inform was made.

Later in the term *Nelson v. Milwaukee*¹²⁰ seemed to indicate that *Celmer* should be viewed as an unusual case and strictly limited to its facts. In *Nelson* an amended complaint in an action against the City of Milwaukee alleged that the plaintiff was "negligently" confined by city police. The trial court found the allegation that the plaintiff was "arrested and imprisoned" demonstrated that the cause of action was essentially one for the intentional tort of false imprisonment. This finding was approved on appeal relying on *Strong v. Milwaukee*¹²¹ which held that section 895.43(3)¹²² precluded the bringing of a suit against a political corporation for the intentional torts of its officers and employees, thus making a complaint containing such allegations demurrable. It seems doubtful that a different result would have been reached on the negligence allegations if the suit had been brought against the police officers, individually, rather than the city. The combination of *Celmer* and *Nelson* in the same court term would seem to indicate that the liability of police officers for negligent arrest has not been significantly expanded, and such liability will result only under unique circumstances.

WILLIAM R. WICK

TRUSTS AND ESTATES

In *Zimmerman v. Brennan*,¹ the court dealt with the growing

120. 57 Wis. 2d 166, 203 N.W.2d 684 (1973).

121. 38 Wis. 2d 564, 157 N.W.2d 619 (1968).

122. WIS. STAT. § 895.43(3) (1971):

No suit shall be brought against any political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor shall any suit be brought against such fire company, corporation, subdivision or agency or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

1. 56 Wis. 2d 623, 202 N.W.2d 923 (1973).

practice of profit sharing trusts as a supplementary method of employee compensation. The problem faced was whether or not trustees of an employees' profit sharing plan can be removed because of conflict of interest based on their simultaneous position as trustees and beneficiaries of the trust.

The case arose when an art studio had set up a profit sharing plan for its employees. Two of the three trustees, however, were not only owners of all the common stock but also officers of the corporation and therefore entitled to share as beneficiaries of the trust. The third trustee was the attorney for the other two trustees and the company itself.

This particular plan gave wide discretion to the trustees as to mode of payment and authorized them to cut off payments entirely if an employee left the employ of the studio to work with a competitor within a year after leaving the studio. Zimmerman, the employee in question, took a leave of absence apparently to return to graduate school. There was then some dispute as to how he was to be paid his share of the trust funds. When the trustees opted to pay in annual installments instead of the lump sum payment requested, Zimmerman sued for removal of the trustees on grounds of conflict of interest. In the course of the litigation it was also learned that Zimmerman had not in fact returned to school but joined a competing firm; thus precipitating the forfeiture of all his rights under the plan.

The trial court refused to remove the two beneficiary-trustees. The petition for removal was refused even though there was a conflict of interest and that by dismissing Zimmerman the trustees stood to gain almost \$1000.00 each. The trial court emphatically pointed out that there was no finding of any mismanagement or misconduct in office. The Supreme Court affirmed.

In arriving at this decision the court first examined section 231.26 of the Wisconsin Statutes² which stated:

Upon the complaint of any person interested in the execution of an express trust, and under such regulations as shall be estab-

2. Although this section was repealed by Ch.66 of the 1971 Session laws its pertinent provisions were rewritten and renumbered. WIS. STATS. § 701.18(2) still reads substantially the same:

A trustee may be removed in accordance with the terms of the creating instrument or the court may, upon its own motion or upon a petition by a beneficiary or co-trustee, and upon notice and hearing, remove a trustee who fails to comply with the requirements of this chapter or a court order, or who is otherwise unsuitable to continue in office. . . .

lished by the court for that purpose, the circuit court may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or *who for any other cause shall be deemed an unsuitable person to execute the trust.* (Emphasis added)

The question then presented was if a mere conflict of interest in a profit sharing trust in itself justified removal of the trustees in question. In formulating a negative answer, great reliance was given to *Estate of Gehl*,³ where the court, in refusing to remove a testamentary trustee, gave great weight to the fact that although there was possible conflict, it was known to the testator, the father of the trustees and of the beneficiaries of the trust, and therefore was of only minor consequence.

