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Trusts -- Power to Execute Long Term Leases

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Trusts—Power to Execute Long Term Leases

In *In re Menzel's Will*[1] a trustee sought court authority to execute a lease of trust property that would run beyond the probable duration of the trust. The settlor, as an executor, and her co-executor had granted a lease to certain real property located in the business district of Minneapolis. The lease agreement was for 99 years, from 1906 to 30 April, 2005, and it would terminate absolutely at the expiration of that term. This lease provided for a net annual cash rental of $8,000 and there was no provision for readjustment of this figure.

Under the testamentary trust created by the settlor, her interest in this land and lease were to be held by the trustee for two named beneficiaries for life, the trust to terminate upon the death of the survivor and the res to be distributed to the three children of one of the beneficiaries or to their surviving lineal descendants and in the absence of lineal descendants, that share to the surviving individuals or their representatives. One of the three remaindermen had been declared dead and the other two presently have a total of ten children. The appellant had been named guardian ad litem of these ten children and any other contingent remaindermen who may now or in the future have an interest in the trust.

The trustee also held an interest in the land and lease as guardian for one of the beneficiaries who is an incompetent. The other beneficiary of the trust held the remaining undivided interest in the land and lease and joined with the appellee, who was acting as trustee and guardian with respect to the other two undivided interests in the land, in seeking the Court's permission in 1956 to negotiate a new lease agreement.

The new agreement for which court approval was sought amends the 1906 lease and, in part, provided for: (1) An immediate increase in rent from $8,000 to $16,000 per year with provisions for readjustments between $12,000 and $31,000 per year; (2) an extension of the lease from 30 April 2005 to 30 April 2055; (3) an option to buy the property in 2055 in accordance with an appraisal as of 30 April 2052; and (4) an option to extend the lease to 30 April 2105 if the option to buy is not exercised.

All adult persons in being having any interest gave their written

possible in most jurisdictions because it would give the transferees interests in the *whole* tract when their metes and bounds descriptions only purported to give them an interest in one half. A conveyance cannot pass the property beyond the bounds of the area described. Potter v. Wallace, 185 Ky. 528, 215 S. W. 538 (1919); Kenoye v. Brown, 82 Miss. 607, 35 So. 163 (1903); Brown v. Pearson, 180 S. W. 895 (Tex. Civ. App. 1915). *But see* Young v. Edwards, 33 S. C. 404, 11 S. E. 1066 (1890) holding that if at all possible, the portion conveyed to the grantee by metes and bounds will be set off to him upon partition, but if it cannot be done, the warranties in the deed will give him by estoppel the part that is set off to the grantor.

[1] 247 Minn. 559, 77 N. W. 2d 833 (1956).

consent to the amended lease agreement; but the guardian ad litem on behalf of the contingent remainderment objected and pointed out that the trust will terminate upon the death of the last surviving beneficiary, that the beneficiaries have life expectancies of 12, 11 and 9.47 years, and that the rule prohibiting a trustee from entering into a lease which extends beyond the known or probable termination date of the trust is thereby violated. The Court held that the amendment was authorized since it was reasonable under the circumstances and was in the best interests of the trust and of the trust beneficiaries.

While resting its decision on statutory authority, the Court acknowledged the broad powers conferred by the trust instrument and cited that grant of powers in support of its holding. However, the significance of the decision that the trustee had power to lease the trust property for long terms extending beyond the duration of the trust is not diminished by the fact that the court based its decision primarily on statutes. For the court indicated that it could have reached the same decision without the aid of statutes and stated, with respect to the applicable portions of these statutes, that they ". . . are declaratory of the well recognized and inherent power of the court to authorize leasing. . . ."[2] The statutory provisions so construed state, "The district court may, by order, on such terms and conditions as seem just and proper, in respect to rentals and renewals, authorized such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, . . ."[3] Therefore, it is necessary to review the case law dealing with this issue in order to determine the proper basis for such a holding in the absence of statutory authority.

By express provision in the trust instrument, a settlor may give the trustee power to execute leases which will run beyond the duration of the trust and leases made in compliance with that provision will be binding upon the remainderman. The power being exercised, it in effect

[2] *Id.* at 567, 77 N. W. 2d at 838.

