ABSOLUTE POWER TO DISPOSE—JUDICIAL RESTRICTIONS

St. Louis Union Trust Co. v. Morton, 468 S.W.2d 193 (Mo. 1971)

I. Powell Morton devised to his wife a life estate in certain real property in Georgia. To the life estate, the testator superadded an "absolute power to dispose."[1] There followed a gift over to the remaindermen if the testator's wife had not disposed of the property before her death.[2] During her life, the life tenant Mrs. Morton sold the Georgia property and with the proceeds created a revocable trust for the benefit of herself and her own relatives. After Mrs. Morton's death, the trustee[3] sought an interpretation of her husband's will to determine who should prevail as between the beneficiaries under the wife's trust and the remaindermen[4] under her husband's will. The court, thus faced the question of whether Mrs. Morton, as life tenant with an absolute power to dispose, had disposed of the property in such a manner as to cut out the remaindermen under her husband's will. *Held:* the conversion of the real property into proceeds by the life tenant did not give the life tenant a fee simple interest; and the depositing of the proceeds in a trust did not prevent them from passing to the remaindermen at the death of the life tenant.[5]

The absolute power to dispose[6] is not an estate;[7] it is a power

---

1. St. Louis Union Trust Co. v. Morton, 468 S.W.2d 193, 194 (Mo. 1971). The pertinent section of I. Powell Morton's will is the following:

> Item One(b) Any interest which I may own at the date of my death in real property located in Clarke County, Georgia, I devise to my said wife, if she survive me, for her life. I give to my said wife the absolute power to dispose of said real property during her life. Upon her death, if she has not disposed of said real property, or upon my death if she does not survive me . . . I give said real property per capita to those persons named at the end of Item Four(b)(3) who are then living.

2. *Id.*

3. The trustee here referred to is the trustee for the revocable trust which the life tenant Mrs. Morton established with the proceeds from the Georgia property.

4. The remaindermen, the defendants in the present action, are I. Powell Morton's nieces and nephews, named as the ultimate beneficiaries in the residuary clauses of his will.

5. St. Louis Union Trust Co. v. Morton, 468 S.W.2d 193, 198 (Mo. 1971).

6. The word "dispose" is a rather comprehensive term. In addition to the power to sell, courts have, at times, defined "dispose" to include such powers as to mortgage, to lease, to partition, to will, to donate, etc.; *see, e.g.* Phelps v. Harris, 101 U.S. 370,

which the testator superadds to the basic estate devised.[8] It can be added to a life estate or an estate for years.[9] When added to a life estate, the absolute power to dispose, which always includes the power to convey a fee simple,[10] presents the problem of whether the addition of the power is so significant as to change the life estate into something else.[11] It is well-established, however, that the addition of the power does not destroy the life estate,[12] nor does it enlarge the life estate into a fee.[13] About five jurisdictions treat a life estate with a power to convey a fee as an estate in fee simple for certain limited purposes, such as for the benefit of creditors, purchasers, and encumbrancers.[14]

Although the addition of the power to dispose does not enlarge the life estate, it may be considered as evidence of the testator's intent

---

380 (1879), in which it is said, "[t]he expression to 'dispose of' is very broad, and signifies more than to sell;" courts generally use the words "dispose" and "consume" and "invade" interchangeably. *See, e.g.*, Bollenger v. Bray, 411 S.W. 65, 69 (Mo. 1967).

7. RESTATEMENT OF PROPERTY § 111 (1936); Casner, *Legal Life Estates and Powers of Appointment Coupled With Life Estates and Trusts*, 45 NEB. L. REV. 342 (1966), in which Professor Casner presents a valuable discussion of the advantages of creating a legal life estate with remainders over rather than putting the land in trust, with income drawing for life to the intended beneficiary and remainders over.

8. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 874 (2d ed. 1956) (hereinafter cited as SIMES & SMITH); Note, *The Power to Consume*, 36 N.Y.U. L. REV. 218 (1961).

9. RESTATEMENT OF PROPERTY § 111 (1936).

10. *See* Commercial Bank v. Sutterwhite, 413 S.W.2d 905 (Tex. 1967); SIMES & SMITH § 892 at 361:

> A power to sell is commonly held not to include a power to mortgage; nor will it include a power to make a gift. But, of course, no hard and fast rules are applied to determine such questions.

11. SIMES & SMITH § 893; Swenson, *The Iowa Repugnancy Rule in Testamentary Dispositions*, 41 IOWA L. REV. 601 (1955-56).

