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Wills - Devise to Executor for Further Distribution - Application of Trust and Power Doctrines

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WILLS—DEVISE TO EXECUTOR FOR FURTHER DISTRIBUTION—APPLICATION OF TRUST AND POWER DOCTRINES—Bequests to executors for distribution to persons to be selected by the executor may be and have been treated in many different ways. Traditionally, such bequests are categorized by the courts in terms of trust, power, or gift law. Inasmuch as each of these bodies of doctrinal law has grown independently with little attempt by the judiciary to interrelate their operative characteristics, classification frequently spells substantial difference in terms of the validity, construction, and effect of the devise.

A comparison of the results reached in two basic cases illustrates the problem. In the first case, testator devised "the residue of my estate to be disposed of in accordance with the judgment and advice of my executor." This bequest, considered as creating a discretionary power, was held valid and the executor was permitted to designate the persons who would take beneficially.[1] In the other, the testator devised "the residue of my estate to my executor in trust, granting the executor absolute authority to dispose of the residue." This devise was held totally void under trust law which does not permit, as will be indicated below, such an indefinite class of takers.[2] Thus, although in terms of apparent testamentary intent the charge upon the executor was substantially identical in both cases, the law as it has developed dictates conflicting results. Because of a failure by the courts to correlate the laws of trust and power, this striking inconsistency is perpetuated. This comment is designed to demonstrate the potential anomalies which exist in traditional thinking in this area and to point up some possibilities for correlation of the hitherto unrelated concepts developed in the trust and power realms.

I. *Traditional Law and Analysis*

In each decision on the legal effect of a testamentary clause granting some distributive choice to the executor there are two steps in process of analysis. The court will first classify the clause as creating or attempting to create a trust, power, or gift. Having chosen the body of applicable law, the court will then proceed to give effect to the terms thereof solely in terms of the single body selected. Because of the immense differences in result imposed by doctrines in each of the three legal areas, the court's initial step is a fortiori as important as the second. Both therefore merit attention.

A. *Rules of Construction.* The decisions provide few clear-cut guides for predicting whether a given devise will be construed as invoking power, trust, or gift rules. The fact that a transferee is an executor has led some courts to presume that

1 An example of such a holding, based on language essentially like the first devise, is Watts's Estate, 202 Pa. 85, 51 A. 588 (1902).

2 An example of such a holding, based on language essentially like the second devise, is Estate of Ralston, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934).

the transfer was in trust,[3] but other courts have reached gift or power constructions in an identical situation.[4] Similarly, use of the terms "trustee" or "in trust" has been made the basis for finding a trust intention.[5] These terms, on the other hand, may be held merely to evidence some trust intent, leaving the way open for a finding that power or gift law should be applied if the court finds the construction more consistent with the apparent testamentary intent.[6] "Trustee" may even be held to have been employed solely to describe the person who is to receive a beneficial gift.[7]

When the devise is to the executor "to dispose of" or "to distribute," this language has been held to indicate a trust intent, in order to avoid treating the word "dispose" or "distribute" as mere surplusage.[8] Precatory words have also been construed as indicating an intent not to make a beneficial gift,[9] and such language may even provide the basis for imposition of trust obligations.[10]

It is also apparent that the construction placed upon legal terms may vary, depending on whether they have been written by a lawyer or a lay testator.[11] The layman may use the term "trust" as a synonym for "faith" or "confidence," not intending

3 Thomas v. Anderson, (8th Cir. 1917) 245 F. 642; In re Brown's Estate, 122 N.Y.S. (2d) 640 (1953); Tunis v. Dole, 97 N.H. 420, 89 A. (2d) 760 (1952). 3 PROPERTY RESTATEMENT §323, comment *e* (1940). Cases on this point are collected in 104 A.L.R. 114 (1936) and 151 A.L.R. 1438 (1944).

4 Watts's Estate, 202 Pa. 85, 51 A. 588 (1902); Gilman v. Gilman, 99 Conn. 598, 122 A. 386 (1923).

5 Estate of Ralston, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934). In Townsend v. Gordon, 308 Mich. 438, 14 N.W. (2d) 57 (1944), and Harvey, Exr. v. Griggs, 12 Del. Ch. 232, 111 A. 437 (1920), the absence of the term "trusts" was used as a basis for a finding that the executor took beneficially and not in trust. But Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445 (1881), in finding that a trust was intended, held that the absence of the term "in trust" was immaterial.

6 In re Renner's Estate, 358 Pa. 409, 57 A. (2d) 836 (1948). See dissenting opinion in Estate of Ralston, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934).

7 Norman v. Prince, 40 R.I. 402, 101 A. 126 (1917); Hodgson v. Dorsey, 230 Iowa 730, 298 N.W. 895 (1941).

8 Thomas v. Anderson, (8th Cir. 1917) 245 F. 642; Davison v. Wyman, Exr., 214 Mass. 192, 100 N.E. 1105 (1913).

9 Sears v. Rule, 45 Cal. App. (2d) 374, 114 P. (2d) 57 (1941); Estate of Wadleigh, 250 Wis. 284, 26 N.W. (2d) 667 (1947).

10 First-Mechanics Nat. Bank v. First-Mechanics Nat. Bank, 137 N.J. Eq. 106, 43 A. (2d) 674 (1945). In re Rowland's Estate, 73 Ariz. 337, 241 P. (2d) 781 (1952), states that precatory words to an executor indicate a trust intent, but that precatory words to a non-executor do not indicate a trust. In Sears v. Rule, 45 Cal. App, (2d) 374, 114 P. (2d) 57 (1941), although the court held that precatory words created no trust, it also found that the devisee did not take beneficially. See 1 TRUSTS RESTATEMENT §25 (1935).