[3] M. S. A. § 501.22 Subd. 4 (1945); M. S. A. § 501.24 (1945) contains substantially the same provisions. The statutes referred to here are the counterpart of a New York statute and apparently they were adopted from it. See 4 BOGERT, TRUSTS AND TRUSTEES § 791 (1948) and Note, 14 MINN. L. REV. 274 at 281 (1930). In addition, these statutes provide that where a trustee is to hold real property during the life of a beneficiary and pay the income received from it to the use of the beneficiary, the trustee may lease the property for a term not exceeding five years without application to the court. M. S. A. § 501.22 Subd. 3 (1945); M. S. A. § 501.24 (1945). It is this section of the statute that changed the state of the law and this provision has been held to be an extension of the power of the trustee rather than a restriction. And, where prior to the statute such a lease was valid only until the termination of the trust, it was now valid for any term up to five years regardless of the duration of the trust itself. This is pointed out in *Weir v. Barker*, 104 App. Div. 1112, 93 N. Y. Supp. 732 (1905); 54 AM. JUR., *Trusts* § 474 (1945); Annot., 61 A. L. R. 1368 (1928).

limits the estate of those entitled at the termination of the trust.[4] This express power to lease is of two types. First, the settlor may have auhorized a lease for a definite term; or, second, the settlor may have given the trustee unlimited power to lease. In the latter case, the trustee is subject only to the conditions that the terms of the lease be reasonable, that he acted in good faith, and in the best interests of the trust.[5]

Although the power to lease is not expressly given, it may be impliedly given where it is necessary to the performance of other duties expressly conferred upon the trustee and where it will enable him to carry out the purposes and intents of the settlor.[6] The trust instrument, and all the surrounding circumstances determine whether or not his implied power exists and if so its scope. Such power has been raised by implication where the trustee was directed to receive and dispose of rents, profits, and income to certain beneficiaries and purposes;[7] and where the trustee was given the "entire control, management, and charge of the estate."[8]

In the principal case, the settlor provided that the trustees "shall have and as freely exercise all rights and powers of dominion and ownership over and with respect to . . . the trust estate as I could or might exercise if living. . . . The trustees . . . are . . . to collect the principal, income, rents, issues, profits, and accruals thereof, and . . . to pay, . . . and distribute the same . . . for the use and benefit of the beneficiaries. . . ."[9] In light of the above decisions and the nature of the trust property, this language is clearly sufficient to raise an implication of a power in the trustee to lease.

Where the trustee exercises an implied power to lease without first making application to the courts, two questions are raised as to the validity of that lease. First, is the term of the lease reasonable?[10] Factors determinative of the reasonableness of such leases are the nature and location of the property, the ordinary and customary periods of leases of that type of property in that locality, the rights of the beneficiaries and remaindermen, the purposes of the trust, and the uses for which the trust property can reasonably be devoted.[11] Second, can a lease reasonably be executed by a trustee which will extend beyond the duration of the trust? It is generally held that in the absence of express or statutory authority the trustee is without power to execute leases extending beyond the

[4] Raynolds v. Browning, King and Co., 217 App. Div. 443, 217 N. Y. Supp. 15 (1920), *aff'd mem.*, 245 N. Y. 623, 157 N. E. 884 (1927) 2 SCOTT ON TRUSTS § 189.3 (1956).

[5] 4 BOGERT, TRUST AND TRUSTEES §§ 782, 783 (1948).

[6] 54 AM. JUR., *Trusts* § 471 (1945).

[7] Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422 (1902); Cox v. Kinston C. R. and Lumber Co., 175 N. C. 299, 95 S. E. 623 (1918).

[8] Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5 (1913).

[9] 247 Minn. 559, 564, 77 N. W. 2d 833, 836 (1956).

[10] Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929); 4 BOGERT, TRUSTS AND TRUSTEES, § 786 (1948); 2 SCOTT ON TRUSTS § 189.1 (1956).

