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TRUSTS - COMMINGLING BY LIFE TENANT OF PERSONALTY NOT AN ACT WHICH NECESSARILY REQUIRES THE GIVING OF SECURITY FOR REMAINDERMAN'S PROTECTION

TRUSTS — COMMINGLING BY LIFE TENANT OF PERSONALTY NOT AN ACT WHICH NECESSARILY REQUIRES THE GIVING OF SECURITY FOR REMAINDERMAN'S PROTECTION — *T*, after certain other bequests, left the residue of his estate, consisting of personalty in the form of stocks, bonds, cash securities, out of which the debts of the estate were paid, to his wife for life, remainder to *T's* children. The wife commingled this fund with her personal funds, negligently, but not fraudulently. *P*, one of the remaindermen, brought a bill for accounting and appointment of a trustee, or at least for requiring security of the life tenant for *P's* protection. *Held*, mere *negligent* commingling

by the life tenant does not alone constitute a showing of danger sufficient to require the giving of security by the life tenant, especially since at present the fund is in such form that there will be no further negligent commingling. *Long v. Lea*, 177 S. C. 231, 181 S. E. 6 (1935).

Where there is a bequest of personalty to one for life with a power, express or implied, to convert the same, and a vested remainder over, the general rule has been to require security of the life tenant as a matter of course, without any specific showing of danger.[1] The reasons for such a rule are: (1) because of the liquidity of the res, it is much more easily concealed or disposed of by the life tenant than other forms of property; [2] (2) because it can be invested, it is not necessary for the life tenant to possess it in order to obtain benefits from the life tenancy, and hence inability to give security and a denial of possession therefor, do not work so great a hardship on the life tenant.[3] It does not appear in the instant case that the application of the above rule was urged, although it would seem to be particularly applicable, as a residuary legacy for life gives rise to an implied privilege of conversion into other forms.[4] But even assuming that this is a case in which to require security of the life tenant *only* upon a proper showing of danger, was not the innocent commingling of the res by the life tenant a proper showing of danger? There are several situations where the generally accepted view is that danger exists. Probably the situation most clearly constituting danger is the nonresidence of the life tenant or the removal of the res from the jurisdiction.[5] A quite similar situation is the case of threatened or contemplated removal of the life tenant or the res from the jurisdiction; and that constitutes a sufficient showing of danger if proof of the allegation is adequately established.[6] Insolvency of the life tenant, existing or impending, constitutes sufficient showing of danger, particularly if creditors of the life tenant are likely to levy on the property.[7] Besides these, there are several situations, which, at least in conjunction with one of the above situations, are considered as having cumulative weight in making a showing of sufficient danger. Poor handling of the trust fund was a cumulative factor in one case.[8] Hostility on the part of the life tenant toward the remaindermen was a cumulative factor in two cases.[9] And there

[1] Generally, see 3 SIMES, LAW OF FUTURE INTERESTS, § 641, p. 45, and cases cited (1936); PROPERTY RESTATEMENT (Tentative Draft No. 5), § 244, p. 174 (1934). *Contra*: Wise v. Hinegardner, 97 W. Va. 587, 125 S. E. 579 (1924).

[2] Matter of Von Kleist's Will, 240 App. Div. 435, 270 N. Y. S. 435 (1934).

[3] Matter of McDougall, 141 N. Y. 21, 35 N. E. 96 (1894).

[4] 3 SIMES, LAW OF FUTURE INTERESTS, § 641, p. 47, and cases cited in note 12 (1936); PROPERTY RESTATEMENT (Tentative Draft No. 5), § 244, comment b, p. 177 (1934).

[5] 14 A. L. R. 1066 at 1076, 1080, 1082 (1921); 3 SIMES, LAW OF FUTURE INTERESTS, § 644, p. 51, and cases cited in note 21 (1936).

[6] See authorities cited in note 5, supra.

[7] 3 SIMES, LAW OF FUTURE INTERESTS, § 644, p. 51, and cases cited in note 22 (1936).

[8] Scott v. Scott, 137 Iowa 239, 114 N. W. 881, 23 L. R. A. (N. S.) 716 (1908).

[9] Langworthy v. Chadwick, 13 Conn. 42 (1838); Matter of Fernbacher, 17 Abb. N. C. (N. Y.) 339 (1885).

is one case wherein commingling (whether negligent or intentional does not appear) by the life tenant, was a factor.[10] No case has been found that has held that one of these factors alone would constitute sufficient showing of danger. However, all the foregoing situations are set out as separately constituting danger in the American Law Institute Restatement.[11] The conclusion reached therein, that commingling constitutes danger, seems to be based on no particular authority, unless it might be the *Bethea* case; [12] however, that conclusion seems to be sound, for there is certainly a real danger to the remaindermen's interest where the life tenant commingles the res with his personal funds. And the danger is present, even though the commingling was unintentional and due to ignorance or carelessness. However, there are no doubt situations where such danger is removed by the particular facts of the case; and in the instant case the fact that the res at the present time was in such form that no amount of ignorance or carelessness on the part of the life tenant could again result in an unlawful commingling lends support to the decision of the court.

R.E.H.

[10] Bethea v. Bethea, 116 Ala. 265, 22 So. 561 (1896). A further factor of insolvency was also present in this case. The case loses its weight for establishing commingling as constituting danger by the following language of the court (116 Ala. 271): "That the allegations of the bill are full and sufficient to show danger of loss and injury to the inheritance in the hands of the defendant, Henry Bethea, is not questioned on demurrer, and is not open to dispute."

[11] PROPERTY RESTATEMENT (Tentative Draft No. 5), § 245, p. 184 (1934).

[12] 116 Ala. 265, 22 So. 561 (1896), supra note 10.