Wills: Legacy or Devise to a Creditor

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The *Kunsman* case was decided in 1936. The holdings of the South Carolina Supreme Court\(^{25}\) and of other supreme courts\(^{26}\) declaring the Fair Trade Act unconstitutional are more recent. However, in 1955, the California Supreme Court was again confronted with a similar case regarding the Fair Trade Act.\(^{27}\) While noting that several states had held these acts unconstitutional, the court reaffirmed the position that was taken in the *Kunsman* case and aligned itself with the majority of state supreme courts and the federal courts. The court said:

> "the statute has been the established law of the state for nearly twenty years and in the orderly administration should be deemed controlling until otherwise provided by duly enacted legislation."\(^{28}\)

The positions taken by the South Carolina and California Supreme Courts are generally representative of those taken by other courts that have decided this constitutional question. The result reached by the South Carolina Court\(^{29}\) is that the general welfare of the people is not benefited by restricting competition on the retail level. The court felt that the act imposes an unwarranted burden upon a fundamental concept of free enterprise. On the other hand, the California Supreme Court reaches an opposite conclusion.\(^{30}\) Its feeling is that there are certain retail marketing practices that are so detrimental to the public interest that they require governmental intervention. The Fair Trade Act prevents these evils and still allows "fair and open" competition on the retail level.

The future of Fair Trade legislation is uncertain. Statutes that were passed twenty years ago to aid fair trade on the retail level are now being struck down as instruments of unfair trade. Perhaps the marketing evils they were supposed to prevent no longer exist or are not present in a period of economic expansion. At any rate, court decisions during the past five years have strongly indicated that Fair Trade Acts are not acceptable in their present form and unless they are changed they will be struck down.

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**WILLS: LEGACY OR DEVISE TO A CREDITOR**

* A owes *B* $100. When *A* dies there is a provision in his will bequeathing a $100 legacy to his creditor *B*. Can *B* as a creditor-legatee take his benefits under *A*'s will and in addition recover against *A*'s estate for the obligation owed to him by *A* while living?

In answering this question the ultimate issue is whether the legacy is to be deemed in satisfaction of *A*'s obligation to *B* or whether it is to be deemed a separate bounty. If the legacy is regarded as a bounty then *B* may take his benefits under *A*'s will and also recover as a creditor against *A*'s estate. However, if the legacy is regarded as a satisfaction of *A*'s obligation then *B* must elect between prosecuting his claim against *A*'s estate or taking under *A*'s will. In the latter case election necessarily follows because the testator, by intending to satisfy his obli-
gation by means of a legacy, has not given B a new and separate right but only an alternative one. The doctrine of election is not germane to this note, but it is often intermingled with the problem of satisfaction.

It is a well-settled and undisputed rule of law that in interpreting wills the central issue is always what was the intention of the testator. If the testator expresses his intent that the legacy is to be deemed in satisfaction of his obligation or if it is to be a bounty, then this intent will control. There is no need to apply rules of construction or presumptions. Therefore, it is only where the testator fails to clearly manifest his intent that recourse must be made to rules of law in determining the effect to be given bequests to creditors.

In 1714, the case of Talbot v. Duke of Shrewsbury laid down what is today termed the general rule. It may be stated thusly: A legacy to a creditor of the testator, which legacy is equal to or greater in amount than the indebtedness due the creditor, in the absence of anything to indicate a contrary intention, will be presumed to have been intended as a satisfaction of the obligation. Accordingly, B, in the hypothetical fact situation above, cannot take as both legatee under A's will and as creditor against A's estate. He could recover $100 as legatee or as creditor, but not both.

However, this is not the end of the problem. While the general rule is an old one and is still deemed to be in existence, it actually has been given little vigor as a practical matter by most courts. In 1895 an English court of Chancery said in speaking of the general rule:

"But no sooner was it established then learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it."

And in 1917 a Pennsylvania court said:

"The rule itself is not founded in reason, and often tends to defeat the bounty of testators, and able chancellors have thought it more agreeable to equity to construe a testator to be both just and generous, where the interests of third parties are not effected. And courts of justice will now lay hold of slight circumstances to get rid of the rule."

