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Equitable Deviation in Indiana

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TRUSTS

EQUITABLE DEVIATION IN INDIANA

The will of William E. English directed that certain real property on Monument Circle in Indianapolis be placed in charitable trust, and that the trustees erect a new building thereon to serve as headquarters for charities of the city. Sale of the property was expressly forbidden by the will. The trustees, however, petitioned the Marion County Probate Court for an order authorizing sale of the land. It was shown that the existing structure had become too antiquated to be used for the trust purpose; that an insufficiency in trust assets—the result of changed conditions—had rendered impracticable the erection of a new building; and that sale of the property would provide funds with which a building could be erected elsewhere, thereby fulfilling the purpose of the trust. These facts moved the court to apply the doctrine of equitable deviation and order sale of the land. On appeal the order was affirmed. *Foust v. William E. English Foundation*, 80 N. E.2d 303 (Ind. App. 1948).

This decision, the first in Indiana to sanction the sale of trust property despite the settlor's express prohibition, was apparently¹ decided on the basis of equitable deviation,

21. The trend among the later cases seems to be toward the rule that delivery is not required. Tennessee, Virginia, and Pennsylvania have within the last quarter century subscribed to this view. *Black v. Black*, 185 Tenn. 23, 202 S. W.2d 659 (1947); *Radiophone Broadcasting Station v. Imboden*, 183 Tenn. 215, 191 S. W.2d 535 (1946); *Boston v. De Jarnette*, 153 Va. 591, 151 S. E. 146 (1930); *Chiles v. Bowyer*, 127 Va. 249, 103 S. E. 619 (1920); *Peoples Trust Co. v. Consumers Ice & Coal Co.*, 283 Pa. 76, 128 Atl. 723 (1925); *Allen v. Mowry*, 278 Pa. 64, 122 Atl. 168 (1923).

1. The Appellate Court's grounds of decision are obscure. In the Marion County Probate Court the parties had argued the applicability of an Indiana statute which empowers circuit or superior courts to authorize sales of trust property if one of the following is shown: the trust real property is subject to waste or depreciation; taxes and costs of repair exceed the income of the property; the sale of the property would be advantageous to the beneficiaries and fulfill the trust purposes. IND. STAT. ANN. (Burns Repl. 1943) § 56-621. The decree of the Marion County Probate Court evidently was based not on the statute, but upon the court's "equitable powers in the administration

a doctrine new to the jurisprudence of this state. That doctrine is frequently confused² with another equitable doctrine, *cy pres*, by which courts under somewhat similar circumstances justify departure from directions contained in trust instruments. Examination of the differences between the two doctrines is relevant in considering the central problem of what circumstances must be shown to justify equitable deviation.

Cy pres, applicable only to charitable trusts, is properly used to direct a trust's *purpose* to an end different from that specified by the settlor. To invoke *cy pres* it must appear that the settlor has manifested a general charitable intent within the scope of which are comprehended both the specified purpose and the purpose to which the trust is to be changed. *Cy pres* permits this substitution of purpose where it has become "impossible, illegal, or impracticable" to carry out the original purpose designated by the settlor.³ On the other hand, equitable deviation, which applies alike to chari-

of the trust to carry out the . . . purposes expressed therein." See Brief for Appellants, pp. 100-101. Appellants (heirs and others who asserted interests in the trust property) in their appellate brief argued that the statute applied only to circuit or superior courts and hence could not be invoked by the Marion County Probate Court. Brief for Appellants, p. 125. Appellee (trustee of the trust) contended the wording was not conclusive since the Marion County Probate Court was established after passage of the statute and furthermore that court was given concurrent jurisdiction in all actions by and against trustees. See IND. STAT. ANN. (Burns Repl. 1946) § 4-2910.

The opinion of the Appellate Court, while making no comment on this issue, by citing the statute may have concurred with appellee's view. Presumably, however, its decision rested on the same doctrine of equitable deviation to which the trial court referred. The ambiguity arises because the Appellate Court cited four authorities as exemplifying "the rule" adopted: 3 SCOTT, TRUSTS § 381 (1939); 2 RESTATEMENT, TRUSTS § 381 (1935); 14 C. J. S., *Charities* § 50 (1939); and the Indiana statute referred to above. Perhaps the court considered the statute to be a legislative restatement of the inherent equity power to apply the doctrine of equitable deviation.