11 Will of Dever, 173 Wis. 208, 180 N.W. 839 (1921); Cheney v. Plumb, 79 Wis. 602, 48 N.W. 668 (1891).

to conjure up the normal legal consequences associated with the trust.

These are examples of the conflicting and inconsistent rules from which a court may draw in its initial step of construing the bequest in terms of the law that it invokes. Lack of clarity and positiveness in these rules makes it difficult to predict what construction will be reached in a given case; there is opportunity for wide judicial discretion in choosing the applicable body of law.

B. *Substantive Doctrine.* Having determined, in the initial step of construction, that it is faced with a trust, power, or gift case, the court will then apply the principles of that chosen body of precedent.

If the court finds that the bequest provides for a gift to the executor, there is of course no real problem as to the validity and construction of a discretionary bequest.[12] Such a construction treats as surplusage all of the devise except "to my executor." As the recipient of an absolute gift, the executor is free to transfer it to others in any manner that he desires.

If, on the other hand, a trust is found to have been intended, the trust will be valid only if the testator has met the requirements imposed in the famous case of *Morice v. The Bishop of Durham,*[13] by designation of a definite trust beneficiary.[14] Failure in this latter respect totally invalidates the devise, and the executor is said to hold the corpus on a resulting trust for the heirs or next of kin of the testator.[15]

The extent to which a beneficiary must be defined has never been accurately determined. The naming of a single individual will of course satisfy the requirement,[16] as will the specification of a small class the membership of which can be readily ascertained. Thus "the children of the testator" will suffice.[17] If,

[12] Norman v. Prince, 40 R.I. 402, 101 A. 126 (1917); Will of Dever, 173 Wis. 208, 180 N.W. 839 (1921); Harvey, Exr. v. Griggs, 12 Del. Ch. 232, 111 A. 437 (1920); Cheney v. Plumb, 79 Wis. 602, 48 N.W. 668 (1891); Hodgson v. Dorsey, 230 Iowa 730, 298 N.W. 895 (1941). See note 30 infra.

[13] 10 Ves. 522, 32 Eng. Rep. 947 (1805).

[14] Chichester Diocesan Fund v. Simpson, [1944] A.C. 341; Estate of Ralston, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934); Uloth v. Little, 321 Mass. 351, 73 N.E. (2d) 459 (1947); Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445 (1881); Olliffe v. Wells, 130 Mass. 221 (1881).

[15] Morice v. The Bishop of Durham, 10 Ves. 522, 32 Eng. Rep. 947 (1805); Inland Revenue Commissioners v. Broadway Cottages Trust, [1954] 3 All E.R. 120; Tunis v. Dole, 97 N.H. 420, 89 A. (2d) 760 (1952). See note 14 supra.

[16] 1 TRUSTS RESTATEMENT §112 (1935).

[17] Moskowitz v. Federman, 72 Ohio App. 149, 51 N.E. (2d) 48 (1943); Markham v.

however, the executor is to select the beneficiaries from a class whose membership is neither identifiable nor ascertainable, the trust will fail for want of a definite beneficiary under the *Morice* rule.[18] A devise which permits the executor to select "anyone" as the beneficiary of the trust is therefore too indefinite.[19] All members of the potential beneficiary class must be ascertainable,[20] and some courts may even require the class to be readily ascertainable. In this latter event, it would seem that an executor's choice among "the cousins of the testator" would fail for want of definiteness, even though all the cousins could possibly, though with great difficulty, be ascertained.[21]

That the executor is permitted to select the actual beneficiaries from a class designated by the testator in no way alters the definite beneficiary requirement. To be considered valid, such a bequest must specify a class as beneficiary with sufficient specificity to meet the *Morice* rule without consideration, and before exercise, of the power of selection.[22]

If the executor is to distribute property held in trust for named purposes, instead of to a class of persons, the trust will fail if the purposes are considered general, indefinite, and noncharitable.[23] Where certain types of specific purposes are designated, e.g., for the care of horses and dogs,[24] the executor will be permitted to carry out the trust, despite the fact that there is no definite beneficiary to enforce the trust.[25] Such an arrange-

Tibbetts, (S.D. N.Y. 1947) 79 F. Supp. 47; Shepard v. Newton, 304 Mass. 6, 22 N.E. (2d) 618 (1939). 1 TRUSTS RESTATEMENT §120 (1935).

18 Uloth v. Little, 321 Mass. 351, 73 N.E. (2d) 459 (1947); Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926); Murdock v. Bridges, 91 Me. 124, 39 A. 475 (1897); In re Brown's Estate, 122 N.Y.S. (2d) 640 (1953); Minot v. Attorney General, 189 Mass. 176, 75 N.E. 149 (1905). 1 TRUSTS RESTATEMENT §120, comment *a*, §122, comment *a* (1935).

19 Estate of Ralston, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934); Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445 (1881); Blunt v. Taylor, 230 Mass. 303, 119 N.E. 954 (1918); Haskell v. Staples, 116 Me. 103, 100 A. 148 (1917); Green v. Allen, 132 Me. 256, 170 A. 504 (1934). Cases following this holding are collected at 2 SCOTT, TRUSTS, 2d ed., §124, note 4 (1956). But see note 30 infra, which cites cases involving comparable language, in which the devises were held to be gifts.

20 1 TRUSTS RESTATEMENT §§120, 122 (1935). The *Restatement* would seem to make this the only requirement. Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680 (1878).

21 See Dalton v. White, (D.C. Cir. 1942) 129 F. (2d) 55 (1942).

22 Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926); Minot v. Attorney General, 189 Mass. 176, 75 N.E. 149 (1905); Shepard v. Newton, 304 Mass. 6, 22 N.E. (2d) 618 (1939). 1 TRUSTS RESTATEMENT §120, comment *c* (1935).

