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## Decedent Estates—Trusts

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## THE COURT OF APPEALS, 1954 TERM

### Trusts

In the case of *In re Wells' Estate*,<sup>15</sup> David Wells had received shares of stock from his mother, Alida Wells, for his lifetime in return for his agreement that at his death the stock was to be sold and the proceeds paid to his mother or her estate. After the mother's death, David received consents from his sister, Anna Oliver, and his son, John Wells, who were beneficiaries under his mother's will, stating that David's widow should receive income from the stock during her lifetime. Between the time of David's death and his wife's death the stock had become worthless.

If the agreement between David and his mother could be enforced, David's estate would have to bear the loss of the decline in the value of the stock. While Anna Oliver's estate and John Wells were bound by their consents, and thus were unable to have the claim of the Alida Wells estate enforced against the David Wells estate,<sup>16</sup> Anna's interest was only a contingent one, and her death before John resulted in the remainder vesting in Anna's children who in no way consented to the retention of the stock after the death of David Wells.<sup>17</sup> The Appellate Division found<sup>18</sup> that the children were entitled to their remainder interest, but since John Wells was the life beneficiary of the trust on which the remainder was based, and since he had consented<sup>19</sup> to the retention of the stock in the David Wells estate, that court permitted the retention by the trustee (a banking institution) under David Wells' estate of the amount due the remaindermen until the death of John Wells.

The Court of Appeals, which was only concerned with the protection of the remaindermen, modified the Appellate Division order so as to provide for the immediate payment of the sum due to John Wells, *as trustee* under the will of Alida Wells, but with direction to pay over the income during his lifetime to the trustee under the will of David Wells for the proper distribution to David Wells' beneficiaries. The court expressed the opinion that only in this manner could the rights of the remaindermen, whose interest in the sum was considered superior to that of the beneficiaries under the will of David Wells, be fully protected.

To better protect the remaindermen, the court took the property from the

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15. 308 N. Y. 270, 125 N. E. 2d 424 (1955).

16. *Oliver v. Wells*, 254 N. Y. 451, 173 N. E. 676 (1930).

17. It is important to note that the children did not take their interest in this remainder through their mother, but they took directly as remaindermen under the will of Alida Wells. They were therefore not estopped by their mother's consent, and they were entitled to have the claim of Alida Wells' estate enforced against David Wells' estate for their benefit.

18. 282 App. Div. 432, 123 N. Y. S. 2d 457 (3rd Dep't 1953).

19. *Havens v. Sackett*, 15 N. Y. 365 (1857).

banking institution as trustee and placed it in the hands of an individual, the same person who had been deprived of his beneficial interest in the trust. "(I)t is a well-settled principle that a trustee . . . is under a duty to deal impartially with . . . beneficiaries . . . and successive interests . . ." <sup>20</sup> The court's decision admits of the possibility of a violation of the trustee's duty as to impartiality and seeks to avoid this by the substitution of trustees. However, by making this substitution the court has probably increased the possibility of impartiality, but to the beneficiaries rather than to the remaindermen. Its holding would seem to suggest that since there is a danger of partiality, the remaindermen's superior interests deserve protection over the beneficiaries' without regard for the degree of possible partiality to each. The writer suggests that the banking institution would have been the more impartial of the two trustees in this case, and that the degree of impartiality to each interest should have been the chief consideration rather than a mere protection of the remaindermen from the possibility of partiality without regard for the danger to the beneficiaries.

### Non-Final Order

*Construction of Hallock's Will*<sup>21</sup> was an appeal from an order of the Appellate Division<sup>22</sup> unanimously reversing, on the law, a decree of the Surrogate's Court in a will construction proceeding. The Appellate Division remitted the proceeding "to the Surrogate's Court for the *determination of allowances, costs and interest, and the entry of decree.*" (Emphasis supplied).

Where the Appellate Division order is final within the meaning of the Constitution,<sup>23</sup> its order would be appealable, notwithstanding the fact that it remitted the case to the Surrogate's Court for entry of a decree.<sup>24</sup> Remission for the determination of costs and allowances would not affect finality, since the Surrogate in his decree expressly reserved these matters "for supplemental decree."<sup>25</sup> However, remission for the purpose of determining interest rendered the Appellate Division order nonfinal.

20. 33 AM. JUR., *Life Estates, Remainders, and Reversions* § 216 (1941).

21. 308 N. Y. 299, 125 N. E. 2d 578 (1955).

22. 283 App. Div. 1091, 131 N. Y. S. 2d 585 (2d Dep't 1954).

23. N. Y. CONST. art. VI, § 7. Jurisdiction of court of appeals: "In civil cases and proceedings as follows: (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which *finally* determines an action or special proceeding . . . where the judgment or order is one of reversal or modification" (Emphasis supplied). Also, C. P. A. § 588.

24. C. P. A. § 591, subd. 2, as amended by L. 1953, ch. 417. The rule was otherwise prior to the 1953 Amendment, *Matter of Mittelstaedt's Will*, 304 N. Y. 795, 109 N. E. 2d 86 (1952); *Matter of Bishop's Will*, 301 N. Y. 498, 95 N. E. 2d 817, (1950).

25. SURROGATE'S COURT ACT § 278.