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Testamentary Designations of Attorneys and Other Employees

Jean Fleming Powers

TESTAMENTARY DESIGNATIONS OF ATTORNEYS AND OTHER EMPLOYEES

JEAN FLEMING POWERS*

I. INTRODUCTION

The power to control the distribution of one's estate is generally expected and even taken for granted by most American testators.[1] Although some limitations are expected,[2] such as limi-

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* Associate Professor of Law, South Texas College of Law, Houston, Texas; J.D., University of Houston Law Center, 1978; B.A., University of Texas at Austin, 1970. The author gratefully acknowledges the helpful comments of Associate Dean Sandra DeGraw, South Texas College of Law.

1. "Where not expressly limited by local statute, the power of a testator to dispose of his realty, as well as his personalty, by last will and testament, has always been recognized in the United States." 1 W. BOWE, D. PARKER, W. PAGE, PAGE ON WILLS § 2.18, at 59 (3d ed. 1960) (hereinafter PAGE ON WILLS).

2. Generally the "right" to dispose of property by will is not considered to be constitutionally protected. The states are therefore free to set certain limitations. As the United States Supreme Court held in Irving Trust Co. v. Day:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the owner of testamentary disposition over property within its jurisdiction.

Irving Trust Co., 314 U.S. 555, 555-56 (1942). *But see* Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906), in which the Supreme Court of Wisconsin stated:

> That there are inherent rights existing in the people prior to the making of any of our Constitutions is a fact recognized and declared by the Declaration of Independence, and by substantially every state Constitution. Our own Constitution says in its very first article: "All men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness . . . ." Unquestionably this expression ["pursuit of happiness"] covers the idea of the acquisition of private property; not that the possession of property is the supreme good, but that there is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoy-

tations on the amount of wealth that may be transferred,[3] limitations on the length of time the testator may control his property after death,[4] and restrictions on the use of property,[5] the testator's intent is still of paramount importance in determining the distribution of his estate.[6] In fact, some of the *limitations* on the ability to direct the distribution of property are designed to give effect to the testator's real intent, for example, by protecting him from undue pressures which might thwart that intent.[7]

The testator controls not only the disposition of assets, but also can determine who will handle the disposition by appointing an executor and, in some cases, trustees and/or guardians.[8] Indeed many testators seek to extend their control a step further and determine the employees to be engaged for certain purposes by their fiduciaries or beneficiaries.[9]

> able, which shall be his very own, *and which he may dispose of as he chooses, or leave to his children or his dependents at his decease.* To deny that there is such universal desire, or to deny that the fulfillment of this desire contributes in a large degree to the attainment of human happiness is to deny a fact as patent as the shining of the sun at noonday.

Nunnemacher, 129 Wis. at 200-201, 108 N.W. at 629 (emphasis added). *Accord*, *In re* Estate of Devroy, 109 Wis.2d 154, 157, 325 N.W.2d 345, 346 (1982).

3. Estate taxes, in a very real sense, limit the amount of wealth which can be freely transferred by will. *See* 1 PAGE ON WILLS, *supra* note 1, § 3.1, at 67.

4. The rule against perpetuities limits the length of time a United States testator may continue to control the use of his property after his death. *See generally* T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS, Ch. 8, 1, at 178 (2d ed. 1984).

5. There are some circumstances

> . . . in which unnatural provisions will be denied effect. In order to conserve and protect the deceased's property, the courts will refuse to enforce destructful provisions in the will, such as those that provide for the burning of money, or that testator's house should be boarded over and left vacant for a long period, or that his farm should go uncultivated and unworked; and of course gifts given for illegal purposes will also be declared void.

1 PAGE ON WILLS, *supra* note 1, § 3.11, at 94.

6. 4 PAGE ON WILLS, *supra* note 1, 30.6 (1961); *see also* Bankers Trust of South Carolina v. Truesdale, 237 S.E.2d 45, 48 (S.C. 1977).

7. Where the testator is acting under undue influence, mistake, or fraud, the will may be found to be invalid, although it technically reflects the "intent" of the testator when executed. 1 PAGE ON WILLS, *supra* note 1, § 5.7, at 175-76.

8. *See generally* J. GRUBATZ, I. BLOOM, & L. SOLOMON, ESTATES AND TRUSTS: CASES, PROBLEMS AND MATERIALS 3.02 [B] [1], at 62 (1989); J. RITCHIE, N. ALFORD, JR., R. EFFLAND, DECENDANTS' ESTATES AND TRUSTS, Chapter 17, 1, at 1168-69 (6th ed. 1982); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 108, at 602 (2d ed. 1953).

9. 1 PAGE ON WILLS, *supra* note 1, § 5.5, at 169.

Seeking this extra degree of control, however, potentially creates more problems and can actually defeat the intent of the testator. First of all, since personal services are involved in the employment relationship, personal discord and dissatisfaction, and even financial losses to the estate or beneficiary, may result if the direction is followed. Further, in trying to construe a will containing such designations of employment, courts must choose among a range of interpretations. The interpretation chosen could result in consequences not intended by the testator, such as the failure of the executor to qualify, the failure of a designated bequest,[10] or a loss to the estate beneficiaries due to claims by the named employee. Finally, the problem of unintended results is exacerbated by the fact that the decisions in this area have too often been made by looking more at the type of employment involved than at the intent of the testator, thereby giving little guidance for cases in which the facts do not match the facts of the precedents.

This article sets forth a clear, principled analysis by which many of the problems in will construction can be alleviated. Such an analysis requires appropriate consideration of the testator's intent, his freedom to create conditions in the will, and the relationship between the two. Under this type of analysis, the result is not dictated by the nature of the employment. However, the type of employment has some influence on the result, since it has some bearing on the testator's intent. As is so often the case concerning written legal documents, the problems can be virtually eliminated by drafting with an awareness of the pitfalls and clearly stating the testator's intent as to how those pitfalls are to be avoided.

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10. While the terms devise and bequest have specific legal meanings in relation to the character of the property involved, they are sometimes used interchangeably. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 1, at 4 (2d ed. 1953). Throughout this paper, the term "bequest" will refer to the testamentary disposition of both real property and personal property.

II. PROBLEMS CREATED BY TESTAMENTARY DESIGNATIONS OF EMPLOYMENT

A. DIFFICULTIES IN THE EMPLOYMENT RELATIONSHIP - POLICY CONSIDERATIONS

The cases dealing with testamentary designations of employment involve many different employment relationships, including designations of attorneys, accountants, real estate agents, and business employees. The common thread in all of these cases is the personal services nature of the relationship. For example, in the Texas case of *Kelley v. Marlin*,[11] the testator had directed that his long time real estate agent be hired to handle the sale of certain real property devised to his wife. The majority found the provision to be enforceable.[12] The decision was based on the testator's expression of intent in "clear, unambiguous, and mandatory language" and on extrinsic evidence of the surrounding circumstances of the "professional and personal relationship" between the testator and the designated agent.[13] However, the difficulty in deciding this case is underscored by the fact that it was decided on rehearing, more than a year after the original opinion was delivered.[14] In that opinion, the Court had found the direction to employ to be *unenforceable* based on the language used in the will[15] and on a policy against finding the intent to force the parties into a personal services relationship.[16]

The real difficulty in this case, as pointed out in the final dissenting opinion, is the fact that the "exclusive real estate contract would require Bill Marlin to perform personal services for Inez Drummet and would create a fiduciary relationship of trust

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11. 714 S.W.2d 303 (Tex. 1986).

