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Precatory Trusts

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the life beneficiary of a non-spendthrift trust may reach his interest by garnishment.[34]

In Texas the Supreme Court held in *G.H. and S.A.R.R. Co. v. McDonald*[35] that a proceeding by garnishment in behalf of a judgment creditor is ordinarily intended to reach such rights, credits, and effects only as are of a legal nature. As to interests in property held in trust, the court said that a proceeding in equity is the appropriate remedy.[36]

Generally, the remedy of garnishment is regarded as summary and harsh, and the proceedings cannot be sustained unless in strict conformity with statutory requirements.[37] So long as Texas courts are limited by the decision in the *McDonald* case, it is apparent that only legal interests can be reached and that the *cestui's* equitable interest must be sought in some other type of proceeding.[38] The appropriate proceedings in Texas appear to be levy of execution or a creditor's bill seeking equitable execution.

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PRECATORY TRUSTS

THERE are many cases where testators acting ill-advisedly have used language whereby the courts have found difficulty in determining whether or not the testators intended to charge their devisees or legatees with a trust. Very commonly the difficulty is caused by the use of precatory words. Precatory words are words of desire or wish as distinguished from words of command, and the purpose of this comment is to show how the early and modern courts have treated this type of language in determining

[34] Henderson v. Sunseri, 234 Ala. 289, 174 So. 767 (1937).

[35] G. H. and S. A. R. R. Co. v. McDonald, 53 Tex. 510 (1880).

[36] Clayton, *Creditors Bills in Texas*, 5 TEX. L. REV. 263, 271 (1927).

[37] Beggs v. Fite, 130 Tex. 46, 106 S. W. (2d) 1039 (1937).

[38] Oglesby v. Durr, 173 S. W. 275 (Tex. Civ. App., 1915) *writ of error refused.*

whether or not a devisee took subject to equitable burdens. If a court finds that a trust was created by such language, there has arisen a precatory trust.[1]

By the early view courts dealt with the problem by finding that a trust was created despite the precatory language used. Such view was so prevalent that the English courts laid down a rule of law that if a testator expressed a "desire" or "wish" that the devisee should make certain disposition of the property, then such was to be treated as a trust, in the absence of any peculiar circumsances. In these cases precatory words were treated as creating trusts when the courts did not know and where it was very doubtful that the testator intended to impose upon the devisee such equitable restrictions.[2] One of the limitations on the doctrine was that the objects of the testator's bounty be sufficiently definite for judicial enforcement. If the objects were uncertain, courts stated that a trust could arise despite the precatory language used but that the indefiniteness of the objects overcame the inference that a trust was to be created.[3] Also, under this early view, the courts would hold that no trust was created when the testator expressed a desire that his devisee would dispose of all of his property for the benefit of others, and not merely the property devised to him by the testator. The reason that the courts said that no trust was created was that the testator could not impose a trust on any property except that which he himself devised; therefore, it was to be inferred that he did not intend to impose a trust upon any of the property.[4]

The modern English and American view seems to be that a trust can be created by precatory words only when the testator desires that the devisee make a particular disposition of the prop-

[1] 1 SCOTT ON TRUSTS § 25 (1939).

[2] Harding v. Glyn, 1 Atk. 469 (1739); Malim v. Keighley, 2 Ves. Jr. 333 (1794); 1 SCOTT ON TRUSTS § 25.1 (1939).

[3] Harland v. Trigg, 1 Bro. C. C. 142 (1782); Stead v. Mellor, 5 Ch. D. 225 (1877).

[4] Palmer v. Schribb, 2 Eq Cas. Abr. 291, pl. 9 (1713); Parnall v. Parnall, 9 Ch. D. 96 (1878); Trustees of Hillsdale College v. Wood, 145 Mich. 257, 108 N. W. 675 (1906); Springs v. Springs, 182 N. C. 484, 109 S. E. 839 (1921); Hopkins v. Glunt 111 Pa 287, 2 Atl. 183 (1885); 1 SCOTT ON TRUSTS § 25.1 (1939).

erty and an obligation is intended to be imposed upon him to make the "desired" disposition. Under this view the courts find it much more difficult to ascertain whether a trust was created than under the early view because the courts must determine the testator's true intention, and to do this much attention must be given to the entire will or instrument of the particular case.[5]

