

CHAPTER 323.

TESTAMENTARY TRUSTS.

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323.01 Testamentary trusts; trustee's bond; conditions. Every trustee to whom any estate, real or personal, shall be devised or bequeathed in trust for, or in whom as trustee any trust shall be created in any manner in favor or for the benefit of any minor or other person by the will of any deceased person, or who may be appointed by any county court to carry out the provisions of any will which creates a trust without naming a trustee, shall give bond to the county judge having jurisdiction of the probate of the will in such sum and with such sureties as the court may order, conditioned as follows:

(1) To make and return to the county court, within such time as the court shall direct, a true inventory of all the goods, chattels, rights, credits, and estate so devised or bequeathed;

(2) To annually render an account to such court of the trust estate in his hands, of the management, disposition, and annual income thereof;

(3) To faithfully execute such trust under the direction of the court according to the true intent and meaning thereof.

(4) To adjust and settle his accounts with such court at the expiration of his trust and pay and deliver to the person entitled thereto all balances, money, and property in his possession and for which he is liable as such trustee. But if the testator in his will has directed that no bond be required of such trustee, none need be given by him unless the court, at the time of proving the will or thereafter, shall determine that a bond is required by a change in the circumstances or situation of the trustee or for other sufficient reason. The cost of procuring a bond may be allowed the trustee, as provided in section 271.14; provided, however, that no bond shall be required from any religious, charitable, or educational corporations or societies, where devises or bequests are given to such corporations or societies in trust for any of the purposes of such corporations or societies.

Cross Reference: For provisions relating to testamentary trusts for charitable purposes, see 317.06.

Note: Power of equity courts to enforce administration of trusts is supervisory and is exercised only to carry out settlor's intention, except where a deviation is necessary to carry out the intention as nearly as possible but even then the rights of remaindermen will not be defeated. Will of Stack, 217 W 94, 258 NW 324.

Where a testamentary trust directed the trustee to apply the income thereof, as seemed necessary in its opinion, for the support and maintenance and comfort of a sister of the trustor, a sanatorium, which, over a period of seven years, had rendered weekly bills to the trustee for board, room and incidental expenses of the sister and her attendant, could not recover from the trustee, on the theory of implied contract, on a claim presented to the trustee on the death of the sister for medical services furnished to the sister over such period of seven years without the knowledge of the trustee. Estate of Ray, 221 W 18, 265 NW 89, 266 NW 239.

Where each cestui que trust is entitled to an aliquot part of an ascertained and definite trust fund, any one of them may sue the trustee for his own portion thereof without making the other cestuis que trust parties to the action. Graf v. Seymour State Bank, 221 W 122, 266 NW 222.

A trust company was guilty of a want of due diligence and ordinary care in the performance of its duties as trustee, and was liable to an estate for failure to present bonds for payment under a trust deed au-

thorizing the mortgagor to pay the bonds before maturity at any interest-payment date on the publication of notice once each week for three weeks in a newspaper of general circulation in the city of Milwaukee, in which city the trust company had its place of business, where notice was so published in such a newspaper, which, however, was not examined by the trust company, and the holders of two-thirds in amount of the bonds acquired knowledge of the call for redemption and acted thereon in time to realize on their bonds before the trustee under the trust deed became insolvent, and where a recorded release of the trust deed was listed in a newspaper on the date set in the notice of call for payment of the bonds, which listing the trust company did not discover although it examined such newspaper. Will of Church, 221 W 472, 266 NW 210.

Neither the parties interested in a trust estate nor the court in which it is being administered can substitute any other scheme for the disposition of the testator's estate than that which is stated in the valid and enforceable provisions in his will. A provision of a will bequeathing a sum in trust to the testator's son, the income only to be paid to the son during his life, and at his decease such sum to be paid to his children, authorized the son to receive only the income from the trust fund; and a provision of the will directing the executor to purchase a farm and cause the title to be conveyed to the testator's son, to hold during his lifetime, and at his death to his children, devised a life estate to the testator's son in a farm which the executor was required to

purchase, and the remainder to the son's children; and, consequently, all schemes pursuant to agreements between the executor of the testator's estate and the beneficiaries for the annual payment to the testator's son of any other amount than the annual income actually realized on the trust fund, and all decisions and orders of the county court approving any such agreements or substituted schemes, or the making of any payments thereunder otherwise than in accordance with the provisions in the will, were void as beyond the power of the parties or the court. Will of Stanley, 223 W 345, 269 NW 550.

Under will bequeathing \$1,500 to testator's son payable when son became 23 years old, trustee should have been appointed when

323.02 When trust declined. Any person appointed trustee by any will who shall refuse to give the bond herein required or neglect to do so for twenty days after receiving notice that such bond is required shall be deemed to have declined such trust.

