Buffalo Law Review

Volume 15 | Number 3 Article 18

4-1-1966

Decedents' Estates—Testamentary Trust—Consideration of Benediciary's Private Means Irrelevant to Decision to Invade Principal

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DECEDENTS' ESTATES—TESTAMENTARY TRUST—CONSIDERATION OF BENEFICIARY'S PRIVATE MEANS IRRELEVANT TO DECISION TO INVADE PRINCIPAL

In 1959 Walter L. Johnson died leaving a will from which the testator's widow received outright, property valued at $65,119.32. The residue of the estate ($17,189.58) was divided in half and given in trust to the widow and testator's daughter. As surviving joint tenant of a bank account the widow also received $73,135.84. By the terms of the will the widow was to receive the income from her trust and, if the trustees found that the income from the trust was not "adequate for the comfortable support and maintenance" of the widow, they were to invade the principal to the extent they "deem necessary and proper for the comfortable support and maintenance" of the widow. In no event, however, was the invasion to exceed 3,000 dollars per annum. Upon the death of the widow the remainder of her trust was to go to the daughter's trust. The terms of the daughter's trust were similar except that (1) the trustees were given discretion to invade the corpus only when they found that the income from the trust "together with other assets at her [the testator's daughter's] disposal" were inadequate for her comfortable support and maintenance, (2) there was no maximum set on the invasion, and (3) there were no remainder provisions. In the year of the testator's death the widow suffered a cerebral vascular accident and because of its effects was adjudged an incompetent in the same year. The medical expenses arising from the accident until the time of the widow's death in 1964 totalled 92,000 dollars. The private income of the widow would account for less than half of this amount, and if the trustees were allowed to invade the corpus, they would have depleted it. During her life the widow was paid the trust income but at no time was the principal invaded. After the widow's death the trustee sought to transfer the corpus of her trust to the trust of the daughter in accordance with the terms of the will. The widow's estate, however, made claim for the maximum invasion for each year of the widow's life after the death of the testator. *Held*, the trust, giving to the widow the income of the trust plus such amount of the principal as the trustees deem necessary for her proper support, was an absolute gift of support and invasion of the principal was not to be dependent upon a showing of inadequacy of the widow's own means; the other income of the widow is irrelevant to the decision to invade the principal; and it would be an abuse of the discretion of the trustees not to invade the principal to the maximum. *Matter of Johnson*, 46 Misc. 2d 52, 258 N.Y.S.2d 922 (Surr. Ct. 1965).

The major problem involved in this case is whether the trustees, in deciding whether to invade the corpus of a testamentary trust, should take into consideration the private means of the beneficiary or whether such means must be disregarded. From the few cases that have reached the Court of Appeals a basic legal principle has evolved. It is said that if the will constitutes an absolute gift of support, the private income of the beneficiary is immaterial to the trustees'

consideration.[1] If, however, the gift is one that is conditioned upon the need[2] of the beneficiary, the independent means of the beneficiary must be considered.[3] Once we have this "rule" we are immediately confronted with the question of determining when a trust is an absolute gift of support and when it is conditioned upon need. The answer is to be found in the intention of the testator.[4] When the language used in the will is clear, the intention of the testator is said to have been embodied in the instrument and it must be given effect.[5] When, however, the terms of the will are vague or ambiguous, discerning the intention of the testator becomes a more difficult proposition. The difficulty has resulted in the drawing of various courts to two poles with various gradations between the two. Some courts rely solely on the language of the will and try to resolve the ambiguity from within the "four corners" of the instrument.[6] Other courts, however, decide the issue not only from the words used, but also from the extrinsic circumstances and conditions surrounding the execution of the will.[7] Because of this difference in approach, various factors have been found to be controlling; and factors found governing in one case are very often ignored in others.[8]

Those courts that feel the intention of the testator must be found in the instrument alone have placed greater weight upon specific words and grammatical constructions.[9] In many of the cases finding an absolute gift of support, the following factors have been found to be of much significance: (1) words similar to those used in the instant case, *i.e.*, if income should prove insufficient, the

1. Matter of Clark, 280 N.Y. 155, 19 N.E.2d 1001 (1939).

2. A gift conditioned upon need is a gift of the income of the trust plus so much of the trust principal as is needed for the support of the beneficiary if the beneficiary's own sources should prove inadequate. See Matter of Johnson, 123 Misc. 834, 207 N.Y. Supp. 66 (Surr. Ct. 1924).

