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Wills and Administration--Abatement of Legacies–Intent of Testator

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statute is intended to take the place of that required at common law.[13]

From this discussion it is submitted that our court, in speaking of the West Virginia statute as being mandatory in respect to the changes made in the common law notice for terminating a year to year tenancy, is consistent with the dicta of prior West Virginia cases and in accord with the courts in other jurisdictions which have passed on the point.

B. D. T.

WILLS AND ADMINISTRATION — ABATEMENT OF LEGACIES — INTENT OF TESTATOR. — By the sixth paragraph of her will, executed in 1928, *T* bequeathed the sum of $10,000 to *A*, as part of a carefully worked out testamentary scheme disposing of an estate appraised at approximately $250,000. In the seventh, eighth and ninth paragraphs[1] immediately following, she made gifts of realty and specific personalty to other beneficiaries — the last of these provisions being the bequest of the contents of a safety-deposit box. The tenth paragraph of the will specifically provided that all such devises and legacies should be "free of all inheritance, estate and other death taxes". Ten years later, *T* executed an instrument in due form, purporting to "make, publish and redeclare" a codicil to this will, and by the terms of the later instrument bequeathed the sum of $5,000 to *B*. Apart from necessary modification as to the executorship, this later publication made no other alteration in the elaborate testamentary dispositions of 1928. On the death of *T* in June, 1938, the appraisal of her estate indicated that its assets were inadequate to satisfy the sums of money bequeathed to *A* and *B*, the specific gifts contained in the seventh, eighth and ninth paragraphs, and the expenses of administration, including estate and inheritance taxes. *Held*, that to satisfy administration expenses, including taxes, there must be an abatement of all testamentary benefits, and that in such abatement, the sums of money given to *A* and *B*, as constituting general legacies must first abate in favor of the gifts under the seventh, eighth and ninth para-

[13] Leavitt v. Leavitt, 47 N. H. 329 (1867); Larkin v. Avery, 23 Conn. 304 (1854); Nelson v. Ware, 57 Kan. 670, 47 Pac. 540 (1897); Howard v. Merriam, 5 Cush. 563 (Mass. 1850).

[1] Paragraph seven devised the family home, and bequeathed household furniture, clothing, jewelry, *etc.* Paragraph eight created a trust in various types of securities, and the ninth paragraph bequeathed "all of the securities which at the time of my death shall be located in my safety deposit box. . . ."

graphs of the will. *Heller v. National Bank of West Virginia at Wheeling.*[2]

Two important principles of testamentary conclusion were before the court in the instant litigation. In the first place, the intent of the testator must always be the dominating consideration — to which all rules of presumed intent will perforce yield — if there be any evidence whatsoever as to the meaning of the will taken as a whole.[3] Particularly is this true where, as here, there was a carefully worked out method for distribution of the testatrix' estate, precise in detail.[4] The second principle of construction is that general legacies must abate prior to specific gifts, in the absence of testamentary intent to the contrary.[5] It must be noted, however, that the latter principle is not a rule of property defeating intent, such as the rule against perpetuities or the rule in

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[2] 33 F. Supp. 250 (N. D. W. Va. 1940).

[3] ". . . the cardinal rule controlling the interpretation of wills . . ." is "the intention of the testator. . . ." Pack v. Shanklin, 43 W. Va. 304, 313, 27 S. E. 389 (1897); Cresap v. Cresap, 34 W. Va. 310, 12 S. E. 527 (1890); Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23 (1887). Intent is "the guiding star". Marcy v. Graham, 142 Va. 285, 299, 128 S. E. 550 (1925).

"It is only where the will affords no satisfactory clue to the real intention of the testator, say the decisions, that courts may from necessity, resort to legal presumptions and rules of construction, and then such rules must yield to the apparent intention of the testator, expressed in his will. . . ." Neal v. Hamilton Co., 70 W. Va. 250, 256, 73 S. E. 971 (1912).

[4] Paragraph one covered the usual clause for payment of debts, funeral expenses, and costs of administration. Item two gave three general bequests to as many charities, items three and four making general bequests to certain other designated charities. Paragraph five provided for four general legacies if the legatees survived the testator. Plaintiff in the case was given one of two general bequests set forth in paragraph six. Items seven, eight and nine bequeathed and devised certain designated articles and securities, mentioned in note 1, *supra*. All such foregoing dispositions were made free of death taxes by paragraph ten; a minutely drafted residuary clause was set forth in eleven; and executors were named in the twelfth paragraph. The codicil redeclared the original will, gave another general legacy, added another executor to succeed one who had died, and provided for contingencies, including any other executor's later proving unavailable.

[5] The legal presumption is that the testator intended that general legacies should be paid out of his personal estate only, and if that is not sufficient, the legacies fail. Read v. Cather's Adm'r, 18 W. Va. 263 (1881). General legacies abate ratably among themselves for the payment of debts before either specific or demonstrative legacies. Myers v. Myers, 88 Va. 131, 13 S. E. 346 (1891); 1 HARRISON, WILLS & ADMINISTRATION (1927) § 296 (2).

Rarely does the testator contemplate an insufficiency of assets, and generally fails to provide for such a contingency in his will. Thus certain general standards have been developed providing an order of abatement, on the theory that they thereby give effect to the probable intent of the average testator. 2 PAGE, WILLS (2d ed. 1928) § 1311. By singling out a specific bequest, the testator presumably intends that the legatee shall take prior to those general legatees whose bequests are not specifically designated. 2 WOERNER, ADMINISTRATION (1889) § 452.

