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APPOINTMENT OF ADMINISTRATOR C.T.A. IN FLORIDA

THOMAS A. THOMAS* AND TOM MAXEY**

Today in Florida there exists considerable confusion and inconsistency with reference to the order of preference to be accorded in the appointment of an administrator cum testamento annexo. For example, a will recently offered for probate¹ in Florida provided for a testamentary spendthrift trust and nominated a foreign bank and trust company as executor and trustee. Since the foreign executor could not qualify under Florida law,² the Court felt it was required to appoint the spendthrift beneficiary, who was the closest relative of the deceased, as administrator cum testamento annexo in direct violation of the testator's intention. The Court reasoned that since the statute³ provided no specific order of preference in the appointment of administrators cum testamento annexo, the statutory order of preference for intestate administrators⁴ should not only be applicable, but is mandatory.

However, in another case,⁵ which is the only reported case in Florida, a different result was accomplished. In that case, the decedent named alternate executors, neither of whom could qualify. Under the will, there were some beneficiaries sui juris; however, there were many more who were minors. The beneficiaries who were sui juris consented to the appointment of one Achor as administrator cum testamento annexo. Thereafter, the sister of the decedent, and only surviving next of kin, petitioned the County Judge for the revocation of Achor's appointment and for her own appointment in accordance with the Florida Statutes⁶ prescribing the order of preference for the appointment of intestate administrators. In rejecting the contentions of the petitioner, the County Judge held that the statute relied upon by the petitioner was applicable to intestate situations only. On appeal, the Circuit Court through the Honorable Stanley Milledge, in sustaining the lower court, declared:

There is no Statute which prescribes whom the County Judge must prefer in designating a person to execute the testator's testamentary plan, when the person selected by the testator cannot act. In

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1. See *Estate of Leon S. Green*, County Judge's Court, Broward County, Florida, No. 10717 (1956).

2. FLA. STAT. § 732.47 (1955).

3. *Ibid.*

4. FLA. STAT. § 732.44 (1955).

5. *In re Sawtelle's Estate*, Circuit Court, Dade County, Fla., 8 Fla. Supp. 166 (1955).

6. See note 4 *supra*.

such cases, he has a wide discretion. Certainly it is no abuse of discretion to appoint one who is beneficially interested in the estate or one who is requested by one who takes. This is precisely what the legislature provided—the right to handle the fund shall attach to those who will take the fund whether by Will or intestacy.

The obvious disagreement of the courts with reference to this problem can be attributed to the following three circumstances:

- 1) The Florida Supreme Court has not as yet been confronted with the problem.
- 2) Uncertainty of the probate law.
- 3) Refusal on the part of the probate courts to adopt the cardinal rule that the intent of the testator is to be given effect whenever possible.

It is, therefore, the purpose of this article to reexamine the preference sections of our probate code; to ascertain legislative shortcomings and to suggest will clauses designed to eliminate present uncertainties in so far as possible.

THE PREFERENCE PROVISIONS

In determining the proper interpretations of our present Florida Statutes⁸, the common and statute law in effect in England on July 4, 1776 is in full force and effect except as abrogated or modified by statute or constitution.⁹

An examination of the common law clearly demonstrates that the English Courts have consistently held that in testate as well as intestate situations, the right to administration follows the right to property. Thus it is stated in a well known English treatise:¹⁰

A Statute of administration, 21 Hen. 8 c/5, (1529) which still governs grants in respects of deaths before 1926, provided only for intestacy and the refusal of the appointed executor to act. In cases not within the statutes, the Court in making a grant of administration with the Will annexed, was left to the exercise of its discretion in the choice of the administrator. No person had such a legal right to preference as could be enforced by application to the common law courts. The rule of practice in the ecclesiastical court, in such a case, was to consider which of the claimants had the greatest interest in the effects of the deceased, and to grant administration accordingly, if there were no peculiar circumstances. Hence, in all cases where no executor was appointed, or the appointed executor failed to represent the Testator, the residuary legatee, if there was one, was preferred to the next of kin, and en-

7. *In re Sawtelle's Estate*, *supra* note 5 at 166, 167.

