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**Creation Of A Trust On Insurance Proceeds By The
Use Of Precatory Expressions In A
Testamentary Instrument**

*Waesche v. Rizzuto*¹

The appellants, trustees named under the last will and testament of the decedent, were sued by the appellee, sister of the testator's wife and member of the testator's household, to have the court construe and enforce a testamentary trust allegedly created by the will. The residuary clause provided for the establishment of a trust fund and further provided that it was the testator's "will and desire" that his trustees make arrangements to assure the adequate support of the appellee, among others, from the trust fund so created. The testator then declared:

"[R]ealizing it is beyond my power by this will and testament to do so, but relying upon faith and confidence in my trustees [who were named in the insurance policy as beneficiaries] that they will comply with my desires, it is my wish that, upon my death,

¹ 224 Md. 573, 168 A. 2d 871 (1961).

the monthly payments of insurance to my trustees be included in the trust fund. . . ."²

The Maryland Court of Appeals, in affirming the decision of the lower court, held that a trust had been created notwithstanding the utilization of the precatory words, "my will and desire." The Court relied upon two prior Maryland decisions wherein precatory terms were interpreted.³ Further, and of greater significance, the Court found that the testator intended the insurance money to form a portion of the trust fund and, as such, the intent was enforceable. It was reasoned that since the precatory words employed by the testator in the earlier provision of the will establishing the trust were found to be mandatory and not directory, the same construction should be applied to similar expressions in the later provision creating a portion of the trust *res*.⁴

A primary requisite for the creation of an express trust is a manifestation of intent by the settlor that a compellable trust be created.⁵ The cases in which the courts encounter the greatest difficulty in ascertaining whether the testator intended the bequest or devise to pass free of legal restrictions or whether it was to be restricted to a designated purpose are those in which a trust was allegedly created through the employment of precatory expressions.⁶ Precatory words are usually words of wishing, desiring or hoping as distinguished from words of direction or command, which more clearly show an intent to impose a legal duty upon a transferee.⁷

Under the early view the courts readily found that the property bequeathed was impressed with a trust notwithstanding the fact that only precatory language was em-

² *Id.*, 582-3.

³ *Gerke v. Colonial Trust Co.*, 114 Md. 289, 79 A. 587 (1911); *Handley v. Wrightson*, 60 Md. 198 (1883).

⁴ The Court quoted *Jones v. Holloway*, 183 Md. 40, 45, 36 A. 2d 551 (1944): "[W]hen a certain term appears in a will more than once, the Court will infer that the testator intended the term to have the same meaning wherever used, unless a contrary intention clearly appears from the context."

⁵ *Mortgage Corp. v. Debenure Corp.*, 178 Md. 658, 676, 16 A. 2d 866 (1940); *Seabrook v. Grimes*, 107 Md. 410, 417, 68 A. 883 (1908); in general see 1 *BOGERT, TRUSTS AND TRUSTEES* (1951) § 45; 1 *SCOTT, TRUSTS* (2d ed. 1956) § 23; *RESTATEMENT, TRUSTS 2d* (1959) §§ 23, 25; 54 *Am. Jur.* 44, *Trusts*, § 33; 89 *C.J.S.* 770, *Trusts*, § 42.

⁶ *BOGERT, op. cit. supra*, n. 5, § 48, p. 341.

⁷ In general see 2 *ALEXANDER, COMMENTARIES ON WILLS* (1918) § 1088 *et seq.*; 1 *BOGERT, TRUSTS AND TRUSTEES* (1951) § 48; 1 *SCOTT, TRUSTS* (2d ed. 1956) § 25; *RESTATEMENT, TRUSTS 2d* (1959) § 25; *RESTATEMENT, TRUSTS* (1935), *Md. Anno.* (1940) § 25; 54 *Am. Jur.* 64, *Trusts*, § 54 *et seq.*; 89 *C.J.S.* 784, *Trusts*, § 44.

ployed by the testator. Accordingly, under this view, precatory words prima facie imposed a trust on the bequest or devise involved unless a contrary intention appeared in the context of the instrument.⁸ One reason, and perhaps the most logical explanation, for the adoption of this rule by the early English courts is that at one time in England, no words, no matter how mandatory in nature, could create more than a moral obligation upon a trustee to carry out the purpose of the trust.⁹ It was, therefore, natural that the testator use words of request. It was also natural that this tendency to use precatory words should continue when trusts subsequently became legally as well as morally binding upon trustees and that the courts, in order to enforce the trusts, should adopt the above rule of construction.¹⁰ However, even under this early rule, if the particular purpose of the trust was too indefinite,¹¹ or the testator expressed a desire to impose a trust not only upon the property bequeathed to the alleged trustee, but also on property owned absolutely by the "trustee" in his own right,¹² the property received by the legatee or devisee did not pass subject to the alleged trust.¹³