3. Matter of Martin, 269 N.Y. 305, 199 N.E. 491 (1936).

4. Matter of Clark, 280 N.Y. 155, 19 N.E.2d 1001 (1939); Matter of Bouvier, 205 Misc. 974, 129 N.Y.S.2d 542 (Surr. Ct. 1954); Matter of Hart, 189 Misc. 171, 71 N.Y.S.2d 488 (Surr. Ct. 1947); Matter of Sharp, 137 Misc. 644, 244 N.Y. Supp. 566 (Surr. Ct. 1930); Matter of Niles, 122 Misc. 17, 202 N.Y. Supp. 475 (Surr. Ct. 1923). See also Halbach, *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425, 1442 (1961); II Scott, *Trusts*, § 128.4 (1958).

5. Matter of Clark, *supra* note 4; Glanckopf v. Guaranty Trust Co., 274 App. Div. 39, 80 N.Y.S.2d 54 (1st Dep't 1948); Matter of Gatehouse, 149 Misc. 648, 267 N.Y. Supp. 808 (Surr. Ct. 1933).

6. See, *e.g.*, Matter of Clark, *supra* note 4; Matter of Levison, 29 Misc. 2d 697, 215 N.Y.S.2d 374 (Surr. Ct. 1961); Matter of Paster, 22 Misc. 2d 4, 198 N.Y.S.2d 441 (Surr. Ct. 1960); *In re* Cameron's Trusts, 127 N.Y.S.2d 870 (Surr. Ct. 1954); Matter of Gatehouse, *supra* note 5.

7. See, *e.g.*, Matter of Briggs, 180 App. Div. 752, 168 N.Y. Supp. 597 (3d Dep't 1917); Matter of Bouvier, 205 Misc. 974, 129 N.Y.S.2d 542 (Surr. Ct. 1954); *In re* Cowee's Will, 120 N.Y.S.2d 674 (Surr. Ct. 1953); *In re* Coghlan, 72 N.Y.S.2d 778 (Surr. Ct. 1947); Matter of Sharp, 137 Misc. 644, 244 N.Y. Supp. 566 (Surr. Ct. 1930); Matter of White, 125 Misc. 901, 212 N.Y. Supp. 267 (Surr. Ct. 1925).

8. See Halbach, *supra* note 4 at 1443.

9. See, *e.g.*, Matter of Clark, 280 N.Y. 155, 19 N.E.2d 1001 (1939); Matter of Hogeboom, 219 App. Div. 131, 219 N.Y. Supp. 436 (3d Dep't 1927); Matter of Aschner, 43 Misc. 2d 809, 252 N.Y.S.2d 472 (Surr. Ct. 1964); Matter of Paster, 22 Misc. 2d 4, 198 N.Y.S.2d 441 (Surr. Ct. 1960); *In re* Cass, 68 N.Y.S.2d 666 (Surr. Ct. 1946); Matter of Hart, 189 Misc. 171, 71 N.Y.S.2d 488 (Surr. Ct. 1947); Matter of Gatehouse, 149 Misc. 648, 267 N.Y. Supp. 808 (Surr. Ct. 1933); Matter of Johnson, 123 Misc. 834, 207 N.Y. Supp. 66 (Surr. Ct. 1924).

trustees may invade the principal to the extent they deem necessary, with "insufficient" and "necessary" being the key words;[10] (2) terms of the will directing that "whatever is left" of the principal of the beneficiary's trust be given to the remainderman;[11] and (3) the combining of income and invasion of principal clauses in the same sentence.[12] Finally, a clause in the will placing the discretionary power to invade the principal in the beneficiary is held to indicate an absolute gift.[13]

