Michigan Law Review

Volume 47 | Issue 1

1948

POWERS-GENERAL TESTAMENTARY POWER:-INEFFECTIVE APPOINTMENT- DEVOLUTION OF APPOINTIVE PROPERTY

Richard L. Eckhart S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Estates and Trusts Commons

Recommended Citation

Richard L. Eckhart S.Ed., *POWERS-GENERAL TESTAMENTARY POWER:-INEFFECTIVE APPOINTMENT-DEVOLUTION OF APPOINTIVE PROPERTY*, 47 MICH. L. REV. 93 ().
Available at: https://repository.law.umich.edu/mlr/vol47/iss1/10

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

POWERS—GENERAL TESTAMENTARY POWER—INEFFECTIVE APPOINTMENT—DEVOLUTION OF APPOINTIVE PROPERTY—In the usual case,[1] the question of the devolution of property subject to a general testamentary power where the appointment is ineffective arises in a contest between those representing the estate of the donee on the one hand and those representing the estate of the donor, including the takers in default, on the other. The historical concept that the devolution of appointive property is from the donor to the appointee[2] competes with the modern concept that the donee's interest in the property is, for many purposes, close to absolute ownership.[3]

A. *The General Theory*

The classic statement of the proposition upon which devolution depends is found in *In re De Lusi's Trusts:*

> "The question in all cases of the class of that now before me is one of intention—namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the

[1] Between donee's residuary legatees and other heirs of donee, Dunbar v. Hammond, 234 Mass. 554, 125 N.E. 686 (1920). Between state tax authorities and donee's appointees, McCord's Estate, 276 Pa. 459, 120 A. 413 (1923); Forney's Estate, 280 Pa. 282, 124 A. 424 (1924). Between donee's estate and donee's remote appointees, Bundy v. United States Trust Co., 257 Mass. 72, 153 N.E. 337 (1926).

[2] 2 CHANCE, POWERS 1 (1841); 3 PROPERTY RESTATEMENT, §§ 365(1), 367 (1940); 1 SIMES, FUTURE INTERESTS, §§ 253-255 (1936).

[3] Old Colony Trust Co. v. Allen, 307 Mass. 40, 29 N.E. (2d) 310 (1940); Fiduciary Trust Co. v. Mishou, (Mass. 1947) 75 N.E. (2d) 3; 55 HARV. L. REV. 1025 (1942).

limited purpose of giving effect to the particular disposition expressed. . . ."[4]

The English decisions which developed this theory contain no concise statement of its basis. But they seem to recognize by implication that the theory is another manifestation of the modern conception of the nature of the donee's interest. The determination of the intent of the donee is not confined to an inquiry into actual intent but includes the question of what the donee would have intended had he thought of the particular situation which arose.

B. *Indicia of Intent to Make Fund Donee's Own*

Two situations have been found to be almost conclusive of the donee's intent to make the appointive fund his own for all purposes. The first of these is appointment of the fund to the donee's executors, without more.[5] Here the donee's failure to indicate the specific purposes for which the appointment is made is the factor rendering the appointment ineffective. It is generally agreed[6] that the donee of a general testamentary power may appoint to his own estate, and the situation in question is very close to an express direction to the executors to appropriate the fund to the uses of the estate.

The second situation involves appointment of the fund in trust. Here it is said that the appointment of the legal title to the trustees is technically good and that the interposition of this legal title is sufficient to wrest control from the donor.[7] The theory of the resulting trust is then applied in favor of the donee's estate, despite the fact that, in other situations, the beneficiaries of a resulting trust are those who would have taken had no disposition been made, in this case, those representing the donor's estate. In addition, this line of argument would seem to stray from practical consideration of the donee's intent. Is it not reasonable to suppose that the trust device is adopted merely as a convenient mode of disposition, without intent to accomplish anything but the consummation of the specific disposition? The position taken by the proponents of the rule that where the appointment is to the same trustees who held legal title under the instrument creating

[4] 3 L.R. Ir. 232 at 237 (1879).

[5] Goodere v. Lloyd, 3 Sim. 538, 57 Eng. Rep. 1100 (1830); Mackenzie v. Mackenzie, 3 Mac. & G. 559, 42 Eng. Rep. 376 (1851).