12. Graham v. Stroh, 342 Mo. 686, 117 S.W.2d 258 (1938); *see* note 13 *infra*.

13. St. Louis Union Trust Co. v. Morton, 468 S.W.2d 193, 195 (Mo. 1971); Van Every v. McKay, 331 Mo. 355, 53 S.W.2d 873 (1932); Hammer v. Edwards, 327 Mo. 281, 293, 36 S.W.2d 929, 934 (1931); Grace v. Perry, 197 Mo. 550, 95 S.W. 875 (1906); 1 AMERICAN LAW OF PROPERTY § 2.15 (A.J. Casner ed. 1952); SIMES & SMITH § 1488 at 378:

> The authorities are overwhelmingly in favor of the proposition that an unlimited power to dispose of the fee or absolute interest when coupled with a life estate does not enlarge the life estate to a fee or absolute interest, and the remainder which follows it is valid.

14. ALA. CODE tit. 47, § 76 (1958); *see* N.Y. REAL PROP. § 378 (McKinney 1968); OKLA. STAT. ANN. tit. 60, § 262 (1971); S.D. COMPILED LAWS ANN. 43-11-18 (1967); WIS. STAT. ANN. § 232.08 (1957).

to devise a fee in situations where the testator's language does not clearly indicate the desire to create a life estate.[15] Courts have judicially fashioned certain constructional preferences when faced with the ambiguity the gift of an absolute power to dispose can present: (1) when the initial gift of the fee is clear, the addition of the power will not cut the fee down;[16] (2) when the initial devisement of the fee is clear, the addition of a power to dispose *and* an express provision for the remainder will not destroy the fee;[17] (3) when the initial gift is general and there is an express creation of the power to dispose and no gift over, courts will find a fee;[18] (4) *but* when the initial gift is general and there is a subsequent gift over of what remains, the immediate devisee will take a life estate with a power to dispose (even when there is no express mention of the power to dispose).[19] These constructional preferences, however, must be treated with caution, for as the court in *Shelton v. Shelton*[20] noted, "the language of one will is rarely, if ever, like another and frequently a slight difference in the words used calls for different constructions of testamentary provisions similar in other respects."[21] The power to dispose can be created

15. Giroir v. Dumesnil, 248 La. 1037, 184 So. 2d 1, 6-7 (1966); Ironside v. Ironside, 150 Iowa 628, 633, 130 N.W. 414, 416 (1911); SIMES & SMITH § 893.

16. Glidewell v. Glidewell, 360 Mo. 713, 718, 230 S.W.2d 752, 755 (1950), after discussing several previous cases, the court concluded, "[t]he cases cited . . . reaffirm the general uncontraverted rules that 'a limitation over after a devise of the fee is void' and 'a devise of the fee cannot be cut down by subsequent ambiguous language.'" Vaughan v. Compton, 361 Mo. 467, 235 S.W.2d 328 (1951). *See* SIMES & SMITH § 893 and §§ 1488-90 (and cases collected therein).

17. *Id.*

18. Vaughn v. Compton, 361 Mo. 467, 235 S.W.2d 328 (1951). *See* SIMES & SMITH § 893 and §§ 1488-90 (and cases collected therein).

19. Shelton v. Shelton, 348 Mo. 820, 155 S.W.2d 187 (1941); Van Every v. McKay, 331 Mo. 355, 53 S.W.2d 873 (1932); Burnet v. Burnet, 224 Mo. 491, 148 S.W. 872 (1912); Armor v. Frey, 226 Mo. 646, 126 S.W. 483 (1910). *See* SIMES & SMITH § 893 and §§ 1488-90 (and cases collected therein).

20. Shelton v. Shelton, 348 Mo. 820, 155 S.W.2d 187 (1941).

21. *In re* White's Estate, 43 Misc. 2d 414, 251 N.Y.S.2d 87, 88 (1964) (creation of power to dispose by implication); Bowman v. Bowman, 3 Ohio Misc. 161, 210 N.E.2d 920, 924 (1965) (express creation of power to dispose); Burnet v. Burnet, 224 Mo. 491, 148 S.W. 872 (1912) wherein the court rather succinctly states that the power of disposal can arise either by implication or expressly:

> The principle to be extracted from these cases is that where a life estate is created whether by implication only or in express words, with a remainder over, the power of the life tenant to defeat the remainder depends upon the exercise of a superadded power of disposition expressly or impliedly given by the will . . . .

