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WILLS-CONSTRUCTION-GIFT TO EXECUTOR TO BE DISPOSED OF IN HIS DISCRETION AS A GENERAL POWER OF APPOINTMENT

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WILLS—CONSTRUCTION—GIFT TO EXECUTOR TO BE DISPOSED OF IN HIS DISCRETION AS A GENERAL POWER OF APPOINTMENT—Testator, after bequeathing specific legacies, gave the residue of his estate to his executor to "dispose of any balance after the aforementioned gifts have been paid according to his wise discretion." The executor was the husband of testator's niece, one of the legatees, and he was well acquainted with testator. He declared his intention of disposing

of the residue to testator's nieces, for whom testator had expressed concern. The trial court held the testator had attempted to create a trust by the residuary clause, which failed for indefiniteness. On appeal, *held,* reversed. The testator created a general power of appointment in the executor. *In re Lindston's Estate,* (Wash. 1949) 202 P. (2d) 259.

When a testamentary gift is given to an executor to be disposed of in his discretion, it is susceptible of three constructions: a trust, a power, or an absolute gift. In attempting to ascertain the testator's intention courts look to the language used in light of the circumstances.[1] Since the language is too indefinite to support a private trust,[2] unless it is clear that a trust was intended, a construction should be preferred that upholds the validity of the gift.[3] Some indicia of an intent to create a trust are the use of the words, "in trust," "to trustees," etc.,[4] or the use of precatory words that negative a beneficial gift to the executor, as where the testator establishes a standard for distribution.[5] Also taken into account is whether or not the executor is a natural object of the testator's bounty,[6] whether the gift is to the executor *eo nomine* or individually,[7] and whether the executor took beneficially under another provision in the will.[8] These are all factors tending to establish whether the executor was intended to take as a

[1] ". . . the court places itself in the position in which the testator was when he made the will; and the will is construed in the light of the surrounding facts and circumstances." 2 PAGE, WILLS §920 at p. 816 (1941), and cases cited therein.

[2] The rule was established in Morice v. The Bishop of Durham, 9 Ves. Jr. 399, 32 Eng. Rep. 656 (1804), affd. 10 Ves. Jr. 522, 32 Eng. Rep. 947 (1805), that a private trust needs a definite beneficiary. The rule has frequently been criticized: See Ames, "The Failure of the 'Tilden Trust,'" 5 HARV. L. REV. 389 (1892), and Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 527 at 538 (1917), but the doctrine is apparently here to stay. See annotations, 3 A.L.R. 297 (1919); 45 A.L.R. 1440 (1926). Such uncertain trusts are invalid because of (1) uncertainty of purpose, (2) uncertainty of beneficiaries, (3) public policy against the delegation of testamentary powers. See Chichester Diocesan Fund and Board of Finance v. Simpson, [1944] A.C. 341.

[3] In re Lummis, 101 Misc. 258, 166 N.Y.S. 936 (1917); Sisson v. Seabury, 22 Fed. Cas. No. 12,913 (1832).

[4] Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926). But this is not conclusive. Norman v. Prince, 40 R.I. 402, 101 A. 126 (1917), noted in 31 HARV. L. REV. 661 (1918).

[5] "Precatory words addressed to a fiduciary or custodian of a fund are enforced as mandatory when like words addressed to the devisee, whose estate is absolute, would not be enforced." Thomas v. Buck, 236 Ky. 241 at 245, 32 S.W. (2d) 1006 (1930). See also Merrill v. Pardun, 125 Neb. 701, 251 N.W. 834 (1933); Erickson v. Willard, 1 N.H. 217 (1818).

[6] A devise to a corporate fiduciary, of itself, negatives any intent to have it take beneficially. 3 PROPERTY RESTATEMENT §323(e) (1940). But gifts to executors who are close relatives of the testator have been held to be absolute. See annotation, 37 L.R.A. (n.s.) 400, 407 (1912).

[7] A gift to an executor is presumed to have been made to him in his official capacity or in trust and not beneficially. Morton v. Flanagan, 143 Kan. 413, 55 P. (2d) 573 (1936), 104 A.L.R. 111 (1936). However, this is a question of construction and the testator's intent governs. Beakey v. Knutson, 90 Ore. 574, 174 P. 1149, 177 P. 955 (1918).

