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Wills and Estates

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trolling stock interest in a corporation was transferred to three named children of the trustors as trustees. The trust instrument provided that the trustees were to hold the stock in one fund until the stock was sold in one block or the company was liquidated or merged, the income to be paid to the three named children or in the event of the decease of one of the children, to his or her named child or children. Upon liquidation the corpus was to be divided between the three named children and four named grandchildren. No time for duration of the trust was explicitly set by the trustors, nor did the instrument contain an express direction to sell. On appeal it was held that there was no violation of the rule against perpetuities. When the objects of a trust have been fully accomplished, no specific duration of the trust having been set, the trust then terminates and the corpus vests. The objects of this trust will have been accomplished upon the death of the last of the seven beneficiaries. This will be within the period of the rule against perpetuities; hence the trust is not invalid. The court cited Hamley, *The Rule against Perpetuities and Powers of Sale*, 7 Wash. L. Rev. 237 (1932).

WILLS AND ESTATES

Construction of Wills—Conditions Precedent—Impossibility of Performance. In In re *Bridge's Estate*,[1] the testator executed a will in 1945 with the following provision:

". . . I hereby will and bequeath unto the following named persons the amounts set opposite their respective names, provided, however, that if any of said named persons are now employed by me or the Mary Bridge Hospital and are not so employed at the time of my decease, then such named former employees are hereby willed and bequeathed nothing."

In 1946 the testator was forced to retire and liquidate his medical business because of ill health. The bequests to eight of the legatees were contested. Six of the recipients were employed by the testator at his clinic. One was employed at the hospital. They were personal friends and had been with him for many years. Another recipient had been engaged as his personal nurse prior to his retirement. All were employed by him or the hospital at the time of the execution of the will. All were in his employ at the time of his retirement except for the hospital employee. She had suffered from a heart attack, and at the direction of the testator she was placed in his hospital and given a pension. The personal nurse voluntarily left his employment after he retired but before his death in 1949. The employment relations of the others were severed because of the liquidation of the business, but they continued to render occasional services in their professional capacity. The court held that literal compliance with the condition of employ-

[1] 41 Wn.2d 916, 253 P.2d 394 (1953).

ment was to be dispensed with. The gifts to the employees in question with the exception of the personal nurse were to become absolute.

The fundamental rule in the construction of wills is that the intention of the testator is the controlling factor.[2] It becomes the duty of the court to ascertain if possible, from the terms of the will itself, the true intent of the testator.[3] But where there is an ambiguity in the terms, extrinsic evidence is admissible to ascertain the intent.[4] It is also a rule that while the will speaks as of the date of death, the intention of the testator is to be determined as of the time of the execution will.[5]

The contention was made that parol testimony cannot be admitted to show that the testator meant one thing when he said another. The court replied that such a rule was a sound one but had no application to the situation presented. "The question with which we are concerned is whether the enforced closing of the testator's business, which rendered impossible a fulfillment of the condition precedent by the employees, *was such an event* as was intended by him to have the effect of cutting off their bequests. *"No attempt is made to prove by extrinsic evidence that the testator intended something other than what he said;* on the contrary, *the justification for considering such evidence is that a state of facts has arisen which the testator did not anticipate and for which he consequently failed to provide."*[6]

The court conceded that impossibility will not excuse the performance of a condition in every instance. It declared that each case is to be examined in the light of its own particular facts in order to determine whether the concept of impossibility of performance is to be given controlling effect. It went on to apply the following rule:

> If personal property is bequeathed upon condition which, before time of performance, becomes impossible to be performed, the property vests in the legatee upon the death of the testator, unless it appears that the performance of the condition was the controlling motive for the making of the bequest.[7]

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[2] *In re* Lidston's Estate, 32 Wn.2d 408, 202 P.2d 259 (1949); *In re* Wilson's Estate, 111 Wash. 490, 191 Pac. 615 (1920).

[3] RCW 11.12.230; *In re* McNulta's Estate, 168 Wash. 397, 12 P.2d 389 (1932); Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677 (1895).

