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Leach v. Hyatt: Recasting Indefiniteness

Thomas E. Simmons*

In *Leach v. Hyatt*,¹ Dennis Belcher represented the executor charged with enforcing a rather unique will. As with many unique wills, this one generated a challenge based on lack of testamentary capacity.² The capacity challenge was heard by a jury, which returned a verdict upholding the will, but a second theory of the challenger remained.³ The challenger was a nephew of the decedent. The nephew claimed that two particular provisions of the will were legally invalid and that the assets disposed of by those clauses should instead pass by intestacy to him and other intestate heirs (a niece and additional nephews).

The will in question was comprised of two substantive clauses, the first (designated as Clause II) had been designed to make a testamentary gift to individuals in an amount equal to the decedent's federal estate tax credit, the second to devise the remainder to charitable institutions.⁴ The testator – Sidney Hyatt – was unmarried and childless. For charitably-minded unmarried individuals whose net worth exceeds their available estate tax credit, a charitable deduction to absorb the “excess” wealth that would otherwise generate a transfer tax is a sensible and simple solution. But Sidney Hyatt's will took an unusual approach, possibly on account of his indecision concerning how to dispose of a portion of his estate.

The first part of Clause II of Hyatt's will directed the executor – O. Max Leach – to carry out eight specific bequests to named individuals.⁵ These straightforward bequests of money and property totaled about \$260,000. After losing his capacity challenge to the will, the nephew did not take issue with these provisions. The second part of Clause II

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¹ *Leach v. Hyatt*, 423 S.E.2d 165, 166-67 (Va. 1992).

² See Opening Brief of Appellant at 1-2 n.1, *Leach v. Hyatt*, 423 S.E.2d 165 (Va. 1992) (No. 920271) [hereinafter Opening Brief of Appellant].

³ *Id.* at 1-2 n.1. Originally, the executor successfully objected “to plaintiff's misjoinder of a suit to impeach the Will with a suit to construe the Will's terms” and the challenges were bifurcated.

⁴ The estate tax credit at the time of the decedent's death was \$600,000. 26 U.S.C. § 2010 (1990); see *Leach*, 423 S.E.2d at 167 n.1.

⁵ *Leach*, 423 S.E.2d at 167.

granted the executor a limited power of appointment to designate the persons that would receive another \$340,000 or so in assets or property:

In the absence of full and complete instructions from me to my Executor or Executrix, the persons to receive something under this Clause II and what each is to receive shall be appointed by my Executor or Executrix in his or her sole and absolute discretion, consistent with the stated objective of this Clause II [to devise the maximum amount that could pass free of the federal estate tax], but this limited power of appointment shall not be used to increase or enlarge any bequest I make to any persons who serve as my Executor or Executrix, by his will or any codicil to it.⁶

The will's second substantive clause (Clause III) followed a similar format. It made specified gifts to named charitable and religious organizations, then granted to the executor a limited power of appointment to dispose of the remaining estate to charities. The executor was "authorized to select 'the qualified charities and the amount each is to receive'" under Clause III.⁷ The nephew claimed both the provisions of Clause II and Clause III, which purported to vest the executor with the power to identify the devisees of the estate, were invalid and moved for summary judgment.⁸ The trial court granted his motion in part, and denied it in part, reasoning that

- (1) The limited power of appointment for private non-charitable beneficiaries in Clause II of the Will is vague and broad and, therefore, unenforceable.
- (2) Accordingly, the assets covered by Clause II, in excess of the specific devises and bequests, fall into the residue of the Estate and are governed by Clause III of the Will.
- (3) No portion of the estate passes by intestacy to the Decedent's nephew and other heirs-at-law.
- (4) The provisions of Clause III of the Will, including the limited power of appointment granted to the Executor, are valid and effectively dispose of the residue of the Decedent's estate.⁹

Based on the trial court's reasoning, the nephew would not receive any additional distributions by way of intestacy because the charitable residuary clause would dispose of the \$340,000 in assets ineffectively disposed of by Clause II. Dennis Belcher's executor-client appealed the

⁶ *Id.*

⁷ Opening Brief of Appellant, *supra* note 2, at 3.

⁸ *Leach v. Hyatt*, 423 S.E.2d 165, 167 (Va. 1992).

