WILLS

Power of Testator to Designate an Attorney

The question presented in the case *In Re Estate of Minnie Shinnick*, 3 Ohio Op. 458 (October 7, 1935) involves the right of an executor to refuse to employ as counsel in the administration of the estate, an attorney designated by the testator to serve in that capacity. It was held that the executor could not be compelled to retain counsel requested in the will.

The court relies in part on Sections 10506-3 and 10509-193 of the Probate Code. It seems that neither of the above sections is particularly pertinent to the question presented. The first section relates to the filing of the name of the attorney with the court by the fiduciary when he is appointed. This section goes no further than to provide what procedure shall be followed *after* the appointment of the attorney, namely, to file the name of counsel with the court, this for the court's information. That this is the legislative intent is strongly brought out by this language: "After the name has been so filed, notices to such fiduciary in his official capacity shall also be sent by the Probate Court to such attorney who shall have authority to sign waiver of service of any or all such notices upon him."

The other section, 10509-193, relating to payment of attorney's fees by the executor and the allowance to him of such expenditures, seems to have little or no connection with the right of a testator to direct who shall act as the attorney in the administration of his estate.

The result represented in the instant case finds ample support from the standpoint of policy alone. As pointed out by the court, the sole responsibility for the administration of the estate rests on the fiduciary; therefore, he should have discretion to appoint whomever he chooses as his attorney. The close relationship which exists between an attorney and client demands complete harmony between the two and full confidence of the one in the other. It was argued that the executor or fiduciary might refuse the appointment unless he accepts the designated attorney; to which the court answered that it was its duty to carry out the testator's will as far as possible and that the court is so doing when an executor is permitted to assume his duties, though he refuse to accept the appointment of the attorney. The following cases support the conclusion reached by the court. *In Re Ogier*, 101 Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61 (1894). *Pickett's Will*, 49 Ore. 127, 89 Pac. 377 (1907); *Leadbetter* v. *Price*, 102 Ore. 159, 199 Pac. 633 (1922);

Foster v. *Elsley*, 19 Ch. D. 518 (1881); *M. B. Young* v. *Jas. Alexander, Executor*, 84 Tenn. 108 (1885); *Matter of Caldwell*, 188 N.Y. 115, at 120; *Matter of Wallach*, 164 N.Y. App. 600, 150 N.Y. Supp. 302 affirmed without opinion in 215 N.Y. 622, 109 N.E. 1094 (1915); *In Re Thistlewaite*, 104 N.Y. Supp. 264 (1907).

A question closely analogous is presented when the testator expresses the intent that certain persons be continued in a designated employment after his death. Where precatory words alone are used, it has been held that the fiduciary is not bound to give effect to the testator's wish. *Shaw* v. *Lawless*, 5 Cl. & Fin. 129 (1837); *Fender* v. *Stevens*, 2 Phill. 142 (1848); *Colonial Trust Co.* v. *Brown*, 105 Conn. 263 (1926); *Jewel* v. *Barnes, Admr.*, 110 Ky. 329, 61 S.W. 360 (1901). But where the directions are mandatory, it has been held that one designated by the testator to continue in an employment other than that of attorney has an enforceable right. *Hibbert* v. *Hibbert*, 3 Mic. Rep. 681 (1845); *Williams* v. *Corbett*, 8 Sin. 349 (1837). In *Hughes* v. *Hiscox*, 110 N.Y. Misc. 141, 181 N.Y. Supp. 395 (1920), the court refused to enforce the provision to continue an employee though the direction was mandatory, though the parties were the same in *Hughes* v. *Hiscox*, 105 N.Y. Misc. 521, 174 N.Y.S. 564 (1909) as in the latter case, where the employee was told that his relief was to seek an equitable charge on the estate in the hands of the executor. This was sought and denied in the case reported in 110 N.Y. Misc. 141.

The doctrine, however, is not without a contrary view. In *Rivet* v. *Battistella*, 167 La. 766, 127 So. 289 (1929), it was held that a provision of a will designating an attorney to settle an estate was binding on those taking under the will. The court points out that in those jurisdictions which follow what might be termed the majority rule, the courts have overlooked the fact that the testator may impose such conditions as he sees fit on his executor and he may accept or decline the trust if he is unwilling to comply with its terms. The court also relies in part on a statute in Louisiana which provides that the designation of an attorney shall be binding on banks appointed as executors and trustees. The passage of this statute indicated that the Legislature did not consider such a condition in a will against public policy. Therefore, since a testator can put any conditions he may wish so long as they are not opposed to public policy, the condition is valid.

The result reached in *In Re Shinnick* is sound, based not only on precedent but also on policy. It would seem that the above cited cases concerning the designation of an employee to continue in the service of the estate after the testator's death where the employee is not an at-

torney are authority for the position maintained by the court. It is to be noted that only a wish or desire was expressed that a certain attorney be appointed. This language was used by the testator: "It is my wish and I hereby request that the court appoint G. Taylor to be the attorney for my executrix." If it is decided that no right can be created by the use of precatory words in the case of one who occupies a much less important place than a legal advisor in the administration of the estate or trust, how much more certainly it must follow that the testator cannot by similar words create an enforceable right in an attorney upon whom the executor, who is solely responsible for the management of the estate, must depend for his legal advice. It seems that the case could have been decided on this narrow ground—that the mere wish or desire of a testator to appoint a designated attorney is not enough to create an enforceable right in him.

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