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## TRUSTS - HONORARY TRUST - AUTHORITY OF A SUCCESSOR TRUSTEE

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TRUSTS — HONORARY TRUST — AUTHORITY OF A SUCCESSOR TRUSTEE — Paragraph 24 of testatrix' will gave to the executor and trustee, appointed under the will, \$10,000 "to be used by him to place a memorial window, or some other memorials, to cost any sum in his discretion up to the sum of One thousand Dollars, in Christ Church Cathedral, at St. Louis, Mo., and to place monuments and markers in my family subdivision of the Clark and Glasgow plot in the Bellefontaine Cemetery, at St. Louis, Mo." Soon after testatrix' death the trustee died. A successor trustee was appointed and by special order of the court was authorized to administer the trust created by paragraph 24. He spent \$1000 for a church memorial window and \$1732.60 for monuments. From the income of the remainder he paid premiums for insurance on a statue in the above named plot and made certain other expenditures. The successor trustee having died, residuary legatees now object to certain of the expenditures from the income, claiming that while the successor trustee could properly administer the trust, it terminated after he had selected and purchased the monu-

ments. *Held*, a successor trustee could not be empowered by a court to make the expenditures designated by paragraph 24. Since no complaint was made to the expenditures for the memorial window and monuments but only to expenditures of income of the balance on hand, certain of those expenditures were surcharged against the account of the deceased successor trustee, including the amount for the insurance premiums on the statue. *Estate of Julia Voorhis*, (N. Y. Surr. Ct. 1941) 27 N. Y. S. (2d) 818.

A bequest for a specific, noncharitable purpose, where there is no beneficiary to enforce it, does not create a trust.<sup>1</sup> Many cases, however, hold that the testator's nominee has the power to apply the bequest to the named purposes.<sup>2</sup> There seem to be two theories to describe the legal relations involved. According to one view,<sup>3</sup> the beneficial interest in the property bequeathed vests in the testator's residuary legatees at the moment of testator's death. The property interests vested by operation of this resulting trust are subject, however, to divestiture, in whole or in part, by the exercise of the nominee's power to appropriate for the specified purposes. According to the other theory,<sup>4</sup> no resulting trust arises unless and until the nominee fails to exercise his power. If the testator's nominee is willing to exercise his power, but dies before doing so, the question arises whether the court can appoint a successor with the same authority.<sup>5</sup> Where, for the purpose of carrying out the testator's intention, the court is willing that the testator's nominee appropriate the bequest to the specified purposes, and the duties attempted to be imposed are not such that the testator would intend only the nominee to exercise them, there would seem to be no reason why the court cannot authorize another to exercise the power.<sup>6</sup> The court's power to do so would seem especially clear under the second theory above. The first theory has been criticized for identifying the authority of the testator's nominee to make the designated expenditures with a power of appointment.<sup>7</sup> Were this theory, nevertheless, to be adopted, it would seem that the testator's nominee would occupy a position similar to that of a donee of a power in trust. Although the duty of the nominee is unenforceable, if he should die before either performing or defaulting, it would seem, following the analogy to a power in trust,<sup>8</sup> that the court would assist in accomplishing the testator's purpose. The principal case does not necessarily controvert this conclusion, for, as construed by the court, paragraph 24 did not create an honorary trust. The court held that the authority granted the testatrix' nominee was permissive rather than imperative, involving no duty but only a power. It was this construction which prevented paragraph 24 from setting up a valid charitable

<sup>1</sup> 1 TRUSTS RESTATEMENT, § 124 (1935).

<sup>2</sup> 1 SCOTT, TRUSTS, § 124 (1939); 2 SIMES, FUTURE INTERESTS, § 555 (1936).

<sup>3</sup> Smith, "Honorary Trusts and the Rule Against Perpetuities," 30 COL. L. REV. 60 (1930).

<sup>4</sup> *Supra*, note 2.

<sup>5</sup> It has been said that no case has answered this question. 1 SCOTT, TRUSTS 625 (1939).

<sup>6</sup> *Id.*

<sup>7</sup> 2 SIMES, FUTURE INTERESTS 438 (1936).

<sup>8</sup> *Id.*, § 287.

trust under section 13a of the New York Personal Property Law.<sup>9</sup> The court considered that a resulting trust vested in the residuary legatees at the moment of testatrix' death, subject to the power of divestiture in testatrix' nominee. Accepting the court's construction of the nature of the authority granted the nominee, it would seem that, returning to the analogy with powers of appointment, the nominee had an authority similar to a power not in trust.<sup>10</sup> It has been said that it is of the essence of a power of appointment that it is personal to the nominee.<sup>11</sup> Hence, under this analysis, no one but the testatrix' nominee could exercise the authority to make the designated expenditures. As can readily be seen, the result of the principal case turns on whether the authority granted by paragraph 24 was permissive or imperative. It would seem that the court's construction is justified. The language of paragraph 24 relates more to the placing of tombstones than to their maintenance; such an interpretation is especially apparent upon consideration of paragraph 25<sup>12</sup> which makes a bequest in trust to the cemetery association for perpetual care, and directs that the interest on the bequest be applied to preservation of stone work on the plot.

*Reed T. Phalan*

<sup>9</sup> "Gifts, grants and bequests of personal property, in trust for the purpose of perpetual care, maintenance, improvement or embellishment of cemeteries or private burial lots, in or outside of cemeteries, and the . . . monuments, structures and tombs in such cemeteries or on such private burial lots are permitted and shall be deemed to be for charitable and benevolent uses. . . ." 40 N. Y. Consol. Laws (McKinney, 1938), § 13a.

<sup>10</sup> See I TRUSTS RESTATEMENT, § 120, comment f (1935).

<sup>11</sup> I SIMES, FUTURE INTERESTS, § 287 (1936).

<sup>12</sup> "I give and bequeath to Bellefontaine Cemetery Association of St. Louis, the sum of Four thousand Dollars, in trust, for the perpetual endowment, care and maintenance of my family subdivision of the Clark and Glasgow plot in the Bellefontaine Cemetery. . . . Such interest as may be allowed on said bequest shall be applied to the care, maintenance, improvement and embellishment of my said plot and for the preservation, repair, restoration, or replacement of any monumental or other stone work on my said plot, should the occasion therefor arise."