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FUTURE INTERESTS—POWERS OF APPOINTMENT—EXCLUSIVE AND NONEXCLUSIVE POWERS AND THE DOCTRINE OF ILLUSORY APPOINTMENTS—Testatrix, after making certain specific bequests, devised the residue of her estate to her son George for life. The will stated that upon the death of George, the property should pass to his widow and descendants, “provided, however, that [George] may devise his interest to his widow, his descendants or my descendants.” The will further provided that if George should die leaving no widow or descendants, and without having made a testamentary disposition, the property was to pass one-half to George’s brother and his descendants, and one-half to a sister. George

died without having married and left a will which disposed of the entire property to the brother. The sister contended that the testamentary power given George was nonexclusive, so that the attempted exercise which gave the sister nothing was void, and the property should pass to the takers in default.¹ Held, the power was exclusive, reversing the lower court. Overruling a line of previous cases, the court adopted the rule of the *Restatement of Property* that a power is exclusive unless the contrary is specified by the donor. The court failed to find such contrary intent. *Harlan v. Citizens National Bank of Danville*, (Ky. 1952) 251 S.W. (2d) 284.

A special power of appointment may be exclusive or nonexclusive. If exclusive, the donee is not required to appoint to all members of the class, but if nonexclusive, no member of the class may be omitted.² In deciding whether a special power is exclusive, the court seeks to determine the intent of the donor. When this is expressed in unequivocal terms, there is no difficulty, but such is the exceptional case. More often, courts examine the language used and attach to certain words or phrases the characterization of exclusive or nonexclusive, even though these bits of language may be capable of various meanings. Thus, a power to appoint "to" or "among" the members of a certain group is commonly held to be a nonexclusive power, even if words of discretion (e.g., "as the donee shall think best") are added. A power to appoint "to such" or "such of" the members as the donee shall elect is typically held exclusive.³ The Kentucky court had adhered to this type of treatment in a line of decisions,⁴ but in the past dissatisfaction had been expressed with the tendency to hold powers nonexclusive in doubtful cases.⁵ In the instant case, the court set out to limit the number of possible nonexclusive powers. It adopted the rule of the *Restatement of Prop-*

¹ More particularly, the sister maintained that, while the donee was free to choose between "his widow, his descendants or my descendants," he could not appoint some of the property to each of these groups, and that within any one of these groups, no member could be omitted. Since the donee had chosen "my descendants" he could not appoint to the brother without giving the sister a share.

² *Moore v. Emery*, 137 Me. 259 at 274, 18 A. (2d) 781 (1941).

³ Howe, "Exclusive and Nonexclusive Powers and the Illusory Appointment," 42 MICH. L. REV. 649 (1944). The author conducts a detailed study of the meaning put upon various modes of expression. See also note, 48 HARV. L. REV. 1408 (1935).

⁴ *McGaughey's Admr. v. Henry*, 54 Ky. 307 (1854). "To divide . . . as she may think proper, among her children" held nonexclusive. The court thought the donor's intent was the same as that expressed in a clearly exclusive power granted as to another part of the property, but felt bound to find the power nonexclusive in the absence of an express power of selection or exclusion. *Degman v. Degman*, 98 Ky. 717, 34 S.W. 523 (1896) ("among my children as she may think best" held nonexclusive); *Clay v. Smallwood*, 100 Ky. 212, 38 S.W. 7 (1896) ("to my other children as she may direct" held nonexclusive); *Barrett's Exr. v. Barrett*, 166 Ky. 411, 179 S.W. 396 (1915) ("as he may direct . . . to his wife and heirs at law" held nonexclusive); *Shaver v. Ellis*, 226 Ky. 806, 11 S.W. (2d) 949 (1928) ("dispose of as she sees proper amongst any of the children" held exclusive). But see *Levi v. Fidelity Trust & Safety Vault Co.*, 121 Ky. 82, 88 S.W. 1083 (1905) ("she may will or distribute to her relations and to my relations . . . as she may choose or desire" held exclusive).