23 Morice v. The Bishop of Durham, 10 Ves. 522, 32 Eng. Rep. 947 (1805); Chichester Diocesan Fund v. Simpson, [1944] A.C. 341; Brown v. Caldwell, 23 W. Va. 187 (1883); Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891). 1 TRUSTS RESTATEMENT §123 (1935).

24 In re Dean, 41 Ch. D. 552 (1889).

25 In re Thompson, [1934] Ch. 342; In re Estate of Searight, 87 Ohio App. 417, 95 N.E.

ment, termed an honorary trust, has been accepted as an exception to *Morice v. The Bishop of Durham* in that want of a definite beneficiary does not produce total invalidity.

The third potential body of law which the court may construe the devise to have invoked is that surrounding a discretionary power of appointment. In power law, there is no basis for invalidity analogous to the definite beneficiary rule in the trust area.[26] Beyond the requirement that the testator must furnish a standard whereby appointees can be identified as falling within the designated class,[27] there is no requirement as to size or specificity of the class of potential appointees. A general power of appointment permits the appointment of anyone. Courts have upheld "the friends of the testator"[28] and "everyone in the world except the executor"[29] as valid classes of potential appointees. Where the donee's power of disposition is absolute and unlimited, however, some courts may find that testator intended a gift beneficially and thus remove the bequest from the power area.[30] On the other hand, if the executor is made the donee of a power by which the testator imposes an obligation or duty on the executor to exercise the power, the courts will construe the bequest as a power coupled with a trust or a power in trust and apply traditional trust law with respect to definiteness of beneficiary.[31]

C. *Application and Basis of the Definite Beneficiary Rule.* From the foregoing discussion it can be seen readily that a court's

(2d) 779 (1950); St. Stephen's Church v. Morris, 115 Va. 225, 78 S.E. 622 (1913); Estate of Koppikus, 1 Cal. App. 84, 81 P. 732 (1905); Angus v. Noble, 73 Conn. 56, 46 A. 278 (1900); McCartney v. Jacobs, 288 Ill. 568, 123 N.E. 557 (1919); 1 TRUSTS RESTATEMENT §124 (1935). See 2 SCOTT, TRUSTS, 2d ed., §§124 to 124.7 (1956).

26 Watts's Estate, 202 Pa. 85, 51 A. 588 (1902); Dormer Estate, 348 Pa. 356, 35 A. (2d) 299 (1944); Baldwin v. Davidson, 37 Tenn. App. 606, 267 S.W. (2d) 756 (1954); Townsend v. Gordon, 308 Mich. 438, 14 N.W. (2d) 57 (1944). 3 PROPERTY RESTATEMENT §323 (1940).

27 3 PROPERTY RESTATEMENT §323, comment *h* (1940). In re Coates, [1955] Ch. 495.

28 In re Rowland's Estate, 73 Ariz. 337, 241 P. (2d) 781 (1952).

29 In re Park, [1932] 1 Ch. D. 580.

30 Norman v. Prince, 40 R.I. 402, 101 A. 126 (1917); Appeal of Richburg, 148 Me. 323, 92 A. (2d) 724 (1952); Harvey, Exr. v. Griggs, 12 Del. Ch. 232, 111 A. 437 (1920); Townsend v. Gordon, 308 Mich. 438, 14 N.W. (2d) 57 (1944). 1 TRUSTS RESTATEMENT §125 (1935). Cases following this holding are collected at 2 SCOTT, TRUSTS, 2d ed., §124, note 2 (1956). But see note 19 supra, which cites cases involving comparable language, in which the devises were held to be invalid trusts.

31 Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926); First-Mechanics Nat. Bank v. First-Mechanics Nat. Bank, 137 N.J. Eq. 106, 43 A. (2d) 674 (1945). 1 TRUSTS RESTATEMENT §27 (1935). See In re Rowland's Estate, 73 Ariz. 337, 241 P. (2d) 781 (1952). Cases on this point are collected in 80 A.L.R. 503 (1932).

decision to apply trust law rather than gift or power law to the bequest may have serious consequences when the executor is to name recipients of the testator's bounty from a class of persons. One must be accurate, however, in recognizing the precise extent of application of the more restrictive *Morice* rule. This rule dictates a different result from power law in only one of the three possible planes of definiteness. Where there is a completely definite class, i.e., its entire membership is identifiable or ascertainable, both a trust and a power to select is valid.[32] Where the class is entirely indefinite, as where the executor is to select the takers from a class which is to be specified in a codicil which in fact is never executed,[33] the devise is always void and the heirs or next of kin take.[34] The present discussion centers upon the intermediate situation, where some, but not all, of the members can be ascertained, as where the property is to be distributed to the "friends" of the testator. Undoubtedly, some persons could clearly qualify as friends, but it might be quite impossible to identify the entire class. Under power law, this type of class is an acceptable object of bounty.[35] Trust law, however, dictates that this type of class cannot be validly specified a beneficiary.[36]

Although the definite beneficiary rule is so well established at present that the courts generally feel no necessity for stating any reason for applying it, there have been several reasons urged as the rationale for the rule. These suggested bases will merely be stated here and later sections of this comment will explore their soundness.

The trust rule has been said to be based on legal necessity, in that there cannot be a trust without a beneficiary to enforce the trust. Under a Hohfeldian type of analysis, it is urged that a valid trust requires a duty in the trustee and that without a beneficiary to hold the correlative right it is impossible to im-

32 Hazard v. Bacon, 42 R.I. 415, 108 A. 499 (1920); In re Dewey's Estate, 45 Utah 98, 143 P. 124 (1914). 3 PROPERTY RESTATEMENT §323 (1940); 1 TRUSTS RESTATEMENT §120 (1935).

