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## Emergency Deviation From Terms Of Trust

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insured from reinstating the wife either by renaming her as the beneficiary or by will where the policy becomes payable to his estate. This statute has the advantage of requiring a statement of intention immediately, rather than leaving the insurance question open for subsequent litigation as in the *Spalding* case.

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### EMERGENCY DEVIATION FROM TERMS OF TRUST

Although courts of equity generally require rigid adherence to the express terms of the trust,<sup>1</sup> the power of equity to authorize the trustee to deviate from the trust instrument under proper circumstances is well established.<sup>2</sup> This may be done when an emergency arises that threatens the main purpose of the trust.<sup>3</sup> The general principle being acknowledged, the critical question is what circumstances actually do create an emergency warranting deviation.

In inflationary periods beneficiaries may feel that a change in economic conditions is alone sufficient to create an emergency. In *Stanton v. Wells Fargo Bank & Union Trust Co.*,<sup>4</sup> a testamentary trust expressly limited the trustees to investing and reinvesting the trust property in "bonds of the United States Government, in bonds of the States of the United States, and municipalities thereof, and such other bonds (the bonds of foreign governments or foreign municipi-

<sup>1</sup>Valley National Bank of Phoenix v. Hartford Accident and Indemnity Co., 60 Ariz. 286, 136 P.2d 458 (1943); Bryson v. Bryson, 62 Cal. App. 170, 216 Pac. 391 (1923); Cannon v. Stephens, 18 Del. Ch. 276, 159 Atl. 234 (1932); Sheets v. Security First Mortgage Co., 293 Ill. App. 222, 12 N.E.2d 324 (1937); 4 Pomeroy, Equity Jurisprudence § 1062 (5th ed. 1941).

<sup>2</sup>"This power resides in the Court of Chancery as a part of its original inherent jurisdiction—its general administrative jurisdiction in cases of trusts." New Jersey National Bank & Trust Co. v. Lincoln Mortgage & Title Guaranty Co., 105 N.J. Eq. 557, 148 Atl. 713, 715 (1930). Weakley v. Barrow, 137 Tenn. 224, 192 S.W. 927 (1917); In re New, [1901] 2 Ch. 534; 2 Scott, Trusts § 167 (2d ed. 1956). This power is somewhat akin to the cy pres doctrine applicable to charitable trusts. Note, 28 Calif. L. Rev. 785 (1940).

<sup>3</sup>The proposition was colorfully stated by the court in Curtis v. Brown, 29 Ill. 201, 230 (1862): "Can it be said that the beneficiary of an estate which would bring in the market one hundred thousand dollars, should perish in the streets from want or be forced to the poor house for support, . . . because there is no power in the courts to relieve against the provisions of the instrument creating this trust?" 54 Am. Jur., Trusts § 284 (1945); Restatement, Trusts § 167 (1935).

<sup>4</sup>310 P.2d 1010 (Cal. App. 1957).

palties excluded) as shall be rated at least 'AA' by Moody Investor's Service, or in the event such service shall no longer be in existence, by such first class service as such trustees shall deem best."<sup>5</sup> An action was brought by all life beneficiaries, their children and one of the two trustees to secure modification of this provision so as to permit the trustees to invest and reinvest in securities permitted by the California Civil Code.<sup>6</sup> The petitioner alleged that there had been a change of economic conditions since the execution of the testamentary trust in 1930, which change was not anticipated by the settlor, and that should the restrictions on investments be enforced, the changed circumstances might very well substantially impair the main purpose of the trust, which was to provide the beneficiaries with the largest income consonant with safe investment. The beneficiaries pointed out that the trust was executed during the depression when investment in stocks was considered unwise, and that since that time there has been a radical change in the investment situation brought about by the current inflationary trend. The cestuis contended that during inflationary periods investment in stocks is desirable because such stock will increase in value and will presumably constitute a hedge against inflation. In furtherance of the petitioner's cause it was shown that the settlor was not inherently adverse to investing in stocks. This was obvious from the fact that the residue of his estate contained many stocks, both preferred and common. In accord with the contentions of the petitioners the trial court entered judgment ordering that the provision restricting investments to bonds be amended so as to permit the trustees to invest in securities approved by the California Civil Code.<sup>7</sup> The appellate court, however, reversed the trial court, holding that where no emergency exists, or is threatened, a deviation from the terms of the trust instrument should not be permitted. The appellate court pointed out that the distributable annual income as well as the corpus of the trust estate had increased substantially in value since 1936. Therefore, in the absence of any showing that the cestuis were in real need, the court declared that it could not guess at what future economic conditions would be and that it was loath to disregard the conclusions of the settlor as to what constituted proper and wise investments.