12. *Id.* at 305.

13. *Id.* at 305; *contra In re* Estate of Fresia, 390 So.2d 176, 178 (Fla. Dist. Ct. App. 1980) in which, unlike the Texas Court in *Kelley*, the court found a designation of a particular real estate agent to be advisory only, due to the fiduciary nature of the relationship.

14. The original opinion was delivered May 8, 1985. 28 Tex. Sup. Ct. J. 410 (May 8, 1985), *withdrawn* 714 S.W.2d 303 (Tex. 1986).

15. *Id.* at 411-12.

16. *Id.* at 412.

and confidence" between the parties.[17] As the Texas Court stated in its first *Kelley* opinion, each "person has unique qualities, and each person has unique frailties. Tempers, personalities, and abilities vary from person to person. Because people are unique, personal relationships are unique."[18] Thus, these policy considerations involved in the creation of the personal relationship have frequently led courts to look unfavorably at enforcement of such provisions.[19]

While the cases involve many types of personal services, the policy concerns are most frequently advanced in relation to testamentary appointments of an attorney to represent the estate.[20] One of the leading cases in this area is a case decided by the Supreme Court of California in 1894, *In re Ogier's Estate*.[21] The court first pointed out that "[t]here is no such office or position known to the law as 'attorney of an estate'," and that when an attorney serves in the probate or administration of an estate, he acts for the executor and not for the estate.[22] The real objection which the court had, and which other courts have had in similar cases,[23] is that the executor will be liable to the legatees under the will for mistakes made by the attorney.[24] The court said that

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17. 714 S.W.2d at 308 (Wallace, J., dissenting). The dissent also sets forth the argument that a direction to the beneficiary to employ a named real estate agent to sell devised property should be unenforceable because it mandates performance of non-delegable duty "contrary to the established law of both contracts and wills." *Id.* (Wallace, J., dissenting). However, this description is inapposite since such designations do not really involve the delegation of duties already in existence, but the creation of the duties in the first instance.

Thus, rather than being a question of delegation, what is involved is more like a situation in which one party hires another to perform a personal service for a third party, such as one person hiring an attorney to defend a third party on a criminal charge, or hiring a doctor to care for a third person. *See infra* note 68 and accompanying text. A competent third party beneficiary in this situation could certainly decline the services offered, but not based on any delegation argument. Likewise, delegation is not really the question when a direction to employ is made, and the objections to such directions must have another basis.

18. *Kelley*, 28 Tex. Sup. Ct. J. at 412.

19. 1 PAGE ON WILLS, *supra* note 1, § 5.5, at 171.

20. *Id.* at 170.

21. 101 Cal. 381, 35 P. 900 (1894).

22. *Id.* at 385, 35 P. at 901. *See also e.g.*, *In re* Braasch's Estate, 274 Wis. 569, 572, 80 N.W.2d 759, 761 (1957) in which the court stated that "[h]istorically, the attorney for the executor was by no means so essential . . . An attorney's claim for services is normally against the Executor or Administrator . . ."; *In re* Mark's Estate, 83 So.2d 853 (Fla. 1955).

23. 1 PAGE ON WILLS *supra* note 1, § 5.5, at 170.

24. *In re* Ogier's Estate, 101 Cal. at 385, 35 P. at 901. *See also In re* Caldwell, 188

> . . . if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator.[25]

B. Potential for Unintended Results

The possibilities for interpretation of a testamentary designation of employment cover such a wide range that a court, not having adequate evidence of intent, could select an interpretation that would produce results not intended by the testator. At one extreme, the court could view the designation of employment of an individual by the estate as an unconditional bequest of the compensation which would be "earned" in the employment, based on a finding that that is the testator's intent. Under such an interpretation, the bequest is carried out even if the designated service never occurs. Thus, in *In re Trybom's Will*[26] the court found that the testator's bequest to his associate of his interest in his office furniture and library, and one-half of his interest in pending legal matters " 'in consideration of the services to be rendered in the probate of this my last Will and Testament' " was really a "reward to his office associate."[27] The court held that the gift was to be carried out in spite of the fact that the executor refused the associate's written offer of her services as attorney for the estate.[28]

Yet if the court were wrong in its interpretation of the tes-

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N.Y. 115, 80 N.E. 663 (1907), in which the court stated:

> The law of this state does not recognize any testamentary power to control executors in the choice of the attorneys or counsel who shall act for them in their representative capacity. They may incur a personal liability for the conduct of their lawyers, and hence are beyond the contact of their testator in making the selection.

Id. at 121, 80 N.E. at 664.

25. *In re* Ogier's Estate, 101 Cal. at 385, 35 P. at 901.
26. 277 N.Y. 106, 13 N.E.2d 596 (1938).
27. *Id.* at 108, 13 N.E.2d at 597.
28. *Id.*

tator's intent, there would be a loss to the estate without the receipt of services in return. The will in *Trybom's* is in fact open to another interpretation. Certainly, if an outright gift were intended, it could have been more clearly expressed.[29] As the dissenting justice forcefully pointed out, if the testator's "purpose was to make an absolute gift to appellant, without proviso or condition, this will demonstrates that he possessed the skill to express it by the omission of all unnecessary words."[30] Further, where the gift is nonetheless couched in terms creating an employment relationship, the "inference must be drawn that this testator expected his estate to receive a quid pro quo, and that, in consideration of this gift, his estate would be otherwise free from expenses in the probation of his will."[31] In fact, the employment designation itself is strong evidence of intent that there be no outright gift, and another interpretation may be more likely to comport with the testator's intent.

At the opposite extreme, the court could find that the designation, rather than creating an absolute right in the designated employee, creates no enforceable rights or obligations at all. Certainly many of the potential problems that are created by employment designations could be avoided by construing the designation to be precatory rather than binding.[32]

In an early Kentucky case,[33] the language, " 'I desire that my friend Robert M. Jewell be retained in the employ of the firm . . .' " was interpreted as importing "no more than an expression of the testator's desire."[34] Likewise, the Supreme Court of Iowa in *In Re Myers' Estate*[35] found that the testator's ex-

29. *Cf.* Zeltserman v. Woods, 333 Mass. 34, 127 N.E.2d 667 (1955), in which the person named to receive the residue of a trust, the beneficiary having predeceased the testator, was also named executor and trustee. When he declined to serve as such, the heirs at law argued that he should forfeit the property for failure to perform the implied condition of service. The court, however, looked at the language of the will—the gift was in the beneficiary's own name rather than as trustee, and an alternate trustee was named but not given any legacy—and the circumstance that it seemed unlikely the entire estate would be given merely as compensation, and found that the property was an outright gift. *Id.* at 36, 127 N.E.2d at 668.

