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EXERCISE OF A GENERAL POWER OF APPOINTMENT WITHOUT SPECIFIC REFERENCE TO THE POWER

Merwin v. Safe Deposit & Trust Co. of Baltimore[1]

Under a declaration of trust executed by her uncle, Mariah Louise Moore held an equitable life estate in the trust fund of $12,000, with a power of appointment over the remainder to "such person or persons, in such shares and proportions," as she should appoint by will. On April 21, 1934, the said life tenant died leaving a will which, after directing payment of her debts, contained general pecuniary legacies of $5,000 to a granddaughter and $2,000 each to three other grandchildren. The will then concluded with a residuary devise and bequest of "all the rest, residue and remainder of my estate, real, personal and mixed," to her daughter and son. After payment of her debts and funeral expenses, there remained only $4,000 of the individual assets of the testatrix available for satisfaction of these general pecuniary legacies. Both the pecuniary legatees and the residuary legatees agreed that the power of appointment was exercised by the will under the provisions of the Maryland Code, which provides: "Every devise and bequest purporting to be of all real and personal property belonging to the testator shall be construed to include also all property over which he has a general power of appointment, unless the contrary intention shall appear in the will or codicil containing such devise or bequest."[2] However, they disagreed as to how this $12,000 should be applied. The pecuniary legatees contended that the entire will operated as an exercise of this power of appointment, and thus that the trust estate should be used to pay the deficiency of their pecuniary legacies. On the other hand, the residuary legatees contended that the general residuary clause alone operated as an exercise of this power, and thus the entire trust estate must be distributed to them. The trustee filed suit to determine what disposition of these trust funds should be made. The trial court adopted the theory of the pecuniary legatees, and ordered payment of the deficiency of their legacies out of the trust estate. The residuary legatees appealed. *Held*, Affirmed.

This was a testamentary power of appointment, and therefore in Maryland could not have been exercised for the

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[1] 188 Atl. 803 (Md. 1937).

[2] Md. Code, Art. 93, Sec. 339.

benefit of the donee's own estate or creditors,[3] yet the parties assumed that it was a *"general power of appointment"* within the meaning of this statute. Such a power is clearly not *"general"* within the meaning of the term under the English decisions, since it could not have been exercised for the donee's own benefit.[4] However, since this statute was enacted by a Maryland legislature, it must be construed according to our Court of Appeals' interpretation of the word *"general"*. In *Prince de Bearns v. Winans*[5] an identical testamentary power of appointment was expressly held to have been exercised under the provisions of this statute, thus impliedly regarding a power, which could be exercised for the benefit of any person except the donee or his creditors, as a *"general"* power within the meaning of this statute.

Prior to the enactment of this statute a power of appointment could only be exercised by three methods: (1) By an express reference to the power itself or to the instrument creating the power.[6] (2) By a specific reference to the property which is the subject matter of the power. (Where the power is testamentary this method of exercise occurs where the testator makes a specific devise or bequest of the property itself.[7]) (3) By a provision which would be inoperative except as an exercise of the power.[8] Only under this method would the exercise of the power result from facts not apparent upon the face of the instrument.

This third method restricted the introduction of extrinsic evidence showing an intention of the donee to exercise the power, to cases where the provision would otherwise be entirely inoperative. Thus, if the donee held any individual property upon which this provision would be operative, extrinsic evidence as to its inadequacy would be inadmissible. Most of the cases arising under the third method were cases involving wills containing, either general pecuniary legacies where the donee's individual estate was entirely inadequate, or a general residuary devise and bequest. In the early case of *Nannock v. Horton*[9] the English courts took the position that evidence of the inadequacy of the donee's individual estate to satisfy the general legacies in his will was inad-

[3] Balls v. Dampman, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545 (1888).
[4] In Leser v. Burnet, 46 Fed. (2nd) 756 (C. C. A. 4th 1931), an identical power was held not to be a "general power of appointment" under the Federal Estate Tax.
[5] 111 Md. 434, 74 Atl. 626 (1909).
[6] Benesch v. Clark, 49 Md. 497 (1878).
[7] Cooper v. Haines, 70 Md. 282, 17 Atl. 79 (1889).
[8] Balls v. Dampman, supra note 3.
[9] 7 Ves. Jr. 391, 32 Eng. Rep. 158 (1802).

missible to show an intention to exercise a power of appointment. In that case the donee had a small amount of individual personal property which would pass under these general pecuniary legacies, so no pecuniary legacy was totally inoperative without the exercise of the power. This decision was clearly followed by our Court of Appeals in *Patterson v. Wilson*[10] where the Court denied that a general residuary clause could operate as an exercise of a power of appointment, since the donee had individual property, both real and personal, which would pass under such residuary clause. However, in *Balls v. Dampman*[11] a general devise and bequest of "all my property, *real*,[12] personal and mixed" was held to constitute an exercise of a power of appointment over real property, since the donee owned no individual real estate but only personalty at his death. The opinion carefully points out that the devise of real property would be "entirely inoperative and nugatory" unless it operated as an exercise of this power of appointment. Thus, until the above statute was enacted in Maryland in 1888, general legacies and general residuary devises and bequests were ineffective as an exercise of a power of appointment, except in the rare cases where the donee held no individual property which would pass under the clause in question.

