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Recent Decisions: Trusts: Express Trusts Where the Trustee Lacks Legal Title

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Trusts: Express Trusts Where the Trustee Lacks Legal Title: In *Estate of Martin,*[1] it appears from the court's statement of facts, although the exact terms of the will are not set forth, that the testator had intended by his will to create a trust wherein the trustee was to have legal title to the trust assets plus a power of sale over the realty. The testator's wife was to receive the use and income from the trust assets for life, the corpus to pass to the testator's children upon the wife's death. The final decree of distribution in the probate proceedings, however, transferred the property *not to the trustee* but to the wife, giving her the use and income thereof for life, the corpus to go to the testator's children. The final decree also appointed the defendant as trustee for the purpose of carrying out the terms of the will and gave him, as provided in the will, the power of sale over the real estate. The trustee then took over the administration of all the assets and continued to exercise broad powers over the assets until the wife's death, some ten years later.

The defendant had apparently engaged in some questionable practices during his term as trustee, and his final account did not possess the accuracy and clarity required of a trustee's account. However, the defendant argued that he had been appointed by the final decree of the probate court as a mere trustee for the convenience of administration, *no property having been assigned to him by the final decree.* The defendant urged that, as a mere trustee for convenience, he was not subject to as high a degree of care in accounting as were conventional trustees of express trusts. The trial court accepted this argument in approving the final account, stating that the defendant "rendered as accurate and detailed a report and account as available data made possible."[2] The remaindermen, the testator's children, appealed from the order approving the trustee's account, urging that the defendant was a trustee of an express trust and, as such, had breached his duty to account.

In order to sustain the appellant's contention, which the court ultimately did, the supreme court had to establish that the defendant was a trustee of an express trust. An express trust may be defined as "a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another."[3] For an express trust to come into existence, it is necessary that the settlor manifest an intention to create a trust. Although the trustee, the beneficiary, and the trust property are the elements which make up a complete trust, either the trustee or the beneficiary, or both, may be temporarily absent without preventing the trust's creation or

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[1] Estate of Martin, 21 Wis. 2d 334, 124 N.W. 2d 297 (1963).
[2] *Id.* at 338, 124 N.W. 2d at 300.
[3] BOGERT, TRUSTS AND TRUSTEES §1 (1951).

its later destruction.[4] A trust cannot exist, however, unless there is trust property in existence. Once it is determined, therefore, that the settlor has manifested his intention to create the trust and there is trust property in existence to which the trust can relate, the trustee can be held by the proper court to all the fiduciary duties which attach to that relationship. Among those duties is the duty to account. In describing the degree of care to be exercised by a trustee in this matter, the court stated:

> However one may handle his personal affairs, a trustee has the duty to keep proper accounts of his stewardship. The responsibilities and duties of a trustee are not to be lightly assumed or carelessly executed. Good faith in their performance is not sufficient. . . . The accounts should be clear and accurate and if they are not, all presumptions are against the trustee and all obscurities and doubts are to be taken adversely to him.[5]

As previously stated, in order to hold the defendant to this high degree of care in accounting, the court had to establish that an express trust had been created; that is, that there was trust property sufficient to sustain a trust and that the testator manifested his intention to create a trust. The court, however, was faced with the novel situation where the trustee did not hold legal title to the trust *res,* but held only a power of sale (due to the final decree which could no longer be attacked because of lapse of time). Yet the court found an express trust, stating, "Trust property, however, need not consist of legal title to the subject matter of the trust but some interest in property is necessary. Here, the power of sale of real estate was given to the trustee and would be technically sufficient to sustain a trust."[6] The court cited the *Restatement of Trusts*:

> The owner of land in creating a trust may expressly give to the trustee a legal estate in the land and incident to it the powers which the legal owner of such an estate normally has. [This is usually the case.] In such a case, the estate is held in trust. The owner may, however, give to the trustee merely powers without creating an estate in him. In that case the powers are held in trust. Whether the owner gives to the trustee an estate or merely powers depends upon the manifestation of his intention.[7]

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[4] RESTATEMENT (SECOND), TRUSTS § 2 (1959).

