

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, including any trust created under s. 206.52 (2), 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 devised or bequests are given to such corporations or societies in trust for any of the purposes of such corporations or societies.

History: 1955 c. 73.

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

Where the plan of liquidation and distribution proposed by the trustees was predicated on the county court's acceptance of the trustees' determination of value, and this was disapproved and new values substituted, the trustees should be released from the plan and given the opportunity to submit other procedures for the approval of the county court if they so desire. *Estate of Teasdale*, 261 W 248, 52 NW (2d) 366. Under (4), providing that no bond shall be required from any charitable corporation where devised or bequests are given to it "in trust" for any of its purposes, a gift in trust may be made by will under Wisconsin law to a charitable corporation for uses within its corporate powers. (See also notes to this case under 318.06.) *Will of Hill*, 261 W 290, 52 NW (2d) 367.

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.

323.025 Trusts of \$1,000 or less. Where a trust estate valued at \$1,000 or less is created for any of the purposes set forth in s. 72.04 (1), the court may order distribution of such estate on terms which will as nearly as possible carry out the intent of the testator if the entity named as beneficiary in the trust instrument is improperly described, or if the court finds that the cost of operating the trust will probably defeat the intent of the testator.

History: 1955 c. 161.

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.

When a bank, nominated as trustee in a will creating a trust, renounced its right to serve, it left the estate in the same position as if no one had been nominated in the will, and hence, when the court was called on to appoint a successor to the trustee originally appointed, the will did not operate to compel the appointment of the bank. In the absence of controlling provisions in the will, the court, in appointing a successor trustee on the death of the trustee of a testamentary trust, has wide discretion and, although the wishes of the beneficiaries may be considered, the court is not bound to appoint their choice or the choice of some of them. Estate of Chapman, 258 W 442, 45 NW (2d) 927.

It is a general rule that a trust never fails for want of a trustee and, if a named trustee is in fact unqualified to be a trustee and declines to qualify, the court, in the exercise of its equity powers, may appoint a trustee or may execute the trust by its own officers. Will of Hill, 261 W 290, 52 NW (2d) 867.

323.035 Special trustees; appointment. If there is necessary delay in appointing a trustee or issuing letters of trust, or if it appears to the court to be necessary, the court may appoint a special trustee to act until the matter causing the delay is disposed of or the necessity therefor ceases to exist. No appeal shall be allowed from the appointment of such special trustee, and the appointment may be made without notice. He may be removed whenever the court so orders. The special trustee, before entering upon the duties of his trust, shall give a bond to the court in such sum and with such sureties as the court designates and approves.

History: 1951 c. 37.

Comment of Advisory Committee, 1951: special trustee provision to testamentary trusts as well as other trusts. (Bill 90-S)

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.

323.06 Control by court. (1) **ORDERS AND WRITS.** The county court, on application of any such trustee or any person interested, may, after notice to all parties in interest, as provided by s. 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 trustees, 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.

(2) **PURCHASES BY TRUSTEE OR GUARDIAN.** Except when authorized by the terms of the trust, no trustee of a trust estate and no guardian of any heir of the decedent shall purchase or be interested in the purchase of any part of the real or personal estate in such trust estate sold unless such sale is made with written consent of the parties concerned and of the guardian ad litem for minors and incompetents and approval of the court after notice and hearing. Violation of this section shall be grounds for the court to proceed against a trustee as provided in s. 312.11.

History: 1951 c. 705; 1953 c. 440; 1957 c. 524.

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.

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.

As a general rule, a trustee managing a business or performing other services for it earns the going rate which owners would pay a nontrustee for the same services, and such rate is a correct measure of the services which he renders the trust in so acting and of the compensation which a trial court may properly allow him therefor. The matter of trustees' compensation is for the court, and general rules relating thereto give way to the trial court's sound discretion influenced by the particular circumstances of each case, the fundamental criterion being reasonableness, determined in the light of the facts and circumstances. Estate of Teasdale, 261 W 248, 52 NW (2d) 366.

323.10 Guardian ad litem. Possible persons unborn or presently unascertainable, having successor or contingent interests in a trust estate as beneficiaries, heirs or next of kin, if not already represented by a fiduciary, may be represented in an accounting by a guardian ad litem if the court deems it necessary. The court may dispense with or terminate the appointment of a guardian ad litem for a person having a successor or contingent interest who is legally incompetent, unborn or presently unascertainable, if there is a living person, sui juris, having in the judge's opinion a substantially identical interest, who is represented by counsel and whose interest is not adverse.

History: Sup. Ct. Order, 271 W v.

Comment of Judicial Council, 1956: This section and 231.35 give statutory recognition to the doctrine of Ruggles v. Tyson, (1899) 104 W 500, 506, with respect to virtual representation of beneficiaries who are unborn or whose identity is unascertainable, but the power of the court to appoint a guardian ad litem, if deemed necessary, is pre-

served. The rule is made uniform for both testamentary and nontestamentary trust accountings. [Re Order effective Sept. 1, 1956]

See note to 324.29, citing Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 439.