33 Uloth v. Little, 321 Mass. 351, 73 N.E. (2d) 459 (1947); In re Fabbri's Will, 1 App. Div. (2d) 1029, 152 N.Y.S. (2d) 100 (1956); In re Estate of Kessler, 271 Wis. 512, 74 N.W. (2d) 146 (1956).

34 3 PROPERTY RESTATEMENT §323, comment *h* (1940); TRUSTS RESTATEMENT, SECOND, Tentative Draft No. 3, §122, comment *e*, §123, comment *e* (1956). See note 33 supra.

35 In re Rowland's Estate, 73 Ariz. 337, 241 P. (2d) 781 (1952); In re Coates, [1955] Ch. 495. 3 PROPERTY RESTATEMENT §323, comment *h* (1940).

36 Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926); Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680 (1878). 1 TRUSTS RESTATEMENT §122 (1935).

pose a duty on the trustee.[37] It has also been argued that to allow a valid trust where there was no definite beneficiary would violate public policy by allowing the testator to delegate to his executor his testamentary power to dispose of his property.[38] Trusts for indefinite classes are also thought to be void for want of certainty, because it is impossible to determine to whom the executor is to distribute the trust property.[39] Finally, the rule against perpetuities has been given as a reason for the trust rule.[40]

II. *Inadequacy of Existing Law*

A. *Analysis of Testamentary Intent.* As has been indicated, the courts have analyzed the testator's intent in terms of whether he intended to create a trust, or a power, or alternatively, to make an outright gift.[41] Actually, the present discussion does not logically encompass cases which adopt the gift construction. Where there has been any meaningful limitation placed upon the transfer to the executor, there would appear to be little justification for reaching the gift interpretation. More important, having found a gift, the court thereby ignores all of the devise except "to my executor" which construction, of course, completely undercuts the problem at hand which centers on the effect of the rest of the devise (e.g., "to distribute to my friends") and on the inconsistencies between trust law and power law with respect to the necessity of naming definite objects. Thus while this comment deals with the validity and effect to be given to devises which provide for the executor's selection of the ultimate takers, the gift cases, by treating this distributive language as surplusage, fall outside of the problem. Consequently, except to note the presence of gift cases in this area and to question the validity of such a construction, except where there are special considerations, this comment will center its attention on power and trust law.

[37] Morice v. The Bishop of Durham, 10 Ves. 522, 32 Eng. Rep. 947 (1805); Scott, "Trusts for Charitable and Benevolent Purposes," 58 HARV. L. REV. 548 at 563-565 (1945); 2 SCOTT, TRUSTS, 2d ed., §123 (1956); Gray, "Gifts for a Non-Charitable Purpose," 15 HARV. L. REV. 509 (1902).

[38] Chichester Diocesan Fund v. Simpson, [1944] A.C. 341. 2 SCOTT, TRUSTS, 2d ed., §123 (1956); Scott, "Trusts for Charitable and Benevolent Purposes," 58 HARV. L. REV. 548 at 566 (1945).

[39] Scott, "Trusts for Charitable and Benevolent Purposes," 58 HARV. L. REV. 548 at 565 (1945).

[40] 2 SCOTT, TRUSTS, 2d ed., §123 (1956). See Smith, "Honorary Trusts and the Rule against Perpetuities," 30 COL. L. REV. 60 (1930); SIMES, FUTURE INTERESTS HANDBOOK §113 (1951).

[41] See SIMES, FUTURE INTERESTS HANDBOOK §52, note 24 (1951).

It becomes pertinent, then, to undertake a more penetrating analysis of testator's intent in terms of his choice between trust and power results. It is perhaps accurate to say, however, that the testator does not think of either the trust or the power of appointment as such in their legal sense. His intentions undoubtedly proceed on the more pragmatic level of the specific result that he wishes to obtain.

These intentions may be best illustrated by consideration of a hypothetical devise drawn from the cases: "residue to my executor to be distributed to such persons as my executor shall select." Given no contextual facts other than the language of the devise, one may find that the testamentary intent here consists of three distinct elements. First, the fact that the transferee is an executor, coupled with the normal rule of construction that no language is to be considered surplusage if possible,[42] leads to the conclusion that the executor is not to take the property beneficially himself.[43] Second, the testator desires that the ultimate takers of the property be those persons selected by the executor. Finally, since the testator's dispositive scheme will be carried out only if the executor actually selects the distributees, it appears that the testator desires to obligate the executor to make a selection.

B. *Defects in the Traditional Doctrines.* If these three objectives are what a testator would normally intend to reach through the hypothetical devise, to what extent are the power and trust doctrines of use to him?

The trust can certainly achieve the first of the testator's aims, for the executor may not take beneficially as a trustee. Some authorities indicate that upon a showing that the executor cannot take for his own use, a devise must therefore be construed as invoking a trust framework.[44] Such a conclusion is

42 Thomas v. Anderson, (8th Cir. 1917) 245 F. 642.

43 See note 3 supra.

44 Minot v. Attorney General, 189 Mass. 176, 75 N.E. 149 (1905); Tunis v. Dole, 97 N.H. 420, 89 A. (2d) 760 (1952). The *Property Restatement* would make this the sole test of whether a power or a trust is created. 3 PROPERTY RESTATEMENT §323, comment *e* (1940). The standard test for determining whether a power is discretionary or in trust is as follows: is the donee of the power under a duty to exercise it? Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926); 1 TRUSTS RESTATEMENT §27 (1935). However, the *Property Restatement* does not recognize the mandatory-discretionary distinction with respect to powers. 3 PROPERTY RESTATEMENT §320, Special Note (1940). It would recognize the necessity of definiteness of objects only where the property has been transferred in trust to a trustee who is to select the ultimate takers. The test proposed by the *Property Restatement* to determine whether an executor takes in trust is this: is the executor

not sound, since it is equally possible to create a valid power whereby the executor is excluded as a potential appointee.[45] It appears, therefore, that both a power and trust construction can achieve the first element of testator's intent.