2. Confusion of the doctrines of equitable deviation and *cy pres* is apparent in the authorities which treat *cy pres* as a method by which a change in administrative machinery may be effected. See, e.g., *Tincher v. Arnold*, 147 Fed. 665, 673 (7th Cir. 1906); *Reasoner v. Herman*, 191 Ind. 642, 652, 134 N. E. 276, 280 (1922); *Richards v. Wilson*, 185 Ind. 335, 393, 112 N. E. 780, 798 (1916); *Bradway, Tendencies in the Application of the Cy Pres Doctrine*, 5 TEMP. L. Q. 489 (1931) *passim*; *Kohn, The Doctrine of Cy Pres in England and America*, 21 CASE AND COMMENT 628, 635 (1915). Both doctrines derive from inherent equity power and are not dependent on statutory authorization.

3. See *Quinn v. People's Trust*, 223 Ind. 317, 328, 60 N. E.2d 281, 285 (1945); 2 BOGERT, TRUSTS AND TRUSTEES § 431-41 (1935); 3 SCOTT, TRUSTS § 399.2 (1939); RESTATEMENT, TRUSTS § 399 (1935).

table and private trusts, is used to accomplish changes in the *administration* of the trust.⁴ Unlike the situation in *cy pres*, the originally designated purpose of the trust is not altered. Where the settlor has prohibited the alienation of trust property, a court will authorize a change in the administration of the trust by applying equitable deviation if certain elements are shown to be present.⁵

First, inasmuch as it is the retention provision that is to be changed, it must appear that the directed retention was an expression by the settlor of the manner, method, or plan of administration by which his intent or purposes were to be accomplished. Obviously there is frequently a problem of differentiating those retention clauses expressive of trust purposes from those which embody administrative directions.⁶ This suggests that a petitioner seeking authorization for the sale of property held in a charitable trust may wisely argue that the retention provision, if not an administrative direction, is declaratory of a trust purpose and therefore subject to alteration under *cy pres*.⁷

Secondly, the court must be shown that subsequent to the creation of the trust, a change of conditions occurred

4. See Scott, *Deviation from the Terms of a Trust*, 44 HARV. L. REV. 1025 (1931).

5. 2 BOGERT, TRUSTS AND TRUSTEES § 394; 3 *id.* §§ 561, 562; 2 SCOTT, TRUSTS § 167, 190.4; 3 *id.* § 381; RESTATEMENT, TRUSTS §§ 167, 190, 381. See Note, 168 A. L. R. 1018 (1947), collecting cases which concern sale of trust property.

6. Retention provisions were treated as administrative directions, and the doctrine of equitable deviation was, therefore, correctly applied in the disposition of the following cases: *Voris v. Sloan*, 68 Ill. 588 (1873); *Johnson v. Wagner*, 219 N. C. 235, 13 S. E.2d 419 (1941); *Grace Church v. Ange*, 131 N. C. 314, 77 S. E. 239 (1913); *Matter of Pulitzer*, 139 Misc. 575, 249 N. Y. S. 87 (1931), *aff'd mem.*, 237 App. Div. 808, 260 N. Y. S. 975 (1932); *Craft v. Shroyer*, 81 Ohio. App. 253, 74 N. E.2d 589 (1947); *Town of South Kingston v. Wakefield Trust*, 48 R. I. 27, 134 Atl. 815 (1926); *Henshaw v. Flenniken*, 183 Tenn. 232, 191 S. W.2d 541 (1945); *Will of Stack*, 217 Wis. 94, 258 N. W. 324 (1935). In the following cases changes respecting retention of trust property were effected by application of the doctrine of *cy pres*. The inference is, therefore, that retention of the property was a trust purpose. See *Shoemaker v. American Security & Trust*, 163 F.2d 585, (App. D. C. 1947). In fact however, courts, while applying the doctrine of *cy pres*, may characterize the retention provisions as administrative directions. See *Village of Hinsdale v. Chicago City Missionary Soc.*, 375 Ill. 220, 30 N. E.2d 657 (1940); *Norris v. Loomis*, 215 Mass. 344, 102 N. E. 419 (1913); *Ely v. Attorney General*, 202 Mass. 545, 89 N. E. 166 (1909); *Weeks v. Hobson*, 150 Mass. 377, 23 N. E. 215 (1890); *In re Y. W. C. A.*, 96 N. J. Eq. 568, 126 Atl. 610 (1924).

7. Appellee in the principal case argued both doctrines. Brief for Appellee, pp. 34, 41.

which would bring about the "defeat or substantial impairment" of the trust purpose, if the originally prescribed administrative directions were followed.⁸ The change of circumstances must adversely affect the trust property.⁹ Since no principles have been developed which would aid a petitioner seeking authorization of a sale to determine what constitutes "defeat or substantial impairment," the factual situation in each case must be drawn upon to give content to those terms.

