

Trusts: Executor Distinguished From Trustee

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NOTES

Trusts: Executor Distinguished From Trustee. In *Burmeister v. Schultz*¹ the testatrix before her death had conveyed real property to her husband and an adult daughter, Grace, in return for a \$12,000 note and mortgage. Other property had been conveyed as gifts to two other adult children, one of whom was named as executor in his mother's will.

After the testatrix's death, her five children other than Grace executed a "release agreement" whereby they released Grace and her husband from "any claims they might have in said real estate" and, in addition, released them from "all claims and demands, actions, and causes of actions . . . concerning the conveyance of the real estate . . . to Grace and her husband. . . ."² The executor signed the agreement in his individual capacity, but not as executor. Two months later, as executor, he demanded payment of \$1,700 unpaid on the Schultzes' note. When payment was not made, the executor obtained a probate court order to foreclose the mortgage and collect the unpaid amount of the note.

The Wisconsin Supreme Court held that the release agreement was ambiguous in that it was not clear whether the beneficiaries under the will had intended to release the Schultzes' obligations under the note and mortgage when they agreed to "relinquish any claims they might have in said real estate." And while the court admitted that the issue had not been raised on appeal, it felt that the release agreement was valid without the executor's signature and without probate court approval—creditors having been paid and tax liabilities met. "The beneficiaries under the will, all of whom are parties to the agreement, are the only ones beneficially interested in the estate property. They may convey equitable title, and the executor, *as a kind of trustee*, must convey the legal title accordingly." (emphasis added)³

In *Burmeister*, while equitable title to the note and mortgage had vested in the beneficiaries, legal title had vested in the executor named in the will. The court considered the note and mortgage to be personalty; traditionally, legal title to personalty vests in the executor, but normally legal title to real property vests in devisees.⁴ The proposed

¹ 37 Wis. 2d 254, 154 N.W.2d 770 (1967).

² *Id.* at 257, 154 N.W.2d at 771-2.

³ *Id.* at 263, 154 N.W.2d at 774-5.

⁴ The devisee may be a trustee. In this respect, *cf. In re Trowbridge's Estate*, 244 Wis. 519, 13 N.W.2d 66 (1944), where the court held that where a will devised real estate to trustees that: "Title to the trust real estate passed under the will to the trustees without any order of the court assigning the property to them, notwithstanding that the appointment of the trustees was deferred until the executors had settled their final account." *Id.* at 525, 13 N.W.2d at 69.

Bogert states that: "In the case of realty title passes directly to the devisee or heirs, although the executor or administrator may have a power to sell to pay debts of the deceased, and hence there is no possibility of a trust arising merely from the appointment of the personal representative." BOGERT, TRUSTS AND TRUSTEES § 12 at 42-3 (2d ed. 1965).

Wisconsin probate code, however, would abolish such distinction by giving the executor legal title to real, as well as personal, property of the decedent.⁵ Since a trustee normally has legal title to trust property, and the beneficiaries an equitable interest,⁶ a question is raised as to whether the court in *Burmeister* was justified in calling the executor a "kind of trustee."

In *McKeigue v. Chicago & Northwestern Railway Co.*,⁷ cited by the court in *Burmeister*, it was held that the executor's duties are trust duties in the sense that the executor holds legal title to the personal property of the estate and as such is "charged with the duty of managing and disposing of the same in accordance with the provisions of the will or of the law. In all essential respects he is regarded in courts of equity as a trustee."⁸

McKeigue and *Burmeister* are troublesome because in calling an executor a trustee any distinction between the two is blurred and the language of the court in both cases can perhaps be justified only by taking a rather broad view of the duties imposed on the holders of the respective offices.⁹ The court in *McKeigue* admits that it uses trustee in the "broad sense" when it thereby "includes executors, administrators . . . and all persons vested with the title or control of property and charged with fiduciary duties in relation thereto for the benefit of another."¹⁰ While explicit that "An executorship or administratorship is not a trust,"¹¹ the Restatement comments that "An executor as well

⁵ "TITLE IN PERSONAL REPRESENTATIVE. Upon his letters being issued by the court, the personal representative has title to all property of the decedent." Proposed Wisconsin Probate Code, § 857.01. The comment to § 857.01 adds: "Historically in Wisconsin a personal representative has had title to personal property but not to real property, while a trustee has had title to both real and personal property." *Cf. Shupe v. Jenks*, 195 Wis. 334, 218 N.W. 375 (1928), which states that an administrator is a trustee and, as such, holds legal title to personal property.