[11] 54 AM. JUR., *Trusts* § 472 (1945); 90 C. J. S., *Trusts* § 319 (1955).

duration of the trust; or, where the term of the trust is uncertain, beyond the probable duration of the trust. Such leases are not binding on the remainderman, the excess of the lease beyond the life of the trust being void.[12] However, where the duration of the trust is uncertain, a lease extending beyond the probable duration of the trust is valid for the actual duration of the trust, if it is otherwise reasonable.[13] There is a minority view that such leases are binding upon the remaindermen if they are reasonable and if they give effect to the scheme and intent of the settlor. The fact that the lease extends beyond the duration of the trust is a factor to consider in determining the reasonableness of the term.[14] Therefore, if a trustee relying on implied authority to lease has any doubt as to the necessity for or reasonableness of a particular lease, or his power to execute that lease; he should, for the protection of the trust and himself, secure court authority in advance of its execution.[15] If he acts without such authorization, the lease may be void as to the remainderman and he may be liable for breach of trust. He may be liable even where he could have obtained court authority for such a lease by prior application to the court.[16]

In proper cases, courts of equity have power to authorize a lease of trust property for a period longer than that expressly or impliedly permitted by the terms of the trust or beyond the duration or probable duration of the trust and such a lease will be binding on the remainderman.[17] Whether a particular case is a proper one will depend largely upon the jurisdiction in which the case arises and the circumstances of that case. Circumstances to be considered are: (1) changes in economic conditions; (2) changes in the physical condition of the property; (3) changes in the purposes for which the property may be used; and (4) changes in the neighborhood in which the property is situated.[18] The court may direct or permit a departure from the terms of the trust where a change of circumstances unknown and unanticipated by the settlor would defeat or substantially impair the fulfillment of the intent and purposes of the trust.[19] There is a division of opinion, as evidenced by

[12] Re Caswell, 197 Wis. 327, 222 N. W. 235 (1928); 4 BOGERT, TRUSTS AND TRUSTEES § 787 (1948); Annot., 61 A. L. R. 1368 (1928).

[13] 2 SCOTT ON TRUSTS § 189.2 (1956).

[14] Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929); Noted in 14 MINN. L. R. 194, 274 (1930); 90 C. J. S., TRUSTS § 319 (1955); 4 BOGERT, TRUSTS AND TRUSTEES § 788, 789 (1948). *Bogert* lists Delaware, Maryland, Maine and Connecticut in the minority group and takes a position tending to favor the minority rule, especially where modern business property in large cities is involved.

[15] Russell v. Russell, 109 Conn. 187, 145 Atl. 548 (1929).

[16] 4 BOGERT, TRUSTS AND TRUSTEES § 790 (1948); 54 AM. JUR., *Trusts* § 474 (1945).

[17] Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905).

[18] 4 BOGERT, TRUSTS AND TRUSTEES § 790 (1948).

[19] 2 SCOTT ON TRUSTS § 167 (1956); 54 AM. JUR., *Trusts* § 284 (1945).

the cases, as to what circumstances constitute an exigency that warrants the authorization of such long term leases.

A minority of courts have authorized long term leases for which there was no express or statutory provision in cases where it found: (1) that the execution of such lease was within the implied power of the trustee;[20] (2) that it was necessary to permit such a deviation from the express terms of the trust because exigencies arose after the death of the settlor which would practically defeat the trust; and (3) that the proposed lease was reasonably designed to meet these changes. Under these circumstances, these courts will assume the position of the settlor and grant such equitable relief as it in its sound discretion deems best to accomplish the purposes of the trust.[21] The court may exercise this power in order to assure a proper income to the beneficiaries.[22] Statements representative of language which the courts have found to convey an implied power to execute such leases appear in *Upham v. Plankinton*[23] and in *In re Gray's Estate*.[24] In the *Upham* case, the trust instrument conferred upon the trustee the "entire control, management, and charge of the estate" and the court stated that there was an implied power to execute leases for reasonable terms, that a 99 year lease was not unreasonable under the circumstances, and that it was in the best interest of the estate. The testator, in *In re Gray's Estate,* stated that the trustees should have the power to "manage and control . . . sell and convey" any part of the trust estate. The court held that the execution of a 99 year lease was not beyond the powers of trustees conferred upon them by the testator. Even in the absence of terminology in the trust instrument from which power to execute a long term lease could be implied and where there was no necessity to preserve the corpus of the trust, several cases have gone so far as to authorize the execution of 99 year leases on the ground that without such relief the trust property would become

[20] Marshall's Trustee v. Marshall, 225 Ky. 168, 7 S. W. 2d 1062 (1928); Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5 (1913).

