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Effects of Sole Gift of Proceeds With No Disposition of Corpus

*by Phillip H. Marshall**

IF EVERY TESTATOR were disposed to cause his manifest testatorial intent to be clearly outlined in his last will and testament, the task of the courts would be to that degree less burdensome. For the courts are called upon to construe and finally decide the rights of conflicting interests which usually arise from a will which does not "legally" import the testator's true intent. Thus, the end result is that it is the court's opinion of what the testator actually intended, which may or may not coincide with the testator's testamentary desire. This situation usually arises where the testator, for one reason or another, deems himself capable of drawing his own will and using the requisite legal language which the courts will recognize and give effect to.

It may be readily observed that the problems created by an ambiguous will become proportionately more complex as the value and various types of assets of an estate increase. Included in the aforesaid complexities is the devise of land due to the technicalities which necessarily accompany a valid conveyance of this type of asset. Adding to these pre-existing problems, the testator in certain instances creates new legal questions through his failure to clearly designate the party that is to receive the land and the type of legal estate that the devisee is to hold therein. It is with this last mentioned problem that the balance of this article will concern itself.

What is the effect of an absolute devise of "proceeds" or "income" of the corpus of an estate where, under a general devise, words clearly importing the creation of a fee simple estate as to the corpus are lacking and there is no express or implied power of sale? More particularly we shall consider the above in the following circumstances:

(1) When in the will there is contained an absolute gift of "proceeds" of the corpus;

(2) A gift of "proceeds" of the corpus followed by limitation upon the corpus; and

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(3) Where under a bequest of "proceeds" along with creation of a testamentary trust and limitations over upon corpus of the estate.

At this point it might be well to state that the words; proceeds, income, rents, profits are used interchangeably, throughout this article primarily because the courts have not placed any particular significance on any one term but have used them as a class to convey the idea that there is a recurrent benefit proceeding from the ownership of property[1] (or a corpus).

(1) Bare Gift of Proceeds.

In connection with the first class mentioned above, we might consider the question involved in *Armina D. Isherwood v. Libbie M. Isherwood,* 16 Ohio Circuit Court Reports 279,[2] in which the first paragraph of the syllabus reads as follows:

> "Devise of the proceeds of all testator's real estate, equivalent to devise of the real estate itself . . ."

The plaintiff, Armina D. Isherwood, filed her petition to quiet title on the 7th of June, 1894, stating that she was the owner in fee simple and possession of certain real estate described in the petition and that the defendant claimed the said real estate adverse to her rights. The controversy appears to have arisen from the provision in the will of the plaintiff's husband of which the significant sections read as follows:

> "2. I hereby give and bequeath to my (adopted) daughter Libbie Maria Isherwood the sum of ten thousand dollars to be paid by my executors out of my estate in installments as my executors may think best or situation of circumstances may require.
>
> 3. I hereby give and devise to my dear wife Armina D. Isherwood in lieu of dower in my real estate and in full of all rights of any kind in my personal and real estate, all of my personal estate of any kind remaining after payment of my just debts and funeral expenses and the bequest of ten thousand dollars to my daughter Libbie Maria Isherwood, and also the *proceeds* of my real estate."

Prior to this action the executor appointed under the foregoing will brought an action to construe the will, which action could have only been maintained if a trust was created by the terms thereof. It was held that no trust was established for the

1 Webster's New Collegiate Dictionary, p. 790.

2 Decision affirmed without opinion in 57 Ohio St. 660, 50 N. E. 1130.

lack of directions in relation to the land, the will containing no residuary clause or any other disposition of the real estate.

The court cites here *Collier v. Grimesey,* 36 Ohio St., 17 as determining the issues presented for opinion and at page 21 states:

> "We do not question (says Judge White, J., in delivering the opinion) that a devise of 'rents and profits' or of 'profits or benefits' of lands, without qualification or limitation will impliedly carry the fee. But in order to determine whether there is such qualification or limitation, we must look into the whole will, with the view of ascertaining the sense in which the terms were used by the testator; and when such sense is ascertained, to give it the effect intended. Such terms cannot be held to carry the fee when it appears from other parts of the will that the fee is otherwise disposed of."

The court further states that the primary issue to be resolved is the actual intention of the testator when he used the terms, "proceeds of my real estate." Everything that the testator possessed at his death both real and personal was disposed of according to the terms of the will. The language used in the disposition to the wife in Item 3 of the will according to the opinion of the court was tantamount to a devise of the corpus of the real estate when considered in the light of the decision in *Collier v. Grimesey, supra.*

The court also cites *Davis v. Williams,* 8[5] Tenn. 646[3] where the court declared:

> "A devise of rents, and profits, or income of land operates as a devise of the land itself; and if limited to the deviser's life, vests in him a life estate into land, but if unlimited, it vests in him an absolute fee simple title to the land, without the use of the term 'heirs' or other words of inheritance . . ."

