TRUSTS AND WILLS

SUPREME COURT REVIEW

WILL CONSTRUCTION

Page v. Buchfinck[1] was appealed on the issue of whether the will of Alven Evans created a precatory trust over personal property devised to his wife. The court rejected arguments for a precatory trust and thereby clarified constructional rules.

> Alven Evans' will contained the following provisions:
> Item Fourth: I make this my last will and testamony [sic] (as shown herein) upon the *hope, desire and belief* that my beloved wife will at her death leave all her property to our said five children share and share alike.
> Item Fifth: All the rest, residue and remainder of my property, if there be any, I give bequeath and devise unto my said five children, share and share alike . . . .[2]

Alven died in 1940 and was survived by his wife, Elizabeth, and five children. Two of the children, Jena and Alta, predeceased their mother, Elizabeth, who died in 1972. Elizabeth left all of her property to her surviving children. The plaintiffs, children of Jena and Alta, argued that the language of Alven's will created a precatory trust and thereby prevented Elizabeth from limiting her bequest to her surviving children.[3]

The court rejected the plaintiffs' theory and held Alven had not intended to create a precatory trust. In previous cases the court recognized that precatory words[4] could operate to create a trust even when a bequest is given in fee.[5] The court in this case clarified itself, holding that a trust is not created if the settlor manifests an intention to impose mere moral obligations.[6] The use of the word desire in Item Fourth was diminished by addition of the words hope and belief.[7] Furthermore, the court noted the prec-

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1. 202 Neb. 411, 275 N.W.2d 826 (1979).
2. *Id.* at 416-17, 275 N.W.2d at 830 (emphasis supplied).
3. *Id.* at 413, 275 N.W.2d at 828.
4. The term "precatory words" is defined as "[w]ords of entreaty, request, desire, wish, or recommendation employed in wills, as distinguished from direct and imperative terms." BLACK'S LAW DICTIONARY 1340 (4th rev. ed. 1968). The court recognized and employed this definition. 202 Neb. at 419, 275 N.W.2d at 831.
5. 202 Neb. at 419, 275 N.W.2d at 831 (citing Tucker v. Myers' Estate, 151 Neb. 359, 37 N.W.2d 585 (1949)).
6. 202 Neb. at 419, 275 N.W.2d at 831 (citing RESTATEMENT (SECOND) OF TRUSTS § 25, Comment b (1959)).
7. 202 Neb. at 421, 275 N.W.2d at 832. *See* Von Duyne v. Von Duyne, 14 N.J. Eq. 397 (1862); Taylor's Estate, 28 Pa. Dist. 778 (1919).

atory words of Alven's will refer to "her" property.[8] Since Alven lacked the power to dispose of any property owned by Elizabeth and since a definite description of the trust corpus was absent, the trust failed for lack of certainty.[9]

In *Haerry v. Hoffschneider*[10] the supreme court interpreted Nebraska Revised Statute section 30-204[11] and considered the effect of conflicting contract and will terms. The court held that a will executed on the same day as a contract was not intended to waive contractual obligations.

Elsie Hoffschneider willed property to her daughter and deeded separate property to her son. In consideration of the deeded property, the son agreed to pay debts of the estate, thereby preventing encumbrances on property willed to the daughter. The contract, the deed, and the will were all executed on the same day. At the time of probate, the son refused to pay claims against the estate. The daughter brought this action to enforce the contact between Elsie and her son.[12]

The son first argued that the agreement was void because it was a testamentary act but was not executed in compliance with the appropriate wills statute, section 30-204. The court found, however, that since the agreement was bilateral, it could not be testamentary and was not governed by section 30-204.[13]

The son then contended that the will and the agreement were inconsistent and that the will should prevail.[14] The court rejected this argument, recognizing that where a contractual obligation is in existence before a will is executed, the will may effectively waive contractual obligations. In this case the agreement was nonexis-

8. The record established that Elizabeth owned property other than that which she received from Alven's estate and recieved income from social security payments. 202 Neb. at 422-23, 275 N.W.2d at 832.

9. Smullin v. Wharton, 73 Neb. 667, 103 N.W. 288 (1905); RESTATEMENT (SECOND) OF TRUSTS § 25 (1959).

10. 202 Neb. 534, 276 N.W.2d 196 (1979).

11. NEB. REV. STAT. § 30-204 (Reissue 1975).

12. 202 Neb. at 536-37, 276 N.W.2d at 197-98.

13. *Id.* at 538, 276 N.W.2d at 198-99. "A testamentary disposition of property involves the act or will of a single individual . . . . [A] contract is an agreement drawing its binding force from the meeting of the minds of the parties." *Id.*; *see* Brock v. Lueth, 141 Neb. 545, 4 N.W.2d 285 (1942).

14. 202 Neb. at 538, 276 N.W.2d at 199. The will read as follows:

> All estate, inheritance, legacy, succession or transfer taxes (including any interest and penalties thereon) imposed by law with respect to all property taxable by reason of my death, limited however to property passing under this will, shall be paid by my executor out of my general estate as a part of the expenses of administration . . . .

Id.

tent until *after* execution of the will.[15] The court also implied that even if the time sequence could be determinative, revocation of the agreement would be inconsistent with the testatrix's intent as manifested in the three documents.[16]

15. *Id.* at 538-39, 276 N.W.2d at 199.
16. *Id.* at 539, 276 N.W.2d at 199.