30. *In re Trybom's Will*, 277 N.Y. at 109, 13 N.E.2d at 597 (O'Brien, J., dissenting).

31. *Id.* at 109-10, 13 N.E.2d at 597 (O'Brien, J., dissenting).

32. *See* 1 PAGE ON WILLS, *supra* note 1, § 5.5, at 170, 171.

33. Jewell v. Barnes' Adm'r, 110 Ky. 329, 61 S.W. 360 (1901).

34. *Id.* at 332, 61 S.W. at 361.

35. 234 Iowa 502, 12 N.W.2d 211 (1944).

pressed wish in his will that his wife appoint the executors as her agents for certain purposes was "not a direct appointment . . . but merely a request — a precatory request," which imposed no obligation on the widow.[36]

Yet interpreting the language as merely precatory also has the potential for producing a result not intended by the testator. Therefore, any determination that the language is precatory must at least be based on a finding that that is the testator's actual or presumed intent, and should not be made if it will thwart the testator's true intent.[37]

The Supreme Court of Pennsylvania in *In re Hand's Estate*[38] construed the language " 'I request my executor . . . to employ my son, as far as it finds he can be of benefit to my estate, and to pay him for his services such compensation as it shall deem just and adequate' "[39] to be mandatory.[40] The finding was based on "the relations which existed between father and son and their past business connections,"[41] and the rule of construction that words of request directed to an executor are generally considered binding rather than precatory.[42] Of course, a construction based on an interpretation of circumstances and rules of law also has at least the potential for undermining the testator's true intent.

C. Inconsistency in Decisions

Given the potential for thwarting the testator's intent, courts need to utilize a principled examination of the testator's intent, thereby increasing the likelihood that the true intent will

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36. *Id.* at 511, 12 N.W.2d at 215.

37. The finding of intent generally goes beyond the literal words of the will. In *Bankers Trust of South Carolina v. Truesdale*, the court construed the words "subject to the following terms and conditions," where the condition was beyond the control of the beneficiaries, to be merely precatory so that the bequest would not be defeated by failure of the condition. *Truesdale*, 237 S.E.2d 45, 49 (S.C. 1977).

38. 315 Pa. 238, 172 A. 666 (1934).

39. *Id.* at 240, 172 A. at 667.

40. *Id.* at 244, 172 A. at 669.

41. *Id.*

42. *Id.* (citing 49 A.L.R. Annotated 31; Presbyterian Board of Foreign Missions v. Culp, 151 Pa. 467, 25 A. 117 (1892); Edwards' Estate, 255 Pa. 358, 99 A. 1010 (1916); Stinson's Estate, 232 Pa. 218, 81 A. 207 (1911), 36 L.R.A. (N.S.) 504).

be given effect. Yet all too frequently the courts seem to base decisions regarding directions of employment arbitrarily on the type of employment involved. This focus on the type of employment is especially apparent where the designation is for the selection of an attorney.[43]

The great weight of authority is that a purported appointment of an attorney is not binding[44] and gives the attorney no beneficial interest in the estate.[45] For many years, the Louisiana decisions had formed a notable exception to this rule.[46] In the 1929 case of *Rivet v. Batistella*[47] the Louisiana Supreme Court declined to follow the lead of the states which find such designations to be non-binding.[48] The court focused more on the intent of the testator than the problems involved in "forcing" this kind of personal services relationship, although it did recognize the latter.[49] After citing several cases in line with majority view, the court noted that those cases all

> proceed upon the theory that the naming of an attorney may be distasteful or disadvantageous to the executor, and entirely overlook the fact that the testator may impose such conditions as he sees fit on his executor, and the latter is free to

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43. *See* 1 PAGE ON WILLS, *supra*, note 1, § 5.5, at 170.

44. *Id. See* Carton v. Borden, 8 N.J. 352, 85 A.2d 257, 259 (1951) in which the court stated:

> A majority of the courts have taken the view that it is unjust to the trustee to compel him to employ as an attorney a person in which he may lack confidence, where the result might well be disastrous to the administration of the trust, and that it is therefore against public policy to compel the trustee to employ him.

See also e.g., Mason & Mason v. Brown, 182 S.W.2d 729 (Tex. Civ. App. 1944) (*writ ref'd w.o.m.*); Robinson's Ex'rs v. Robinson, 297 Ky. 229, 235, 179 S.W.2d 886, 889 (1944) (dictum).

45. In re Pickett's Will, 49 Or. 127, 137-38, 89 P. 377, 380 (1907), involved an attack on the validity of the will based on the argument that the attorney named in the will as attorney for the estate was disqualified as a subscribing witness to the will. The court found that the designation did not confer a beneficial interest in the estate in that it was not binding on the executor. Therefore, he was not disqualified as a witness.

46. 1 PAGE ON WILLS, *supra* note 1, 5.5, at 170. *See* Succession of the Falgout, 279 So.2d 679 (La. 1973), in which the court stated that "[s]uch a designation becomes a condition of the legacies and the executor's appointment." *Id.* at 681. *See also* Succession of Pope, 230 La. 1049, 89 So.2d 894 (1956); Succession of Rembert, 199 La. 743, 7 So.2d 40 (1942).

47. 167 La. 766, 120 So. 289 (1929).

48. *Id.* at 769-70, 120 So. at 290.

49. *Id.* at 770, 120 So. at 289-90.

> accept or decline the trust if not satisfied with the conditions imposed.[50]

If the real concern is what is "distasteful" or "disadvantageous," it seems unclear why appointments of attorneys are generally unenforceable, whereas other types of appointments and conditions on gifts by will receive greater acceptance.[51] Certainly appointments in other areas have as much potential for being "distasteful" or "disadvantageous" to the executor or beneficiaries as the appointment of an attorney. For example, "keeping the accounts" of the estate, a designation which has been found to be enforceable,[52] has the potential for creating significant problems for the executor. Further, a direction to employ the testator's son to carry on the testator's business, also upheld,[53] can have significant impact on anyone with an interest in the estate. Problems can also be encountered, as the dissenting justice in *Kelley v. Marlin* pointed out, where a real estate agent is appointed.[54] An analysis which superficially focuses on the type of employment increases the likelihood of arbitrary decisions that do not address the real impact on the executor in any consistent way.

III. A SUGGESTED FRAMEWORK FOR ANALYSIS OF TESTAMENTARY APPOINTMENTS

A. OVERVIEW

A lot of the inconsistencies and unintended results could be alleviated by the use of a more principled and logical legal analysis. Such an analysis involves a recognition of the power of the testator to create certain conditions in his will, and an examination of two potential conditions in light of the intent of the testator. Further, the result is not dictated by the type of employment, except to the extent that the type of employment is relevant to determining testator's intent.

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50. *Id.*
51. 1 PAGE ON WILLS, *supra* note 1, § 5.5, at 171.
52. *Id.* at n. 12 (citing Harker v. Smith, 41 Ohio St. 236 (1884)).
53. *In re* Hand's Estate, 315 Pa. 238, 172 A. 666 (1934).
54. *Kelley*, 714 S.W.2d 303, 308-09 (Wallace, J., dissenting).

