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PROBLEMS IN THE DRAFTING AND ADMINISTRATION OF TRUSTS*

CHARLES M. MORRIS†

The cardinal rule of fiduciary administration may fairly be summed up in one word; viz.: Intent. All courts, definitely including our own Supreme Court, have by repeated decisions stressed the doctrine that the founder’s lawful intent, expressed by will or deed, constitutes the law of a given trust.¹

This doctrine emphasizes the delicate responsibility of counsel preparing a will or a deed of trust, to express in certain terms the lawful purposes of the founder. Nor is counsel’s duty discharged by a mere faithful transcription of the founder’s primary purpose. Counsel is technically trained in weighing the lawfulness of intent, and is quali-

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¹ The substance of this paper was presented before the Junior Association of the Milwaukee Bar.
† Member of the Milwaukee bar; Vice-president, First Wisconsin Trust Company.
² In re Grotenrath’s Estate, 215 Wis. 381, 254 N.W. 631 (1934); Will of Stanley, 223 Wis. 345, 269 N.W. 550 (1937); Freier v. Longnecker, 227 Ia. 366, 288 N.W. 444 (1939); In re Rooker’s Will, 248 N.Y. 361, 162 N.E. 283 (1928); Binney v. Attorney General, 259 Mass. 559, 156 N.E. 724 (1927).
fied by his experience and his reading in the anticipation of conditions and problems which his lay client is unlikely to foresee.

Many questions may be readily disposed of by the trust instrument, but when not so disposed of involve regrettable perplexity and expense of construction. This is illustrated by a will involving a large estate which was before our Supreme Court so far back as 1885. The court commented:

"It would be difficult to find a will with language unobscured and containing so few provisions, and yet involving so many intricate legal propositions. This does not result from any bungling or awkward use of the words employed nor the usual confusion produced by a superfluity of language, nor repeated inconsistent and conflicting statements, but from a poverty of expression as to things touched upon, obviously growing out of the absence of the requisite knowledge of the law applicable to the dispositions intended." The will again came before the Supreme Court in 1928. The trust which it created consisted mainly of valuable business real estate, actually continued for two lives for a period of nearly 60 years; and the court was constrained to hold that there was no power of sale, and no power to lease beyond the wholly conjectural term of the trust. A carefully drafted instrument would not have caused such difficulty.

The founder of a trust, whether by will or by deed inter vivos, will properly first consider the selection of his counsel to express and define his purposes, and to guide him in the definition of those purposes.

He will next reflect, with his counsel's aid and guidance, upon the selection of his trustee. No matter how skillfully his intent be defined, an inexpert trustee can, and often will, defeat it in whole or in part.

Having sagaciously selected his counsel, and cautiously chosen his trustee; how far shall he trust his trustee?

It has always seemed to the writer that unless highly implicit faith can be reposed in the honesty and discretion of the chosen trustee, the choice of a different trustee is imperative.

By the rules of the common law, and by statutes, the temptations of fallible human nature are, tacitly or expressly, recognized as too severe to be resisted. Trustees have come to be limited, consequently, by some technical rules which, however essential in an earlier stage of trust administration, are under present conditions often more burdensome than protective to the trust. It is not suggested that these rules be abrogated or relaxed by law, but that the founder of a trust study his fiduciary plan carefully with a view to making it broadly

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2 Scott v. West, 63 Wis. 529, 24 N.W. 161, 25 N.W. 18 (1885).
3 Ibid., 63 Wis. 529, 550, 24 N.W. 161, 163.
workable, as well as safe. This he can efficiently do only with the aid, and guided by the study and experience, of counsel.

The first problem confronting the founder of a trust involving real estate is to make the terms of his trust so flexible, within the domain of prudence, that the trust shall not be devastated by frozen and unproductive assets. The trustee, having been cautiously selected, should be definitely clothed with powers of conveyance, and with powers of demise, which will enable him to deal with the res of the trust for the benefit of the term tenant as well as of the remaindermen.

