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Decedent's Estate—Precatory Language

Richard G. Birmingham

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impairment results only from the nature of the property without any design or intent to curtail the beneficial interest, there would not seem to be the same compelling reasons for such an election.

*In re Shupack's Will*⁹ illustrates this situation and exemplifies two divergent interpretations of the scope of the elective right. The testator's property consisted primarily of six wholly-owned corporations which he placed in three separate and equal trusts, one for his widow and one each for his two children. The widow asserted a right of election against the testamentary provision made for her on the basis that the children's interests were necessarily antagonistic to her own and that their two-thirds control of the corporations could possibly result in a failure of income from her trust. This contention highlights the essential consideration as to the legislative intent; *i.e.*, was it to insure for the widow the substantial equivalent of her intestate share of the assets her husband held at death or was it to insure further that the trust would be substantially beneficial?

In denying the right of election, the Court indicated that the statute could not have been designed to guarantee any particular income. Rather, any possibility of income impairment resulted from the character of her husband's assets — a character which was unfortunate for the widow but one which did not form the basis for an expansion of Section 18's coverage. In contrast, the minority argued that it was this very possibility of impairment which the elective right was designed to remedy. Without a reasonable certainty of substantial benefit, the trust was illusory in fact and failed to meet the statutory test.

The principal case outlines one of the few real areas of contention which remains on the borderline. Depending on the breadth of the interpretation given it, Section 18 could embrace either the majority or the minority position. The widow may receive an entirely fair and ratable cross-section of her husband's assets in a trust which meets the literal statutory test but which suffers under the threat of impairment of income, resulting from the very nature of the assets. Only judicial balancing of current socio-economic factors can supply the key.

Precatory Language

Constructions of wills frequently have been required in New York because of the use of precatory or hortatory language, words which purport to express a desire or wish rather than a mandatory direction for the distribution of the estate. The applicable test to be applied is whether the testator meant simply to advise or influence a discretion vested in someone or to control and direct a certain dispo-

9. 1 N. Y. 2d 482, 136 N. E. 2d 513 (1956), *modifying* 1 A. D. 2d 841, 149 N. Y. S. 2d 20 (2d Dep't 1956).

sition.¹⁰ The intent however must be clear to prevent the ordinary meaning of the words from taking effect as words of entreaty or admonition, leaving obedience, exercise and performance to the sense of duty, gratitude and discretion of the one to whom they are addressed.¹¹

In ascertaining the testator's intent, a great variety of indicia have been applied to place the language in its proper frame of reference — and in the last analysis, each fact situation must stand on its own merits.¹² Primary consideration is given to the various provisions of the will itself¹³ but the issue is not necessarily concluded by these alone. If the dispositive words fail to reveal a precise indication of what the testator meant to express, all the rules of construction must be considered and matters dehors the will may control.¹⁴ As illustrative of indicia which courts have considered are the existence of a moral duty to support,¹⁵ a close family relationship¹⁶ and the use of the same language elsewhere in a mandatory sense.¹⁷

A striking example of construction may be found in the contrast between *In re Daly's Will*¹⁸ and *Spencer v. Childs*.¹⁹ The testatrix in the former case requested that a named beneficiary, if she should serve as executrix, should do so without compensation. In the latter case, the testatrix requested her two children, or the survivor of them, to pay a specific sum monthly to her sister-in-law for life. The decision in the first case held the language to be expressive of a wish, while in the second, it found the language to be mandatory.

The basic rule was applied in both cases, that the language will be taken as precatory unless there is a clear indication to the contrary.²⁰ *In re Daly's Will* provided no such indication. The executrix was entitled to a statutory commission and could be deprived of it only by directions more specific than mere precatory words. Also, since there were four executors serving, and only three full commissions are allowable by law,²¹ there was no reduction of the amount due to the beneficiaries.

10. *Matter Of Hayes' Will*, 263 N. Y. 219, 188 N. E. 716 (1934); *Phillips v. Phillips*, 112 N. Y. 197, 19 N. E. 411 (1889).