Consequently, because of the courts' dissatisfaction with the general rule along with their disposition to evade its application through various exceptions, there has developed what is sometimes spoken of as the modern rule, to wit: It must appear from the will that the legacy was intended as satisfaction of the obligation, and no presumption to that effect should be indulged. The modern rule is based on the common sense approach that a testator best knows his intention and if he intends satisfaction of an obligation by a legacy, he should and can easily so state. Therefore, under the modern rule the legacy is deemed to be a bounty

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1 70 Cal. 424, 12 Pac. 392 (1886).
2 Atkinson, Wills § 146 (2d ed. 1953).
4 In re Steinkraus' Estate, 233 Wis. 186, 288 N.W. 772 (1939).
5 Re Horlock, 1 Ch. 516 (1895).
6 Id. at 518.
8 Id. at 60.
10 Lopez v. Lopez, 96 So. 2d 462 (Fla. 1957).
rather than satisfaction. Accordingly, B, in the hypothetical above, can take as both legatee under A's will and as creditor against A's estate.

Though the modern rule is gradually gaining acceptance with the courts, there are still many jurisdictions which adhere to the old general rule. In these states most of the courts have attempted to take the particular case out of the field of the operation of the general rule through various exceptions. These exceptions have been based on "slight circumstances" which the courts have used to show an intent on the part of the testator, namely, that the testator intended the legacy as a bounty and not as satisfaction. This approach to the problem of satisfaction is quite similar to that followed by those courts which adhere to the modern rule. They regard the situations which were exceptions to the old rule merely as part of the facts and circumstances to be considered in determining the intention of the testator.

A few examples will suffice to illustrate what "slight circumstances" have been held sufficient to create an exception to the general rule. It has been held that the legacy is not to be presumed as satisfaction of the testator's obligation, by the courts who follow the general rule, in the following instances: where the legacy is given for an express purpose other than in payment of the obligation; where the legacy is contingent; where the bequest and the obligation are of a different nature, as in the case where the obligation is a money debt and the bequest is in the form of some other kind of property; where the will contains an express direction for the payment of the testator's debts. Some courts have found an exception to the general rule where there is a difference in the time of payment, that is, the legacy is to be paid upon probate of the will while the obligation may not be due for some time in the future. Some courts look to the obligation itself to find an intent on the part of the testator to give a bounty, as in the case where the debt is unliquidated; where the debt was contracted for after the making of the will; where the obligation is owed by the testator in a trust or representative capacity.

The most recent case in point is the Florida case of Lopez v. Lopez. The will in this case bequeathed to the testator's widow certain properties, bank accounts, and other items. It also provided for the prompt payment of all the testator's just debts and payment of all inheritance taxes from the residuary estate. The residue of the estate was left to the testator's three sons. The will did not indicate expressly or impliedly whether the testator intended that the provisions were to be in lieu of or in satisfaction of any claims which the three sons might have against his estate. The testator, while living, had acted as trustee for his sons in regard to the income from certain stock and real property. While in such capacity he had commingled, with his own assets, the trust funds received by him. The issue in the

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12 Atkinson, Wills § 138 (2d ed. 1953).
14 Thompson v. Wilson, 82 Ill. App. 29 (1898).
15 Lopez v. Lopez, 96 So.2d 462 (Fla. 1957); 57 Am. Jur., Wills § 1575 (1948).
16 Re Hill's Estate, 23 Iowa 189, 102 N.E. 770 (1912).
18 Glover v. Patten, 165 U.S. 394 (1879).
21 96 So. 2d 462 (Fla. 1957).
case was whether the testator by making his sons residuary legatees intended that such legacies were to be in satisfaction of any claims they might have against his estate. The court applied the modern rule, and the sons were not required to elect between taking under the provisions of their father's will and maintaining their separate action against his estate.

How has California dealt with this problem? The first case to consider it seems to be Smith v. Furnish\textsuperscript{22} where the bequest of $300 was to Mrs. Smith "in consideration and in payment for her kind care and attention during my last sickness."\textsuperscript{22} The court held that the testator's intent was clearly manifested to the effect that the bequest was to be in satisfaction of his obligation.

