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Postscript To A Note On Trust Powers After Termination

By Bernard D. Meltzer*

In "A Note on Trust Powers After Termination," which appeared in the May-June 1974 issue of this journal,¹ I discussed the uncertainties with respect to the authority of trustees and the investment difficulties, that may result from the failure of a trust agreement to deal specifically with trust powers during the winding-up period. After the preparation of that article, the Illinois General Assembly enacted the Trusts and Trustees Act.² Section 4.18 of that act, with respect to trusts to which it is applicable, obviates the difficulties referred to above.³ It should be observed that Section 3(2) provides that the statute is applicable only to trusts created by instruments, including wills, executed on or after October 1, 1973.

Section 3(2) may, of course, be read as implying that the broad powers conferred by Section 4.18 do not extend to trusts created by instruments executed prior to October 1, 1973. That implication is, however, far from a necessary one; for Section 3(2) could properly be read as negating a retroactive application of the 1973 act. Under that view, trust powers during the winding-up period of antecedent trusts would be determined on the basis of the common law and without any restrictive inferences drawn from the 1973 legislation. Indeed, the policy reflected in that legislation could properly be considered in giving content to the common law.⁴ That policy, together with the considerations urged in my earlier article, would justify a construction of the common law that would confer on all trustees the salutary authority conferred prospectively by the 1973 act. Nevertheless, the implication in the denial of retroactivity embodied in Section 3(2) of the act may, of course, be a factor in the refusal of trustees to adopt that construction prior to a judicial resolution of the question involved.

FOOTNOTES

3. Section 4.18, together with Section 4, provides that a trustee is:

To have all of the rights, powers and duties given to or imposed upon the trustee by law and the provisions of the trust instrument during the period between the termination of the trust and the distribution thereof and during any period in which any litigation is pending which may void or invalidate the trust in whole or in part or affect the rights, powers, duties or discretions of the trustee except as otherwise directed by the court.

Section 4.18 appears to operate “during the period between the termination of the trust and the distribution thereof” regardless of whether “any litigation is pending, etc.”; in other words, “and” after “distribution thereof” is to be read as “or.” See K. Llewellyn, The Common Law Tradition 527, par. 25 (1960).


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