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Executors and Administrators: Grounds for Refusing to Appoint Executor Nominated in a Will

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fine to have this deterrent effect upon one of large means than it would upon one of ordinary means granting that the same malignant spirit was possessed by each."

This inclination of the court to give weight to social standing, wealth or other relationships of the parties is borne out by the case of *Trogden* v. *Terry,* 172 N.C. 575, 90 S.E. 582 (1916). While the plaintiff was having dinner in a hotel dining room, the defendant came up to him with a written retraction of a statement that plaintiff had previously made, and demanded that the plaintiff sign it. The defendant held his walking cane in a threatening position, and in answer to the plaintiff's question, "What if I don't sign it?", he replied, "I will whip the hell out of you." After the plaintiff signed, the defendant called him a "damned contemptible puppy." For this the plaintiff was awarded $1,000 for actual damages and $1,500 as exemplary damages. The court declared that "there was abundant evidence of malice upon which the jury in their discretion were warranted in inflicting punitive damages."

PHILIP W. CROEN.

Executors and Administrators—Grounds for Refusing to Appoint Executor Nominated in a Will.—A testator died and left 3 children; John Svacina, Mrs. Clara Eatman and Ella Svacina. Ella, a resident of Florida, came to Wisconsin and immediately took possession of the decedant's personal property. John and Clara then filed a petition for probate of the will; and upon the same date, Ella, being named in the decedent's will as the sole executrix, filed a petition for her appointment as executrix thereof. Later, the surviving heirs filed objection to the appointment of Ella as executrix on the ground that Ella was not "legally competent" to be appointed by the court as executrix. Upon the petition of John and Clara, the court issued letters of special administration to a trust company. Following this, a hearing was held upon the objections to the appointment of Ella as executrix. The lower court held that there was a discretion in the county court to refuse to appoint a nonresident nominee, by interpretation of Sec 324.35 WIS. STAT. (1941), which permits the removal of a nonresident executor.

It was *held,* on appeal, that mere nonresidence of the executor named in the will does not disqualify him, and that the court must appoint him if all the other requirements are satisfied. The power of the court to remove the executor on the basis of nonresidence applies only to removal, and cannot be used by the court as grounds for refusing to appoint the executor named in the will. *In re Svacina's Estate,* 1 N.W. (2d) 780 (Wis. 1942).

Although the executor is nominated by the will, the executor exists by virtue of the appointment by the court. *Davenport* v. *Sandeman,* 204 Iowa 927, 216 N.W. 55 (1895). It is generally accepted that the courts have no discretion in issuing letters testamentary to the party named in the will. Unless the nominee is expressly disqualified by statute, or if such discretion is created by statute, the court cannot reject the person named. *Will of Zartner,* 183 Wis. 506, 198 N.W. 363 (1924). The qualifications of an executor are statutory in Wisconsin. "When a will shall have been admitted to probate the court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, accepts the trust, and gives bond when and as required by law." WIS. STAT. (1941), Sec. 310.12. The power to name an executor to administer an estate is coextensive with the power to devise or bequeath the estate itself. *State ex Rel. Lauridsen* v. *Superior Court,* 179 Wash. 198, 37 P. (2nd) 209,

95 A.L.R. 819 (1934). To allow the court to refuse an appointment for any reason but statutory disqualification would be to permit the court to interfere with the privilege of disposition of a person's property to whomever he chooses. The testator has chosen the executor named because of the special confidence reposed by the testator in the nominee and the court must respect his wishes. *Holliday* v. *Holliday,* 16 Ore. 147, 19 Pac. 81 (1888); *Berry* v. *Hamilton,* 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515 (1851); *In re Leland's Will,* 219 N.Y. 387, 114 N.E. 854 (1916); *In re Worman's Estate,* 151 Ore. 475, 49 P. (2nd) 1136 (1935). "The courts will not undertake to make a better will nor name a better executor for the testator." *In re Kennedy's Estate,* 266 N.Y.S. 883 (1933). The fact that the court may always remove an executor may be another reason for the refusal of some states to grant the courts discretionary power in the appointment of an executor. *In re Bett's Estate,* 185 Minn. 627, 240 N.W. 904 (1932); *In re Will of Zartner,* supra.

In some states, however, discretion is exercised. An executor is not created by the will but is merely given an opportunity to become such by a satisfactory compliance with the statutory qualifications. "Where there have been such changes since the execution of the will, that in all reasonable probability he would not have been named, the court is not bound to confirm the selection by appointment." *In re Birkholz's Estate,* 197 N.W. 896 (Ia., 1924).

The statutory requirement that the executor be "legally competent" permits a wide latitude to the court in interpreting each individual case. The circumstances of every case carry considerable weight in the court's decision. *In re Blochowitz' Estate,* 124 Neb. 110, 245 N.W. 440 (1932).

The court is not bound to appoint the nominee in the will as executor. *In re Robinson's Estate,* 149 Wash. 307, 270 Pac. 1020 (1928); *In re Birkholz's Estate,* supra.

