Michigan Law Review

Volume 52 | Issue 7

1954

WILLS-CONSTRUCTION-EFFECT OF PRECATORY WORDS RELATING -TO DISPOSITION OF PROPERTY ON DONEE'S DEATH

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WILLS—CONSTRUCTION—EFFECT OF PRECATORY WORDS RELATING TO DISPOSITION OF PROPERTY ON DONEE'S DEATH—After two bequests, each of an absolute interest in one-third of her property, to a niece and a nephew,[1] testatrix bequeathed the remaining one-third of her estate to her husband " . . . to have and to hold subject to the request hereinafter stated. It, however, is my wish and desire and I charge my said husband . . . to make disposition . . . so that it will not pass to his heirs upon his death, but shall revert, after his death, to my heirs and be distributed to the legatees named in subparagraphs A. and B. of this clause Eighth . . . subject, however, that my husband shall be at full liberty to use, have and keep all the income . . . and so much of the principal and corpus as he may find convenient and desirable for his comfort, advantage and enjoyment. . . . " Plaintiff[2] petitioned for a construction of the will, contending that the bequest to the husband was of something less than a fee. The lower court adopted this construction, but on appeal, *held,* reversed. In the light of the husband's right to invade the corpus of one-third portion of the estate, the testatrix intended to invest in him an absolute fee supplemented by an unenforceable desire that he dispose of the property on his death to her heirs. *Grover v. Wood,* 337 Mich. 467, 60 N.W. (2d) 316 (1953).

The proposition universally announced, although seldom of any aid, is that the intent of the testator is the polestar of construction.[3] That the Michigan court effectuated this intent in the principal case seems somewhat doubtful. Because of the power of the husband to dispose of the corpus of his share of the estate for his own benefit, the court had difficulty in concluding that the terms of the will gave him anything less than a fee. Although it is frequently announced that where a donee is vested with absolute enjoyment, the natural construction of additional precatory language is that it expresses the testator's wish without imposing an obligation,[4] it is equally true that this does not pre-

[1] These bequests were made in subparagraphs *A* and *B* of clause eight of testatrix' will.

[2] Legatee under subparagraph *B* of clause eighth.

[3] "The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended." Phillips v. Phillips, 112 N.Y. 197 at 205, 19 N.E. 411 (1889).

[4] See cases collected in 49 A.L.R. 36 (1927); 70 A.L.R. 329 (1931); 107 A.L.R. 912 (1937). See also, 1 BOGERT, TRUSTS AND TRUSTEES §48 (1951).

clude such words from having a mandatory effect if it is clear that the testator so intended.[5] Many decisions have found a trust on language much weaker than that employed by the testatrix in the principal case.[6] But certainly the particular words used are not of exclusive significance in determining whether or not the testatrix intended to create a binding obligation. Aid should be sought in a consideration of other parts of the will.[7] In the light of testatrix' bequests to her niece and nephew in fee and her later reference to them in the bequest to her husband, it would seem that her intent was to limit the rights of her husband, although at the same time giving him the power to use the principal for his own benefit during his lifetime. It appears that in reaching its decision the court was influenced by the difficulty of fitting this loosely conceived arrangement into customary concepts of property interests. Aside from the availability of the precatory trust analysis,[8] adequate authority exists which would have supported a determination that the will created successive legal interests, viz., a life estate coupled with a power to consume the corpus and a vested remainder.[9]

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[5] See cases collected in 49 A.L.R. 38 (1927); 107 A.L.R. 912 (1937).

[6] See 49 A.L.R. 42 (1927); 70 A.L.R. 330 (1931); 107 A.L.R. 916 (1937), as to the effect given various precatory expressions.

[7] See 1 BOGERT, TRUSTS AND TRUSTEES §48 (1951).

[8] Williams v. Williams' Committee, 253 Ky. 30, 68 S.W. (2d) 395 (1934); Merrill v. Pardun, 125 Neb. 701, 251 N.W. 834 (1933). The report of the case under consideration raises some doubt as to whether a possible trust analysis was ever presented to the court.

[9] McCarty v. Fish, 87 Mich. 48, 49 N.W. 513 (1891); Gadd v. Stoner, 113 Mich. 689, 71 N.W. 1111 (1897); In re Mallary's Estate, 127 Mich. 119, 86 N.W. 541 (1901); Bateman v. Case, 170 Mich. 617, 136 N.W. 590 (1912).