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THE CHANCELLOR IN LOCO PARENTIS:
MODIFICATION OF TRUSTS FOR CHILDREN

JULIUS H. MINER*

LEGALLY considered, a trust involves the right to the beneficial enjoyment of property, the legal title to which is vested in another.\(^1\) Its general purpose is to protect property in the interest of designated beneficiaries who are to enjoy the income or principal or both. Through its use, in most cases, the donor aims to provide management and control of the property which he considers superior to that which the beneficiaries could give it. Although it may gratify the settlor's vanity to extend beyond the grave his dominion over property and his influence over survivors, tragic consequences of such attempts are not uncommon. Sound as the judgment of the donor may be when the trust is made, time and change, which mock at infallibility, often operate to defeat his very purpose.

In the United States, private trusts have been frequently used as a means to diminish inheritance and federal estate taxes by preventing property from vesting in the first taker so that it may ultimately pass free of interim taxes to other beneficiaries in remainder. Some trusts have been created for the payment of income to beneficiaries who would otherwise receive it out of earnings paid directly to the donors. Others have been established for the purpose of assuming part of the capital gain on securities thereafter to be sold. So great has been the use thereof for such purposes that the federal government in recent years has taken cognizance of this legal mechanism for tax reduction and has caused the

\* Judge, Circuit Court of Cook County, Illinois.
\(^1\) Bowes v. Cannon, 50 Colo. 262, 116 P. 336 (1911); Weer v. Gand, 88 Ill. 490 (1878).
enactment of legislation imposing higher tax obligations and reducing tax exemptions. The ability to modify or eliminate provisions in instruments creating trusts, therefore, becomes of vital importance in order to make it possible to meet unforeseen exigencies and to cope with frequent changes in tax laws and tax regulations directed at trust estates.

It is believed that modern courts of equity have been entirely too conservative in considering themselves bound by the doctrine of emergency in authorizing modification of the terms of trusts for the benefit of children. It is proposed, in the present article, to consider the general problem of modification of private trusts and the doctrine of emergency, and then to deal with the special problems relating to the modification of trusts where minor beneficiaries are involved. When the extent of equitable jurisdiction over minors is considered, it will be seen that courts of equity possess ample power to modify such trusts where benefit to the children will result. The chancellor should consider himself as standing in loco parentis when facing such problems.

I. MODIFICATION OF PRIVATE TRUSTS

It is an elementary principle of law that a settlor may, in the absence of statutory restriction, reserve in the trust instrument power to modify or revoke the trust, in whole or in part, without affecting its validity. Such power may be express or implied. It is personal to whomever it is delegated, and is not transferable or descendible. Where such power is given to the trustee, to the cestui que trust, or to

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2 National Newark & Essex Banking Co. v. Rosahl, 97 N.J. Eq. 74, 128 A. 586 (1925); Faulkner v. Irving Trust Co., 246 N.Y.S. 313 (1930); Richardson v. Stephenson, 193 Wis. 89, 213 N.W. 673 (1927).
3 Hale v. Hale, 146 Ill. 227, 33 N.E. 858 (1893); Sims v. Brown, 252 Mo. 58, 158 S.W. 624 (1913); Russell's Ex'rs. v. Passmore, 127 Va. 475, 103 S.E. 652 (1920).
4 Farmers' Loan & Trust Co. v. Bowers, 29 F. (2d) 14 (1923); National Newark & Essex Banking Co. v. Rosahl, 97 N.J. Eq. 74, 128 A. 586 (1925); Barnard v. Gantz, 140 N.Y. 249, 35 N.E. 430 (1893).
5 In re Dolan's Estate, 279 Pa. 582, 124 A. 176, 49 A.L.R. 858 (1924).
7 Roberts v. Taylor, 300 F. 257 (1924); Larimer v. Beardsley, 130 Iowa 706, 107 N.W. 835 (1900); Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904); In re Innis, 106 Minn. 343, 119 N.W. 48 (1908); Dumas v. Carroll, 112 S.C. 284, 99 S.E. 801 (1919).
a third person,\textsuperscript{8} or where the power reserved is subject to their approval,\textsuperscript{9} or is required to be exercised in a particular manner or under special circumstances,\textsuperscript{10} or within a limited time,\textsuperscript{11} the trust instrument cannot be modified or revoked without fully complying with such provisions. A power to revoke has been held to include a power to modify,\textsuperscript{12} else the donor could first revoke and then create a new trust.

\textbf{WHERE POWER IS NOT RESERVED}

As a general rule, after a trust has been fully created, without reserving a power to alter or revoke it, whether it be a testamentary or inter vivos trust,\textsuperscript{13} and where no statutory provision permits modification, it may not be altered or revoked by the settlor alone, or in concert with the trustee,\textsuperscript{14} without the consent of all the beneficiaries.\textsuperscript{15} The consent of some beneficiaries will not affect the status of others.\textsuperscript{16} A settlor who has named himself as trustee with complete management of and supervision over the trust property has no implied power to modify or revoke,\textsuperscript{17} unless he is also the sole beneficiary.\textsuperscript{18} A reconveyance by the trustee to or with the settlor will not, therefore, destroy the trust, and the

\begin{itemize}
  \item \textsuperscript{8} Restatement, Trusts, Vol. 2, § 330.
  \item \textsuperscript{9} Walker v. Sharpe, 68 N.C. 363 (1873).
  \item \textsuperscript{10} Restatement, Trusts, Vol. 2, § 330.
  \item \textsuperscript{11} Schreyer v. Schreyer, 91 N.Y.S. 1065 (1905).
  \item \textsuperscript{12} Rehr v. Fidelity-Philadelphia Trust Co., 310 Pa. 301, 165 A. 380 (1933).
  \item \textsuperscript{13} Rehr v. Fidelity-Philadelphia Trust Co., 310 Pa. 301, 165 A. 380 (1933).
  \item \textsuperscript{14} Restatement, Trusts, Vol. 2, § 330.
  \item \textsuperscript{15} Schreyer v. Schreyer, 91 N.Y.S. 1065 (1905).
  \item \textsuperscript{16} Rehr v. Fidelity-Philadelphia Trust Co., 310 Pa. 301, 165 A. 380 (1933).
  \item \textsuperscript{17} Schreyer v. Schreyer, 91 N.Y.S. 1065 (1905).
  \item \textsuperscript{18} Rehr v. Fidelity-Philadelphia Trust Co., 310 Pa. 301, 165 A. 380 (1933).
\end{itemize}
equitable interests of the cestuis will still attach. For that
matter the refusal by the trustee to accept the trust will not
affect its validity.