[6] But see Lincoln Trust Co. v. Adams, 107 Misc. 639, 177 N.Y. S. 889 (1919).

[7] Brickenden v. Williams, L.R. 7 Eq. 310 (1869); In re Van Hagan, L.R. 16 Ch. D. 18 (1880); In re Scott, [1891] 1 Ch. 298; Dunbar v. Hammond, 234 Mass. 554, 125 N.E. 686 (1920); Talbot v. Riggs, 287 Mass. 144, 191 N.E. 360 (1934). See also 41 COL. L. REV. 538 (1941); 2 TRUSTS RESTATEMENT, § 426 (1935); 3 PROPERTY RESTATEMENT, § 365 (2) (1940). In most of the cases cited, the result reached could have been explained by the presence of other indicia of intent.

the power, the resulting trust then operates in favor of the donor's estate,[8] involves some inconsistency when analyzed in terms of intent. Again the donee may well have made this choice of trustees merely as a matter of convenience.

In addition, a number of other circumstances are indicia of the donee's intent to make the fund his own, to which the courts have attributed various degrees of significance. A clear-cut indication of intent is found in a provision expressly blending the appointive property with owned property of the donee.[9] This is especially true where the blending provision is inserted before the dispositive provisions in the executing instrument. As well as indicating an intent to make the fund the donee's own for all purposes, such a provision would bear strongly on the preliminary question of whether the power was exercised by all the provisions of the will so as to permit allocation in the event that the donee's owned property is insufficient.[10]

Where the donee refers to the appointive property as his own, by means of inclusive language or language of absolute ownership, he indicates that he considers the property part of his estate or that it will be made so by the executing instrument.[11] In this connection, the phrase "my property" may be construed as either encompassing or distinguishing, depending on the context.[12] If the donee consistently keeps the owned and appointive property separate,[13] he may be indicating that he intends to take the fund out of the donor's estate only for the purpose of the appointment, and the fact that he gives both kinds of property to the same persons does not strongly indicate a contrary intent.[14]

Charging the appointive property with the donee's debts is generally considered strong evidence of blending.[15] Here the position of

[8] In re Pinède's Settlement, L.R. 12 Ch. D. 667 (1879); In re Thurston, L.R. 32 Ch. D. 508 (1886); 3 PROPERTY RESTATEMENT, § 365, comment (a) (1940).

[9] Chamberlain v. Hutchinson, 22 Beav. 444, 52 Eng. Rep. 1179 (1856); Willoughby Osborne v. Holyoake, L.R. 22 Ch. D. 238 (1882); In re Horton, 51 L.T.R. 420 (1884); Coxen v. Rowland, [1894] 1 Ch. 406; In re Marten,[1901] 1 Ch. 370; Bradford v. Andrew, 308 Ill. 458, 139 N.E. 922 (1923); McCord's Estate, 276 Pa. 459, 120 A. 413 (1923); Fiduciary Trust Co. v. Mishou, (Mass. 1947) 75 N.E. (2d) 3; 3 PROPERTY RESTATEMENT, § 365, comment (d) (1940).

[10] Minot v. Paine, 230 Mass. 514, 120 N.E. 167 (1918); Slayton v. Fitch Home, Inc., 293 Mass. 574, 200 N.E. 357 (1936); Low v. Bankers Trust Co., 270 N.Y. 143, 200 N.E. 674 (1936); 3 PROPERTY RESTATEMENT, § 363 (1940).

[11] Bradford v. Andrew, 308 Ill. 458, 139 N.E. 922 (1923).

[12] Compare Bradford v. Andrew, ibid., with Easum v. Appleford, 10 Sim. 274, 59 Eng. Rep. 619 (1839).

[13] Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E. (2d) 487 (1938).

[14] In re Stannert's Estate, 339 Pa. 439, 15 A. (2d) 360 (1940).

