Kentucky Law Journal

Volume 45 | Issue 4 Article 12

1957

Wills--Life Estate With Implied Power to Encroach

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WILLS—LIFE ESTATE WITH IMPLIED POWER TO ENCROACH—Testator's will provided in part as follows:

> [I] hereby give and bequeath to my beloved wife, Susie Alice Dennis, all of my property, personal, real and mixed to be used by her during her natural life and at her death the remainder to be invested and the proceeds to go to the upkeep of the Choateville Cemetery. . . .

His widow, to whom he was married for many years, was his sole survivor, and his estate consisted of a house and lot, furniture and personal effects. Nine years after testator's death, his widow sought a declaration of rights, alleging dire need and claiming that the will gave her a life estate with the right to encroach upon and use such of the property as might be reasonably necessary for her comfort and support. The lower court held she received only a bare life estate with no power to invade the principal for any purpose. *Held:* Reversed. The will conferred a power to encroach, including the power to dispose of the real estate, where such encroachment was necessary to the life tenant's reasonable and comfortable support. *Dennis* v. *Trustees of Choateville Christian Church,* 290 S.W. 2d 601 (Ky. 1956).

As in most will cases, the decision here purports to turn on an interpretation of the phraseology used in the instrument. Since the primary objective was the usual one of giving effect to the intention of testator as gathered from the express language of the whole instrument,[1] considering certain circumstances attendant at its execution,[2] the finding of the court in the instant case is most difficult to reconcile with the relevant Kentucky decisions. Indeed, it would be unrealistic to attempt to evaluate the court's holding solely upon doctrinal grounds and without consideration of factors apart from the testamentary language which may have been influential.

In the final analysis, testator's language in the principal case presents this basic question for decision: Did he intend to give his wife a *bare* life estate with an ordinary remainder over in the whole estate or did he intend to give her a *consuming* life estate with a remnant remainder over in what might remain at her death? The first alternative is the normal interpretation where testator uses no words expressly conferring a right to use or dispose on the first taker. The second result is a permissible interpretation in Kentucky if the will

[1] Trustees Presbyterian Church of Somerset v. Mize, 181 Ky. 567, 205 S.W. 674, 2 A.L.R. 1237 (1918), states that the intention of testator must be ascertained from the entire will, either from its express words or the necessary inferences resulting from their use; Anderson v. Hall, 80 Ky. 91 (1882); Price v. Price, 298 Ky. 608, 183 S.W. 2d 652 (1944).

[2] 33 Am. Jur. 724 (1941).

as a whole contains language from which a limited power to consume can be reasonably inferred. The latter interpretation is followed most frequently in construing wills where the estate of the first taker is not expressly identified as a life estate. The classic testamentary language which results in the creation of a true remnant gift over is found in *Hanks* v. *McDanell*[3] where the instrument gave testator's property to his wife:

> [T]o be used, enjoyed and disposed of by her in any way she may choose with this provision however—that, should any of said property . . . remain at the death of my said wife, the same shall [go over] . . .[4]

An analysis of the remnant gift over as a future interest and an evaluation of comparatively recent Kentucky cases has been made elsewhere.[5]

In adopting the interpretation that testator intended to give his wife a consuming life estate with remnant remainder over, the court pointed out that if he had intended a mere life estate he would have devised the property for "her natural life," but he added the words: "to be used by her." The court said that "to use" means, in the dictionary sense, "to consume";[6] however, cases cited in the opinion as so interpreting the word when employed in wills do not appear, upon a closer examination, to support such a meaning.[7] Admitting

[3] 307 Ky. 243, 210 S.W. 2d 784, 17 A.L.R. 2d 1 (1948).

[4] Id. 210 S.W. 2d at 785. Here the language was broad enough to imply an unlimited power of disposal, but the court concluded that a life estate was devised coupled with the limited power to consume inter vivos. Such a holding follows, at least by implication, the unanimous refusal of courts to sustain a gift over if testator clearly intended to confer absolute ownership on the first taker in the form of a fee simple estate. Instead of completely ignoring the probable intention of testator, however, the courts award his widow "the next best thing" by interpreting the gift over as a remainder in the remnant of the estate, indicating that testator "meant" to create a life estate with the power to encroach.