The *Zimmerman* court then reasoned that, although it historically has demanded high standards of trustees which go even beyond honesty and good faith, a profit-sharing trust presented a different situation:

The unique character and purpose of a profit-sharing trust must be considered. Such a trust is for the benefit of both the employee and the employer. The individual trustees often represent or are identified with either the employer or the employees, so to speak, and both these parties acknowledge that the trustees, who are company employees or directors or stockholders, may have a conflict of interest.⁴

Thus such a trustee of a profit-sharing plan who may have a conflict of interest was not an unsuitable person to execute the Trust.

Although the court later stated that the holding of this case is confined to its facts, the impact of its logic may well have an effect on nonprofit-sharing trusts as well. The main thrust of the court's reasoning was that such a trust did not contemplate disinterested trustees and that the intent of the parties would therefore be frustrated if a trustee with a conflict of interest was removed. But what constitutes a contemplation of disinterested trustees? It would seem now that trustees¹ with conflicts of interest may not be removed when the parties were aware of the conflict at the time of the creation of the trust. Indeed *Gehl* seems to be excellent authority for such a proposition. An even further extension of this would be that if the beneficiary discovered the conflict after the creation

3. 5 Wis. 2d 91, 92 N.W.2d 372 (1958).

4. 56 Wis. 2d at 628.

of the trust, but acquiesced or made no objection, this may also be a trust which does not contemplate disinterested trustees.

In *Estate of Farber*⁵ the court was faced with a situation where the testatrix devised one half of her estate to her sister and the other one half to her two nieces. There was no residuary clause. She also stated explicitly that her half-brothers and sisters were not to share in the testate property.⁶ However, when she died she was survived by a single niece; her sister and other niece predeceasing her without issue. The trial court ruled that since the others had predeceased the testatrix their shares in the estate lapsed and should be paid over as intestate property to be shared by the heirs-at-law according to the rules of intestate succession. The heirs-at-law included, of course, the half-brothers and sisters which were otherwise barred from taking under the will.

The court then considered the so-called rule of disinheritance. That rule states that disinheritance by a will does not prevent the person from sharing a lapsed legacy as an heir-at-law.⁷ The effect of the rule is relatively simple. If the decedent dies partially intestate, that property passes to the heirs under intestate succession even if those heirs were explicitly excluded from taking under the will. In other words, if property fails to pass under a valid will, an instrument based on the desires and intent of the testator, it will pass under the intestate succession laws which act irrespective of the intent of the deceased.

The court in *Farber*, however, seemed to greatly modify this rule in order to accommodate the apparent intention of the testatrix:

In those cases where the intent to completely disinherit a certain heir or group of heirs is expressed beyond doubt, as evidenced by positive language stating which heirs are to take, and if any such heirs remain to take, the clearly expressed intention of the testator shall be recognized. Any other rule would serve to defeat the obvious intentions of the testator and thus violate the basic constructional doctrine of wills that the intent of the testator is paramount and must be given effect whenever possible.⁸

Certain questions immediately arise. The court used a rule of

5. 57 Wis. 2d 363, 204 N.W.2d 478 (1973).

6. “. . . it being my intention that all my estate shall be inherited by those above named, kindred of the whole blood, and that none shall go to my brothers and sisters of the half blood . . .”

7. See, 4 BOWE-PARKER: PAGE ON WILLS, § 30.17 (1961).

8. 57 Wis. 2d at 368.

construction of wills to arrive at their result. That is, when interpreting a will great weight should be given to the intent of the testator. This, of course, is undisputed hornbook law. However, it is questionable whether the court was using intent to help dispose of property passing under a will or property passing under intestate succession which ordinarily finds the intent of the deceased irrelevant. It would seem that the latter alternative is the correct one. The court actually seemed to be using a doctrine of will construction to modify the law of succession which is involved only when a valid will is not applicable.