A discretionary power of appointment can clearly carry out the second element as well, permitting the executor to select the ultimate takers.[46] There is no doubt that a trust can produce the same result, provided that there is a valid trust. In satisfaction of this latter condition, however, the hypothetical devise will apparently run afoul of the definite beneficiary rule, since no definite class of beneficiaries is specified.[47]

Power law cannot achieve the third objective. In order to validate a power which takes as its object an indefinite class, the testator must make the power discretionary, which of course fails to impose an obligation upon the executor to make a selection.[48] If the power is coupled with a duty to exercise it, a power in trust is created, and the power in trust is subject to the definite beneficiary requirement; so the hypothetical devise must again come within the *Morice* rule.[49] On the other hand, although trust law is capable of obligating the executor to make a selection, it fails to impose the obligation in the hypothetical case, because as a trust, the bequest again must be struck down for want of a definite beneficiary. With respect to the third objective, then, the laws of trust and power present

precluded from taking beneficially? 3 PROPERTY RESTATEMENT §323, comment *e* (1940). The *Property Restatement* does not recognize the use of the term power in trust, and it is difficult to determine what the *Property Restatement* does with the case represented by the usual meaning of this concept, i.e., donee of the power is under a duty to exercise the power. The *Property Restatement* gives relief for non-exercise only where the objects of the power are such as could also be objects of a trust. 3 PROPERTY RESTATEMENT §367 (1940). Thus, since the *Property Restatement* places no limit on definiteness of objects (except that there must be some persons who can be recognizable as coming within the class), it would seem that where there is a power in trust to an indefinite class, the *Property Restatement* would allow the donee to exercise the power, although it would provide no remedy for non-exercise. This would seem to be Ames' reasoning as will be discussed infra.

45 In re Park, [1932] 1 Ch. 580; Dormer Estate, 348 Pa. 356, 35 A. (2d) 299 (1944); In re Jones, [1945] Ch. 105; In re Harvey, [1950] 1 All E.R. 491. See SIMES, FUTURE INTERESTS HANDBOOK §52 (1951), and 3 PROPERTY RESTATEMENT §323, comment *e* (1940), which states that such a construction is "conceivable."

46 Watts's Estate, 202 Pa. 85, 51 A. 588 (1902); In re Rowland's Estate, 73 Ariz. 337, 241 P. (2d) 781 (1952); In re Coates, [1955] Ch. 495.

47 1 TRUSTS RESTATEMENT §120 (1935). See Hazard v. Bacon, 42 R.I. 415, 108 A. 499 (1920); Markham v. Tibbetts, (S.D. N.Y. 1947) 79 F. Supp. 47.

48 Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926); In re Rowland's Estate, 73 Ariz. 337, 241 P. (2d) 781 (1952).

49 Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926).

an anomaly when the object is an indefinite class. To carry out the testator's wishes fully, the executor must be obligated to exercise the power of selection, yet as a trust or a power in trust (which are the only vehicles for imposing the obligation), the devise is totally void for want of a definite beneficiary. The devise is thus valid only as a power, the law applicable to which does not compel the executor to exercise his discretion. Thus, the designation of an indefinite class as the group from which the executor is to select, as in the hypothetical devise, automatically means that under the existing law, the testator's third objective of imposing a duty on the executor will be frustrated. Complete fulfillment of the testator's dispositive scheme is simply not possible under our present legal structure.

It is suggested that the traditional analysis is too legalistic and mechanical.[50] In its initial step of construction, there is great unpredictability as to whether it will construe a devise as a power or a trust. Then in the second step of applying legal doctrine, total invalidity may easily result under the trust construction. It is submitted that in the indefinite-class cases, the courts should start with the rudiments of the testator's intent, i.e., the results which he wishes to reach by his devise. This intent should be measured against the available means of property distribution, and since no public policy questions are raised, the court's purpose should be to carry out the testator's objectives so far as is possible without distorting the devise.[51] On such an analysis, it would appear that the application of power law would be the most satisfactory means of handling of the indefinite-class cases, for the devise would be substantially carried out (completely carried out, if executor exercised the power).

Application of power law would involve no distortion of the bequest. If trust law were strictly applied, the property would go to testator's heirs or next of kin.[52] If power law were applied, the property would go precisely as testator intended if the power were exercised. If the power were not exercised, the trust property would remain in the heirs or next of kin, just as it would

50 See Scott, "Trusts for Charitable and Benevolent Purposes," 58 HARV. L. REV. 548, 563 (1945).

51 Dulles's Estate, 218 Pa. 162, 67 A. 49 (1907), which sustained a trust for indefinite purposes, started with the premise that the owner of property could make any distribution of property which is not unlawful.

52 Estate of Ralston, 1 Cal. (2d) 724, 37 P. (2d) 76 (1934); Morice v. The Bishop of Durham, 10 Ves. 522, 32 Eng. Rep. 947 (1805); Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445 (1881). See note 15 supra.

under trust law.[53] By excluding the executor as a possible appointee,[54] any possibility that the property would be distributed in conflict with testator's wishes would be eliminated.

III. *Correlation of Trust and Power Law*

A. *The Ames Approach.* The inconsistent results reached in these indefinite-class cases by application of trust or power law were early brought into focus by Dean Ames,[55] who argued for a partial change in the trust rule in order to make it consistent with power doctrine.