[15] In re Ickeringill's Estate, L.R. 17 Ch. D. 151 (1881); Willoughby Osborne v. Holyoake, L.R. 22 Ch. D. 238 (1882); Coxen v. Rowland, [1894] 1 Ch. 406.

the provision for the payment of debts in relation to the provision exercising the power is of some importance. A simple direction to pay debts after stating that both properties are being disposed of may be considered blending,[16] while it may not if the order is reversed.[17] Depending on the presence or absence of other indicia, the provision may be held to take the appointive property out of the creating instrument for the purpose of paying debts but for no other.[18]

Another situation arises where the donee has made no reference to the power whatsoever in his will. But, in many jurisdictions, a will purporting to dispose of all of the donee's property is considered, with or without the aid of a statute,[19] as exercising any general power that he had, unless the donee himself manifested a contrary intent. Such a rule seems to indicate judicial and legislative recognition that most people consider a general power to be property and that most decedents desire to benefit the objects of their bounty so far as possible. If such recognition is proper in considering the question of whether or not the donee has exercised the power, it should also extend to determining the donee's intent with respect to making the fund his own. With the aid of this rule, it may be said that the general dispositive provision is almost the equivalent of an express blending provision.[20] Certainly the donee has made no attempt to keep the owned and appointive property separate. Argument may be made that this is too great a departure from the historical concept that appointive property passes from the donor to the appointee, and that the exception is being converted into the general rule. In view of the increasing number of situations in which the donee of a general power is treated as owner of the appointive property,[21] the departure may be merely indicative of this trend. It has recently been held that an exercise of the power under the English Wills Act is not indicative of intent to appropriate the fund for all purposes.[22] While a literal interpretation of the statute might indicate this result, it is submitted that the decision departs from the aforementioned principle that the basis for such a statute is a legislative recognition of the average decedent's intent in such situations. It is true that in the case cited there were no other indicia of

[16] Wyeth v. Safe Deposit & Trust Co., 176 Md. 369, 4 A. (2d) 753 (1939).

[17] Terppe's Estate, 224 Pa. 482, 73 A. 922 (1909).

[18] Laing v. Cowan, 24 Beav. 112, 53 Eng. Rep. 300 (1857); THEOBALD, WILLS, 9th ed., 211 (1939).

[19] For a list of these statutes, see 3 PROPERTY RESTATEMENT, § 343, comment (d) (1940).

[20] For purposes of allocation where owned property is insufficient, exercise of the power in a residuary clause may not extend to other provisions of the will. Slayton v. Fitch Home, Inc., 293 Mass. 574, 200 N.E. 357 (1936).

[21] See 55 HARV. L. REV. 1025 (1942).

[22] In re Dobson's Settlement, [1946] V.L.R. 83.

the donee's intent, and that in two cases reaching the opposite result under the same statute there were other indicia; that is, that the will would have been inoperative if the power were not exercised,[23] and that debts had been charged against "property" indiscriminately;[24] but, if the principle stated above is sound, these factors would not be significant. The Supreme Judicial Court of Massachusetts has held[25] that exercise of a general testamentary power by the judicially-recognized operation of a general residuary clause is alone sufficient to indicate the intent of the donee to make the fund his own. This substantiates the principle contended for above.

The effect of appointing an executor, as distinguished from appointment to an executor, has not been clearly decided. *In re Thurston*[26] is often cited for the proposition that where a will deals solely with appointive property, and appoints an executor, this alone will not take the property out of the creating instrument for all purposes. If only appointive property is to be dealt with and the donee has indicated that he intends to exercise the power and appoints an executor, the result would seem to be as effective an appointment to the donee's estate as an appointment by the donee directly to the executor. Should there be owned property to be dealt with, the mere appointment of an executor would be much less significant.

C. *Factors Rendering Appointment Ineffective*

The usual causes of failure of the appointed interest are the death of the appointee before the donee,[27] and failure of the donee to name the appointees or purposes or to exhaust the fund.[28] Since the so-called "lapse statutes" should apply to the appointive property to the same

[23] In re Ickeringill's Estate, L.R. 17 Ch. D. 151 (1881).

[24] In re Vander Byl, [1931] 1 Ch. 216.

[25] Old Colony Trust Co. v. Allen, 307 Mass. 40, 29 N.E. (2d) 310 (1940).

[26] L.R. 32 Ch. D. 508 (1886).