[4] Harrel v. Rutherford, 40 Wn.2d 171, 241 P.2d 1171 (1952); *In re* Toronodo's Estate, 38 Wn.2d 642, 228 P.2d 142 (1951); Shufeldt v. Shufeldt, 130 Wash. 253, 227 Pac. 6 (1924).

[5] Tacoma Sav. & Loan Ass'n. v. Nadham, 14 Wn.2d 576, 128 P.2d 982 (1942); *In re* Phillip's Estate, 193 Wash. 194, 74 P.2d 1015 (1938); Peiffer v. Old National Bank & Union Tr. Co. 166 Wash 1, 6 P.2d 386 (1931).

[6] Note 1 *supra*, at 925, 253 P.2d at 399.

[7] Morley v. Calhoun, 7 Ohio O.C. (New Series) 285, (1898). *See also* Sherman v. American Congregational Ass'n. 98 Fed. 495 (1899). Compare 4 REST., PROPERTY

According to the court, the close relationship between the testator and the legatees tended to show that the principal motive of the testator was to benefit his old friends and associates. The bequests were not rewards for staying in his employ until his death. There was no evidence that most of the beneficiaries even knew that they were mentioned in the will.[8] The failure of the testator to change his will even after the employees had been discharged was viewed as suggesting that he believed that the legatees would still be entitled to inherit under it.[9]

The rule applied by the court has been criticized on the ground that it is illogical and because it has no sound historical basis.[10] Although it has been quoted with approval by a number of courts, it has been applied in only a limited number of cases.[11] The rule serves to carry out the probable intent of the testator, and is justifiable as a narrow rule of construction.

Persons Entitled To Letters of Administration. In re *Leith's Estate,*[12] upheld the discretionary power of the probate court to appoint as an administrator a *nominee of a member* of a preferred class without waiting for the statutory forty day period to elapse though a *member* of the preferred class petitions for his own appointment within this period.

The intestate left surviving her a number of nieces and nephews. One of the nieces petitioned the court for the appointment of her daughter as general administratrix. Notice of the hearing which was set for June 30, 1953, twenty-five days after the death of the decedent, was given. Prior to the hearing another niece petitioned for her own appointment as administratrix. A hearing was had on both petitions,

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§ 438 (1944), where it is stated that: "Impossibility of performance of the terms of a condition precedent, special limitation, condition subsequent or executionary limitation, otherwise valid under the rules stated in §§ 434-437 excuses from such performance if, and only if, this result is the judicially ascertained intent of the person imposing the restraint."

[8] *See* Comment e of 4 REST., PROPERTY § 438.

[9] *See* Comment g of 4 REST., PROPERTY § 438 where it is stated that: "Prior to the effective date of the conveyance, the conveyor may have actual knowledge that performance of the terms of the restraint is impossible. When such knowledge is acquired after the execution of the instrument of conveyance but before its effective date, as in the case of knowledge acquired by a testator subsequent to the execution of the will and before his death, failure to revoke the instrument normally tends to an inference that the gift was to take effect despite the inevitable failure of its terms."

[10] See Pound, *Legacies on Impossible or Illegal Conditions Precedent,* 3 ILL. L. REV. 1 (1908).

[11] See Simes, *The Effect of Impossibility Upon Conditions in Wills,* 34 MICH. L. REV. 909 (1936).

[12] 42 Wn.2d 223, 254 P.2d 490 (1953).

and the court made an oral ruling appointing the daughter of the first niece who had petitioned. All the nieces and nephews with the exception of first petitioner joined in petitioning the court for the appointment of one of their number and asked the court to reconsider the oral ruling. From a denial of this motion and the order appointing the daughter, an appeal was brought. The supreme court upheld the order of the lower court on the authority of In re *St. Martin's Estate,*[13] and *State* ex rel. *Karney v. Superior Court.*[14]

RCW 11.28.120 provides that:

> Administration of the estate of the person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:
> (2) The next of kin[15] in the following order: . . (e) nephews or nieces.
> (4) If the persons so entitled fail for more than forty days after the death of the intestate to present a petition for letters of administration, or if it appears to the satisfaction of the court that there are no relatives or next of kin, as above specified eligible to appointment, or they waive their right, and there are no principal cerditor or creditors, or such creditor or creditors waive their right, then the court may appoint any suitable person to administer the estate.