⁶ Two exceptions to this general rule can be found in the RESTATEMENT. Section 83 states that: "An equitable interest, if transferable, can be held in trust." Comment *a* to § 83 says: "The rule stated in this section is applicable to equitable interests in land, chattels, legal choses in action, or other intangible things, and to equitable choses in action."

Section 88(1) states: "Unless a different intention is manifested, the trustee of an interest in land takes such an estate, and only such an estate, as is necessary to enable him to perform the trust by the exercise of such powers as are incident to ownership of the estate." It is possible, according to comment *b*, for the owner to "give to the trustee merely powers without creating an estate in him."

⁷ 130 Wis. 543, 110 N.W. 384 (1907).

⁸ *Id.* at 546, 110 N.W. at 385.

⁹ A somewhat curious distinction is found in 31 AM. JUR. 2d *Executors and Administrators* § 2 at 28 (1967) which states: "Executors and administrators are not public officers within the commonly accepted meaning of that term, although they are regarded as officers of the court and the positions they hold are frequently referred to as 'offices.' More accurately, however, the position merely resembles an office, and is a trust. In other words, executors and administrators are trustees. . . ."

¹⁰ *McKeigue v. Chicago & Northwestern Railway Co.*, 130 Wis. 543, 546, 110 N.W. 384, 385.

¹¹ RESTATEMENT (SECOND) OF TRUSTS § 6 at 18 (1959).

as a trustee is a fiduciary."¹² It is interesting to note that American Jurisprudence, in defining a trust, states that the word "is often employed in law as well as in popular language in a sense which is much broader than its ordinary technical significance, as denoting or as synonymous with 'confidence,' 'fiduciary relationship,' and so on, and it is often used in reference to the confidential aspect of any kind of a bailment or possession by one person of the property of another."¹³ Bogert also states that an executorship comes closest to a trusteeship in that "Both belong to that large class of relations called 'fiduciary,' in which the one trusted is under some extraordinary duties and some disabilities."¹⁴ The court in *Burmeister* avoids the use of the term "fiduciary" altogether, but if both executors and trustees are presumably fiduciaries, there may be seeming propriety in calling an executor a "kind of trustee." Determining whether the court's definition of executor is justifiable necessitates an examination into the nature of a fiduciary, and a separate examination into the nature of the duties of executors and trustees. Even if executors and trustees are both fiduciaries, nonetheless the court's terminology may be both imprecise and misleading.

Scott calls a fiduciary "a person who undertakes to act in the interest of another person,"¹⁵ and the Restatement says that:

A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation. A fiduciary is normally under a duty not to delegate to a third person the performance of his duties as fiduciary. As to matters within the scope of the relation he is under a duty not to profit at the expense of the other and not to enter into competition with him without his consent, unless authorized to do so by a proper court or by the provisions under which the relation arose. If the fiduciary enters into a transaction with the other and fails to make a full disclosure of all circumstances known to him affecting the transaction or if the transaction is unfair to the other, the transaction can be set aside by the other.¹⁶

The Wisconsin Court's readiness to liken an executor to a trustee also appears in *Estate of Scheibe*,¹⁷ in which an executor, without offering the real property for which he was responsible for sale to the public or without engaging a broker, sold the property to his sister for \$12,800, although testimony of two appraisers had set its

¹² RESTATEMENT (SECOND) OF TRUSTS § 6, comment *a* at 18 (1959).

¹³ 54 AM. JUR. *Trusts* § 4 at 22 (1945).

¹⁴ BOGERT, TRUSTS AND TRUSTEES § 12 at 44 (2d ed. 1965).

¹⁵ Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539 (1949).

¹⁶ RESTATEMENT (SECOND) OF TRUSTS § 2, comment *b* at 6 (1959). Both the RESTATEMENT § 2, comment *b*, and SCOTT, THE LAW OF TRUSTS § 2.5 at 38-41 (2d ed. 1956) do not include the executor-legatee or executor-next-of-kin relationship among fiduciary relationships, but Scott does in his article, *The Fiduciary Principle*, 37 CALIF. L. REV. 539 at 541 (1949).

