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I. MARITAL RIGHTS

Edgar v. Fitzpatrick[1] dealt with the difficult question of whether the disposition of certain of decedent's property via an inter vivos trust constituted a fraud upon his widow's marital rights. The facts of the case were roughly as follows: On July 29, 1957, which was about two years and five months prior to his death, decedent, then 78 years of age, executed a revocable inter vivos trust agreement by which he conveyed to himself, as trustee, certain shares of an investment fund. Income was to be paid to the decedent during the term of his life and upon his death the shares were to be distributed equally to the decedent's three children by a prior marriage, unless the decedent should change the beneficiaries. The decedent also reserved the right to sell or reinvest the trust property and to otherwise deal with it upon such terms as he should see fit. It does not appear from the facts whether decedent's widow was aware of the execution of the trust prior to his death. They had been married about eleven years at the time the trust was executed. Very few circumstances surrounding the execution of the trust were shown. It was established that the decedent was in a hospital at the time, but there was no evidence as to his physical or mental condition. One of decedent's children, a beneficiary of the trust, testified that the purpose of the trust "was to see to it that Grandma (the widow) didn't get anymore [sic] out of the estate than we did."[2] The property transferred by the trust instrument amounted to about one-third of decedent's total estate. By the terms of a will executed about six and one-half months subsequent to the trust, decedent left his widow one-third of his estate passing under the will plus household goods and $2400.00 in lieu of the homestead allowance given under § 474.260, RSMo

*This article contains a discussion of selected Missouri court decisions reported in Volumes 357-369 South Western Reporter, Second Series.

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1. 369 S.W.2d 592 (Spr. Mo. App. 1963).
2. *Id.* at 595.

1959. No mention of the trust instrument was made in the will. The widow contended that the disposition purportedly made by the inter vivos trust constituted a fraud upon her marital rights in violation of § 474.150, RSMo 1959.

In rejecting this contention and holding that the trust was valid and that no part thereof could be set aside as being in fraud of marital rights, the appellate court held that there was insufficient proof in the record that the trust was executed with the intent and purpose to defeat the wife and, further, that the proof also failed to show that the transfer was made in contemplation of death which, said the court, "we must also assume . . . is still an element to be considered in determining such an intent."[3] The court further held that, even assuming it might infer a fraudulent intent on the part of the settlor from the sole fact that he substantially deprived his widow of her marital rights by putting a considerable portion of his property beyond her reach, yet the amount involved was not so disproportionate as to warrant such a finding.[4] The court also held that § 474.150, RSMo 1959 does not establish any new definition of fraud and that the law in this respect is concerned with the personal motive and intent of the settlor to defraud his wife rather than the actual effect and result accomplished. The court made it clear in no uncertain terms that it was dissatisfied with the decision reached,[5] but felt that three prior decisions of the Missouri Supreme Court[6] compelled such a result.

II. Rule Against Perpetuities

McGowan v. St. Louis Union Trust Co.[7] had a few words to say,[8] via dicta, concerning the "infectious invalidity" doctrine purportedly established in the early case of *Lockridge v. Mace.*[9] In *McGowan,* the settlor,

3. *Id.* at 601.
4. For this holding the court relied upon Potter v. Winter, 280 S.W.2d 27 (Mo. 1955) and Wahl v. Wahl, 357 Mo. 89, 206 S.W.2d 334 (1947).
5. "In the writer's opinion it should be declared to be a fraud on law; but we are bound by Supreme Court precedent. . . ." 369 S.W.2d at 602.
6. Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939); Wanstrath v. Kappel, 356 Mo. 210, 201 S.W.2d 327 (1947); Potter v. Winter, 280 S.W.2d 27 (Mo. 1955). For a thorough analysis of these cases see Lowe, *Transfers in Fraud of Marital Rights,* 26 Mo. L. Rev. 1, at 15-19 (1961).
7. 369 S.W.2d 144 (Mo. 1963).
8. More properly, perhaps, it should be stated that *McGowan* left many words unsaid.
9. 109 Mo. 162, 18 S.W. 1145 (1891). This is the case most often cited in Missouri for the proposition that if any part of a trust violates the rule against perpetuities the entire trust is void.

