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Private Law: Trusts

Gerald LeVan

deceased shareholder. It should make no difference under section 55A whether the repurchase is a voluntary one or whether it is pursuant to a contract as in the present case; the corporation may not prejudice corporate creditors by diverting funds to redeem stock.

TRUSTS

*Gerald Le Van**

The only decision of note dealing with private express trusts was rendered by the Third Circuit in *Harriss v. Concordia Bank & Trust Co.*,[1] where the beneficiary sought to terminate the trust or alternatively to require invasion to the extent of $40,000 to pay outstanding bills. Mrs. Harriss' husband had created a testamentary trust over his entire estate, she being the beneficiary as to one-fourth of both principal and interest. The other beneficiaries were her children. As to her interest, the trust was to continue for life, whereas the trust terminated as to the children's interests when the youngest attained age 25.

Apparently, the principal trust property was a portfolio of securities worth several hundred thousand dollars at the settlor's death. The trust instrument permitted invasion of principal for Mrs. Harriss' benefit in the trustees' "uncontrolled discretion . . . in case of serious illness, surgical operation, or other grave emergency." During the twelve-year period between her husband's death and the institution of this suit, Mrs. Harriss suffered an incredible series of personal, physical, mental, family, and financial disasters. On five different occasions, the trustee had invaded principal on behalf of Mrs. Harriss in an aggregate amount of some $165,000. Apparently, she had joined the trustee on each occasion in obtaining a court order authorizing the invasion. However, in this instance, it appears that the trustee neither joined nor opposed her attempt to terminate the trust or alternatively to invade principal once again. At the time of trial, her monthly trust income was approximately $800.

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* Associate Professor of Law, Louisiana State University and Assistant Reporter for Louisiana Law Institute Committee for Continuing Revision of the Louisiana Trust Code.

1. 265 So.2d 330 (La. App. 3d Cir. 1972). The reader may also be interested in *Bertrand v. Sandoz*, 260 La. 239, 255 So.2d 754 (1971), which upholds the constitutionality of the so-called "public trust" for the financing of public improvements.

It was argued that the trust should be terminated by the court under authority granted in article 2026 of the Trust Code[2] because the settlor could not and did not anticipate the enormity of the problems which she faced. In rejecting this contention, the court pointed out the settlor's obvious purpose to support her from trust income for the remainder of her life which, in its view, clearly anticipated future financial problems; further invasion would reduce income below subsistence levels, thus termination at this point would defeat the settlor's primary purpose. The same view persuaded the court to disallow further invasion.

The opinion does not state whether Mrs. Harriss' interest was subject to spendthrift restraints. However, it is interesting to note that her annual trust income of approximately $9,600 was just below the maximum amount insulated from seizure by creditors under article 2004 of the Trust Code.[3]

The trustee's posture in such a proceeding should be noted. As to termination, he has the apparent duty to oppose it. As to further invasion, however, his discretion is being challenged. In some jurisdictions, the courts have adopted a very limited scope of review over discretionary powers of the trustee. In essence, judicial review is limited to alleged abuses of such powers, *once exercised*.[4] Moreover, the test of "abuse" is not the familiar objective prudent man rule but rather the extent to which the exercise of discretion accords with the settlor's intention, prudence notwithstanding. By contrast, article 2115 of the Trust Code[5] provides that trustee discretionary powers are not subject to the control of the court except to *prevent* an abuse of discretion. Perhaps both views are too narrow. The beneficiary should be entitled to head off an outright abuse of discretion before it

2. "The proper court may order the termination or modification of a trust, in whole or in part, if, owing to circumstances not known to a settlor and not anticipated by him, the continuance of the trust unchanged would defeat or substantially impair the purposes of the trust."

3. "(2) The portion of the net annual income in excess of the amount that will give a beneficiary an aggregate net annual income of $10,000 from all spendthrift trusts and from all other trusts under which alienation by a beneficiary of his interest is restricted . . . ."

4. Watling v. Watling, 27 F.2d 193 (6th Cir. 1928); RESTATEMENT (SECOND) OF TRUSTS, § 187 (1959).

5. "If discretion is conferred upon a trustee with respect to the exercise of a power, its exercise shall not be subject to control by the court, except to prevent an abuse of discretion by a trustee."

occurs; by the same token, the court should have power to compel the trustee to correct an abuse which has already occurred.

It is interesting that the court relies upon the settlor's intention as its standard, rather than the less subjective "prudent man rule." In his respect, the decision accords with those in other jurisdictions.

Huber v. Calcasieu Marine National Bank[6] involved an action against the trustee for alleged maladministration of an inter vivos trust. The settlor of that trust died before the action was brought, leaving her entire estate in two testamentary trusts, one for the benefit of her only child, a son, and the other for the benefit of his six children. It was alleged and sustained that the action against the trustee of the inter vivos trust was an asset of the estate of the settlor and thus became part of the trust property of the testamentary trusts. It remained to determine the proper parties plaintiff. Applying article 2222,[7] the court held that the trustee was the proper party plaintiff and sustained an exception of no cause or right of action against the remaining plaintiffs, who were beneficiaries of the testamentary trusts. The result appears to be correct.

COMMERCIAL PAPER

*Ronald L. Hersbergen**

When the signature of the payee of a check is forged, certain well-settled consequences result: subsequent takers cannot become holders in due course,[1] and the drawee bank pays

6. 262 So.2d 404 (La. App. 3d Cir. 1972).

7. "A trustee is the proper plaintiff to sue to enforce a right of the trust estate, except that a beneficiary may sue to enforce such a right, in order to protect his own interest, in an action against:

"(1) A trustee and an obligor, if the trustee improperly refuses, neglects, or is unable for any reason, to bring an action against the obligor; or

"(2) An obligor, if there is no trustee or the trustee cannot be subjected to the jurisdiction of the proper court."

* Assistant Professor of Law, Louisiana State University.

1. Under R.S. 7:52, a holder in due course is said to be a "holder" who has taken the instrument under the conditions therein prescribed. R.S. 7:191 defines "holder" as the payee or indorsee who is in possession of the instrument, or the bearer thereof. But under R.S. 7:30, one becomes a holder through the negotiation to him, in the case of order paper, by the indorsement of the prior holder. Thus, the forger, not himself being a "holder" cannot negotiate the instrument in such a manner that the taker would be a holder, hence not a holder in due course. The same is true with respect to subsequent transfers of the instrument bearing the forged indorsement. *See* Fidelity Nat. Bank v. Vuci, 224 La. 124, 68 So.2d 781 (1953).