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Precatory Trusts

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PRECATORY TRUSTS. The law as to the construction of precatory words is not reducible to a formula which can be made to fit any particular case. In fact, it is hard more than to indicate an inclination or leaning of the courts in deciding such situations.

With this preface in mind, we purpose to examine the early line of authorities, the modern trend at large, and the particular cases in Washington.

Early English courts raised trusts on mere precatory words.¹ The reason for this rule was perhaps because originally all trusts were at best only of precatory force, and so would most naturally be couched in words of entreaty and desire, then when trusts became enforced by law, since trusts had been more often created by precatory words, the courts treated all precatory words as imperative, deeming such to be the intent of the testator.² The English courts, quite reasonably in view of the history of trusts, presumed that the words were but courteous commands.³

As early as 1827, however, there were murmurings against the rule of those early decisions.⁴ The vice-chancellor then said, "The current of decisions has, of late years, been against converting the legatee into a trustee." Again in 1854,⁵ the court remarked against the rule, but yet six years later they reiterated the old holding.⁶ But in 1871 the English court definitely broke away from the old authorities.⁷ Subsequent decisions, following the new lead, so distinguished and hedged in the early cases as to make them no longer the law of England.⁸

A few American jurisdictions⁹ perhaps continue to follow the former English doctrine, but the modern cast of American authority is in accord with the now prevailing English view, which is,

¹ *Eales v. England*, Prec. Ch. 200, 24 Eng. Rep. 96 (1702) "Not doubting but she will give" as creating a trust: *Massey v. Sherman*, 1 Amb. 520, 27 Eng. Rep. 335 (1739) "Desire" *Harding v. Glyn*, 1 Atk. 469, 26 Eng. Rep. 299 (1739).

² *In Re Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718 (1853).

³ *Malim v. Keighley*, 2 Ves. 333, 30 Eng. Rep. 659 (1794) *Wright v. Atkyns*, 17 Ves. 255, 1 T. R. 143 (1810).

A devise to a wife "recommending to her and not doubting" that she would consider his near relatives was held not to create a trust: *Sale v. Moore*, 1 Sim. 534, 57 Eng. Rep. 678 (1827).

⁴ *Palmer v. Simmonds*, 2 Drew 221, 61 Eng. Rep. 704 (1854)

Testator's desire that if his children conducted themselves to his wife's approbation they be left property was held to create a trust: *Bonsor v. Kinnear* 2 Giff. 195, 66 Eng. Rep. 82 (1860).

⁵ Sir G. Mellish said, "I do not understand how a court of equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her and not this Court of Chancery to say what share she shall have and what share the children shall have" *Lambe v. Eames*, L. R. 6 Ch. 597, 25 Eng. Rul. Cas. 471 (1871).

In Re Williams Estate, 2 Ch. 12, 66 L. J. (Ch.) 296 (1897) *In Re Hutchinson and Tenant*, 8 Ch. D. 540, 39 L. T. (ns) 86 (1878).

⁶ 49 A. L. R. 19 cites as such jurisdictions Maryland, New Jersey and Washington. *Nunn v. O'Brien*, 83 Md. 198, 34 A. 244 (1896) cf. *Pratt v. Sheppard & E. P. Hosp.*, 88 Md. 10, 42 A. 51 (1898) Words of wish, desire and request operate to create a trust: *Deacon v. Cobson*, 83 N. J. Eq. 122, 89 A. 1029 (1914) but see *Van Duyne v. Van Duyne*, 14 N. J. Eq. 39 (1862) where the court said, "A command is certainly sufficiently imperative. So a hope or wish may be if addressed to an executor or trustee. But standing alone, and to a legatee . . . they are not imperative."

concisely, that to raise a trust from precatory words, the court must be satisfied that the intent to create a trust is as clear as though it had been created by the use of ordinary trust language. As was held in *Russell v. U S. Trust Co.*,¹⁰ the language to create a trust must be a command and not merely the testator's expression of hope or confidence, or as expressed in *In Re Marti's Estate*,¹¹ it must appear that the testator intended to impose an imperative obligation and used words which excluded the exercise of discretion or option in reference to the act in question. Prima facie a mere request or expression of hope or confidence does not import a command.¹²

However, the doctrine of the majority courts will perhaps permit the raising of a trust where the precatory words, in conjunction with relevant circumstances¹³ and with the context of the will¹⁴ show that the words were intended to be imperative. A distinction has also been made between precatory words addressed to an interested devisee and where addressed to a mere executor or disinterested trustee. In these situations, the courts are more willing to find that such expressions are mandatory, for such disinterested persons ought to be bound by the mere wish of a testator.¹⁵

Perhaps the Washington court has taken a somewhat more liberal view of the problem in favor of the beneficiaries than most jurisdictions, going far to uphold trusts created by precatory words. For instance, in *Hunt v. Hunt*¹⁶ the court said that a trust might be created by precatory words, if the words were not so modified by the context as to amount to a mere suggestion. A comparison of this *dictum* with the holding of the early English cases reveals that in each a presumption in favor of the trust is indulged in. In *Langan v. Miles*,¹⁷ although the court refused to create a trust where the testator had left property to one Miles "with full confidence that Miles would make proper adjustment," it indicated that such words alone "might" support an offer of oral proof to make the several shares certain." But these precatory words were further qualified, as suggested in *Hunt v. Hunt, supra*, by

¹⁰ 136 Fed. 758, 69 C. C. A. 410 (1905).

