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COMMENTS

WILLS—EFFECT OF TESTAMENTARY DESIGNATION OF COUNSEL FOR THE EXECUTOR

The general common law rule is that a provision in a will selecting a person as attorney for the executor of the will is not binding on the executor and is of no legal effect. The various reasons given for this rule may be stated as follows:

(1) The responsibility for the administration of the estate lies with the executor and not with the attorney. It is the duty of the executor when legal aid is necessary, to hire such attorneys as in his opinion and judgment are best fitted to advise him, and who will be of greatest benefit to the administration of the estate. The position of executor involves some discretion and a great deal of responsibility. It would be unreasonable to tie the hands of the executor in exercising this discretion as far as employment of counsel is concerned.

(2) The relationship of attorney and client is a highly personal and confidential one. It would be unwise to impose arbitrarily on the executor an attorney contrary to his preferences.

(3) There is no such office as attorney for the estate. Any counsel hired to aid in probate matters is the counsel of the executor, and the executor is personally liable for the services rendered by such counsel. It is true that the executor will be reimbursed from the estate if the aid of counsel is actually needed in administering the estate; but the fact remains, the primary liability is that of the executor.

(4) If the attorney is derelict in performing his duties, the executor is liable to third parties injured by the attorney's acts, as he is to distributees under the will who suffer from the attorney's mistakes.

(5) If the executor himself causes injury to third parties or to the beneficiaries under the will, he is liable to such third parties and beneficiaries even through the executor acted under advice of counsel.

The language used by the testator in appointing the attorney does not seem to affect the rulings of the courts on this question. In Conlan v. Sullivan the court said the executor is not bound to employ an attorney appointed by the testator, even though the will uses such

1 This rule applies in the United States: 1 Page on Wills, 109 (1941); and in England, 1 Page on Wills, 108 (1941). 166 A.L.R. 491 contains further authority for this statement. In 41 Harv. L. Rev. 709 at 719 (1928), it is stated, "accordingly it would seem that cases which universally hold that a trustee or executor is not bound to employ an attorney designated by the testator are clearly correct."

2 Estate of Arneberg, 184 Wis. 570, 200 N. W. 557 (1924); In re Ogiers Estate, 101 Calif. 381, 35 Pac. 900 (1894); Young v. Alexander, 84 Tenn. 108 (1885).

3 In re Ogiers Estate, 101 Calif. 381, 35 Pac. 900 (1894); Matter of Caldwell, 188 N.Y. 115, 80 N.E. 663 (1907); Young v. Alexander, 84 Tenn. 108 (1885); 41 Harv. L. Rev. 709 at 719 (1928).

4 Young v. Alexander, 84 Tenn. 108 (1885); 41 Harv. L. Rev. 709 at 719 (1928).

5 280 Ill. App. 332 (1935).
words as “direct,” “command,” or “appoint.” This statement was *dicta* in the case, but was made after a very thorough and well reasoned analysis of the decided cases on the question. Language to the same effect as that used in the *Conlan* case was used by the court in *Re Estate of Lachmond*. This last case involved a mutual and reciprocal will made pursuant to a contract between the testator and the executrix of the will. The court said that even in the case of mutual, reciprocal wills, a testamentary appointment of counsel vested no rights in the counsel.

It has been urged in some of the decided cases that because of the relationship between the testator and the person appointed as counsel, or because of the language used by the testator in designating the person as counsel, the designation should be considered as a bequest to the person so designated. Such arguments have been rejected by the cases. In *Young v. Alexander* the attorney was a nephew of the testator. This relationship was referred to in the will, yet the court said the appointment was not binding on the executor. The testator in *Conlan v. Sullivan* requested the executors to employ “my friend, Frank A. O’Donnell” as their attorney. The court held this direction not to be binding on the executor. The language used by the testator in *In re Thistlewaite* was in effect “I direct and desire” that my friend, Charles McLouth, have charge of the legal aspects of my estate and that he advise my executors. McLouth claimed that this language designated him as the only person to be employed as counsel for the executor and imposed a trust on the estate in his favor, for the value of the legal services that would be rendered in administering the estate. The court in rejecting this contention pointed to the absurd results such a theory would involve: namely that if this trust were imposed, the executors would have to retain McLouth as their counsel even though he became incompetent and unable to perform the legal services required in administering the estate, or else pay him the value of the legal services required and employ another attorney at their own personal expense. The court refused to construe the language in the will so as to effect such a result. The problem involved in answering the argument suggested in this paragraph is one of construction of the terms of the will. The case of *In re Thistlewaite* indicates the courts will require a clear and unambiguous expression by the testator that he intends to establish a legacy in favor of the designated counsel before a testamentary designation of counsel will be construed to be such a legacy.