The failure of a member of a preferred class to petition the court for letters of administration within the specified time constitutes a waiver of his right to be appointed, and confers upon the court the jurisdiction to appoint "any suitable and competent person."[16] Whether the court acquires jurisdiction upon an application made *before* the forty day period has not been expressly decided before, although some cases have indicated that it does.[17]

In *State* ex rel. *Karney* v. *Superior Court, supra,* the appointment of the nominee of two non-resident daughters was attacked by the son, who apparently filed his petition for appointment *after* the forty day period. It was contended that the forty day period had not expired when the appointment was made. The court declared that it "was under no obligation to wait forty days for others in the same class to

[13] 175 Wash. 285, 27 P.2d 326 (1933).
[14] 143 Wash. 358, 255 Pac. 376 (1927).
[15] The phrase "next of kin" does not include "persons, although relatives by blood, who have no interest in the estate, either under the statutes of descent or by the terms of the will of a decedent." *In re* Covington's Estate, 177 Wash. 668, 670, 33 P.2d 87, 88 (1934), State *ex rel.* Cowley v. Superior Court, 158 Wash. 546, 291 Pac. 376 (1927).
[16] McLean v. Roller, 33 Wash. 166, 73 Pac. 1123 (1903), *In re* Mason's Estate, 189 Wash. 641, 66 P.2d 310 (1937).
[17] *In re* Wilbur's Estate, 8 Wash. 35, 34 Pac. 407 (1894), *In re* Miller's Estate, 130 Wash. 199, 226 Pac. 493 (1924); See State *ex rel.* Karney v. Superior Court, note 14 *supra* at p. 362, 255 Pac. 377.

appear and make application,"[17a] and that "others of the preferred class who desired to present their rights to the court should have appeared and presented those rights in that proceeding."[17b] However, the holding would seem to be limited to the proposition that a member of the preferred class who does not petition within the forty day period cannot thereafter contest the appointment even though it is made within that period.

In the instant case, the members of the preferred class petitioned the court *before* the lapse of the forty day period but were denied a hearing because such action would "render uncertain and delay the appointment of any administrator. . . . [T]his consequence would be inconsistent with the purpose and result of the statutory notice of hearing." The court went on to say that the probate court was not required to reconsider its oral decision and that there was "no clear showing that this ruling was an abuse of discretion."

Similar statutes have been generally construed to confer upon the person first entitled to letters of administration an absolute right of which the court has no power to deprive him otherwise than as provided in the statutes.[18] But the Washington court has consistently held that under the statute, the preference right conferred is not absolute,[19] and that a suitable person other than the petitioner may be appointed when there is a substantial reason requiring it.[20] The reasoning of the court has been that the statute[21] which disqualifies certain persons from acting as executors or administrators does not specify that there shall be no other grounds than those enumerated;[22] and that there is a predominant right in those interested in having an estate administered and distributed in accordance with the law. If the statute were mandatory this predominant right would be defeated by the appointment of an unsuitable person of the preferred class.[23]

The statute does not, by its express terms, confer a right of nomination to any of the enumerated classes, except the surviving husband

[17a] Note 14 *supra*, at p. 362. 255 Pac. at p. 377.
[17b] *Ibid.*
[18] 2 BANC. PROB. PRAC. 2d § 241 (1950).
[19] *In re* Covington's Estate, note 15 *supra;* State *ex rel.* Cowley v. Superior Court, note 15 *supra; In re* Langill's Estate, 117 Wash. 268, 201 Pac. 28 (1921).
[20] *In re* Langill's Estate, note 19 *supra* (stranger preferred to a son who had misused funds of estate and whose general character was such as to render him unfit); *In re* St. Martin's Estate, note 13 *supra*, and *In re* Thomas' Estate, 167 Wash. 127, 8 P.2d 963 (1932) (court on its own motion appointed stranger when it appeared that there was dissension among the heirs).
[21] RCW 11.36.010.
[22] *In re* Langill's Estate, note 19 *supra.*
[23] *In re* Stott's Estate, 133 Wash. 100, 233 Pac. 280 (1925).