Thus it was held that a gift of proceeds alone was sufficient to pass the fee in the corpus in the absence of a subsequent definite limitation over.

(2) Gift of Proceeds With a Prohibition Against Alienation.

In relation to the second category, gift of "proceeds" of the corpus followed by a limitation thereon, was construed sufficient to pass the fee thereto, notwithstanding a subsequent clause prohibiting alienation. We might now consider issues involved in *Minor v. Shippley, et al.,* 21 Ohio App. 236 in which a quiet

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[3] Reported in 4 S. W. 8.

title action came to the appellate court from the Court of Common Pleas of Licking County. From the agreed statement of facts John Eugart died testate in 1853 leaving Anna and Maria Eugart, wife and daughter respectively, as survivors. Portions of his controversial will read as follows:

> "Item 2. I give to my wife, Anna, all the proceeds of my farm on which I now reside in Licking County, Ohio, until my daughter shall arrive at the age of eighteen years.
>
> Item 3. When my said daughter shall arrive at the age of eighteen years then she shall have ¼th the proceeds of the farm, my wife ¼th so long as she remains my wife, and the remainder shall go to the Preachers' Aid Society of the Methodist Protestant Church and the Muskingum Annual Conference.
>
> Item 4. At the death of my said daughter, I give the whole of said *proceeds* of said farm to the Preachers' Aid Society, *but said Society are not to sell the farm.*"

After Maria came into possession of the farm subsequent to the death of her mother, the Preachers' Aid Society in 1893 started court proceedings to have a receiver take charge of the farm, put it in repair, and divide the proceeds thereof between said Aid Society and the daughter. Judgment was rendered for the defendant and the Aid Society was ordered to convey their interest on the farm by quit claim deed to the defendant.

The issue as stated was that if the plaintiff acquired title by purchase, then she was entitled to have her title quieted—if by devise or descent the plaintiff had only a life estate therein. More particularly the decision was dependent upon the determination of the question as to whether the Aid Society, when devised the "proceeds" of the farm at the death of Maria Minor, thereby acquired a remainder in fee and when subsequently ordered to convey their interest to the plaintiff herein she acquired that interest by purchase and held a fee simple estate in the entire farm.

The court held that based upon the devise of "proceeds" the Aid Society acquired a remainder in fee, when ordered to convey their interest to Maria Minor she acquired her title by purchase and was permitted to have her title quieted.

The contention of the defendant that the words, "I give the whole of said proceeds of said farm," are not sufficient to vest absolute title to same is untenable, notwithstanding the subsequent limitation upon the devise "but said Society are not to sell the farm." For the court states that "the rule in Ohio is to the

contrary viz., that such words are sufficient to transfer the fee. The general and fixed rule of construction is: that a gift of income of real estate is a gift of the real estate itself, and a gift of the perpetual or unrestrained income is a gift of the fee."

Based upon the above rule the court held that once a fee was created in the first taker, and a subsequent clause attempting to limit that fee was repugnant to the prior grant and therefore must be eliminated as an indicator of intent when the court construed the will.

This court also cites *Collier v. Grimesey, supra,* in support of their decision that "the gift of proceeds, without an effective qualification is sufficient to pass a fee simple absolute estate to the corpus."

(3) Gift of Proceeds Along With the Creation of a Testamentary Trust Gift Over of the Corpus.

Finally, in category No. 3 we find a case which contains a gift of income to the first taker along with a creation of a testamentary trust and a gift over of the corpus. The court here found that the first devise of income gave absolute title to the *income* only. The gift over was in this case held valid, because the phrases throughout the will would not lend themselves to any other construction but the establishment of life estate in the first takers.

In *Smith v. Robbins, et al.,* 72 Ohio St. 1, the two surviving daughters of the testator, now 59 and 70 years of age respectively, were beneficiaries of a trust created by the will in question which held shares of stock in a chemical company and several parcels of real estate. The annual income from the stock alone was $13,453.00 to each beneficiary. The beneficiaries as plaintiffs sought to have it decreed that they each owned in fee simple absolute, a one-third interest in the corpus of the estate (both stock and the real property). Also to have it adjudged that the purpose of the trust being subserved that it was terminated (the testamentary trust having been operative for a long period), and possession of the respective shares of the corpus be delivered immediately.

