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## Trusts

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## TRUSTS

Decisions of the Ohio courts in the field of trusts reported during 1962 were devoid of landmark cases such as the 1961 decision of the supreme court in the *Smyth* case.<sup>1</sup> Interesting decisions were reported pertaining to the investment powers and duties of a trustee, the interpretation of language creating trusts, and the personal liability of trustees for negligence causing injury to third persons.

### TRUST INVESTMENTS

The most significant decision was that of the supreme court in *Toledo Trust Co. v. Toledo Hosp.*<sup>2</sup> The trust provisions expressly restricted the investments of the trustee to federal and municipal government bonds. No specific amount of income nor principal was required to be distributed to the beneficiaries, all of whom were charities. However, the use of one-half of the corpus to build a hospital building was authorized. The trustee argued that the inflation of the past twenty years had decreased the dollar's purchasing power by fifty per cent and that carrying out the testamentary authorization to build a hospital building would be impeded unless deviation should be permitted. All the beneficiaries joined in the prayer of the trustee's petition. The sole party opposing the petition was the Attorney General of Ohio, who had been made a party defendant as required by statute.<sup>3</sup> The court held that it was not justified, under the testator's strict language, and in the absence of an existing emergency, in permitting the trustee to deviate because of inflationary factors.<sup>4</sup> It was noted that the restrictions on investments had served the trust well during the 1930 depression and might prove equally wise in the future.<sup>5</sup> The opinion strongly implies that had the testator provided that the charitable beneficiaries were to receive a specific sum, either income or corpus, deviation might have been permitted in order to enable

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1. *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961).

2. 174 Ohio St. 124 (1962).

3. OHIO REV. CODE § 109.25.

4. The court followed its rule enunciated in the second syllabus of *Union Sav. Bank & Trust Co. v. Alter*, 103 Ohio St. 188, 132 N.E. 834 (1921), which provides as follows:

"The controlling object in the construction of a will is the ascertainment and declaration of the intention of the testator; and the changed value of money and property, the changed circumstances and needs of the beneficiary, do not justify a court in modifying the provisions of a will to meet the changed circumstances and conditions. The theory that the testator, had he foreseen the changed circumstances and conditions, would have provided a different and larger income is an assumption merely and is no excuse for the usurpation by the court of the right to dispose of testator's property in a way different from that by him directed."

5. This observation seems particularly appropriate in view of the sharp stock market break in the spring of 1962.

the trustee to obtain for the beneficiaries the dollar purchasing power the testator had specified they should have.<sup>6</sup>

In *Vacha v. Vacha*<sup>7</sup> the Probate Court of Cuyahoga County construed the investment provisions of a noncharitable testamentary trust. Under the will, Blackacre was left to X in trust to hold, manage, lease, and care for the property and collect the income therefrom all in accordance with the trustee's best judgment and direction. The trustee was "also fully authorized" to invest cash in the trust. The court was asked to determine whether under such provisions the trustee was confined to legals.<sup>8</sup> Following the Ohio Supreme Court's rule set forth in *Home Savings & Loan Co. v. Strain*,<sup>9</sup> the court held that since the trustee was given discretion and judgment in the matter of investing and, in addition, "was fully authorized" to invest cash, there was no intent to restrict the trustee to legals.<sup>10</sup>

The duty imposed by statute<sup>11</sup> on a court appointed fiduciary of any type (executor, administrator, trustee, or guardian) to place idle funds in the trust at interest, is sometimes overlooked. In the case of *Guardianship of Sachs*<sup>12</sup> the supreme court had occasion to refer to this rule. While the case is not otherwise concerned with the law of trusts, it does serve as a reminder of the fiduciary duty imposed by said statute, and the principle on which it is based,<sup>13</sup> to keep trust funds at work producing income for the trust beneficiaries.

#### CREATION OF TRUSTS

Traditionally, courts have tried to construe liberally language which seems to create a charitable trust.<sup>14</sup> This tradition was again demonstrated in the decision of the Court of Appeals for Franklin County in *In re Estate of Luce*.<sup>15</sup> The testator left the residue of his estate to X "to be expended by her for any charity or charities that she may select and as a memorial to me."<sup>16</sup> The court stated that no particular form of words is needed to create a trust.<sup>17</sup> Where the will shows the

6. RESTATEMENT (SECOND), TRUSTS § 167, comment *c* (1959).

7. 179 N.E.2d 187 (Ohio P. Ct. 1961).