B. Conditions and Intent

1. *The Two Conditions*

Testators are generally free to create any conditions they want in a will, as long as they are not against public policy.[55] A direction to an executor or beneficiary to employ a named individual, potentially involves two conditions. First of all, hiring the designated employee may be a condition which must be fulfilled before the named executor can be appointed, or the named beneficiary can receive the bequest.[56] For example, in *Rivet*, the court stated that an executor who would not accept the condition of employing a designated attorney could "decline the trust,"[57] indicating that he could *accept* the trust *only* if he agrees to fulfill the condition. Second, the performance of the employee may also be a condition to the receipt of payment.[58] Thus, in *Browne v. Bayonne Trust Co.*,[59] the funeral director specified by the testator, who was not hired and therefore did not serve, had not fulfilled this condition and thus had no claim against the estate.[60] In other words, the bequest or appointment could be conditioned on hiring the designated employee, and the compensation of the employee could be conditioned on service.

Looking at the first possibility, the coercive effects of the "condition" are obvious. If the right to receive a substantial gift or appointment is conditioned on hiring a designated individual, there is considerable pressure to hire that individual. Recognizing the coercive effect of the condition, and considering the policy favoring freedom of choice where personal services are involved,[61] courts sometimes hold that the interest in freedom of choice outweighs the normally paramount consideration of the

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55. 5 Page on Wills, *supra* note 1, 44.3, at 401 (1962).

56. "Where it clearly appears that the gift was only upon condition precedent that the devisee should perform some act, the devise will not take effect unless the condition is complied with . . ." *Id.* 44.6.

57. *Rivet*, 167 La. at 770, 120 So. at 290.

58. 1 Page on Wills, *supra* note 1, § 5.5, at 171.

59. 118 N.J.L. 396, 193 A. 179 (1937).

60. *Id.*

61. *See Kelley*, 714 S.W.2d at 308, (Wallace, J., dissenting); *Kelley*, 28 Tex. Sup. Ct. J. at 412.

intent of the testator.[62] As to the second condition, a decision such as one described in *Browne* could result in the loss of a benefit which the testator actually intended to confer on the designee.[63] Either analysis potentially defeats the testator's intent. Yet by analyzing the cases in light of the two conditions, it is still possible to look primarily to the testator's intent without violating any significant policy concerns, or any legal rules related to conditions.

2. *Intent of the Testator*

A key factor in examining the intent of the testator is deciding whether his main intent in directing the employment is to benefit the estate or beneficiary on the one hand, or the employee, on the other hand. Actually, as pointed out by Professor Scott in his article *Testamentary Directions to Employ*,[64] a dual benefit is often contemplated.[65] Nonetheless, at least some intent to benefit the employee is crucial to his ability to seek redress. If the sole intent is to benefit the estate or beneficiary, the designated employee would be merely an incidental beneficiary of the designation,[66] with no standing to complain if not employed.[67]

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62. *Id. See also* 1 PAGE ON WILLS, *supra* note 1, § 5.5, at 171. As to the primacy of the testator's intent generally, *see supra* PAGE ON WILLS, note 1, 30.6, at 26 (1961).

63. In *Browne*, the direction to appoint a designated funeral director, obviously reflecting the testator's intent, was defeated by a holding that the designee who, not having actually performed, had no enforceable right in the designation. *Browne*, 193 A. 179.

64. Scott, *Testamentary Directions to Employ*, 41 HARV. L. REV. 709 (1928).

65. As Professor Scott stated:

> [The testator] may intend to confer a benefit both upon the *cestuis que trust* and upon the designated person, and thus to kill two birds with one stone. The testator may desire to reward an old employee for his past services by assuring him a continuation of his position, or he may desire to give a position to a relative or friend; and this he may do because he also thinks that the designated person is the person most competent to fill the position.

Id. at 713.

66. *See infra* notes 71-73 and accompanying text.

67. Scott, *supra* note 64, at 713. In *In re Platt's Will*, the court found that, while the direction to the guardian of the testator's son to continue the employment of testator's housekeeper was binding on the guardian, it was given entirely for the son's benefit, and therefore conferred no right on the housekeeper. *In re* Platt's Will, 205 Wis. 290, 297, 237 N.W. 109, 112 (1931).

This result is apparent when the relationship is examined as a third party beneficiary relationship. In a third party beneficiary contract, the promisor promises to do something which will benefit a third party, and the promisee exacts the promise with the intent to benefit the third party.[68] If there were a contract between the testator and the fiduciary or beneficiary, such that the latter promised to hire the employee if a certain gift or appointment were made, then the employee would be a third party beneficiary with enforceable rights in that agreement (assuming the requisite intent to benefit).[69]

In the context of the direction to employ, there is not really a contract, but there is a relationship created between the testator, the employee, and the executor or beneficiary. There may be, in essence, an implied contract based on acceptance of a gift or appointment which was conditioned on hiring the designated employee.[70] The testator directs the employment, much as the promisee exacts a promise, and the "employee" will benefit by the hiring in the same way that a third party beneficiary benefits from the performance of the promisor in a third party beneficiary contract. In both cases, however, that expected benefit only gives rise to a cause of action if the beneficiary is an intended, rather than an incidental, beneficiary.[71]

> A person who incidentally benefits from the performance of a trust has no better standing to enforce the trust or to recover damages for a breach of trust than has an incidental beneficiary of a contract to enforce the contract or to recover damages for a breach of the contract.[72]

Where the employee is an incidental beneficiary, he has no rights against the estate.[73] For example, in *Browne*, *supra*, the Supreme Court of New Jersey declined to find that the executor had a duty to employ the undertaker designated by the testator.

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68. *See generally* E. FARNSWORTH, CONTRACTS §§ 10.2 and 10.3 (1982); J. CALAMARI & J. PERILLO, CONTRACTS 17-1 (3d ed. 1987).

69. *See e.g.*, Seaver v. Ransom, 224 N.Y. 233, 120 N.E. 639 (1918). *See also* 2 S. WILLISTON, WILLISTON ON CONTRACTS 370, at 908-12 (1959).

70. *See e.g.*, Seaver V. Ransom, 224 N.Y. at 241, 120 N.E. at 642; 2 WILLISTON, *supra* 370, note 69, at 912-913.

71. RESTATEMENT (SECOND) OF CONTRACTS § 315 (1981).

72. Scott, *supra* note 64, at 713.

73. *Id.*

It stated, "In our view the will was not a legacy in favor of the respondent, nor did it establish any rights for his benefit. It was simply a direction to the executor in which the respondent had no interest or legal right."[74] Where there is sufficient actual intent to benefit the employee, however, a remedy must be fashioned which will as nearly as possible effectuate the testator's intent.

