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THE HIRSHORN CASE—AN EXTENSION OF THE POWER OF EXECUTORS?

CARL V. LINDORFF*

A decision by the Colorado Supreme Court rendered July 11, 1949 presents an interesting problem in the drafting of wills and their interpretation.[1]

The will of Hyman Hirshorn provided in part that his one-half interest in the Algerian Club should go to ". . . *all employees who have been determined by my executor to be bona fide employees of the Algerian Club for more than one year prior to my death.*" One, Georgetta Hendrickson, had been employed more or less continuously for a period exceeding one year prior to the death of the testator. Evidence was conflicting as to the nature and causes of the interruptions in her employment. None of the employees had been employed continuously for one prior to the testator's death, due to a fire which necessitated closing the club for a period. Georgetta Hendrickson was excluded by the executor from participation in the will.

The Denver County Court made findings to the effect that the petitioner, Hendrickson, was entitled to participate in the will. The District Court of the City and County of Denver affirmed this judgment, saying in part:

> In my judgment the petitioner, Georgetta Hendrickson, was a bona fide employee of the Club Algerian. The evidence establishes, I think, that she had worked there regularly for a period of not less than one year prior to the death of Hyman Hirshorn.

The Supreme Court of Colorado in a 4-3 decision reversed the district court, holding that the will conferred upon the executor a discretionary power which should not be disturbed in the absence of abuse of discretion. Speaking through Mr. Justice Stone the court said: "Under such testamentary provision it is the judgment of the executor and not the judgment of the court which must prevail." In the minority opinion of Mr. Justice Holland, in which Mr. Chief Justice Hilliard concurred,[2] reference is made to this provision of the will, and it is said:

> This lays bare an unequivocal *direction* and not *discretion* . . . . This wording in the will before us contemplates that *each and every one* who had regular employment for at least a year before the death of the testator would share in his beneficence. Whenever any employee could establish such employment, his right to share could not be denied, whether erroneously, arbitrarily, or capriciously.

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* Written while a student at the University of Denver College of Law.

[1] Hendrickson v. Borga, ... Colo. ....., 209 P. 2d 543 (1949), Colorado Bar Association Advance Sheet for July 14, 1949 at page 21.

[2] Mr. Justice Hays dissented upon other grounds.

OTHER CASES RECOGNIZING EXECUTOR'S DISCRETIONARY POWER

The cases are numerous in which it has been held that where the will confers discretionary powers upon the executor, the exercise of such powers conferred will not be the subject of judicial review unless there has been an abuse of discretion. The case of *In re Barbey's Will*[3] is of striking factual similarity. After bequeathing the residue of the assets remaining after liquidation of a certain corporation to the testator's employees, the will provided:

> The proportional interest of each such employee shall be determined by multiplying the years of his or her service by total salary, not including bonuses, received by him or her during the twenty-four months preceding my death. I authorize my executors to determine in *their absolute discretion* which employees will qualify to receive a share under this paragraph *and to interpret and apply in their discretion* the formula above stated. (Emphasis added).

Two employees whose employment had not been continuous from day to day were excluded by the executor. The court upheld his determination on the grounds that the executor was given discretionary power to make the determination, and in the absence of abuse of discretion the court should not disturb his finding.

A Federal case[4] is in substantial accord with the preceding case. The will provided in part, "the existing male executor shall act as umpire, and his determination and decision over his signature attached to this will, shall in all respects be accepted as final." In a suit by beneficiaries, the court in upholding the decision of the executor, said:

> Ordinarily a court will not disturb the findings of an arbitrator. But if the arbitrator refuses to act, awards upon a matter not submitted, makes an incomplete determination or commits a gross mistake or error of judgment evincing partiality, corruption or prejudice, transcends his authority or violates some statutory requirement on which the dissatisfied party had a right to rely or commits some other like error, courts of equity may interfere and correct the error.

In *Wait Executors v. Huntington*,[5] the executor of the will petitioned the court to have the terms of the will construed. The court denied the request holding that the terms of the will conferred this power upon the executor by the following provision:

> Should any informality appear or questions arise as to the meaning or legal construction of this instrument, I hereby direct that the distribution of my estate shall be made to such persons and associations as my *executors shall determine* to be my intended legatees and devisees and *their construction* of my will *shall be binding* upon all parties interested. (Emphasis added).

The Supreme Court of Iowa reached a similar result in a suit by a legatee against the executor.[6] The language in the will in that case was: "If any question of construction or meaning shall

[3] 32 N.Y.S. 2d 191 (1941).
[4] American Bd. of Commissioners of Foreign Missions v. Ferry, 15 Fed. 696 (C.C. W.D. Mich., 1883).
[5] 40 Conn. 9 (1873).
[6] Talladega College v. Callanan, 197 Iowa 556, 197 N. W. 635 (1924).

arise under this will or any question of right or dispute shall arise as to how much anyone is entitled to, I direct that *the decision of a majority of my said executors shall be final.*" (Emphasis added.)

CASES WHEREIN DISCRETIONARY POWER WAS DENIED

The courts, however, have not always exhibited such a reluctance to disturb the decisions of those to whom such discretionary powers have been given. In the case of *Taylor v. McClave*,[7] the will provided:

> I declare that if any question shall arise as to the construction and administration of my will, or any clause, matter or thing therein contained or with relation thereto, my trustees or trustee acting either on their or his own judgment or under professional advice and upon such evidence as they or he shall think fit may determine such question by writing under their hands or hand; and *I declare that such determination shall be final and binding on all persons* interested under this my last will or any codicil thereto. (Emphasis added).