or wife.[24] Although there is dictum in one case to the effect that the person qualified must either accept the appointment himself or waive the right absolutely,[25] it has been held that a request by the petitioner that another person be appointed in his place constitutes a qualified waiver which does not forfeit the rights of the petitioner at least where a creditor has also petitioned.[26] Such a request is entitled to serious consideration, however, and the court should exercise its discretion in favor of such nominee,[27] but it is not controlling upon the court's ultimate decision.[28]

In the instant case, there were two or more persons in equal right, one of whom applied in his own name for appointment and the other requested the appointment of a nominee. The Washington court, in In re *St. Martin's Estate,*[29] and in In re *Thomas' Estate,*[30] upheld the appointment of a person *other* than the petitioner or the nominee upon motion of the probate court itself when it appeared that there was dissension among the heirs. Although in the instant case the second niece, who petitioned in her own right, did not introduce evidence at the hearing, there was no finding by the probate court that this applicant was unsuitable or that there appeared to be any dissension among the heirs.

Although the decision may be in accord with the general reluctance of the supreme court to disturb lower court rulings and with the policy of facilitating the administration of estates, it would seem to be so at the expense of the rights of those interested in securing a competent administrator.

Proof of Lost or Destroyed Will. RCW 11.20.070 provides that

[24] Part one refers to "the surviving husband or wife, or such person as he or she may request to have appointed." The surviving spouse, if competent, is entitled to letters of administration in preference to others but whether this right is absolute has not been decided by court. See *In re* Bredl's Estate, 117 Wash. 372, 374, 201 Pac. 296 (1921), which would seem to indicate that it is not. The provision conferring a right to nominate a competent person is probably an absolute one. See McLean v. Roller, note 16 *supra,* at 171, 73 Pac. at 1123.

[25] State *ex rel.* Cowley v. Superior Court, note 15 *supra,* at 550.

[26] Larson v. Stewart, 69 Wash. 223, 124 Pac. 382 (1912). In *In re* Erickson's Estate, 145 Wash. 99, 258 Pac. 857 (1927) it was held that the creditor does not have an absolute right to be appointed. Although a creditor is given a preference right by the statute, his right depends upon the total nonaction of the preceding classes, and the court may appoint a nominee of the member of the preceding class to the exclusion of the creditor, Larson v. Stewart, *supra,* unless such nominee is not a suitable person as in *In re* Utter's Estate, 112 Wash. 197, Pac. 836 (1920).

[27] Larson v. Stewart, note 26 *supra.*

[28] *In re* Mason's Estate, note 16 *supra; In re* Utter's Estate, note 15 *supra; In re* St Martin's Estate, note 13 *supra.*

[29] Note 13 *supra.*

[30] Note 20 *subra.*

"No will shall be allowed to be proved as a lost or destroyed will . . . unless its provisions shall be clearly and distinctly proved by at least two witnesses. . . ." In In re *Peters' Estate*,[31] a secretary had made a carbon copy of a will but had not witnessed its execution. The court held that she was competent to testify to the provisions of the will.

