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WILLS — PRECATORY GIFTS — In the second item of the will testator gave to his wife all of his property "as her absolute property." In the third item the testator provided: "it is hereby directed that my sister [plaintiff in this case] . . . be given one hundred fifty and no/100 dollars monthly during her natural life and one hundred dollars monthly to my brother-in-law Charles E. McCarle . . . in the

event that he survives his wife above mentioned." The fourth item provided that in case the testator's wife predeceased him, one hundred dollars monthly should be paid to each of his wife's four sisters, and named them. The fifth item read: "In the event that these foregoing bequests become a burden on the estate, it is decreed that they be reduced judiciously to comport with existing conditions and circumstances." Testator's wife, defendant in this case, was made executrix. She refused to pay the $150.00 monthly to plaintiff or any part thereof, and plaintiff sought a declaratory judgment construing the will of David E. Hasey, deceased. *Held*, the third item of the will merely expressed testator's wish or suggestion as to what the testator would like to have his wife do with the property left to her as "her absolute property," and the plaintiff took nothing. *In re Hasey's Estate, McCarle et al. v. Hasey*, 192 Minn. 582, 257 N. W. 498 (1934).

In construing a will, the most essential fact to be determined is the intent of the testator;[1] this is the "polar star" of construction. The words used, the instrument considered as a whole, and the circumstances of the case must all be considered in an attempt to find the testator's intent.[2] Where property is given "absolutely," it can be diminished only by words equally clear and unambiguous.[3] Words necessary to create a trust are not technical.[4] It is only necessary that they should point out specifically the intent of the testator. But that intent necessarily involves an imperative element. A mere wish, desire, or expectation of testator, expressed in these words or those of similar meaning, is not sufficient.[5] The words required to create a trust must be mandatory, commanding, ordering, or must be construed to have that effect.[6] "Direct" is usually considered a word of command,[7]

[1] 2 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS, 6th ed., § 898, p. 1031 (1923); Covenhoven v. Shuler, 2 Paige Ch. (N. Y.) 122, 21 Am. Dec. 73 (1830); in Smith v. Bell, 6 Pet. (31 U. S.) 68 (1832), Marshall, C. J., said (at p. 74): "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law."

[2] Colton v. Colton, 127 U. S. 300, 8 S. Ct. 1164 (1888); Collister v. Fassitt, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586 (1900). In the subsequent case of Post v. Moore, 181 N. Y. 15, 73 N. E. 482 (1905), Mr. J. O'Brien, commenting upon the case of Collister v. Fassitt, said that the creation of a trust in that case turned largely upon the circumstances which appeared in the record *dehors* the will itself.

[3] 1 JARMAN, WILLS, 7th ed., 173 (1930); ibid., 549; 2 ibid., 848; 2 ibid., 1152; Weber v. Kress, 198 App. Div. 687, 192 N. Y. S. 186 (1921); Sheet's Estate, 52 Pa. 257 (1866); Melies v. Beatty, 313 Ill. 418, 145 N. E. 146 (1924).

[4] See 49 A. L. R. 10 (1927).

[5] In re Miller's Estate, Long v. Willsey, 132 Minn. 316, 156 N. W. 349 (1916); Post v. Moore, 181 N. Y. 15, 73 N. E. 482 (1905); In re Sowash's Estate, 62 Cal. App. 512, 217 P. 123 (1923); Gross v. Smart, 189 Ky. 338, 224 S. W. 871 (1920); In re Crawford's Will, 99 Misc. 416, 163 N. Y. S. 1107 (1917).

[6] See 49 A. L. R. 10 (1927). In Williams v. Williams' Committee, 253 Ky. 30 at 31, 68 S. W. (2d) 395 (1933), it was held that the words, "It is my desire and I request," after a gift of the property to his widow, "to be hers absolutely" created obligatory duties and established a trust.