For example, in *Kelley v. Marlin* the executor hired the testator's wife's son by a prior marriage to sell real estate that was to be sold by Mr. Marlin under the terms of the will.[75] It would seem that the testator intended not only a benefit to the estate based on his respect for Mr. Marlin's abilities, but also intended to give a benefit to Mr. Marlin due to the longstanding relationship between the two. In such a case, the fiduciary or beneficiary generally should not and will not be allowed to thwart the testator's intent by hiring someone else.

If it is decided that the testator really intended to benefit the employee, and that intent should not be frustrated, the question becomes one of how the benefit will be conferred, and what effect the failure to hire has on the named executor or beneficiary. A possible remedy for the disappointed designee would be one of specific performance. This is clearly not a desirable remedy due to the personal services nature of the employment.[76] Professor Scott thoroughly explored and rejected this remedy in his work,[77] and, in fact, it is not generally seriously considered as an available remedy in such cases,[78] although the compensation may in fact be paid as if the employee had performed.[79] Of course, a finding that carrying out the designated employment is a condition to receipt of a gift could have almost the same effect, since many beneficiaries may comply with the condition rather than forfeit the bequest. Likewise, if an executor cannot be appointed unless he agrees to stated conditions, either he will comply, or another executor will be appointed who will comply.

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74. 118 N.J.L. 396, 193 A. 179 (1937).

75. 714 S.W.2d 303, 305 (Tex. 1986).

76. *See generally* FARNSWORTH, *supra* note 68, § 12.4, at 822; CALAMARI AND PERILLO, *supra* note 68 16-5, at 666-67.

77. Scott, *supra* note 64, at 720-22.

78. *Id.* at 721 n. 31.

79. *See infra* note 108 and accompanying text.

3. *Conditional Bequests and Appointments*

This forfeiture of the bequest or appointment will not attain unless it is decided that a condition is intended. In order to find this, it must be determined that the intent that the employment occur is sufficiently strong that the failure to employ should cause a forfeiture of the bequest or appointment. There are cases generally where a condition is clear and, if not fulfilled, will cause such a forfeiture.[80] However, this intent must be clear and a condition will not be created by implication to cause a forfeiture not intended by the testator.[81] In *Kelley v. Marlin*,[82] for example, although it is reasonable to find that the testator intended to benefit his longtime real estate agent by appointing him under the will, it is not likely that the intent was so strong that he would want his wife to forfeit her interest for failure to perform the "condition."

This forfeiture can be avoided by finding that no condition was intended, and that, at most, the designation creates a charge against the estate rather than a forfeiture of the entire estate.[83] Cases dealing with "conditional gifts" are enlightening in this regard, in that the reasoning related to forfeiture in those cases can be carried over to the employment designation cases.[84] In the "conditional gift" cases, the forfeiture is generally[85] avoided by creating a charge or lien against the devised property to fulfill the "condition," while still allowing the bequest to be carried

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80. The number of potential conditions seems to be limited only by the imagination of the testator. Testators have, for example, attached to the receipt of a bequest conditions as to birth of issue, marriage, divorce, religious belief, insolvency, and use of property. *See generally*, 5 PAGE ON WILLS, *supra* note 1, §§ 44.21-44.33 (1962).

81. *Id.* 44.2.

82. 714 S.W.2d 303 (Tex. 1986).

83. *See infra* note 86 and accompanying text.

84. Many of the cases involve a condition of support or payment to another, although the reasoning could also apply to a direction to hire a named individual. *See Kelley*, 714 S.W.2d at 305.

85. The terms used may be different in some cases, with some courts using a "condition subsequent" finding to avoid the forfeiture. For example, the Supreme Court of Georgia used this reasoning in Raby v. Minshew, 238 Ga. 41, 231 S.E.2d 53 (1976) dealing with a devise to testator's son and daughter on the condition that they care for testator's wife during her lifetime. The court construed this to be a condition subsequent, rather than precedent, so that performance would be excused due to impossibility, the wife having predeceased the testator. *Id.* at 42, 231 S.E.2d at 54. *See generally* 5 PAGE ON WILLS, *supra* note 1, 44.4 (1962).

out.[86]

For example, in *Whicher v. Abbot*,[87] the testator's property, which included real property, was devised to one of his sons on the "condition" that he provide support and maintenance for the testator's incompetent son for the rest of the latter's lifetime. The competent son predeceased the incompetent. Therefore, it was impossible for him to completely fulfill the condition. The court refused to construe the language as creating a condition, in spite of fairly clear conditional language, looking at the effect of such a construction - a forfeiture of the devise - in relation to the testator's intent.[88] In doing so, the court stated:

> No language will be construed into a condition subsequent contrary to the intention of the parties, when the intent can be gathered from the whole instrument read in the light of surrounding conditions. The strongest words of condition will not work a forfeiture of the estate unless they were intended to so operate.[89]

Here, looking at the entire will and surrounding circumstances, the court found that the dominant intent of providing for care for the incompetent son would not be furthered by a forfeiture of the estate, but would be furthered by the creation of a charge on the estate to provide for the support as needed.[90]

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86. Miller v. Miller, 197 Neb. 171, 247 N.W.2d 445 (1976) (devise to beneficiary on the condition that he pay $2,000 each to four people found to create fee simple subject to liens for said payments); Hitz v. Estate of Hitz, 319 N.W.2d 137 (N.D. 1982) (devise of interest in land to son "provided" he pay $4,000 to daughter held to create vested interest subject to equitable lien to secure payment of the $4,000); Rubio v. Valdez, 603 S.W.2d 346 (Tex.Civ.Ap. - Eastland 1980) (devise of real estate to son "upon his paying" $10,000 to other children held to create fee simple interest subject to a charge only).

87. 449 A.2d 353 (Me. 1982).

88. *Id.*

89. *Id.* at 356.

90. *Id. See also* 6 PAGE ON WILLS, *supra* note 1, § 51.4, in which it is stated that:

> The courts prefer to construe such provison [devise made "on condition" of payment to a third party] as creating charges rather than conditions, since they prefer a construction which will make the estate vest as early as possible .... If the provision is merely a condition ... the failure of the devisee to make such payments ... [may] defeat the beneficial legacy or support payments to the third person ... and ... likewise defeat the legacy .... For these reasons, the courts are disposed to treat such provisions as creating charges or liens ...

The rationale for finding a charge on the estate is especially strong when, as in *Whicher*, a conditional devise of real property is involved.[91] Yet whether the bequest includes real property or not, the overriding consideration is whether it is the intent of the testator that the bequest be forfeited by a failure to perform as indicated. If that is not the intent, then there is no *condition*, but rather a *duty* to do as the testator directed.[92] Thus, no question of forfeiture is involved,[93] but the question whether the compensation is to be paid by way of creation of a charge on the estate must be addressed.

In cases in which the potential "condition" on the bequest is a direction to give something to a third party, once it is decided that the bequest is *not* actually conditional, the "charge" is essentially automatic since the intent is clear. For example, in *Whicher*, the testator's intent to provide for his incompetent son is obvious, and the provision for the son is totally gratuitous (i.e., requires no action on the part of the son). On the other hand, in the instance of a testamentary appointment, there is the additional consideration that the testator frequently intends that the estate will receive a quid pro quo for the payment to the employee.[94] Thus, even after a finding that a charge against the estate or bequest is preferred over a forfeiture, it still re-

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rather than as conditions.