Likewise there is language which the courts interpret as indicating an intention on the part of the testator that the invasion should be predicated upon a showing of need. In this respect clauses allowing invasion to the extent of "need" or to the extent that the beneficiary may "require" for proper support[14] or "any words of condition or words imparting need are especially likely to be stressed as requiring consideration of other resources"[15] as is the appearance of elaborate provisions for the remaindermen.[16]

At the other pole are the courts that attempt to find the intention of the testator not only from the language of the will but also from other extrinsic factors surrounding the execution of the will. The factors that have tended to sway the court toward a decision that the testator intended the trust as an absolute gift of support are: (1) the beneficiary is the widow[17] of the testator *or* was in close relationship with the testator and perhaps previously depended upon the testator for support because of incompetency, advancing age, infancy,

10. See, *e.g.*, Matter of Clark, 280 N.Y. 155, 19 N.E.2d 1001 (1939); Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237 (1923); Matter of Aschner, *supra* note 9 (arguing that the word "necessary" must be taken to relate to the definition of support rather than a limitation upon the invasion of the corpus); *In re* Coghlan, 72 N.Y.S.2d 778 (Surr. Ct. 1947); Matter of Gatehouse, *supra* note 9; *but see* Matter of Sharp, 137 Misc. 644, 244 N.Y. Supp. 566 (Surr. Ct. 1930); Matter of Niles, 122 Misc. 17, 202 N.Y. Supp. 475 (Surr. Ct. 1923); Many recent cases simply base their decision on previous case rulings. See, *e.g.*, Matter of Grubel, 37 Misc. 2d 910, 235 N.Y.S.2d 21 (Surr. Ct. 1962).

11. The rationale here seems to be that the testator has acknowledged his intention that the principal be invaded and shows an obvious lack of concern for the remainderman. See, Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237 (1923); *In re* Cowee's Will, 120 N.Y.S.2d 674 (Surr. Ct. 1953); Matter of Gatehouse, *supra* note 9.

12. *In re* Cowee's Will, *supra* note 11.

13. See, *e.g.*, Matter of Springett, 25 Misc. 2d 68, 206 N.Y.S.2d 48 (Surr. Ct. 1960); Matter of Lyon, 192 Misc. 306, 80 N.Y.S.2d 369 (Surr. Ct. 1948); *In re* Ginnever's Estate, 69 N.Y.S.2d 452 (Surr. Ct. 1947).

14. The theory here is that the invasion is based upon the need of the beneficiary and does not depend upon the insufficiency of the income of the trust. See, *e.g.*, Matter of Martin, 269 N.Y. 305, 199 N.E. 491 (1936); *In re* Aldrich's Estate, 140 N.Y.S.2d 182 (Surr. Ct. 1955); *In re* Cass, 68 N.Y.S.2d 666 (Surr. Ct. 1946); Matter of Johnson, 123 Misc. 834, 207 N.Y. Supp. 66 (Surr. Ct. 1924).

15. Halbach, *supra* note 4 at 1447.

16. Because it shows a concern for the remainderman on the part of the testator. See *In re* Aldrich's Estate, 140 N.Y.S.2d 182 (Surr. Ct. 1955); Matter of Sharp, 137 Misc. 644, 244 N.Y. Supp. 566 (Surr. Ct. 1930).

17. See Matter of Grubel, 37 Misc. 2d 910, 235 N.Y.S.2d 21 (Surr. Ct. 1962); Matter of Bedell, 196 Misc. 227, 92 N.Y.S.2d 70 (Surr. Ct. 1949) (where the rationale would appear to be that the husband naturally intended to provide for the support of his wife regardless of her means); *In re* Coghlan, 72 N.Y.S.2d 778 (Surr. Ct. 1947); *In re* Kohlman's Estate, 60 N.Y.S.2d 556 (Surr. Ct. 1946); *In re* Block's Estate, 57 N.Y.S.2d 153 (Sup. Ct. 1941); Matter of Gatehouse, 149 Misc. 648, 267 N.Y. Supp. 808 (Surr. Ct. 1933).

or other reasons[18] and (2) the remainderman of the trust is someone or something with which the testator had little previous concern or connection.[19]