A trust may be rescinded or the instrument may be re-
formed in a court of equity upon the same grounds as in any
other transaction, viz: fraud, mistake, mental or legal
incapacity of the donor, failure of consideration, duress,
and undue influence. Rescission will be decreed only upon
a mistake of fact and not of law, notwithstanding a recent
New Jersey decision to the contrary.

To what extent, and under what circumstances, may
equitable jurisdiction be invoked to authorize a deviation
from the express provisions of the trust or to sanction acts
by the trustee which he is given no power to do? Most of our

19 Hubbard v. Buddemeier, 328 Ill. 76, 159 N.E. 229 (1927); Binns v. La Forge,
191 Ill. 598, 61 N.E. 382 (1901); Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895);
Hinton's Ex'r. v. Hinton's Committee, 256 Ky. 345, 76 S.W. (2d) 8 (1934); Krauch
v. Krauch, 179 Md. 423, 20 A. (2d) 719 (1941); Rednor v. First Mechanics Nat.
Bank of Trenton, 131 N.J. Eq. 141, 24 A. (2d) 850 (1942).


21 Brophy v. Lawler, 107 Ill. 284 (1883).


23 65 C.J. 331, § 88.


25 Lawrence v. Lawrence, 181 Ill. 248, 54 N.E. 918 (1899); Coolidge v. Loring,

26 In Reuther v. Fidelity Union Trust Co., 116 N.J. Eq. 81 at 85, 172 A. 386 at
388 (1934), Reuther turned over all of his savings under an irrevocable trust exe-
cuted by his wife as donor. The court there permitted revocation because it con-
cluded that: "While he probably understood all that was contained therein, he did
not realize the practical effect and consequences which might flow from things
not stated, such as the omission of a clause giving Mrs. Reuther the definite right
to revoke. . . Had he been told that . . . he could have insisted upon the insertion
of such a clause." The Court also pointed out that if it should be held that, with-
out such a clause, the agreement was irrevocable, then the gift thereby made
was unwise and improvident and should be set aside, because it divested the
settlor's practically all their savings and put it out of their power to resort to
any fund with which to tide themselves over lean years which might result as a
natural business risk. It concluded that the interests of the infant beneficiaries
"cannot accrue unless they survive the father and mother, and they may not live
to take, and, should they take, it would be at a time when they are of age and
able to find for themselves. They need now, during their infancy, the support
and care which their parents will be better able to provide, if the parents have
funds to use for the purpose." In Lawrence v. Lawrence, 181 Ill. 248, 54 N.E. 918
(1899), the court held a claim that the grantor did not comprehend the legal effect
of the instrument was no basis for vacating it, where no allegation of mistake or
misunderstanding was advanced.
MODIFICATION OF TRUSTS

Courts\textsuperscript{27} follow the English authorities\textsuperscript{28} which permit changes in, or the termination of, a trust before its expiration where all the beneficiaries interested in the estate are properly before the court, where all are sui juris, where all are legally capable of consenting, and where all do consent.\textsuperscript{29} It would seem unreasonable, and even against public policy, to restrain the owners, legal or beneficial, from using or disposing of property in which they alone are interested.\textsuperscript{30} It has even been held that consenting beneficiaries, with the settlor’s consent, may have modification or partial revocation, provided the interests of the non-consenting beneficiaries, or those under legal incapacity to consent, are not affected,\textsuperscript{31} and if the complete continuance of the trust is not necessary to carry out a material purpose.\textsuperscript{32} In each instance, the court will be careful, however, not to defeat any object of the settlor.\textsuperscript{33}

Where not all the beneficiaries consent to the termina-


\textsuperscript{29} Cowie v. Strohmeyer, 150 Wis. 401, 136 N.W. 956 (1912).


\textsuperscript{31} Boyd v. United States, 34 F. (2d) 488 (1929); State Bank of Nauvoo v. LoddeI, 78 Ill. App. 600 (1898), affirmed 180 Ill. 56, 54 N.E. 157 (1899); Wayman v. Follansbee, 253 Ill. 602, 98 N.E. 21 (1912); Anderson v. Williams, 262 Ill. 308, 104 N.E. 659 (1914); Anderson v. Kemper, 116 Ky. 339, 76 S.W. 122 (1903).


\textsuperscript{33} Anderson v. Williams, 262 Ill. 308, 104 N.E. 659 (1914); Watson v. Watson, 223 Mass. 425, 111 N.E. 904 (1916); Evans v. Rankin, 329 Mo. 411, 44 S.W. (2d) 644 (1931).
tion of the trust and some of its purposes are unfulfilled, the court will not direct its termination. Likewise, the failure of a cestui to answer a complaint for construction of a trust will not warrant an adjudication to terminate it when that relief is not sought. Where there are beneficiaries who do not or cannot legally consent, or are unascertained, or are not in being, the court will not terminate the trust in the absence of statutory authority. So also, where there is a spendthrift clause in the trust instrument.

As to just who are beneficiaries required to consent to revocation or modification will depend upon whether the interests which such persons have in the trust estate possess the attributes of descendibility, devisability or alienability. Consent of possible unborn remaindermen has been held unnecessary to terminate a trust when the person who would have taken at the death of the life tenant was living and consented to termination.

Approval by the trustee to terminate the trust has held both necessary and unnecessary unless, of course, he is


39 City Bank Farmers Trust Co. v. Howland, (N.Y. Sup. Ct.) Oct. 18, 1937, as reported in N.Y.L.J. of that date, p. 1059, col. 2. See also note thereon in 51 Harv. L. Rev. 754.


also a beneficiary. Without any beneficial interest in the trust, the trustee's objections to dissolution of the trust will not be recognized. In the absence of a specific grant of power to the trustee by the settlor, or by statute, the trustee has no power to change any of the terms of the trust instrument, or terminate the trust, except as therein provided. The trustee's powers are only those defined in the instrument and he must comply therewith or else he may incur personal liability.

