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## WILLS - PROVISIONS FOR CONSTRUCTION OF THE WILL BY UMPIRE NAMED BY TESTATOR

Alfred I. Rothman  
*University of Michigan Law School*

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WILLS — PROVISIONS FOR CONSTRUCTION OF THE WILL BY UMPIRE NAMED BY TESTATOR — Testatrix created a trust and bequeathed one-fifth of the income to her son *W* and to *S*, his wife, with a proviso that if *S* survived her husband such income should not be paid to her in case she remarried. *S* divorced *W* and remarried. Under a clause in the will giving them the power to determine with finality any question as to the construction or administration of the will,<sup>1</sup> the executors and trustees construed the will to mean that *S* was not

<sup>1</sup>The clause read as follows: "And I declare that if any question shall arise as to the construction and administration of my will, or any clause, matter or thing therein contained or with relation thereto, my trustees or trustee, acting either on their or

to receive any further share of the income, that testatrix would consider the divorce and remarriage during *W*'s lifetime the same as if the wife predeceased the son. *S* brings a bill for the construction of the will. *Held*, that the construction placed on the will by the executors and trustees was not binding on complainant. Under such a clause a decision by the executors and trustees may not be contrary to a clear provision in the will, and the court will further interfere in case of a gross mistake or error in judgment. *Taylor v. McClave*, 128 N. J. Eq. 100, 15 A. (2d) 213 (1940).

A provision in a will that a designated person, usually an executor or trustee, shall act as umpire as to all questions relative to the construction of the will is valid and effective.<sup>2</sup> Analogies are sometimes drawn to powers of appointment<sup>3</sup> and to agreements whereby disputes concerning the meaning of a written contract are to be submitted to a specified person.<sup>4</sup> Under such a provision the umpire is not confined to a determination of the disposition intended by a testator, but may also determine to what property the will applies.<sup>5</sup> That the named umpire is an interested party under the will does not invalidate his decision, at least where the contingency was foreseen by the testator when he conferred the power.<sup>6</sup> However, where such personal interest exists, the testator's intention to confer the power to interpret and construe must clearly appear from the context of the will.<sup>7</sup> If the will makes the executors arbiters of the amount of their own compensation, a reasonable and honest construction as to what the amount should be will be binding.<sup>8</sup> Testators do not merely provide for submission, but generally provide further that the umpire's decision shall be final and binding on the legatees and devisees. Whether the inclusion or exclusion of the latter statement

his own judgment, or under professional advice, and upon such evidence as they or he shall think fit, may determine such question by writing under their or his hands or hand; and I declare that such determination shall be final and binding on all persons interested under this my will or any codicil hereto." Principal case, 15 A. (2d) at 215.

<sup>2</sup> THOMPSON, CONSTRUCTION AND INTERPRETATION OF WILLS, § 8 (1928); 2 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS, 6th ed., § 841 (1923); 69 C. J. 124 (1934).

<sup>3</sup> *Wait v. Huntington*, 40 Conn. 9 (1873).

<sup>4</sup> *Moore v. Harper*, 27 W. Va. 362 (1886); *American Board of Commissioners of Foreign Missions v. Ferry*, (C. C. Mich. 1883) 15 F. 696.

<sup>5</sup> *Couts v. Holland*, 48 Tex. Civ. App. 476, 107 S. W. 913 (1908). But see *Matter of Frankenheimer*, 130 App. Div. 454, 114 N. Y. S. 975 (1909), affirmed in 195 N. Y. 346, 88 N. E. 374 (1909).

<sup>6</sup> *Wait v. Huntington*, 40 Conn. 9 (1873) (one umpire was a beneficiary under the will and the other was closely related to legatees); *American Board of Commissioners of Foreign Missions v. Ferry*, (C. C. Mich. 1883) 15 F. 696 (umpire given a share in residuary estate).

<sup>7</sup> *Nations v. Ulmer*, (Tex. Civ. App. 1940) 139 S. W. (2d) 352. In the court's opinion no arbitral power was given to trustees by the following language: "An additional amount of ten per cent of the gross income which is hereby named as compensation to the trustees in addition to fees and commissions allowed by law in the administration of estates, which said commission and compensation the trustees may retain without any judicial ascertainment." 139 S. W. (2d) at 355.