Certain factors militate against an intent to bequeath an absolute gift of support. It has been found that the testator intended a gift conditioned upon need, if (1) the testator had not previously provided for the support of the beneficiary[20] and/or the beneficiary has the physical ability to provide for himself;[21] or (2) if the beneficiary had received considerable other assets from the will;[22] or (3) if at the time of the execution of the will the testator knew of other assets available to the beneficiary;[23] or (4) if the size of the trust is small and insufficient to maintain full support for any length of time without depleting the trust.[24]

When all the cases are considered a general pattern seems to exist. Whenever the beneficiary is a widow, or one of close relation to the testator who had previously depended upon the testator for support, or an incompetent, the courts have seemed willing to find an absolute gift of support.[25] If the beneficiary does not have this close or exceptional relationship and has sufficient independent funds,[26] or if the beneficiary is physically and mentally competent to provide for himself,[27] the courts usually come to the opposite conclusion.

The court in the instant case recognized that its decision as to whether the widow's trust should be transferred to the daughter's trust or be invaded for the benefit of the widow's estate depended upon the preliminary question of whether the testator intended the trust to be one of an absolute gift of support or one conditioned upon need. Apparently using the approach that the intention

18. See, *e.g.*, Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237 (1923) (paralytic and incompetent son); Holden v. Strong, 116 N.Y. 471, 22 N.E. 960 (1889) (son with history of insanity); Matter of Hart, 189 Misc. 171, 71 N.Y.S.2d 488 (Surr. Ct. 1947) (dependent 70-year-old sister).

19. See *In re* Coghlan, 72 N.Y.S.2d 778 (Surr. Ct. 1947); Matter of Hart, *supra* note 18. *But see*, *In re* Mayer's Will, 59 N.Y.S.2d 561 (Surr. Ct. 1945).

20. See Matter of Briggs, 180 App. Div. 752, 168 N.Y. Supp. 597 (3d Dep't 1917); Matter of Levison, 29 Misc. 2d 697, 215 N.Y.S.2d 374 (Surr. Ct. 1961); Matter of Hart, *supra* note 18; *In re* Cass, 68 N.Y.S.2d 666 (Surr. Ct. 1946).

21. *In re* Cowee's Will, 120 N.Y.S.2d 674 (Surr. Ct. 1953); Matter of Kelly, 166 Misc. 774, 3 N.Y.S.2d 51 (Surr. Ct. 1938); Matter of White, 125 Misc. 901, 212 N.Y. Supp. 267 (Surr. Ct. 1925); Matter of Briggs, *supra* note 20. *But see*, Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237 (1923).

22. See Matter of Kelly, *supra* note 21; *In re* Aldrich's Estate, 140 N.Y.S.2d 182 (Surr. Ct. 1955); *In re* Cowee's Will, *supra* note 21.

23. See Matter of Briggs, 180 App. Div. 752, 168 N.Y. Supp. 597 (3d Dep't 1917); *In re* Aldrich's Estate, 140 N.Y.S.2d 182 (Surr. Ct. 1955); Matter of Sharp, 137 Misc. 644, 244 N.Y. Supp. 566 (Surr. Ct. 1930); Matter of White, 125 Misc. 901, 212 N.Y. Supp. 267 (Surr. Ct. 1925).

24. See Matter of Garret, 9 A.D.2d 545, 190 N.Y.S.2d 758 (2d Dep't 1959); Matter of Niles, 122 Misc. 17, 202 N.Y. Supp. 475 (Surr. Ct. 1923); Matter of Sharp, *supra* note 23; There are a small number of cases that depend neither upon language nor extrinsic factors existing at the time of the execution of the will. In these cases the courts have permitted invasion on the basis that not to do so would completely exhaust all of the assets of the beneficiary, and this cannot be allowed. See Matter of Bouvier, 205 Misc. 974, 129 N.Y.S.2d 542 (Surr. Ct. 1954); Matter of Hoepner, 176 Misc. 47, 27 N.Y.S.2d 398 (Surr. Ct. 1941).

