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Review of Pennsylvania Legislation 1939 - Fiduciaries and Decedents' Personal Liability of a Fiduciary Signing in Fiduciary Capacity

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requires the accumulation of income for a period in excess of the life of the grantor or testator and the term of twenty-one years from his death. The court pointed out that the rule that stock dividends under these circumstances were distributable as income was a "rule of property" and the testator could not abrogate a rule of property by a direction that the rule should not apply.

This so-called "rule of property" has now been altered by the Act of 1939.11 This statute provides that provisions in instruments creating trusts which require extra-ordinary dividends declared upon stock held in trust, whether they are to be paid in cash, stock or in stock rights in the issuing or another corporation to be treated in whole or in part either as income or principal shall be valid and enforceable. The statute also permits the instrument to contain a direction that profits realized from the sale of stock may be treated in whole or in part as principal or income. The Act of 1853 was expressly repealed to the extent that it was inconsistent with the new legislation.

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b. Personal Liability of a Fiduciary Signing in Fiduciary Capacity

Section 1 of the Act of June 24, 1939,1 provides that where an instrument contains, or a person adds to his signature thereto, words indicating that he contracts or signs in his fiduciary capacity and such words disclose the estate or trust for which he acts, he is not to be personally liable thereon unless it contains an express provision that he shall be personally liable. Lacking such an express provision for personal liability, an action may be brought against him only in his fiduciary capacity and execution may be had only against the fiduciary assets.

Section 2 provides that "instrument" as used in Section 1 shall include any instrument in writing of any kind. "Person" is given its usual broad meaning including corporations, etc. "Fiduciary" is defined as including executors and administrators, trustees, etc., and any person acting in a similar capacity.

Section 3 is a separability provision as to instruments, and the act is made effective as to instruments executed before enactment.

It is to be noted that the act applies only to written instruments, leaving oral contracts and engagements to be controlled by the common law. The act does not purport to provide for an exclusive method whereby personal liability may be avoided in the case of written instruments. The act provides that where three essentials are present, there shall not be personal liability. These three essentials are: Either the body of the instrument shall contain or the signature shall have


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added to it, words (1) indicating that the fiduciary is contracting or signing in
his fiduciary capacity, and (2) disclosing the trust or estate for which he is acting;
and there must be (3) lack of an express provision for personal liability. A con-
tract signed: "A, trustee for B" would comply with the statutory requirements and
A would not be personally liable. Suppose A does not have authority to bind the
estate or trust, the contract being an improper one? The act does not contain the
familiar provision of Section 20 of the Negotiable Instruments Law precluding
personal liability "if he was duly authorized." It would seem that the Section pre-
cludes personal liability on the contract in such a case although not forbidding
liability for deceit or for breach of warranty. Except for this qualification, the
Section would seem to produce the same result as the Negotiable Instruments Law
in Section 20. To the extent that it differs from Section 20, this Act will control
in proper cases, for its definition of instruments includes negotiable ones. The
Act makes no change in Section 44 of the Negotiable Instruments Law.

Could there be a valid, oral agreement that the fiduciary should be personally
liable? The act requires an express provision in the instrument to that effect, and
lacking fraud, accident or mistake, it would seem to be forbidden also by the parol
evidence rule.

The prior law on this subject has been in a very confused state. Some cases
have indicated that where the fiduciary signs as such, and the instrument or signa-
ture names the estate or trust, he is not personally liable. Still other cases indicate
that even where these two elements are present, the fiduciary is personally liable
notwithstanding, unless there was an express agreement that he was not to be per-
sonally liable. The Restatement of Trusts takes the position that a trustee is
personally liable on all contracts made in the administration of the trust even though
it appears that he is acting in his fiduciary capacity and the name of the beneficiaries
or trust is disclosed, unless there is an agreement that he shall not be liable. The
present Act is therefore at variance with the Restatement view, requiring an express
provision to create personal liability rather than an express provision to prevent
liability.

It is submitted that the Act does not cover the situation of an ordinary agent
acting for a natural person principal, which is not an estate or trust. Section 1

2 Id., 56 Purd. Stats. (Pa.) § 96.
3 Germantown Trust Co. v. Emhardt, 321 Pa. 561, 184 Atl. 457 (1936). This was a case
where the instrument did not even contain the word "trustee," "agent," etc. For cases in which
such words were used and in which oral evidence was permitted, see Boon & Hill Co. v. Pruden-
(1907); Wanner v. Emmanuel's Church, 174 Pa. 466, 34 Atl. 188 (1896); Barclay v. Parsley, 110
Pa. 13, 20 Atl. 411 (1885).
Super. 538 (1905); DeRoy v. Morris, 8 Pa. Super. 119 (1898).
5 Barrett v. King, 64 Pa. Super. 60 (1916); Boon & Hill Co. v. Prudential Trust Co., 39 Pa.
Super. 65 (1909); Allam's Estate, 199 Pa. 573, 49 Atl. 252 (1901); Whitman's Estate, 195 Pa.
144, 45 Atl. 673 (1900); Aughinbaugh v. Roberts, 4 W. N. C. 181 (Pa. 1876); Tassev v. Church,
4 W. & S. 346 (Pa. 1842).
6 Sections 261-263.
applies to cases where the words of the instrument or the words added to the signature disclose the estate or trust for which the fiduciary contracts or signs. These words do not include a natural personal principal. The definition of “fiduciary” conspicuously omits reference to an agent as being within the classification of fiduciaries. It is submitted, however, that under the common law of Pennsylvania as well as Section 20 of the Negotiable Instruments Law, an agent who makes a written contract and who signs as agent, disclosing in the body of the instrument or by words added to the signature the name of the principal, is not personally liable on the contract if he was authorized to so contract. As indicated above, this was not true as to fiduciaries such as trustees and executors and administrators.

A nice constitutional question may well be raised as to the validity of the provision taking away from a creditor the existing right to the personal liability of a trustee or executor or administrator on a pre-existing contract. The Act did provide for a period in which suit could be brought on such personal liability on previously executed contracts, but the period was six days only, and if otherwise unconstitutional, this grace period will certainly not save the provision. It is believed that the separability provision was inserted because of a doubt as to constitutionality on this point.

The Act is a helpful one in clarifying the law as to personal liability in the situations to which it applies.

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c. Estate Taxes

The following amendments affect taxation of decedents' estates:

The Act of June 21, 1939,1 amends Section 3 of the Death Transfer Tax Act by permitting a fiduciary to sell or mortgage real estate devised in remainder by entering into security for the payment of the tax when due upon the remainder interests, and thus permitting such real estate to be sold or mortgaged free of the lien of the tax interest, the Department of Revenue then looking to the security as approved rather than the property. Heretofore, a settlement would have to be made for the tax before its due date or the property sold or mortgaged subject to the lien of the tax to be paid when due by the remainder interests.

The Act of June 24, 1939,2 is an amendment adding provisions to Section 2 of the Death Transfer Tax Act, precluding the allowance of deductions where no notice is given of the claim to the executor, administrator, or register of wills.

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1P. L. 619, 72 PURD. STATS. (Pa.) § 2304.
3P. L. 721, 72 PURD. STATS. (Pa.) § 2302.