11. *Matter of Burch*, 152 Misc. 387, 274 N. Y. Supp. 123 (Surr. Ct. 1934), *aff'd.*, 243 App. Div. 663, 276 N. Y. Supp. 933 (3d Dep't 1935).

12. *Post v. Moore*, 181 N. Y. 15, 73 N. E. 482 (1905).

13. *Riker v. Lee*, 133 N. Y. 523, 30 N. E. 598 (1892).

14. *Collister v. Fassitt*, 163 N. Y. 281, 57 N. E. 490 (1900).

15. *Poor v. Bradbury*, 196 Mass. 207, 81 N. E. 882 (1907).

16. *Colton v. Colton*, 127 U. S. 300 (1888).

17. *Grieves v. Grieves*, 132 Md. 300, 103 Atl. 572 (1918).

18. 1 N. Y. 2d 100, 134 N. E. 2d 58 (1956).

19. 1 N. Y. 2d 103, 134 N. E. 2d 60 (1956).

20. *Matter of Krooss*, 302 N. Y. 424, 99 N. E. 2d 222 (1951); *In re Von Kleist's Will* 240 App. Div. 436, 270 N. Y. Supp. 435 (4th Dep't 1934); *In re Scott's Will*, 165 Misc. 480, 300 N. Y. Supp. 861 (Surr. Ct. 1937).

21. SURROGATE'S COURT ACT §285.

Spencer v. Childs involved a somewhat more complex consideration and possessed those indicia sufficient to support an intent to make payment mandatory. Testatrix' language was clear and precise; it was directed to her children; it immediately preceded the bequest of the residuary estate from which it was to be paid, and it prescribed a payment which was exact in amount and identical with that which testatrix herself had paid previously for sister-in-law's support during a thirteen-year period. All of these pointed not to an ineffectual wish but to an affirmative mandatory direction. Further, the children in fact paid the specified amount to the sister-in-law for two years after testatrix' decease, indicating that they too took the meaning to be mandatory.

These two cases provide a self-evident lesson for the draftsman. In each case, the use of precatory language led to extended litigation, involving time and heavy expense to the parties and to the estates. If precatory expressions must be employed, despite the undesirable consequences which may follow, there should be at least a clear indication whether such wish or desire is intended to be binding.

Attorney's Fees

*In re Bishop's Estate*²² involved a claim by legal counsel for services rendered to decedent. This claim was resisted by the personal representatives who denied that the appellant attorney had been retained by decedent. The services related to a certain piece of realty in which the decedent had an interest as tenant in common with three others. The four tenants had retained appellant to manage the realty, contracting for an annual fee plus an additional amount for exceptional transactions outside the scope of routine management. Appellant rendered such a service, completing some items during decedent's life, and one after his death.

The appellant must show that he was engaged by the decedent to perform the services sued for or that they were performed with his knowledge or consent or for his benefit.²³ While he need not show a written contract, he must establish his claim by a clear and convincing preponderance.²⁴ The minutes of the tenants' meetings in this case supported a finding that the appellant was retained as counsel by the decedent for the services performed. Appellant was to receive added compensation for exceptional services rendered, he handled problems relating to exceptional leases referred to him by the tenants; he carried on negotiations with their consent, and he reported monthly on the progress of negotiations. The benefit of

22. 1 N. Y. 2d 385, 135 N. E. 2d 578 (1956).

23. *Matter Of Humfreville*, 6 App. Div. 535, 39 N. Y. Supp. 550 (1st Dep't 1896); *McGrath v. Alger*, 43 App. Div. 496, 60 N. Y. Supp. 122 (2d Dep't 1899); *In re Woodin's Estate*, 31 Misc. 820, 64 N. Y. Supp. 1112 (City Ct. 1900).

24. *Caldwell v. Lucas*, 233 N. Y. 248, 135 N. E. 321 (1922); *In re Ennever's Estate*, 116 Misc. 32, 189 N. Y. Supp. 177 (Surr. Ct. 1921); *In re Otis' Estate*, 126 Misc. 741, 215 N. Y. Supp. 419 (Surr. Ct. 1926).