Ames apparently recognized that there were two aspects to the definite beneficiary rule in the *Morice* decision: (1) unless a testator names a definite beneficiary or beneficiaries who can enforce the trust on their own behalf, an enforceable trust cannot be created; and (2) on failure of the bequest to create an enforceable trust, the bequest is void and of no effect and the executor must hold the property on a resulting trust in favor of the heirs or next of kin. Although he apparently conceded the validity of the first proposition, Ames disagreed with the second, arguing that voiding the trust was a result which did not necessarily follow from acceptance of the rule requiring an enforceable obligation.[56] He felt that the unenforceable trust might nevertheless be given limited legal effect. He reasoned as follows:

It is agreed that when the executor is vested with a discretionary power to select appointees from an indefinite class, the executor is permitted to make the selection so long as he appoints to one who fits the description of the class designated.[57] Yet if under the same circumstances the executor is vested with a mandatory power of selection, the devise is void. Since the discretionary power is valid though unenforceable, it is entirely inconsistent to hold that a mandatory power is void, because it is unenforceable.[58] When testator attempts to impose a duty to make a selection in the trust context, the executor should be *permitted* to carry out the terms of the trust, even though no enforceable obligation is created. The executor should have a

53 See note 65 infra.
54 See note 45 supra.
55 Ames, "The Failure of the Tilden Trust," 5 HARV. L. REV. 389 (1892).
56 Id. at 395
57 See notes 26, 27, 28, and 29 supra.
58 Ames' reasoning indicates that he believed that the real basis for the definite beneficiary rule was the necessity of having someone to enforce the trust. See note 37 supra.

discretionary power to carry out the trust in favor of persons who clearly came within the limits of the named but indefinite class of beneficiaries.[59]

The Ames position does not wholly undercut the *Morice* rule, because it continues to recognize that no enforceable rights can be vested in members of the indefinite class. It does, on the other hand, depart from the traditional conception that specification of an indefinite class creates by operation of law a resulting trust in favor of the heirs or next of kin.

B. *Criticism of the Ames Approach.* Gray and Bogert have defended the prevailing *Morice* rule.[60] Gray's argument with Ames rests on the conception that there cannot be an enforceable trust without a definite beneficiary to whom the trustee owes a duty. Without a beneficiary to hold a correlative right, a trust duty cannot be imposed on the trustee.[61] He further argued that a valid trust could not be created without a proper beneficiary in whom could be vested the equitable title to the trust corpus. Absent such a beneficiary, legal title would be in the trustee with equitable title in limbo.[62]

[59] Ames developed his argument with reference to the Tilden Trust [see Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891)], which was a trust for indefinite purposes. However, Ames would not have limited his view to the trust for indefinite purposes, since his rationale was based on the inconsistency of the trust rule with the rule relating to the discretionary power of appointment. Scott has recognized the applicability of the Ames view to the indefinite class trust. 2 SCOTT, TRUSTS, 2d ed., §122 (1956). Since trusts both for indefinite purposes and for indefinite classes of persons fail for want of a definite beneficiary, and since in both types of cases it would be equally possible for the trustee to carry out the trust through a power, it is believed that there is no valid basis for according different treatment to the two types of cases, with respect to the application of the Ames rationale.

[60] In his first edition, although he apparently personally advocates the Ames rationale, Scott stated that the power rule was not consistent with the trust rule. 1 SCOTT, TRUSTS, 1st ed., §122 (1939). In allowing a donee to distribute among appointees of an indefinite class, the discretionary power rule was in conflict with Clark v. Campbell, 82 N.H. 281, 133 A. 166 (1926). The trust and power rules could, of course, be harmonized by changing the power rule so that it conformed to the trust rule. Norris v. Thomson's Executors, 19 N.J. Eq. 307 (1868), seems to be the only authority for applying the definite-objects rule to all powers. Such an approach would seriously undercut a most useful means of property distribution; all but special powers would be invalidated. Since the sole achievement of this approach would be to attain symmetry, there would appear to be no sound basis for adopting this view. In his recent second edition, Scott does not state that the power rule is out of line with the trust rule, and he seems to indicate that it is the trust rule, rather than the power rule, that is defective. 2 SCOTT, TRUSTS, 2d ed., §§122, 123 (1956). See also Scott, "Conveyances upon Trusts Not Properly Declared," 37 HARV. L. REV. 653 at 687, 688 (1924); Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 527 at 538 (1917).

[61] Gray, "Gifts For a Non-Charitable Purpose," 15 HARV. L. REV. 509 at 512-514 (1902). GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., Appendix H. (1915). But see GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §909 (1942).

[62] Gray, "Gifts For a Non-Charitable Purpose," 15 HARV. L. REV. 509 at 514 (1902).

Gray's criticism fails to recognize that there are potentially two means by which the definite beneficiary might be changed in order to make it consistent with power law. The first would be to abolish the *Morice* rule completely and permit the creation of a trust for which there is no beneficiary. The second would be to modify the rule so that instead of totally invalidating a trust for which the beneficiary is indefinite courts would give effect to the devise only so far as is possible under the guides furnished by the testator. Gray appeared to believe that Ames subscribed to the first alternative, and if this were so, there would be merit in his criticism. But it would appear that Ames followed the second course, permitting the trustee to carry out the otherwise unenforceable trust. Since Ames' analysis is explained in terms of a power-liability relationship, Gray's right-duty criticism would seem inappropriate.[63]

Gray's second argument, based upon the absence of a person or persons in whom to vest equitable title, is also met under the Ames view. Equitable title is vested in the heirs or next of kin, subject to divestment by the exercise of the executor's power of selection, and legal title is in the executor. All estate interests are therefore properly vested.[64]

Analyzing the executor's action in terms of power rather than duty does not completely eliminate checks upon his discretion. The power to carry out the trust would presumably exist for only a reasonble time before it would be extinguished, and if the executor attempted to use his power in a means not contemplated by the terms of the bequest, his act could be held not to have divested the heirs or next of kin of equitable title.[65] Such checks would appear to be no less effective than those available under trust law.