8. OHIO REV. CODE § 2109.37 as amended, OHIO REV. CODE § 2109.371.

9. 130 Ohio St. 53, 196 N.E. 770 (1935).

10. Annot., 78 A.L.R.2d 7, 24 (1961).

11. OHIO REV. CODE § 2109.42.

12. 173 Ohio St. 270, 181 N.E.2d 464 (1962).

13. RESTATEMENT (SECOND), TRUSTS § 181, comment *c* (1959).

14. 9 OHIO JUR. 2D *Charities* § 5 (1954).

15. 116 Ohio App. 420, 185 N.E.2d 559 (1962).

16. *Id.* at 421, 185 N.E.2d at 560. The major question involved was whether the charitable trust found to be created was exempt from Ohio inheritance taxes. It was held that the succession was not exempt under OHIO REV. CODE § 5731.21, because the testator did not limit the charitable purposes to ones carried on in Ohio.

17. 41 OHIO JUR. *Wills* § 677 (1935).

testator intended to charge the property bequeathed with a trust in favor of third persons, effect will be given to the trust whether the words used by the testator are dispositive, pre-emptory, or only precatory. Moreover, a charitable trust can be created even though, as here, no definitely ascertainable beneficiaries are designated.<sup>18</sup>

Where an elderly testator having living issue desires to leave substantial interests for charities, it is recommended,<sup>19</sup> in setting up such person's estate plan, that the gifts to charities be made through the use of an inter vivos trust so as to avoid the operation of the mortmain statute.<sup>20</sup> Such a device was employed in *Drew v. Richards*,<sup>21</sup> only in this case the informality of the arrangement opened it to attack. Here the trustor, the primary trustee, and one of the beneficiaries all were one and the same person. However, the court found, contrary to the claims of the plaintiff (a lineal descendant of the trustor), that the trust was not void under the Statute of Frauds.<sup>22</sup> A question also arose as to whether there had been an actual physical transfer of the assets to the trust. The court found sufficient segregation of assets in the trustor's safe deposit box to establish an acceptable corpus of the trust. The mortmain statute is deeply imbedded in the law of Ohio. It has stoutly withstood numerous efforts to change it.<sup>23</sup> One would do well to be as formal and precise as possible in creating any plan designed to circumvent it.

*Cleveland Trust Co. v. Pomeroy*<sup>24</sup> is concerned with the right of the debtor-trustor to revoke a purported trust which he had created in the 1930 depression for the purpose of facilitating the orderly liquidation of the trustor's nonliquid assets so that his creditors, who were made beneficiaries of the trust, might be paid in full. The court found from its analysis of the instrument and the fact that a transfer of legal title of the assets had been made to the trustee, that a valid trust had been created. Interesting non-trust questions in the areas of novation and the right of creditor beneficiaries to enforce their obligations otherwise barred by the statute of limitations, are also discussed. When the trustor attempted to revoke, his act clouded the future administration of the trust. The trustee properly brought an action for instructions.<sup>25</sup> The opinion points

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18. *Palmer v. Oiler*, 102 Ohio St. 271, 131 N.E. 362 (1921). See RESTATEMENT (SECOND), TRUSTS § 364 (1959).

19. Kohn, *Drafting Techniques to Protect Charitable Trusts*, 34 CLEVE. BAR ASS'N. J. 21 (1962).

20. OHIO REV. CODE § 2107.06.

21. 177 N.E.2d 633 (Ohio Ct. App. 1960).

22. OHIO REV. CODE § 1335.01.

23. Schwartz, *The Ohio Mortmain Statute — A Need for Reform*, 13 W. RES. L. REV. 576, 594 (1962).

24. 177 N.E.2d 410 (Ohio C.P. 1961).

25. *Cf. In re Estate of Ferris*, 182 N.E.2d 78 (Ohio P. Ct. 1962).