A power of sale and conveyance, entrusted to a responsible and competent trustee should always be incorporated. Assuming that such a power may in some cases be abused, nevertheless an adequate remedy for abuse of trust powers is readily invoked by the parties in interest. The interest of the trust estate peremptorily dictates that the title conveyed by the trustee under his power should be unassailable: beneficiaries are protected, since the trustee remains always responsible to them for an abuse of that power.

As to leases of real estate subsisting in a trust, the rule presently existing that (in the absence of specific power) they must be limited to the term of the trusts, may and in perhaps a majority of cases will result in an absolute incapacity of the trustee, even by the authority of the court, to realize the present revenue and future value of the property. Business property in metropolitan areas cannot be advantageously rented for short and uncertain terms. Its practical use will often involve large expenditures by the lessee. A valuable property, capable of yielding a large revenue, will lie practically dormant, with little or no revenue resulting, from the absolute inability of the trustee, even with the aid of the court, to subject the property as a res to a lease for a term of years.

Of course every trust will be governed by its own circumstances; but those circumstances may be impracticable of prediction. It would seem to be the part of prudence to clothe a responsible trustee with the power to make any character of lease, usual and customary, binding the real estate and the successive interests therein, without reference to the anticipated length or brevity of the trustee's actual estate.

Here again the trustee will always act at a certain peril and must respond for any damages for a breach of trust, or an abuse of his fiduciary discretion. The definition of such responsibility will be considered later.

An important consideration in the foregoing suggestions is the impossibility, in our comparatively new community, of anticipating or

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5 See A. L. I. Restatement Trusts, secs. 202, 205.
6 See note 4, supra.
7 See A. L. I. Restatement Trusts, sec. 305.
predicting changes in the availability of given assets. Fifty years ago, long leases were rare. They have since become common. In most trust estates they constitute the only method by which unimproved, or imperfectly improved, real estate may be made adequately productive to the term tenants and to the remaindermen. Consequently, the powers of the trustee should be so adequately conferred that a court is required to consider only whether those powers have been abused.

It may be, and in many estates that have come under the observation of the author certainly is, expedient to clothe the trustee with power to make leases for a period of 99 years, and perhaps in some cases to permit the trustee to grant options of purchase of the improved property. The question of options of purchase will probably arise in exceptional cases but should always be given thoughtful consideration by counsel charged with the framing of wills, and deeds of trust, and serious consultation with the contemplating founder of the trust.

A question which should be given consideration in respect of unimproved, or imperfectly improved, real estate is whether the trustee should be empowered to make improvements requisite to derive a revenue; and if so, how the funds for such improvements shall be raised. This problem will be influenced, and governed, by the conditions existing in the specific contemplated trust. Without specific authority in the will or deed of trust, a trustee cannot borrow money for the purpose of improvements, and will be unable to invest other assets of his trust estate in the requisite improvements. He is limited in his investments by the trust investment statute which does not contemplate investments in real estate. A trustee may well be confronted with the alternative of selling real estate at a sacrifice or of holding it with little or no revenue, unless he is permitted, by use of a borrowing power or of subsisting trust assets to make the estate productive, both for the term tenant and for the remaindermen.

The expression of the powers recommended will tax the learning, experience and ingenuity of counsel. There are, however, powers which may and in many cases are essential to the efficient, economical and productive administration of the trust.

In connection with the powers vested in trustees a question has often arisen, without entirely satisfactory answer, as to what extent powers vest in surviving trustees or in successor trustees. In many cases wills and trust agreements after designating the original trustees grant the specific powers “to my said trustees.” There is usually a provision for the qualification of successor trustees. Whether there is or not, it is

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8 Ibid., secs. 191, 188 comment e.
9 Wis. Stat. (1941) sec. 320.01.
elementary that a trust will not fail for lack of a trustee. The court will supply a trustee. Do these powers of "my said trustee" inure to surviving trustees and to successor trustees? The author is not aware of any satisfactory judicial answer to this question. It seems that the powers are a part of the trust, and that they inure, with all the rest of the trust, to surviving and successor trustees. The question should not be left in doubt. Every will and deed of trust should define precisely how far the powers, however discretionary and confidential, shall pass to surviving and successor trustees. Otherwise the surviving or successor trustees may be crippled in his administration of the trust.