While the earlier courts thus accepted the testator's expression of mere wish or desire as sufficient to impose legal obligations on the trustee whenever the other elements of a trust were present, the modern weight of authority allows precatory words to create a trust only when all the surrounding circumstances show an intent of the testator to impose legal obligations on the trustee despite the use of the precatory language.¹⁴ This rule of construction has led to varied and irreconcilable decisions, as courts are now dealing with discovering the actual intent of the testator to impose binding obligations, which

⁸ *Curnick v. Tucker*, L.R. 17 Eq. 320 (1874); *Gully v. Cregoe*, 24 Beav. 185, 53 Eng. Rep. 327 (R.C. 1857); *Malim v. Keighley*, 2 Ves. 530, 30 Eng. Rep. 760 (R.C. 1795); *Harding v. Glyn*, 1 Atk. 469, 26 Eng. Rep. 299 (R.C. 1739); for further cases see *BOGERT, op. cit. supra*, n. 7, pp. 342, 343; *SCOTT, op. cit. supra*, n. 7, p. 191; also see 49 A.L.R. 14, n. 12 (1927).

⁹ *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718 (1853); also see 54 Am. Jur. 64, Trusts, § 55.

¹⁰ 54 Am. Jur. 64, Trusts, § 55.

¹¹ *Stead v. Mellor*, L.R. 5 Ch. Div. 225 (Eng. 1877).

¹² *Hood v. Oglander*, 34 Beav. 513, 55 Eng. Rep. 733 (R.C. 1865).

¹³ For further cases see *SCOTT, op. cit. supra*, n. 7, pp. 191, 192; *RESTATEMENT, TRUSTS* (1935) Md. Anno. (1940) § 25.

¹⁴ For representative cases see *In re Stuart's Estate*, 274 Mich. 282, 264 N.W. 372 (1936); *Brubaker v. Lauver*, 322 Pa. 461, 185 A. 848 (1936); *McClure v. Carter*, 202 Va. 191, 116 S.E. 2d 260 (1960); *In re MacAdams Estate*, 45 Wash. 2d 527, 276 P. 2d 729 (1954); 1 *SCOTT, TRUSTS* (2d ed. 1956) § 25; see also *RESTATEMENT, TRUSTS* (1935) Md. Anno. (1940) § 25. *Contra: Tucker v. Myers' Estate*, 151 Neb. 359, 37 N.W. 2d 585 (1949); *Hedrick v. Hedrick*, 125 W.Va. 702, 25 S.E. 2d 872 (1943).

under the earlier rule was presumed from precatory words whenever the other elements of the trust were present.

No concrete rule can be formulated whereby the courts can, in all cases, determine what terms or expressions will impose a trust upon a bequest or devise.¹⁵ The use of particular precatory expressions in the instrument provide the courts with little assistance in ascertaining the actual intent of the testator.¹⁶ However, various guides to intent have been formulated through a consideration of other portions of the instrument and the position of the testator, trustee and beneficiary of the alleged trust at the time of the execution of the creating instrument.¹⁷ Where a testator has pointed out with certainty the objects of the trust and the subject matter to which it is to attach, precatory words will probably be sufficient to create a trust;¹⁸ the clarity and certainty of the subject matter and object are construed by the court as evidence of the intention of the testator.¹⁹ A determining factor in some cases is the scope of the alleged trustee's duties, *i.e.*, whether the testator gives the "trustee" very broad or merely ministerial discretionary powers.²⁰ Finally, the relation between the various parties may influence the court. Thus, when the supposed beneficiary of the trust would ordinarily be a natural object of the testator's bounty, the courts more readily impose a trust upon property bequeathed by will notwithstanding the use of precatory terms.²¹ In addition, where

¹⁵ *Saylor v. Plaine*, 31 Md. 158, 163, 1 Am. Rep. 34 (1869).

¹⁶ See 49 A.L.R. 42 *et seq.* (1927), which extensively reviews prior decisions according to the precatory expressions employed; for supplemental annotations see 70 A.L.R. 326 (1931); 107 A.L.R. 896 (1937).

¹⁷ The text follows the factors as discussed in 1 BOGERT, TRUSTS AND TRUSTEES (1951) § 48, p. 344 *et seq.*; the following circumstances are listed by RESTATEMENT, TRUSTS 2d (1959) § 25 as worthy of consideration: "(1) the imperative or precatory character of the words used; (2) the definiteness or indefiniteness of the property; (3) the definiteness or indefiniteness of the beneficiaries or of the extent of their interests; (4) the relations between the parties; (5) the financial situation of the parties; (6) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; (7) whether the results reached by construing the transaction as a trust or not a trust would be such as a person in the situation of the settlor would naturally desire to produce."

Cf. RESTATEMENT, TRUSTS (1935) Md. Ann. (1940) § 25.