⁵ *Barrett's Exr. v. Barrett*, supra note 4, at 415.

erty⁶ that a special power is exclusive unless a contrary intent appears, and decided that the past Kentucky decisions which found nonexclusive powers in ambiguous language had been wrongly determined.⁷ The power in the principal case was found exclusive under this rule. This decision, it would seem, goes beyond the intent of the *Restatement* writers, for this reason: the *Restatement* applies a presumption of intent to create an exclusive power where the language is colorless,⁸ but it would also acquiesce in reference to ambiguous wording to determine intent. Thus, the *Restatement* finds that an interpretation of a power "to divide . . . on his death among my children" as nonexclusive is justified.⁹ In applying the *Restatement* rule, the Kentucky court decided that a previous case in that state which held nonexclusive a power "to divide . . . as she may think proper, among her children" was error.¹⁰ While it is difficult to generalize from a single case, it may be that under the new Kentucky rule a nonexclusive power cannot be granted except in unmistakable terms.¹¹ It would be interesting to discover how Kentucky would treat a power "to dispose of the same after his death among his children in such shares . . . as he shall think . . . proper."¹² This language is not unambiguous, but the *Restatement* holds that it is indicative of intent to create a nonexclusive power. The Kentucky court might find it insufficient to do so. This holding has particular significance for Kentucky, since it is one of the few states that clearly adopts the doctrine of illusory appointments.¹³ At law, the appointment of a nominal sum to certain members of the class, while giving the bulk of the property to others, was a valid exercise of a nonexclusive power. However, the English courts of equity held these nominal appointments illusory. Unless each member of the class received a substantial (although not necessarily equal) portion of the property, the whole appointment would be set aside.¹⁴ While this doctrine has been abolished in England by statute,¹⁵ and in many of the states by statute or decision,¹⁶ it is unquestionably part of the law of Kentucky. The rule is hard to apply in practice because there is no clear-cut test of substantiality; courts look to percent-

⁶ 3 PROPERTY RESTATEMENT §360 (1940).

⁷ Principal case at 287-288.

⁸ Howe, "Exclusive and Nonexclusive Powers and the Illusory Appointment," 42 MICH. L. REV. 649 at 651 (1944).

⁹ 3 PROPERTY RESTATEMENT §360, comment c, illus. 4 (1940).

¹⁰ Principal case at 288, referring to McGaughey's Admr. v. Henry, supra note 4.

¹¹ Such unmistakable language might be "to all and every of the objects as the donee shall appoint, but no object shall be excluded by the donee." See Howe, "Exclusive and Nonexclusive Powers and the Illusory Appointment," 42 MICH. L. REV. 649 at 650 (1944).

¹² 3 PROPERTY RESTATEMENT §360, comment c, illus. 3 (1940).

¹³ Barrett's Exr. v. Barrett, supra note 4, at 413. The McGaughey, Degman, and Clay cases, supra note 4, also announced the rule, but it was dictum therein. Georgia secures the doctrine by statute, Georgia Code Ann. (1935) §§37-602, 37-604.

¹⁴ Howe, "Exclusive and Nonexclusive Powers and the Illusory Appointment," 42 MICH. L. REV. 649 (1944); Moore v. Emery, supra note 2.

¹⁵ Law of Property Act, 15 Geo. V, c. 20, §158(1) (1925). Earlier versions had stated that no appointment should be invalidated because the sum was nominal. The present text states that no appointment is invalid because it excludes a member of the class.

¹⁶ For the division of authority as of 1944, see Howe, "Exclusive and Nonexclusive Powers and the Illusory Appointment," 42 MICH. L. REV. 649 at 669-671.

ages rather than absolute amounts, but no distinct line between the nominal and the substantial exists.¹⁷ The present case, in greatly reducing the number of powers that can be found nonexclusive, proportionately reduces the potential application of the illusory appointment doctrine. In so far as this decision preserves nonexclusive powers for a few cases and will continue to protect them from illusory appointments, it should please those writers who believe that the device is a useful one. If the donor wishes to secure to each member of the class a minimum amount, other methods are open to him which create less difficulty, and are more certain of result, than nonexclusive powers.¹⁸ Therefore the alternative of abolishing such powers or, what is very nearly the same thing, discarding the illusory appointment doctrine, seems justified.¹⁹

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¹⁷ *Ibid.* The writer has collected all the cases in which the court reported both the total amount of the property and the size of the gift in question, and concludes that the line between validity and invalidity lies, in practice, between certain very narrow percentages.

¹⁸ The usefulness of a power of appointment lies chiefly in the discretion granted to the donee. If the donor wishes to insure a minimum appointment to each of the class members, such should be stated and discretion granted as to the remainder.

¹⁹ The better course is to hold all powers exclusive. A court that retains nonexclusive powers and simply abolishes the illusory appointment doctrine would invalidate an appointment that completely omits a member of the special group, but would uphold an appointment that gives him one cent.