[27] Easum v. Appleford, 10 Sim. 274, 59 Eng. Rep. 619 (1839); Chamberlain v. Hutchinson, 22 Beav. 444, 52 Eng. Rep. 1179 (1856); In re Pinède's Settlement, L.R. 12 Ch. D. 667 (1879); In re De Lusi's Trusts, 3 L.R. Ir. 232 (1879); In re Ickeringill's Estate, L.R. 17 Ch. D. 151 (1881); Willoughby Osborne v. Holyoake, L.R. 22 Ch. D. 238 (1882); In re Horton, 51 L.T.R. 420 (1884); In re Thurston, L.R. 32 Ch. D. 508 (1886); Coxen v. Rowland, [1894] 1 Ch. 406; In re Boyd, [1897] 2 Ch. 232; In re Marten, [1901] 1 Ch. 370; Bradford v. Andrew, 308 Ill. 458, 139 N.E. 922 (1923); Old Colony Trust Co. v. Allen, 307 Mass. 40, 29 N.E. (2d) 310 (1940).

[28] Goodere v. Lloyd, 3 Sim. 538, 57 Eng. Rep. 1100 (1830); Mackenzie v. Mackenzie, 3 Mac. & G. 559, 42 Eng. Rep. 376 (1851); Le Fevre v. Freeland, 24 Beav. 403, 53 Eng. Rep. 413 (1857); Brickenden v. Williams, L.R. 7 Eq. 310 (1869); In re Hawkesley's Settlement, [1934] Ch. 384; Dunbar v. Hammond, 234 Mass. 554, 125 N.E. 686 (1920).

extent that they apply to owned property,[29] the first cause would be eliminated where such a statute is applicable. Where ineffectiveness is due to a failure to exhaust the fund, there may be justification for requiring stronger evidence of the donee's intent to make the entire fund a part of his estate. The decisions do not make this distinction, however.

After reviewing the English decisions, which were principally the result of the causes mentioned above, Professor Gray was of the opinion that the doctrine of making the fund the donee's own would be applicable to cases where the appointment failed for remoteness.[30] This proposition is borne out by leading decisions in this country,[31] including failure by reason of suspending the absolute power of alienation beyond the period prescribed by the "two-lives" statutes.[32] Violation of positive rules of law has caused failure where the appointee,[33] or the appointee's husband,[34] was an attesting witness to the instrument executing the power, and where, because of the donee's illegitimacy, appointment to her "next of kin" could be of no effect.[35] There has been no indication that the cause of failure has any bearing on a determination of the donee's intent, and, with the one exception mentioned above, this position is believed to be sound.

D. *Extent of Donor's Control*

The most common string that the donor attaches to the appointive property is the provision for takers in default of appointment. If there is absolutely no attempt by the donee to exercise the power, undoubtedly the donor's provision is effective and the property devolves thereunder. The problem arises where the donee has attempted an ineffective exercise—is the donor's provision still effective? While some decisions indicate that it will be,[36] the trend of judicial opinion is toward treating such provision as of little significance in solving the general problem of devolution of the appointive property. The court in *Fiduciary Trust Co. v. Mishou*[37] definitely explodes the theory

[29] 3 PROPERTY RESTATEMENT, § 350 (1940); 1 SIMES, FUTURE INTERESTS, § 267 (1936).

[30] GRAY, RULE AGAINST PERPETUITIES, 4th ed., § 540.1 (1942).

[31] Bundy v. United States Trust Co., 257 Mass. 72, 153 N.E. 337 (1926); Talbot v. Riggs, 287 Mass. 144, 191 N.E. 360 (1934); Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E. (2d) 487 (1938); Fiduciary Trust Co. v. Mishou, (Mass. 1947) 75 N.E. (2d) 3.

[32] Low v. Bankers Trust Co., 270 N.Y. 143, 200 N.E. 674 (1936).

[33] Hoare v. Osborne, 33 L.J. Ch. 586 (1864).

[34] In re Vander Byl, [1931] 1 Ch. 216.

[35] In re Scott, [1891] 1 Ch. 298.

[36] Bundy v. United States Trust Co., 257 Mass. 72, 153 N.E. 337 (1926); Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E. (2d) 487 (1938).

[37] (Mass. 1947) 75 N.E. (2d) 3.

that would attach primary importance to the donor's provision, and it is believed that this approach is correct. If we are to be consistent in regarding the donee's intent as the controlling criterion, the result of the *Mishou* case seems to follow as a matter of course. The broad character of the donee's rights cannot be lessened by the donor's insertion of provisions to take effect only in default of appointment. It seems improbable that such provision would have any substantial effect on the manner in which the donee regards the appointive property.

