Michigan Law Review

Volume 49 | Issue 5

1951

TRUSTS AND ESTATES-LEGACIES OF CORPORATE SHARES-RIGHT OF SELECTION

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TRUSTS AND ESTATES—LEGACIES OF CORPORATE SHARES—RIGHT OF SELECTION—Testator by holographic will bequeathed twenty-five shares of certain stock to legatee, a minor unrelated to the testator. At his death, testator owned twenty-one shares of preferred and fifty-three shares of common stock of the specified type, the preferred stock being the more valuable. Held, legatee had the right to select the most valuable combination of shares possible, or twenty-one shares of preferred and four shares of common stock. *In re Connolly's Estate*, (Pa. Super. 1950) 71 A. (2d) 856.

The rule applied in the principal case was first laid down in *Duckmanton v. Duckmanton*,[1] an early English decision involving a freehold devise to be satisfied out of an estate which included two tracts of land of unequal value, both answering the description in the will. Rather than allow the bequest to fail for want of definiteness, the devisee was given a right of selection. In subsequent cases involving legacies to be satisfied out of a fund not capable of pro rata distribution according to the terms of the will,[2] this rule has been generally followed.[3] Although some practical difficulties are involved in its application,[4] and it has been criticised as arbitrary and unjust,[5] the rule finds its justification in the fact that if no right of selection were allowed the alternative would be failure of the legacy for indefiniteness.[6] But where, as in the principal case, the fund consists

faith toward his patient, it can scarcely be said that the patient has assumed the risk that his healer will withhold vital information from him.

In the principal case, the argument might be made that, since plaintiff knew or should have known that that defendant was prohibited by statute from administering or prescribing insulin, she assumed the risk of injury resulting from his failure to prescribe insulin. On the basis of the foregoing analysis, however, this argument would avail defendant nothing, since plaintiff did not assume the risk of defendant's failure to advise as to the proper method of treatment.

[1] 5 Hurl. & N. 219, 157 Eng. Rep. 1165 (1860).

[2] Such funds usually involve parcels of realty, such as "houses," "lots," or tracts of land. Cases are collected in 157 A.L.R. 1129 (1945).

[3] Tapley v. Eagleton, [1879] L.R. (12 Ch.) 683; Johnson v. Goss, 128 Mass. 433 (1880); Prater v. Hughston, 202 Ala. 192, 79 S. 564 (1918); Cleveland v. Carson, 37 N.J. Eq. 377 (1883); 1 JARMAN, WILLS, 7th ed., 435 (1930).

[4] Where two or more legatees or devisees are named as participants in the fund, courts have resorted to the rather arbitrary presumption that the first named was intended to have the right of selection. In re Turner's Will, 206 N.Y. 93, 99 N.E. 187 (1912); Estate of Deffebach, 14 Cal. App. (2d) 268, 57 P. (2d) 1340 (1936); In re Cook's Estate, 193 Misc. 261, 82 N.Y.S. (2d) 755 (1948). The usual rule, however, in cases not involving the right of selection is that the order of mention in the will is not controlling as to preference among the legatees. Porter v. Howe, 173 Mass. 521, 54 N.E. 255 (1899); Ruel v. Hardy, 90 N.H. 240, 6 A. (2d) 753 (1939); 3 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3d ed., 1544 (1923). Further complications are encountered when assets of unequal value are bequeathed to a class of legatees or devisees, e.g., "One house to each of my nephews and nieces." One court has settled the order of selection in such a case by lot. In re Knapton, [1941] L.R. Ch. 428.

[5] See Smith v. Burt, 388 Ill. 162, 57 N.E. (2d) 493 (1944); see also 25 CALIF. L. REV. 126 (1936).

[6] A few courts have followed a second alternative by giving the legatee or devisee an undivided interest in the fund. Lambert v. Lambert, (Tex. Civ. App. 1922) 243 S.W. 623; In re De Bernal's Estate, 165 Cal. 223, 131 P. 375 (1913); Caudle v. Caudle, 159

of corporate shares or other assets capable of aliquot distribution within the terms of the will, the reason for the rule disappears, and its application becomes difficult to justify.[7] In the principal case the alternative to allowing the legatee the right of selection was not failure of the legacy, but a pro rata apportionment of the stock according to its average market value,[8] a result in accord with the usual presumption that the testator intended to treat the objects of his bounty equally.[9] Since recognition of a right of selection is not required to give effect to the legacy, there can be no reason for implying such a right in the absence of evidence that the testator in fact intended to give a preference to the legatee.[10] To imply a right in the legatee to appropriate to himself the more valuable portion of a fund to the detriment of other legatees or heirs merely on the ground that the fund contains assets of unequal value goes beyond the reasoning underlying *Duckmanton v. Duckmanton* and gives a preference to a legatee where such a preference cannot be justified.

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N.C. 53, 74 S.E. 631 (1912). It seems difficult, however, to find in a devise of "one house to X and one house to Y" an intention to give X and Y a tenancy in common in the two houses. In re Turner's Will, 206 N.Y. 93, 99 N.E. 187 (1912).

[7] In those cases where the rule has been so applied, the application has been mechanical, without any attempt at finding a reason for it. Will of Stark, 149 Wis. 631, 134 N.W. 389 (1912); O'Donnell v. Welsh, [1903] 1 Ir. Rep. 115; Millard v. Bailey, [1866] L.R. (1 Eq.) 378. See especially Mizener's Estate, 262 Pa. 62, 105 A. 46 (1918), in which the legatee was given the right of selection in the face of clear evidence that the testator had intended to treat all his children equally.

[8] This was the effect given a similar bequest in Darlington's Estate, 289 Pa. 297, 137 A. 268 (1927). See also Mayo v. Whedon, 47 App. D.C. 138 (1917); Owens v. Citizens & Southern Nat. Bank, 177 Ga. 289, 170 S.E. 196 (1933); Graham v. De Yampert, 106 Ala. 279, 17 S. 355 (1895); Tandy's Exr. v. Cook, 19 Ky. L. Rep. 1061, 42 S.W. 741 (1897).

[9] Will of Weed, 213 Wis. 574, 252 N.W. 294 (1934); Matthews v. Targarona, 104 Md. 442, 65 A. 60 (1906); In re Connor's Will, 6 App. Div. 594, 39 N.Y.S. 900 (1896); Parsons v. Reel, 150 Iowa 230, 129 N.W. 955 (1911).

[10] Where the testator has clearly indicated an intent that the legatee have a right of selection, the problem of finding an implied right will not arise. Case v. Hasse, 83 N.J. Eq. 170, 93 A. 728 (1914); Potomac Lodge v. Miller, 118 Md. 405, 84 A. 554 (1912); Andrews' Ex'x. v. Spruill, 271 Ky. 516, 112 S.W. (2d) 402 (1937).