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1949 FIDUCIARIES INVESTMENT ACT

by

A. J. WHITE HUTTON*

In the Report of the Joint State Government Commission for the year 1949 relating to Decedents' Estates Laws, there is contained The Fiduciaries Act of 1949 and The Fiduciaries Investment Act of 1949. The former was reviewed in the October issue of the *Dickinson Law Review* and it is the purpose of the present article to review the latter Act known as Act No. 144, approved May 26, 1949, and bringing together in an orderly form the investment provisions relating to Pennsylvania fiduciaries, except personal representatives, whether subject to the jurisdiction of the orphans' court or of the common pleas court.¹

Historical Observations

The problem of the investments for trust funds has been the subject of concern to the courts and the legislature in Pennsylvania for over a century past, and the culmination of the matter appears in the amendment to Article 3, Section 22 of The Pennsylvania Constitution adopted November 7, 1933, providing as follows:

"The General Assembly may, from time to time, by law, prescribe the nature and kind of investments for trust funds to be made by executors, administrators, trustees, guardians and other fiduciaries."

This provision supplants the original Section 22 of Article 3 which forbade the General Assembly from enacting any law authorizing "the investment of trust funds by executors, administrators, guardians or other trustees, in the bonds or stock of any private corporation," and further stipulating that "such acts now existing are avoided saving investments heretofore made."²

*Hemphill's Appeal*³

The facts and the law of this interesting case are set forth by Black, C. J. as follows:

"Stephen Girard, by his will, bequeathed to Mary Antoinette Hemphill, \$50,000, to be invested by trustees (whom his executors were empowered to appoint), *on good security* for her use during life. The trustees, on the 12th of December, 1837, invested a part of this legacy in stock of the Bank of the United States at twenty per cent above par. The stock afterwards depreciated in the market, until it bore merely a nominal value. The point to be decided is, whether the trustees shall

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¹ See *Fiduciary Review*, May and June, 1949.

² P. S., Const. Article 3, §22, p. 287, and Supplement p. 82.

³ 18 Pa. 303 (1852).

be credited in their account with these shares of stock at the price they paid for them, or whether they must themselves bear the loss.

"We have not a doubt, that the investment was made in perfect good faith, and we have just as little doubt, that it was *not* made on good security. One of these propositions is amply sustained by the high character of the trustees, and the other by the total insolvency of the bank. Neither of them was denied in the argument. But was the faith of the trustees justified by the condition of the bank at the time? We feel obliged to answer this in the negative. The character of the bank had been blown upon; the public funds had been removed from it; the general government had refused it a charter; it had bought one from the state at an enormous price; it was then in a state of suspension; and the prudence of its management was fiercely denied by very many persons. These things were sufficient to put the trustees on their guard, and to prevent them from risking the trust fund in its stock, until they had examined its affairs, and were sure of its insolvency.

"But we put the case on a broader ground. In England it has been held for more than a century past to be settled law, that a trustee can only protect himself from risk, when he invests the trust fund in real or government securities, or makes the investment in pursuance of an order by the court: 3 Atkyns 444; 5 Ves. 838; 7 Ves. 150; 1 Madd. 290."

Observing that the same rule had been adopted in other states, notably New York and New Jersey, and that in Pennsylvania the doctrine did not appear ever to have been either affirmed or denied, the learned Chief Justice opined:

"So far therefore as our own authorities go, the question is an open one. But the time has come when the interests and rights of trustees, as well as orphans, married women, and insane persons, demand the settling of it, and we think the rule here ought to be as it is elsewhere, not because we feel bound by the precedents of a foreign state, but because we cannot resist the considerations of justice and policy by which they are supported."⁴

Act of 1917

The Fiduciaries Act of 1917 provided in Section 41 for various forms of investments by those occupying a fiduciary relationship, and it is noted that this Act is the first statutory recognition of the right of fiduciaries to make investments without securing the prior authorization of the court.⁵ The Commissioners, *inter alia*, declared:

"The Commissioners believe that the powers of investment granted to fiduciaries under the present law are too greatly restricted and that their enlargement would be welcomed throughout the State. At present

⁴ Followed in *Commonwealth v. McConnell*, 226 Pa. 244, 75 A. 367 (1910), opinion by Mestrezat, J.; referred to with other cases in *In re Gillingham's Estate*, 353 Pa. 493, 46 A.2d 269 (1946), opinion by Allen M. Stearne, J.

