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Property—Trusts and Future Interests—Disposition of Corpus to Life Beneficiary

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Stock—Conflict of Ownership

In *Bata v. Bata*,[47] the Court of Appeals affirmed the judgment of the court below in the adjudication of conflicting claims to shares of stock of a Czech business enterprise deposited in a New York safe deposit box. It was determined that the plaintiffs, statutory heirs of a wealthy Czech industrialist, had the "better right" to the shares in suit which defendant, half brother of decedent, claimed by virtue of an alleged contract of sale and estoppel. That the New York court had obtained jurisdiction had been previously established over defendant's objection thereto on the ground of *forum non conveniens*.[48] Under the law of Czechoslovakia, the alleged contract between defendant and decedent, of which there was signification in decedent's will, was held invalid, and all of decedent's property, subject to certain debt and legacy payments, devolved upon the plaintiffs, his heirs, via intestacy. Further, the courts below determined that defendant had not established either constructive or actual possession of the shares of stock in question by virtue of plaintiffs' past conduct, and hence the latter were not estopped from claiming their right to the shares as property included in the estate which they inherited. Inasmuch as it appeared from the evidence that there was some factual basis for this determination, the Court of Appeals was precluded from finding otherwise.[49]

C. *Trusts and Future Interests*

Disposition of Corpus to Life Beneficiary

a. *Duty to account:* A testamentary gift of personal property for life with a remainder to others, in effect constitutes the life tenant a trustee of the principal fund for the benefit of the remaindermen.[50] Hence he has no right to invade the principal fund, but is to have only the income for himself, and must account as a trustee to the remaindermen.[51] If he fails to account, any doubts as to his use of the fund are to be resolved against him.[52]

In a recent case,[53] personal property had been given to a tenant for life with remainder to such of his children as he might

47. 306 N.Y. 96, 115 N.E. 2d 672 (1953).

48. *Bata v. Bata*, 304 N.Y. 51, 105 N.E. 2d 623 (1952); see 2 BFLO. L. REV. 73 (1952).

49. See *Matter of Kaplan*, 284 N.Y. 584, 63 N.E. 2d 337 (1945).

50. *Matter of Von Kleist*, 265 N.Y. 422, 193 N.E. 256 (1934); *Matter of Denton*, 102 N.Y. 200, 6 N.E. 256 (1886).

51. Surrogate's Court Act §261-a applies the statutory provisions relating to trustees to legal life tenants.

52. *White v. Rankin*, 18 App. Div. 293, 46 N.Y. Supp. 228 (1897), *aff'd*, 162 N.Y. 622, 57 N.E. 1128 (1900); 4 BOGERT, TRUSTS AND TRUSTEES §962 (1948).

53. In re *Reckford's Will*, 307 N.Y. 165, 120 N.E. 2d 696 (1954).

appoint by will. The life tenant so appointed a son who died two months after he did. Large amounts of the property had disappeared, and there was no evidence that the life tenant had ever accounted to the deceased remainderman.

The Court of Appeals refused (5-2) to surcharge the balance of the life tenant's estate with the value of the missing personalty because of a lack of evidence that he did *not* account.

Ignoring the fact that the remainderman was unascertained until the death of the life tenant, the court pointed out that the son may have impliedly consented to his father's invasion of the principal and hence both he and his estate would be estopped from later objecting.[54]

An affidavit concerning the life tenant's periodic destruction of records was considered to be of insufficient weight to raise the presumption against the fiduciary who fails to account. As the burden of proving that there had been no accounting, formal, informal, or implied, is on the remainderman,[55] the total lack of evidence required a judgment for the life tenant's estate.