Id. at 117-118 (footnotes omitted).

91. When the estate consists at least partially of real estate, there is the additional consideration of the need for stability of title to support finding a charge rather than a condition subsequent. *See e.g.*, Helms v. Helms, 135 N.C. 164, 171, 47 S.E. 415, 418 (1904) in which the court stated:

> The difficulties which readily occur in treating provisions of this kind as conditions are numerous. The uncertainty into which titles would be thrown is a strong reason for construing provisions for support as covenants and not conditions is recognized by the courts . . . . The courts have almost uniformly treated the claim for support and maintenance as a charge upon the land, which will follow it into the hands of purchasers.

92. *See id.* The duty is created by a covenant which is implied rather than expressed. *Cf. supra*, note 70 and accompanying text.

93. To avoid forfeiture (here, forfeiture of the right to receive property or qualify as executor), there is generally a preference for finding a duty, rather than a condition. RESTATEMENT (SECOND) OF CONTRACTS § 227 comments b and d (1981). This is because a failure to perform a condition would result in forfeiture of the right to return performance. *Id.* at 224 and 227 comment b. Whereas the failure to perform a duty, unless such failure is material, would not. *Id.* at 227, comment d.

94. Scott, *supra* note 64, at 726.

mains to be decided if such charge should be made in spite of nonperformance of the employment.

4. *Service as a Condition to Payment*

At this point one analyzes the receipt of compensation in terms of conditions — that is, by asking whether the performance is a condition to payment. If not, then there is simply an unconditional gift, as discussed above.[95] If performance is a condition to payment, one must further look to the law of conditions to discover what will happen if the condition is not performed.

Willful nonperformance presents an easy case. If the designated employee refuses to accept the employment, he, of course, will not be paid.[96] In this case, however, the parties generally will not find themselves in court.

Not quite as clearcut, but not really conceptually troublesome either, are the cases in which performance is attempted, but is materially deficient. If it is found that performance is a condition to payment, then that performance should give the estate the intended return for the expenditure. If the executor had hired the employee without direction from the testator, he would clearly have the right to insist on the agreed performance before being required to pay for the service.[97] Likewise, if one person had hired the employee to perform for a third party, he too could insist on the agreed performance prior to making payment.[98] The fact that the testator had directed the employment by the executor or beneficiary should not change this result, and payment will not be due if there is a material breach of the con-

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95. *See supra* notes 26-28 and accompanying text.

96. In such a case, where the offer of employment is not accepted, no contract is ever formed on which to base a claim for payment.

97. It is well settled that where the performance of one party is to occur over a period of time, and the performance of the other party consists of payment, the performance must occur before the payment, absent a contrary intention. RESTATEMENT (SECOND) OF CONTRACTS § 234 comment e (1981).

98. This would create a third party beneficiary contract with the person hiring the employee being the promisee. The promise to perform by the employee (promisor) "creates a duty in the promisor to the promisee to perform the promise even though he also has a similar duty to an intended beneficiary." *Id.* at § 305(1).

tract in the performance condition. Further, the executor or beneficiary will be able to dismiss the employee and hire someone who will perform.[99]

The possibility of dismissal for cause[100] to some extent answers any objections regarding a "forced" employment relationship. It is less objectionable to expect the executor or beneficiary to abide by the testator's wishes if the result of doing so is not to force him to accept inadequate performance. If the objection is really that the executor would be liable for bad advice, the answer, at least to a degree, is in the ability to discharge or refuse to employ incompetent counsel.[101] This ability not only flows from the contractual arrangement, but will also most likely comport with the testator's intent.

The disputed cases involve a designated employee, not dismissed or rejected for cause, whose failure to perform is nonetheless not voluntary. If the failure is due to something beyond the control of the beneficiary or fiduciary, then it is conceptually a case of impossibiity or impracticability.[102] Whether the result of that is that there is no obligation to the employee, or that the performance is excused and payment made, will again depend on whether the testator's primary intent was to benefit the estate or the employee. Analogous to a condition of service to the estate *after* the testator's death is a condition of service to the testator *at the time of* the testator's death. In *Wooster School Corp. v. Hammerer*,[103] the testator had devised certain property

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99. *See Scott, supra* note 64, at 714-15.

100. Even the Supreme Court of Louisiana, when it was regularly upholding the validity of designation of attorney for the estate, implicitly recognized the right of the executor to dismiss said attorney for cause in stating that "*unless facts exist which furnish adequate cause recognized in law for refusing* to do so, the executor must abide by the lawful condition imposed by the decedent in his testament." Succession of Falgout, 279 So.2d 679, 681 (1973) (emphasis added). The court therefore found that in that case, since no cause for dismissal of the attorney had been asserted, the motion to discharge the attorney should be denied. *Id.* at 682.

101. A trustee would certainly be justified in discharging from the employment or in refusing to employ the person designated by the testator upon the same grounds which would justify one who had made a contract to employ another for a fixed period in discharging him from the employment or in refusing to employ him . . .

Scott, *supra* note 64 at 714.

102. RESTATEMENT (SECOND) OF CONTRACTS § 261 comment d (1981).

103. 410 So.2d 524 (Fla. Dist. Ct. App. 1982).

to Hammerer on the condition that he be in the employ of the testator at her death. A few months before testator's death, and after she was suffering from the effects of a stroke, Hammerer was essentially forced to leave the testator's employ by her nephew and sister.[104] The court held that Hammerer was nonetheless entitled to the bequest, since the performance of the condition had been prevented by a third party.[105] In so holding, the court gave paramount consideration to the intent of the testator as to the benefit to flow from the provision. As the court stated:

> [W]here it becomes impossible for the condition to be performed without the fault of the donee, performance should be excused unless it be determined that performance of the condition was the controlling motive for the testator's making of the bequest. . . . The determining inquiry should be whether the testator's intent in making a bequest was to benefit the donee or to obtain strict performance of some important act in any and all events, with the donee being paid, by way of bequest, for performing the act.[106]

The same reasoning could be applied when the performance prevented was to have been for the estate after the testator's death.

In fact, most of the cases dealing with testamentary appointments will be prevention cases, since the "impossibility" will most often be the result of the refusal of the executor or beneficiary to make the designated appointment.[107] *A fortiari*, if the condition were prevented by the act of the beneficiary or fiduciary, given sufficient intent of the testator to benefit the do-

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104. *Id.* at 525.

105. *Id.* at 527. The excuse of prevention generally refers to prevention by a party to the contract. *See generally* CALAMARI & PERILLO, *supra* note 68, 11-28. Since the prevention here was that of a third party, this is instead a case of impossibility, which includes prevention by a third party. RESTATEMENT (SECOND) OF CONTRACTS § 261 comment d (1981) ("Events that come within the rule stated in this section are generally due either to 'acts of God' *or to acts of third parties.*") (emphasis added).

106. *Hammerer*, 410 So.2d at 527.

