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Decedent's Estate—Attorneys' Fees

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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 preceeded 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).

these services were received by decedent; as to that item completed after his death, the Court found a valid basis in the fact context for an implied contract between appellant and the benefited representatives of the decedent.

Each case of this nature must be decided on its own merits and no single factor is necessarily determinative. Rather, the entire pattern must be evaluated to discover whether the weight of the evidence justifies a finding that the relationship of attorney-client existed.

Joint Savings Accounts

When a deposit in the specified form is made in a joint savings bank account, a conclusive presumption arises upon the decease of one of the parties thereto that the intention was to vest title in the survivor, absent a showing of fraud or undue influence.[25] As a matter of substantive law, mere compliance with the statutory requirements makes the evidence of intent irrefutable[26] and no burden of proof falls upon the survivor to substantiate it,[27] nor is any proof of actual intent material.[28] Despite this clear language, there remains an issue as to the actual volition of the person in signing the joint deposit form—*i.e.*, when the act of making the deposit itself was voluntary, there is a conclusive presumption of intent to vest the monies in the survivor but where the act of depositing originally was not knowingly, consciously and freely made, the entire transaction may be seen as a nullity and no presumption may follow. The effect of involuntary transfers therefore may be distinguished from the results which flow from a voluntary establishment of a joint account.[29]

This critical distinction formed the basis for the majority opinion in *In re Creekmore's Estate.*[30] The decedent while in her final illness had expressed a desire to execute powers-of-attorney to her daughter to enable the daughter to utilize four bank accounts for the payment of bills. This desire was communicated to her attorney who contacted the banks. One of the banks was willing to accept a power-of-attorney but two others recommended the creation of joint accounts. The attorney took the proferred forms to the decedent and, after a ten-minute private conference, the decedent executed all the forms. The daughter claimed the proceeds of the latter two accounts which represented three-fifths of the decedent's assets. A beneficiary of these accounts under decedent's will contested.

25. N. Y. BANKING LAW §239-3.
26. *In re Porianda's Estate,* 256 N. Y. 423, 176 N. E. 826 (1931); *Walsh v. Keenan,* 293 N. Y. 573, 59 N. E. 2d 409 (1944).
27. *In re Fenelon's Estate,* 262 N. Y. 308, 186 N. E. 794 (1933).
28. *Inda v. Inda,* 288 N. Y. 315, 43 N. E. 2d 59 (1942).
29. *In re Buchanan's Estate,* 184 App, Div. 237, 171 N. Y. Supp. 708 (3d Dep't 1918); *In re Fenelon's Estate,* 262 N. Y. 57, 186 N. E. 201 (1933).
30. 1 N. Y. 2d 284, 135 N. E. 2d 193 (1956).