<sup>8</sup> *Nations v. Ulmer*, (Tex. Civ. App. 1940) 139 S. W. (2d) 352.

makes a difference is doubtful. In every case, even when the umpire's decision is stated to be final, the right of appeal to a regularly constituted court exists.<sup>9</sup> But courts are not entirely agreed on the degree of conclusiveness of the umpire's decision. Most courts adhere to what may be termed the "good faith" test: if the decision is made honestly and in good faith it will be upheld, even though the court independently might have arrived at a different result.<sup>10</sup> An erroneous decision will be allowed to stand, unless the error is so palpable as to evince partiality, corruption, or some other improper motive. Therefore, in so far as it contemplates judicial interference for a mere erroneous decision, the principal case is in the minority.<sup>11</sup> However, there is no dissent from the proposition, laid down in the principal case, that the umpire's decision may not contravene a clear provision of the will nor disregard the plain intention of the testator.<sup>12</sup> This merely means that courts will guard against arbitrary action and an abuse of power. The difficulty lies in determining whether the provision is "clear" or the intention "plain."<sup>13</sup> The primary purpose of a provision such as the one under consideration is to prevent undue litigation which, aside from causing ill feeling among the beneficiaries, dissipates the assets of the estate.<sup>14</sup> The accomplishment

<sup>9</sup> In *re Reilly's Estate*, 200 Pa. 288, 49 A. 939 (1901).

<sup>10</sup> THOMPSON, *CONSTRUCTION AND INTERPRETATION OF WILLS*, § 8 (1928); *Nations v. Ulmer*, (Tex. Civ. App. 1938) 122 S. W. (2d) 700; *Couts v. Holland*, 48 Tex. Civ. App. 476, 107 S. W. 913 (1908); *American Board of Commissioners of Foreign Missions v. Ferry*, (C. C. Mich. 1883) 15 F. 696.

<sup>11</sup> The principal ground on which the decision is based is that there is no ambiguity in the language and consequently nothing for the umpire to decide. However, implicit in the decision is the idea that the court will not uphold an erroneous determination. *Lydick v. Lydick*, 147 Kan. 385, 76 P. (2d) 876 (1938), is to the effect that if the decision of an umpire is erroneous, then it is subject to review.

<sup>12</sup> 69 C. J. 124 (1934) and cases there cited.

<sup>13</sup> As an original proposition one might ask who is to decide the question, the umpire or the court. In the principal case the executors and trustees honestly believed that an interpretation of the will was called for. However, the court felt otherwise, that there was no ambiguity as to testatrix' meaning. Why not apply the same test—good faith—to this preliminary question? If the question is one for judicial cognizance only, may not a court reverse a mere erroneous decision by holding that the intent is plain and obvious? One answer to this line of thought is that abuse by a court is less likely than abuse by an umpire.

<sup>14</sup> A condition in a will providing for the forfeiture of a bequest in case a beneficiary contests the will is enforced by all courts in some situations. However, there is a real conflict of authority as to whether these conditions will be valid in all cases. Some courts hold these conditions valid in all cases; other courts hold they are valid only where contestant does not have probable cause. Browder, "Testamentary Conditions Against Contest," 36 MICH. L. REV. 1066 (1938). A practical interpretation placed on a will and acquiesced in for a long time by all the parties in interest will ordinarily not be disturbed. 2 SCHOULER, *WILLS, EXECUTORS, AND ADMINISTRATORS*, 6th ed., § 841 (1923).

Concerning agreements as to a construction, see the views expressed in *United States Trust Co. of New York v. Speir*, 97 N. J. Eq. 150, 127 A. 33 (1924), and *Poland v. St. Joseph's Orphan Asylum Assn.*, 29 Ohio C. C. 649 (1907).

of the purposes varies inversely with the amount of court interference; the greatest effect is given to that purpose by the least amount of judicial review. Therefore, if a bona fide question of interpretation exists, a determination made honestly and in good faith should be conclusive.

*Alfred I. Rothman*