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6 170 Pac. (2d) 748 (Ore., 1946).
7 84 Tenn. 108 (1885).
8 280 Ill. App. 332 (1935).
9 104 N. Y. Supp. 264 (1907).
10 104 N. Y. Supp. 264 (1907).
This argument that the designation of a person as counsel makes him a legatee under the will may be handled in another way by regarding the "bequest" to him as a conditional one, the condition being the rendering of legal services to the estate. If the executor objects to the person named as counsel by the testator for any reason, the person so named can not fulfill the condition to obtaining his bequest, and the bequest will not be given to him.

In Estate of Arneberg, an attorney for the administratrix sought to establish a lien against an estate for legal services rendered the administratrix in settling the estate. The Wisconsin Court has indicated the rule to be that the estate of a deceased person is not subject to a lien for the payment of compensation for legal services rendered in the administration of the estate unless the administrator is personally insolvent or financially unable to pay for such services. The primary liability is upon the administrator. To avoid these cases the attorney in the Arneberg case cited section 3808 (a), Wisconsin Statutes, which provides:

"Whenever a firm or corporation of any kind is named as administrator or executor of an estate, he or she who is nearest of kin and who receives any interest in the estate, and if there be no bequest of any kind, then the party receiving the largest amount or interest from the estate, shall name the attorney who shall represent the estate in all proceedings of any kind or nature, unless good cause be shown before the court why this should not be done."

The attorney argued that this statute established a new legislative policy which changed the status of an attorney employed to perform legal services in the probate of an estate from that of an attorney for the executor to that of an attorney for the estate. The court in answer to this proposition pointed out that the statute was only applicable when firms and corporations are named executors or administrators; that this was clearly a modification of the general rule which allows the personal representative to employ his own counsel; and that since the section was only applicable in instances where executors or administrators were firms or corporations, it emphasized the right of all other executors and administrators to employ counsel of their own choice. It would appear that this case may be interpreted as an approval by the Wisconsin Supreme Court of the general doctrine that testamentary designation of counsel for executors is of no legal effect. It

11 184 Wis. 570, 200 N. W. 557 (1924).
12 McLaughlin v. Winner, 63 Wis. 120, 23 N. W. 402 (1885); Miller v. Tracy, 86 Wis. 330 at 333, 56 N.W. 866 (1893); Wiesmann v. Daniels, 114 Wis. 240 at 243, 90 N.W. 162 (1902).
13 This statute is now sec. 310.25, Wis. Stat. (1945), the material part of which is identical with 3808 (a) quoted above.
indicates that in the absence of controlling statutes, executors may choose their own legal advisers.

The author's research indicates Louisiana as the only jurisdiction enforcing a testamentary designation of counsel. *Rivet v. Battistella* illustrates the reasoning of the Louisiana court on the problem. The court in that case acknowledged the general rule elsewhere to be that testamentary designation of counsel is opposed to a public policy which favors freedom of choice of the executor in this regard; but stated that in its view, such designation was nothing more than a provision for the manner in which the estate was to be administered, a matter the Louisiana court stated to be lawfully within the control of the testator. Act number 45 of the Laws of Louisiana for 1902 provided that when a bank is appointed executor of a will, the designation of counsel by the testator or the selection of counsel by the heirs will bind the bank. The court seized on this statute as being indicative of the policy of the state in allowing testamentary control over the appointment of counsel, and extended the power of the testator to appoint counsel for the executor to include those instances where private persons were named as executors. The holding of the Louisiana court, it is submitted, should not derogate from the majority rule on the effect of testamentary appointment of counsel. The Louisiana decision is based on a statute which, in express language, commits that state to the policy of giving effect to testamentary designation of counsel for the executor. All other courts dealing with the problem in the absence of legislative declaration have held such designation to be of no effect. Section 310.25, Wisconsin Statutes (1945), does indicate a legislative intent to permit control over the discretion of executors in their choice of counsel, but this legislative intent is limited to allowing control over the executor's choice only where the executor is a firm or a corporation. Furthermore, Sec. 310.25 gives the right of choice of counsel to the heirs of the testator only, and not to the testator himself.

Section 310.25 is the only Wisconsin statute affecting the executor's right to choose his own legal advisers. *Estate of Arneberg* is the only Wisconsin case interpreting the statute. This case sheds no light on the meaning of the statute further than to limit its scope and legal effect to instances where the executor is a firm or a corporation. It would seem clear that section 310.25 would be applicable when there is no designation of counsel by the testator. If, however, the testator designates counsel, it may be urged that since the established policy of

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14 167 La. 766, 120 So. 289 (1929).
15 There are several Louisiana cases that affirm the Rivet case, but these later cases do not discuss the reasoning or principles established in the Rivet case.
16 See footnote (13) supra.
17 *Estate of Arneberg*, 184 Wis. 570, 200 N. W. 557 (1924).
18 184 Wis. 570, 200 N. W. 557 (1924).
the Wisconsin Court is to give effect to the intent of the testator\(^\text{19}\), the statute should not be construed to include instances where the testator has designated counsel. However, the cases cited in the above footnote are almost uniform in placing some limits on the general policy of complete enforcement of the testator's expressed intent. The following quotation from *Upham v. Plankington* suggests the nature of such limitations:

“Every person of mature years and sound mind has a right to make his own will, conformable to statutory regulations designed to safeguard that right and not violating any written or any unwritten law\(^\text{20}\), and to have that will carried out according to his intent.”