Shelley's Case. Thus it has often been held that the ordinary practice of abatement of general legacies may be disregarded in order to give effect to the prevailing intent of the testamentary dispositions.[7] Where a testator gave $2,000 to *A*, $5,000 to *B*, and a house to be sold and the proceeds held in trust for *C*, upon an insufficiency of assets appearing, the two general legacies were paid out of the proceeds of the sale of the house. The court did not believe it was the testator's intent to effect a will that first gave two pecuniary legacies, then "practically wipes out these two gifts, distributing all the available property to another set of persons."[8] In *Matter of Crouse,* the testator gave a stated sum to his wife, reserving from the residue specific articles to the use of a son. The court held that the general legacy to the wife came first, stating "otherwise we would say that either the testator or the law mocked the widow with a mere polite phrase, not having or intended to have any efficacy."[10] It has been stated that the mere fact that the testator made such general legacies indicated that he meant them to be paid, and if no other personalty than that given by specific bequests is available, then such personalty must first satisfy the general bequests.[11] There are other instances of the courts' disposition to go contrary to the general order of abatement in order to effectuate further the testator's intent,[12] and

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[6] "In any given case, however, the intention of the testator can overcome and supersede these rules of thumb." *In re* Hochster's Will, 166 Misc. 621, 2 N. Y. S. (2d) 962, 964 (1938).

"A rule of construction always contains the saving clause, 'unless a contrary intention appear by the will': . . . . On the other hand, a rule of law which is not a rule of construction . . . acts independently of intention, and applies to dispositions of property in whatever form of words expressed." HAWKINS, CONSTRUCTION OF WILLS (2d ed. 1885) vii. Hawkins reiterates that the rules of construction applied to wills are not rules of law.

It is often the tendency for a rule of construction when followed frequently, acquiring more and more authority, to be regarded and applied like a rule of law. See 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 395 *et seq.*

[7] Where there was no other personalty to sustain a general legacy other than that given in a specific bequest, in holding that the latter must yield, the court stated "that the general legacy is to be raised out of the personal estate, although specifically bequeathed. For, it is not to be supposed that the testator meant to mock the legatee." Biddle v. Carraway, 59 N. C. 95, 102 (1860). Presuming that a will is drawn honestly and in good faith, when the testator provided a legacy he must have intended that it should be paid in full. *In re* Smallman's Will, 138 Misc. 889, 247 N. Y. Supp. 593 (1931).

[8] Torchiana's Estate, 292 Pa. 470, 474, 475, 141 Atl. 294 (1928).

[9] 244 N. Y. 400, 155 N. E. 685 (1927), reversing the lower court's contrary holding, 215 App. Div. 736, 212 N. Y. Supp. 794.

[10] Matter of Crouse, 244 N. Y. 400, 405, 155 N. E. 685 (1927).

[11] Biddle v. Carraway, 59 N. C. 95 (1860).

[12] In such instances, the facts and surrounding circumstances, as well as the precise provisions of the will, are important, since a decision may turn on

the instant case must accordingly be viewed in the light of these departures. In substance, the court has held that the direction in the tenth paragraph of the will exonerating all testamentary gifts from inheritance taxes, as well as the republication of the will by codicil less than five months before the testatrix' death, did not suffice to take its facts out of the general policy as to abatement. In reaching that conclusion, the court's opinion did not advert to the apparent intent of the testatrix, through her lengthy testamentary dispositions, to effect an equitable distribution of her property, nor to the fact that the ninth paragraph generally disposed of securities which at her death might be found in her safety-deposit box.[13] It would thus seem that the present decision accords with the policy of a more narrow interpretation of intent, following the orthodox view which would require a substantial and explicit clue as to the testator's intent, where abatement in one fashion or another has become necessary.

J. S. M.

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whether or not there is a substantial clue as to the testator's intent. In the case of *In re* Day's Estate, 150 Misc. 691, 271 N. Y. Supp. 170 (1934), specific gifts were mentioned in a residuary disposition, but the court construed them as general legacies in order to give full effect to a general bequest to testatrix' aged husband, who was then given preference to the assets. In one decision, a trust fund to *A* for life was abated to sustain general legacies to other beneficiaries, where insufficiency of assets would otherwise lead to the abatement of testator's general legacies and "the partial destruction of his main testamentary scheme." Matter of Title G. & T. Co., 195 N. Y. 339, 345, 88 N. E. 375 (1909). See SCHOULER, WILLS (3d ed. 1901) § 466. *Cf. In re* Ward's Estate, 165 Misc. 165, 300 N. Y. Supp. 826 (1937) (considering the remainder of a specific trust estate as general in nature, so as to apply it to other general legacies); Shethar agt. Sherman, 65 How. Pr. 9, 14 (N. Y. 1883) (Holding a specific bequest of certain railroad stock as a general gift so as to abate *pro rata* with other general legacies). And see *In re* Stumpp's Estate, 153 Misc. 92, 274 N. Y. Supp. 466 (1934); Matter of Neil, 238 N. Y. 138, 144 N. E. 481 (1934); and *In re* Smallman's Will, 138 Misc. 889, 247 N. Y. Supp. 593 (1931) preferring a certain pecuniary legatee over other general legatees contrary to the usual principle which states that general legacies shall abate *pro rata*. Myers v. Myers, 88 Va. 131, 13 S. E. 346 (1891).

[13] The contents of the box were more than sufficient to pay all the debts, death taxes, costs of administration, and the bequests to the general legatees.