It has been suggested that the donor, by expressly providing a condition of effective exercise, may prevent devolution of the appointive property to the donee's estate.[38] While such a condition has been included by donors in some instances,[39] none of the decisions has expressly taken it under consideration. It would seem that the suggestion is sound and that it can be explained in terms of the donee's interest in the appointive property. The broad character of the powers of the donee includes the power to appoint to his own estate, and, where sufficient indication of intent is found, to benefit his estate by an alternative appointment arising by implication where particular dispositions fail. The proposed condition would have the effect of denying the right to appoint to the donee's own estate except by direct and effective appointment. The limitation would give effect to the donor's intent without infringing on the usual concept of a general power.

E. *Leading American Decisions*

The most significant decisions involving this problem have arisen in Illinois and Massachusetts. The power involved in *Bradford v. Andrew*[40] was a general power to appoint by deed or will; but, as in several English decisions,[41] this fact was not accorded any significance. In most of these cases, including the *Bradford* case, the attempt to exercise the power was by will, and, while a general power to appoint by deed or will is usually considered a greater interest than a general power to appoint by will only, any distinction between the two would

[38] Fiduciary Trust Co. v. Mishou, (Mass. 1947) 75 N.E. (2d) 3; 2 TRUSTS RESTATEMENT, § 426, comment (b) (1935).

[39] Easum v. Appleford, 10 Sim. 274, 59 Eng. Rep. 610 (1839); Bristow v. Skirrow, L.R. 10 Eq. 2 (1870); In re Pinède's Settlement, L.R. 12 Ch. D. 667 (1879).

[40] 308 Ill. 458, 139 N.E. 922 (1923).

[41] Goodere v. Lloyd, 3 Sim. 538, 57 Eng. Rep. 1100 (1830); Chamberlain v. Hutchinson, 22 Beav. 444, 52 Eng. Rep. 1179 (1856); Brickenden v. Williams, L.R. 7 Eq. 310 (1869); In re Ickeringill's Estate, L.R. 17 Ch. D. 151 (1881); In re Horton, 51 L.T.R. 420 (1884); Coxen v. Rowland, [1894] 1 Ch. 406; In re Marten, [1901] 1 Ch. 370; In re Dobson's Settlement, [1946] Vict. L. Rep. 83. Even where the exercise of the power was by deed, the same principles were applied. Mackenzie v. Mackenzie, 3 Mac. & G. 559, 42 Eng. Rep. 376 (1851); In re Scott, [1891] 1 Ch. D. 216.

seem to vanish where the donee has failed to take advantage of an inter vivos exercise of the power.[42] The *Bradford* appointment was made directly in the residuary clause and the all-inclusive language there used gathered the appointive property into the donee's estate when the appointment lapsed. The basis of the decision in *Northern Trust Co. v. Porter*,[43] that the fund was not made the donee's own, was that the donee had carefully kept the owned and appointive property separate throughout her will. The ineffective appointment had been to new trustees, but the court did not consider that circumstance of significance in determining the donee's intent. Although there is some indication that the donor's provision for takers in default was important, the opinion by no means indicated that the opposite result would have been reached had that provision not been present.

The line of Massachusetts cases, commencing with *Dunbar v. Hammond*,[44] and culminating in the recent case of *Fiduciary Trust Co. v. Mishou*,[45] represents most of the judicial treatment of this problem in the United States. The *Dunbar* case contained considerable evidence of the donee's intent to make the property his own; but the decision reached, that the fund was part of the donee's estate, refers solely to the resulting trust theory. Appointees to take in default of appointment were not mentioned, but as pointed out in the *Mishou* case, the donor had in fact provided for them. Again, in *Bundy v. United States Trust Co.*,[46] the appointment was in trust, and there the power was exercised by the "residuary-clause" rule which, as before noted, may well be considered as favoring the donee's estate. But again the court

[42] The distinction would still be significant in another connection, that of applying the Rule against Perpetuities to the limitations created. Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E. (2d) 487 (1938); Fiduciary Trust Co. v. Mishou, (Mass. 1947) 75 N.E. (2d) 3.

[43] 368 Ill. 256, 13 N.E. (2d) 487 (1938).

[44] 234 Mass. 554, 125 N.E. 686 (1920).