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

value at \$28,000 and \$30,600. Citing *McKeigue*, and pointing out that "an executor in all essential respects will be held to the responsibilities and the duties of a trustee. . . .",¹⁸ the court noted that the will in *Scheibe* gave the executor the power to sell real estate "'without special authority,'" and that it was the trustee who brought the action against the executor. The court stated: "The executor failed in his trust";¹⁹ furthermore, the duty of an executor in selling real property under a testamentary power of sale rests on a "standard beyond that of good faith . . .," for "an executor . . . must exercise the diligence and caution which a careful and prudent owner would observe in the sale of his own property."²⁰ The executor in *Scheibe*, like a trustee, was in a fiduciary relation with the beneficiaries under the will—like Scott's fiduciary, "he [was] under a duty not to profit at the expense of the beneficiary."²¹ But the court's reference to the executor as a trustee clouds Bogert's distinction that "the prevalent view is that personal representatives are not strictly speaking equity trustees, although they are probate fiduciaries,"²² and indicates that the court in *Scheibe* meant that the executor's duties were fiduciary and that, as in *McKeigue* and *Burmeister*, the term "trustee" is being given a broad definition.

In *Estate of Van Epps*,²³ decided after *Burmeister*, the Wisconsin Court does not call the executor a trustee, outside of approving quotations from *McKeigue* and *Scheibe*, and instead says, "nor does anyone argue that in his capacity as executor [Freeland Van Epps] does not owe . . . fiduciary duties to the beneficiaries under the will."²⁴ In that case the partner, and brother, of the testator was named coexecutor under the will. The original partnership agreement gave the surviving partner the option to purchase the deceased partner's interest, but the testator's will requested that if his brother should survive him, that he forego exercise of the option unless the exercise would be beneficial to the beneficiaries. The executor purchased the testator's interest at a price over \$11,000 less than the market value. The court set the sale aside, holding that the nature of the executor's duties prevented him from exercising the option in his individual capacity. Citing the Restatement that "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary,"²⁵ the court added that to allow the executor to exercise the option *either* in an individual capacity or as executor would be contrary to the interests

¹⁸ *Id.* at 119, 140 N.W.2d at 198.

¹⁹ *Id.* at 122, 140 N.W.2d at 199.

²⁰ *Id.* at 120, 140 N.W.2d at 199. See also Recent Decision, 50 MARQ. L. REV. 559 (1966).

²¹ SCOTT, THE LAW OF TRUSTS § 2.5 at 38 (2d ed. 1956).

²² BOGERT, TRUSTS AND TRUSTEES § 12 at 43 (2d ed. 1965).

²³ 40 Wis. 2d 139, 161 N.W.2d 278 (1968).

²⁴ *Id.* at 148, 161 N.W.2d at 282.

²⁵ RESTATEMENT (SECOND) OF TRUSTS § 170(1) at 364 (1959).

of the beneficiaries. "He is duty bound to act in the interests of the beneficiaries *at all times* with respect to the property in the estate."²⁶ There may thus be a fiduciary relation without the creation of an express trust and the court's position in *Estate of Van Epps* seems to be analogous to its position in *Burmeister* when it says: "The beneficiaries . . . may convey equitable title, and the executor, as a kind of trustee, must convey the legal title accordingly."²⁷

Estate of Van Epps does not obviate the difficulties inherent in considering an executor a trustee. The court is clear that the executor is more properly a fiduciary (like a trustee) and it emphasizes that such a relationship involves one principally of loyalty. But a further problem arises in the Restatement's assertion that, "The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations. The duties of a trustee are more intensive than the duties of some other fiduciaries."²⁸ And Scott adds, "The greater the independent authority to be exercised by the fiduciary the greater the scope of his fiduciary duty."²⁹—that is, generally, the duty of loyalty. Both the executor and trustee *are* fiduciaries, but in many other respects the offices differ and the Restatement's and Scott's distinctions regarding the intensiveness of duties serves as an appropriate stepping stone in showing some marked differences between the two roles, and these differences show how difficult it is to call the two the same.