SIMES & SMITH §§ 892-93.

either expressly or by implication. When expressly created, the following language is often employed: "all my estate . . . with right and power in him to sell . . . or dispose,"[22] "my estate . . . with full and complete capacity, with full and complete discretion capacity, authority and power . . . to sell, grant, convey, and deliver,"[23] and "all my estate . . . real and personal or mixed . . . to be empowered to sell or dispose of it at pleasure."[24] When created by implication, the pregnant phrase is usually found in an item providing for a gift over of the undisposed portion of the testator's estate: "upon the death of the survivor of us . . . if there shall be any property remaining undisposed of . . . we give. . . ."[25]

The power to dispose may be either absolute or limited.[26] Once courts have found a power to dispose, they closely scrutinize the testator's language to determine if he has conditioned or limited the exercise of the power. Courts generally will construe the power as limited if there is any language at all which will support that construction.[27] The power to dispose has been held to be limited by such language as "for her proper support and maintenance,"[28] "to support in the manner . . . she is accustomed,"[29] and "as may be necessary."[30] The courts reason that the testator primarily intended the immediate devisee to take a life interest and that the power to dispose was superadded only to meet any problem which might arise if the income from the life interest was inadequate to support the life tenant; and if the testator wished the life tenant to have an unlimited power of disposal, he would not have created a life estate with an explicit gift over. The judicial test applied to determine if the life tenant has exercised

22. Morisseau v. Biesterfeldt, 345 S.W.2d 210 (Mo. 1961).

23. Bollenger v. Bray, 411 S.W.2d 65 (Mo. 1967).

24. Redman v. Barger, 118 Mo. 568, 24 S.W. 177 (1893).

25. Glidewell v. Glidewell, 360 Mo. 713, 230 S.W.2d 752 (1950).

26. *See, e.g.*, Dekker v. United States, 245 F. Supp. 255 (S.D. Ill. 1965) (creation of absolute power to dispose); Osborn v. Morrison, 132 Ga. 169, 132 S.E.2d 58 (1963) (creation of limited power to dispose).

27. *See* Bollenger v. Bray, 411 S.W.2d 65 (Mo. 1967); Griffin v. Nicholas, 224 Mo. 275, 123 S.W. 1063 (1909) (dissenting opinion), *later adopted en banc*, Cook v. Higgins, 290 Mo. 402, 235 S.W. 807 (1921).

28. Flesher v. United States, 238 F. Supp. 119, 121-22 (N.D. W.Va. 1965); *See also* Griffin v. Nicholas, 224 Mo. 275, 123 S.W. 1063 (1909) (dissenting opinion).

29. Bollenger v. Bray, 411 S.W.2d 65 (Mo. 1967).

30. Kern v. Kern, 100 Ohio App. 327, 331, 136 N.E.2d 675, 679 (1955); Morisseau v. Biersterfeldt, 345 S.W.2d 210 (Mo. 1961).

his power in accordance with the limitations cited above is *whether there was a reasonable necessity of the life tenant to justify invasion of the corpus of the estate.*[31] The test implies that before a conversion of real property will be allowed, personalty and income must be insufficient.

An absolute power to dispose will result when there is a gift of the power with no subsequent limiting language.[32] Generally, the holder of an absolute power of disposal can dispose of the property as he pleases;[33] but many jurisdictions deny him the following rights: (1) to give away the property;[34] (2) to make a testamentary disposition;[35] and (3) to waste or squander the property for the purpose of defeating the remainderman's interest.[36] The tests, which courts apply to determine if the absolute power to dispose was properly exercised, vary greatly. Some courts apply a "reasonable necessity test," similar to that used to evaluate a limited power of disposal, while other courts apply a mere "good faith" test.[37]

When the life tenant with absolute power of disposal exercises his power by sale, the life tenant's interest in the proceeds is not enlarged into a fee.[38] He continues to have a life interest only, but his life in-

31. Bollenger v. Bray, 411 S.W.2d 65 (Mo. 1967).

32. The cases cited in notes 28-30 *supra* demonstrate that courts prefer to find a limited power to dispose and will give full force to any language which might be interpreted as limiting the exercise of the power. After all, an absolute power to dispose is a rather free-wheeling power and can lead courts into many rather tenuous distinctions.

33. Many courts, which have given extended analysis to the absolute power to dispose, have been primarily concerned with the tax consequences of such a power for the marital deduction under INT. REV. CODE OF 1954 § 2056. For a valid marital deduction, "the power (to dispose) must include the right to transfer the property absolutely with or without consideration, that is, both the right to sell and to donate, in complete derogation of the rights of the remainderman," Burnet v. United States, 314 F. Supp. 492 (D. S.C. 1970).