[45] (Mass. 1947) 75 N.E. (2d) 3. Several problems were considered in this and related cases: (1) measure of remoteness of appointment under a general testamentary power, see Fiduciary Trust Co. v. Mishou, id. at 8-9; Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E. (2d) 487 (1938); 2 SIMES, FUTURE INTERESTS, § 538 (1936). (2) Doctrine of election where appointments are too remote, see Fiduciary Trust Co. v. Mishou, id. at 11-12 and cases cited in note; FARWELL, POWERS, 3d ed., c. 9 (1916); GRAY, RULE AGAINST PERPETUITIES, 4th ed., §§ 541-562 (1942). (3) Revocation of testamentary trustee's accounts where income has been administered under provisions void for remoteness, see Porotto v. Fiduciary Trust Co., (Mass. 1947) 75 N.E. (2d) 17. (4) Whether the term "issue" in a testamentary trust includes illegitimates, see Fiduciary Trust Co. v. Mishou, id. at 14-16, and compare Fiduciary Trust Co. v. Michou, (R.I. 1947) 54 A. (2d) 421. To the effect that appointive fund falling into donee's estate from appointments void for remoteness does not then pass under the same limitations, see Fiduciary Trust Co. v. Mishou, id. at 10-11.

[46] 257 Mass. 72, 153 N.E. 337 (1926).

seemed to consider only the resulting trust theory, refusing to apply it where the donor had provided for takers in default of appointment. Neither case mentioned the donee's intent or the broad character of his rights. Up to this point, the resulting trust theory of *In re Van Hagan*[47] seems to have been accepted by reason of its logic rather than because of the basic principle which the theory was intended to effectuate. *Talbot v. Riggs*[48] also involved an ineffective appointment in trust with a resulting contest over the appointive property between the heirs of the donee and those of the donor. For the first time the general principle that the question was one of the donee's intention was stated, but the decision went on the ground of a resulting trust in express reliance on the *Dunbar* case, despite the fact that the donee had carefully kept the owned and appointive property separate in his will. It will be noticed that the only substantial difference between this case and the *Northern Trust Co.* case lies in the fact that in the latter the donor had named those to take in default of appointment. However, the difference in theory was substantial; the *Talbot* case chose the appointment to trustees as the principal indicium of intent, while the Illinois court chose the deliberate segregation of the two properties. In two recent cases the Massachusetts court, speaking through Chief Justice Qua, has kept the donee's intent and interest in the foreground, minimizing the importance of the appointment in trust and the provision for takers in default. In *Old Colony Trust Co. v. Allen*, the court declared that the whole doctrine of determining the devolution of appointive property in favor of the donee's estate in the event of ineffective appointment is based on ". . . the conception that the grant of a general power is in itself almost tantamount to a grant of ownership. . . ."[49] and again in the *Mishou* case that:

> ". . . It arises out of the broad character of the rights conferred upon the donee of a general power, which include the right to appoint to his own estate and closely approach, although they do not reach, absolute ownership. . . ."[50]

In the *Allen* case, it is pointed out that the appointment in trust can never be more than a makeweight, that is, some evidence of the donee's intent. The ineffective exercise there did not involve the intervention of trustees, yet, applying the "residuary-clause" rule, the court was able to find in the donee's general disposal of all of his property an

[47] L.R. 16 Ch. D. 18 (1880). More recent English decisions have depended on other indicia of intent, but see In re Scott, [1891] 1 Ch. 298.

[48] 287 Mass. 144, 191 N.E. 360 (1934). This case appears in 93 A.L.R. 964 (1934), together with an extensive annotation of the cases to that time.

[49] 307 Mass. 40 at 42, 29 N.E. (2d) 310 (1940).

[50] (Mass. 1948) 75 N.E. (2d) 3 at 10.

intent to make the appointive property his own for all purposes. In the *Mishou* case, the court makes clear that what the donee intends to do with the appointive property cannot be materially affected by what the donor has said shall be done with it in the event that the donee does not appoint the fund at all.

F. *Conclusion*

It is apparent that no single test for determining the donee's intent in every instance has been formulated. However, a greater willingness to find that the donee intended to make the fund his own is indicated by the recent emphasis on the broad interest of the donee in the appointive property. In the absence of deliberate segregation of owned and appointive property, it is not unlikely that the donee's intent to make the fund his own will be regarded as coincident with his intent to exercise the power.

Richard L. Eckhart, S.Ed.