POWER TO CONTRACTUALLY APPOINT "ATTORNEY FOR THE ESTATE": A NONEXISTENT RIGHT OF A DECEDENT

I. INTRODUCTION

The phrase "attorney for the estate" describes the attorney who handles the legal affairs that often arise from the disposition of a decedent's estate. The attorney for the estate, if needed, is appointed by the decedent's "personal representative." Whether a decedent-testator can contractually name an attorney for the estate and thus expose his own estate to liability if the personal representative fails to appoint the named attorney to that position is a question which has rarely been addressed in the law. The question invokes issues of testamentary power, attorney-client relationships, contract law and possible ethical problems.

This Article will examine how the law has settled related issues and how that law might be applied by a court faced with a contract attempting to appoint an attorney for the estate. First, the Article will examine the well-settled doctrine that a testator has no power to appoint an attorney for the estate by a provision in his will and how that relates to a similar provision in a contract. Second, the Article will discuss if a testator-decedent has any right to appoint an attorney for the estate in a contract and, if so, what "inherent" rights a personal representative has in refusing to appoint the lawyer without committing a breach of contract. Third, this Article will discuss the possible ethical problems which could arise if clients and attorneys are allowed to contract for the appointment of an attorney for the estate. Finally, the Article will conclude by explaining why contracts naming attorneys for the estate should not be enforced and why no liability should arise from a personal representative's failure to appoint the attorney named in a contract.

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1. In a case where the decedent has left a will, the personal representative is called an "executor." If the decedent dies without a will and his estate passes by intestacy, the personal representative is called the estate "administrator." Although they possess different titles, both share the same responsibilities: taking inventory of decedent's estate, settling decedent's surviving obligations, and distributing decedent's estate.
II. TESTATOR'S POWER TO APPOINT
BY WILL PROVISION

As a general rule in almost all jurisdictions, a testator has no power to appoint or bind his personal representative to appoint a specific attorney to the position of attorney for the estate by a provision in the will. These jurisdictions hold that any language in a will, no matter how strong, which directs the executor to appoint a specific attorney to that position is advisory only and the executor is under no obligation to follow decedent's direction. Only Louisiana holds that an executor is bound to appoint the attorney whom testator named in the will, thus exposing decedent's estate to liability if executor fails to do so.

Two basic rationales are mentioned in almost all decisions following the majority view. The first rationale arises from the fact that the attorney for the estate serves the personal representative (here the executor) and not the estate. Thus an attorney-client relationship exists between the personal representative and the attorney for the estate. The success of any


3. See supra note 2.

4. The landmark case of Rivet v. Battistella, 120 So. 289 (La. 1929) established that rule in Louisiana. However, Rivet was later overturned by Succession of Jenkins, 481 So.2d 607 (La. 1986). In Jenkins, the Louisiana court adopted the majority rule that language in a will directing an executor to appoint a specific attorney was advisory only. However, the Jenkins rule was short-lived. In 1987 the Louisiana legislature enacted LA. REV. STAT. ANN. § 9:2448 which reinstated the old Rivet rule, thus again binding an executor to follow the appointment directed by testator in his will and exposing the decedent's estate to liability for executor's failure to do so. Louisiana is currently the only jurisdiction with this rule.

5. See Jenkins, 481 So. 2d 607; see also supra note 2.
attorney-client relationship depends on mutual acceptance and mutual trust. It is therefore essential for the successful and proper disposition of decedent's estate that the personal representative be allowed to pick an attorney whom he trusts and can accept. The second rationale is related to the first. It is premised on the fact that the personal representative can be held personally liable for mistakes made during the administration of decedent's estate, including mistakes made by the attorney for the estate. The majority decisions state that it is essential that the personal representative have control of who serves as attorney for the estate since he faces personal liability from that person's actions.

If a court were faced with an attorney demanding damages for the failure of a personal representative to appoint him attorney for the estate when a contract signed by decedent ordered him to, that court could easily apply the majority rule with respect to directive will provisions and deny the attorney damages. In fact, many of the majority decisions use language which is broad enough to apply to contract provisions as well as will provisions. In In re Estate of Wallach the New York court stated, "The right of the executor to select the attorney whom he would employ in the affairs of the estate cannot be controlled." In In re Estate of Caldwell, the New York court held that the law does not recognize any power of the testator to control the executor's choice of attorneys. This language implies that any attempt by testator-decedent to do so, whether by will or inter vivos contract, is not legally binding.