[5] Matthews, Remnant Gifts Over in Kentucky, 44 Ky. L.J. 397 (1956). See also Norvell, The Power to Consume: Estate Plan or Estate Confusion, 28 Mich. State B.J. 5 (1949); 4 Simes & Smith, Law of Future Interests 67-70 (1956); Collings v. Collings' Ex'rs., 260 S.W. 2d 935 (Ky. 1953) (a good general summary of the Court's view of the remnant gift over). For the latest Kentucky case on the general subject, see McKee v. Hedges, 297 S.W. 2d 45 (Ky. 1957).

[6] The court quotes from Webster's New International Dictionary, Second Edition, where "use" is defined as: "To convert to one's service; to avail oneself of; to consume."

[7] The court cites Miller, Com'r of Finance v. Franklin County, 302 Ky. 652, 195 S.W. 2d 315 (1946), which construes the word "use," in a statute requiring seized gambling devices to be "forfeited to the use of the state," as meaning "absolute appropriation." But, as pointed out by appellees' brief, the Miller case is merely an interpretation of the intention of the legislature in regard to that particular statute. The court, however, quotes the Miller case as follows: "We have frequently . . . determined [the word "use" as meaning "the absolute investiture of title"]. . . . One of the late cases, so determining, is Hopkins v. Howard's Exr'x., 266 Ky. 685, 99 S W. 2d 810 (1936). In that opinion we quoted from the prior case of Rice v. Fields, 192 Ky. 161, 232 S.W. 385 (1921)."

that the word "use" in the proper context may have some remnant gift connotation, the usual definition of the word in the cases means something less than "consume," and much stronger language should be required to imply an intention to augment a bare life estate.[8] Moreover, it is difficult and unrealistic to determine the first taker's interest apart from the words used to create the future interest, since the nature of both interests is governed by the language of the entire will. Where, as here, a life estate clearly is created but the power of the life tenant to consume is inconclusively expressed, the nature of the remainder over probably is the controlling factor as to the existence of the power. The court said that if anything be needed to strengthen the conclusion that a consuming life estate was devised, it was the disposition of "the remainder," a "plain indication" that testator contemplated a diminution of the corpus during the immediate beneficiary's lifetime.[9] This conclusion is a non sequitur in the writer's opinion. The word "remainder" is the *customary* expression for creating a vested estate following the creation of a life or lesser estate.[10]

But these cases do not support such a comprehensive meaning. The will in the Hopkins' case read in part: "I will to my wife . . . all of my personal property of every kind for her use and control during her life . . ." and the court held that the widow merely took a life estate without the right to consume. The will in the Rice case devised real and personal property to the widow "to be held and controlled and used by her for any purpose that she might see fit, during her natural life time." The court held that a life estate only was created, that there was no express power to sell or give the property away unless by the use of the words "held," "controlled," and "used." It was agreed that these three words did not invest the widow with any power of disposition other than might incidentally appertain to a reasonable use, and that the only property subject to destruction would be that personal property subject to destruction by use. Cf. Martin v. Barnhill, 21 Ky. L. Rep. 1666, 56 S.W. 160 (1900).

[8] See, for example: Davison's Adm. v. Davison's Adm., 149 Ky. 571, 149 S.W. 982 (1912); Wright v. Singleton, 190 Ky. 657, 228 S.W. 38 (1920); Shirley v. Graham, 201 Ky. 339, 256 S.W. 718 (1923). 33 Am. Jur. at 727 states that there are usually additional words where the power is implied, and that "use" is a word of partial dominion and in several cases has been held not to grant any power of consumption. The writer submits, also, that it makes some difference whether the word is employed as a noun, i.e., "the use," or as a verb, i.e., "to use," since the former is clearly a "weaker" word.