107. The other impossibility scenario most likely to occur is the situation in which the designated employee predeceases the testator. In such cases, however, not only is it unlikely that a claim would be made, but it is highly unlikely that the testator intended the benefit to go to the *estate* of the employee, thereby diminishing his own estate without the receipt of any quid pro quo.

While one could conjure up other impossibility cases, they would likely be too rare to warrant discussion here, and could be handled as they arise using the same principles discussed here.

nee, the condition should be excused and payment due from the estate or out of estate property as if the condition had been performed.[108] Under this analysis, the testator's intent is most fully realized. The primary gift or appointment is made, albeit diminished by the payment to the designated employee, who still receives the benefit intended. Further, if the employment is of a nature that would preclude other employment,[109] the amount paid to the "employee" could be reduced by any amount actually earned by the employee in any other capacity during the same time periods.[110]

5. *The Relationship between Intent and the Type of Employment*

Assuming that the intent of the testator controls, it should not be necessary to ask whether public policy is offended more by a direction to hire a lawyer, an accountant, a real estate agent, or some other classification of employee. One simply asks what conditions were created by the testator by examining his intent as indicated in the will and the circumstances. Yet if this approach is taken, the inevitable question is whether there is a principled basis for the now overwhelming majority view that directions to employ attorneys are generally unenforceable,[111] while other designations receive greater acceptance.[112] To answer the question, it is enlightening to examine the analysis on a step by step basis.

The first question is whether the direction to hire is a condition to the appointment of the executor, or to the receipt of property under the will.[113] That question is answered by simply determining whether the testator would want the bequest or appointment to fail if the direction to employ is not followed.[114] Intent should be the key here, not the type of employment. Gen-

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108. *See* CALAMARI & PERILLO, *supra* note 68, 11-28 (3d ed. 1987).

109. For example, a wage earner in a full time position would only be able to hold one such position at a time, whereas an attorney or real estate agent might be able to serve even though also serving other clients or principals.

110. *See* Scott, *supra* note 64, at 725.

111. *See supra* notes 44 and 45 and accompanying text.

112. *See supra* note 51 and accompanying text.

113. *See supra* text accompanying note 56.

114. *See supra* text accompanying notes 80 and 81.

erally, the "power to dispose of property by will includes the right to attach to testamentary gifts such terms, conditions, or restrictions as the testator pleases, provided they are not contrary to public policy or forbidden by law."[115]

In dealing with conditions to bequests generally, the courts have been reluctant to defeat the intent of the testator unless the violation of public policy is clear.[116] For example, an Oregon Court of Appeals gave effect to a condition requiring forfeiture of a life estate in certain real and personal property if the devisee failed to reside on the real property for six months in any year, unless prevented from doing so by illness.[117] Although the devisee had become physically disabled, and found it necessary to leave the premises to further her education so that she could support herself, the court found that she had still failed to fulfill the condition in that "her disabilities did not *prevent* her from residing on the property."[118] Certainly if the real consideration is what is "distasteful" or "disadvantageous,"[119] a condition such as this one has potentially much greater significance than the designation of a particular attorney.[120]

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115. Brown v. Drake, 275 S.C. 299, 300, 270 S.E.2d 130, 131 (1980).

116. In the *Brown* case, the Supreme Court of South Carolina upheld a will provision disinheriting any children of the testator if " 'awarded to' " his second wife or " 'raised by her after 1 year of age.' " The court found that the provision, while arguably "obnoxious", could not have affected the conduct of the wife or children in the past, since they normally would not even be aware of its presence in the will, and could not now affect future conduct. Since it could not affect custody when the will becomes effective, and since the testator has a right to disinherit his children for any reason acceptable to him, no public policy was violated. *Id.* at 302-304, 270 S.E.2d at 131-132.

117. Sarvela v. McCoy, 46 Or. App. 515, 612 P.2d 314-15 (1980).

118. *Id.* at 519, 612 P.2d at 315.

119. *See supra* text accompanying note 50.

120. *Cf.* Cast v. National Bank of Commerce Trust & Sav. Ass'n, 185 Neb. 358, 176 N.W.2d 29 (1970), in which the Supreme Court of Nebraska upheld a will condition that in order to receive the testator's interest in the family farm, the devisee, or one of his children, should move onto the farm and maintain it as his residence for twenty-five years, and legally change his name to include the name "Webermeier" in it. The court withdrew its opinion in part the following year, holding the condition void. Cast v. National Bank of Commerce Trust & Sav. Ass'n, 186 Neb. 385, 183 N.W.2d 485 (1971). The basis for this, however, was that the provision was an indirect restraint on alienation of a fee simple estate. Presumably, a condition without this consideration, such as a similar condition to taking the interest initially or to a lesser estate, would have been upheld. As the court stated:

> Where a grantor or testator grants or devises a fee simple title, he is not permitted to fetter the title that he created with inconsequential and unreasonable conditions *otherwise valid.* Such conditions are not favored in the law and they should be

Indeed, the early Louisiana cases, while representing a decidedly minority view,[121] stressed the freedom of the named executor to decline if he did not wish to accept the conditions of the appointment. As stated by the Supreme Court of Louisiana in *Succession of Rembert*:

> Upon [the executor] is placed the duty of taking the will as left by the testator and executing it in its minutest detail to the utmost of his ability. There is no mandatory provision of the law that thrusts this trust upon him; *he may reject it if he so desires*. But once it has been accepted, he accepts also the duty imposed upon him of seeing that all of the valid provisions and dispositions of the will are performed.[122]

Viewed from this perspective, it appears that the point of departure separating the early Louisiana decisions from the current vast majority is not really a different attitude about the importance of the personal services relationship. The difference, it seems, lies in differing interpretations of the relative importance to the testator of the appointment made in the will. This became especially clear when the Louisiana court reversed itself in 1986 in *Succession of Ado Jenkins*,[123] in which it held the designation of an attorney for the estate to be merely precatory, leaving the executor free to hire whomever he or she pleased.[124]

The result in that case does not necessarily represent a change in attitude about the importance of the intent of the tes-

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> strictly construed against the testator or grantor *as against a fee simple title*. It is true, generally speaking, that a *testator may dispose of his property as he pleases* . . . but . . . one will not be permitted to become whimsical and unreasonable after creating an estate recognized by the law, *such as an estate in fee simple*, by attaching conditions repugnant to the estate created. On the other hand, *we do not go so far as to say that all conditions subsequent attached to a fee simple estate are void where alienability is not involved*. A condition attached to a fee simple estate, otherwise valid must be reasonable and not affect its marketability.

Id. at 390-91, 183 N.W.2d at 489.

121. *See supra* note 46 and accompanying text.

122. 199 La. 743, 750-51, 7 So.2d 40, 42 (1942) (emphasis added). *See also Rivet*, 167 La. at 770, 120 So. at 290.

123. 481 So.2d 607 (La. 1986).