¹¹ 132 Cal. 666, 61 Pac. 964 (1900).

¹² See also *Howells State Bk. v. Pont*, 113 Neb. 181, 202 N. W. 457 (1925) and *In Re Barney*, 207 App. Div. 25, 201 N. Y. S. 647 (1923).

¹³ In *In Re Thistlethwaite et al.*, 104 N. Y. S. 264 138 N. Y. 264 (1907) the court looked into circumstances surrounding the making of a will to determine what was the intent of the testator in connection with words of "desire" used in a gift.

¹⁴ "precatory words should not only be of such character as to indicate that the testator indicated a trust to be created, but they must be consistent with other provisions of the will" *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465 (1895).

¹⁵ "A peculiar confidence is always presumed to exist between an executor and testator. The slightest wishes of the latter ought to be binding on the conscience of the former" *Erckson v. Willard*, 1 N. H. 217 (1818) see also *Van Duyne v. Van Duyne, supra*; *Central Trust Co. v. Egleston*, 47 Misc. 693, 98 N. Y. S. 1055 (1905).

¹⁶ The expression "I desire \$15,000.00 to be given to my foster son for any time convenient to my executrix" was held not to create a trust, for to have so held would have depleted the estate: 18 Wash. 14, 50 Pac. 578 (1897).

¹⁷ 102 Wash. 32, 172 Pac. 894 (1918) cf *In Re Mac Martin's Estate*, 131 Wash. 192, 229 Pac. 530 (1924).

language showing that the expression was not imperative. The fact, however, that the court quotes with approval the test of a precatory trust as set out in the early English case of *Wright v. Atkyns*, *supra*, is indicative of the inclination of that body

In Re Hochbrunn's case¹⁸ illustrates the result hinted at in *Hunt v. Hunt*, *supra*. There a devise was coupled with a "special request" to make a certain disposition. Nothing in circumstance or expression qualified the request and a trust was held to have been created.¹⁹

The latest pronouncement of the Washington court on this problem is in *Woodcock v. McCord*²⁰. The facts are here set out in some detail to aid in a thorough analysis of the decision.

By will testator Williams gave to the defendants the remainder of his property "for the following purposes and uses and upon the following trusts.

"I suggest said trustees sell and dispose of my stock of merchandise, mill and mill plant to a corporation to be organized by my employees." There followed quite specific plans as to the proposed organization, together with plans of the manner of purchase by the employees. The closing paragraph of this section of the will was phrased in this manner: "All provisions of this subdivision of my will in regard to the formation of such corporation and purchase of said business and in fact all provisions of this subdivision are not mandatory upon my trustees, but are merely a suggestion as a basis of working out a plan whereby the business can be handled advantageously."

Williams' wife and an adopted son were residuary legatees as well as recipients of specific bequests. Defendants were the executors and trustees under the will, whom the plaintiffs, three employee incorporators of the O. B. Williams Co., sue to require to convey the sawmill plant to the corporation.

The lower court held on a demurrer that the trustees had the discretion to sell or not as they wished. The Supreme Court held that the complaint was good as against a general demurrer and required the trustees to submit a plan for carrying out the testator's intent as interpreted by them. Four justices dissented.

It seems quite clear that the case must turn on the question of whether or not an enforceable trust was created in favor of the plaintiffs. And it is recognized law that to determine whether or not a trust has been created by a will the court must look first to the instrument creating it.²¹ However, when "necessary and appropriate," circumstances under which the will was made may be considered.²²

Looking then only to the language of the will in the *Woodcock* case, we find that the testator suggests a plan whereby the trustees

¹⁸ 138 Wash. 415, 244 Pac. 698, 49 A. L. R. 7 (1926).

¹⁹ Court will consider fact that testator knew trust language: *In Re King's Estate*, 144 Wash. 281, 257 Pac. 848 (1927).

²⁰ 160 Wash. 607, 295 Pac. 734 (1931).

²¹ *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428 (1892) "It has long been settled that in construing wills, the intention of the testator is to be collected from the words of the will itself read in the light of surrounding circumstances." 28 R. C. L. 214 Sec. 174, note 22. *In Re Marti's Estate*, *supra*.

might organize a corporation of employees and sell certain property to such corporation. Under the *dictum* thrown out in the *Hunt* case, *supra*, possibly the plaintiffs could stand on these words of suggestion, nothing more appearing. Their position is further strengthened when we look at the position of the defendants. The trustees were not interested devisees, but were only executors of the will invested with title for a particular purpose. Relying on the rule set out in *Erickson v. Willard*, *supra*, the plaintiffs could maintain that the mere wish of the testator should bind the executors. But neither of these grounds seem sufficient to uphold the trust when viewed in the light of the concluding sentence of this section of the will set out above. This sentence seems to negative any possible imperative character that might be imparted to the original words of suggestion, even though addressed to executors. Even in line with the *Hunt* case, such a qualification of precatory words ought to control.