Bogert's criticism is based upon a fear that the trust institu-

[63] Gray's answer to this proposition would be that the testator intended to create either a mandatory or a discretionary power; if the former were intended, the devise must stand or fall as such. Id. at 513.

[64] Scott has suggested that the heirs or next of kin take on a resulting trust which is subject to a condition precedent that the executor fails to exercise his power to carry out the trust. Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 527 at 538 (1917); Scott, "Conveyances Upon Trusts Not Properly Declared," 37 HARV. L. REV. 653 at 687, 688 (1924). If the equitable title of the heirs or next of kin were subject to a condition precedent, then the equitable title would still be outstanding and vested in no one. Gray's criticism would thus be valid. In his recent second edition, however, Scott states that the equitable title vests immediately in the heirs or next of kin from whom it can be divested by exercise of the power. 2 SCOTT, TRUSTS, 2d ed., §123 (1956).

[65] 1 TRUSTS RESTATEMENT §124, comment *b* (1935); TRUSTS RESTATEMENT, SECOND, Tentative Draft No. 3, §122, comment *d*, §123, comment *d* (1956).

tion will be further diluted by acceptance of the Ames approach. He feels that in order to derive the traditional benefits available from use of a trust, one should be required to comply precisely with its requirements. Any chipping away at these requirements will lead to uncertainty and confusion.[66] It seems obvious, however, that the Ames view would not compel a departure from the accepted requirements for creation of an enforceable trust, but would only place a power in the trustee not heretofore recognized. It may be further suggested that instead of lending uncertainty to the law, the Ames rationale would render the law more certain. The present law would appear to provide very little basis for predicting whether a devise created a valid power or an invalid trust.

To the criticisms of these authors may be added the suggested justifications for creation and preservation of the definite beneficiary trust rule outlined in section I-C above. The first justification there indicated amounts to no more than Gray's criticism of the Ames view, based upon a Hohfeldian type of analysis, just discussed, and appears to require no further comment. The second argument advanced in favor of the *Morice* rule, that enforcement of a trust in favor of an indefinite class of beneficiaries would amount to usurpation of testamentary powers, is not a sound basis for attacking the Ames view. The courts have shown constant willingness to accept the validity of the discretionary power of appointment, which potentially is equally capable of usurping testamentary powers. This willingness would appear to indicate that any public policy opposing invasion of the testator's domain is insubstantial at best when applied to these cases in the manner that Ames advocates.[67]

Uncertainty as to taker was the basis for the third argument in favor of the definite beneficiary rule. It may be submitted that while this contention would have validity as to a trust in favor of a wholly indefinite class,[68] it is inapplicable as a ground for attacking the Ames view. Ames' doctrine is intended to apply only to the case where the class is partially definite; in such event, the executor is permitted to appoint solely persons whom the court determines to fall definitely within the class.[69]

66 1A BOGERT, TRUSTS AND TRUSTEES §§162, 166 (1951).

67 2 SCOTT, TRUSTS, 2d ed., §123 (1956).

68 See notes 33 and 34 supra.

69 In re Gestetner Settlement, [1953] Ch. 672; Dulles's Estate, 218 Pa. 162, 67 A. 49 (1907).

To the final argument that the rule against perpetuities is a bar to a trust in favor of an indefinite class, one may reply that the executor's power would need to be exercised within a reasonable time or at least within his lifetime. Under this interpretation, the power could not be exercised beyond the period of the rule. On closer analysis it will be noted that the rule against perpetuities is not actually a reason for the definite beneficiary rule. Whereas the trust rule is concerned with what is the proper beneficiary of a trust,[70] the rule against perpetuities deals, in the present setting, with the wholly independent question of when the trustee can exercise his power of selection. The latter inquiry is pertinent in determining validity, irrespective of whether the class of objects is definite or indefinite.

C. *Acceptance by the Trusts Restatements.* As originally published, the *Restatement of Trusts* largely followed the great weight of authority with respect to the rules pertaining to trust beneficiaries.[71] The honorary trust doctrine, however, was broadly extended to allow the trustee of any unenforceable trust to carry out its terms, if specific, non-capricious purposes were named as the object of the trust.[72] Where the trust was created for a partially indefinite class, no such discretion was given the trustee as Ames would suggest,[73] except where the trustee was to select the beneficiaries from among the testator's relatives[74] in which case the trustee could make the selection, even though there was no enforceable trust.[75]

In a recently approved revision to the *Restatement of Trusts,*

70 2 SCOTT, TRUSTS, 2d ed., §123 (1956). See note 65 supra.

71 1 TRUSTS RESTATEMENT §§112, 122, 123, 124, 125 (1935).

72 1 TRUSTS RESTATEMENT §124 (1935). The decided cases have not applied the honorary trust rule to all trusts for specific purposes, but the rule has been limited chiefly to trusts for animals, for care of graves, erection of monuments and a few other similar specific purposes. 2 SCOTT, TRUSTS, 2d ed., §§124 to 124.7 (1956). In Estate of Reed, 82 Cal. App. (2d) 448, 186 P. (2d) 147 (1947), although the devise in trust was for the specific purpose of carrying on the work of two named persons, the bequest was held totally void, the court applying the general trust rule. But see In re Thompson, [1934] Ch. 342, where the honorary trust doctrine was applied to a trust for the specific purpose of promoting foxhunting. The A.L.I. apparently recognized that §124 involved an extension of the honorary trust doctrine, for in comment *d,* §124, it notes that the rule has been applied in the types of cases enumerated above.