Where the trustee is uncertain of his powers or duties, he may and should apply to the court for directions, for he cannot sit by complacently and permit dissipation of the trust res. In fact, he may become subject to liability if he fails to apply for permission to deviate from the terms of the instrument, if he knows or should know of the existence of circumstances requiring the change. Only in the event of an emergency may a trustee deviate from the trust instrument without first obtaining permission of the court and then only if, in such emergency, he has no opportunity to apply. Courts have, however, condoned profitable deviations by trustees who had not first applied for authority. On the other hand, courts have been reluctant to exercise a trustee's discretion and have frequently refused to guide the trustee where they felt that interpretation was unnecessary.

Courts of equity have sanctioned modification or termination of trusts where accomplishment of the trust purpose

42 Western Battery & Supply Co. v. Hazelett Stor. Battery Co., 61 F. (2d) 220 (1932); Eakle v. Ingram, 142 Cal. 15, 75 P. 566 (1904).
45 In re Cole's Estate, 102 Wis. 1, 78 N.W. 402 (1899).
49 Shirko v. Soper, 144 Md. 269, 124 A. 911 (1923); Brown v. Hazelhurst, 54 Md. 26 (1880); Williams v. Smith, 10 R. I. 280 (1872).
50 McCarthy v. Tierney, 116 Conn. 588, 167 A. 807 (1933); Foley v. Hastings, 107 Conn. 9, 139 A. 305 (1927).
has become impossible or illegal;\textsuperscript{52} where the trust has become dry or passive, as where its purposes have been fully accomplished;\textsuperscript{53} or where there is no longer any valid reason for preserving the trust.\textsuperscript{54} The same is true where there is no purpose other than payment of income,\textsuperscript{55} or trustee's fees,\textsuperscript{56} or if all the interests under the trust have vested.\textsuperscript{57} In like manner where the courts have found that administration of the trust was extremely difficult and onerous,\textsuperscript{58} or too costly, or its continuance was not, in the opinion of the court, for the best interest of the cestui,\textsuperscript{59} they have ordered the termination thereof.

Contrary to the express intention of a testator, courts of equity have even subjected the interests of beneficiaries of spendthrift trusts, cloaked with every form of legal immunity, to claims which have "an unusual moral appeal or are affected, to an unusual degree, by public interest,"\textsuperscript{60} such as those for taxes or for the support of the beneficiary's wife and children.\textsuperscript{61} The reasoning in some of the cases in which

\textsuperscript{52} Hopkins v. Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. Ed. 739 (1897); Miller's Ex'rs. v. Miller's Heirs & Creditors, 172 Ky. 519, 189 S.W. 417 (1916); Donaldson v. Allen, 182 Mo. 626, 81 S.W. 1151 (1904); In re Harrar's Estate, 244 Pa. 542, 91 A. 503 (1914); Armistead's Ex'rs. v. Hatt, 37 Va. 316, 33 S.E. 616 (1899).

\textsuperscript{53} Fox v. Fox, 250 Ill. 384, 95 N.E. 498 (1911); Felgner v. Hooper, 80 Md. 262, 30 A. 911 (1894); Brown v. Cowell, 116 Mass. 461 (1875); Harlow v. Cowdrey, 109 Mass. 183 (1872).

\textsuperscript{54} Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 187 P. 425 (1920); Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306 (1916); Fidelity & Columbia Trust Co. v. Gwynn, 206 Ky. 823, 268 S.W. 537 (1925).

\textsuperscript{55} In re Buch's Estate, 278 Pa. 185, 122 A. 239 (1923).

\textsuperscript{56} Eakle v. Ingram, 142 Cal. 15, 75 P. 566 (1904).

\textsuperscript{57} Fidelity & Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W. (2d) 814 (1937); Smith & Others v. Harrington, 86 Mass. (4 Allen) 566 (1862).

\textsuperscript{58} Sowle v. Potter, 223 Ky. 136, 3 S.W. (2d) 174 (1928). In Restatement, Trusts, Vol. 2, § 336, appears the language: "If owing to circumstances not known to settlor and not anticipated by him the continuance of the trust would defeat or substantially impair the accomplishment of the purpose of the trust, the court will direct or permit termination of the trust."

\textsuperscript{59} Haldeman's Trustee v. Haldeman, 239 Ky. 717, 40 S.W. (2d) 348 (1931); Schriver v. Frommell, 179 Ky. 228, 200 S.W. 327 (1918). See also Stephens v. Collison, 274 Ill. 389, 113 N.E. 691 (1916); In re Devlin's Trust Estate, 284 Pa. 11, 130 A. 238 (1925).

\textsuperscript{60} Carey and Schuyler, Illinois Law of Future Interests (Burdette Smith Company, Chicago, 1941) p. 563, § 434.

such claims have been allowed is that, upon a proper construction of the trust agreement, the claimants were considered as beneficiaries rather than creditors. It has also been held that income from a spendthrift trust, otherwise immune to creditors, is subject to an attorney's lien for services rendered in protecting and enforcing the rights and interests of the beneficiary who hired him.\(^2\)

Where the entire legal estate and all equitable interests have become vested in the same person, the courts will decree the trust extinguished by merger, as when the cestui assigns his interest to the trustee, or the trustee conveys his legal title to the cestui, or both convey their respective interests to a third party. In such event, the protection of the beneficiary, which is the primary purpose of the trust, is no longer necessary and there is no further reason for the separation of the equitable and legal titles.\(^3\) Redelivery by the trustee to the donor not in accordance with the provisions of the trust instrument will not, however, terminate the trust.\(^4\)

**MODIFICATION—THE EMERGENCY DOCTRINE**

Our courts of chancery have almost uniformly directed trustees to deviate from the express terms of the trust agreement in the event of an emergency,\(^5\) or for the preservation of the estate or the income therefrom for the cestui que trust.\(^6\) The necessity for such action must be shown as

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\(^2\) In re Williams, 187 N.Y. 286, 79 N.E. 1019 (1907). See also Restatement, Trusts, Vol. 1, § 157; Carey and Schuyler, op. cit., p. 563, § 434; 38 Ill. L. Rev. 674.

\(^3\) Coryell v. Klehm, 157 Ill. 462, 41 N.E. 864 (1895); Brophy v. Lawler, 107 Ill. 284 (1883); Cunningham v. Bright, 228 Mass. 385, 117 N.E. 909 (1917); Langley v. Conlan, 212 Mass. 135, 98 N.E. 1064 (1912).

\(^4\) Stephens v. Collison, 274 Ill. 389, 113 N.E. 691 (1916); Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895).