[5] Estate of Martin, *supra* note 1, at 341-42, 124 N.W. 2d at 302.

[6] *Id.* at 340, 124 N.W. 2d at 301.

[7] RESTATEMENT, *supra* note 4, § 88, comment *b.* Scott, as reporter for the *Restatement,* quite naturally adheres to the *Restatement* view in his own treatise, SCOTT, TRUSTS § 88 (2d ed. 1956). The court also cited RESTATEMENT, *supra* note 4, § 2, comment *c*: "The term 'property' denotes interests in things and not the things themselves. . . . The term 'trust property' denotes the interests which are held in trust. The term 'the subject matter of the trust' denotes the things themselves interests in which are held in trust. Thus, where the owner of land transfers an estate in fee simple or for life or for a term of years to a person as trustee, the estate is the trust property, and the land itself is the subject matter of the trust." The court apparently used this to clarify

The court went on to say: "We consider the defendant a trustee of a trust . . . *created by the will* [indicating the court's belief that the testator intended to create a trust] and because of the circumstances the defendant had fiduciary duties respecting the property to which he did not have legal title."[8] (Emphasis added.)

The New York courts have upheld this concept of a trustee holding a mere "naked" or collateral power in trust, legal title being in the beneficiary. A will was construed in a proceeding to settle a trustee's account in the case of *In Re Martin's Will*.[9] The testator had created by his will a residuary trust for the primary benefit of his widow, and upon her death directed that the principal of the trust go to his grandchildren. The will provided further that if the widow died before any of the grandchildren reached majority, the trustee was to manage their distributive shares until they reached majority. The trust terminated on the widow's death and the remainder vested equally in the grandchildren, two of whom were minors. The court held that the trustee became donee of a power in trust over the *minors'* funds and that the trustee had the power and duty to pay income and invade principal whenever necessary for the support, maintenance, and education of the minors subject, of course, to the control of the court. The case of *In Re Babbage's Estate*[10] was also concerned with a will construction. The testator had bequeathed a substantial part of his estate to a minor and directed that the minor's father manage the minor's property for her welfare. The father contended that he was a mere custodian who, in administering the fund, was not answerable to the court for his actions. However, the court held that the father was given powers in trust over the minor's property, which intention the testator had manifested by imposing equitable duties on the father to deal with the property for the benefit of the minor. The court held further that it had jurisdiction over the father in his exercise of the power.

The New York cases dealt with the situation where the testator *intended* to give the trustee merely a power in trust. Although the principal case dealt with a situation where the testator intended the trustee to have legal title as well as a power of sale, the same question—whether a mere power can be held in trust—arose due to the final decree in the probate proceedings. This decree did not provide the trustee with legal title, but it did leave with him the power of sale which the testator had *intended* the trustee to have in order to facilitate the administration of the trust. The final decree left only a power of sale to sustain the trust.

The aforementioned cases are to be distinguished from those in which

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the distinction, in its use of the terms, between the trust property and the subject matter of the trust.

[8] Estate of Martin, *supra* note 1, at 341, 124 N.W. 2d at 301.

[9] 221 N.Y.S. 2d 667, 32 Misc. 2d 555 (1961).

[10] 106 N.Y.S. 2d 332, 201 Misc. 750 (1951).

a power has been found to be held in trust due to the application of statutes limiting the purposes for which express trusts can be created. For example, in *Janura v. Fencl*,[11] the trust instrument recited that the trustee was to have no duties to perform for twenty years, and the beneficiaries were to have the management and control of the property during that time. If any property remained in the trust at the expiration of twenty years, the trustee was then to sell it and divide the proceeds among the beneficiaries. The court found this to be a passive trust, with legal title vesting in the beneficiaries. It also held that the power of sale granted to the trustee was valid as a power in trust[12] and that the trustee could exercise that power in twenty years if, in the meantime, the beneficiaries had not disposed of the property themselves.

