

MICHAEL J. COOK V. FRANCES J. HUNSECKER, C.P.  
Franklin County Branch, Action in Equity, Vol. 8, Page 109.

*Complaint in Equity seeking partition of real estate incapable of being partitioned which is claimed to be prohibited from being partitioned pursuant to the will which gave plaintiff his one-half interest in the property.*

1. Precatory words are words of entreaty, request, desire, wish, or recommendation, employed in wills, as distinguished from direct and imperative terms.
2. "Desire", "Request", and "Suggest" are precatory rather than mandatory as they indicate a wish, request and recommendation rather than a peremptory order.
3. Intent of the testator is of primary importance when construing a will as long as that intent can be ascertained.
4. In determining the intent of a testator, a court is to examine the words utilized in the instrument, the scheme of distribution, the circumstances surrounding the execution of the will and any other facts which may have a bearing on the issue.
5. Where a testator has made an absolute disposition of his property in a will, words coming after that disposition which are considered to be precatory will not operate to diminish the absolute estate previously given.
6. A testator's expression of reasons for making an absolute disposition is merely an explanation of the motive for making the gift and not a limitation.
7. Although it may be obvious that the testator wished that the property remain in a certain name, the suggestion that the property be sold if his wishes could not be carried out provides sufficient evidence to conclude that the testator did not intend to prohibit partition of the property.
8. If a court determines that there shall be partition because of a default or admission or after a hearing or trial, the court shall enter an order directing partition which shall set forth the names of all the co-tenants and the nature and extent of their interests in the property.

*Timothy W. Misner, Esquire, Attorney for Plaintiff*  
*David C. Wertime, Esquire, Attorney for Defendant*

#### OPINION & DECREE NISI

WALKER, P.J., April 27, 1995:

#### FINDINGS OF FACT

Plaintiff, Michael J. Cook, filed a complaint in equity seeking the partition of a particular tract of real estate on January 24, 1995.

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Plaintiff and defendant, Frances J. Hunsecker, each own a one-half interest in this said tract of real estate which contains one hundred sixty-three (163) acres and fifty-five (55) perches.

The defendant filed an answer to the complaint with new matter on April 14, 1994. Defendant has alleged that according to the terms of the will of Michael H. Cook, plaintiff is prohibited from partitioning the said tract of land and that if partition is granted that plaintiff is required to arrange a public sale of the real estate in its entirety. Defendant argues that the will dictates that a public sale rather than a private sale of the real estate must be held.

Plaintiff maintains that the language used in the will of Michael H. Cook is purely precatory and is in no way legally binding. Consequently plaintiff argues that the real estate can be partitioned and that pursuant to Pa.R.C.P. 1563(a) must first be offered for private sale confined to the parties.

Defendant then filed a separate complaint on February 2, 1995 seeking partition of a tract of timber land naming Michael J. Cook and Maretta Jane Hege as defendants. As Maretta and William Hege conveyed all their right, title and interest in the tract of timber land by quitclaim deed on February 21, 1995, this court entered an order consolidating both matters for purposes of trial.

Trial was held on March 3, 1995. Evidence was presented and memorandums were submitted. The parties have stipulated that the property in question is not capable of division. This matter is now ripe for disposition.

## DISCUSSION

It appears that the paragraphs labeled "Second" in Michael H. Cook's will is the item in controversy.

It is my desire that the Cook farm in Warren Township remain in the Cook name; therefore, I give and devise my one-half (1/2) interest in said farm together with all my farm animals, machinery, and tools to my son, Michael J. Cook.

I request that he attempt to purchase the one-half (1/2) interest in this farm which is owned by my sister, Frances. If he is unable to negotiate such a purchase, then I suggest that he arrange a public sale of the entire farm.

Black's Law Dictionary, Fourth Edition defines "Precatory Words" as [w]ords of entreaty, request, desire, wish, or recommendation, employed in wills, as distinguished from direct and imperative terms." The court finds that the words utilized in the paragraph labeled "Second" of Michael H.'s will are precatory rather than mandatory as they indicate a wish, request and recommendation rather than a peremptory order.

The intent of the testator is of primary importance when construing a will as long as that intent can be ascertained. *In re Patrick's Estate*, 487 Pa. 355, 409 A.2d 388 (1979). In determining the intent of a testator, a court is to examine the words utilized in the instrument, the scheme of distribution, the circumstances surrounding the execution of the will and any other facts which may have a bearing on the issue. *Id.* at 359. Where a testator has made an absolute disposition of his property in a will, words coming after that disposition which are considered to be precatory will not operate to diminish the absolute estate previously given. *In re Tuttle's Estate*, 132 Pa.Super. 356, 200 A. 291 (1938). A testator's expression of reasons for making an absolute disposition is merely an explanation of the motive for making the gift and not a limitation. *In re Zoller's Estate*, 373 Pa. 451, 96 A.2d 321 (1953).

This court is of the opinion that Michael H. Cook specifically and absolutely devised his share in the farm to his son Michael J. Cook without any conditions or restrictions. It is obvious from Michael H.'s will and his attempts to purchase his sister's share of the farm that he wanted the entire farm to be held solely under the "Cook" name. However, he also recognized, from his own experience, that his desires might not be fulfilled by friendly means and that a forced sale might be his son's only alternative to maintaining a co-tenancy. This court is convinced that if Michael H. had truly intended that the farm remain in the Cook name at all costs he would not have mentioned the possibility of selling the farm at a public sale where anyone could purchase the property.

Although not required to do so, Michael J. followed the wishes of Michael H. and did attempt to purchase the property from the defendant. Michael J. is now following the suggestion by Michael H. that he arrange a sale of the property in its entirety, although in a manner different from that suggested by Michael H. This court is of

the opinion that both parties will be better served by subjecting the property to a private sale between the parties as they will not be subject to outside bidding.

### CONCLUSION

If the court determines that there shall be partition because of a default or admission or after a hearing or trial, the court shall enter an order directing partition which shall set forth the names of all the co-tenants and the nature and extent of their interests in the property.

42 Pa.R.C.P. 1557.

The court having determined that partition is permitted directs that the real estate containing 163 acres and 55 perches and the timberland be partitioned. As the property in question is not capable of division without prejudice or spoiling the whole, 42 Pa.R.C.P. 1563 will apply. Therefore, this court directs that the property be offered for private sale confined to the parties.

### DECREE NISI

April 27, 1995, the court having determined that partition is permitted directs that the real estate containing 163 acres and 55 perches and the timberland be partitioned. As the property in question is not capable of division without prejudice or spoiling the whole, 42 Pa.R.C.P. 1563 will apply.

The court directs that the property be offered for private sale confined to the parties.

The defendant is granted ten (10) days to file exceptions. If no exceptions are filed, this decree becomes absolute.

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