\(^5\) Black v. Bailey, 142 Ark. 201, 218 S.W. 210 (1920). In Curtiss v. Brown, 29 Ill. 201 at 223 (1862), the court said: "That the terms of the deed, creating the trust, are like iron bands, rigid and unyielding, and that no human power can unloose or even adjust them, no matter what emergency or necessity may arise, even though they may destroy the whole interest designed for the beneficiary... We do not think so great a defect exists in our system of jurisprudence." See also Nail v. American Nat. Bank of Bristow, 21 F. Supp. 385 (1937); Adams v. Cook, 15 Cal. (2d) 352, 101 P. (2d) 484 (1940); Porter v. Porter, (Sup. Ct., Me.) 20 A. (2d) 465 (1941); Wachovia Bank & Trust Co. v. Laws, 217 N.C. 171, 7 S.E. (2d) 470 (1940).

\(^6\) Hoffman v. First Bond & Mortgage Co. of Hartford, 116 Conn. 320, 164 A. 656 (1933); Stephens v. Collison, 274 Ill. 389, 113 N.E. 691 (1916); Young v. Young,
being required to check depletion of the res or to insure continuance of a reasonable income.\textsuperscript{67} Variation may be sanctioned under such conditions even though the testator foresaw the future change in circumstances and expressly insisted upon adherence to his instructions.\textsuperscript{68}

In case of such emergency, courts of equity will enlarge the power of a trustee contrary to the express provisions of the instrument,\textsuperscript{69} or direct a change in trust administration or management when necessary to accomplish trust purposes. Without regard to adverse terms, courts will authorize the trustee to lease,\textsuperscript{70} sell, mortgage, convert, alter and improve real estate,\textsuperscript{71} and to dispose of precarious invest-

\textsuperscript{67} Johns v. Montgomery, 265 Ill. 21, 106 N.E. 497 (1914); Vickers v. Vickers, 189 Ky. 323, 225 S.W. 44 (1920); Pennington v. Metropolitan Museum of Art, 65 N.J. Eq. 11, 55 A. 468 (1903).

\textsuperscript{68} In the case of In re New, [1901] 2 Ch. 534, the settlor expressly provided that the trust res should "continue in the same state of investment in which it should be found at the time of his demise, notwithstanding the same might be of a wasting or hazardous nature."

\textsuperscript{69} Denegre v. Walker, 214 Ill. 113, 73 N.E. 409 (1905); Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A. 555 (1926).

\textsuperscript{70} Patterson v. Johnson, 113 Ill. 559 (1885); Marsh v. Reed, 184 Ill. 263, 56 N.E. 306 (1900).

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ments,22 or an unprofitable business.23

Changes of circumstances from those which existed at the creation of the trust, which necessitate alteration of its terms, are generally divided into two classes, viz: those where the settlor has failed to provide for the relief sought,24 and those where he has expressly prohibited it.25 It is readily understandable that if courts of equity have power to approve that which the trustee was given no power to do, then they can also sanction that which the trustee was precluded from doing.26

Where the chief purpose of the trust is to support its beneficiaries, but owing to conditions not anticipated by the donor the earnings are insufficient, invasion of so much of the principal as is necessary to carry out that purpose is usually decreed by the chancellor. Both English and American courts have authorized either an increased allowance out of income27 or a withdrawal from the corpus itself.28

While the English courts have been a bit reticent in ordering conversion of an infant's real estate into personality

22 In re Pulitzer's Estate, 249 N.Y.S. 87, at 93 (1931), the court said: "The law in the case of necessity reads into the will an implied power of sale." In re Muller's Will, 280 N.Y.S. 345 (1935), the court denied the right to depart from the class of legal investments because of probable inflation. The court held it was futile to indulge in such probabilities and that it had no power to disregard the command of the legislature in that regard.


25 Marsh v. Reed, 184 Ill. 263, 56 N.E. 306 (1900); Curtiss v. Brown, 29 Ill. 201 (1862); Weakley v. Barrow, 137 Tenn. 224, 192 S.W. 927 (1917); Upham v. Plankinton, 166 Wis. 271, 165 N.W. 18 (1917).

26 Johns v. Montgomery, 265 Ill. 21, 106 N.E. 497 (1914); Longwith v. Riggs, 123 Ill. 258, 14 N.E. 840 (1887); Denegre v. Walker, 114 Ill. App. 234 (1904); Marsh v. Reed, 64 Ill. App. 535 (1896); Weakley v. Barrow, 137 Tenn. 224, 192 S.W. 927 (1917).


to insure better earning, they have been very liberal in their attitude on maintenance and education of minors.\textsuperscript{79} In fact, English statutes give trustees sole discretion in making such allowances.\textsuperscript{80} They will not, however, direct a trustee to pay to one beneficiary a part of a fund which the testator has provided for the benefit of another,\textsuperscript{81} or permit an advance from the corpus of the estate which would constitute an award to a cestui que trust not ultimately entitled to it.\textsuperscript{82}

Although it is firmly established that the regulation and control of trusts is one of the original and inherent powers of chancery,\textsuperscript{83} most of our courts hold to the view that they owe it to the settlor to direct that the property be dealt with in accordance with his express intention, except where it clearly appears that deviation is urgently necessary for the preservation of the estate or its income, or where performance is otherwise impossible or illegal. They still adhere to the indestructible trust theory laid down in \textit{Claflin v. Claflin},\textsuperscript{84} that equity ought not to revoke gifts, reduce or increase fixed donations or presents to beneficiaries contrary to express provisions made by the settlor. In the absence of emergency or dire necessity therefor, they refuse to authorize modification of trust instruments merely because such would be advantageous to beneficiaries, even though such beneficiaries are minors.\textsuperscript{85}


\textsuperscript{80} See note in 78 U. of Pa. L. Rev. 1000.

\textsuperscript{81} Hughes v. Federal Trust Co., 119 N.J. Eq. 502, 183 A. 299 (1936); In re Lucey's Estate, 98 N.J. Eq. 314, 128 A. 677 (1925). In Errat v. Barlow, 14 Ves. Jr. 201, 33 Eng. Rep. 498 (1807), an allowance was denied because it might affect an interest of persons not yet in esse.


\textsuperscript{84} 149 Mass. 19, 20 N.E. 454, 3 L.R.A. 370 (1889).

