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POWER OF APPOINTMENT-VALIDITY OF EXERCISE SUBJECT TO A NO-CONTEST CLAUSE

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POWER OF APPOINTMENT—VALIDITY OF EXERCISE SUBJECT TO A NO-CONTEST CLAUSE—The decedent received under the will of her husband a general testamentary power of appointment over a remainder interest. In her will she exercised the power, providing that any person benefiting under the power who in any manner should institute, encourage, or participate in proceedings for the avoidance of any part of the will should forfeit his right to any benefits from the power or from her estate. *Held*, exercise of a general testamentary power of appointment subject to a no-contest forfeiture provision is valid. *Marx v. Rice*, 1 N.J. 584, 65 A. (2d) 48 (1949).

Whether the donee of a power may exercise it by annexing conditions to the gift would seem to be a matter of the intent of the donor and the terms of the power as expressed in the instrument creating the power. Where there is no prohibition in the instrument, and the power is not exceeded, everything which is legal and within the limits of authority should be supported.[1] The tendency of courts to allow the widest possible latitude in exercising powers is illustrated in holding that, even under special powers, appointments in trust,[2] appointments creating lesser estates,[3] and appointments subjected to charges[4] were within the terms and intent of the particular powers. Cases most analogous to the principal one[5] are those where conditional appointments have been sustained when appointments were made to certain persons, but upon failure or occurrence of a specified condition, the gift goes over to other persons.[6] In the case of a general power to appoint a fee, since the donor knows that the donee can appoint to himself or his estate, and subsequently dispose of the property subject to any valid conditions and limitations he chooses,[7] it would seem clear that an intent to restrict exercise of the power solely to absolute appointments would be absent. To find such intent would be to hold that what can be done in two steps with complete validity, must fail when accomplished in one.[8] New Jersey courts having held that provisions of this type for forfeiture in the event of contest are permissible,[9] it would follow that the forfeiture provision annexed to the exercise of a general power was properly upheld.

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[1] Crozier v. Crozier, 3 Dr. & War. 353 (IR) (1843); 8 SUDGEN, POWERS 412 (1861).

[2] Trollope v. Linton, 1 Sim. & Stu. 477, 57 Eng. Rep. 189 (1823); Hillen v. Iselin, 144 N.Y. 365, 39 N.E. 368 (1895); annotation, 121 A.L.R. 144 (1939).

[3] Alexander v. Alexander, 2 Ves. Sr. 640, 28 Eng. Rep. 408 (1755); McLean v. McLean, 174 App. Div. 152, 160 N.Y.S. 949 (1916), affd. without opinion 223 N.Y. 695, 119 N.E. 1056 (1918); annotation, 121 A.L.R. 139 (1939).

[4] Thwaytes v. Dye, 2 Vern. 80, 23 Eng. Rep. 661 (1688); Monjo v. Woodhouse, 185 N.Y. 295, 78 N.E. 71 (1906); annotation, 6 L.R.A. (n.s.) 746; 7 Ann. Cas. 138 (1907).

[5] The principal case apparently is unique on its facts.

[6] Stroud v. Norman, Kay 313, 69 Eng. Rep. 132 (1854); Vatcher v. Paull, [1915] A.C. 372; Stuart v. Castlestuart, 8 I. Ch. R. 408, 8 Ir. Rep. 408 (1858); Graham v. Angell, 17 W.R. 702 (IR) (1869). All involve exercise of special powers.

[7] In re Paterson, 5 MAN. L. REP. 274 (1888).

[8] 3 PROPERTY RESTATEMENT, §356 (1940).

[9] Provident Trust Co. of Philadelphia v. Osborne, 133 N.J. Eq. 518, 33 A. (2d) 103 (1943); O'Donnell v. Jackson, 102 N.J. Eq. 470, 141 A. 450 (1928). On validity of no-contest provisions generally see: 81 UNIV. PA. L. REV. 267 (1932); 36 MICH. L. REV. 1066 (1937); 1 OKLA. L. REV. 237 (1949).