in 1904, conveyed the shares of a corporation in trust with directions that the income and dividends be paid to the settlor during his life and at his death to pay the dividends equally to the settlor's three daughters and one grandson. At the date fixed in the charter of the corporation for its expiration (October 2, 1951, or sooner, if so voted by the beneficiaries), the trust was to terminate and all of the trust assets were to be distributed to the grandson "or to his heirs should he be then deceased, then to be and become vested in him . . . or in his heirs, absolutely, free from all trusts or conditions."[10] Plaintiffs contended that the "gift over" provision to the grandson upon the expiration of the life of the corporation was void as being in violation of the rule against perpetuities; that as of October 2, 1951, the date the corporation expired and the "gift over" to the grandson became distributable, a resulting trust arose in favor of the heirs of the settlor. Defendant trustee contended, among other things, that even assuming that the "gift over" to the grandson should fail because of the rule against perpetuities, yet the prior gifts under the trust were valid for the reason that "this court 'has never closed the door completely on the doctrine that the conveyor's preference, had he known of the voidity, should be given effect, and would in the proper kind of case apply that doctrine' "[11] and that this was the proper type of case in which to apply the doctrine of partial invalidity, even assuming that the "gift over" provision voided the entire trust under the ruling in *Lockridge v. Mace*.[12]

The supreme court, in deciding this issue, was able to side-step the question of whether or not the doctrine of infectious invalidity is in fact the law of Missouri, and, if so, whether the court would depart from that doctrine in a "proper case" or, indeed, in any case. The court held that, even assuming that the doctrine of infectious invalidity is the law in Missouri, and further assuming that the "gift over" to the grandson violated the rule against perpetuities, yet, contrary to plaintiffs' contention, a resulting trust would have arisen in 1904, the date the trust was created, and not in 1951, the date the "gift over" became distributable to the grandson,[13] and that between those two dates plaintiffs had conveyed to

10. 369 S.W.2d at 146.
11. *Id.* at 150.
12. *Supra* note 9.
13. Citing 4 SCOTT, TRUSTS §§ 411, 411.2 (2d ed. 1956); 89 C.J.S. *Trusts* § 103 (1955); 6 AMERICAN LAW OF PROPERTY § 24.47 (1952); RESTATEMENT (SECOND), TRUSTS § 411, comments *b, g, h, i* (1959).

the grandson any interest they might have had in any such resulting trust. The case leaves open the whole question of whether the case of *Lockridge v. Mace*[14] did in fact hold that the doctrine of infectious invalidity is the law in Missouri, or, if so, whether it would still be followed today.

III. Administration of Testamentary Trusts

In *Morrison v. Asher*,[15] defendants, as trustees of a testamentary trust, were called upon by a remainderman beneficiary to answer for various practices engaged in by them in relation to their activities as trustees. Their removal as trustees was also sought. Among the various sins allegedly committed by the trustees were the following: they had failed for a number of years to render an accounting, either to the court or to the beneficiaries; certain portions of trust reality had been sold without court authority and without any such authority appearing in the trust instrument; while acting as trustees, they had borrowed moneys from the trust estate and in exchange had given their personal, unsecured notes which bore a low rate of interest; they had not attempted to collect several notes due the trust estate; they had paid to themselves out of the trust various commissions for services rendered as trustees without court authority and though the trust instrument made no provision for their compensation. It was also shown that there was considerable hostility between the trustees and the remainder beneficiaries. The trustees' "defense" was that they, along with two other persons, one of whom was plaintiff, were the remainder beneficiaries of the trust and that they had offered to loan money out of the trust to the other remainder beneficiaries on the same terms as they themselves had borrowed it; that the sale of the trust realty, even though not expressly authorized by the trust instrument, was, nevertheless, an exercise of sound business judgment on their part. The trial court directed the trustees to render an accounting and to collect interest and principal on notes due the estate, but refused to remove defendants as trustees; plaintiff appealed.

Held, reversed. The trustees committed a breach of trust by borrowing from the trust fund. They also should not have paid themselves commissions without the consent of the beneficiaries or court approval where the trust instrument, as here, made no provision as to what the trustees

14. *Supra* note 9.
15. 361 S.W.2d 844 (Spr. Mo. App. 1962).

should receive for their services; and it is a ground for removal that a trustee has overcharged for his services. Although hostility between the trustees and a cestui, alone, is not sufficient ground for removal of the trustees,[16] hostility coupled with other conduct such as questionable investments, is ground for removal.[17] The court ordered that the trustees be removed and also ordered them to pay the market rate of interest on funds they had borrowed from the trust, rather than the low rate which they themselves had fixed.