The will provided one-fifth of trust income to be divided equally between William Parke McClave (testator's son) and Sara F. McClave (his wife) and provided that the whole one-fifth should go to surviving widow of deceased son so long as she remained unmarried. William P. and Sara F. McClave were divorced and she remarried. Subsequently, the trustees construed the will to indicate that the intention of the testator was that the one-half of the one-fifth of the income paid to Sara should cease. The court reversed this determination upon the grounds that neither of the two contingencies (first Sara predeceasing her husband, or second, William's death and Sara's remarriage) upon which her payments were to terminate had occurred. There was no provision for the contingency that happened. The court further stated: "This court cannot be deprived of its jurisdiction by any direction of the testator to the effect that his executor or any other person, other than the court shall construe or define the provisions of a will."

A similar judicial view was displayed by the highest court of Kansas [8] in referring to a provision in the will which gave the executor authority to determine in writing, duly signed by him, *any question as to the construction and administration of the will,* said, "It would not . . . be conclusive if the decision should have been erroneous and a legatee would desire a review thereof in the regularly constituted courts."

The rule most consistent with authority would seem to be that where a discretionary power is clearly conferred and the limits of the power are defined, its exercise will not be reviewed by the courts unless there is a showing of improper motives or bad

[7] 128 N. J. Eq. 109, 15 A. 2d 213 (1940).
[8] Lydick v. Lydick, 147 Kan. 385, 76 P. 2d 876 (1938).

faith. But the jurisdiction of the courts is not ousted by testamentary provision attempting to give the executor final and conclusive authority on all matters in the will.

THE HIRSHORN CASE NOT CONSISTENT WITH THE RULE

The courts have been reluctant to disturb the decisions of executors vested with discretionary powers. How readily should courts construe language in wills, the meaning of which is not clear, as having conferred such power? The writer has encountered no other case in which language comparable to that found in the Hirshorn will has been held to give the executor such power.

The language in the Hirshorn will which relates to this particular is: "to all my employees who have been determined by my executor to be bona fide employees." The majority opinion places emphasis on the fact that the testator made the bequest to the employees "who have been determined by my executor" to be bona fide employees. Does this provision differ from a direction that the executor is to *determine* and pay the testator's lawful debts? Certainly under such testamentary language it would not be contended that the testator *intended* that his creditors' rights should be made to depend upon his executor's discretion.

A brief examination of the cases hereinbefore set forth, several of which were considered by the Colorado court, readily distinguishes the language in the wills considered from that in the Hirshorn will.

In one case [9] the testator not only provided that the executor was to *determine,* but went on to explain his intent by, "in their absolute discretion" and "to interpret and apply in their discretion." Similarly, where the will provided that the executor should act as *umpire* and that his determination should be in *all respects* accepted as *final,*[10] there is obviously an intention to grant to the executor something beyond his usual authority. It would also seem that where the powers granted are prefaced by such language as "should any informality appear or questions arise" [11] or "if any question of construction or meaning shall arise," [12] it is fairly evident that the testator's intention was to provide an extra-judicial means of settling controversial issues. Inasmuch as the intent of the testator is to be ascertained from the four corners of the will, such expressions should be considered since they illuminate the words which follow.

The language employed in the *Taylor* case [13] and in *Lydick*

[9] In re Barbey's Will, *supra* note 3.
[10] American Bd. of Commissioners of Foreign Missions v. Ferry, *supra* note 4.
[11] Wait Executors v. Huntington, *supra* note 5.
[12] Talladega College v. Callanan, *supra* note 6.
[13] *Supra* note 7.

v. Lydick [14] is equally unambiguous. The courts in these cases simply denied the power of the testator to so hamper the judiciary.

It is inescapable that the decision in the *Hirshorn* case results in requiring less positive language that the testator intended to grant discretionary powers to his executor than precedents previously have required. It is noteworthy that nowhere in the Hirshorn will were the duties of the executor likened to those of an *umpire, arbitrator,* or a *judge.* Nowhere in the will is there indication that determinations of the executor are to be *final, discretionary,* or *binding.*

The law of Colorado as represented by the *Hirshorn* case makes it advisable to reexamine existing wills for words which might be construed to grant the executor broader powers than intended. In drafting wills in the future where the intention is to create no powers of this nature, it would seem advisable to avoid such language as: "I direct my executor to determine" or "to such persons as my executor has determined." This can be done by merely defining the objects of the testamentary disposition as: "to all employees who have been with the firm for not less than one year immediately prior to my death." While the duty to make the preliminary decision will thus devolve upon the same person, the finality of the determination will be materially affected.

LETTERS TO THE EDITOR

B.S. IN PSYCHOLOGY

In reply to the article in the July, 1950, Dicta, by Robert B. Parks, I should like to state that it must be apparent that if the losing of functional utility is verbalized into normal activity channels, the socio-economic level will result in a tendency to maladjustment. The net positive value of the environment interrelated with the socio-legal aspects of adjustmental pattern of the mores focalized on the social response considering sociability levels and status need, will invariably result in the functional criteria "B". Deviate behavior, however, considered together with chronicity behavior dynamics and considering also net positive value of the environment in terms of maturation is obvious. Affect-liaison without ego support must, of necessity, result in disfunctioning super-ego (or lack of it). Distorted acquisition is held by some authorities to result in an affect-distortion ratio in the societal group criterion "S". All of these factors (or the lack of them) considering the interpersonal security of faulty developmental relationships in terms of frustration factors properly determinant in a series of well-known studies will always result in a tendency toward the ratio "BS".

Non-psychological Law-oriented reader,
FRANCIS L. SHALLENBERGER.

[14] *Supra* note 8.