Of course one of the most difficult and persistent problems of a trustee is the matter of investment of his trust fund. Chapter 320 of the Wisconsin Statutes prescribes certain canons to which trustees may conform in the absence of other authority in their wills and deeds of trust. Conformity with this statute is not attended by infinite difficulty. It must be recognized however that the statute is somewhat of a counsel of perfection. Under conditions lately obtaining, investments under this statute necessarily impose a low income yield. Under conditions which many apprehend, investments under this statute may involve an utterly negligible income yield; and it may become imperative in the view of many founders of trusts broadly to extend the investment powers of their trustees. For many years past some founders of trusts have extended these powers to the so-called insurance investment statutes of Wisconsin, under one of which investments may even be made in stocks of solvent corporations. It seems not unlikely that founders of trusts who have confidence in their selected trustees may continuously broaden the investment power, to the end that trusts may participate in the hope of substantial revenues and profits from equities at the same time that they are obliged to participate in the possibilities of loss. Of course such powers impose grave and delicate responsibilities upon the trustee. He must use the most implicit good faith and he must use enlightened judgment. Any provisions thus broadening the investment powers of trustees must, in order to be effective, refer to the trustee's discretion.

Some text writers urge that trustees in making investments rely upon the order of the court, and upon the advice of counsel. In Wisconsin, at least, the writer believes that no court will be willing (except as specifically authorized by statute) to enter an order varying the peremptory calls of the investment statute. Whether such an order if entered would be a protection to the trustee may be gravely questioned. Nor does it seem that a trustee can evade his fiduciary duty by reliance

10 See Perry, Trusts and Trustees (7th ed., 1929) sec. 38; Wis. Stat. (1941) secs. 231.27, 231.28.
11 Wis. Stat. (1941) sec. 201.25.
upon the advice of counsel. If an order of the court is ineffective to relax the mandate of a statute, a fortiori is the advice of counsel ineffective. It is to be apprehended that counsel, invited to pass upon such question, would point to the statute and say, "There is your law." Consequently, any broadening of investment powers should be clearly and unequivocally expressed in the trust instrument.

A somewhat common form, of which the writer is doubtful, is one to the effect that the trustee shall have the same powers which the founder himself might have. Some courts have held that they cannot construe this expression. The writer would prefer not to try to construe it. It is not difficult to define broadly the investment powers of the trustees (including their survivors and successors) in such words that no doubt can arise, and that the founder's lawful intent can be adopted by the trustee, and by the court.

A delicate question which not infrequently arises in trusts is the application of Section 231.21 of the Wisconsin Statutes, providing that the court may under certain circumstances direct the trustee to invade the principal for the support of beneficiaries. The language of this statute is such that its application to a given case is not easy. It may be done only in the case of need. In one case our Supreme Court declined to entertain the application because it considered that adequate need was not disclosed. It may be done only where the interests of others are not invaded. In a recent case the Supreme Court held that it was incompetent for the court to invade the principal of a trust fund for the benefit of a term tenant who would never succeed to the principal. The only instance in which the writer was ever convinced that the invasion was clearly warranted was one where two term tenants divided the income; upon the death of either the trust was to be closed and the fund distributed to the survivor, and the two term tenants and remaindermen concurred in asking the invasion for their common benefit. The Milwaukee county court approved the invasion.

It is probably elementary, and was definitely recognized in Will of Leitsch, that where a residuary estate is limited to or in trust for a beneficiary, the beneficiary is entitled to the income from the date of the testator's death.

On the other hand, it has been established in Wisconsin that where a legacy is left to a beneficiary the legacy draws interest or income only from one year after the date of death; and in Will of Barrett, it was held that where a money legacy was left in trust for a bene-

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12 In re Estate of Adams, 216 Wis. 77, 255 N.W. 886 (1934).
13 In re Estate of Boyle, 232 Wis. 631, 288 N.W. 257 (1939).
14 185 Wis. 257, 201 N.W. 284 (1924).
15 173 Wis. 313, 181 N.W. 220 (1921).
ficiary the legacy drew interest or income only from one year after the testator's death.

