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Trusts — Power of a Trustee to Grant Leases Extending Beyond the Probable Period of a Testamentary Trust—Plaintiff, in his capacity as trustee under a testamentary trust, had with permission of the circuit court leased trust property to the defendant for a term of 15 years. While the lease had more than six years to run, the entire beneficial interest in the trust vested in one Walter Widmann who made a voluntary assignment of his interest to plaintiff. Plaintiff thereafter immediately petitioned for termination of the trust and an order of termination was entered. Plaintiff then brought an unlawful detainer action against the defendant lessee, contending that, since the trust had terminated, the lease had also terminated. *Held*: A trustee may make a lease extending beyond the trust period if, in so doing, he thereby gives effect to the intent of the testator. *Smith v. Widmann Hotel Co.*, 49 N.W. 2d 301 (So. Dak., 1951).

The problem of the principal case appears to arise only where the testator has not expressly limited the term for which a trustee may lease trust property, and where the trust period is indefinite because it is measured by the life of a person who has the beneficial interest. Where the trust has been set up with an express termination date, it seems to be an apparently universal rule that a lease extending beyond that date is invalid as to the excess on the principle that such a lease would be contrary to the testator's intention as shown in the express terms of the trust.¹

The problem raised in the principal case can arise in two different fact situations: where the trustee at the time of executing the lease attempts to limit the lease to the probable period of the trust estate and where the trustee attempts to lease for a period which in all probability will extend beyond the duration of the trust estate.²

In regard to leases of trust property where the trustee at the time of execution of the lease attempted to limit the lease to the probable period of the trust estate by recourse to mortality tables and court advice there are two views as to the validity of the lease as against remaindermen if in fact the trust estate should terminate prematurely. Under the strict view the lease terminates immediately upon termination of the trust estate.³ It seems that the courts following this view lay down the rule that any lease, even though based upon the probable termination date of the trust, which in fact does extend beyond the trust period is unreasonable. This view has been modified in New York⁴ and Pennsyl-

¹ Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5, 48 L.R.A. (N.S.) 1004 (1913); annotation, 61 A.L.R. 1369 (1920); 26 R.C.L. 1303 (1920).

² In re Hubbel, 135 Iowa 637, 113 N.W. 512, 13 L.R.A. (N.S.) 496, 14 Ann. Cas. 640 (1907).

³ Gomez v. Gomez, 147 N.Y. 195, 41 N.E. 420 (1895).

⁴ NEW YORK REAL PROP. CODE, Sec. 106 (1923).

vania⁵ by statutes which provides that a trustee having the power to lease trust property may lease for a period of five years and such lease will not be rendered invalid by reason of the termination of the trust estate before the expiration of the five year period. These statutes have been held to enlarge powers of the trustee to make leases but where the lease is for a period longer than five years and the trust estate terminates prior to the lease the excess will be void as to the remaindermen.⁶

The other view holds that where the lease is based upon the probable termination date of the trust and the trust terminates prematurely the lease will still be valid for that reasonable period.⁷ Under this view the remaindermen take the property encumbered by the lease until that time when they could have reasonably expected to have received the property had the trust not terminated prematurely. Under this view the actual period of the trust does not determine whether the lease is reasonable or not, but reasonableness is determined primarily by the probable duration of the trust estate, when the lease was executed.⁸

Under both of the above views, where the lease, at the time of execution, will extend beyond the probable period of the trust, the portion of the lease remaining after the trust terminates is void as to the remaindermen. That is, under both the strict and more liberal views, such a lease is considered unreasonable in a majority of jurisdictions.⁹ This majority rule is based upon the principal that the trustee is intended only to have the power to make a reasonable lease of trust property and, per se, a lease which is likely to extend beyond the trust period is unreasonable.¹⁰

The Restatement of Trusts¹¹ sets down the rule that the trustee has the power to make a reasonable lease and, if the trust is not terminable at a fixed time ordinarily the trustee cannot properly make a lease which will extend beyond the probable period of the trust estate. However, there are certain circumstances which may justify interpreting the intention of the testator to permit such a lease.¹² Thus, where owing to

⁵ 20 PENN. STAT. 717 (1917).

⁶ In *re Bentel's Estate*, 347 Pa. 237, 32 A.2d 224 (1934); *Hastings v. Black*, 24 N.Y.S. 2d 190 (1941).

⁷ *Watland v. Good*, 189 Iowa 1174, 199 N.W. 613, 61 A.L.R. 1359 (1920).

⁸ In *Re Hubbel*, *supra*, note 2, the court mentions that the nature of the trust property, purposes of the trust, interests of the beneficiaries and other elements are to be considered in determining the reasonableness of the lease, but seems to rely primarily on the probable duration of the trust estate.

⁹ 4 BOGERT, TRUSTS AND TRUSTEES 787 (1948).

¹⁰ In *re Hubbell*, *supra*, note 2.

¹¹ RESTATEMENT, TRUSTS, Sec. 189 (a) (b) (c) (d) and (e) (1935).