323.03 Trustee's refusal to act; successor; rights of. If any trustee appointed in any will not containing a provision for perpetuating the trust shall refuse to accept the same, or shall resign, be removed or die, or if a trust be created by the will and no trustee be therein named to execute such trust a trustee may be appointed by the county court, after notice to the persons interested in such trust estate. Every trustee so appointed by the court shall be bound by the provisions of this chapter in the same manner and to the same extent as though appointed by will, and the estate so given in trust shall vest in such trustee in like manner, to all intents and purposes, as the same vested in the original trustee named in such will, and he may demand, sue for and recover from any other person holding the same any and all property belonging to such trust estate.

323.04 Resignation of trustee. Any trustee so appointed by will or by the court may, upon a request in writing, be permitted to resign the trust if the court shall think it expedient.

323.05 May be removed. Any trustee who shall become disqualified by insanity or incapacity, or who shall be evidently unsuitable to perform his duties as such trustee, or who shall neglect or refuse to comply with the provisions of this chapter shall be removed by the court after notice to such trustee and other parties interested as provided by section 324.18. [*Supreme Court Order, effective Jan. 1, 1940*]

323.06 Trustee may sell property; no exeat and injunction, when may issue. The county court, on application of any such trustee or any person interested, may, after notice to all parties in interest, as provided by section 324.18, authorize and require such trustee to sell any property so held in trust in such manner as the court may direct and to invest the proceeds of such sale in such manner as will be most for the interest of all concerned therein; and such court may from time to time make such orders and decrees as it may deem just and reasonable in relation to the sale, management, investment and disposition of such trust property and to the settlement of the account of such trustee, but no such order shall be made in violation of the terms of the trust. To keep the trust property from being removed out of the state or improperly or illegally used or invested the county court shall have the same power as circuit courts to issue the writ of ne exeat and injunctions. [*Supreme Court Order, effective Jan. 1, 1940*]

Note: Where loss of trust res is threatened, court may order a sale and cut off interest of contingent remaindermen in real estate constituting corpus of the trust, provided that proceeds of sale are impressed with the trust and reinvested, but may not destroy the trust or lodge ownership of the

son reached 21, to hold son's interest, and where guardian continued to hold interest she and bondsman were liable to extent trustee would have been liable. Guardianship of Snyder, 224 W 200, 272 NW 1.

Language of will construed to create a single trust and to intend distribution of pro rata shares therein, not cash, to each beneficiary, and trustee's setting up of separate accounts for the share of each after paying one beneficiary in cash held not to establish any new or separate trusts. Will of Manegold, 234 W 525, 291 NW 753.

Title to trust real estate passes under the will creating the trust to the named trustees without any order of court assigning the property to them. Estate of Trowbridge, 244 W 519, 13 NW (2d) 66.

corpus in residuary legatees free of interest of remaindermen. Sale of corpus must be in good faith and solely for benefit of trust estate, and persons having a direct interest in defeating the trust should not be bidders at the sale. Will of Stack, 217 W 94, 258 NW 324.

323.065 Mortgaging personalty. The county court, on the application of any such trustee, may at any time order the personal property so held in trust to be mortgaged when it shall appear to be necessary for the purpose of paying debts, expenses of administration, for the preservation of trust property, for the purposes of the trust, or when it shall be requested by all the beneficiaries residing in this state; or the court may order such personal property to be mortgaged upon a showing by the trustee that such mortgaging is beneficial to the trust estate; but no order for such mortgaging shall be made in violation of the terms of the trust. [*1941 c. 198*]

323.07 Accounts of testamentary trustees. Upon rendering any account to the court of his trusteeship, the testamentary trustee shall produce for examination by the court, or a duly authorized clerk thereof, all securities, evidences of deposits and investments reported by him, which shall be described in such account in sufficient detail so that the same may be readily identified, and the court, or its duly authorized clerk,

shall ascertain whether such securities, evidences of deposits and investments correspond with such account. But such court may by a general or special order exempt any trust company bank, or any bank with trust powers, which has made the deposit required by section 223.02 from the requirements of this section, if such bank shall, within 30 days after each examination by its proper supervisory banking authority file in such court a certificate of the examiner in charge, that at such examination the securities, evidences of deposits and investments of all trust accounts of such bank were examined and compared with the records of the several trusts and found to be correct. Notwithstanding any such order of exemption the court may at any time require the testamentary trustee to produce all securities, evidences of debt and investments for examination as provided in this section. [1933 c. 394; 1941 c. 249]

Note: The general rule is that charges incurred with respect to unproductive property, included in a trust, are payable out of the principal thereof unless the settlor manifested a different intention in the instrument creating the trust. Estate of Trowbridge, 244 W 519, 13 NW (2d) 66.
The owners of a contingent interest in the corpus of the trust cannot complain that the expenses for attorney fees and guardian ad litem fees allowed to the resigning trustee

in his action for approval of his account and for discharge from liability as trustee should be paid out of the income of the trust, since they are not affected thereby; and the owner of the income of the trust cannot complain, where her attorney suggested to the trial court that such fees, if not paid by the plaintiff, should be paid out of the income rather than the corpus of the trust. Uihlein v. Albright, 244 W 650, 12 NW (2d) 909.