This distinction is not recognized by the courts of many states, and is denied or ignored by responsible text writers. The American Law Institute Restatement of the Law of Trusts holds that a money legacy left in trust for a beneficiary draws its income to the beneficiary from the date of testator's death. Unless the Leitsch case overrules the Barrett case (which the author does not read into it) the executor's income from a money legacy, whether disposed directly to a beneficiary or in trust for a beneficiary, inures to the residuary estate.

Another interesting angle of this problem is: if a residuary estate is disposed to or in trust for a beneficiary, what is the disposition of the executor's income from assets which never lapse into the residuary estate but are used, after a year, in paying debts, legacies, taxes and cost of administration? This income, in an invested estate, may well be considerable. So far as my reading goes, the question has not been considered by the Supreme Court of Wisconsin, and has been dealt with radically differently in different jurisdictions. There is for example, a strong Massachusetts case which holds that such income belongs to the term beneficiary, or to the trustee for his benefit.

A trust problem which has occasioned a wealth of irreconcilable decisions is the allocation, between term tenant and remainderman—that is, between income and corpus—of dividends on corporate stocks. This problem has often been treated by our own Supreme Court, and by a recent decision is dealt with under perplexing conditions.

A trust estate was largely committed to an industrial stock of a substantial surplus value accumulated before the testator's death. A dividend policy maintained for many years was continued after the foundation of the trust, with formal notice to the trustees that it was derived, in whole or in part, from surplus antedating the testator's death. The Supreme Court emphasized the view that the dividend was ordinary, and should be credited to the income account, without attempt to discover the source of the dividends; and that "ordinary dividends" are frequently not large enough to warrant a burdensome investigation by the trustee into their source. As to the inevitable result of depleting the corpus value of the estate, the court decided: "The trustees are..."
required to make proper allocation of dividends to corpus or income, and if this is done appear to us to have no further responsibility with respect to book value.22

A note to this case23 discloses the wide difference of opinion in the courts, and suggests many elements which still are not clearly covered by Wisconsin decisions. For example, a continuous, recurrent dividend, normal in amount, even if wholly or partly out of capital surplus, would seem to be an ordinary dividend. But if dividends are suspended for several years, and are then resumed in normal amounts out of capital surplus, may the trustee treat them as ordinary dividends and allocate them to income? And, if there comes to the trustee a block of stock appraised at ten times its par value, may the trustee treat a usual recurrent dividend of 6% on appraisal, but 60% on the nominal par, and paid wholly or largely out of capital surplus, as income? These, and similar problems, are frequently recurrent in trust administration. They may involve trusts in costly litigation. They may involve trustees in burdensome liabilities. They will inevitably trouble and may often perplex the courts. The draughtsmen of wills and trust agreements can deal with them effectively only if they have full knowledge of the trust portfolio, and of the surplus value of the stocks in the portfolio, and of the trust founder’s purposes as to dividends. If the surplus value is to be paid out in dividends, and those dividends to be distributed as income, the remainderman’s estate may be and in some cases will be heavily depleted. The trust founder should understand his problem, and should instruct his trustee in clear and unequivocal terms.

It has been suggested in this article that a trustee having been cautiously selected with a view to his probity, his competency and his responsibility, broad discretion should be reposed in him. The Wisconsin Supreme Court has justly held that the discretion of a trustee is more than a matter of ordinary care.24 Nevertheless, in order that the founder of a trust may reasonably expect his trustee to proceed confidently though cautiously in the administration of the trust, to the end that those intended as the recipients of his bounty shall most adequately benefit, he must give the trustee such reasonable protection as will give his discretion some effect. The trustee should not be tempted to evade all his responsibilities and opportunities of service in order merely to escape responsibility for errors made in good faith and in the exercise of due care. The trustee’s discretion should be deliberately defined as the reasonable care which prudent men would exercise under like circumstances in their own affairs, or a like definition.

22 Ibid., 235 Wis. 591, 599, 294 N.W. 29, 32.
23 130 A. L. R. 492 (1941).
24 In re Estate of Allis, 191 Wis. 23, 209 N.W. 945 (1926); Whitford v. Reddeman, 196 Wis. 10, 219 N.W. 361 (1928); In re Will of Church, 221 Wis. 472, 266 N.W. 210 (1936).