[7] Beakey v. Knutson, 90 Ore. 574 at 579, 174 P. 1149 (1918), "The term 'direct' is mandatory in its signification. It means 'to point out with authority or direct as a superior; to order; to instruct; to command.'" Plaut v. Plaut, 80 Conn. 673 at 678, 70 A. 52 (1908), "But 'direct' is a word of command."

though it may be used to express a wish or desire.[8] A consideration of the whole instrument aids in determining the intent of the testator. All parts of the will are to be considered. A subsequent clause stating what will defeat the trust will show that a trust was intended by the testator.[9] The special circumstances of the case must likewise be considered, an important one of which is this—is the object of the bounty a natural one? [10] Mere unreasonableness as to the object of the bounty will not defeat a trust, but in construing a will in which it is doubtful whether the testator intended a trust or not, whether the object of the bounty is natural or not will have an important bearing. The other general requisites of a trust are that the subject and the beneficiaries of the trust must be certain.[11] It is not necessary that the extent to which the beneficiary is to be benefitted should be certain.[12] The party to whom the words are addressed often has some significance. If addressed to the executor, as executor, words of request have often been held to be sufficient to create a trust.[13] If addressed to a spouse, the courts have been especially lenient in construing words of a mere request into a command, justifying this on the assumption of testator's politeness.[14] When addressed to the spouse who is also

[8] In re Jansen's Will, Homberger v. Jansen, 181 Wis. 83, 193 N. W. 972 (1923), the court held that the word "direct" was used as a mere expression of desire or wish. But it was apparent from the whole will that no trust was intended.

[9] Phillips v. Phillips, 112 N. Y. 197, 19 N. E. 411 (1889), the will read (at p. 201): "If she [spouse-executrix] find it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a year . . . I wish it to be done." The court said (at p. 203): "with it [the provision in the will] the inference is that the contingency provided for was the only one intended to excuse payment."

[10] Collister v. Fassitt, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586 (1900); Colton v. Colton, 127 U. S. 300, 8 S. Ct. 1164 (1888); Phillips v. Phillips, 112 N. Y. 197, 19 N. E. 411 (1889).

[11] In Williams v. Williams Committee, 253 Ky. 30, 68 S. W. (2d) 395 (1933), quoting Lord Langdale in Knight v. Knight, 3 Beavan 148 at 173, 49 Eng. Rep. 58 (1840), a trust will be created, "if the subject of the recommendation or wish be certain; and, . . . if the objects or persons intended to have the benefit of the recommendation or wish be also certain"; Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834 (1933); 2 JARMAN, WILLS, 7th ed., 843 (1930), 49 A. L. R. 10 (1927).

[12] Collister v. Fassitt, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586 (1900), in which the wife of testator was directed (at p. 282) "to use so much thereof for the support and benefit of my niece, Georgie S. Collister, as my said wife shall from time to time in her discretion think best so to do," was held to create a trust. Colton v. Colton, 127 U. S. 300, 8 S. Ct. 1164 (1888), in which the words, "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best," (p. 302) were held to create a trust.

[13] In re Hull's Estate, 77 Cal. App. 792, 247 P. 1093 (1926), hearing denied by the supreme court; in re Farrelly's Estate, Blakeslie v. Allen, (Cal. App. 1931) 296 P. 670; 49 A. L. R. 34 (1927).

[14] Merrill v. Pardun, 125 Neb. 701 at 707, 251 N. W. 834 (1933): "use of word 'request' in a disposition by will limiting an apparently absolute bequest to a widow does not imply that it is optional, discretionary or recommendatory . . . and if the person affected by the limitation is in close or fiduciary relation to the testator as a widow, the use of the word 'request' imports, although in courteous and polite form, a command or direction, imperative and dispositive in legal effect." In 49 A. L. R. 10 at 34 (1927), such expressions are termed "words of tenderness and civility." *Contra* opinion, 2 JAR-

named executor it would seem that the same rule should apply. Applying these broad, general rules of construction to this case, what do we have? First a gift of property "absolutely," followed immediately by the clause, "It is directed . . . ," addressed to the spouse of the testator who was also named as executrix. The beneficiary of this item was testator's sister who was advanced in years at the time. It was "directed" that the executrix pay a definite monthly sum to this beneficiary. Subsequent items in the will indicate that the testator intended a trust to be established. The circumstances of the case point to this. And all the requisites of a trust are satisfied. It is submitted that in the event the court could not find the requisite intent to hold that the third item prevails over the second, it should have done so on the arbitrary rule of construction that the latter of two inconsistent clauses in a will prevails over the former.[15] This is merely a rule of convenience to be used only as a last resort.

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MAN, WILLS, 7th ed., 855 (1930), quoting Lopes, L. J.: it is "inconceivable that a testator who really meant his hope, recommendation, confidence or request to be imperative, should not express his intention in a mandatory form."

[15] 1 JARMAN, WILLS, 7th ed., 540 (1930); it has become an established rule in the construction of wills, that where two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention." *Contra*, Bradford v. Martin, 199 Iowa 250, 201 N. W. 574 (1925), holding that the first of inconsistent or repugnant provisions expresses the intent of the testator.