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Wills - Direction to Employ Certain Attorney for Probate

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duty, as a result of the failure to comply with such contract."[17]

Thus, a covenant to maintain premises and cure defects therein, is by operation of law a covenant to indemnify for any failure or breach of such duty. Further, it is held that one of the general remedies of the lessee against the lessor for breach of the covenant to repair is an action at law to recover the damages, including injuries to third persons, suffered through such breach.[18]

The Wisconsin court construed the indemnity clause of the lease to the extent of controlling the liabilities of the parties and did not consider the equities involved, viz., that the breach of the covenant to repair became by operation of law a covenant to indemnify which therefore rendered the indemnity clause of the lease inoperable.[19] Should the problem again arise in Wisconsin, or other jurisdictions holding similarly thereto, consideration should be given to the equitable effect of a breach of a covenant to repair which by operation of law becomes a covenant to indemnify.

Thus, it may be concluded that the convenantor who agrees to maintain the premises and cure any defects therein cannot recover contribution (which is based on equity and justice) or indemnity (which is based on contract) where he breaches the covenant. The reasons why the covenantor should be thus precluded from recovery are that such a covenant is by operation of law an indemnity provision and it is not equitable or just to allow him to recover contribution or indemnity for payment for injuries caused by a defective condition which he promised to alleviate. Further, where contribution or indemnity is granted the covenantor, the covenantee should be allowed a counterclaim or setoff by reason of the cause of action he has acquired by the covenantor's breach of the covenant to maintain the premises and cure any defects therein.

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Wills—Direction to Employ Certain Attorney for Probate—In his will testator designated appellant as attorney for his estate but testator's sister and next to kin claimed to be entitled to name an attorney of her own choosing. The corporate administrator was willing to retain either attorney and petitioned the county court for instructions. From a ruling that the next of kin was entitled to name the attorney, the lawyer named by the testator appealed. *Held:* Reversed. Since the administrator was willing to carry out the expressed desire of the testator, his

[17] Trego v. Rubovits, 178 Ill. App. 127 (1913).
[18] *Supra,* note 13.
[19] *Supra,* note 10.

designation was mandatory as to all other persons. *In re Ogg's Estate, 262 Wis. 181, 54 N.W. 2d 175, (1952).*

Although wills often request the executor to employ a certain attorney as legal counsel in the probate of the estate, such provisions are seldom the subject of litigation. Doubtless this is due to the fact that the executor usually complies with the wishes of the testator in the matter. However under the common law of the United States and England testamentary directions selecting a certain attorney as counsel for the estate are generally not held to be binding on the executor.[1] The application of the rule does not depend on the words used and no language however mandatory can compel an executor to retain an attorney to whom he objects.[2]

Actually tthe office of "advisor to an executor" or "attorney for the estate" is unknown to the law.[3] These terms are popularly used to indicate one who is the attorney for the administrator or executor in the management of the estate. The relationship between the parties is that of principal and agent. The general rule that the acts or omissions of an attorney while he is acting within the scope of his authority are binding upon his client applies.[4] Since the executor is acting in a fiduciary capacity he may be held liable to third parties for the acts of his attorney. Thus if the attorney is guilty of negligence, misappropriation of funds or other misconduct which causes a loss to the estate the executor may be held liable to make up the deficiency.[5] Similarly if the executor breaches a duty imposed on him by his trust through the neglect or bad advice of his lawyer, his reliance on the advice of counsel does not relieve him for liability.[6] Recognizing the agency relationship and the resulting liability of the executor for the acts of his attorney the courts following the general rule have held that executors should be allowed to select their attorneys without regard to the designation of an attorney in the will.[7] The general rule has also been defended on the grounds

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[1] In one of the earliest decisions on the question the English court of Chancery refused a motion by an attorney so selected in the will to restrain the trustees from employing another as attorney to the estate saying, "The direction in the will imposes no trust or duty on the trustees to continue the plaintiff as their solicitor." Foster v. Elsley (1881) L. R. 19 Ch. Div. 518. Later cases are collected in 1 PAGE ON WILLS sec. 49 (3rd ed. 1941); Note 166 A.L.R. 491 (1946); Note 31 MAR. L. REV. 231 (1947).

[2] Conlon v. Sullivan, 280 Ill. App. 332 (1935); Foster v. Elsley *supra* note 1. See In re Wallach, 164 App. Div. 600, 150 N. Y. Supp. 302 (1914) where a provision directing the executors to employ the testator's son as sole attorney in the settlement of the estate and stipulating that the son should receive two thousand dollars per year for his services as attorney was stricken out of the will by the court.

[3] Young v. Alexander 84 Tenn. 108 (1885); In re Ogier's Estate 101 Cal. 381, 35 P. 900 (1894); Estate of Arneberg 184 Wis. 570, 576, 200 N.W. 557 (1924).

[4] 5 AM. JUR. ATTORNEYS AT LAW §§67, 78.

[5] Kaufman v. Kaufman, 292 Ky. 351, 166 S.W. 2d 860, 144 A.I.R. 866 (1942).

[6] In re Stahl's Estate, 113 Ind. App. 29, 44 N.E. 2d 529 (1942).