\textsuperscript{85} Atkinson v. Lyle, 191 Ark. 61, 85 S.W. (2d) 715 (1935); Russell v. Russell, 109 Conn. 187, 145 A. 648 (1929); Ackerman v. Union & New Haven Trust Co., 90 Conn. 63, 96 A. 149 (1915); Stephens v. Collison, 274 Ill. 389, 113 N.E. 691 (1916); Johns v. Montgomery, 265 Ill. 21, 106 N.E. 497 (1914); Fox v. Fox, 250 Ill. 384, 95 N.E. 498 (1911); Johnston v. Buck, 220 Ill. 226, 77 N.E. 163 (1906); Johns v.
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II. MODIFICATION OF TRUSTS FOR CHILDREN

In England, Lord Chancellor Macclesfield was among the early jurists to recognize the need for modification of trust agreements for minor beneficiaries, but, in 1845, Vice-Chancellor Sir J. L. Knight Bruce declared that although he believed that the proposed arrangement before him would be for the benefit of the infant, he did not consider that he had jurisdiction to sanction it; that it would mean in effect to "unsettle property already subject to the terms of a settlement, and that Parliament alone has authority to do."  

In 1903, however, Justice Farwell refused to follow that theory and held that guardians and trustees may change the nature of infant's estates, under particular circumstances, where such change was for the advantage or convenience of the infant, and that when made the court would approve such deviation. He decreed that a court of chancery had the power to compromise the rights and claims of infants and persons under disability, where those rights and claims were equitable; that such power had been continually exercised by the court and resulted almost necessarily from the jurisdiction which the court exercised over trustees. He further stated that "in the exercise of that jurisdiction, the Court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of cestuis que trust who are infants or under disabilities."

To the same effect is the case of In re New, in which the trustees, in the interest of their cestuis que trustent, of whom some were persons not sui juris and others were not yet in existence, applied for leave to reorganize and expand

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88 In re Wells, [1903] 1 Ch. 848.
89 [1903] 1 Ch. 848 at 854.
90 In re New, [1901] 2 Ch. 534.
a company because of its tremendous growth and huge earnings. The court held that although the testator expressly provided that the res should "continue in the same state of investment in which it should be found," the court could authorize going beyond the trust instrument "where the circumstances require that something should be done."91

Justice Buckley, on the other hand, insisted in the same year as the decision in the preceding case that in his opinion there did not reside in the court any power to authorize trustees, on the ground that such action was beneficial, to take an interest which the testator had not authorized.92 The same reasoning was followed by Justice Kekewich two years later.93

In Curtiss v. Brown,94 frequently cited and relied upon by American authorities, the court rejected the suggestion that the terms of the deed creating the trust were like iron bands, rigid and unyielding, and that no human power could unloose or even adjust them, no matter what emergency or necessity might arise, and even though such emergencies might destroy the whole interest designed for the beneficiary. In support of such refusal, the court said: "We do not think so great a defect exists in our system of jurisprudence."95 Most subsequent decisions hold, however, that the exercise of such power can only be warranted by some exigency which makes the action imperative for the preservation of the interests of the beneficiaries. In the absence of dire necessity they have declined modification solely to increase income96 or to adopt a better and more advantageous plan of administration.97 Where modification has been sanctioned, although not indispensable to preserve the trust, the question involved was one relating to the administration of the trust and a more judicious mode of managing and controlling the subject matter thereof in order that the design

91 [1901] 2 Ch. 534 at 543.
92 In re Morrison, [1901] 1 Ch. 701.
93 In re Tollemache, [1903] 1 Ch. 457.
94 29 Ill. 201 (1862).
95 29 Ill. 201 at 228.
96 Williams v. Williams, 204 Ill. 44, 68 N.E. 449 (1903); Johns v. Johns, 172 Ill. 472, 50 N.E. 337 (1898).
97 Johns v. Montgomery, 265 Ill. 21, 106 N.E. 497 (1914); Johnson v. Buck, 220 Ill. 226, 77 N.E. 163 (1906).
and wishes of the donor might be more completely accomplished.\textsuperscript{98}

\textbf{BY COMPROMISE OF MINOR'S CLAIMS}

Our courts are liberal in favoring settlements in litigation involving interests of minor beneficiaries. They hold almost uniformly that when a court of equity assumes jurisdiction of the subject matter and of the parties, some of whom are infants, it is incumbent upon the court to protect and adjudicate upon all personal and property interests of such infants, even beyond the express terms of the trust, wherever it is for their benefit and convenience. To hold otherwise would result in adults being assured of more adequate relief and protection than would minors when their property interests are involved in litigation.

The action by courts of equity in compromising litigation affecting estates of minors has become so prevalent,\textsuperscript{99} that some of our states have enacted statutes making such compromise of litigation arising out of testamentary trusts in favor of minors binding on all parties.\textsuperscript{100} Such action is considered and approved as a contractual disposition of property rather than a modification of the terms of the trust instrument,\textsuperscript{101} provided no rights of adults or other minors are prejudiced thereby.\textsuperscript{102}

In such cases it has been held that the consent of a guardian is not necessary to affect a compromise and that a trustee may retain control of a minor's estate against the minor's guardian.\textsuperscript{103} A guardian or next friend has, of course, no right to bind an infant or incompetent party by a

\textsuperscript{98} Northern Trust Co. v. Thompson, 336 Ill. 137, 168 N.E. 116 (1929). See also Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A. 555 (1926); Marsh v. Reed, 184 Ill. 263, 56 N.E. 306 (1900); Packard v. Illinois T. & S. Bank, 261 Ill. 450, 104 N.E. 275 (1914).


\textsuperscript{101} In re Ellis, 228 Mass. 39, 116 N.E. 956 (1917); Appeal of Hannan, 227 Mich. 569, 199 N.W. 423 (1924).

\textsuperscript{102} Morris v. Morris, 45 Tex. 60, 99 S.W. 872 (1907).

\textsuperscript{103} Finch v. Miller, 178 Ga. 37, 172 S.E. 25 (1933); Metzner v. Newman, 224 Mich. 324, 194 N.W. 1008 (1923); Wilson v. Schaefer, 107 Tenn. 300, 64 S.W. 208 (1901).
But while it is the duty of the court to protect the interests of minors and persons under disability, and to make certain by competent proof that the compromise is fair, a consent decree thus entered will not be reversed if found to be beneficial to the incompetent party or to the minor. If it is unfair and prejudicial, it will be reversed or modified.

In sustaining a compromise agreement involving property rights of infants, Mr. Justice Brewer, of the United States Supreme Court declared that:

It would be strange indeed if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than compromised their claims. If such a rule ever comes to be recognized it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf honestly, fairly, upon proper investigation and with the approval of the appropriate tribunal shall be held as binding upon them as similar action taken by adults.