[9] The court cites only Weller v. Dinwiddie, 198 Ky. 360, 248 S.W. 874 (1923), which defines "remainder" in the dictionary sense: "A portion of a thing remaining or left at the separation and removal of a part; remnant; residue," Webster's New International Dictionary, Second Edition. But see infra note 10. Although the court states that it is "evident" that testator's expressions should be given their "ordinary, everyday meaning," it should be noted that the will in the instant case was typewritten and properly attested to and witnessed, and appellees contended that the will was lawyer-drawn. See also, 33 Am. Jur. 725 (1941), which points out that the nature of the property is a factor in determining whether a power to dispose is intended, since the inference is stronger where the subject of the gift is not consumable.

[10] The Weller case, supra note 9, also states the common legal definition of "remainder": "[W]hat is left of the entire estate . . . after a preceding part has been disposed of, and whose regular termination the remainderman must await."

Virtually all of the cases clearly show that the usual language for indicating a remnant gift over includes such expressions as "if anything be left," "whatever may remain", "the remainder, if any", and equivalent phrases.[11]

The court could have properly disposed of the instant case by following its decision in *Taylor* v. *Taylor*.[12] There the widow was devised property "to have during her life . . . and at her death . . . the remainder" over. It was held, following *Weller* v. *Dinwiddie*,[13] that "remainder" was sometimes used in the sense of meaning what is not consumed, but that in such a case the entire will must manifest a purpose to give the life tenant the right to encroach. It was also pointed out that a previous case[14] had determined that the words "to have and use" clearly expressed no larger interest in the first taker than a bare life estate. If the widow had received the property to be used for life, the remainder, *if any*, over, it might be possible to justify the court's interpretation. Or if the first taker's interest had been clearly delineated as a consuming life estate, "the remainder" over would not reduce the estate intended.[15] But these additional words were not written by the testator. In the writer's opinion, therefore, the court implied the power to consume where there was a remainder over of the whole estate following a bare life interest. The incongruity of such a decision is evident when it is considered that previously the power to consume has only been implied where there was a remainder over of the remnant of the estate or where testator's words reasonably manifested a right to encroach upon the life estate.

Whether the power to consume is express or implied, the extent of such power presents a second interpretation question and the answer must be found in the language of the instrument. It was determined in the instant case that the implied power could be exercised only for the reasonable support and maintenance of the appellant. In specifying this limitation, the court followed *Presbyterian Church of Somerset* v. *Mize*.[16] In this leading case it was decided that where there is no express power of disposition, but such a power is necessarily implied

[11] Trustees Presbyterian Church of Somerset v. Mize, supra note 1; Clore v. Clore, 184 Ky. 83, 211 S.W. 208 (1919); Cottrell v. Cottrell, 305 Ky. 663, 205 S.W. 2d 312 (1947); Hanks v. McDanell, supra note 3; Jacob v. Barnard, 307 Ky. 321, 210 S.W. 2d 972 (1948); Swango v. Swango's Adm'r., 313 Ky. 495, 232 S.W. 2d 347 (1950). For a compilation of cases involving the remnant gift over, see 17 A.L.R. 2d 1 (1950).

[12] 266 Ky. 375, 99 S.W. 2d 201 (1936). See also Davison's Adm. v. Davison's Adm., supra note 8.

[13] Supra notes 9 and 10.

[14] Shirley v. Graham, supra note 8.

[15] See Weakley v. Weakley, 237 S.W. 2d 524 (Ky. 1951); Matthews, supra note 5 at 421-423.

[16] Supra note 1.

from the terms of the will, the life tenant cannot waste the estate nor give it away nor dispose of it except for his own necessary support. The rule has thus evolved that the implied power of disposal is not unlimited. The first taker may not dispose of the corpus by inter vivos gift or by will.[17] But where there is a bona fide need, the life tenant may dispose of the principal and destroy the interest of remaindermen.[18]

Up to this point the application of the accepted rules of interpretation has been discussed. But this is not the whole story. To fully understand and evaluate cases where the courts must construe the nature of the first taker's interest from ambiguous expressions of intent, there are factors apart from the testamentary language which should be considered. For instance, the identity of the parties to the action may be influential. Most of the cases involve a determination of the interests of the widow or her devisees or heirs and the remaindermen or heirs of the husband, and there is some evidence that the court is more objective in its construction where the interests of the spouse are directly involved. Where the widow is a party, the existence or extent of her need may be another important factor. If she is impecunious and infirm, her "appeal" is correspondingly increased, and if she seeks to consume the property, the court's interpretation of the instrument may vary depending on whether her motive is to secure necessary support and maintenance or merely a profitable bargain.