The general rule is that for a witness to be qualified he must speak from personal observation of the event or thing to be testified to.[32] A person who proposes to testify to the contents of a document either by copy or otherwise, must have read it.[33]

The contention that a competent witness to the provisions of a lost will must have witnessed its execution finds support in In re *Needham's Estate*.[34] The court there rejected the following offer of proof: that the witness would testify that the decedent showed him a paper and stated that it was his will; that the witness examined the paper and became familiar with its contents; that it purported upon its face to be a will of the deceased, duly executed by him; and that the witness was able to state its contents and provisions from the knowledge thus obtained. Apparently because of a misapprehension of the facts, the court declared that "the offered testimony of the witness Adams would not have amounted to the testimony of one witness such as the statute contemplates, for it was based entirely upon what he was told by the deceased. He knew nothing either of the execution or contents of the will save as told to him by the decedent."[35] In subsequent cases, however, the court has regarded the *Needham* case as standing for the proposition that the two witnesses required by the statute must each be able to testify to the provisions of the will from his or her own knowledge, and not from the declarations of another, even of the testator.[36]

In the *Peters'* case, the court declared that while the result in the *Needham* case was correct since the opinion indicates that the execution of the will was not adequately proven, it was not controlling. The execution of the will in the *Peters'* case had been proved in prior probate proceedings and was not challenged in this action. The two cases

[31] 143 Wash. Dec. 777, 264 P.2d 1109 (1953).
[32] 2 WIGMORE, EVIDENCE § 657 (3d ed. 1940).
[33] 4 WIGMORE, EVIDENCE § 1278 (3d ed. 1940).
[34] 70 Wash. 229, 126 Pac. 429 (1912).
[35] *Id.* at 232-3, 126 Pac. at 430.
[36] See *In re* Auritt's Estate, 175 Wash. 303, 27 P.2d 713 (1933); *In re* Calvin's Estate, 188 Wash. 283, 62 P.2d 461 (1936).

indicate that the execution of the will must be satisfactorily proved before the offer of proof of its provisions will be accepted.

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WORKMEN'S COMPENSATION

Destruction of Common Law Remedies—Wife's Loss of Consortium. Plaintiff's husband was injured through the negligence of his employer; he recovered compensation under the state Workmen's Compensation Act.[1] Plaintiff brought an action to recover damages for her loss of consortium. In *Ash v. S. S. Mullen, Inc.*[2] the Court rejected the claim, holding workmen's compensation was an exclusive remedy since the Act provides ". . . relief for workmen, injured in extrahazardous work, and their *families* and dependents . . . and to that end all civil actions . . . for . . . personal injuries . . . are . . . abolished, except as in this title provided."[3] The wife is included in the term "family" by previous Washington decisions.[4] A possibly more emphatic basis of the decision is the provision that compensation ". . . shall be in lieu of any and all rights of action whatsoever against any person whomsoever. . . ."[5] The Act does provide compensation for the wife as follows: She receives compensation in event of her husband's death, and in case of partial or total disability the injured workman receives greater benefits if he is married than if single.[6]

Since the case was of first impression the Court turned to many other jurisdictions to support its conclusions.[7] Plaintiff relied heavily upon *Hitaffer v. Argonne Co.*,[8] which permitted the wife to recover for loss of consortium even though the applicable federal statute provides that the employer's liability under the act is to be ". . . exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such

[1] RCW 51.
[2] 143 Wash. Dec. 319, 261 P.2d 118 (1953), noted 26 ROCKY MT. L. REV. 216 (1954).
[3] RCW 51.04.010 (Italics added).
[4] *E.g.*, Collins v. Northwest Casualty Co., 180 Wash. 347, 39 P.2d 986 (1935).
[5] RCW 51.32.010, a provision ignored in note, 26 ROCKY MT. L. REV. 216 (1954) which disapproves of the principle case.
[6] RCW 51.32.040 *et seq.*
[7] *E.g.*, Napier v. Martin, 194 Tenn. 105, 250 S.W.2d 35 (1952); Holder v. Elms Hotel Co., 338 Mo. 857, 92 S.W.2d. 620 (1936); likewise, the husband cannot sue for his loss of consortium, Swan v. F. W. Woolworth Co., 129 Misc. 500, 222 N. Y. Supp. 111 (1927); GuGse v. A. O. Smith Corp., 260 Wis. 403, 51 N.W.2d 24 (1952).
[8] 87 U.S. App. D.C. 57, 183 F.2d 811; *cert. den.* 340 U.S. 852 (1950); noted 36 CORN. L. Q. 148 (1950).