Scott says that "An executor is not . . . a trustee in the strict sense of the term. Their powers may differ and their duties, and the nature and extent of their liabilities to third persons."³⁰ The Restatement adds:

The duties of an executor are limited to the winding up of the estate of a decedent and are temporary in their character. In the absence of a statute otherwise providing, the duties of an executor are: (1) to reduce to possession the personal assets of the testator; (2) to pay the testator's debts; (3) to pay legacies; and (4) to distribute the surplus, if any, among the testator's next of kin.³¹

Bogert calls the executor a "temporary officer," the trustees being "ordinarily a more permanent representative," and "Hence, when the duties placed on one who is an executor must continue beyond the ordinary period of administration, and involve much investment and management, the court will consider this strong evidence of an intent to make the executor also a trustee."³² But in *In re Gehring's Will*³³ the

²⁶ *Estate of Van Epps*, 40 Wis. 2d 139, 149, 161 N.W.2d 278, 282.

²⁷ *Burmeister v. Schultz*, 37 Wis. 2d 254, 263, 154 N.W.2d 770, 774-5.

²⁸ RESTATEMENT (SECOND) OF TRUSTS § 2, comment *b* at 7 (1959).

²⁹ Note 15 *supra*.

³⁰ SCOTT, THE LAW OF TRUSTS § 6 at 55 (2d ed. 1956).

³¹ RESTATEMENT (SECOND) OF TRUSTS § 6, comment *b* at 19 (1959).

³² BOGERT, TRUSTS AND TRUSTEES § 12 at 47-48 (2d ed. 1965).

executrix deposited money belonging to the estate in a bank where it earned 3 percent interest per annum and the court refused to charge her with an additional 2 percent, although the money could easily have earned 5 percent in the community. Noting that "trustees (which term as here used includes executors . . .) are subject to certain responsibilities in the manner of making the estate intrusted to their management more productive,"³⁴ and that the executrix was unaccustomed to business practices and should not be penalized for her lack of acumen, the court failed to make a distinction between the duties of executor and trustee, even in the limited area of investment of funds. Regarding this duty of investment the Restatement says, in making a delineation not found in *Gehring*:

Although a trustee is ordinarily under a duty to make investments in order to make the trust property productive, an executor ordinarily has no such duty. Where, however, there is reason for a delay in the distribution of the assets of a decedent, the executor may have a power and may have a duty to make investments, but the scope of permissible investments may be narrower than those permissible to a trustee.³⁵

The Wisconsin statute³⁶ stipulates that: "Executors, administrators, guardians and trustees may invest the funds of their trust . . ." and establishes guidelines for doing so, but says nothing of a duty of the executor to do so. Under the proposed Wisconsin probate code, on the other hand, the duties to be imposed upon the personal representative in the management of the estate will presumably include, in the case of the executor during that period before the accounts are closed, investments as authorized by section 320.01, in an effort to make the estate more productive.³⁷ Furthermore, it is important to note that the balance of section 320.01 uses the term "fiduciary" to describe the officeholder affected by the statute. Thus, if the court in *Gehring* would say that the same duty of investment falls upon both an executor and a trustee in making the estate productive—and the court was not at all clear—the Restatement and Scott would disagree, Scott conceding only that while the executor normally has no duty to make investments, where "there is a valid reason for retaining funds in the estate of a decedent, it may be incumbent on the executor . . . to make them productive by investing them."³⁸

There are instances, as well, of fiduciary relations which "do not rise to the dignity of express trusts,"³⁹ but in which the executor may

³³ 179 Wis. 589, 192 N.W. 36 (1923).

³⁴ *Id.* at 594, 192 N.W. at 38.

³⁵ RESTATEMENT (SECOND) OF TRUSTS § 6, comment *b* at 20 (1959).

³⁶ WIS. STAT. § 320.01 (1967).

³⁷ Proposed Wisconsin Probate Code, § 857.03.

³⁸ SCOTT, THE LAW OF TRUSTS § 6 at 57 (2d ed. 1956).

³⁹ *Merton v. O'Brien*, 117 Wis. 437, 442, 94 N.W. 340, 342 (1903).

actually have been intended to act as a regular trustee or in which the duties placed upon the executor so closely resemble those of a trustee that the task of distinguishing the two becomes all the more difficult. Bogert states :

Frequently a testator names an executor and directs him to perform certain duties and it becomes a question of construction whether it was intended that the personal representative should act as executor merely or whether with respect to the particular functions described he should, in addition to his work as executor with respect to other matters, take on the responsibility of a trustee. The phraseology employed is much less important than the nature and duration of the duties to be performed.⁴⁰ It has been held that trust duties may be given to an executor without making him a trustee. "To the ordinary duties of the one chosen to settle the estate may be added the performance of a trust in such a manner that the two functions coalesce."⁴¹