Another way of interpreting the court's ruling is to view the niece as taking the remainder of the estate, not by will or by intestate succession but solely according to the "intent" of the deceased. This too is unpalatable.

A better approach, perhaps, would be that of the court in *Will of Ziehlke*,⁹ where the testator explicitly excluded his nieces and nephews from taking under the will.¹⁰ There the court applied the law of descent without regard to the intention of the deceased:

Here, however, the nieces and nephews do not take under the will but by law. The fourth paragraph being the residuary clause and the gift failing, the residue goes by operation of the law of descent. No doubt this is not what the testator intended, but the only way in which he could vary the rules of descent would be by making an effective gift at variance with these. This he did not do.¹¹

In the case of *Estate of Gotthart*,¹² the court was asked to interpret a devise to an heir of certain property that was occupied as a homestead at the time of the execution of the will. The pertinent part of the will was quoted as follows: "I hereby give and bequeath my homestead which I occupy at the time of my death to my son, Gustave Gotthart."

Events subsequent to the execution of the will raised serious questions about the homestead status of the certain property and if the testator did, in fact, occupy the same at the time of his death. The testator had lived in the house for over eight years, claiming it as his homestead. There was no question that it was indeed a

9. 230 Wis. 574, 284 N.W.497 (1939).

10. "Fifth: For reasons known to all, it is my will and I hereby direct that no part of my estate shall go to any of my nieces or nephews." *Id.* at 575.

11. *Id.* at 579.

12. 56 Wis. 2d 563, 202 N.W.2d 397 (1972).

homestead at the time the will was drafted and signed. However, the testator eventually suffered a stroke and was hospitalized for three weeks. Because of his advanced years and weakened condition he was admitted to a nursing home upon discharge from the hospital. He lived there for over a year when he was again hospitalized. Six days later he died. During the time of the testator's residence in the convalescent home it apparently seemed obvious that he would not be returning to his old residence for quite some time if he returned at all. His son petitioned the county probate court for the appointment of a guardian. Testator's personal effects were all removed from the home and the premises were rented on a monthly basis. The testator himself had consented to the removal of his belongings and the subsequent rental. However, in order to rebut the inference that this constituted an intention to abandon the homestead, the court noted that on several occasions the testator told his children how much he wanted to come home.

The court decisively rejected the argument that the homestead was abandoned and therefore that part of the will which devised a homestead was nullified. It ruled that a homestead did, in fact, exist at the time of the testator's death. The court relied on the case of *Herrick v. Graves*¹³ which held that

. . . a party would not forfeit the [homestead] exemption on being absent from home a season, traveling with his family, *even though he should rent the premises to a tenant in the meantime, or should be prevented, by some temporary necessity*, from occupying his homestead for a time with his family.¹³ (Emphasis that of *Gotthart* court)

The court noted that more than mere relinquishment of the property was needed to extinguish homestead rights. There had to be an accompanying or subsequent intention to discontinue the use of the premises as a home. The court found no such intention here.

This interpretation, however, seems open to question. The realities of life would seem to indicate to the testator that he would probably never return to his former abode. He was an old man of over 74 years. He had recently suffered a severe stroke that caused him to be hospitalized for almost a month and leaving him in such a weakened condition that he required the constant care and supervision of a nursing home for what turned out to be the rest of his life. He realized that instant recovery was not forthcoming and

13. 16 Wis.163, (1862).

consented to the rental of his home.