It is also important to note that the two underlying rationales for the nonbinding majority rule with respect to will provisions are served equally well by extending such a nonbinding effect to contract provisions. In either case (contract or will), the personal representative must have trust in the attorney for the estate and be able to choose the attorney whom he feels will shield him from personal liability.

6. See id.
7. See id.
9. Id. (emphasis added). See also Kreider's Estate, 233 A.2d 226 (Pa. 1967) ("Every executor has the right to choose his own attorney").
10. 80 N.E. 663 (N.Y. 1907).
11. See id.
III. DOES DECEDENT-TESTATOR HAVE ANY RIGHT TO APPOINT ATTORNEY FOR THE ESTATE?

Common sense would tell most people that if a testator has the right to appoint an executor, who is the primary fiduciary of his estate, then he would also have the right to appoint an attorney for the estate who is also a fiduciary of the estate. However, as we have seen, a testator has every right to name an executor in his will and absolutely no right to appoint an attorney for the estate in that same will (except in Louisiana). Whether a decedent-testator can contract during his lifetime for the appointment of an attorney for the estate (and thus legally bind his personal representative or estate) has rarely been addressed in this country. The answer to that question will primarily turn on whether a person has any right to appoint an attorney for the estate which he can bargain with in a contract. If such a right exists, then liability could arise from a personal representative’s failure to appoint the named attorney. This is so because most contractual obligations survive the death of the obligor which are not personal in nature and are binding on his executor and are enforceable.\footnote{12} Thus, if a personal representative does not carry out the valid and enforceable contracts of the decedent, the attorney has a claim for damages.\footnote{13}

As stated, however, the primary issue a court will face in answering the question of possible liability will not be whether the contract survived the decedent; rather the inquiry will focus on whether a valid contract between the attorney and decedent was ever entered into. If the decedent had no legal right to appoint an attorney for the estate, then any attempt to do so in a contract will be void. Obviously, a decedent cannot transfer a benefit to an attorney which he does not have, and any contract which attempts such an appointment will be unenforceable. Only one court has

\footnote{12} See Estate of Spann v Kennedy & Son, Inc, 520 S.W.2d 286 (Ark. 1975) ("It is well established that executors and administrators are bound by the covenants and contractual obligations of their decedents that are not personal in nature"); see also In re Stormer's Estate, 123 A.2d 627 (Pa. 1956); Whipple v Rhode Island Hosp. Trust Co., 155 A. 587 (R.I. 1931); Cates v Cates, 104 So. 2d 756 (Ala. 1958); Butler v Fantle, 39 N.W.2d 877 (S.D. 1950); United States ex rel Wilheilm v Chain, 300 U.S. 31 (1937) ("It is a presumption of law that the parties to a contract bind not only themselves but (also) their personal representatives"); 31 AM. JUR. 2D § 158, Executors and Administrators § 318 (1962); 33 C.J.S Executors and Administrators § 189 (1936).

\footnote{13} See Dumont v Heighton, 123 P. 306 (Ariz. 1912); see also supra note 12.
directly faced this question. In *Reinwald v. Chemical Bank & Trust*, the New York Supreme Court held that a decedent cannot dictate the choice of his executor's counsel, either by will or inter vivos contract. In this case, an attorney had a written contract signed by the decedent that directed decedent’s executor to appoint the attorney to the position of "attorney for the estate." The court stated that such a covenant was unenforceable in so far as it purports to bind the executor in his selection of counsel. The court based its decision on two rationales, both arising out of the attorney-client privilege which exists between the representative and attorney for the estate. First, the court stated that the attorney-client relationship had to be based on trust and acceptance, and this could only be achieved by giving the executor full discretion to choose his counsel. Second, the court stated that a client who has retained an attorney for a particular matter (and disposing of decedent’s estate is a “particular matter”) must at all times be allowed to dismiss his attorney without cause and without fear of damages. To bind an executor to a contract would create liability for damages if the executor dismissed the attorney without cause.