8. FLA. STAT. § 732.44 (1955).

9. FLA. STAT. § 2.01 (1955).

10. WILLIAMS, LAW OF EXECUTORS AND ADMINISTRATORS § 335 (13th ed., Perry 1953).

titled to administration with the will annexed. The principle that the right of administration should follow the right of property was so strongly favored by the court that, though in the case of the appointed executor's renunciation the letter of the statute expressly directed the ordinary to grant administration to the next of kin, yet the spirit of the act was held, both by common lawyers and civilians, to exclude the next of kin where there was a residuary legatee, on the ground that the next of kin had no interest.

The residuary legatee or residuary devisee, even where there is no present prospect of any residue, is entitled to administration in preference to the next of kin, legatees, annuitants and to creditors. He is so entitled even though only residuary legatee in trust.

An examination of commonly accepted American works on the subject, from old to new, bears out this current statement of English authority. In a work¹¹ published in 1898 we find the principle stated thusly:

In cases of testacy, if the executor dies, renounces, or is incompetent, the right of Letters of Administration cum testamento annexo goes to the residuary legatee, or, if he is incompetent or renounces, to the other legatees, instead of to the husband, widow or next of kin. Mention should be made of the right of the residuary legatee to Letters of Administration cum testamento annexo in preference to either surviving husband, widow, or next of kin or creditors. This right is based upon the principle, before stated, that the right to administer follows the right to the estate, or the principal interest in it. As in cases of testacy the residuary legatee has the greatest interest in the estate, it is held at common law, and is often confirmed by statutes in the United States, that in case the executor dies, renounces, or is incompetent, the residuary legatee is the person entitled to Letters of Administration in preference to all others, whether surviving husband, widow, next of kin or others. And if the residuary legatee is dead, or renounces, or incompetent, the grant of letters will go to the other legatees, in accordance with their interest, unless statutory provisions expressly direct otherwise.

In 1923, Judge Woerner stated in his celebrated treatise upon the subject as follows:

In granting Letters cum testamento annexo the court is governed by the same principles which determine the appointment of general administrators, chief among which is that in the absence of resultation, right to administer follows the right to the personal property. Hence residuary legatees are preferred, in the grant of letters cum testamento annexo, to the next of kin or widow; and this preference extends to the representatives of residuary legatees who survive the testator and have a beneficial interest, such representative being entitled to letters cum testamento annexo in preference to the next of kin, unless otherwise determined by statute.¹²

11. SIMON, GREENLEAF & CROSWELL, EXECUTORS AND ADMINISTRATORS 88 (1898).

12. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION, INCLUDING WILLS § 245 at 82 (3d Ed. 1923).

And in 1939, Professor Rollison¹³ of Notre Dame phrased the principle similarly:

A testator may have no preference as to who shall serve as executor, and so he may not name in his will any person as executor; or having made such appointment in the Will, the appointee may renounce, neglect to qualify, or be legally incompetent. In all such cases letters testamentary would be issued and administration with the Will annexed granted to the proper person. If there is no statutory provision on the subject the right to be appointed administrator with the Will annexed should follow the property, just as in ordinary administration.

It is rather apparent that in the absence of contrary statutory provisions, the right to administration inures to the beneficiaries of the decedent's property, whether the estate be testate or intestate. Our probate code is in accordance with this general principle in intestate situations, since the statute¹⁴ confers preference in administration in the same order as the intestate order of distribution.¹⁵ Similarly, in situations in which a will is discovered after granting of intestate letters of administration, the statute preferred, not the intestate distributees, but those who will be entitled to take under the will.¹⁶ Apparently, however, under present holdings if the same will were discovered prior to intestate beginning, a different result would be reached, and the intestate order of preference would be applicable, even though the person entitled to preference under the intestate statute had no interest whatsoever under the will.¹⁷ Thus we find an anomalous situation existing in the Florida laws.

Examination of the historical background of Florida statutes makes it clear that such a result was never intended by the Legislature, and it is, therefore, apparently attributable to the courts.