It is important to notice what the court does under given circumstances as well as what it says. In about two-thirds of the cases involving a construction of the widow's interest she was awarded a life estate with the power to encroach. In those cases where the widow's interest was construed as a mere life estate, only one true hardship resulted. In the others, the widow was not described as indigent but was attempting to dispose of the corpus as the fee owner or was simply asking for a construction of the instrument in order to clarify her rights thereunder.

In only a few cases, including the principal case, did the widow ask for an interpretation defining her interest as less than a fee simple. The remainderman, on the other hand, consistently alleged that the widow had acquired a bare life estate. In this situation, it might be

[17] The power to encroach necessarily implies the power to sell or mortgage the property. 2 A.L.R. at 1268 (1919).

[18] The question inevitably arises in such cases as to whether the court or the life beneficiary, herself, should be the judge of her need. Hisman v. Willett, 32 Ky. L. Rep. 906, 107 S.W. 334 (1908); Maynard v. Raines, 240 Ky. 614, 42 S.W. 2d 873 (1931). See also 2 Woerner, American Law of Administration 1144-1145 (1923).

said that the court is faced with a "doctrinal question": under the terms of the will, how much can be given the widow without completely destroying the attempted gift over? If the widow is given a fee, the remnant gift provision is invalidated. If it is decided that she has a life estate with a power to encroach upon the principal, however, the gift over is doctrinally preserved. From a practical, as well as a legal point of view, the power to encroach must be limited so that the remainder is not wholly consumed except to meet the devisee's dire need. Therefore, in a case where the widow needs to encroach upon the corpus for her support, she can be protected without destroying the remnant gift over if the language of the instrument permits the court to construe a life estate with the limited power to encroach.

The possible influence of these various factors is illustrated in *Cottrell* v. *Cottrell*,[19] a 1947 Kentucky case. Testator's will stated: "I give, bequeath and devise all my estate . . . to my wife. . . ." Upon her death a payment was to be made to certain devisees, and after this payment testator devised "Whatever the remainder . . ., if any, to my brother." As in the principal case, the widow was an invalid and desired a life estate with the power to encroach for her necessary support and to pay certain of testator's debts. The court, in giving the widow the benefit of the doubt, noted that it "would be a presumption against human nature to conclude other than that testator was doing his best to provide for the care and comfort of his wife." In such cases, the court answers the "doctrinal question" as to what aid can be given the widow without destroying the gift over by interpreting her interest as a life estate with the limited power to consume. In *Embry's Ex'x* v. *Embry's Devisees*,[20] the widow claimed an unrestricted life estate from the language: "do with [my property] as she may please during her life, and at her death if there is anything remaining . . ." it shall go over. The court interpreted the language as creating neither a fee nor a mere life estate, but a life estate with the power to encroach for support. The court thus assured the widow a measure of free use and management of the property during her life, but guarded the gift over from indiscriminate consumption.

Compare the testamentary language in the *Cottrell* case and in the principal case to the following:

> [I] . . . bequeath all [my property] . . . unto my beloved wife . . . to her and for her absolute use and benefits while she lives. . . .[21] [There was no remainder clause].

[19] Supra note 11.

[20] 31 Ky. L. Rep. 295, 102 S.W. 239 (1907). See Hickman v. Moore, 160 Ky. 474, 169 S.W. 827 (1914).

[21] Wright v. Singleton, supra note 8.