The *Stanton* decision would seem to fall within the scope of the generally accepted doctrine that equity has no authority to make

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<sup>5</sup>Id. at 1012.

<sup>6</sup>Cal. Civ. Code § 2261 (1949).

<sup>7</sup>Ibid.

over a trust merely to gain for the cestui a better gift than was provided by the settlor.<sup>8</sup> Under this view, the power to permit deviation by the trustee should be limited to cases of grave emergency. In short, a court should not modify a trust instrument simply because the court thinks it can do a better job than the settlor did. In *Thompson v. Union National Bank in Kansas City*<sup>9</sup> the testator created a trust of personal property with income payable to his wife and children. For many years the trust estate produced an annual income of from \$3,600 to \$4,800, but finally declined to \$1,300. In an effort to gain more income the beneficiaries brought an action against the corporate trustees seeking a deviation from the express terms of the trust as to allowable investments. It was urged by these beneficiaries that the testator had in mind the economic conditions prevailing in 1913 when his will was executed and did not anticipate that quality bonds, then drawing 5½ to 6 per cent interest, would, in years to come, earn 3 per cent or less. But the court, following the prevailing rule, refused to employ its power of alteration merely to increase the benefits for the present cestui.

Some courts, however, have felt that a change of economic conditions in itself creates an emergency sufficient to warrant a deviation from the terms of the trust.<sup>10</sup> In *St. Louis Union Trust Co. v. Ghio*,<sup>11</sup> the testator directed that the trust funds be invested in mortgage notes or sound bonds returning at least 4 per cent interest. Upon a showing that such investments could not produce a return of 4 per cent the court in the *St. Louis* case permitted the trustee to invest in other securities that would produce 4 per cent interest. A similar decision was reached in *Citizens' National Bank v. Morgan*,<sup>12</sup>

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<sup>8</sup>Rogers v. English, 130 Conn. 332, 33 A.2d 540 (1943) (the trustee was not permitted to invest the trust money in United States bonds or other trust investments contrary to the terms of the trust, when it was shown that investments in mortgages on realty did not jeopardize the interests of the estate); In re Jones' Will, 221 Minn. 524, 22 N.W.2d 633 (1946) (the court refused to authorize deviation from the terms of a testamentary trust so as to permit the trustee to invest in common or preferred stock merely to increase the income to the life tenant); National Bank of Tacoma v. Roberts, 172 Wash. 355, 20 P.2d 25 (1933) (where testamentary trust directed trustee to allow beneficiaries \$300 per month for support and education, trustee did not have discretionary power to allow more); 3 Bogert, Trusts and Trustees § 561 (1946).

<sup>9</sup>291 S.W.2d 178 (Mo. App. 1956).

<sup>10</sup>In re Pulitzer's Estate, 139 Misc. 575, 249 N.Y. Supp. 87 (Sur. Ct. 1931), aff'd mem., 237 App. Div. 808, 260 N.Y. Supp. 975 (1st Dep't 1932); Weld v. Weld, 23 R.I. 311, 50 Atl. 490 (1901); In re New, [1901] 2 Ch. 534. See also Annot., 170 A.L.R. 1219, 1230-33 (1947).

<sup>11</sup>240 Mo. App. 1033, 222 S.W.2d 556 (1949).

<sup>12</sup>94 N.H. 284, 51 A.2d 841 (1947).

where the trustee was directed to invest the trust funds in bank deposits. It was held that due to changed economic conditions which reduced the rate of return on bank deposits from 4 to 2 per cent the trustee should be permitted to invest in various other legal trust investments.

Another circumstance in which the courts of equity are called upon to invoke their inherent power to permit deviations from the express terms of the trust is where the trust instrument fails to give the trustee a power of sale, or where such power is specifically denied by the trust instrument, and an exigency has arisen threatening the destruction of the trust property.<sup>13</sup> Despite such limitations upon the power of the trustee, it sometimes becomes necessary for the court to permit a sale of the trust property in order to preserve the estate and protect the rights of the beneficiaries. This situation is graphically illustrated by *In re Pulitzer's Estate*,<sup>14</sup> where the testator bequeathed shares of stock of the Press Publishing Company in trust for his three sons and provided further that the shares should not be sold under any circumstances. It was shown that great losses were being incurred in the publication of the newspaper with the result that the newspaper would soon be of no value. Under these circumstances the court authorized the trustees to sell the assets of the company. But in *Security-First National Bank of Los Angeles v. Easter*,<sup>15</sup> a California Court of Appeal took a more restrictive view of what constituted an emergency. In that case it was shown that the depression had so reduced the income from the real property that the trustees had been unable to make substantial payments to the beneficiaries for some years. The court declared that before ordering a sale of real property contrary to the expressed provisions of the trust "the court should require some showing of the possibility of a sale for a reasonable price and of the nature and the security of the proposed investment."<sup>16</sup>