The question of the investment duties of a trustee came up in *The First National Bank of Kansas City v. Hyde.*[18] By the terms of the trust instrument it was provided that the trustees "shall be and they are hereby fully authorized and empowered to retain and continue to hold as investments . . . any stocks which belong to me at the time of my death, or they may sell said stocks or any part thereof and reinvest the same in other stocks or securities or invest said stocks or the proceeds therefrom in other stocks or in other securities or in any other investments, and for the purpose of so doing my said trustees may sell or dispose of said stocks in any manner so as to enable them to keep said trust estate invested in proper stocks, securities or investments."[19] As against the contention of the beneficiaries that the trustees should invest only in corporate stocks, which contention was based upon statements allegedly made by the settlor and upon letters allegedly written by him, the court held that by the terms of the trust instrument the trustee was authorized to sell the corporate stock and reinvest the proceeds in state, federal or municipal bonds, United States treasury notes, and debentures. The court further held that even though the trust estate, as originally tendered to the trustee, was made up wholly of corporate stock, and even though the trust instrument authorized the trustee to retain such stock, yet, because the direction to retain was not mandatory, the trustee had a duty to dispose of such stock and reinvest the proceeds if sound business judgment dictated that retention was not justified.[20] The court also approved the rule laid down in the *Restate-*

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16. Citing Shelton v. McHaney, 343 Mo. 119, 119 S.W.2d 951 (En Banc 1938); Sternberg v. St. Louis Union Trust Co., 163 F.2d 714 (8th Cir. 1947).
17. Citing Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369 (1956); Gaston v. Hayden, 98 Mo. App. 683, 73 S.W. 938 (K.C. Ct. App. 1903).
18. 363 S.W.2d 647 (Mo. 1963).
19. *Id.* at 652.
20. Citing Loud v. St. Louis Union Trust Co., 313 Mo. 552, 281 S.W. 744 (1926).

ment as to the duty of a trustee to diversify trust holdings so as to distribute the risk of loss,[21] and held further that a trustee cannot be charged with keeping abreast of the financial conditions of a beneficiary in considering what investments should be made.

IV. Construction of Wills

In *Mercantile Trust Co. v. Sowell*,[22] testatrix, by Article Fifth of her will, devised the residue of her estate in trust with directions to hold the corpus intact for the duration of the life of testatrix's husband, who was to receive the net income therefrom. Upon the death of testatrix's husband the corpus was to be divided into five equal parts, the same to be held in trust for the benefit of five beneficiaries (four individuals and a church), each of whom was to receive the net income from one such part until ten years subseqeunt to the date of the death of testatrix's husband. In the event that any of the said four individual beneficiaries predeceased testatrix or died prior to the expiration of the ten year period following the death of her husband, the number of beneficiaries was to be deemed reduced and the "income and principal allocated to said deceased beneficiary . . . shall be prorated and added to the principal of the trusts for the then surviving beneficiaries."[23] Testatrix further provided that "if all of the individual beneficiaries . . . shall predecease me or shall die within the ten . . . year period . . . the trust shall cease . . . and my trustees shall pay over the property then constituting such trust . . . as follows: Ninety (90) per cent to . . . University. . . . The remaining ten (10) per cent to . . . Church."[24] A further provision of the will provided that should the individual trustees appointed by the will become unable to act, a successor trustee should be appointed by the University Chancellor. In a declaratory judgment action brought by the executor and the trustee, the individual beneficiaries contended that unless all of the individual beneficiaries should have died prior to the expiration of the ten year period following the death of testatrix's husband, neither Church nor University would be entitled to the corpus as residuary legatees and, as to this portion of the property, testatrix would have died intestate. The Church and the University contended that they should take as residuary legatees even if none of the four

21. Restatement (Second), Trusts § 228 (1959).
22. 359 S.W.2d 719 (Mo. En Banc 1962).
23. *Id.* at 722.
24. *Ibid.*

named individual beneficiaries died within the ten year period, and the trial court so held.

In a four to three decision the supreme court affirmed. The court noted that all of the four individual beneficiaries were younger than testatrix; that, in fact, it was quite unlikely that they would all die prior to the expiration of the ten year period; that testatrix, had she meant to condition the rights of the Church and the University upon such an unlikely event, would have so provided in clear language. As bolstering the court's finding that it was the intent of testatrix to allow the Church and the University to take as residuary legatees notwithstanding the fact that the four named beneficiaries might survive the ten year period, the court gave considerable weight to the fact that testatrix had given the Chancellor of the University the power to appoint a successor trustee, indicating that she intended that it should take as residuary legatee.