[8] If the person named as executor with the discretion to dispose of the residue was also a specific legatee, it is often held that the testator did not intend to leave two gifts to him beneficially. Haskell v. Staples, 116 Me. 103, 100 A. 148 (1917). But this is not conclusive. In re Howell, [1915] 1 Ch. D. 241.

fiduciary or as a beneficiary. The indefiniteness of the gift is some evidence of the lack of intent to create a trust.[9] If, as a matter of construction, it is determined that no trust was intended, or conversely, that the executor was intended to take beneficially,[10] the court may construe the gift as a power or an absolute gift. No special form of words is necessary to create a power so long as the intent to do so is present.[11] The adoption of the power construction gives effect to all of the words employed by the testator, while the absolute gift interpretation treats the words of distribution as mere surplusage and thus is rarely justified.[12] Under the better view when a gift is given to an executor by will to be disposed of in his discretion and it is determined that the executor was not intended to take in a fiduciary capacity, a power is thereby created.[13] This construction will more nearly coincide with the testator's presumed intent than finding an absolute interest in the executor. In most cases it is probable that the testator intended that his executor should have the authority to create interests in others,[14] but did not intend to impose imperative duties with correlative rights on the one hand, or to have his words of discretionary disposal treated as mere surplusage, on the other. While, as a practical matter, there is little difference between a general power and an absolute gift construction, it is possible that in the former case the executor will exercise his discretion more prudently than in the latter. In the instant case the court has reached a desirable result, in that there were none of the usual trust factors present and effect was given to the entire residuary clause. The willingness of the executor to appoint to objects

[9] "Whenever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and quantum of the subject, as well as the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust." Lines v. Darden, 5 Fla. 51 at 73 (1853). See also, 1 BOGERT, TRUSTS AND TRUSTEES §48 (1935).

[10] As a general rule these are the only alternatives. Hypothetically, it is possible that the testator intended no trust and also no beneficial interest in the executor, but to construe the language as a power to appoint to anyone but the donee is to construe a highly doubtful testamentary intent and it is better for the property to pass as part of the residue or by intestacy than by any such unusual device. 3 PROPERTY RESTATEMENT §323(e) (1940). But such a power was held valid in In re Park, [1932] 1 Ch. D. 580.

[11] In re Watt's Estate, 202 Pa. St. 85, 51 A. 588 (1902); In re Will of Tinsley, 187 Iowa 23, 174 N.W. 4 (1919).

[12] 3 PROPERTY RESTATEMENT, §323(e) (1940). The donee of a general power may obtain the beneficial interest by appointing to himself or his estate. However, if the donee fails to exercise the power the property passes to the taker in default or the donor's heirs, and not to the donee's estate as it would if it were an absolute interest, and the donee's creditors ordinarily have no rights in the property subject to the unexercised power. Gilman v. Bell, 99 Ill. 144 (1881).

[13] Of course, it may be found that the testator intended a special power of appointment, in which case, especially if there is no taker in default, it might be imperative and require the same certainty as a private trust. Brook v. Brook, 3 Sm. & G. 280, 65 Eng. Rep. 659 (1859); Harding v. Glyn, 1 Atk. 469, 26 Eng. Rep. 299 (1739).

[14] One possible objection to this construction is that it in effect delegates the testamentary power from the testator to the executor. See Attorney-General v. Nat. Provincial and Union Bank of England, [1924] A.C. 262, 264; Scott, "Trusts for Charitable and Benevolent Purposes," 58 HARV. L. REV. 548 at 566 (1945).

of the testator's bounty illustrates the desirability of validating such testamentary schemes.[15] Ultimately, of course, each case must depend upon its own facts and upon the court's attitude toward the ruling in the case of *Morice v. The Bishop of Durham*,[16] which so often thwarts testamentary expectancies.

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[15] The fact that a trustee is willing to perform an indefinite trust will not save it, Morice v. The Bishop of Durham, supra, note 2, but it is undoubtedly one factor that may influence the court to uphold the testamentary scheme. See Ames, "The Failure of the 'Tilden Trust,'" 5 HARV. L. REV. 389 (1892).

[16] Supra, note 2.