The technical objections to a power being held in trust seem to be that the trustee does not hold legal title to the trust *res* and that it is questionable whether a power can be said to be property or an interest in property sufficient to sustain a trust. As evidenced by its holding in the *Martin* case, the court feels that (at least in this limited situation) a trust can exist without legal title in the trustee and that a power, if not "property" for *all* purposes, is at least an interest in property sufficient to sustain a trust. A leading authority in the trust field reasons as follows:

> In the case of both trust and trust powers one holds a property interest which he is under a duty to use for another's benefit. If the trust power relation is fiduciary and the donee's duty is enforceable in equity, there is no reason why the trust power should not be called a true trust. . . . A power to dispose of property the general ownership of which is vested in another is certainly a property interest. If a donor sought by express language to create an imperative power and make it the subject matter of a true trust, it would seem that he should succeed.[13]

Although the argument was not presented in the *Martin* case, this writer feels that our Wisconsin statutes recognizing powers in trust[14] could be urged upon the court in any future case involving a similar issue. It is to be noted, however, that if the settlor intends to create a trust with only powers as the trust property and any of the powers are mandatory, he should manifest such intent clearly, for the *Restatement* warns:

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[11] 261 Wis. 179, 52 N.W. 2d 144 (1952).

[12] WIS. STAT. § 231.14 (1961): "When an express trust shall be created for any purpose not enumerated in the preceding sections of this chapter no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust. . . ." The comparable New York statute is N.Y. REAL PROP. LAW § 99.

[13] BOGERT, *op. cit. supra* note 3, § 116. Contrary to the *Restatement*, Bogert uses the terms "trust property," "trust res," and "subject matter of the trust" interchangibly. *Id.* § 111.

[14] WIS. STAT. § 231.14 (1961), *supra* note 12. See also WIS. STAT. §§ 232.21, .22 (1961), defining general and special powers in trust.

> If by the terms of the instrument creating a trust mandatory powers are conferred upon the trustee, although by the instrument no legal estate is limited to him in specific words, he takes an estate and not merely powers, in the absence of a contrary intention.[15]

One would normally think that the exercise of a mere power of sale in trust should not require the effort and expertise in accounting required of the defendant in the *Martin* case. Indeed, all that one who exercises a power of sale should have to do, it seems, is account for the proceeds and show that he received a reasonable price. Nevertheless, the trustee in the *Martin* case undertook the broad administration of all the property. He supervised some of the assets and completely controlled the others. Although the reported case does not specifically list any other powers exercised by the trustee, it can be safely assumed that he did so (investing corpus and income, incurring expenses in preserving the estate, etc.). Such activities only served to increase his responsibilities to account, even though by exercising these other powers, he exceeded his authority as trustee. Because the trustee undertook to exercise these added powers and to determine, by himself, his own duties for ten years, the court in effect estopped him from denying that he had these added powers for the exercise of which he had to account. The court said: "If there were any question of the scope of his duties, the trustee should not have waited ten years before claiming his rights were less than those which, in fact, he exercised."[16]

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Insurance: Construction of the Uninsured Motorist Clause: In *State Farm Mut. Auto. Ins. Co. v. Brower*,[1] a Virginia case, plaintiff sued his own insurance carrier. Brower, the insured, was injured when his automobile was struck by an automobile driven by one Mazza. Brower sued Mazza for damages and recovered a judgment. Because Mazza's insurance carrier, National Automobile Insurance Co., had gone into receivership four months before the action was instituted, it did not appear in the action, offered no defense, and paid no part of the judgment.

Plaintiff based his action against his own carrier on the Virginia uninsured motorist statute. This statute provides that, in all bodily injury and property damage insurance policies, the insurer shall undertake to pay the insured the amount he is entitled to recover as damages from the owner or operator of an uninsured motor vehicle.[2] The statutes define an uninsured motor vehicle as

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[15] RESTATEMENT, *supra* note 4, § 88, comment *c*.
[16] Estate of Martin, *supra* note 1, at 341, 124 N.W. 2d at 301.
[1] 134 S.E. 2d 277 (Va. 1934).
[2] VA. CODE § 38.1-381(b) (1950).