The Florida Statutes in regard to preference were first enacted in 1828 and as originally adopted,¹⁸ provided:

Section 7. Be it further enacted that letters of administration shall be granted to the representatives of the *intestate* who apply for the same, preferring first to husband or wife and next, such others as are entitled to distribution of the *estate of the intestate* in the order of consanguinity; and if no such persons apply for administration or no such persons apply for administration or if one applying can not comply with the provisions of this act after citation duly published for the term of six weeks, once a week in some newspaper where *intestate* died, if any be printed there, if not, in some newspaper printed in the adjoining district or state, and also by writing

13. ROLLINSON, *THE LAW OF WILLS* § 218 at 408 (1939).

14. FLA. STAT. § 732.44 (1955).

15. FLA. STAT. § 731.23 (1955).

16. FLA. STAT. § 732.44 (1955).

17. See note 1 *supra*.

18. See COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, (Duval 1839).

posted at three public places in the county, then the said court or judge may grant administration to a creditor of the intestate or some other fit person; but, if any will shall, after granting letters of administration, be produced and duly approved, the aforesaid letters of administration shall be revoked and letters testamentary granted to the executors of said will; provided they shall be ready and willing to be qualified, and if not, the letters of administration previously granted shall stand good and the will be therefore annexed.

Section 8. Be it further enacted that previously to the granting of Letters of Administration, it shall be the duty of the Court or the Judge to require the person applying for administration to state upon oath or affirmation to the best of his knowledge and belief, whether there be any heirs or legal representatives of the intestate in being or not, which statement shall be in writing and subscribed by the party making the same and filed in the clerk's office and such person applying as aforesaid for letters of administration, shall also be required to state upon oath or affirmation *whether according to the best of his or her knowledge and belief the deceased died without a will* and to swear or affirm that he will well and truly administer all and singular the goods, chattels, rights and credits of said deceased, make a just and true inventory of the same, pay his debts as far as the assets of the estate shall extend and the law direct, and make a fair distribution according to law and render a true account of the administration of the estate when thereto required. (Emphasis supplied.)

It will be noted from the above cited provisions that the only departure from the common law was in that situation in which a will was found after intestate proceedings had been commenced, in which event, if no executor was able to qualify, the Legislature directed that the administrator already appointed in intestate proceedings be allowed to continue to serve.

When the Legislature revised the Probate Act in 1933,¹⁹ although the aforesaid Statutes were changed in wording, it does not appear that the results obtainable thereunder were in any way altered. These 1933 revisions constitute the current Florida Statutes with one unimportant exception, and until 1947 included the same provision in derogation of the common law, *i.e.*, if a will was found and probated *after intestate letters had been granted*, and if there were no executors ready and willing to qualify, then Letters of Administration C. T. A. would be given to the administrator already qualified. However, this modification in derogation of the common law was clearly applicable only in the situation indicated by the Legislature and could not have been reasonably construed as extending such preference to testate situations without an intestate beginning.

Moreover, in 1947, the Legislature saw the error of its ways and amended the statute so as to revert to the common law principle, by stating

19. See Laws of Fla. c. 16103, § 80 (1933).

that if a Will were found and probated after intestate letters had been granted and if the executors named therein were unable or unwilling to qualify, then the previously granted intestate letters would be revoked and letters cum testamento annexo granted with preference being given to the person, if otherwise qualified, selected by the persons beneficially interested in the estate.

We thus observe a complete cycle in which the Legislature, having indicated that the common law of England is in force in Florida unless specifically changed, has modified the common law in a minor respect and then reversed this modification by statute reiterating the common law. Accordingly, since Florida Statutes § 732.44 (1955), grants preference in administration in intestate cases in the same order as the intestate order of distribution, the statutory result in Florida today appears to be that the right to administer goes to those persons who take the estate, whether it be testate or intestate.

This construction has been adopted by the Statutory Revision Department of the Attorney General's Office in its codification process, as is indicated by the fact that all sections, from 732.22 through 732.42 are clearly applicable only to testate situations. However, section 732.43 and the sections following provide for intestate situations and other problems such as executors de son tort. Moreover, the Supreme Court in an intestate situation,²⁰ has indicated that the provisions of section 732.44, relating to preference in the appointment of administrators, are not effective until the provisions of 732.43, relating to procedural requirements of petition for administration, are carried out:

We are of the opinion that before the provisions of 732.44, F.S., F.S.A., relating to preference in the appointment of an Administrator are effective they must give way to provisions of Section 732.43, F.S., F.S.A., relating to procedural requirements of Petition for Letters of Administration.