If a court ignores the *Reinwald* decision and concluded that such a contract right does exist, another issue will arise if a personal representative fails to follow the contract: Who is liable, the estate or the personal representative? As a general rule, actions premised on breaches of contracts occurring after a party’s death are brought against the personal representative of the party’s estate, and liability for the breach of the contract extends to the personal representative only. However, courts in most jurisdictions have established special rules for contracts relating to attorney services. As a general rule in these jurisdictions, a client is free

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15. *Id.*
16. See *id.* at 100.
17. See *id.* at 99.
18. See *id.*; see also *infra* note 21.
19. See Colorado Nat'l Bank of Denver v Friedman, 846 P.2d 159, 170 (Colo. 1993); see also United States *ex rel* Wilhelm v. Chain, 300 U.S. 31, 35 (1937) (holding that executors are liable for breaches of contracts occurring after testator’s death); Thomas Yates & Co. v American Legend, 370 So. 2d 700 (Miss. 1979) (holding that personal representatives are bound to perform contracts entered into by their decedents, and may be compelled to pay damages for failure to perform).
20. See *supra* note 19.
to terminate his or her relationship with an attorney at any time and for any reason without becoming liable for breach of contract, even where there is an express employment contract.\textsuperscript{21} Since the personal representative steps into decedent’s shoes as far as inheriting decedent’s contractual obligations,\textsuperscript{22} he also inherits the decedent’s contractual rights.\textsuperscript{23} Among these rights would be the virtually unlimited power to terminate all relations with an attorney without being liable for breach of contract. What is more, there actually exists an attorney-client relationship between the personal representative and the attorney for the estate.\textsuperscript{24} Therefore, the personal representative would possess his own “unlimited” power to terminate relations with an attorney, independent of any right he may have inherited from the decedent. So even if a court did decide that a person has a right to appoint an attorney for the estate in a contract and that the contract extends to the personal representative, it is unlikely that the attorney could do anything to enforce that contract or recover damages for its “breach.” It must be mentioned, however, that at least one jurisdiction holds that an attorney is entitled to damages for breach of contract when a client “wrongfully” terminates his employment under an express contract.\textsuperscript{25}

IV. ETHICAL CONSIDERATIONS

Possible ethical problems could arise if an attorney who drafts a contract is also a named beneficial party in that contract. Most of the currently existing law deals with attorneys who draft wills and name


\textsuperscript{22} See Henry, 741 S.W.2d 233; see also supra note 12.

\textsuperscript{23} See id.

\textsuperscript{24} See id.; see also supra note 2.

themselves beneficiaries, executors, or other estate fiduciaries. However, the ethical rules are stated in language which would clearly apply to a contract "appointing" an attorney for the estate.

One possible problem could arise from the conflict of interest rules and undue influence. The Model Code of Professional Responsibility states, "A lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument."\textsuperscript{26} Obviously this section was written to deal with provisions in wills and will substitutes. However, the language would apply to a contract naming a lawyer to a fiduciary position. In fact, a New York court did that in \textit{Estate of Lowenstein}.\textsuperscript{27} In this case an attorney sued testator's estate for testator's failure to appoint the attorney executor of his estate even though testator had signed a contract agreeing to do so. The court held (based on EC 5-6) that "a contract provision requiring the nomination of the attorney . . . as fiduciary of testator's estate is unenforceable unless it is clearly demonstrated . . . that the nomination was not the product of overreaching."\textsuperscript{28} Thus, even when the appointment of an attorney comes in a contract, and not a will, a court is likely to scrutinize the transaction very closely for any possible signs of overreaching.

V. CONCLUSION

A testator-decedent should not have the power to contractually bind his personal representative to appoint a specific lawyer to the position of an attorney for the estate. The first reason for this conclusion is that the attorney for the estate serves the personal representative and not the estate. Therefore, the personal representative should be allowed to pick the attorney he feels he can work with most beneficially. Second, because the personal representative faces potential personal liability for the attorney for the estate's actions, he should be given complete discretion to choose the person he feels will most likely shield him from such liability. Third, since the law is well established that a testator cannot bind his executor to appoint by will, the law should (for the sake of consistency) apply the

\textsuperscript{26} \textsc{Model Code of Professional Responsibility} EC 5-6 (1969).
\textsuperscript{27} 600 N.Y.S.2d 997 (N.Y. Surrogate's Ct. 1993).
\textsuperscript{28} \textit{Id.} at 998.
same rule with respect to contracts. This conclusion would also prevent
clever attorneys from circumventing the well established rule with respect
to wills and accomplishing the impermissible result by contract.

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