In 1918, in White v. Derring,\textsuperscript{24} a California court for the first time generally discussed the problem of a devise to a creditor. The court quoted Lord Eldon in La Sage v. Coussmaker:\textsuperscript{25}

\begin{quote}
"A legacy was never deemed a satisfaction for a legal demand when that demand was unliquidated at the time of the legacy given, nor where it was given before the time when the demand accrued, or the debt was contracted, unless it was expressly said in the will that it should be satisfied."
\end{quote}

The court distinguished the Smith case by saying that the testator's intent was clear there while in this case it was not. The court went on to follow the rule laid down in the New York case of Sheldon v. Sheldon,\textsuperscript{27} that:

\begin{quote}
"A legacy to a creditor is not to be deemed in satisfaction of his debt, unless so intended by the testator."
\end{quote}

The court further added that this intention must be expressed in unmistakable language and appear from the will construed as a whole. It was held that the creditor-legatee was not required to make an election between his rights as legatee and creditor.

Between 1917 and 1950 there were no cases litigated on the problem of a legacy to a creditor. Then in 1950 the most recent California cases in point were decided. In the case of Merril v. Dustman,\textsuperscript{29} the testatrix made a contract with her housekeeper, whereby said testatrix promised to bequeath $1000 and certain other properties to her housekeeper if the housekeeper would care for the testatrix for the remainder of the testatrix's life. The testatrix in her will bequeathed to the housekeeper precisely the same gift as she had promised. The court held that the housekeeper could not recover against the testatrix's estate for the reasonable value of her services since she had already accepted her benefits under the will. The court said that the true rule is that a contract and a will are to be considered together to ascertain whether the will constitutes performance of the contract.

In the case of Taylor v. George\textsuperscript{30} the will recited that no provision was made for the testator's son because he was the named beneficiary of an insurance policy on the testator's life in an amount sufficient for his needs so far as any contribu-

\textsuperscript{22} 70 Cal. 424, 12 Pac. 392 (1886).
\textsuperscript{23} Id. at 427, 12 Pac. at 394.
\textsuperscript{24} 38 Cal. App. 433, 177 Pac. 516 (1918).
\textsuperscript{25} 170 Eng. Rep. 323 (1 Esp. 188) (1794).
\textsuperscript{26} Id. at 323.
\textsuperscript{27} 133 N.Y. 1, 30 N.E. 730 (1892).
\textsuperscript{28} Id. at 4, 30 N.E. at 730.
\textsuperscript{29} 97 Cal. App. 2d 473, 217 P.2d 998 (1950).
\textsuperscript{30} 34 Cal. 2d 552, 212 P.2d 505 (1950).
tion from the testator was concerned. The testator designated the insurance pro-
ceeds as the fund out of which his obligation under a divorce decree to support
his son was to be met. The proceeds of the insurance policy, of which the son was
the beneficiary, exceeded in amount the future support payments provided for by
the divorce decree. The court said:

"... The fact that at the testator's death the child [testator's son] was found to be the
beneficiary, when considered in the light of the terms of the will, affords a reasonable
basis for the conclusion that the provision for insurance was intended as fulfillment
of the obligation to support."

In both these cases the attitude of the court in deciding the question of whether
a legacy to a creditor of the testator is to be deemed in satisfaction of his obliga-
tion apparently is that no presumption of intent to satisfy the obligation will be
indulged in. But rather that the court would look to all the facts and surrounding
circumstances and to the will as a whole, to determine the true intention. There-
fore, it seems that the prevailing rule in California today is the modern rule as
expressed in the White case.

Thus, the primary consideration, in cases dealing with the question of whether
a legacy to a creditor of the testator is to be deemed in satisfaction of the testator's
obligation or whether it is to be deemed as a separate bounty, is the intention of
the testator. It must be borne in mind that presumptions and rules of construction
are only devices to assist the court. The general rule that a legacy to a creditor
will be presumed to be in satisfaction of the testator's obligation has been stricken
with so many exceptions, and the courts have been so anxious to apply them, that
it would seem that the continued recognized existence of the rule would tend to
hinder rather than assist. The writer feels that the better view, as adopted by the
Florida court in the Lopez case, would be to drop the exception-riddled general
rule entirely in favor of the modern rule.

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31 Id. at 558, 212 P.2d at 508.