[21] Packard v. Illinois Trust & Savings Bank, 261 Ill. 450, 104 N. E. 275 (1914); Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905); Smith v. Widmann Hotel Co., 74 S. D. 118, 49 N. W. 2d 301 (1951).

[22] 2 SCOTT ON TRUSTS § 189.4 (1956).

[23] 152 Wis. 275, 140 N. W. 5 (1910). In this case the settlor left valuable business property in trust. The value of the land had greatly increased but the buildings had deteriorated so that very large capital outlays would be necessary to adequately improve the property. In order to secure lessees willing to make such improvements on the property, the trustees wanted approval of 99 year leases which it had negotiated. The trust would terminate upon the death of a beneficiary who had a life expectancy of approximately 16 years.

[24] 196 Wis. 383, 220 N. W. 175 (1928). In this case the property in question was a lot in a city business district renting at $1,400 per annum. The value of the property had increased rapidly since the creation of the trust. The proposed lease provided for the erection of a building by the lessee costing not less than $100,000 with rent increasing over a 50 year period from $3,500 to $7,500 and then for the next 49 years at $7,500 per annum. The trust was for the life of the settlor's daughter and until a grandson should reach 30 years of age.

"substantially unproductive";[25] or that it was a good business venture and beneficial to all interested parties.[26]

Nevertheless, it is apparent that the majority of the courts are more hesitant to permit a long term lease where exigencies have arisen if the existence of the trust is not clearly endangered. In these jurisdictions, it must be shown that such leases are absolutely necessary to preserve the trust estate.[27] A long term lease, even though it is an advantageous one, will not be permitted if the trust can be preserved with leases of shorter duration.[28] The fact that a 99 year lease may be beneficial to all parties in interest is not sufficient reason to authorize it.[29] The emphasis is on preservation and, in the absence of express power in the trustee to execute such a lease, the court will not authorize it unless it is essential to the preservation of the corpus of the trust.[30] The majority view places considerable emphasis upon the protection of the remainderman. The long term leases are rejected because of the feeling that they confer benefits upon the benficiary at the expense of the remainderman[31] in contradiction of the settlor's expressed plan for distribution of his property.[32] Weight is also placed upon the fact that the remainderman is deprived of a valuable right by a long term lease in that he is ordinarily entitled to possession of the property, free of encumbrances and restrictions, upon the termination of the trust.[33]

In the principal case, the court states that where, "because of changed conditions caused by monetary devaluation, the beneficiaries are deprived of substantial income which the settlor intended them to have" relief should be granted the same as it is in cases where such relief is necessary to preserve the corpus.[34] Since the power to lease may be inferred from the testatrix's will, and in view of the circumstances—the present low rental, the term for which the present lease will run, the great increase in benefits that will accrue to the beneficiaries and remainderman, the provisions for adjustments in rent, the type and location of the property, and the approval of the adult remaindermen—the holding in this case is an equitable one even though it is not necessary to preserve the trust estate and even though the lease probably will extend 80 years beyond the life of the trust; and may, if the option is exercised, outlast the trust by 130 years. Although contra to the majority view, it is submitted that this approach is the more desirable one under the circumstances.

[25] Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900).
[26] Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905).
[27] 4 BOGERT, TRUSTS AND TRUSTEES § 790 (1948).
[28] Hubbell v. Hubbell, 135 Iowa 637, 113 N. W. 512 (1907).
[29] Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929).
[30] Re Caswell, 197 Wis. 327, 222 N. W. 235 (1928).
[31] *Ibid.*
[32] 4 BOGERT, TRUSTS AND TRUSTEES § 790 (1948).
[33] 2 SCOTT ON TRUSTS § 189.2 (1956).
[34] 247 Minn. 559, 569, 77 N. W. 2d 833, 839 (1956).