> I desire to bequeath to my wife . . . all of my property . . . to be held and controlled by her and used by her for any purpose that she may see fit, during her natural life time, after her death, I desire that whatever may remain of my estate. . . . [shall be distributed].[22]
>
> [I] give [all my property] . . . to my beloved wife . . . to be held, used and enjoyed by her during her natural life. . . . After [her] death . . . I give . . . all the remainder . . . to my children. . . .[23]

The court construed all these clauses as creating a life estate with no power to invade the principal for any reason. It may be significant that in none of the above cases was a needy widow suing for a power to consume the property for her reasonable and necessary support. In the first case the widow desired to dispose of the property as the fee owner thereof, not for maintenance but solely for profit and gain. In the second case the widow, claiming a fee title, had impetuously conveyed the property, and the suit was between the testator's heirs and the vendee of the widow. In the latter action, the widow was deceased, and her devisees and testator's remaindermen were the interested parties.

The court has vigorously denied any nondoctrinal approach to the solution of these cases. In *Shirley* v. *Graham*,[24] the court defended the basic principle that only the testator's intention as expressed in the instrument should control. In that case, as here, the widow was a confirmed invalid and the income from her estate was insufficient to provide for her adequate support. The court disavowed any authority to take care of the unforeseen by disregarding the testator's language upon the presumption of what he would have wanted. The testator undoubtedly intended to provide for his wife's needs, but he decided how he wanted it done—by a life estate. The prescribed means, said the court, should not be disregarded in order to accomplish an assumed or expressed purpose. Whether the court has always followed the principles enunciated in this case may be open to conjecture.

In the principal case the court was faced with the plea of an aged and infirm widow, sorely in need of a power to invade the corpus of the modest estate for her essential needs. Balanced against her interests were the contentions of the trustees of the Choateville Church that the corpus should remain intact so that the testator's intention to provide for the future upkeep of the Church cemetery could be realized. One suspects that the court was probably as keenly aware of the immediate plight of the widow as it was of the words contained within the four corners of the instrument. Certainly counsel for the appellant understood the possible influence of these extrinsic factors

[22] Rice v. Fields, supra note 7.
[23] Davison's Adm. v. Davison's Adm., supra note 8.
[24] Supra note 8.

when he carefully pointed out in his brief that if the construction placed upon the will by the lower court prevailed, the appellant would become a public charge, a result which the testator could never have intended. After reversal, appellees, in their petition for a rehearing, urged that, notwithstanding the need of the widow and the natural sympathy for her, the court should adhere to the guiding light of construction, the expressed intention of the testator.[25] The writer submits that in the principal case the status of the widow, her need for care and maintenance, may have overcome the apparent intention of the testator to create a mere life estate without the additional power to encroach.[26]

The value of the proper implication of the power to consume is unquestioned. In the first place, while the consuming life estate is not suited to a large, complex estate, it can be employed quite effectively where the estate is a modest one and the remainderman is closely associated with the first taker.[27] Secondly, as long as there are homemade wills the implied power may be the only way to accomodate the testator who, recognizing that a mere life estate may prove insufficient for his widow's comfortable support, attempts to give her almost a fee while controlling subsequent devolution.

In Kentucky, as in most states, every will lacking explicit directions must be litigated, and fine distinctions are often drawn as to the meaning of almost identical provisions. The draftsman learns from this case that he should not too generously phrase the first taker's interest if he only intends to draft an ordinary life estate. If the testator here had given his wife the property "during her natural life and at her death the remainder" over, there could be little doubt that a bare life estate was created. But the addition of the words "to be used" permit the court to imply the power to encroach, even though most authorities would probably consider the words as mere surplusage. In short, there is little, if anything, in the language of the instant will indicating the testator's intention that his widow should have the power to consume.

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[25] In their original brief, the appellees betrayed a knowledge of the "unpopularity" of their position when they cautioned the court not to assume that the upkeep of the small cemetery named as remainderman was not of relative importance to testator. It was pointed out that it was only for testator to know how much the maintenance of the cemetery meant to him.

[26] For a short note on this general subject, see 31 Can. Bar Rev. 1041 (1953). This article comments upon a "refreshing" wills case where the judge "went directly to the fundamentals of the problem without allowing himself to be sidetracked by a literal application of one or two rules of construction." It is noted that these rules are designed to ferret out testator's intent, but too often are applied literally to defeat his real intention. By "intent" here is meant not only testator's positively indicated intent, but that which he would have apparently formed had the problem been passed to him.

[27] See Matthews, supra note 5; Norvell, supra note 5.