In holding in *Merton v. O'Brien*⁴² that the Statute of Limitations had run against the plaintiff-administrator who had sought to have an express trust declared by virtue of the fact that the defendant was possessor of lands which had been devised to him and which had been subject to a lien in the form of cash legacies, the court recognized that "in case a man owns and occupies property subject to a mortgage or charge there may . . . be 'trust characteristics' in his holding."⁴³ The court distinguished the older case of *Powers v. Powers*⁴⁴ where the defendant was also the executor of his father's will and under which he had been given lands subject to the payment of a legacy of \$200 to his brother. While the question of whether there was an express trust was not raised in *Powers*, the court did find that "the defendant holds the lands so devised to him in trust for the plaintiff, to the extent of the unpaid portion,"⁴⁵ and the court in *Merton* said that the defendant in *Powers* "did in fact occupy the position of a trustee toward the plaintiff, by reason of the fact that he was executor of the will."⁴⁶

Considering what has been discussed regarding the varying distinctions between the duties of trustees and executors, it is particularly unfortunate that the court in *Burmeister* chose to refer to the executor as a "kind of trustee" rather than by some other definition, preferably that of fiduciary, where generally the two offices come closest in function. Thus while the court in *Burmeister* says that the executor must convey legal title to the mortgage and note to the Schulztes at the request of the beneficiaries, it means that he is the person concerned with

⁴⁰ BOGERT, TRUSTS AND TRUSTEES § 12 at 48 (2d ed. 1965).

⁴¹ BOGERT, TRUSTS AND TRUSTEES § 12 at 54 (2d ed. 1965).

⁴² 117 Wis. 437, 84 N.W. 340 (1903).

⁴³ *Id.* at 442, 84 N.W. at 342.

⁴⁴ 28 Wis. 659 (1871).

⁴⁵ *Id.* at 662.

⁴⁶ *Merton v. O'Brien*, 117 Wis. 437, 443, 84 N.W. 340, 342 (1903).

attending to their interests. But it is necessary only to call the executor a fiduciary to find a duty incumbent upon him to convey the title. The general characteristic of the fiduciary relationship is loyalty and most authorities seem to agree that executors and trustees owe this loyalty to their respective beneficiaries in varying degrees. It is to be hoped, however, that enough basic *differences* between executors and trustees have been pointed up to indicate that the court's language in *Burmeister* was less than exact and that it would have made the court's meaning as to the executor-legatee relationship clearer had it used the suggested term "fiduciary" rather than adding yet another nuance to the variable definitions of "trust" and "trustee."

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Eviction Procedure In Public Housing: While public housing has been a fact of American life for over thirty years and countless millions have been tenants in such projects, the case law arising out of this relationship has been minimal. The case of *Thorpe v. Housing Authority of the City of Durham*,¹ vacated and remanded in 1967² and decided in January, 1969, represents the Supreme Court's first consideration of a controversy founded on this relationship.

The Thorpe family moved into their home in the Durham Housing Project on November 11, 1964.⁴ Residents of the project, according to a standard lease used in federally assisted housing projects, are month-to-month tenants with the lease providing for automatic renewal for one month periods. The lease may be terminated by either party with at least fifteen days notice prior to the end of the month. On August 10, 1965, Joyce Thorpe was elected president of a tenants' organization in the project. On the following day she received notice that her lease was being terminated as of August 31, 1965. No explanation was given for the termination.⁵

Through her attorneys, Joyce requested a hearing to determine the reasons for the termination of the lease. The hearing was denied and no reasons were given. The Thorpe family's holdover prompted the Housing Authority to institute a summary ejection proceeding in the Justice of the Peace Court. In a motion to quash the action it was argued that Joyce was being deprived of her constitutional rights and

¹ 89 S. Ct. 518 (1969).

² 386 U.S. 670 (1967).

³ For a complete discussion of public housing and many of the problems alluded to in this article, see Rosen, *Tenants' Rights in Public Housing*, HOUSING FOR THE POOR: RIGHTS AND REMEDIES, Project on Social Welfare Law, Supplement No. 1 (1967).

⁴ For a detailed statement of the facts, see Douglas' concurring opinion in the first Thorpe case, 386 U.S. 670, 674 (1967).

⁵ "All apparently went well for eight months; the record reveals no complaint from the manager of the housing project." *Thorpe v. Housing Authority of the City of Durham*, 386 U.S. 670, 674 (1967).