124. *Id.* at 610.

tator, but rather a different view of what that intent is. It lends support to the view that there is at least a strong presumption *against* an interpretation that the testator *intends* the designation of employment of an attorney to be a condition to being named executor. The presumption is not justified by finding a greater importance in allowing freedom to choose one's own attorney as opposed to freedom to make other similar choices, but in the circumstances of the naming of the attorney in the will in the first instance.[125] Absent unusual circumstances, it would not seem to be the usual intent of a testator that his choice of attorney take precedence over his choice of executor, given the importance of the position of executor and the confidence the testator normally has in his choice for that position.[126]

In addition to that factor, there *is* a strong public policy concern in relation to the opportunity for overreaching by the attorney preparing the will in influencing the client to appoint him as either the executor or the attorney of the estate.[127] The Supreme Court of Wisconsin in *State v. Gulbankian*[128] strongly disapproved the practice of attorneys influencing clients in any way to make such appointments, whether by consultation, using a will form designating an attorney for the estate, providing safekeeping for the will, or any other method.[129] Even so, the court recognized that the pressures can be subtle and difficult to police.[130] Given the difficulty of enforcement, the opportunity for influence, the likelihood that many clients would not even think of appointing an "attorney for the estate" without a suggestion from someone else, and the need to avoid even the suggestion of professional impropriety,[131] courts should be extremely reluctant to find that the hiring of a named attorney is a condition precedent to appointment as executor or to receiving a benefit under the will.

These same considerations are generally not present when other types of employment are involved. Other types of employ-

125. "For the attorney drafting a will to be named as attorney for the succession has at least a suggestion of impropriety." *Id.* at 609-10.

126. *In re* Braasch's Estate, 274 Wis. at 573, 80 N.W.2d at 759.

127. *See generally* Annot. 57 A.L.R. 3d 703 (1974).

128. 54 Wis.2d 605, 196 N.W.2d 733 (1972).

129. *Id.* at 611, 196 N.W.2d at 736.

130. *Id.* at 612, 196 N.W.2d at 737.

131. *Id.*

ees will not normally be directly involved in the writing of the will. Further, the legal profession has a strong interest in maintaining its image of integrity in the eyes of the public,[132] an interest which may not be as compelling for some other professions. However, regardless of the nature of service to be performed, all of the relevant circumstances should be examined before it is decided that a gift or appointment is to be forfeited for a failure to hire the designated employee, and due consideration should be given to the possibility of improper influence on the part of the designee.

As to a direction to hire a named attorney, however, a presumption against a finding that the executor's appointment is conditioned on hiring the attorney is not tantamount to a rule of law. Compliance with the testator's request could in fact be a condition precedent to such appointment if that is the true intent. That such a condition, if intended, is enforceable, is clearly illustrated in *In re Estate of Devroy*[133] in which the designation of the personal representative was specifically conditioned on the retention of a particular attorney. In addition to the conditional language, the testator named an alternative representative, and further provided that if either personal representative named was unable or unwilling to serve, the court should " 'appoint a personal representative who will retain' " the designated attorney.[134] This language, along with a recitation of reasons for the importance of the appointment,[135] underscores the testator's intent, and that intent takes precedence over the policy arguments.[136] Thus, the real policy concern where attorney designations are involved is not so much a policy against a finding that the appointment of the executor is conditioned on hiring a named attorney, where that is the clear intent, as a policy against a finding of such intent in the first place in the absence of the clearest of circumstances.

If hiring the employee (attorney or otherwise) is a condition, and that condition is not fulfilled, then the court will simply refuse to appoint, or will remove, the executor, or direct that the

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132. *See* C. WOLFRAM, MODERN LEGAL ETHICS 3.1 at 81-82 (Practitioner's ed. 1986).
133. 109 Wis.2d 154, 325 N.W.2d 345 (1982).
134. *Id.* at 156, 325 N.W.2d at 346.
135. *Id.*
136. *See id.*

bequest be given to the alternate beneficiary. If it is *not* a condition, the next step is to determine the effect of the refusal to hire. There can, of course, be no legal effect unless the suggested employee has standing to sue for payment. This depends on whether he is an intended beneficiary (i.e., was really intended by the testator to benefit by the designation).[137]

At this point in the analysis, the type of employment assumes a lesser degree of importance, although, in the case of an attorney, the *Gulbankian* concerns will always be present to some extent. The real focus of the inquiry at this point is on the relationship of the designated employee to the testator. If there is a close personal or familial relationship, a court may well find that it is the testator's intent that the "employee" receive payment even if his services are refused. On the other hand, absent such a relationship, the intent of the testator would normally be primarily to benefit the beneficiaries of the estate, with the incidental benefit to the employee requiring the quid pro quo of service to the estate.[138] Thus, service would be a condition to payment, and as an incidental beneficiary only, the employee would have no standing to complain about not being hired. Again, such a finding is based on the intent of the testator, and where it clearly appears that payment is to be made in spite of prevention of performance, as in *Trybom's*,[139] then the payment will be made.

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137. *See supra* notes 71-73 and accompanying text.

138. Compare Scott, *supra* note 64 at 723-24 dealing with the refusal of a trustee to hire a designated employee. As Professor Scott stated:

> The testator normally intends primarily to benefit the *cestuis que trust*. He does not intend to diminish the amount which they will receive by subjecting the estate to a liability for damages to the person whom he desires to give employment. He may have hoped to kill two birds with one stone. But if the trustee refuses to comply with the direction and, for some reasons of policy, cannot be compelled to comply, the stone will miss one of the birds. Either the *cestuis que trust* or the person whom the testator directed the trustee to employ must suffer. In the absence of other evidence of the testator's intention, his primary purpose to benefit the *cestuis que trust* should be carried out.

Id. at 724.

139. *See supra* notes 26-28 and accompanying text.

IV. CONCLUSION

An analysis focusing on the intent of the testator in relation to the two conditions discussed above should generally produce more consistent results. The analysis, however, could and should be rendered unnecessary by careful, professional draftsmanship. This professionalism in drafting is lacking if the attorney suggests a designation of his own employment in any capacity.[140] Yet the problems are not confined to appointments of attorneys.[141] Generally, it is best to avoid problems by not attempting to tie the hands of the executor or beneficiary in selecting any fiduciaries and employees.

Even in cases in which it is important to the testator to make certain directions to employ, the consequencess of a failure to hire, or a failure to perform, should be clearly set out in the will. For example, the testator could, similar to a suggestion made by Professor Scott in the trust context,[142] specify payment for a given service, making it clear whether the payment is to be forfeited if the "employee" refuses to perform the service. Provision could also be made for a refusal of the executor or beneficiary to employ the designated person. That is, it should be clear whether there is a forfeiture of the bequest or appointment because of such refusal. It should further be made clear whether a "disappointed designee" is entitled to damages, full payment, partial payment, or no payment. Given the basic proposition that the intent of the testator controls,[143] the more clearly that intent can be expressed, the fewer problems are likely to be encountered in the administration of the estate.

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140. *Gulbankian*, 54 Wis. 2d at 610-12, 196 N.W.2d at 736-37.
141. *See supra* text accompanying notes 51-54.
142. *See* Scott, *supra* note 64 at 724-25.
143. *See supra* note 6 and accompanying text.