A third requirement dictates that the settlor must not have anticipated the change of conditions.¹⁰ This requirement grows out of the notion that the court, in altering the administrative directions, is permitting the trustee to do that which the settlor would have authorized had he foreseen the change in conditions which in fact came about. If the settlor *did* anticipate the change, the express prohibition of the instrument must be read as forbidding sale despite the altered conditions, and judicial authorization of a sale would be unjustified.¹¹

8. Hicks Memorial Ass'n v. Lock, 178 Ark. 892, 12 S. W.2d 866 (1929) (no change of conditions found); Industrial Trust v. President and Fellows of Harvard College, 69 R. I. 317, 33 A.2d 167 (1943) (no impairment of trust by retention of property found). See cases cited note 6 *supra* as illustrative of findings of impairment and change of conditions.

9. Cary v. Cary, 309 Ill. 330, 141 N. E. 156 (1923); Weakly v. Barrow, 137 Tenn. 224, 192 S. W. 927 (1916). Compare Johns v. Johns, 172 Ill. 472, 50 N. E. 337 (1898), with Johns v. Montgomery, 265 Ill. 21, 106 N. E. 497 (1914). (These cases dealt with the same trust property. In the first case the court refused a sale where the only showing was a change as to the beneficiaries, while in the second case sale was permitted because the change finally affected the property.) Another view has stated that the changed circumstances must affect the beneficiaries' interests as well as the trust property. See Note, 77 A. L. R. 971 (1932). Reliance on this view precluded a sale in Schramm v. United States National Bank, 151 Ore. 693, 52 P.2d 181 (1935).

10. 2 SCOTT, TRUSTS § 167, 190.4; 3 *id.* § 381; RESTATEMENT, TRUSTS §§ 167, 190, 381.

11. Lovelace v. Marion Institute, 215 Ala. 271, 110 So. 381 (1926). See 2 SCOTT, TRUSTS 842; Scott, *Deviation from the Terms of a Trust*, 44 HARV. L. REV. 1025, 1039 (1931). The trust instrument may manifest the settlor's anticipation of changing conditions by the inclusion of a provision which permits the continuance of the trust "so long as" the trustees retain the property for the prescribed trust purposes, with a reverter or valid gift over in the event the property ceases so to be retained. First Cong. Soc. v. Bridgeport, 99 Conn. 22, 121 Atl. 77 (1923) (sale otherwise justifiable refused because of reverter provision); RESTATEMENT, TRUSTS § 399, comments *b* and *l* (1935). *But cf.* State v. Fed. Square Corp., 89 N. H. 538, 3 A.2d 109 (1938) (reverter provision held ineffective to prevent forced sale through exercise of power of eminent domain); *In re* Y. W. C. A., 96 N. J. Eq.

Finally, there is the rather obvious requirement that the sale of the trust property must be in furtherance of the trust purpose.¹² Only that amount of alienation necessary to preserve or accomplish the trust purpose will be allowed.¹³ Although no case has been found in which he was required to show that the requested sale was the most expedient remedy, a petitioner might wisely be prepared to prove that, if other remedies do exist, sale of the property in question is the remedy best calculated to save the trust purpose from impairment.¹⁴

WORKMEN'S COMPENSATION

TEST OF CAUSATION BETWEEN EMPLOYMENT AND INJURY

A powder plant employee was killed by lightning while proceeding to shelter pursuant to his employer's instructions. In a proceeding for workmen's compensation, experts gave conflicting testimony regarding whether the employee was more exposed to lightning than others in the same locality who were not engaged in the same pursuit. The Indiana Appellate Court affirmed an award of compensation. It held that since the employee would not have been at the place where the lightning struck at the time it struck except for his employment, there was sufficient causative connection between the employment and the death by lightning.¹ On transfer to the Supreme Court the award was affirmed, but on a different ground. The Supreme Court held that the employment "caused" the death, since the Industrial Board could properly find from the evidence that the employee's

568, 126 Atl. 610 (1924). On the advisability of using conditions precedent and subsequent as a means for discouraging sale see *Scobey v. Beckman*, 111 Ind. App. 574, 41 N. E.2d 847 (1942); 3 SCOTT, TRUSTS § 401.2.

12. *O'Hara v. Grand Lodge*, 213 Cal. 131, 2 P.2d 21 (1931); *Security-First National Bank v. Easter*, 136 Cal. App. 691, 29 P.2d 422 (1934). See note 5 *supra*.

13. *Johns v. Montgomery*, 265 Ill. 21, 106 N. E. 497 (1914); *Weakly v. Barrow*, 137 Tenn. 224, 192 S. W. 927 (1916).

14. But in *Gilman v. Hamilton*, 16 Ill. 225 (1854), the existence of a better remedy moved the court to refuse to apply the doctrine of *cy pres* in authorization of sale.

1. *E. I. Du Pont De Nemours Co. v. Lilly*, 75 N. E.2d 796 (Ind. App. 1947).