⁵ Report of Commission, 1917, p. 204; Article, *Fiduciary Investments—1948*, *Fiduciary Review of March, 1948*, which also contains a chart of authorized investments for fiduciaries to that date.

trustees are limited to loans of the United States, the State of Pennsylvania, municipal corporations of the State, mortgages and ground rents; and according to the literal wording of the statutes the decree of the orphans' court should be first obtained, although in practice the statutes have been considered as authorizing the investments specified, and the necessity of a preliminary application has been disregarded."⁶

Act of 1949

As stated by another writing on this subject:⁷

"This Act is primarily a codification of various statutes prescribing legal investments for fiduciaries. Although certain changes have been made, there will be found no drastic departure from the legislative policy which has been followed for the previous decade. In addition to its rearrangement of existing law in a more orderly and understandable form, the physical arrangements of the act will also make possible future amendments and additions with a minimum of mechanical difficulty. Unlike the Wills, Intestate, and Estates Acts of 1947, and the Fiduciaries Act of 1949, the Investment Act of 1949 became effective upon its enactment. For that reason, all fiduciaries who are subject to it should familiarize themselves with its provisions."

The Act of 1949 contains twenty-one sections including the repealer and embodies twelve pages in the Report of the Commission. Briefly the sections cover the following: government obligations, obligations of federal organizations, obligations of Pennsylvania governmental organizations, corporate bonds, mortgages, fractional interest in mortgages, stock and savings and loan insurance corporation shares, real estate, ground rent, interest bearing deposits, and common trust fund and mortgage investment funds.

There are special provisions relative to the retention of unauthorized investments and investments which become unauthorized, and provisions also relative to the scope of court directions. It is also provided in Section 18 as follows:

"Directions of Testator or Settlor.—The testator or settlor in the instrument establishing a trust may prescribe the powers, duties and liabilities of the fiduciary regarding the investment or non-investment of principal and income and the acquisition, by purchase or otherwise, retention, and disposition, by sale or otherwise, of any property which, at any time or by reason of any circumstance, shall come into his control; and whenever any such provisions shall conflict with this act, such provision shall control notwithstanding this act. In the absence, however, of an express restriction to the contrary in the trust instrument, the fiduciary may invest in any investment authorized by this act."

⁶ Report of Commission, 1917, p. 204 note.

⁷ Robert Brigham, Member of Phila. Bar, Chmn. of Advisory Committee to Committee on Decedents' Estate Laws of the Joint State Government Commission, *Fiduciary Review* of June, 1949. See attached to this number of *Fiduciary Review* a list of Authorized Investments for fiduciaries in Pennsylvania under the new law.

Other 1949 Laws

The following are a few of the important pieces of current legislation applying to subjects which touch decedents' estates:

Act No. 118 effective September 1, 1949, amending the Act of 1865, P. L. 30, 21 P. S. 51, to validate conveyances of an adult's real estate in conjunction with a minor spouse 17 years of age or over.

Act No. 197 effective September 1, 1949 pertaining to the custody of minors, amending Orphans' Court Act of 1917, 20 P. S. 2253. See in connection with this Act, *Gard Appeal*, 356 Pa. 378, 52 A.2d 313 (1947) and *Dougherty Adoption*, 358 Pa. 622, 58 A.2d 77 (1948).

Act No. 315 effective May 11, 1949, amending the Death Transfer Tax Act of 1919, P. L. 521, 72 P. S. 2301, to exempt from tax property held in joint names of husband and wife with right of survivorship although not owned by entireties. See *McEnery v. Nahlen*, 20 Erie 441.

Act No. 390 effective September 1, 1949 authorizing conveyance of interest of either former spouse after divorce to the other without the joinder of grantee spouse in the conveyance and validating such conveyances made prior to the Act.

Act No. 412 effective September 1, 1949, amending the Act of 1927, P. L. 884, providing that property acquired by husband and wife after September 1, 1949 upon divorce will automatically be owned as tenants in common, each having an equal one-half share in the value.

Act No. 512 effective May 1, 1949 covering the subject of presumption of payment of charge on real estate, making the presumption conclusive after the lapse of fifty years unless an action or proceeding shall have been instituted for its collection or unless before September 1, 1950 a proceeding to enforce payment of or to preserve, revive or continue such encumbrance or charge shall be instituted. This is quite an important act covering a rather troublesome situation frequently encountered in title research work. The Act sets forth in detail the procedure.

Act No. 528 effective May 23, 1949 on interstate arbitration and compromise of inheritance taxes, an important piece of legislation already adopted by Maryland, Vermont and Virginia, and looking to the solution by comity among the states of vexing questions in the inheritance tax field.⁸

⁸ See *Fiduciary Review* June, 1949 for the above and other suggestions as to important current legislation.