⁹ Opening Brief of Appellant, *supra* note 2, at 3.

first ruling – that the part of Clause II purporting to delegate the naming of certain individual heirs to the executor – was invalid on account of vagueness.¹⁰ The challenger-nephew did not cross appeal the issues that he had lost, and although seemingly represented by Roanoke attorneys, he did not file a brief before the Virginia Supreme Court.¹¹ Nor did the charities or other heirs/devisees appear. Thus, the single issue on appeal was the validity of the will's non-charitable limited power of appointment provision in Clause II.¹²

Although the nephew's arguments are not preserved in the record on account of his failure to file a brief, his arguments can be largely reconstructed from Dennis Belcher's brief. In it, he explains that "the Decedent's nephew asserted that the limited power of appointment contained in Clause II of the will is invalid" because the potential appointees constitute "an indefinite class" and therefore the clause was "incapable of being enforced."¹³ The nephew had relied on cases such as *Lawless v. Lawless* where a residual bequest to the testator's brother "on a special purpose" was held not to create a trust since the court ascertained "no definite subject nor any certain or ascertainable object."¹⁴ Indeed, indefiniteness in identification of one's devisees can be problematic in the context of the law of wills and decedents' estates. A will, for example, devising half a testator's estate to persons to be se-

¹⁰ The trial court also concluded (oddly) that it was not the decedent's intent to vest his executor with a limited power of appointment, reasoning:

[The Decedent] intended the devises and bequeaths that are set forth in paragraphs a through h . . . [of Clause II]. He did not identify any additional persons in any codicils to this Will. There is no evidence or representations that he gave written or oral instructions to his Executor for additional bequests. I conclude therefore that those items are all of the items that are disposed of in Clause II of his Will and that his attempt to authorize his Executor to give away additional parts of his estate to satisfy the unified credit allowance was not his true intention and that the limited power of appointment is void and of no legal force and effect.

Opening Brief of Appellant, *supra* note 2, at 5 (quoting the trial court's decision).

¹¹ The appellant's brief was served on opposing counsel for the nephew. Opening Brief of Appellant, *supra* note 2, at 15. The decision states, "No brief or argument on behalf of appellee, Louis S. Hyatt." *Leach*, 423 S.E.2d at 167. The nephew's counsel may have withdrawn between the time when the appellant's brief was filed and the appellate decision was issued.

¹² Limited powers of appointment restricted to a class of charitable donees are typically less controversial. *E.g.*, *McGee v. Vandeventer*, 158 N.E. 127, 128 (Ill. 1927) (holding that the deceased husband's will created charitable trusts which were capable of enforcement and created a valid power of appointment in Elsie Caldwell as trustee for the beneficiaries of the trust and the amounts and purposes for which the estate should be used).

¹³ Opening Brief of Appellant, *supra* note 2, at 10.

¹⁴ *Lawless v. Lawless*, 47 S.E.2d 431, 432, 436 (Va. 1948).

lected by the executor who rendered greatest services in the testator's declining years has been held to be too indefinite to be enforceable.¹⁵ A bequest to one's "best friend" may also prove too uncertain to be enforceable.¹⁶ A bequest to whomever the executor should select might also fail. Indeed, the majority of jurisdictions, at least in 1992, would have invalidated limited powers of appointment in an executor on grounds of indefiniteness.¹⁷ But Dennis Belcher argued his client's position not in the context of wills and estates, but rather in the context of property, citing to the Restatement (Second) of Property's recognition of the validity of limited powers of appointment.¹⁸ He attempted to recast a wills case as a property case and to re-characterize an indefinite bequest as a limited power of appointment. (It certainly did not hurt that the will quite clearly intended to vest the executor with a power of appointment.¹⁹ Honoring testator intent is a dependable mainspring in the law of decedent's estates.²⁰)

His strategy worked. The Virginia Supreme Court reversed unanimously.²¹

The court's opinion begins with fundamental principles. First, the court framed powers of appointment as "a delegation of authority to a named individual, enabling that person to dispose of an interest which is

¹⁵ *In re Long's Estate*, 67 P.2d 331, 331 (Wash. 1937).

¹⁶ *Early v. Arnold*, 89 S.E. 900, 902 (Va. 1916) (noting that the expression "whoever has been his best friend" is too indefinite for anyone to determine who was intended as the object of the testatrix's bounty).

¹⁷ FRANK O. BROWN, JR., VIRGINIA PRACTICE PROBATE HANDBOOK § 14.25 (rev. Oct. 2016). "This [*Leach*] opinion places Virginia in the minority regarding this issue." *Id.*; see also *Leach v. Hyatt*, 423 S.E.2d 165, 168 (Va. 1992) (citing decisions which have invalidated limited powers of appointment in this context and decisions which have upheld them, so long as "the power is unambiguously expressed"); John F. Kuether, *Significant Probate and Trust Decisions*, 30 REAL PROP. PROB. & TR. J. 645, 700 (1996) (describing the *Leach* holding as "following the minority approach"). Since *Leach*, the Virginia Legislature has enacted its version of the Uniform Powers of Appointment Act. VA. CODE ANN. § 64.2-2700 (2016).