The common law policy against allowing testamentary designation of counsel must be considered a part of the unwritten law referred to by the court. In view of the disposition made by the courts of testamentary designations of counsel for executors, it is submitted that the construction of the statute in question should not be affected by the presence of a testamentary designation.

Section 310.25 provides that the counsel designated by the heirs shall handle legal problems for the estate “unless good cause be shown before the court why this should not be done.” What is “good cause” within the meaning of this statute? Judging from the wording of the statute, it seems to have been enacted to give the heirs of a deceased person the power to appoint counsel for the executor in the instances enumerated in the statute. The reason for granting this power to the heirs probably was to give them a chance to appoint a person who will be in a position to protect and look after the interests of the heirs when a firm or corporation is named as executor. It is submitted that the statute should not be construed so as to give this same power to the testator when there is no express language in the statute conferring this power on the testator. It would seem that the public policy against testamentary designation of counsel prevents the testator from appointing counsel for the executor, and section 310.25 prevents the executor from choosing its own counsel when the executor is a firm or corporation. The power to choose counsel is in that instance given to the heirs. A clause in the statute making an exception to this power of the heirs when good cause is shown should not be construed to create a power of testamentary appointment. This argument is given added credence by the canon of statutory interpretation

\(^{19}\) Will of Dardis, 135 Wis. 457 at 463, 115 N. W. 332 (1908); Will of Rice, 150 Wis. 401, 136 N. W. 956 (1912); *Upham v. Plankington*, 152 Wis. 275, 140 N. W. 5 (1913); Will of Schaefer, 207 Wis. 404 at 409, 241 N. W. 382 (1932); Will of Stack, 217 Wis. 94 at 98, 258 N. W. 324 (1935).

\(^{20}\) Italics the author's.
that all statutes in derogation of the common law shall be strictly construed. The clause creating the "good cause" exception to the power of the heirs to appoint counsel was probably intended to cover instances where the counsel appointed by the heirs was not capable of handling the position to which he was appointed.

If the legislature enacted 310.25 for the sole purpose of preventing a monopoly of the probate business by counsel appointed by corporate executors, an argument might be made that the testamentary designation of counsel is "good cause" within the meaning of the statute, and its acceptance would allow counsel designated by the testator to assert a right to act as counsel for the estate. This argument is subject to the weakness that testamentary designation even when found in a mutual, reciprocal will made pursuant to a contract vests no rights in the designated counsel. If the counsel is given no right by the designation in the will, it is difficult to see how a statement in a statute, the meaning of which is not clear, can be construed, in derogation of a well established common law principle, to give the designated counsel any rights.

It might be argued that 310.25 violates the Fourteenth Amendment to the Federal Constitution by depriving persons of liberty and property without due process of law. In the instances where the statute is operative, it deprives the testator of the power to appoint counsel for the executor; it deprives the designated counsel of the right to act as counsel; and it imposes on the executor a counsel chosen by the heirs of the testator. To answer this argument as far as the testator and the person designated as counsel are concerned, we need only consider that at common law the testator had no power to appoint counsel, and the counsel obtained no right from such appointment. An executor is free to accept or decline his appointment as executor. This freedom of choice by the executor would seem to refute any claim that his liberty has been invaded by the statute. Furthermore, the legislature is entitled to adopt reasonable regulations governing the administration of estates. Section 310.25, it is submitted, is a reasonable legislative regulation imposed on corporate executors for the protection of the interests of the heirs, and to prevent a monopoly of the probate business by counsel appointed by such executors.

In summary then, testamentary designation of counsel is generally of no legal effect. The executors and administrators are free to choose their own counsel in the absence of contrary legislation. In Wisconsin when the executor or administrator is a firm or corporation, the heirs of the deceased shall, as provided in 310.25, choose the counsel who will perform the legal services for the estate "unless good cause be shown

21 Re Estate of Lachmond, 170 Pac. (2d) 748 (Ore., 1946).
before the court why this should not be done." It is suggested the good cause referred to in the statute includes only cases where the counsel appointed by the heirs is incapable of performing the legal services required by the estate.

—Edmund W. Powell