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POWERS - LESS THAN OUTRIGHT APPOINTMENTS

H. Marshall Peter
University of Michigan Law School

POWERS — LESS THAN OUTRIGHT APPOINTMENTS — The decedent created a voluntary trust, providing for income payments to himself during his life and upon his death to *X* for her life, and directing the trustee "at her death to pay over and deliver the principal of said trust to whomsoever may be designated by her by Will or other testimentary instrument. . . ." In the event that she failed to make such designation, her descendants, or, if there were none, her heirs were to receive the principal. *X* in her will gave her husband a life estate and, on his death or remarriage, bequeathed the property to a trustee for the benefit of her children and grandchildren. The question raised was as to the validity of this exercise of the power of appointment, it being contended that only an outright appointment of the principal was permissible. *Held*, that the power was validly exercised, there being nothing in the instrument of its creation requiring an outright appointment of principal. *Massey v. Guaranty Trust Co.*, (Neb. 1942) 5 N.W. (2d) 279.

There can be no valid disagreement with the court's decision in the instant case. Not only is it well founded in precedent,[1] but it is based upon sound legal thought. Since the power given was general, the donor can hardly be supposed to have felt any great concern as to what estates the appointees would take.[2] Moreover, because of the mathematical axiom that "the greater includes

[1] Some of the following cases involve general powers, as did the principal case, and some special powers. Butler v. Heustis, 68 Ill. 594 (1873); Appeal of Appleton, 136 Pa. 354, 20 A. 521 (1890); Mays v. Beech, 114 Tenn. 544, 86 S. W. 713 (1905); In re McClellan's Estate, 221 Pa. 261, 70 A. 737 (1908); Cheever v. Cheever, 172 App. Div. 353, 157 N. Y. S. 428 (1916); Lehman v. Spicer, 108 Misc. 721, 176 N. Y. S. 445 (1919); In re Lewis' Estate, 269 Pa. 379, 112 A. 454 (1921); In re French's Estate, 119 Misc. 445, 196 N. Y. S. 397 (1922); Regents of University System v. Trust Co. of Georgia, 186 Ga. 498, 198 S. E. 345 (1938); In re Comey's Will, 173 Misc. 377, 17 N. Y. S. (2d) 949 (1940); In re Wildenburg's Estate, 174 Misc. 503, 21 N. Y. S. (2d) 331 (1940); In re Jackson's Estate, 175 Misc. 882, 25 N. Y. S. (2d) 102 (1940); Geneva Trust Co. v. Sill, 27 N. Y. S. (2d) 289 (S. Ct. 1941); In re Hart's Will, 262 App. Div. 190, 28 N. Y. S. (2d) 781 (1941); In re Lichtenstein's Estate, 177 Misc. 320, 30 N. Y. S. (2d) 455 (1941).

[2] 39 COL. L. REV. 885 (1939); 53 HARV. L. REV. 687 (1940).

the less," it may be said that a power to appoint an absolute estate includes the power to appoint one less than absolute.[3] Had the power been exercisable during the lifetime of the donee there would have been an additional basis for the court's decision. Since the donee might appoint a complete legal estate to himself in that situation, it would surely be academic for the court to conjure up any restrictions whatsoever upon him.[4] Those cases which, by their language, seem to require that donees totally exercise their powers almost invariably involve peculiar facts.[5] If the power given is special, it is not easy to assume indifference on the donor's part as to what befalls the beneficiaries. If the donee's action will result in benefiting persons not belonging to the designated group, this portion at least of his appointment will not be allowed to stand.[6] If the power is in trust or nonexclusive, there may be good reason for the court's not allowing delayed distribution. Finally, in every case, the donor's words must be scrutinized to ascertain his intent.[7] If he appears unwilling for the

[3] Mays v. Beech, 114 Tenn. 544, 86 S. W. 713 (1905); Regents of University System v. Trust Co. of Georgia, 186 Ga. 498, 198 S. E. 345 (1938); Wilmington Trust Co. v. Wilmington Trust Co., (Del. Ch. 1940) 15 A. (2d) 153; In re Hart's Will, 262 App. Div. 190, 28 N. Y. S. (2d) 781 (1941). See also 14 IND. L. J. 466 (1939).

[4] 24 MINN. L. REV. 587 (1940).

[5] Myers v. Safe Deposit & Trust Co., 73 Md. 413, 21 A. 58 (1891), and In re Kennedy's Will, 279 N. Y. 255, 18 N. E. (2d) 146 (1938), both involved special powers, the terms of which the donees had attempted to violate. The Kennedy case is now well restricted to its facts. The language used by the donor in In re Hart's Estate, 172 Misc. 453, 15 N. Y. S. (2d) 318 (1939), reversed 262 App. Div. 190, 28 N. Y. S. (2d) 781 (1941), appeared to the lower court to indicate an intention that an immediate appointment be made in fee simple.

[6] Myers v. Safe Deposit & Trust Co., 73 Md. 413, 21 A. 58 (1891), goes even further, voiding the proper bequests as well as the improper limitation over.

[7] The following expressions undoubtedly influenced the court's decisions: "in such manner and form, and to such person or persons as she may appoint," Maitland v. Baldwin, 70 Hun 267, 24 N.Y.S. 29 (1893); "in such shares and amounts as she may choose," In re Lewis' Estate, 269 Pa. 379, 112 A. 454 (1921); "upon such estates as she may . . . designate and appoint," In re Comey's Will, 173 Misc. 377, 17 N. Y. S. (2d) 949 (1940); "in such manner and in such shares," In re Hart's Will, 262 App. Div. 190, 28 N. Y. S. (2d) 781 (1941). Conversely: "on her death to pay and divide," In re Kennedy's Will, 279 N. Y. 255, 18 N. E. (2d) 146 (1938); "immediately . . . pay over the corpus or principal . . . appoint in fee simple absolutely," In re Hart's Estate, 172 Misc. 453, 15 N. Y. S. (2d) 318 (1939). See also De Charette v. De Charette, 264 Ky. 525, 94 S. W. (2d) 1018 (1936), where in spite of the general rule that a donee may delegate his power [In re Lewis' Estate, 269 Pa. 379, 112 A. 454 (1921); In re Wildenburg's Estate, 174 Misc. 503, 21 N. Y. S. (2d) 331 (1940)], the donor's expression of personal trust and confidence was held to prevent this.

It should be remembered that strongly prohibitory language on the part of the donor is required to restrict the donee in most instances. For example, the expression "so as to vest complete fee simple title free from any remainder or limitation whatever" appeared in Regents of University System v. Trust Co. of Georgia, 186 Ga. 498, 198 S. E. 345 (1938). Yet the court did not feel that there had been a sufficiently express prohibition to prevent the application of the "greater includes the less" doctrine.

donee to carve out smaller interests, or set up trusts, or delegate his power, his wishes must conclusively govern.[8] In the absence of the types of situations named, however, there is no reason why he should not do what suits him. Unless some law such as a rule against perpetuities or against restraints or alienation is actually violated, no vague argument of public policy should stand in his way.[9]

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[8] "The intention of the donor of the power is the great principle that governs in construction of powers. . . ." 4 KENT, COMMENTARIES 339 (1826).

[9] The lower court In re Hart's Estate, 172 Misc. 453, 15 N. Y. S. (2d) 318 (1939), admitted being influenced by the public policy behind the New York statute on restraints on alienation. For criticism see De Witt v. Searles, 123 Neb. 129, 242 N. W. 370 (1932), and 53 HARV. L. REV. 687 (1940).