34. *See* Burnet v. United States, 314 F. Supp. 492, 495 (D. S.C. 1970) (see especially footnote 3 of the court at 495); Burnet v. Burnet, 244 Mo. 491, 506, 148 S.W. 872, 877 (1912).

35. *See* note 34 *supra*; *In re* Western Pennsylvania Nat'l Bank, 424 Pa. 161, 225 A.2d 676 (1967).

36. Anderson v. Kennon, 353 S.W.2d 241 (Tex. Civ. App. 1962).

37. *In re* Estate of Gramm, 420 Pa. 510, 218 A.2d 342 (1966); United States v. Lincoln Rochester Trust Co., 297 F.2d 891 (2d Cir. 1962); *In re* Koos' Estate, 269 Wis. 478, 69 N.W.2d 598 (1955).

38. Bridges v. First Nat'l Bank of Dallas, 430 S.W.2d 376, 381 (Tex. Civ. App. 1968); *In re* Estate of Gramm, 420 Pa. 510, 218 A.2d 342 (1966); Morisseau v. Biesterfeldt, 345 S.W.2d 210 (Mo. 1961); Guthrie v. Crews, 286 Mo. 438, 229 S.W. 182 (1920).

terest with the power to dispose will now be in proceeds rather than realty. If the life tenant further disposes of the proceeds to purchase property, the remainderman's interest will attach to whatever property is purchased with the proceeds. Numerous cases have recognized that a change in the form of the estate will not enlarge the life tenant's interest.[39] Thus whether the life tenant uses the proceeds to purchase land, paintings, or books, the remainderman's interest will attach to the property. The court in *Guthrie v. Crews*[40] recognized that to allow a life tenant, by an exercise of the power, to defeat the interest of the remainderman would be in blatant disregard of the testator's provision that the life tenant be only a life tenant and that if there was a residue, it should go to his *chosen* remainderman.

A few courts, however, have provided examples of positive acts by which the life tenant with an absolute power to dispose could defeat the remainderman's interest in the proceeds: (1) The life tenant could consume the proceeds by using them for his own maintenance even in situations where the life tenant has other funds which more than adequately meet his needs.[41] Thus if the life tenant carefully segregates his own funds from the proceeds, he can extinguish the remainderman's interest by consuming the proceeds, while reserving his other funds for any of the purposes for which the use of the proceeds is prohibited;[42] (2) The life tenant could use the proceeds to purchase life insurance or to buy U.S. Savings Bonds, as was done in *Edds v. Mitchell.*[43] The

39. Olsen v. Weber, 194 Iowa 512, 515, 187 N.W. 465, 466 (1922) (life tenant sold the land and used the proceeds to purchase other land; then exchanged newly purchased land for other land; *held*, remainderman's interest attached to each piece of property acquired); *In re* Beaty's Estate, 172 Iowa 714, 715, 154 N.W. 1028, 1031 (1915) (a change in the form or identity of the property could have no effect to enlarge or change the life tenant's title thereto); Anderson & Co. v. Hall's Adm'r & Co., 80 Ky. 91 (1882) (remainderman allowed to follow proceeds from sale of realty into other realty purchased with the proceeds); *see* Annot., 158 A.L.R. 480 *et seq.* (1945).

40. Guthrie v. Crews, 286 Mo. 438, 229 S.W. 182 (1920).

41. *In re* Estate of Gramm, 437 Pa. 381, 263 A.2d 445 (1970); Nielson v. Duyvejonck, 94 Ill. App. 2d 224, 236 N.E.2d 743, 746 (1968); C.C. Young Memorial Home for Aged Women v. Nelms, 223 S.W.2d 302, 307 (Tex. Civ. App. 1949).

42. This may seem like a gimmick which the life tenant indulges in to defeat the remainderman's interest. And so it is. But when the testator chooses to add the absolute power to dispose to a life estate, he is bestowing on the life tenant such a broad power that courts can be expected to have difficulty in imposing limits when the testator himself has chosen to make the power unlimited.

