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FIDUCIARY ADMINISTRATION – DEVIATION FROM TERMS OF TRUST–INVASION OF PRINCIPAL FOR BENEFIT OF LIFE TENANT

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FIDUCIARY ADMINISTRATION — DEVIATION FROM TERMS OF TRUST — INVASION OF PRINCIPAL FOR BENEFIT OF LIFE TENANT—By a will executed in 1932 testator, who died in 1944, made outright bequests of \$2,500 and his personal goods to his widow and \$5,000 to each of his sons. He then devised the residue of his estate to trustees to pay the income to his widow for life and, upon her death, to distribute the corpus to his then living issue in equal shares by right of representation, and, in default of such issue, to those who would take if he had died intestate when his widow died. The will gave the trustees broad investment and management powers but no express power to invade principal. As the annual income of the trust fund was only \$2,300, the trustees sought authorization to invade the \$107,000 principal in an amount not to exceed \$4,000 a year, in order to provide the eighty-two year old widow then in need of medical care with reasonable support. Testator's children, unable to use their interests to benefit their mother because of provisions against alienation by anticipation,¹ joined in the petition, as did a grandchild. The latter, a minor, was represented by a guardian ad litem, who was also appointed to represent the possible interests of persons yet unborn. *Held*, because of changes in circumstances, unforeseen by the testator, "including shrinkage in investment returns, decline in purchasing power, and the expense occasioned by the widow's extreme infirmity,"² principal might be invaded in order to effectuate the testator's "primary purpose"³ of providing reasonable support for his widow. *Petition of Wolcott*, (N.H. 1948) 56 A. (2d) 641.

Although a court of equity may deviate from the terms of a trust and invade principal in order to aid a needy income beneficiary who has an absolute right to the principal when the trust is terminated⁴ or, in some cases, who has a contingent right to the principal,⁵ yet there seems to be no authority for invasion of principal

¹ Query whether the children's interest in principal could be made inalienable. See 1 BOGERT, TRUSTS AND TRUSTEES, perm. ed., § 220 (1935); 1 SCOTT, TRUSTS, perm. ed., § 153.2 (1939); 1 TRUSTS RESTATEMENT, § 151 (1935).

² Principal case at 643.

³ *Ibid.* Cf. *Longwith v. Riggs*, 123 Ill. 258, 14 N.E. 840 (1887) (testator's "manifest intention" to permit corpus to be invaded for maintenance of income beneficiary with no expressly created interest in corpus); *Zinmeister's Trustee v. Long*, 250 Ky. 50, 61 S.W. (2d) 887 (1933) ("dominant idea").

⁴ 3 BOGERT, TRUSTS AND TRUSTEES, perm. ed., § 562 (1946); 2 SCOTT, TRUSTS, perm. ed., § 168 (1939); 1 TRUSTS RESTATEMENT, § 168 (1935).

⁵ For purposes of this note a contingent right to principal means an interest in principal subject to condition precedent or subsequent. Where principal is invaded for a needy income beneficiary who is one of a class the survivors of which will receive the principal when the trust terminates, the invasion is permitted though the person aided thereby may never become entitled to principal. 2 SCOTT, TRUSTS, perm. ed., § 168 (1939); 1 TRUSTS RESTATEMENT, § 168, comment e (1935). It is generally held that corpus will not be invaded for a needy income beneficiary with a contingent right to principal. *Stewart v. Hamilton*, 151 Tenn. 396 at 400, 270 S.W. 79 (1924) ("taking the property for the use of those who may never be entitled to it"). See also 3 BOGERT, TRUSTS AND TRUSTEES, perm. ed., § 562 (1946); 2 SCOTT, TRUSTS, perm. ed., § 168 (1939); 1 TRUSTS RESTATEMENT, § 168, comment d (1935). However, there is some authority for a