V. Constructive Trust

In *Durwood v. Dubinsky*,[25] plaintiff and defendants had entered into a written agreement whereby plaintiff was to employ defendants in his theatre business for a stated period of time and, as compensation, pay the defendants a stated percentage of the net profits from the business in return for which defendants agreed not to engage in the theatrical business during the term of their employment. A dispute arose as to whether plaintiff was paying defendants the required percentage of the net profits. Plaintiff brought suit to resolve this dispute and in a separate count averred that defendants, in violation of the terms of the agreement, had engaged in the theatrical business during the term of their employment and asked the court to impose a constructive trust in favor of plaintiff on the rents and profits allegedly received by defendants in violation of the contract. The supreme court found that both parties had violated the contract, and that plaintiff did so "with the intent to deprive his brothers [defendants] of a substantial part of the agreed to compensation."[26] The court further found that although defendants had technically violated the contract in that they had engaged in the theatrical business, yet plaintiff had suffered no actual loss therefrom, and rejected plaintiff's argument that he was entitled to a constructive trust without showing any damages. The court

25. 361 S.W.2d 779 (Mo. 1962).
26. *Id.* at 792.

was of the opinion that the imposition of a constructive trust in favor of an equal wrongdoer "would impose a remedy . . . so harsh and disproportionate to the injury that it would result in punitive action."[27]

Yax v. Dit-Mco, Inc.[28] was a class action instituted on behalf of minority stockholders of a corporation seeking to compel defendants, two of whom were members of the board of directors, to hold in trust for the benefit of the corporation and all of its shareholders the benefits received from a contract whereby said defendants purchased a large number of the company's outstanding shares of stock which were owned by another director. The court refused to grant the requested relief, pointing out that ordinarily a corporate officer or director may purchase the company's stock in the same manner as any other person and that, likewise, the directors may sell their stock to whomsoever they desire.[29] Furthermore, in this case it was shown that it would have been unwise for the corporation to have purchased all of the stock; the sale price was fair and the transaction was not consummated for the purpose of effectuating any ulterior or illegal motive. In such circumstances the trial court properly denied any relief to plaintiffs.

VI. Administration of Inter Vivos Trusts

In *Jesser v. Mayfair Hotel, Inc.*,[30] plaintiffs, who were the minority beneficiaries of a voting trust, brought an action in equity to restrain a contemplated sale of their interests by the trustees to the holders of the majority interest. In a prior opinion on the merits,[31] the supreme court had reversed the trial court's decision and remanded the case with directions to enter a decree enjoining the contemplated sale and to dismiss defendants' counterclaim without allowance of attorneys' fees to defendants. After the case was remanded to the trial court, plaintiffs filed an "amended petition" seeking an allowance of attorneys' fees and expenses out of the trust and the trial court allowed what is believed to be a reasonable amount for these items. From this judgment the defendants appealed. After first holding that the prior opinion[32] did not dispose of the question of plain-

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27. *Id.* at 793.
28. 366 S.W.2d 363 (Mo. 1963).
29. Relying upon 13 Am. Jur. *Corporations* §§ 1010, 1012, 1013 (1938).
30. 360 S.W.2d 652 (Mo. En Banc 1962).
31. Jesser v. Mayfair Hotel, Inc., 316 S.W.2d 465 (Mo. 1958).
32. *Ibid.*

tiffs' rights to attorneys' fees and expenses, the court considered defendants' contention that plaintiffs should not be allowed fees and expenses because the object of the suit brought by them was to force the termination of the trust or that, in any event, the result of the suit was a net loss to the trust and not of substantial benefit to anyone, including the trust beneficiaries. In affirming the trial court's judgment, the court held that the purpose of plaintiffs' suit was to seek a construction of the trust instrument concerning the trustees' power to sell only a part of the trust estate, a point about which there was ambiguity in the trust instrument. The fact that, as a result of plaintiff's action the shares were not sold at all but were returned to the holders of the trust certificates, did not constitute a loss. The court held further that a trust beneficiary who prevents a wrongful disposition of trust property renders a benefit to the trust as much as one who recovers back trust property wrongfully disposed of,[33] and is therefore entitled to attorneys' fees and expenses.

33. Citing Leggett v. Missouri State Life Ins. Co., 342 S.W.2d 833 (Mo. En Banc 1961) and cases therein cited at 936.