Texas adopts the modern view which is expressed in the *Restatement of Trusts*. "No trust is created unless the settlor manifests an intention to impose enforceable duties."[6] In Texas this intention must be more mandatory than the mere desire or wish of the settlor. The intention of the settlor must be to impose an enforceable obligation on the devisee or legatee.[7] In other words, the devisee will get full title to the property devised if the objects of the testator's "desire" or "wish" are uncertain, or where the property subject to the precatory language is not sufficiently defined; or where the devisee has a clear discretion to act as he thinks fit; or where the language of the devise vests the donee with an absolute and unqualified ownership with only a suggestion that the donor intended some limitation on the ownership.[8]

As shown above, Texas does follow the *Restatement of Trusts*, but the cases are not consistent as to when enforceable duties are imposed. In *Speairs v. Ligon*[9] a testator devised land to his wife "requesting" that she dispose of the property at her death so as to make the younger son an equal legatee with the other children. The court held that the wife took absolute title to the land because an absolute power of disposal was given to her. The testator did not show a clear intention that his suggestion should be legally en-

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[5] SCOTT, *op. cit. supra* note 1 at § 25.2, 155.

[6] RESTATEMENT, TRUSTS § 25 (1935).

[7] McMurray v. Stanley, 69 Tex. 227, 6 S. W. 412; Notes, 49 A.L.R. 10 (1927); 70 A.L.R. 326 (1931).

[8] Johnson v. Bingham, 251 S. W. 529 (Tex. Civ. App. 1923), *aff'd* (Tex. Comm. App. 1924) 265 S. W. 130, *Opinion adopted Tex. Sup. Ct.*, 269 S. W. 1033; Autrey v. Stubenrauch, 63 Tex. Civ. App. 247, 133 S. W. 531 (Tex. Civ. App. 1911) *writ of error refused*; See 42 TEX. JUR., *Trusts* § 18 (1932).

[9] 59 Tex. 233 (1883).

forceable. The same result was reached in another case where the testator devised the residue of his property to his wife "for her to divide the amount due to each of the heirs as she in her judgment thought they were entitled to."[10] In *Johnson v. Bingham*[11] the court held that no trust was created because the language was too indefinite and unsatisfactory to create a trust and should therefore be treated as merely suggestive. Despite these cases, Texas courts have found a trust created by precatory language on the face when it is expressed in a mandatory sense. In *Norton v. Smith*[12] a trust was held to be created by the language, "It is my will that at her death she will to our respective families whatever she may have making an equal division thereof." The court said that looking at the will in its entirety, the testator intended the words to be used in a mandatory sense. Other trusts have been found to be created by precatory language such as "I desire"[13] and "it is my earnest wish and desire."[14]

There are no rigid rules to follow in the interpretation of any will except to look at the entire will with a purpose to effectuate the true intention of its maker, and also consider the various facts and circumstances surrounding the particular testator. It is a commonplace that the same precatory words may convey different meanings and interpretations in different contexts. And, of course, different words may have distinctly different meanings. For example, the word "will" is a stronger word than "desire" or "wish," because it evidences the decision of mind that something is to be done or foreborne and implies an intention on part of the testator that the devisee should do particular things with the property. But the word "desire" may be used interchangeably with the word

[10] Weller v. Weller, 54 S. W. 652 (Tex. Civ. App. 1899).

[11] 251 S. W. 529 (Tex. Civ. App. 1923), aff'd. 265 S. W. 130 (Tex. Comm. App. 1924), *Opinion adopted Tex. Sup. Ct., modified* 265 S. W. 884 (Tex. Comm. App. 1924), *Opinion adopted Tex. Sup. Ct., rev'd. in part* 269 S. W. 1033 (Tex. Comm. App. 1925).

[12] 227 S. W. 542 (Tex. Civ. App. 1921) *writ of error refused.*

[13] Arrington v. McDaniel, 14 S. W. (2d) 1009, (Tex. Comm. App. 1929), Drinkard v. Hughes, 32 S. W. (2d) 935 (Tex. Civ. App. 1930).

[14] Alexander v. Thompson, 38 Tex. 533, (1873).

"will," as a more courteous expression of the testator's intention; therefore, whether these words are merely suggestive (precatory) or mandatory must be determined from the particular instrument.[15]

As pointed out at the beginning of this comment, testators who have used precatory language in their wills have acted ill-advisedly, because their true intention very probably cannot be ascertained and carried out. To prevent such controversies from arising, the testator, if he intended to create a trust, should use expressly the words "trust" and "trustee" along with mandatory instructions for his devisee to follow.

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[15] See 44 TEX. JUR., *Wills* § 161 (1932).