¹² *Ibid.*, Sec. 189 (e). "Among the circumstances which may be material are:

1. Character of the property.
2. Custom with respect to duration of leases of such property in the community.
3. Inability to procure reasonable rentals for such property for a shorter term.
4. The disposition of the property to be made at the termination of the

circumstances not known to the settlor at the time of setting up the trust it would defeat the purposes of the trust not to permit a long lease extending beyond the trust period, such a lease may be made with permission of the court.¹³ Here, while the probable duration of the trust estate is an element entering into the concept of reasonableness of the lease, the controlling element seems to be the intent of the testator.¹⁴

Wisconsin seems to put primary emphasis on whether the testator would have made such a long lease, had he been living at the time it was executed and had the same information available to the trustee.¹⁵ In determining this issue, consideration is given to the nature of the trust property, length of leases in the locality, and the interests of the remaindermen. Some commentators¹⁶ indicate that the Wisconsin rule is to the contrary due to the court's decision in a later case.¹⁷ Upon a close inspection of this later case, however, it will be found that the *Upham* case was not overruled, but that the court expressly followed the rule of that case and found that the testator probably would not have made the lease involved.¹⁸ This case also held that mere pecuniary benefit to the life beneficiaries was not a sufficient reason to permit a lease which would extend beyond the probable duration of the trust and thereby encumber the estate of the remaindermen.¹⁹

It seems that the rule of the principal case and the Wisconsin rule is the better rule and gives the trustee greater latitude in making the most advantageous use of trust property. While the rights of the remaindermen are to be given great consideration and should not be encumbered unreasonably the test of carrying out the testator's intention seems an adequate protection. Limiting the lease to the probable duration of the trust estate will be desirable in most instances but, in some cases, may prove to be an undue burden to the trustee and prevent him from making the most advantageous use of the trust property. It seems in most instances¹⁹ that the requirement of carrying out the testator's intention will limit the lease to the probable duration of the trust estate, and will

trust, for example, whether it is to be sold or distributed in kind and if it is to be sold whether the continuation of the lease would impair its marketability at a fair value."

¹³ *Supra*, note 11, sec. 189 (d).

¹⁴ The Restatement Rule was adopted by statute in California where it is now provided that the trustee may lease for any reasonable period of time and that such a lease will not be impaired by termination of the trust estate if the lease is necessary to carry out the testator's intention. For a discussion of the California Statute and its effect see 21 So. CALIF. L. REV. 260 (1948).

¹⁵ *Upham v. Plankinton*, *supra*, note 1.

¹⁶ 4 BOGERT, TRUSTS AND TRUSTEES 787, 788 (1948); and 54 AM. JUR. 473 (1940).

¹⁷ *Will of Caswell*, 197 Wis. 327, 223 N.W. 235, 61 A.L.R. 1369 (1928).

¹⁸ *In re Estate of Gray*, 196 Wis. 383, 220 N.W. 175 (1928) was decided in the term preceding the *Caswell* case and expressly upheld the *Upham* case.

¹⁹ *Will of Caswell*, *supra*, note 17, is one instance where the requirement of carrying out the testator's intention limited the lease to the probable period of the trust estate.

also give the trustee the advantage of leasing for longer periods to the benefit of both the life beneficiary and the remaindermen, and thereby carry out the purposes of the trust in those instances where a beneficial short term lease cannot be made.

LOUIS R. GILBERT

Trusts — Stock Dividends — Allocation to Income or Corpus — Testator created a testamentary trust, using as corpus 1300 shares of stock. Subsequent thereto a stock dividend was declared, increasing the "corpus" by 1219 shares. The life tenant under the trust brought an action for a declaratory judgment seeking to have the stock dividend declared income so as to be distributable to him. *Held*: In the absence of any intention to the contrary by the settlor, a stock dividend declared at a regular director's meeting to be paid from current earnings becomes part of the corpus, and is not distributable to the life tenant as ordinary income. *Armentrout v. Armentrout*, 100 N.E. 2d 555 (Ohio Probate Court, 1951).

The Ohio court, in the principal case, had little difficulty in justifying its position because of a well-reasoned earlier Ohio decision which had clearly established the law in that state.¹ A study of other jurisdictions, however, reveals at least a four-way split of authority, with some jurisdictions following a modified form of one or the other of the four principal rules.² The Massachusetts rule,³ followed in the principal case, distinguishes between a stock dividend and a cash dividend, and declares that the stock dividend becomes part of corpus while the cash dividend goes to income.⁴ The application of the Massachusetts rule has been held not to be affected by the fact that the stock dividend is a regular dividend, although it would seem that this application of the rule is open to severe criticism.⁵ Having once decided that a particular

¹ *Lamb v. Lehmann*, 110 Ohio St. 59, 143 N.E. 276, 42 A.L.R. 437 (1924).

² This article is limited to a discussion of the disposition of stock dividends in the declaring corporation. No attempt is made to discuss the problems presented by stock rights, liquidating dividends, extraordinary cash dividends, stock dividends in another corporation etc. For an extensive discussion of these problems, see the annotation in 130 A.L.R. 486; 1942 Wis. L. Rev. 299.

³ *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705 (1868).

⁴ This rule has been adopted in the UNIFORM PRINCIPAL AND INCOME ACT, § 5, 9A U.L.A. 233.

⁵ *Rhode Island Hospital Trust Co. v. Tucker*, 51 R.I. 507, 155 Atl. 661, 83 A.L.R. 1253 (1931); modified on rehearing, 52 R.I. 277, 160 Atl. 465, 83 A.L.R. 1259 (1932). Generally stock dividends are considered to be "extraordinary" in nature, i.e., dividends which represent an accumulation of corporate earnings other than those accruing during regular dividend periods, which are not paid at regular intervals, which are unusual in size etc. When, as in this Rhode Island case, the Massachusetts rule is applied to an "ordinary" or "regular" dividend, and it is the policy of the corporation to declare only "regular" stock dividends, the life tenant will be deprived of all benefit in the trust. While in the cited case, the court (on rehearing) did give relief to the life tenant, by stating that it was the duty of the trustee (there