¹⁸ *Nunn v. O'Brien*, 83 Md. 198, 200, 34 A. 244 (1896); *Handley v. Wrightson*, 60 Md. 198, 203 (1883).

¹⁹ *Pratt v. Sheppard, etc. Hospital*, 88 Md. 610, 627, 42 A. 51 (1898), citing the leading authority *Morice v. Bishop of Durham*, 10 Ves. Jur. 522, 32 Eng. Rep. 947 (1805).

²⁰ *Cf.* *In re Fordrungs Will*, 154 N.Y.S. 2d 552 (1956); *Andrews v. Hughes*, 243 N.C. 616, 91 S.E. 2d 591 (1956); *In re Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718 (1853).

²¹ *Colton v. Colton*, 127 U.S. 300 (1888); *Warner v. Bates*, 98 Mass. 274 (1867).

a testator employs words of request to his executor or other person occupying a fiduciary position toward him, the court will probably find the requisite trust intent.²² However, where property is bequeathed to the legatee absolutely, the fact that the testator subsequently adds precatory expressions is likely to have no legal effect and no trust will be created.²³ It should be emphasized that these factors are merely guides to intent, that the presence or absence of one or the other is usually not determinative in and of itself, and that, as stated earlier, the result under the modern rule should be governed by a consideration of all the surrounding circumstances in each case.²⁴

The first time the Maryland Court of Appeals considered whether words of recommendation created a trust was in 1838 in *Tolson v. Tolson*.²⁵ It was there held that the testator in the devise to seven of his sons with a request "to take care of their brother John Tolson and his family" had imposed a trust upon that portion of the property necessary for the proper support of John.²⁶ The decision, in that respect, seemed to follow the English rule; and, forty-five years later, in *Handley v. Wrightson*²⁷ it was stated that, although there have been decisions to the contrary, Maryland considers "the weight of authority to be for upholding words of request, desire, expectation, and the like, as creative of trusts, when the contrary does not appear from the context or by necessary implication."²⁸

Fifteen years after this decision the leading Maryland case of *Pratt v. Sheppard, etc. Hospital*²⁹ was decided by the Court of Appeals. In the midst of a lengthy opinion, citing numerous authorities, the Court, through Chief Judge McSherry stated:

"Whatever may have been the results reached in the earlier cases . . . there is a strong tendency nowadays to restrict the doctrine of precatory trusts. * * * Whether or not a trust has been created in a given

²² In re Lawrence's Estate, 17 Cal. 2d 1, 108 P. 2d 893 (1941); In re Moody's Will, 155 Me. 325, 154 A. 2d 165, 73 A.L.R. 2d 1225 (1959).

²³ *Sands v. Church, etc.*, 181 Md. 536, 30 A. 2d 771 (1943); *Nunn v. O'Brien*, 83 Md. 198, 34 A. 244 (1898); *Williams v. Worthington*, 49 Md. 572 (1878).

²⁴ *Supra*, n. 14.

²⁵ 10 G. & J. 159 (Md. 1838).

²⁶ However, the Court held that no trust was established with regard to John Tolson's wife and children, the term "family" not designating any individual persons with sufficient accuracy.

²⁷ 60 Md. 198 (1883).

²⁸ *Id.*, 201.

²⁹ 88 Md. 610, 42 A. 51 (1898).

case by the use of precatory words is, in the last analysis, a question of construction and interpretation to ascertain the *intention*."³⁰

Subsequent Maryland decisions have tended to follow this statement of the law.³¹

With regard to the decision of the Court in the principal case impressing a trust on the insurance proceeds, it should be noted that the Court apparently leaned toward the *Handley* decision,³² wherein it was declared that precatory words presumptively create a trust. Although the Court repeatedly referred to the ascertainment of the testator's intention and it is true that many of the factors usually influencing the courts to find the necessary trust intent were present (*i.e.*, certainty in object of the trust and subject matter;³³ the fact that the appellee was a member of the testator's household, and, therefore, a natural object of his bounty;³⁴ the fact that the legatees were, in fact, designated by the testator as "trustees"³⁵), the statement by the testator in his will that he realized it was beyond his power by that instrument to impress the trust upon the insurance proceeds could be said to indicate that the testator had no intent to impose legal obligations upon the recipients of the same. Technically, it is difficult to argue that the testator had the intent to impose legally enforceable duties³⁶ upon the beneficiaries of the policy when he had believed that it was beyond his power so to do. However, the Court of Appeals apparently felt that under all of the surrounding circumstances the testator's precatory words should be sufficient to impose legal duties. This may achieve an acceptable result on the facts of the instant case, but it may give doctrinal purists some difficulty in deciding whether the Court is following the older or more modern approach to precatory expressions.