43. Edds v. Mitchell, 143 Tex. 307, 320, 184 S.W.2d 823, 830 (1945):

A life insurance policy for the benefit of another is perhaps the best illustra-

remainderman's interest attaches to whatever property is purchased with the proceeds, but here the very property purchased creates interests which ultimately defeat the remainderman's gift. For example, the remainderman has an interest in the life insurance policy while the life tenant is alive. But at the life tenant's death, the beneficiary under the policy succeeds to the benefits of the policy. Thus, the remainderman's interest in those proceeds which were used to pay the premiums on the policy has been extinguished;[44] or (3) The life tenant may make a purchase such as was made in *In re Smith's Will*,[45] in which the life tenant used the proceeds to purchase diamonds for personal adornment rather than investment. The court found that the proceeds had changed species to such an extent that the remainderman should no longer have the right to trace them.[46] The life tenant will thus defeat the remainderman's interest if at his death he has consumed the proceeds, left no property which stands in place of the proceeds, or has used the proceeds to purchase property such as insurance policies which create indefeasibly vested interests in third parties at the life tenant's death.

In *St. Louis Union Trust Company v. Morton*, there was an express creation of an absolute power to dispose.[47] The court acknowledged that Missouri cases had developed the rule that the conversion of real property into proceeds does not enlarge the life tenant's interest. The life tenant will *not* hold the proceeds in fee unless the testator further provided that he should so hold. The *Morton* court, finding no such provision, concluded that the proceeds, even though deposited in trust, belonged to the remaindermen.[48]

> tion of a contract for the benefit of a donee beneficiary. When the insurance is effected in favor of a third person, his rights under the policy vest immediately, and they can be affected or terminated, without his consent, only in the manner provided by the policy or by the law. If the policy gives the insured the power to change the beneficiary, the right of the beneficiary named in the policy is not indefeasible but it is nevertheless a vested right.

The court goes on to note that when the person whose life is insured dies, the rights of the beneficiary under the policy are indefeasibly vested.

44. *Id.* By this life insurance "ruse" the life tenant has diverted proceeds from the remainderman and at the same time made a testamentary disposition of the proceeds to the life tenant's own chosen beneficiaries.

45. *In re* Smith's Will, 231 App. Div. 277, 247 N.Y.S. 263 (1931).

46. *See* Annot., 17 A.L.R.2d 85 (1951).

47. *See* note 1 *supra.*

48. 468 S.W.2d at 198.

The *Morton* court verged on a novel question which apparently neither the court nor the attorneys felt the necessity to discuss: *whether the life tenant had exercised her absolute power to dispose in such a manner by the creation of the trust as to defeat the remaindermen's gift?* The *Morton* court perfunctorily dismissed the issue by stating that the absolute power to dispose entitled the holder only to *use* the proceeds. The fact that Mrs. Morton *used* the proceeds to create a revocable trust did not in any way affect the remainderman's interest. But in so holding the court may have disregarded a legitimate exercise of the power to dispose. Perhaps Mrs. Morton felt the need to put her money in trust in order to provide wisely for herself and to care for those of her relatives to whom she felt a responsibility. Perhaps there were certain tax advantages to creating the trust. Thus, the trust may have fulfilled a legitimate objective of Mrs. Morton's financial plans while she was alive. And at her death, the rights of the other trust beneficiaries should have become indefeasibly vested since the power to revoke the trust was personal to Mrs. Morton and did not pass to her successors at death.[49] Under the rationale outlined in *Edds v. Mitchell*,[50] Mrs. Morton had created indefeasibly vested rights to the proceeds in third parties, thus effectively disposing of the proceeds in derogation of the rights of the remaindermen under her husband's will. But neither the Missouri Court in *Morton* nor the Pennsylvania court in *In re Estate of Gramm*,[51] a case similar to *Morton*, considered such an argument since it was not called to their attention.

The testator in creating an absolute power to dispose gives the life tenant wide discretion in consuming the life estate. It seems that when the life tenant has determined that the creation of a trust out of the proceeds serves a useful purpose, the courts should be reluctant to disregard her judgment unless it is clearly apparent that the life tenant was acting in bad faith and was actually attempting to destroy the remainderman's interest. In prohibiting *inter vivos* gifts of the proceeds, testamentary gifts, and waste,[52] the courts may conclusively presume that the life tenant is attempting to extinguish the remainder, but in all other cases, the courts should be careful to respect the wide

49. G. BOGART, LAW OF TRUSTS 385 (4th ed. 1963).
50. *See* note 43 *supra.*
51. *In re* Estate of Gramm, 420 Pa. 510, 218 A.2d 342 (1966).
52. *See* notes 32-37 *supra.*

discretion the testator has placed in the life tenant by making the power to dispose *absolute.* In *Morton,* the trust may have been merely a scheme through which Mrs. Morton was attempting to give the property to her own relatives, but the court should have, at least, considered the possibility that the life tenant was properly exercising her discretion.