The court strongly implied that a *permanent* removal was not enough to lose the homestead status unless the testator voluntarily removed himself or explicitly approved such action:

While such acts may themselves support a conclusion on the part of the children that in all probability their father would never return to his home, they fall short of evidencing an intent on the part of the testator to abandon the homestead where he had lived for the past eight years.¹⁴

Thus, the court would seem to preclude the destruction of the homestead status even where it is almost certain the property owner will never return. The court stated that there must be an "intention" to abandon, but it can be argued that a narrow definition of "intention", which fails to include the situation where it is physically necessary to abandon despite the desires of the homesteader, may work injustice to the original objectives of the homestead statutes.

The better justification for allowing the devise to the testator's son was given by the court when interpreting the word "occupy". The court stated that if the property owner did not, in fact, occupy the premises at the time of his death and that if the words of the will were read literally the devise would fail, this is not an absolute bar. Rather, the language of the will should be looked at with consideration to the surrounding circumstances at the time of its execution and a determination made in accord with the intent of the testator. Perhaps this would have been a less tortuous way of allowing a grant of a "homestead" where that homestead status had expired after execution of the will.

In *Richards v. Richards*,¹⁵ the court clarified the status of the constructive trust, pointing out that fraud was no longer a necessary element of that equitable remedy and in fact held that no evidence of wrongdoing of any kind was needed to invoke a constructive trust. In that case the father of the plaintiff had secured a divorce settlement from his first wife. Part of the settlement was a stipulation that the children of that marriage, the plaintiffs, were to be named beneficiaries of certain insurance policies maintained by their father. Subsequent to the divorce, the father remarried and named his new wife, the defendant, as the sole beneficiary of that

14. 56 Wis. 2d at 567.

15. 58 Wis. 2d 290, 206 N.W.2d 134 (1973).

policy. The defendant was guilty of no fraud or wrongdoing in securing her status as beneficiary. In fact, she did not even know about the existence of the policy until after the death of her husband and a letter from the insurance company informing her of its existence.

In denying plaintiff's petition for a constructive trust on the insurance proceeds, the trial court noted there was no wrongdoing involved and therefore the doctrine of constructive trust could not be applied. In so holding the trial court relied on *Will of Jaeger*,¹⁶ which held that a constructive trust would arise only if there is evidence of fraud.

The supreme court, in rejecting this view, noted that the *Jaeger* requirements for constructive trust had been abandoned in an earlier case. The court in *Estate of Massouras*,¹⁷ said the fraud requirement was too restrictive and inconsistent with the basic purpose of the equitable device of a constructive trust. The alternative test offered in that case, however, seemed to be only a watered down version of the fraud test. The court in *Massouras* stated:

[A constructive trust] is implied by operation of law as a remedial device for the protection of a beneficial interest against one who either by *actual or constructive fraud, duress, abuse of confidence, mistake, commission of a wrong, or by any form of unconscionable conduct*, has either obtained or holds the legal title to property which he ought not in equity and in good conscience beneficially enjoy. (Emphasis added).

The holding in *Richards* can be seen as a clear expansion of the *Massouras* test since the defendant was guilty of none of the above quoted modes of conduct. Here she merely accepted the proceeds of an insurance policy, the existence of which she had only recently learned.

In support of this interpretation the court also relied on two other cases, *Lee v. Preiss*,¹⁹ and *Estate of Boyd*.²⁰ In *Lee* the husband orally promised to maintain an insurance policy with his divorced wife as beneficiary to compensate for his lack of support payments during the pendency of the divorce. He also made repeated representations to his children to that effect. Nevertheless

16. 218 Wis. 1, 259 N.W.842 (1935).

17. 16 Wis. 2d 304, 114 N.W.2d 449 (1962).

18. *Id.* at 312.

19. 18 Wis. 2d 109, 118 N.W.2d 104 (1962).

20. 18 Wis. 2d 379, 118 N.W.2d 705 (1963).

after the divorce decree he changed the beneficiary provision on the policy excluding his former wife. Although the court did not rely on the doctrine of constructive trust they did hold that the equitable rights to the proceeds were superior to the rights of a named beneficiary.