73 1 TRUSTS RESTATEMENT §122 (1935).

74 "Relatives" constitutes an indefinite class when it is interpreted to mean everyone who is related to the testator. If "relatives" is used to mean only the testator's next of kin, then it constitutes a definite class.

75 1 TRUSTS RESTATEMENT §121 (1935). See 2 SCOTT, TRUSTS, 2d ed., §121 (1956). See Huling v. Fenner, 9 R.I. 410 (1870).

there have been two changes accepted which would allow the trustee of an unenforceable trust, either for an indefinite class or for general or indefinite purposes, to carry out the trust, if the trustee were directed or authorized by the terms of the trust to select the ultimate takers from the class or the purpose, and if the class or purpose were not entirely indefinite.[76] Together with the existing broadly stated honorary trust rule, these two changes appear to represent a complete adoption of the Ames rationale in the *Restatement.*

D. *Acceptance by the Courts.* In contrast to this change in the *Restatement* viewpoint, there has appeared very little judicial precedent giving support for Ames' suggested revision of the definite beneficiary rule. The vast majority of jurisdictions do not accept his position, and, indeed, do not even bother to discuss it.

Perhaps the greatest amount of support is to be encountered in the honorary trust cases, where a specific purpose is designated, but no definite beneficiary is named. Despite the fact that there is no definite beneficiary to whom the trustee's duty is owing and by whom the trust can be enforced, these trusts are generally accepted as valid to the limited extent of giving the trustee a power to carry out the trust. Trusts of which the purpose was to benefit animals,[77] erect monuments,[78] care for graves,[79] and a few other similar specific purposes have been upheld.[80]

There are at least three American decisions which did not decree total invalidity where a definite beneficiary was not designated.[81] These courts allowed the executor to select the trust beneficiaries, where the devise named general purposes which were sufficiently definite so that a court could determine whether a given selectee came within the named purposes. One English decision, in permitting a trustee to carry out a trust for a partially

76 TRUSTS RESTATEMENT, SECOND, Tentative Draft No. 3, §§122, 123 (1956). For the A.L.I.'s discussion of proposed §§122 and 123, see 33rd Annual Meeting, A.L.I. PROCEEDINGS 445-454 (1956). The second edition, embodying these changes, was adopted in 1957. See 34th Annual Meeting, A.L.I. PROCEEDINGS 279 (1957).

77 In re Dean, 41 Ch. D. 552 (1889); In re Estate of Searight, 87 Ohio App. 417, 95 N.E. (2d) 779 (1950).

78 Estate of Koppikus, 1 Cal. App. 84, 81 P. 732 (1905).

79 2 SCOTT, TRUSTS, 2d ed., §124.2 (1956).

80 2 SCOTT, TRUSTS, 2d ed., §§124 to 124.7 (1956). See In re Thompson, [1934] Ch. 342. See note 25 supra.

81 Dulles's Estate, 218 Pa. 162, 67 A. 49 (1907); Cochran v. McLaughlin, 128 Conn. 638, 24 A. (2d) 836 (1942); Feinberg v. Feinberg, (Del. Ch. 1957) 131 A. (2d) 658.

definite class, appears to have enunciated precisely the Ames viewpoint.[82] Other cases which hold that a power is created where the executor is directed to distribute, lend indirect support to the Ames position,[83] and the ruling that a valid power can be created which excludes only the executor as a possible appointee also provides some support, by undercutting the position that a trust must be intended if the executor cannot take beneficially.[84]

IV. *Conclusion*

Prevailing trust and power law, when applied side by side in the perspective of bequests to executors for distribution, produce inconsistent results. The courts, however, have shown little inclination to correlate the two or to alter their traditional "pigeon-holing" method of analysis by which these principles are applied. It is submitted that the concepts of power and trust should be employed, not as ends in themselves, but as means for effectuating the desires of the testator. Acceptance of the Ames rationale would provide a sound step in this direction and would solve at least part of the present conflict between trust and power doctrines. It seems but common sense to give the executor a power by the use of which he can fully effectuate a bequest, rather than imposing total invalidity of the trust as a sanction for testator's failure to specify all the potential beneficiaries to whom the executor may distribute.

William P. Wooden, S.Ed.

[82] In re Gestetner Settlement, [1953] Ch. 672.

[83] See notes 26, 27, 28 and 29 supra. The final result of In re Rowland's Estate, 73 Ariz. 337, 241 P. (2d) 781 (1952), was a holding that there was a power in trust where the object was definite and a discretionary power where the class of objects was indefinite. Some courts reason that, since no definite beneficiaries are named, the testator intended to create a power. In re Lidston's Estate, 32 Wash. (2d) 408, 202 P. (2d) 259 (1949); Hodgson v. Dorsey, 230 Iowa 730, 298 N.W. 895 (1941); Gilman v. Gilman, 99 Conn. 598, 122 A. 386 (1923); and Harvey, Exr. v. Griggs, 12 Del. Ch. 232, 111 A. 437 (1920). It should be noted that, although the cases cited in this note reach the ultimate Ames result, they do so within the existing framework of the law by holding, as a matter of construction, that a power was intended by the devise. This reasoning is to be distinguished from the Ames view which would hold that, even though a devise be construed as an intended trust, the executor or trustee would be given a power to carry out the unenforceable trust. To what extent, if any, the Ames rationale has influenced courts in finding a power as a matter of construction is not discernible from the decisions.

[84] In re Park, [1932] 1 Ch. 580. See note 45 supra. Dormer Estate, 348 Pa. 356, 35 A. (2d) 299 (1944), is apparently the only American decision in point. The two executors were found to have a power which was general, except that they could not appoint to themselves. Unfortunately, the direct holding of the case, that on the death of one executor the power was destroyed, does not directly support this proposition.