105 Davis v. Mather, 309 Ill. 284, 141 N.E. 209 (1923); Dodge, Conservator v. Cole, 97 Ill. 338 (1881).

106 Milly v. Wm. Harrison, Executor, 47 Tenn. (7 Coldw.) 191 (1869). In Brooke v. Lord Mostyn, 33 Beav. 457, 55 Eng. Rep. 445 (1864), the court said: "If, in the course of a suit or any other proceeding in this Court, a compromise is proposed between one or more adult persons and one or more infants, the Court takes steps to ascertain whether it will be for the benefit of the infant or infants that the proposed compromise should be accepted... In dealing with such a question, it is the duty of a Judge (and, as I believe, a duty always performed by him) to consider carefully the facts, and to determine, upon such consideration, what is best to be done for the infant, in like manner as a father would act for a son in similar circumstance. No doubt in such cases, especially when the result of this evidence is doubtful, the Court is much influenced by the opinion of the nearest relatives and guardians of the infant, who have no interest in the matter except to promote the advantage of the child. When this has been done, and the Court has decided in favour of the arrangement, and the arrangement has been thereupon carried into execution, the whole thing is concluded."

MODIFICATION OF TRUSTS

The case of Metzner v. Newman,\(^{108}\) is one of the leading cases involving such compromises in American courts. The testator therein left surviving four children and four grandchildren, and provided in his will that the residue of his estate be held in trust to be divided in equal shares among the four grandchildren when the youngest reached majority, the issue of any of them to take, by representation, the share of their parents in the event of death. During the pendency of litigation contesting the will, the family entered into a compromise agreement including a provision that the residue be divided equally among the testator’s four children and four grandchildren. Objections were filed to the administrator’s final account because the estate was administered in pursuance of the compromise agreement. The probate court sustained the objections and two infant legatees appealed on the ground that the settlement was fair and for the best interest of the infant legatees. The chancellor approved the compromise, but the guardian ad litem appealed, taking the position that a court of chancery has no power to entertain such proceedings. The Supreme Court of Michigan said:

An examination of the authorities upon the question of the jurisdiction of the court leads us to the conclusion that when a chancery court has jurisdiction of the subject matter and parties, some of whom are infants, it may pass upon and adjudicate the rights and equities of the infants and the decree will be binding as to them. We are also of the opinion that when infants' property rights are involved in litigation the general guardian or guardian ad litem may negotiate for a compromise of the litigation, and if the court approves it, after an examination of the facts, the judgment or decree will be binding upon the infants. After a somewhat extended research we have found no case which disputes this rule of procedure . . . If appellant’s contention were the law it would be difficult for a chancery court to dispose of suits involving the rights of infants. While it is generally held that general guardians and guardians ad litem may not compromise pending litigation so as to be binding upon the infant it is just as generally held that when the terms of the compromise are examined by the court and approved, it is legal and binding. Indeed, if this were not true, as one of the counsel has well suggested, then infants would have fewer rights than adults when their property rights were involved in litigation.\(^{109}\)

\(^{108}\) 224 Mich. 324, 194 N.W. 1008 (1923).

\(^{109}\) 224 Mich. 324 at 330, 194 N.W. 1008 at 1010.
The Illinois Supreme Court has also passed upon this question. In the case of Williams v. Williams, after citing numerous decisions upholding the power of a chancery court to authorize the settlement of infants' rights in litigation, the court quoted with approval from the Tennessee case of Reynolds v. Brandon to the effect that:

The jurisdiction of a court of equity to enforce and ratify contracts for the compromise of doubtful rights is too well settled to require to be supported by authorities. Whenever a court of Chancery is called upon to sanction and enforce a contract of compromise, which involves the rights and interests of minors, it is bound, in the exercise of its general superintendence and protective jurisdiction over the persons and property of infants, to see that their rights and interests are not injuriously affected by such contract. They must have their day in court; they must be represented by guardians ad litem; the proof must satisfy the conscience of the Chancellor that their rights and interests are promoted and secured by the compromise. When these requisites are complied with, it is not simply the right, but the duty of the Chancellor to uphold and enforce such compromises, especially where they settle family disputes and put an end to litigation as to doubtful rights. If the Chancery Court could not exercise its jurisdiction for the protection of the rights and interests of minors in such cases, the law extends to them less protection than it extends to adults.

The Reynolds case had, in turn, quoted with approval from Trigg v. Read, in which the court said:

In the cases of family compromise, all that need be said here is that agreements affecting them are upheld with a strong hand, and an equity has been administered in regard to them, which has not been applied to agreements generally, upon the ground that the honor and peace of families makes it just and proper to do so.

Where the trustee insisted that the court had no jurisdiction to approve a settlement because unborn issue of the parties were not, as a class, represented by any person made a party to the complaint, the Supreme Court of Illinois, in Wolf v. Uhlemann, stated:

110 Wolf v. Uhlemann, 325 Ill. 165, 156 N.E. 334 (1927); Matthews v. Doner, 222 Ill. 592, 127 N.E. 137 (1920); Williams v. Williams, 204 Ill. 44, 68 N.E. 449 (1903).
111 204 Ill. 44, 68 N.E. 449 (1903).
112 50 Tenn. (3 Heisk.) 593 at 605 (1870).
113 24 Tenn. (5 Humphr.) 528 at 545 (1845).
114 325 Ill. 165, 156 N.E. 334 (1927).
The theory upon which the unborn members of a class are bound by representation of other members of the same class is, that the interests of the members of the class present in court are such that they are equally certain to bring forward the entire merits of the question so as to give the contingent interests effective protection. The doctrine of class representation has long been recognized in this and other jurisdictions. There can be no question under the authorities that the remaindermen not in esse were represented by living members of the same class who are parties to the suit and that the decree protects appellant [trustee] in making distribution.115

The court therein further stated that:

Undoubtedly, the members of a family are not privileged to alter the terms and provisions of a will merely for the convenience of the family or for the sole purpose of securing greater individual financial advantages than those specified in the will and intended by the testator. However, the rule is well established that courts of equity favor the settlement of disputes among members of a family by agreement rather than by resort to law. Obviously, such an agreement must be obtained without fraud or deception. . . .116

To hold otherwise, the court intimated, would produce prolonged litigation which would result in an expensive material depletion of the estate with family relationships torn asunder.