In *Boyd* the court was faced with a divorce stipulation for insurance benefits similar to that in *Richards*. However, like in *Lee*, the court did not impress a constructive trust on the proceeds received by the beneficiary but instead allowed a claim against the estate of the deceased identical to the amount of the proceeds. The claim was allowed, the court reasoned, because a stipulation in a divorce action was in the nature of a contract which should be given a construction that would best reflect the intention of the parties.²¹

It should be emphasized that in neither of the two above mentioned cases was the rule of constructive trust relied on. The holding in *Richards* then opens up the constructive trust remedy in such divorce stipulation situations and may well effect the expansion of the remedy in other cases.

The case of *Kinzer v. Bidwell*²² dealt with the problem of avoiding passive trusts. In this case Kinzer, the appellant, purchased a lakefront lot from the respondents. He also brought an undivided one-sixth interest from them in certain property just off the lake.

Before the sale of the interest the respondents had owned that property subject to an agreement that no party would sell his interest without first offering it to the others at cost and that no improvements be made on the property without the unanimous consent of the owners. In order to better effectuate the agreement the respondents put the property in trust. Kinzer bought his interest subject to this trust.

He later tried to sell his interest in this property and brought suit for a partition. The trial court held that the land agreement was void because it was a passive trust and therefore the parties held the land in common and could partition. The trial court did, however, reform the agreement because of mutual mistake, to prohibit any development of the land for several years.

The supreme court in reviewing this case noted that the reformation depended on the validity of the trust agreement. If the trust

21. See also *Miner v. Miner*, 10 Wis. 2d 438, 103 N.W.2d 4 (1960), for another example of this kind of reasoning.

22. 55 Wis. 2d 749, 201 N.W.2d 9 (1972).

was indeed active, and therefore valid, there would be no need for the reformation. An examination was then made into the validity of the land trust. It was noted that in any major action the trustee could not act unless directed to do so by four-sixths of the beneficiaries. On this basis the trial court held the trust was passive.

Black's Dictionary, (4th ed.) defines a passive trust as: "A trust as to which the trustee has no active duty to perform." Such trusts which provide no real function for the trustee are generally held to be void. Several theories have been used to support this rule. One is the common law Statute of Uses which dictated such a rule in real property trusts, another is a rule in equity that courts will not require or permit the doing of a useless thing.²³

Whatever the rationale for this view, Wisconsin explicitly forbids this kind of trust. The legislature has stated:

Every trust, to the extent it is private and passive, vests no title or power in the trustee, but the beneficiary takes a title corresponding in extent to the beneficial interest given him. A trust is passive if the title or power given the trustee is merely nominal and the creating instrument neither expressly nor by implication from its terms imposes active management duties on the trustee.²⁴

In holding that the trust in question was an active and valid trust the court first examined the purpose of the trust. It noted that the trust was created to maintain the property in its natural and undeveloped state and prohibit sale or lease of the interest of individual shareholders unless four-sixths of them decided otherwise. Possession and control was therefore placed in the trustee to maintain the land in this state by stopping less than four-sixths of the beneficiaries from selling their interests or building improvements upon the land.

The court held that this duty, in itself, was sufficient to constitute an active duty even though the trustee was helpless to act on any major matter without approval of four-sixths of the beneficiaries.

In addition to this there was evidence that the trustee maintained liability insurance, ascertained and paid taxes, handled inquiries from parties desiring to buy or list the property for sale and collected money from beneficiaries for payment of taxes, insurance

23. See generally, BOGERT ON TRUSTS (4th ed., Hornbook series) 119-122.

24. WIS. STATS. § 701.03 (1971).

and the like. The court found that this additional evidence was more than enough, coupled with the duty to maintain the status quo, to create an active trust.

The case is a clear indication that the Wisconsin court may well follow the trend of finding that any duty, however conditional or slight, will be sufficient to create an active trust, and the court will be more than generous in finding the duty to be more than just nominal so as not to violate the statutory requirement.

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