With the limited factual situation sketched in we might set out of the controversial portions of the will in question, which are are follows:

> "FIRST: I give devise and bequeath to my dear wife, Julia Anna Harwood, the third part of my estate of every

kind, whether consisting of real estate, money, debts, merchandise, furniture, or whatever description and character said property may be.

SECOND: The remaining two-thirds of my estate shall be equally apportioned amongst my children, but shall not be paid over to them but shall be invested in their behalf, and the *annual income* arising to each child shall be subject to her control, whether married or unmarried in no instance shall the husband of any such child have any power or control over the principal or interest of said share; nevertheless, each of my children shall have full power and authority to will and devise her portion of said inheritance in such manner as she sees fit.

THIRD: In case either dying without leaving a will her portion is to be equally divided between her children who may survive her or if she have no children surviving her said portion shall be paid to my children who may survive her share and share alike."

The major question to be resolved is was it the true intent of the testator to create a fee simple estate in the corpus of the estate in the daughters? The answer to this question necessarily depends upon the construction the court desired to give to the words which made up the will. Such phrases in the second item of the will as:

(1) "to be apportioned amongst my children,"

(2) "annual income arising to each shall be subject to her control,"

(3) "each of my children shall have the full power to devise her portion of said inheritance," and

(4) the phrase which prohibited the husband from sharing in the corpus or proceeds of the estate. The above phrases might tend to, when considered apart from the will in its entirety, create a question as to whether the testator contemplated an immediate vesting of the fee in his children or not.

In answer to the questions created by the will as to the type estate the first takers were possessed of, the court held that under the will the children took an absolute title to the *income* but only an estate for life in the corpus of the estate, with the power in each to finally dispose by will of her portion devised for her benefit and with a remainder in the children surviving such child and failing these in the surviving child of the testator in case the corpus should not have been disposed of by will. That, also, the mere grant of control of the annual income to the

testator's children did not give the devisees under the will an absolute fee in the corpus of the estate but only a life interest therein.

The court appears to have taken the position that had the testator desired an immediate vesting of the corpus he would have intimated this desire in more emphatic terms than merely stating "her portion of the inheritance" or in granting to the beneficiaries income of investment "subject to her control." In fact the testator made an executory devise of the corpus separate and apart from the income which would further support the view that no immediate vesting of a fee was contemplated by the testator.

In the courts' discussion of the will they state that there was no operative sentence giving or indicating a purpose to give an absolute estate as to the principal. The phrase "her portion of the inheritance" indicates an absolute fee but the court states that that portion was only a life estate when effect was given to the will as a whole. Also, that the expressed purpose of the will was to make such provision for these daughters as would insure as far as humanly possible a permanent income during their lives "freed from the risks and vicissitudes incident to the management of valuable property by ladies who, it is reasonable to assume, were unaccustomed to such responsibility. . . ." That it was the "income" alone that was the subject of the devise to the plaintiff as distinguished from the disposition of the corpus which the testator made an additional provision.

Finally, *Baxter v. Boyer,* 19 Ohio St. 490, and *Johnson v. Johnson,* 51 Ohio St. 446 were cited by the court to support their application of the rule that where real property is devised or bequeathed by words *prima facie* (giving control of the income in the present case) importing an absolute estate and by subsequent clause in remainder to another, the first taker takes only a life estate and limitation over is valid.

The general rule of construction as stated in *Baxter v. Boyer, supra,* is

> "that conflicting provisions of a will should be reconciled so as to conform to the manifest general intent and it is only in cases where such provisions are wholly and absolutely repugnant that either should be rejected . . . giving effect to this principle the general intent and paramount purpose of the will can be easily carried out."

However, the courts are limited to the extent that they can not "give a construction to the words which would not import

their proper meaning." [4] With the use of these general rules of construction the courts are usually enabled to determine the testator's actual intent when they are reviewing an ambiguous will of the nature outlined above. Thus a fee simple absolute estate can be created even though the requisite legal terminology has not been employed by the testator. Through a series of decisions which have given effect to the manifest intent although not clearly defined by the testator, the common law in Ohio appears to be that an absolute gift of income of a corpus is realty, the absence of anything to indicate a contrary intention, passes the realty.[5] What is the basis for this rule?

One line of reasoning could be that when the testator has given the first taker the equitable title or beneficial use of the corpus without an effective limitation thereon he has given the donee in reality an equitable fee. There being no reason to withhold legal title from the holder of the entire equitable title, legal title should be merged into the equitable title and the first taker be construed to hold a fee simple absolute under the will.[6]

Has the testator given the entire equitable title to the corpus when he makes a gift of proceeds, income or the like? This question necessarily depends upon the intent of the testator as manifested in his testamentary disposition. For if any effective limitation has been placed thereon an equitable life estate may have been intended by the testator.