Apparently, there are no cases in North Carolina involving leases for a period of 99 years. But there are two cases where, without express authority in the trust instrument, the trustee leased the property for long terms, the longest period being for 30 years. The cases, *Cox v. Kinston C. R. and Lumber Co.*[35] and *Waddell v. United Cigar Stores of America,*[36] may give some indication of the position our Court would take if a case involving a 99 year lease arose. In the *Cox* case, the Court found that the trust was to terminate at the death of the trustee. The trustee, at the age of 66 and without prior court approval, entered into a lease with the defendant. The lease was to run for five years with options in the lessee so that it could run for twenty years if the options were exercised. Seven years later the trustee died, the remaindermen sought possession and the defendant contended that he had exercised his option. The court held that the trustee had no power to execute a lease which would extend beyond the duration of the trust. The Court classified the cases on this subject as those where the trustee attempted to lease without securing court authorization and those where he asked the authorization of the court before executing the lease. The court was of the opinion that, in cases of the first type, it was uniformly held that a trustee has no power to execute a lease extending beyond the duration of the trust and that, in the latter class, courts of equity have the power to enlarge the powers of the trustee. As a general proposition, this classification reflects the trend of authority. Undoubtedly, where there is no express authority, the trustee would be well advised to seek court advice before executing a lease of this nature. But, it may be noted that there is some authority for the view that the lease may not be invalidated by the trustee's failure to seek court approval in advance if the court would have approved the lease if the trustee had asked for its approval prior to the execution of the lease and if the power to lease can be implied and shown to have been necessarily exercised.[37]

In the *Waddell* case, the trust was to terminate upon the death of two designated beneficiaries who had life expectancies of 44.9 and 45.5 years. The trustee proposed to lease the property to the defendant for 30 years and initiated this action for the purpose of obtaining the Court's advance approval. The trial court found that the trustee had an implied power to lease.[38] Since the two beneficiaries had life expectancies considerably longer than the term of the proposed lease and the trustee had implied

[35] 175 N. C. 299, 95 S. E. 623 (1918).

[36] 195 N. C. 434, 142 S. E. 585 (1928); See, Note, 7 N. C. L. REV. 94 (1929).

[37] McCrory v. Beeler, 155 Md. 456, 142 A. 587, 588 (1928); Grady v. Robinson, 180 Ore. 315, 175 P. 2d 463 (1946).

[38] The language from which authority to lease could be implied gave the trustee power "to handle, manage, control and improve in such way as to him may seem desirable and to collect all income." Waddell v. United Cigar Stores of America, 195 N. C. 434, 435, 142 S. E. 585, 586 (1929).

power to lease, the court found that the issue that trustees may not execute leases extending beyond the duration of the trust without express authority was not necessarily raised. In view of these two decisions, it appears that a trustee, with only implied authority to lease, may validly execute leases which will not extend beyond the probable duration of the trust. But, where the lease will extend beyond the probable life of the trust, the excess will not bind the remainderman if the trustee failed to secure advance court approval. If the trustee makes application to the court for its approval in advance, it appears that he may be authorized to execute such lease as is absolutely necessary to preserve the trust. However, if the North Carolina Court should be consulted in a case similar on its facts to the principal case, on the basis of the two cases considered above, it is doubtful if it would approve such a lease.

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Workmen's Compensation—Eye Injuries and Loss of Vision

The amount of compensation awarded for eye injuries is considerable although such injuries account for a very small percentage of the Workmen's Compensation cases. Earning power is often dependent upon visual acuity and an employee deserves high compensation for the loss or impairment of his sight. In New York it has been estimated that eye injuries constitute approximately three per cent of all industrial injuries but the average cost for eye injuries is about twice the average for other injuries.[1] In North Carolina during the period July 1, 1954, to June 30, 1955, there were 137 cases involving eye injuries closed by the Industrial Commission and the amount of compensation was $354,975.00.[2]

Loss of vision is compensable under all the Workmen's Compensation statutes. A specified sum for loss of an eye is granted and total loss of vision is usually compensated for as loss of an eye. Under the North Carolina statute an employee suffering an eye injury resulting in total loss of vision is granted sixty per cent of his average weekly wages during one hundred and twenty weeks.[3]

Partial loss is compensated in such proportion as the partial loss bears to the total loss and an eighty-five per cent, or more, loss is deemed "industrial blindness" and compensated as total loss of vision.[4]

[1] Davidson, *The State Labor Department Ophthalmologist,* 8 INDUSTRIAL MEDICINE, Number 4, 153.

[2] Letter from Mr. R. F. Thomas, Deputy Commissioner, North Carolina Industrial Commission, to Herbert L. Toms, Jr., January 22, 1957.

[3] N. C. GEN. STAT. § 97-31(q).

[4] N. C. GEN. STAT. § 97-31(t): "Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye or for partial loss of hearing shall be such proportion of