CHANGING ACCUMULATION PROVISIONS

Courts of chancery have liberally ordered advances from income and principal for the maintenance of minor cestuis contrary to express trust provisions directing accumulation. One of the essentials for the granting of an application in behalf of a minor for maintenance and education out of interest expressly provided for accumulation,117 or out of principal,118 is that an exigency may have arisen which was non-existent at the creation of the trust, and was not anticipated by the creator. As was stated in Stephens v. Howard's Executor:119

The source of the power [to break in upon the terms of a trust which neither expressly nor impliedly authorize such a course] is easy to

115 325 Ill. 165 at 180, 156 N.E. 334 at 339.
116 325 Ill. 165 at 183, 156 N.E. 334 at 340.
118 Barlow v. Grant, 1 Vern. 255, 23 Eng. Rep. 451 (1684); Longwith v. Riggs, 123 Ill. 258, 14 N.E. 840 (1887); Rhoads v. Rhoads, 43 Ill. 239 (1867); Matter of Muller, 29 Hun (N.Y.) 418 (1883).
119 32 N.J. Eq. 244 (1880).
trace. It is found in the fact that the infant is the absolute owner of the property, no other person having either a present or prospective legal interest in it, and that, if the present enjoyment of the property is withheld, the infant must suffer, possibly for the advantage of some person who has no interest in the infant and was never thought of by the testator as a possible recipient of his bounty. 120

Where there was no other property of the minor adequate for his maintenance and education, where the minor was of tender age, without any parent living, and no third person was interested in the fund, the court held in the case of Matter of Charles Potts that in such a case, in equity, interest would be ordered paid for maintenance almost as a matter of course. It declared further that: “Even where a legacy or devise is given to several children, with the benefit of survivorship, and a direction for accumulation during minority, yet, if the chance of survivorship is equal among all, equity would allow maintenance from the interest.” 121

In Knorr v. Millard, 122 the testator left one-fifth of his residue to Knorr’s children or the survivors of them, to be invested at interest by the executor and divided equally between them when they should severally become of age, and in case any of them died under age, leaving children, then to such children should be given the share of their parents. Infant legatees applied for an order to advance money from income on the ground that their father could not adequately support them. In discussing the rights of possible claimants not in esse, the court said:

But inasmuch as these bequests are not contingent except as to time of payment, and as the chances of all the children are equal, the power has been recognized in the court of chancery, in its administration of trusts, to provide for making necessary advances out of the income when the infants are otherwise likely to suffer, even where by the terms of the trust itself an accumulation is contemplated. 123

An English judge believed that “money laid out in the child’s education was most advantageous and beneficial for the infant, and therefore he should make no scruple in breaking into the principal, where so small a sum was devised,

120 32 N.J. Eq. 244 at 247.
121 1 Ashm. (Pa.) 340 at 344 (1831).
122 52 Mich. 542, 18 N.W. 349 (1884).
123 52 Mich. 542 at 544, 18 N.W. 349 at 350.
that the interest thereof would not suffice to give the legatee a competent maintenance and education." He was so emphatic upon the point that he insisted that any trustee refusing to so apply the principal should be subject to removal.

In speaking of the power of the court to anticipate the time of payment of a legacy left by a parent in trust to accumulate for his children, so far as it may be necessary for the maintenance of the beneficiaries, the Illinois Supreme Court once said that it "does not subvert the will, or tend to defeat the intention of the testator, for his children were the darling objects of his solicitude, and were he living, he would undoubtedly make ample provision for them. A court of chancery may do what it is evident from the will the testator would do if living." The same rule has been followed where feeble-minded adults were involved.

The Supreme Court of Tennessee clearly emphasized that doctrine by allowing the withdrawal of income for the education of the beneficiary, contrary to the express terms of the trust that she receive the principal and all accumulated interest when she became twenty-five years of age. The court, in so deciding, said:

A court of equity, acting in loco parentis, or occupying the place of the trust creator, in such case, does what it conceives would have been done by the creator had he foreseen the situation of his beneficiary in a substitution of another course of management in order to the completer realization of his purposed bounty. If this be not competent to be done by a court of equity, it is not difficult to contemplate a situation in which the testator's purposed benefit would be defeated entirely; for example, a seizure of the beneficiary by a disease that would inevitably make her its victim before she had reached the age of twenty-five years. The concept and doctrine may be of comparatively recent declaration and application, but the principle involved commends itself to the court as consonant with justice and the development of an equity system along lines of sound polity.

It is essential, of course, that the infant should have such an absolute title or interest in the trust or its income that the

125 Rhoads v. Rhoads, 43 Ill. 239 at 255 (1867).
126 Longwith v. Riggs, 123 Ill. 258, 14 N.E. 180 (1887).
127 Bennett v. Nashville Trust Co., 127 Tenn. 126 at 129, 153 S.W. 840 at 841 (1913).
right of no other person will be affected by the allowance. Unless he has such an interest, the consent of any person entitled in remainder, whose estate may be diminished in value by the allowance, must be obtained before the application will be entertained. Where children born and to be born have a common interest in a fund, the fund, if necessary, may be applied for the maintenance of the children. The power of equity to provide for the maintenance and education of infant beneficiaries out of a trust fund where no provision was made by the creator has, in England, been specifically authorized since 1860, by a statute known as Lord Cranworth's Act.

III. EQUITABLE JURISDICTION OVER MINORS

It is the duty of a court of equity to invoke its power whenever necessary to fully protect the personal and property rights of minors. The origin of this jurisdiction is a mooted question. In all probability it was claimed by the Crown as parens patrie to protect its subjects. It was a part of the king's executive power, especially as general guardian over all infants, and did not belong to the court of chancery under its general judicial functions. This branch of legal authority was delegated to the chancellor as the personal representative of the crown to be exercised by him alone and not by the court of chancery. Corresponding jurisdiction over the person and property of lunatics and all others who may be found non compos mentis, seems likewise to have been derived by delegation from the crown. This

132 In re Woman's North Pacific Presbyterian Bd. Missions, 18 Ore. 339, 22 P. 1105 (1890); Losey v. Stanley, 147 N.Y. 560, 42 N.E. 8 (1895).
theory has, however, been rejected by eminent English and American writers and jurists in favor of an inherent original jurisdiction of equity over infants as part of its general jurisprudence.\textsuperscript{134} Despite the source of authority, courts of equity have from earliest times regarded infants as their special wards and the guardianship thus provided has proven of great advantage in the preservation of the personal and property rights of infants.\textsuperscript{135} This is also true when the court has dealt with a trust created for the benefit of an insane person, or one under legal disability.\textsuperscript{136}

In the exercise of that jurisdiction, courts of equity may direct to be done whatever may be necessary to preserve the estate of an infant and the income derived therefrom.\textsuperscript{137} Thus where an infant has the right to elect between different remedies or provisions, such as the right to elect one of two or more bequests in a will, equity may take jurisdiction to elect for the infant.\textsuperscript{138} In fact, it is one of the primary func-

\textsuperscript{134} Hills v. Pierce, 113 Ore. 386, 231 P. 652 (1924).