In addition to the foregoing, the basis may also center upon the general principle that the courts endeavor to ascertain and enforce the intention of the testator, whether expressed in technical language or not. This is found in the rule that any words, no matter how informal, which clearly show the testator's intention to dispose of the entire estate, will pass such estate, even though the description of the property may be very informal and lacking in *technical* accuracy. This result is also reached on the theory that a partial intestacy is to be avoided where the construction warrants it. The latter principle must always be balanced against the tendency to hold that an heir can only be disinherited by express words.[7]

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[4] 19 Ohio St. 490, 37 Ohio Op. 312 (1869).

[5] 3 Page on Wills (2nd ed. 1926), Sec. 961, p. 40, W. H. Anderson Co., Cinn., Ohio.

[6] "Select Cases & Other Authorities on the Law of Trusts," p. 743, Scott (4th ed. 1951), Langdell Hall, Cambridge, Mass.

[7] 3 Page on Wills (2nd ed. 1926), Sec. 942, pp. 3, 4, W. H. Anderson Co., Cinn., Ohio.

However, the major question for determination is, whether an effective qualification or limitation has been placed upon the gift of proceeds to such an extent so as to intimate to the court that the first taker was not intended to have complete dominion and control over both the proceeds and the corpus. What then may be considered to be an effective limitation?

The court may take into consideration the fact that a testator appointed a trustee which would indicate that he did not intend to pass the complete ownership in the property by a gift of the income.[8] Also when a gift of income is followed by a gift over of the corpus such gifts show that the gift of income was not to vest a fee in the property.[9] Thus when the gift of income fails to pass a fee to the land, a lesser estate (usually a life estate) may be construed, or the corpus may immediately revert to the estate of the testator to be distributed according to the statutes governing intestate succession. The above limitations were plainly existent in the will under consideration in *Smith v. Robbins* which, in light of the foregoing, was decided correctly. However, by way of comparison, was prohibition against alienation contained in the controversial will of John Eugart in *Minor v. Shippley* a valid limitation as would indicate that a fee was not intended? Here I believe the question becomes narrowed.

It appears that the court might have over-emphasized the effect of a gift of income. Further, it appears that the construction given to the will is questionable, if based solely upon *intent* rather than upon a rule adopted by the court to meet the exigencies created by the testator's use of words that had "no legal significance." For the testator could have contemplated a reversion or other effective limitation in the event that the Society did sell the farm when he included his restrictive clause.[10] In brief, the general rule that a gift or bequest of proceeds is sufficient to pass a fee in the absence of an effective limitation thereon, has become a judicial principle of law in the interpretation of wills. However, "words are to have that force which authority gives them, unless the contrary is clear." This rule of

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[8] 3 Page on Wills (2nd ed. 1926), Sec. 961, pp. 41, 42, W. H. Anderson Co., Cinn., Ohio.

[9] Ibid.

[10] 19 Ohio St. 490 (1869). At page 495, "* * * it must first be well ascertained that the will in question when construed fairly, and in light of *all* its provisions and surroundings gives an estate in fee." Also, "If he (testator) supposed he had already made her the absolute owner, why make *any* provision as to manner of using or possessing it?"

construction is further supported by Section 2107.51 of the Ohio Revised Code which reads:

> When whole estate to pass.
>
> Every devise of lands, tenements, or hereditaments in a will shall convey all the estate of the devisor therein, unless it clearly appears by the will that the devisor intended to convey a less estate.

In *Isherwood v. Isherwood* the bare gift of "proceeds" was held sufficient to pass the fee, there not being an attempt to place a limitation upon the donee's gift of income.

It therefore appears to be a matter of weighting the controversial phrases of the will—one against the other and in their relation to the intent of the entire will when the court seeks to ascertain the manifest intention of the testator. It follows that it would be impractical to state any exact rule as to nature of an estate created whenever a particular word or phrase such as "proceeds" is used by the testator. Although these same words and phrases may re-appear frequently in numerous wills, the general surrounding intent will vary with each controversial instrument, for the term as used must be modified by the surrounding intent.[11] Therefore, when the three cases previously set forth are considered in connection with the general rules of construction as to proceeds, the decisions appear with possibly the exception of *Minor v. Shippley,* to have been logically derived.

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[11] 37 Ohio Op. 312. At page 314, "It is not generally profitable to place too much reliance on previously decided cases (regarding wills), because scarcely any two instruments present language precisely alike . . . ."

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