[7] Young v. Alexander *supra,* note 3; In re Ogier's Estate *supra,* note 3; Re

that it preserves the close and confidential relationship between attorney and client which would be impinged if the executor is forced to work with an attorney not of his own choosing.[8]

However in the case of *Rivet* v. *Battislella* the Louisiana Court refused to follow the general rule saying:

> "All these cases proceed upon the theory that the naming of an attorney may be distasteful or disadvantageous to the executor, and entirely overlooked the fact that the testator may impose such conditions as he sees fit on his executor, and the latter is free to accept or decline the trust if not satisfied with the conditions imposed."[9]

The Louisiana Court's statement should be contrasted with the approach taken by former Chief Justice Vinjie when he said:

> "Of course we agree with that part of the argument of courts who hold that a testator has the right to attach whatever lawful conditions he sees fit to a legacy or devise. But that does not answer the question, What constitutes a lawful condition?"[10]

In determining the validity of a condition contained in a will the Wisconsin Court can be expected to give great weight to the public policy favoring the intent of the testator. In Wisconsin a testator is said to have a constitutional right to have his will carried out according to its terms.[11] It has been recognized, however, that the testator's directions are controlling only upon certain subjects.[12] Generally he has the power to direct the *method* of management and disposal of his property,[13] but the testator's power to direct *who shall* manage his property has apparently never been extended beyond his statutory right to name a personal representative.[14] Therefore it might be argued that the testator's power to control personnel in the probate of his estate does not

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Lachmund 179 Or. 420, 170 P. 2d 748 (1946); In re Caldwell, 188 N.Y. 115, 80 N.E. (1907) where the court said, "They (executors) may incur a personal liability for the conduct of their lawyers and hence they are beyond the control of the testator in making the selection."

[8] See In re Wallach *supra,* note 2 where it was said, "The relations between counsel and client are of a very delicate and confidential character and unless the utmost confidence prevails between them the client's interests must necessarily suffer."

[9] 167 La. 766, 120 So. 289 (1929). The statute permitting the creation of trusts in Louisiana provides that, "The designation in any act of donation inter vivos or mortis causa of an attorney for the trustee or trustees shall be binding on such bank as may be named trustee." La. Act 107 of 1920. Par. 2. See also Succession of Rembert, 199 La. 743, 7 So. 2d 40 (1942); Succession of Martin 56 So. 2nd 176 (La. 1952) where the Louisiana court held that the executor is obligated to accept advice and assistance from the designated attorney although he may also employ another attorney of his own choosing. But see Scott, *Testamentary Directions to Employ,* 41 HAR. L. REV. 709, 717 (1928).

[10] Will of Keenan, 188 Wis. 163, 179, 205 N.W. 1001, 42 A.L.R. 836 (1925).

[11] In re Will of Rice 150 Wis. 401, 450, 136 N.W. 956, 974 (1912).

[12] Will of Dardis, 135 Wis. 457, 462, 115 N.W. 332 (1908).

[13] *Ibid.*

[14] WIS. STATS. (1951), sec. 310.12.

extend to the selection of an attorney for the estate. It would seem that the testator's intentions should be less favored when they are expressed upon a subject over which the testator has no control. Accordingly the public policy underlying the general rule might prevail over the policy which favors the enforcement of the testator's intentions.

The only definite impairment of the general rule in Wisconsin is that existing by reason of Section 310.25 Wisconsin Statutes (1951) which provides that where a firm or corporation of any kind is named as executor the heirs shall designate the attorney to be employed as legal counsel in the probate and administration of the estate. The statute was enacted for the protection of the interest of heirs, and to prevent a monopoly of the probate business by counsel appointed by such (corporate) executors.[15]

Although the principal case creates an exception to 310.25 it does not conflict with the general rule. The court held that where the corporate executor is willing to follow the expressed desires of the testator in the selection of legal counsel, the designation is binding as to all other persons.[16] This decision does not conflict with the public policy against forcing an executor to employ and rely on an attorney chosen by another, which is the foundation of the general rule. Had the court compelled an unwilling corporate executor to employ an attorney designated by the testator the decision would have been an exception to the common law rule.

Whether the Wisconsin Court would hold a testator's direction to employ a certain attorney to be binding upon an unwilling corporate executor must be regarded as an open question. The general common rule and the public policy supporting it could be argued against such a holding. On the other hand the court might consider the executors power to select so greatly weakened by 310.25 that the prevailing public policy would be that which favors the testator's right to make a will and have it carried out according to his wishes.

Whether Wisconsin would go still further and hold a testator's direction to employ a designated attorney to be controlling upon an individual executor is very doubtful. In such a case the common law rule would not be already weakened by 310.25. In fact the Wisconsin Court has held that 310.25 strengthens the general common law rule in that its limitation to corporate executors emphasizes the right of all other executors and administrators to select their own legal advisors.[17]

Generally a testator has the power to dispose of his property, as he sees fit. However this power is not unlimited. A man may destroy his property but a provision in his will that his executor shall destroy his

[15] 31 MAR. L. REV. 231 (1947).
[16] See principal case.
[17] Estate of Arneberg *supra*, note 3.

property is against public policy. He may refuse to erect buildings on his property but a provision in his will saying that buildings shall never be erected on the property is unenforceable.[18] He may shut up his house but a provision requiring his executor to shut up his house is against public policy.[19] Nor can a trustee be compelled to employ a particular person to aid him in the management of the trust although the testator could have employed whomever he desired for that same purpose.[20] The same public policy would seem to support the rule that an executor shall not be hampered in the management of the estate's affairs by being forced to work with an attorney not of his own choosing.

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[18] Smith v. Townsend, 32 Pa. (8 Casey) 434 (1859).
[19] Brown v. Burdett, 21 Ch. D. 667 (1882).
[20] 1 RESTATEMENT, TRUSTS §126 (1935).