However, mere nonresidence does not disqualify the nominee. The testator must be free to select his executor, and to limit his choice to state residents may force the decedent to place his estate in the hands of an inexperienced person or even a stranger. *Cutler* v. *Howard,* 9 Wis. 309 (1859). Nonresidence is a statutory disqualification in Illinois. There the court reasons that an executor is an officer of the state, and therefore the state may select the person upon whom an office may be conferred. Only a resident, within the territorial limits, may be invested with the legal power. The state has an interest in the distribution of the decedent's property. *In re Petition of Mulford,* 217 Ill. 242, 75 N.E. 345 (1905). Nonresidence in Michigan does not absolutely disqualify or prohibit the appointment, but may be grounds for the exercise of discretion as to the appointment as well as the removal. *Grand Trunk Western R. Co.* v. *Kaplansky,* 270 Mich. 135, 258 N.W. 423 (1935); *Breen* v. *Kehoe,* 142 Mich. 58, 105 N.W. 28, 113 Am. S. R. 558 (1905).

An heir is not disqualified from acting as an executor. *In re Betts's Estate,* 185 Minn. 627, 240 N.W. 904 (1932); *In re Doolittle's Estate,* 169 Iowa 639, 149 N.W. 873 (1914).

One having a claim against the estate of the deceased may be appointed as executor. *In re Doolittle's Estate,* supra; *United States National Bank & Trust Co.* v. *Sullivan,* 69 F. (2nd) 412, (C.C.A. 7th, 1934).

Immorality of the executor does not justify the refusal of the court to appoint an executor. *Clark* v. *Patterson,* 214 Ill. 533, 73 N.E. 806 (1905).

"Where the nominee, would be required to prosecute, on behalf of adverse litigants, suit which he would defend as an individual, he is not 'legally competent'." *In re Blochowitz' Estate,* supra.

By statute, a trust company organized pursuant to the provisions of Chapter 221 of the WIS. STAT. may act as an executor of an estate. WIS. STAT. (1941) Sec. 223.03(7).

Objections which go to the temper, disposition, habits and moral character of the nominee are not sufficient to render the named executor "legally incompetent." Nor will the fact that he may be obnoxious to the heirs justify the court in refusing to nominate him. *Saxe* v. *Saxe,* 119 Wis. 557, 97 N.W. 187 (1903), cited in the principal case.

SYDNEY R. MERTZ.

Limitation of Actions—When Statute of Limitations Begins to Run in Malpractice Actions.—Plaintiff, having sustained a spinal and back injury while working in a rock quarry, went to the defendant doctor for treatment. The full and complete history of the injury was given to the defendant who, the plaintiff alleges, was negligent in failing to make the proper examination and diagnosis necessary to ascertain the nature and extent of the injuries. Plaintiff alleges that it was the doctor's duty to make a thorough examination of his injury so as to determine the nature and extent thereof, and to use means generally and commonly employed by physicians and surgeons for the diagnosis and treatment of such a case. Treatment, following the diagnosis of June 10, 1938, lasted until Aug. 15, 1938 at which date the plaintiff was transferred to a hospital, his injuries having been aggravated by the defendant doctor's treatment. Defendant demurred to plaintiff's petition for the reason that more than two years had elapsed between June 10, 1938, the alleged date of the wrongful act or omission, and the filing of the petition. Demurrer was sustained by the trial court. On appeal, held, judgment reversed. The statute of limitations in a malpractice suit does not commence to run until treatment ends. In malpractice cases there is difficulty in determining the exact moment when the act or ommission which caused the damage took place. The negligent act may occur at some particular moment or may characterize the entire treatment. Since the doctor's service is a continuing one of diagnosis and treatment throughout the case, the physician must be given all reasonable time and opportunity to correct the ordinary and usual mistakes even incident to skilled surgery; premature litigation in order to save the rights of the patient in the event of substantial malpractice, disrupts the mutual confidence that is highly essential to the relationship of doctor and patient. The treatment and employment should be considered as a whole, and, if malpractice occurs therein, the statute of limitations should begin to run when the treatment ceases. *Williams* v. *Elias,* 1 N.W. (2d) 121 (Neb. 1941).

A majority of courts, especially in adjacent jurisdictions, have held that the nature of the action of malpractice against a doctor requires the statute of limitations to run from the date of termination of the treatment.

The Ohio court adopted the rule in *Gillete* v. *Tucker,* 67 Ohio St. 129, 65 N.E. 865 (1902). In that case the defendant doctor negligently left a surgical sponge in the incision of an operation and when the wound failed to heal properly, treated the patient for a period of years in an attempt to cure the situation although not removing the sponge. The court in ruling for the plaintiff held that if the surgeon negligently closed the incision and left the sponge therein and this condition is present when he abandons the case or otherwise retires therefrom, the statute of limitations does not commence to run against the action until treatment has been abandoned by the physician or otherwise terminated.