Inasmuch as 732.43 requires a statement under oath that the decedent died without a will, neither it nor 732.44, under the Supreme Court's mandate, could possibly be applicable to testate situations when such an oath could not be made. Moreover, section 732.23 specifically states that no citation (such as is required in petition for intestate letters) need be served before the probate of a will. Further, the practice of combining petition for probate with petition for letters cum testamento annexo seems the universal practice in Florida, judging from a rather comprehensive review of the form books and the forms supplied by the various county judges. None of these even suggest an allegation that the applicant has cited others.

In summary, at present there is no Florida statute which expressly prescribes any preference in the appointment of administrators cum testamento

20. *In re Bush's Estate*, 80 So.2d 673 (Fla. 1955).

annexo²¹ or which modifies or abrogates the common and statute law principle in effect in England in 1776, that the right to administration cum testamento annexo follows the right to the property, accordingly, this principle is in effect in Florida, and courts should prefer for appointment as administrator cum testamento annexo those who take under the will rather than those who would be entitled to appointment under the intestate statute.

PROPOSED LEGISLATION

Although, as heretofore indicated, there should be no confusion with regard to preference in appointment of administrators cum testamento annexo, nevertheless it cannot be denied that such confusion exists, and that appropriate legislation should be considered. It is felt that amending the existing § 732.44 to read as follows, would clarify legislative intent and eliminate the confusion:

732.44 Preference in appointment of administrator.—

1) In the granting of letters of administration in intestate cases, the following preference shall be observed:

(a) The surviving spouse shall first be entitled to letters.

(b) The next of kin, at the time of the death of the decedent, shall next be entitled to letters.

(c) If there are several next of kin, equally near in degree, the one selected in writing by a majority of them who are sui juris shall be appointed. If no such selection is thus made, the county judge may exercise his discretion in selecting the one best qualified for the office.

(d) If no application is made by the next of kin, the county judge in his discretion, may appoint some capable person, but no person may be appointed under this subsection who is employed by such county judge or who holds public office under such county judge, nor any person who is employed by or holds office under any judge exercising probate jurisdiction.

(e) Persons entitled to an estate may select a disinterested person as administrator; and if such person is otherwise qualified, he shall be appointed.

(f) After letters of administration have been granted, if any person who is entitled to preference other than the person appointed and upon whom citation was not served and who has not waived his preference seeks the appointment, letters granted may be revoked, and such person

21. See note 2 *supra*.

may have letters of administration granted to him after citation and hearing upon his application.

(g) After letters of administration have been granted, if any will is produced and probated, the aforesaid letters shall be revoked and letters testamentary shall be granted to the executor of said will, or letters of administration cum testamento annexo shall be granted, if there is no executor ready and willing to qualify, preference being given to the person as provided under part (2) hereof. No such will shall be probated without citation to the administrator.

2) In the granting of letters of administration cum testamento annexo, the following preference shall be observed:

(a) if no executor shall have been nominated by the testator, or if nominated shall be unqualified for some reason or reasons other than residence, then the person chosen by the persons beneficially interested in the estate shall be first entitled to letters cum testamento annexo. In the determination of those beneficially interested, the trustee or trustees of testamentary spendthrift or other long term trust, or trust during minority, rather than the beneficiaries of any such trust or trusts, shall be construed to be beneficially interested.

(b) if the executor nominated by the testator shall be unqualified only because of non-residence in the State of Florida, then the person chosen by the executor nominated by the testator shall be first entitled to letters cum testamento annexo.