to aid a needy income beneficiary who has no interest in or power over the corpus.⁶ Under what theory, then, does the New Hampshire court exercise equity's "undoubted power to permit a deviation from the literal provisions of the will"?⁷ According to the "unforeseen change of circumstance" doctrine,⁸ when an event occurs which the testator did not foresee and for which he did not make appropriate provision in his will, equity does what the testator cannot himself do and gives the trustee powers necessary to deal with the situation in hand. However, the doctrine apparently has never been used to give principal to one who has no interest therein.⁹ Further, the three changes of circumstance relied upon by the court hardly could have been unforeseeable to the testator immediately before his death. Does the court mean that only slight unforeseeability at the time of the testator's death will suffice, or does it mean that unforeseeability is to be determined as of the time of the execution of the will? Since a testator can change his will until he dies, and since the "change of circumstance" doctrine is founded on the theory that equity will grant the trustee necessary powers which the testator cannot himself grant when the need therefor becomes apparent, it would seem that the unforeseeability should be determined as of the time of the testator's death. Therefore, the court may be construing the will to reach a desirable result, rather than applying the strict "change of circumstance" doctrine. Although "the testator's purpose to furnish reasonable support for his wife is not expressed in words," yet "it is nevertheless implicit in the disposition made of his estate," so that "the remaindermen are deprived of no rights," the "rights which the life tenant was intended to have" not having been exceeded.¹⁰ Construction of a will is largely, or perhaps wholly, a matter of providing for situations which the testator did not think about.¹¹ Though the court says that it has discovered the testator's "primary

contrary view. 2 SCOTT, TRUSTS, perm. ed., § 168 (1939); 1 TRUSTS RESTATEMENT, § 168, comment f (1935); *Matter of Muller*, 29 Hun (N.Y.) 418 (1883) (on a showing of "extreme emergency," court authorized invasion of corpus for needy children of lifetime income beneficiary who were to receive the principal only if they survived the income beneficiary, their issue to receive it if they did not survive); *contra*, *Brandt v. Continental Bank and Trust Co.*, 43 N.Y.S. (2d) 255 (1943), *affd.*, 267 App. Div. 890, 47 N.Y.S. (2d) 589 (1944).

⁶ See *Estate of Boyle*, 232 Wis. 631, 288 N.W. 257 (1939). But cf. cases cited in note 3, *supra*, and an annotation in 108 A.L.R. 542 (1937) entitled, "When will, absent explicit provision to that effect, be deemed to confer upon beneficiary of life or lesser estate or interest right to trench upon principal or corpus."

⁷ Principal case at 644.

⁸ 3 BOGERT, TRUSTS AND TRUSTEES, perm. ed., § 561 (1946); 2 SCOTT, TRUSTS, perm. ed., § 167 (1939); 1 TRUSTS RESTATEMENT, § 167 (1) (1935).

⁹ See *First Nat. Bank of Oshkosh v. Barnes*, 237 Wis. 627, 298 N.W. 215 (1941). The change of circumstance doctrine seems to be invoked to enable the trustee better to administer the trust for the benefit of the beneficiaries named by the settlor, by giving him, under certain circumstances, power to sell, mortgage, or pledge the corpus, to make a type of investment not otherwise authorized, etc., rather than to change the beneficiaries. See note 8, *supra*.

¹⁰ Principal case at 644.

¹¹ 2 SIMES, FUTURE INTERESTS, §§ 304-313 (1936); 3 PROPERTY RESTATEMENT, §§ 241-248 (1940).

purpose,"¹² it might be more accurate to say that the court is deciding what the testator *would* (or *should*?) have done if he had thought of the situation which confronts the court. There is, however, a point beyond which construction should not go; "if that were not so, a testator could never have any assurance that any of the provisions of his will would be effectuated."¹³ Although the decision may be difficult to justify under the "change of circumstance" doctrine or as a matter of construction, the facts present an appealing case for the relief requested. Not only was the income beneficiary aged and in need, but also the two persons most likely to acquire the principal consented to the invasion, the next most likely person was represented by a guardian ad litem, and the chance of other persons taking was extremely remote.

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¹² Principal case at 643.

¹³ 2 SIMES, FUTURE INTERESTS 20 (1936).