Sometimes a court may permit a trustee to lease or mortgage real property, even though he may be forbidden to do so by the terms of the trust.<sup>17</sup> In *Adams v. Cook*<sup>18</sup> the trust instrument gave the trustee

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<sup>13</sup>*American Trust Co. v. Nicholson*, 162 N.C. 257, 78 S.E. 152 (1913); *Weakley v. Barrow*, 137 Tenn. 224, 192 S.W. 927 (1917); *State v. Underwood*, 54 Wyo. 1, 86 P.2d 707 (1939).

<sup>14</sup>139 Misc. 575, 249 N.Y. Supp. 87 (Sur. Ct. 1931), *aff'd mem.*, 237 App. Div. 808, 260 N.Y. Supp. 975 (1st Dep't 1932).

<sup>15</sup>136 Cal. App. 691, 29 P.2d 422 (1934).

<sup>16</sup>*Security-First National Bank of Los Angeles v. Easter*, 136 Cal. App. 691, 29 P.2d 422, 425 (1934).

<sup>17</sup>3 Bogert, *Trusts and Trustees* § 562 at 500 (1946); 2 Scott, *Trusts* §§ 189.4 and 191.2 (2d ed. 1956).

<sup>18</sup>15 Cal. 2d 352, 101 P.2d 484 (1940).

the power to lease the property, but further provided that any lease entered into by the trustee would be subject to a subsequent sale of the property by the trustee under the conditions of the trust. At the time the trust was created it was not known that there was oil on the property. After the oil was discovered, the trustee was approached by several companies seeking oil and gas leases of the premises. The trustee refused to execute a lease except upon the conditions stated in the declaration of the trust, and the companies refused to enter into any lease which was made subject to a subsequent sale of the property. During the period of this impasse, many wells were being drilled on adjacent properties with the result that oil was being drained from beneath the land subject to the trust. To protect the newly discovered oil, 90 per cent of the beneficiaries brought an action seeking a modification of the terms of the trust so as to permit the trustees to enter a lease free of the restrictions set forth by the trust instrument. The court in directing the trustee to make the lease assumed that the settlor would have given the trustee such power had he known of the presence of oil at the time he executed the trust. The court reasoned that it was, in effect, merely doing what the settlor himself would have done had he had the same facts before him at the time of the creation of the trust. The action of the courts in cases of this general nature is usually supported by the rationale that the court is merely carrying out the implied intent of the settlor. In reality, however, it would seem that the court is, in fact, creating a new power in the trustee contrary to the expressed intention of the settlor.<sup>19</sup>

As a general proposition, the courts will not authorize a deviation from the express terms of the trust instrument unless there is a showing of an emergency that threatens to destroy or substantially impair the purposes of the trust.<sup>20</sup> Consequently, the courts have uniformly refused to grant permission to deviate from the terms of the trust where the sole object of the applicant is to gain a better income for the present cestui.<sup>21</sup> The decision of the California court in *Stanton v. Wells Fargo Bank & Union Trust Co.*<sup>22</sup> would seem to be in

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<sup>19</sup>"Aside from the vice inherent in playing with supposed intention when none exists, which nearly always produces unhappy results, there is no valid reason for the position and it seems far more reasonable and certainly more understandable for the court simply to admit that it is conferring powers on the trustee contrary to any intent and beyond any contemplation of the settlor because the unexpected exigencies of the situation demand such action to preserve the trust and carry out its purpose." Spann, *Deviation from the Terms of a Trust*, 20 Neb. L. Rev. 133, 134 (1941).

<sup>20</sup>In re Tollemache, [1903] 1 Ch. 457; 54 Am. Jur., *Trusts* § 284 (1945).

<sup>21</sup>3 Bogert, *Trusts and Trustees* § 561 (1946).

<sup>22</sup>310 P.2d 1010 (Cal. App. 1957).