\textsuperscript{135} United States v. Morse, 218 U. S. 493, 31 S. Ct. 37, 54 L. Ed. 1123 (1910); Witter v. Cook County Com'rs., 256 Ill. 616, 100 N.E. 148 (1912); Lynch v. Rotan, 39 Ill. 14 (1865); Hamilton v. Traber, 78 Md. 26, 27 A. 229 (1893); Bowles v. Troll, 190 Mo. App. 108, 175 S.W. 324 (1915); Losey v. Stanley, 147 N.Y. 560, 42 N.E. 8 (1895); In the Matter, etc., of Hubbard, 82 N.Y. 90 (1880); Eyre v. Shaftsbury (Countess of), 2 P. Wms. 103, 24 Eng. Rep. 659 (1722).

\textsuperscript{136} In Davis v. Mather, 309 Ill. 284 at 290, 141 N.E. 209 at 211 (1923), the court said: "It cannot be seriously questioned that a court of equity, when an application is made in apt time, has power to elect for an insane spouse incapable, by reason of want of capacity, of personally making an election. . . The jurisdiction of a court of probate over the estate of an incompetent was and is equitable. . . It has power to order that done which is for the best interest of the estate of the ward." See also Sippell v. Wolff, 333 Ill. 284, 164 N.E. 678 (1928); McCartney v. Jacobs, 288 Ill. 568, 123 N.E. 557 (1919); Longwith v. Riggs, 123 Ill. 258, 14 N.E. 180 (1887). In Dodge, Conservator v. Cole, 97 Ill. 338 (1881), the right of revocation originally reserved in the instrument was also held assertable by a conservator or by a court of equity. After tracing the powers of chancery, the Supreme Court reviewed the general and fundamental principles of courts of equity and the differences and similarities in the English and the American courts' conceptions of real and personal property. The court relied upon the powers of chancery courts to order sales of the property of infants.


tions of the court to protect all of the interests of minors, even on its own motion. Infancy is sufficient for most courts to sustain jurisdiction, whether relief is asked in the pleadings or not. A complaint cannot be taken as confessed against a minor and a guardian ad litem cannot bind his infant ward by any admissions in the answer.

The general jurisdiction of a court of equity of course can be invoked only when the court is given jurisdiction over the infant and the subject matter in accordance with the usual practice of equity, such as by the commencing of a suit of regular procedure in the court or by intervention in such a suit, which will make him a ward of the court. The court thereby becomes his guardian in contemplation of law. A minor settlor may disaffirm his trust transfer until he reaches his majority, and where a trust is created for the benefit of an infant during his minority, it will so continue until he becomes of age, unless a longer duration is intended. Where it is provided that the trust is to continue during his minority or until his marriage, it will terminate upon the beneficiary's marriage.

CONCLUSION

The trust has always been recognized as a device for family security and while it may be intended to insure fi-

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139 Gibbs v. Andrews, 299 Ill. 510, 132 N.E. 544 (1921); Feldott v. Featherstone, 290 Ill. 485, 125 N.E. 361 (1919); Mechling v. Meyers, 284 Ill. 484, 120 N.E. 542 (1918); Losey v. Stanley, 147 N.Y. 560, 42 N.E. 8 (1895).


141 Mechling v. Meyers, 284 Ill. 484, 120 N.E. 542 (1918); Thomas v. Thomas, 250 Ill. 354, 95 N.E. 345 (1911); Williams v. Williams, 204 Ill. 44, 68 N.E. 449 (1903); White v. Glover, 59 Ill. 459 (1871); Bernstein v. Bernstein, 176 N.Y.S. 820 (1919).

142 Mason v. Truitt, 257 Ill. 18, 100 N.E. 202 (1912); Roe v. Angevine, 7 Hun (N.Y.) 679 (1876).

143 Rhoads v. Rhoads, 43 Ill. 239 (1867).

144 Thomas v. Thomas, 250 Ill. 354, 95 N.E. 345 (1911); Downin v. Sprecher, 35 Md. 474 (1871).

145 Mechling v. Meyers, 284 Ill. 484, 120 N.E. 542 (1918); Thomas v. Thomas, 250 Ill. 354, 95 N.E. 345 (1911); Curtiss v. Brown, 29 Ill. 201 (1862).


148 Nunn v. Peak, 130 Ky. 405, 113 S.W. 493 (1908).

149 Hughes v. Rhodes, 18 Ky. L. 457, 37 S.W. 489 (1896); Newman v. Dotson, 57 Tex. 117 (1882).
nancial independence to the surviving members after death, it has a broader function in preserving the family's general well-being. We have clung too long and too tenaciously to the outworn rule that the trust instrument is the trustee's charter and all of its terms must be rigidly observed. Too much consideration is given to what the testator said and meant under different circumstances and conditions, and too little to what he would have said or done in view of the unexpected turn of events, if he realized it was for the best interests of his loved ones. It seems rather the wiser course for a court of equity to place itself in the testator's position and to do what he would do to accomplish his primary purpose.

This policy was well defined in *Curtiss v. Brown*, where it was said:

Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency.\(^{1}\)

It is the responsibility of the chancellor to ascertain and carry into effect what is advantageous for the minor just as a father would act for a child under similar circumstances. That power should be exercised with great caution and each case should be dealt with according to its own special circumstances, but where it is clearly beneficial to the infant cestui, even though it is not absolutely necessary, the court, like the father, should be in a position to approve it. The modes in which these benefits may be accomplished are not so vital as the ultimate welfare of the minor cestui. The trust is created for his benefit and it is his interest which should be given primary consideration, consistent with the rights of others.

\(^{1}\) 29 Ill. 201 at 230 (1862).