This narrow construction of the common law has been repudiated in most of the American jurisdictions, and extrinsic evidence, showing the inadequacy as well as the total lack of individual property, has been held admissible to prove an exercise of a power of appointment by general legacies or general residuary devises and bequests.[13] The inconvenience and injustice which resulted under this narrow construction of the common law was severely criticized by numerous English judges,[14] until in 1837 a statute was enacted in England providing that a general devise of all real or personal property should operate as an exercise of any power of appointment of the testator, unless a contrary intention should appear on the will.[15] This statute not only abolished the narrow construction that no extrinsic evidence was admissible to prove the inadequacy of the donee's individual estate, but went far beyond the majority American view, which admits such evidence, to the extent of creating a presumption in favor of the exercise of all powers in the

[10] 64 Md. 193, 1 Atl. 68 (1885).
[11] Supra note 8.
[12] Italics ours.
[13] Hartford-Connecticut Trust Co. v. Thayer, 105 Conn. 57, 134 Atl. 155 (1926).
[14] Hughes v. Turner, 3 Myl. & K. 666, 40 Eng. Rep. 1254 (1834).
[15] St. 7 Will. IV and 1 Vict., C. 26, Sec. 27.

donee, if his will purports to devise and bequeath all real and personal property. Not only does the statute create a presumption in favor of the exercise of a power of appointment by a general residuary clause, but permits such presumption to be rebutted only by evidence appearing on the will itself. To the extent that the common law rule required a power to be exercised on the face of the will, conversely the statute requires the non-exercise to be shown on the face of the will. It must be noted that the English statute applies to all powers, both special and general, which the testator has power to exercise by will.

This English statute was the model for our present Maryland one. However, it is especially noticeable that the Maryland statute is expressly restricted to general powers, thus leaving the problem of the exercise of special powers to the rules of the common law as developed in *Patterson v. Wilson*[16] and *Balls v. Dampman*.[17] Like its English counterpart, our Maryland statute creates a presumption in favor of the exercise of general powers, which can only be rebutted by a contrary intention appearing in the will. The only Maryland case involving a construction of this clause, "unless the contrary intention shall appear in the will," is the case of *Gassinger v. Thillman*.[18] That case held that a general residuary clause, in a will executed prior to the creation of a reserved general power of appointment, did not operate as an exercise of such power, since a contrary intention appeared from the fact that the testator reserved in himself the power subsequent to the drafting of the residuary clause in his will. Thus a contrary intention appeared on the face of the will as disclosed by the date of its publication.

The statute describes the type of devise and bequest, which shall operate as an exercise of general powers, as "every devise and bequest purporting to be of all real and personal property belonging to the testator." By this is clearly meant a general residuary clause. Whether the will contains other general pecuniary legacies, as in this case, or only a general residuary clause is immaterial. However, the statute merely described such a clause as including all property subject to a general power of appointment, without expressly providing that such property shall pass under the clause itself or under the entire will. This was the problem presented in this case, since the individual

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[16] Supra note 10.
[17] Supra note 3.
[18] 160 Md. 194, 153 Atl. 19 (1930).

property of the testatrix was insufficient to the extent of $7,000 of satisfying the general pecuniary legacies.

If the Court had construed the statute as passing the property subject to the general power under the residuary clause only, then the intention of the testatrix as disclosed by the use of a general residuary clause would be defeated. A gift of "all the rest, residue and remainder of my estate, real, personal and mixed" clearly implies an intention that all general pecuniary legacies be paid in full. Until all are paid in full there is no residue to pass under such a clause. The Court carefully pointed out that the statute was intended to apply to wills conveying all of the testator's property whether by a single clause or as the combined results of distinct clauses. To accomplish this the power must be exercised by the entire will and not by a single clause, i. e. the residuary clause.

If the property subject to the power passes under the entire will and not merely under the residuary clause, two problems arise: (1) Will such property then be subject to the claims of the donee's creditors? Clearly in jurisdictions permitting the donee of a general power to appoint it to his own estate or creditors, the property becomes subject to the donee's creditors.[19] However, in Maryland since the power was testamentary only, it cannot be exercised directly or indirectly for the benefit of the donee's creditors.[20] (2) Will such property be used to pay all the general pecuniary legacies in full? The opinion points out that if such property is used to pay the general pecuniary legacies, the intention of the testatrix to provide for all the pecuniary legacies in full before providing for the residuary legatees is accomplished. This construction operated to enforce the order of priority of payment of the legacies as disclosed by the arrangement of the will, and is fully supported by decisions in other states.[21]

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[19] Clapp v. Ingraham, 126 Mass. 200 (1879).
[20] Balls v. Dampman, supra note 3.
[21] Moran v. Cornell, 49 R. I. 308, 142 Atl. 605 (1928).