INTERIM MEASURES

The cautious scrivener, even though agreeing thoroughly with that which has previously been discussed, cannot help but recall a comparable situation of conversing between bars with a client who "could not be arrested"; and will desire some additional method or methods of preventing the possible interference of some court appointed administrator cum testamento annexo with no interest in the property. It is submitted that ordinarily this situation arises because of the inability of a foreign executor named in the will to qualify in the probate jurisdiction; and consequently, if the executor or executors named in the will, but unable to qualify, or the heirs were given the right to appoint the administrator cum testamento annexo, the problem would be eliminated to a great extent. A clause in the will, similar to the following, is suggested:

NOMINATION OF EXECUTOR

I hereby nominate and appoint _____,
of _____, as Executor of this my Last Will and
Testament; or, in the event he is unable or unwilling to act, by

reason of his death, inability to qualify in some jurisdiction other than Florida, or for any other reason, either originally or thereafter, I hereby nominate and appoint the _____ Bank located in Miami, Florida, as Executor of this my Last Will and Testament. In the event the said _____, or his successor, the _____ Bank, should both be unable or unwilling to act, whether by reason of death, inability to qualify in some jurisdiction other than Florida, or for any other reason, either originally or thereafter, I then direct that they, or the survivor of them, shall nominate an executor of this my Last Will and Testament; or if they or the survivor of them shall be unable or unwilling for any reason so to nominate, I then direct that [*the person or persons with the largest interest under the will*] shall nominate an executor of this my Last Will and Testament; and the court having jurisdiction, whether domiciliary or ancillary, shall appoint said nominee executor of this my Last Will and Testament with all powers herein contained as fully as if I myself had made such nomination.

The effectiveness of such a clause, of course, depends upon the right of the testator to delegate the power to nominate his executors. Although the question does not appear to have been presented in Florida, it has arisen in eleven states in the United States, *i.e.*, Alabama,²² Connecticut,²³ Delaware,²⁴ Indiana,²⁵ Michigan,²⁶ Minnesota,²⁷ Montana,²⁸ New Jersey,²⁹ New York,³⁰ Pennsylvania,³¹ and Wisconsin,³² as well as in English,³³ Scotch³⁴ and Canadian³⁵ cases. In each of these jurisdictions, the power has been upheld; and no jurisdiction has been discovered in which it has been denied. Accordingly, there is every reason to believe that it would be held to be valid in Florida; and that an executor under a foreign will containing such a clause, who could not qualify in Florida, would be able to nominate one to act for him, and thus to effectively carry out the intent of the testator.

22. *Thomas v. Field*, 210 Ala. 502, 98 So. 474 (1923).

23. *Bishop v. Bishop*, 56 Conn. 208, 14 Atl. 808 (1888).

24. *State, for the Use of Browne v. Rogers*, 1 Houst. 569 (Del. 1858).

25. *Wilson v. Curtis*, 151 Ind. 471, 51 N.E. 913 (1898).

26. *Brown v. Just*, 118 Mich. 678, 77 N.W. 263 (1898).

27. *In re Crosby's Estate*, 218 Minn. 149, 15 N.W.2d 501 (1944).

28. *In re Efferz's Estate*, 123 Mont. 45, 207 P.2d 1151 (1949).

29. *Mulford v. Mulford*, 42 N.J. Eq. 68, 6 Atl. 609 (1886); *Hutton's Executor v. Hutton*, 41 N.J. Eq. 267, 3 Atl. 882 (1886).

30. *Hartnett v. Wandel*, 60 N.Y. 346, 19 Am. Rep. 194 (1875).

31. *In re Boning's Estate*, 214 Pa. 19, 63 Atl. 296 (1906).

32. *Cole v. Watertown*, 119 Wis. 133, 96 N.W. 538 (1903).

33. *Fornum v. Administrator General*, 14 App. Cas. 651 (P.C. 1889); *Goods of Deichman*, 3 Curt. Eccl. 123, 163 Eng. Rep. 676 (P. C. 1842); *Goods of Cringan*, 1 Haag. Eccl. 548, 162 Eng. Rep. 673 (P.C. 1828).

34. See *Goods of Cringan*, *supra* note 33. In this case the court speaks of such delegation as being "not very unusual in Scotland" and its exercise in the case then before the English court had already been approved "by the Commissary Court at Dumfries."

35. *Morin v. Morin and Gorneau*, 43 Que. Off. R. 373 (1940).