25. See cases cited *supra* notes 16, 17.

26. See cases cited *supra* notes 21, 22.

27. See cases cited *supra* note 20.

of the testator should be determined solely from the language of the instrument, the court compared the language used in the instant case with that found in the will considered in *Matter of Clark*.[28] Since the gift in *Clark* was held to be absolute, and the invasion clauses of the two wills were similar, the court in the instant case concluded that the trust here likewise set up an absolute gift of support and held that in light of the existing conditions it would be an abuse of discretion for the trustees not to invade the principal to the maximum. Although having already "determined that the language of the will is sufficiently similar to many cases reaching the same conclusion, so that no further support for its decision is necessary," the court mentions "two other arguments to support the conclusion."[29] First, the court pointed out that in the daughter's trust there was specific direction to the trustees to consider the other income of the daughter before invading the principal. This directive was lacking in the widow's trust and this "distinction in language makes the court believe that the draftsman was aware of the different interpretations that would be given to the two different paragraphs."[30] Secondly, the court reasoned that even if it had followed the decision in *Matter of Martin*[31] (holding that the private sources of the beneficiary must be considered before invasion) the practical effect would have been the same. For even if the widow's private income was considered and added to the income from the trust, the sum would not be sufficient to cover the medical and living expenses incurred by the widow.

It is difficult to find any faults in the logic of the court in the instant case once we have accepted the proposition that the intention of the testator here can be gathered by comparing the language he used and the language used in a different will. It may be true that the language of the two wills is similar, but it is quite another thing to say that the intentions of the testators are the same. By using the similarity of language as the basis for its decision and ignoring its own advice "that no will requiring a determination by a court as to its construction is twin to another will requiring such determination by a court,"[32] the court has failed to take into consideration other factors that would seem to indicate a different intention. Besides the trust fund, the testator willed to his widow $65,119.32, and as the surviving joint tenant of a bank account, the widow also received $73,135.84. This left the widow with a total of $138,255.16 at her disposal. The wide difference between the amount received outright and the amount of the trust fund ($8,594.79) would indicate that the testator intended the trust fund to be a reserve for the widow and the large sum to be used for her support. It could be argued that if the trust were a reserve, it would

28. 280 N.Y. 155, 19 N.E.2d 1001 (1939). The relevant clause of the will there read: "In the event that the income . . . shall . . . be insufficient for her every comfort and support, I authorize my said trustee to pay . . . such portion of the principal . . . as it shall from time to time deem necessary." *Id.* at 158-59, 19 N.E.2d at 1002.

29. Instant case at 57, 258 N.Y.S.2d at 928.

30. *Ibid.*

31. 269 N.Y. 305, 199 N.E. 491 (1936).

32. Instant case at 53, 258 N.Y.S.2d at 924.

indicate that the testator intended that the widow be able to spend the outright gift in any manner she wished while relying on the reserve for her support. This latter argument is considerably weakened by observing the size of the trust fund. The trust, if used for the absolute support of the widow, could be so used for a very short number of years before being completely depleted. It is not reasonable to ascribe such an intention to the testator. Also, the rather obvious concern for the remainderman would indicate that the testator wished the principal to remain intact. But, as was pointed out, the court did find two other arguments to support its decision. The first being that the draftsman was aware of the different interpretations that would be given to the words creating the widow's and the daughter's trusts. If such an awareness can be assumed, it is difficult to understand why it was not made clear in the widow's trust. The second supporting argument is that "the same conclusion could well be reached following *Matter of Martin.*" The court can use this argument only by making a sharp distinction between the income from the private assets of the beneficiary and the assets themselves. *Matter of Martin,* upon which the instant court relies, is not as clear on this distinction. Obviously, if the trustees are restricted to looking only at "income" rather than total assets, the result in the instant case would be the same following either *Martin* or *Clark.* If total assets can be considered, however, the results would differ. The courts have not made this distinction between assets and income and it has been indicated that this distinction cannot be made.[33]

"A glance at the digests will show that this problem continues to plague the courts and probably will do so as long as variations in language occur."[34] The courts of New York have done little to alleviate it. The Court of Appeals has not taken a case dealing with precisely this problem since 1939,[35] and the lower courts have done little to clarify the situation. This has resulted in a situation where it is almost impossible to predict the outcome of any one case where an ambiguous clause is present. Factors that seem important in one case appear to have no relevancy in the next, even though there is no substantial difference in the language of the two wills.[36]

Part of the fault for the situation, of course, must be with the draftsman, *i.e.* the lawyers. Even with confusing and unpredictable decisions, the lawyers continue to employ imprecise language. The reason for the use of this vague language is difficult to find, but perhaps it is the settled convenience of using printed forms. A look at some of the Form Books in common usage will show the possible sources of some of the language employed in these wills.[37] Much of

33. See Matter of Martin, 269 N.Y. 305, 199 N.E. 491 (1936); Matter of Hogeboom, 219 App. Div. 131, 219 N.Y. Supp. 436 (3d Dep't 1927).