¹⁸ Opening Brief of Appellant, *supra* note 2, at 5-6 (citing RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 11.4, 12.1 cmt. h (AM. LAW INST. 1982)).

¹⁹ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 18.2 reporter's note 2 (AM. LAW INST. 2011) ("Courts have been reluctant to recognize a power of appointment unless the intent of the donor to create such a power is clearly implied.").

²⁰ See Opening Brief of Appellant, *supra* note 2, at 12 (denominating testator intent "as the polar star" in will construction) (quoting *Trice v. Powell*, 191 S.E. 758, 760 (Va. 1937)). Also supporting Dennis Belcher's position was the emphasis that failing to give effect to powers of appointment could undermine estate tax planning objectives. *Id.*

²¹ *Leach*, 423 S.E.2d at 169. "We believe that the minority approach, in examining whether the donor unambiguously expressed an intent to create a limited power of appointment, provides the better analytical framework for ascertaining the donor's intended disposition of his property." *Id.* at 168.

vested in another.”²² Generally, a donor (the person creating the power of appointment) may impose requirements and conditions on the donee’s exercise of the power in favor of one or more appointees, such as the manner of the power’s exercise.²³ The donee then acts as a “conduit” for the donor.²⁴ Powers of appointment come in two primary varieties: general powers of appointment, which can be exercised in favor of the donee herself (or her estate, her creditors, or her estate’s creditors), and limited powers of appointment (which cannot).²⁵ Construction of a power of appointment is governed by the donor’s intention.²⁶ While some degree of certainty that the testator intended to vest a donee with a power of appointment is necessary, the *Leach* court observed, “the donee’s exercise of the power is valid as long as it does not exceed the authority given the donee in the grant of the power.”²⁷

Having completed its outline of fundamental principles, the court next squarely addressed the issue presented: the validity of a noncharitable limited power of appointment which fails to designate a beneficiary class. “A major argument advanced against upholding this type of power is that, in not designating a specific class of beneficiaries, the limited power manifests uncertainty or indefiniteness in the donor’s intent,” the court noted.²⁸ The court distinguished the holdings from other jurisdictions invalidating noncharitable limited powers of appointment which found fault with the failure of the donor to adequately designate the class of beneficiaries for whom the power could be exercised.²⁹ Instead, the Virginia Supreme Court reasoned, the better framework for ascertaining testator intent is to ask “whether the donor

²² *Id.* at 167 (citing *Davis v. Kendall*, 107 S.E. 751, 760 (Va. 1921)).

²³ *Id.* (citing *Holzbach v. United Va. Bank*, 219 S.E.2d 868, 871 (Va. 1975)). *See also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.2 (defining terms associated with powers of appointment).

²⁴ *Leach v. Hyatt*, 423 S.E.2d 165, 168 (Va. 1992) (citing *Holzbach*, 219 S.E.2d at 872).

²⁵ 26 U.S.C. § 2401(b) (2012). The *Leach* opinion incorrectly describes a general power of appointment as one which permits the donee to appoint “the property to anyone including himself or his creditors.” *Leach*, 423 S.E.2d at 167, (citing *Shriners Hosp. v. Citizens Bank*, 92 S.E.2d 503, 508 (Va. 1956)). In fact, when categorizing powers of appointment in the transfer tax context, a general power of appointment may contain a narrower class of potential appointees than a limited power of appointment, so long as the class includes the either donee herself, her creditors, her estate, or the creditors of her estate. 26 U.S.C. § 2401(b)(1). *See also* John G. Steinkamp, *Estate and Gift Taxation of Powers of Appointment Limited by Ascertainable Standards*, 79 MARQ. L. REV. 195 (1995).

²⁶ *Leach*, 423 S.E.2d at 168 (citing *Holzbach*, 219 S.E.2d at 871-72; *Davis*, 107 S.E. at 758).

²⁷ *Id.* at 168 (citing *In re Lidston’s Estate*, 202 P.2d 259, 267 (Wash. 1949)).

²⁸ *Id.* (citing *Blankenship v. Blankenship*, 124 S.W.2d 1060, 1062 (Ky. 1939)).

²⁹ *Id.*

unambiguously expressed an intent to create a limited power of appointment . . .”³⁰ Clause II of Sidney Hyatt’s will expressed “a clear intent to give Leach a limited power of appointment over a fixed amount of property.”³¹ Therefore, Clause II was valid. The trial court’s decision was reversed.³²

Dennis Belcher had prevailed and succeeded in enforcing the will’s terms as written. *Leach v. Hyatt* represents an example of his advocacy skills and a sensitive judicial construction of powers of appointment. Dennis Belcher successfully overcame judicial discomfort with indefiniteness in a testamentary context by recasting a bequest without a devisee as a matter of property law and the enforceability of limited powers of appointment.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 169.