There is an additional problem in the instant case in that even if the testator manifested the requisite intent to impose a trust upon the insurance proceeds, as was found

³⁰ *Id.*, 623.

³¹ *Sands v. Church, etc.*, 181 Md. 536, 30 A. 2d 771 (1943); *Gerke v. Colonial Trust Co.*, 114 Md. 289, 79 A. 587 (1911); *Colburn v. Union Infirmary*, 114 Md. 94, 78 A. 817 (1910); *Blackshere v. Samuel Ready School*, 94 Md. 773, 51 A. 1056 (1902); *Williams v. The Committee*, 92 Md. 497, 48 A. 930 (1901).

³² *Handley v. Wrightson*, 60 Md. 198 (1883).

³³ *Supra*, n. 18.

³⁴ *Supra*, n. 21.

³⁵ *Supra*, n. 22.

³⁶ RESTATEMENT. TRUSTS 2d (1959) § 25, p. 69: "No trust is created unless the settlor manifests an intention to impose enforceable duties."

by the Court, it is arguable that the testator did not have the power to impose such a trust. Immediately upon the death of the insured, the insurance beneficiary's rights under the insurance contract become completely fixed.³⁷ Whether the insured can further affect the rights of the beneficiary by his will depends upon the terms of the insurance contract. Where such a right is not reserved in said agreement, a majority of jurisdictions hold that an attempted modification by will is ineffective.³⁸ However, these courts will impose a trust upon the proceeds of insurance where, prior to the vesting of the named beneficiary's interest, the insured has communicated to him an intent that the beneficiary hold the proceeds for the benefit of another. Where the named beneficiary of the policy expressly promises or impliedly consents by silence to effectuate the insured's intent, the courts will usually impose a trust upon the proceeds in favor of the persons for whom the testator intended the insurance proceeds to benefit.³⁹

The Court in the instant case cited three federal cases apparently supporting its conclusion that the insured could impress the insurance proceeds with the trust. The only decision cited dealing with the trust problem was *Burgess v. Murray*.⁴⁰ In that case the beneficiary had been advised by letter from the insured, prior to his demise, that the said beneficiary was to apply the insurance proceeds in favor of another. The court found a trust to have been created. In the instant *Waesche* case⁴¹ the trustees were named as the beneficiaries of the insurance policy on the same day that the testator executed his will. It would appear, since it was not mentioned in the opinion, that the beneficiaries had no knowledge until after the death of the insured that he wished them to hold the proceeds in trust.⁴² Assuming this is the correct interpretation of

³⁷ VANCE, INSURANCE (3d ed. 1951) 680.

³⁸ *Id.*, 686, n. 5.

³⁹ See Annotation, Validity and Enforceability of Promise by Beneficiary of Life Insurance to Insured to Pay Proceeds, in Whole or Part, to Third Persons, 102 A.L.R. 588 (1936); also see VANCE, INSURANCE (3d ed. 1951) § 119.

⁴⁰ 194 F. 2d 131 (5th Cir. 1952); the other decisions cited, *i.e.*, *Batts v. United States*, 120 F. Supp. 26 (D. N.C. 1954) and *Bradley v. United States*, 143 F. 2d 573 (10th Cir. 1944) dealt with the problem of the validity of an attempted change of a designated beneficiary by the insured.

⁴¹ *Waesche v. Rizzuto*, 224 Md. 573, 168 A. 2d 871 (1961).

⁴² When the money was received, each of the trustees deposited his portion in a separate, individual bank account. One of the trustees later invested his \$5,000 in stocks, registered in his and his wife's names jointly. The trustee testified that his brother, the other trustee, had agreed to do the same. He also testified that it had been determined that this money

the factual situation, there is, at least, an argument that a trust could not have been impressed upon the insurance proceeds. If the beneficiaries of the insurance policy have no knowledge that they are to take the proceeds of said policy in trust prior to the insured's death, there would seem to be little ground upon which it could be argued that they impliedly consented to hold the proceeds under such condition before their right to the proceeds became vested.

The Washington Supreme Court in an opinion arising from facts closely analogous to those presented by the instant case distinguished the *Burgess* decision⁴³ in a similar manner.⁴⁴ However, it was there decided that the Court did not have to determine whether a positive direction in the will of the insured to apply insurance proceeds in a particular manner would be enforceable, when the beneficiary had no knowledge of this direction prior to the insured's death; there being no positive direction to the beneficiary, only precatory words, which were not considered to have had mandatory force. The decision in the instant case, therefore, apparently goes beyond the authorities cited by the Court.

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was not a part of the residue and remainder, but that it would be used under the testator's wishes. *Id.*, 580.

⁴³ *Burgess v. Murray*, 194 F. 2d 131 (5th Cir. 1952).

⁴⁴ *In Re Milton's Estate*, 48 Wash. 2d 389, 294 P. 2d 412 (1956).