34. Instant case at 56, 258 N.Y.S.2d at 296.

35. The last case on point was Matter of Clark, 280 N.Y. 155, 19 N.E.2d 1001 (1939).

36. See generally, Holbach, *supra* note 4.

37. See Modern Legal Forms §§ 10040, 1023.1 (1965); 12 Am. Jur. Legal Forms 1171 (1955). A better form is 13 Marke, *Bender's Forms* § 2509 (1961).

the confusion existing in the court today could be eliminated if draftsmen would use more precise language in recording the intentions of the testator.

Other states also have had to face the same problem and have, in many instances, experienced similar difficulties. From the reported cases, it appears that some states find it less difficult to look at the circumstances surrounding the will and are more likely to find a trust conditioned upon need than are the New York courts.[38] A Connecticut case has declared that there is a ". . . *general rule* requiring that other resources of the beneficiary, both principal and income, must be substantially exhausted before any invasion of the corpus is authorized."[39]

The A.L.I. Restatement of the Law of Trusts, however, says that there is an *inference* that the "beneficiary is entitled to support out of the trust fund even though he has other resources."[40]

Where does this leave us? Perhaps a Minnesota judge best summed up the situation when he wrote, "nothing would be accomplished by attempting to discuss or reconcile the cases on this subject. About all that can be said is that authorities may be found to support any view."[41] Unfortunately, this situation exists in New York. The way the law on this subject stands today, it is impossible to predict with any degree of certainty the outcome of any one case. This situation results in great difficulty for the lawyer trying to handle this type of will, and for the trustee in trying to decide whether to invade the principal or not.[42] The parties to the will also are put in positions of great inconvenience. Some definite statement on this problem is needed and should be given.

It is submitted that there should be a presumption, or inference, of a gift conditioned upon need unless there is specific language to the contrary. First, the presumption would give some certainty in a very confusing field. Secondly, this seems the most equitable solution. If the principal is needed by the beneficiary, it can and should be invaded. If, however, the beneficiary has income and assets sufficient to provide for himself, there seems to be little reason for invading the corpus to the detriment of the remainderman unless the intention of the testator was clearly expressed. In any event this presumption can be rebutted by a clear showing of intent to the contrary on the part of the testator.

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38. See, *e.g.*, Dunklee v. Kettering, 123 Colo. 43, 225 P.2d 853 (1950); Stempel v. Middletown Trust Co., 127 Conn. 206, 15 A.2d 305 (1940); Lumbert v. Fischer, 245 Mass. 190, 139 N.E. 446 (1923); First Nat'l Bank v. Howard, 149 Tex. 130, 229 S.W.2d 781 (1950); Matter of Leonard, 115 Vt. 440, 63 A.2d 179 (1949).

39. Guarantee Trust Co. v. New York City Cancer Comm., 145 Conn. 542, 144 A.2d 535, 537 (1958) (Emphasis added.). Further, the A.L.R. has declared that, "By the *weight of authority*, unless the language of the trust instrument affirmatively reveals an intention to make a gift of the stated benefaction regardless of the beneficiary's other means, the trustee should consider such other means in exercising his discretion to disburse the principal for the purpose." Annot., 2 A.L.R.2d 1383, 1432 (1948). (Emphasis added.)

40. Restatement (Second), Trusts § 128 (1959).

41. *In re* Tuthill's Will, 247 Minn. 122, 126, 76 N.W.2d 499, 502 (1956).

42. For a brief account of the problems facing the trustee, see, McLucas, *Discretionary Trusts*, Trusts and Estates, March 1958.