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WILLS-BEQUESTS OF ANNUITIES-RIGHT OF LEGATEE TO RECEIVE PRINCIPAL IN LIEU OF ANNUITY

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WILLS—BEQUESTS OF ANNUITIES—RIGHT OF LEGATEE TO RECEIVE PRINCIPAL IN LIEU OF ANNUITY—Decedent left a will in which she made a bequest of $3000, $1000 to be paid in cash and the balance to be invested by her executor in annuities to be purchased from certain specified companies. In his final report, which was upheld by the district court, the executor expressed his belief that the legatee had the right under this will to elect either to receive the entire bequest in cash or to have the designated part invested in the specified annuities, and stated that since the legatee had elected to receive the cash, the entire $3000 would be distributed directly to her unless the court ruled otherwise. At the hearing of the executor's report, the annuity companies filed objections which the district court overruled. On appeal to the Supreme Court of Iowa, *held*, reversed. Where a will directs that a certain sum be invested in

an annuity, the legatee may not elect to receive payment in cash of the sum provided. *In re Johnson's Estate,* (Iowa 1947) 30 N.W. (2d) 164.

It is well-established in England that where a will directs the executors or trustees to purchase an annuity for a named beneficiary, he may elect to take the capital sum even when the will specifically prohibits this election.[1] In *Reid v. Brown,*[2] one of the earliest United States cases involving this question, a New York inferior court adopted the English rule. Subsequently, the Massachusetts Supreme Judicial Court adopted the English view, citing the New York case, and stated that this rule is an application of the principle that when a bequest is made to be used for the purchase of an object, the legatee may elect to receive money instead, since he can sell the object in any event.[3] In *Re Bertuch's Will*[4] the New York Appellate Division applied the rule to a will which expressly stated that the annuitant should not have the right to receive the capital sum. The English view, although criticized by various writers,[5] has been considered to be supported by the weight of authority in this country. During the last five years, however, in addition to the principal case, there have been decisions in two states and strong dicta in another adopting the opposite rule.[6] In a 1943 New Jersey case[7] which involved a will directing the purchase of an annuity for a legatee and providing that the legatee should not be paid the capital sum, the court rejected the English doctrine as a violation of the principle that the testator's expressed intention should be carried out where not inconsistent with statute or public policy. The New Hampshire Supreme Court required an executor to purchase an annuity for a legatee even though the will did not specifically forbid turning over the principal sum to the legatee.[8] In dealing with a trust which gave the trustee the discretionary power to use the

[1] In re Brunning, [1909] 1 Ch. 276; In re Robbins, [1906] 2 Ch. 648; In re Mabbett, [1891] 1 Ch. 707; Wakeham v. Merrick, 37 L.J. Rep. 45 (1867); In re Browne's Will, 27 Beav. 324, 54 Eng. Rep. 127 (1859); Ford v. Batley, 17 Beav. 303, 51 Eng. Rep. 1050 (1853).

[2] 54 Misc. 481, 106 N.Y.S. 27 (1907).

[3] Parker v. Cobe, 208 Mass. 260 at 263, 94 N.E. 476 (1911). The court recognized the similarity between this situation and that presented in Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889). In the Claflin case the fact that the beneficiary of a trust had the absolute and sole interest was not sufficient to induce the court to defeat the testator's intent by dissolving the trust and distributing the res to the beneficiary. In the Parker case, the court held this doctrine applicable only to trusts; some writers have disagreed. See 41 MICH. L. REV. 276 (1942).

[4] 225 App. Div. 773, 232 N.Y.S. 36 (1928).

[5] 41 MICH. L. REV. 276 (1942); 29 COL. L. REV. 370 (1929); 3 SCOTT, TRUSTS, § 346 (1939). The Model Probate Code adopts the view of the principal case, see SIMES AND BASYE, MODEL PROBATE CODE, § 190 b and comment (1946).

[6] Berry v. President and Directors of the Bank of Manhattan Co., 133 N.J. Eq. 164, 31 A. (2d) 203 (1943); Bedell v. Colby, (N.H. 1947) 54 A. (2d) 161. Dicta: Feiler v. Klein, (Ohio App. 1947) 74 N.E. (2d) 384, affd., Feiler v. Feiler, 149 Ohio 17, 77 N.E. (2d) 237 (1948). See also, In re Benziger's Estate, 61 Cal. App. (2d) 628, 143 P. (2d) 717 (1943).

[7] Berry v. President and Directors of the Bank of Manhattan Co., 133 N.J. Eq. 164, 31 A. (2d) 203 (1943).

[8] Bedell v. Colby, (N.H. 1947) 54 A. (2d) 161.

trust res to buy annuities for the beneficiaries, the Ohio Appellate Court disapproved of the English rule and the *Bertuch* decision in particular, stating that "a more ruthless refusal to respect the wishes of the testator can hardly be imagined." [9] The Ohio Supreme Court affirmed this holding, after the principal case was decided, although the court said that since the trust set up was active and valid, it was not necessary to decide whether or not Ohio would follow the English view.[10] As pointed out by the Ohio court and the principal case, an annuitant cannot sell his annuity for the purchase price.[11] Generally speaking, annuities, unlike specific objects, have little or no cash value, and it is therefore unlikely that the legatee will be able to frustrate the testator's intent by selling the annuity. The view of the New Jersey and New Hampshire courts is consistent with the frequently reiterated American doctrine of giving effect to the testator's expressed intent wherever it is not illegal or violative of public policy.[12] In 1936, New York changed its law by statute,[13] and only one recent case has been found which follows the English rule.[14] The principal case and other recent decisions seem to indicate a trend away from this view which already may constitute a change in the weight of authority.

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[9] Feiler v. Klein, (Ohio App. 1947) 74 N.E. (2d) 384 at 388.

[10] Feiler v. Feiler, 149 Ohio 17 at 24, 77 N.E. (2d) 237 (1948).

[11] Principal case at 168-169; Feiler v. Klein, (Ohio App. 1947) 74 N.E. (2d) 384 at 388.

[12] The doctrine is usually applied to the termination of trusts; see Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889) and 3 SCOTT, TRUSTS, §337 (1939).

[13] 13 N.Y. Consol. Laws (McKinney, 1938) § 47b.

[14] In re Woelfly's Estate, (Pa. 1947) 39 Berk Co. L.J. 227.