The court hints, in the *Woodcock* decision, that what is decided is that some plan of sale to the employees' corporation is mandatory upon the trustees, and that the words granting discretion to them refer only to the particular details of the sale. But it will be noted that the only words sufficient to create a trust are those used in connection with the particular plan suggested to the trustees. And this plan is not mandatory, either by admission of the court, or under the most liberal holding as possibly indicated in prior Washington decisions. This leaves, then, only the introductory words of the subdivision in which the property was given to the trustees "for the following purposes and uses and upon the following trusts, to wit." upon which to raise a trust. This language is not sufficient to raise other than a constructive trust for the estate, for it lacks certainty as to beneficiaries or objects of the intended trust.²³

Thus since the particular plan is not mandatory, and since the only possibility of creating a trust rested in precatory words used as part of this optional plan, it must follow that no trust was created.

Perhaps the court was moved by what seemed a harsh case.²⁴ Perhaps, too, out of the bewildering conflict of authorities as to the effect of precatory words,²⁵ the court could find some authority to support its holding in part, although they cited none. But in view of the size of the gift to the employees compared with the gift to the wife,²⁶ and in view of the strict modern trend of the law set out

²³ *Morice v. Bishop of Durham*, 10 Ves. Jr. 522, 32 Eng. Rep. 947 (1805) *Burnes v. Burnes*, 70 C. C. A. 369, 137 Fed. 781 (1905) *Langan v. Miles*, *supra*. For a discussion of the *Morice* case see 5 Har. L. Rev. 389, 392; 65 Univ. Pa. L. Rev. 527, 538; 15 Har. L. Rev. 509; 37 Har. L. Rev. 653, 687.

²⁴ "The success of the business of O. B. Williams was largely due to the loyalty and cooperation of his employees." *Woodcock v. McCord*, *supra*.

²⁵ *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465, 49 A. L. R. 14 (1895).

²⁶ Employees sought to purchase a business worth \$361,041.22 for \$75,000.00, which purchase price is not enough to provide for all specific bequests of testator. Brief of Respondent Trustees, p. 28 in *Woodcock* case; "In determining the intention of the settlor the following circumstances are considered: (5) The financial situation of the parties; (7) Whether the result reached would be such as settlor would naturally desire" Restatement of Law of Trusts, p. 82, Sec. 37b, 5, 7.

above, or in light of the Washington cases it seems that the dissenting opinion represents the correct view.

There is a faint suggestion in the majority opinion that the basis of their decision is that the intent of the testator is ambiguous as to the creation of a trust, and that the court decided only that the complaint was good as against a general demurrer, without deciding finally whether or not a trust was created. But a more careful reading of the decision indicates that the only ambiguity troubling the court was as to the extent of the gift and the conditions governing the sale.²⁷ Further, considering the fact that the dissenting opinion discusses only the problem of precatory trusts, it would seem that this was the crucial question decided by the court.

The most recent opinion on the many questions raised in the *Williams Estate* controversy bears out the above analysis in so far as the result is concerned, for the Supreme Court on the last appeal held that no trust was created, on the ground that the beneficiaries were indefinite.²⁸ The case will not be discussed at length here, for it does not bear directly on the question of precatory words, but it is submitted that the court could have finally settled this troublesome cause when the question of precatory trusts was raised on the demurrer by holding that no mandatory duty was imposed upon the trustees.²⁹

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²⁷ "It was there decided that their complaint stated a cause of action to the legal effect that the provisions of the will created a precatory trust, but designated certain provisions which were ambiguous." Holcomb, J., dissenting in *In Re Williams Estate*, 67 Wash. Dec. 423, 439 (1932).

²⁸ On rehearing in the lower court, the point was raised as to the indefiniteness of beneficiaries, on which point, *inter alia*, the cause was again heard before the Supreme Court. The appellants (residuary legatees) pointed out that the proposed corporation was to be made up of employees or of employees who had been employed five years, and that this phraseology named two distinct classes of beneficiaries, resulting in indefiniteness.

The Court relied on the principle of *Morice v. Bishop of Durham*, *supra*, upholding the contention of the appellants. Three justices dissented. *Woodcock v. McCord*, 67 Wash. Dec. 423 (1932).

Granting that the result is correct, it is difficult to see how the Court could decide that the employees stated a cause of action on a declaration of trust, without then deciding that these beneficiaries (employees) were too indefinite. Although the first case arose on demurrer, finding that there was an enforceable precatory trust (rightly or wrongly) it seems that the Court should have searched the record before it for further defects. Since the definiteness or indefiniteness of beneficiaries appeared on the face of the record then before the Court, it would seem that the court inferentially then determined that there was no indefiniteness as to beneficiaries.