The dissent maintained that the complete disappearance of the personalty was sufficient evidence to shift the burden of proving a proper use of the fund to the father's estate.

b. *Discretion of trustee:* The Court of Appeals has previously held that a testator may create a trust which grants to the beneficiary an absolute power to terminate the trust by demanding and receiving the corpus from the trustee.[56] Similarly sweeping power was found to be invested in the testamentary trustee in In re *Bisconti's Estate.*[57] Testatrix directed that income of a trust be paid to her daughter for life and authorized trustees to invade principal "as in their sole and uncontrolled discretion they may deem wise, whether because of insufficiency of income personal need or otherwise." The trustee forthwith requested authority to deliver the corpus to the life beneficiary. The objections of the special guardian of three remaindermen, grandchildren of the testatrix by another child, sustained by the lower courts, were rejected.

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54. As where the cestui knows of the method employed by the trustee and fails to object immediately. 4 BOGERT, *op. cit. supra* note 4 § 962.

55. *Owen v. Blumenthal,* 280 N.Y. 96, 19 N.E. 2d 977 (1939).

56. *Matter of Wollard,* 295 N.Y. 390, 68 N.E. 2d 1816 (1946). A trust was established to pay the income to the testator's wife "together with as much of the principal or corpus . . . as she may deem necessary for her maintenance comfort and well being." The court held that under the terms of the will the trustees could not question the good faith and honest judgment of a request for principal by the beneficiary.

57. 306 N.Y. 442, 119 N.E. 2d 34 (1954).

The decisions below were predicated upon the application of the canon of construction known as *ejusdem generis*. This court, examining the words of the bequest, found an intent so clearly expressed as not to permit the application of any rules of construction.[58] The word "whether," following words of an essentially negative character, excluding all control over the trustees, eliminated any restriction on their judgment and rendered the special items enumerated words of description only—the words "or otherwise" being another and more general descriptive category. The inclusive character of the prior terms evidenced an intent that the words "or otherwise" was a term of enlargement to include every conceivable situation outside those stated.

The court necessarily finding that the testatrix contemplated and in fact provided for such a contingency, the trust was allowed to be destroyed before it was ever actually in existence. Such an intention seems extremely doubtful, and it would appear that the decision encroaches upon the principle that a court may intervene in the administration of a trust when it appears that the trustee no matter how broad the discretion bestowed upon him, is so administering his trust that it fails to accomplish the purpose for which it was created.[59] The effect of the decision may well be qualified by a careful application by the lower courts of the principle involved. Recent decisions[60] indicate that this has been the fate of *Matter of Wollard*,[61] and a like treatment is appropriate in this instance.

Power of Sale

Where a trustee is given the power to sell real property or other trust property the courts by interpretation determine whether the power ceases or survives the termination of the trust.[62] The general rule is that if the tenor of a will does not limit the power of sale expressly or impliedly upon the trust term, the power is deemed to continue unaffected even though the title to the trust *res* passes to the beneficiaries.[63]

58. *Matter of Watson's Will*, 262 N.Y. 284, 186 N.E. 787 (1933); *Matter of Rollin's Will*, 271 App. Div. 982, 68 N. Y. S. 2d 116 (2d Dep't 1947), *aff'd*, 297 N. Y. 612, 75 N.E. 2d 627 (1947), 1 DAVIDS' NEW YORK LAW OF WILLS § 491 (1924).

59. *Matter of Vandecar*, 49 Misc. 39, 98 N.Y. Supp. 309 (Surr. Ct. 1905). But see *Corkery v. Dorsey*, 223 Mass. 97, 111 N.E. 795, 796 (1916).

60. *Matter of Britt*, 272 App. Div. 426, 71 N.Y.S. 2d 405 (3d Dep't 1947); *Matter of Hart*, 189 Misc. 171, 71 N.Y.S. 2d 488 (Surr. Ct. 1947); *Matter of Cass*, 68 N.Y.S. 2d 666 (Surr. Ct. 1946).

61. *Supra* note 1.

62. 3 SCOTT, TRUSTS, 1890, 1891 (1939).

63. *Cussack v. Tweedy*, 126 N.Y. 81, 26 N.E. 1033 (1891); *Hutkoff v. Winmar Realty Co.*, 211 App. Div. 726, 208 N.Y. Supp. 25 (1st Dep't 1925).