

**THE USE OF "REQUEST," "WISH", "DESIRE":  
PRECATORY TRUST OR NOT?**

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**INTRODUCTION**

"Starlight, starbright, first star I see tonight, I wish I may, I wish I might, have the wish I wish tonight." How many times have we heard or used that childhood refrain during our lifetime? We use such words even though we know that wishing won't make things come true. Those "wish" words are what the law characterizes as precatory words - words that convey a recommendation rather than a positive command or direction. We often see them used in wills to express a settlor's intent to create a trust, sometimes being interpreted to impose an obligation on those to whom they are directed - and sometimes not. This article includes a history of the courts'

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interpretations of those expressions and asks whether there is any bright line test in analyzing the settlor's intent to create a trust when precatory words or expressions are used.

## I BACKGROUND

"A trust is, generally speaking, a device whereby a trustee manages property as a fiduciary for one or more beneficiaries. The trustee holds legal title to the property.... The beneficiaries hold equitable title...."<sup>2</sup> The settlor, the one who creates the trust, need only manifest an intent (by words or conduct) that the property (the "res") be held in trust for the beneficiary (the "*cestui que trust*") for some purpose.

Nothing more than a manifestation of intent to create a trust is necessary.<sup>3</sup> The United States Supreme Court has held, "No technical language is necessary to the creation of a trust.... If it appears to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of

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<sup>2</sup> Wills, Trusts, and Estates, Dukeminier, Johanson, Lindgren & Sitkoff, 7th Ed., Aspen Publishers, 2005, p. 485.

<sup>3</sup> Scott, The Law of Trusts (4th Ed., 1987) § 17.1, except for trusts of real estate for which a writing is required under the Statute of Frauds or where the disposition is testamentary and must comply with the applicable Statute of Wills. Not even a transfer of property is required since the owner may declare himself a trustee of his property for others. *Id.* § 17.1. See also Restatement (Third) of Trusts § 13 (2003): "A trust is created only if the settlor properly manifests an intention to create a trust relationship."

equity will affix to it the character of a trust....”<sup>4</sup> Thus, where a person’s intent is to separate legal ownership from equitable ownership, a valid trust comes into existence.<sup>5</sup>

It is precisely because the formality of creating a trust is so informal that so much uncertainty has arisen where persons attempt that creation without a writing. But lack of a writing is really not the issue; it’s the language used, whether or not it’s written.<sup>6</sup>

In the normal course of events, the manifested intent of the

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<sup>4</sup> Colton v. Colton 127 U.S. 300, 310 (1887)

<sup>5</sup> Bogert, *The Law of Trusts and Trustees*, § 1 (2d Ed. 1979); see also *Penny v. White*, 594 S.W.2d 632 (Mo. App. 1980) where, at p. 639, the court states “A valid express trust comes into existence when a person with a present power of disposition over definable property reposes the legal ownership to that res in another for the beneficial use of a third person.” It must also be remembered that the mere use of the words “trust” or “trustee” does not, ipso facto, create a trust. Restatement (Third) of Trusts §13, comment b (2003); Bogert, *The Law of Trusts and Trustees*, § 11 (6th Ed. 1987)

<sup>6</sup> The issue of whether a “precatory trust” is created may arise not only in a testamentary disposition, but also in other instruments: a deed to the Vestry and Wardens of a parish “for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans” was expressive of motive and given the same interpretation as being precatory, *St. James Parish v. Bagley*, 50 S.E. 841 (N.C. 1905); see also *Marx v. Rice*, 65 A.2d 48 (N.J. 1949) where the precatory words were held not to create a mandatory duty upon a holder of a power of appointment. And in TAM 9722001, the settlor was “desirous” that the trustee distribute the trust principal in accordance with the beneficiary’s wishes. The Internal Revenue Service ruled that the precatory language did not give the beneficiary a power of appointment.

settlor is clearly expressed in a document - either in an inter vivos instrument or in a testamentary document. Yet even though the intent may be expressly stated, the trust may still fail for lack of a trust res,<sup>7</sup> a lack of identifiable beneficiaries,<sup>8</sup> or because the equitable duties imposed upon the trustee are too vague to be enforced.<sup>9</sup>

This intent must be shown by clear and convincing evidence.<sup>10</sup> If the language in the will plainly and unambiguously expresses

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<sup>7</sup> In *Brainerd v. Commissioner*, 91 F.2d 880 (7th Cir. 1937), the taxpayer orally declared a trust of his expected profits from stock trading during the following year. Although there was an express declaration of trust intent, the court held that there was no res at the time of the declaration and the trust failed because there was no additional declaration when the profits came into existence. The trust failed for want of a res.

<sup>8</sup> In *Clark v. Campbell*, 133 A. 166 (N.H. 1926), the testator declared a trust of his property not distributed during his lifetime and directed the trustees to distribute the same "to such of my friends and they, my trustees, shall select." The Supreme Court of New Hampshire held at p. 168 that "By the common law there cannot be a valid bequest to an indefinite person. There must be a beneficiary or a class of beneficiaries indicated in the will capable of coming into court and claiming the benefit of the bequest." Thus, although there was a clear expression to create a trust, it failed for a lack of definite beneficiaries.

<sup>9</sup> *Morice v. Bishop of Durham*, 9 Ves. Jr. 399, 406, 32 Eng. Rept. 656, 659: "But here there is no specific purpose pointed out, to which the residue is to be applied...." Scott, *The Law of Trusts* (4th Ed. 1987), § 123(3); Restatement (Third) of Trusts § 13, comments a, d (2003)

<sup>10</sup> *Matter of Bollinger*, 943 P.2d 981 (Mont. 1997): "...evidence which is unmistakable, clear, satisfactory and convincing."; see also, Bogert, *Trusts and Trustees*, § 49, (2nd Rev. Ed., 1982)

the intention of the testator, extrinsic evidence is not admissible to show an intention different from that expressed in the will.<sup>11</sup> But extrinsic evidence of surrounding facts and circumstances may be admitted to explain the language of a will when uncertainty arises as to the testator's true intention.<sup>12</sup>

What happens when a trust fails? In *Briggs v. Penny*,<sup>13</sup> it is declared: "If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take." In other words, the trust fails and there is a resulting trust back to the next of kin.

## II WHAT ARE PRECATORY WORDS?

PRECATORY is defined as "having the nature of prayer, request, or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction."<sup>14</sup>

PRECATORY WORDS are "Words of entreaty, request, desire,

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<sup>11</sup> Woodcock v. McCord, 295 P.2d 734 (Wash. 1931)

<sup>12</sup> In re Estate of Curry, 988 P.2d 505 (Wash.App. 1995)

<sup>13</sup> 3 Mac. & G. 546, 42 Eng. Rept. 371, 375 (1851)

<sup>14</sup> Black's Law Dictionary, 6th Ed., West Publishing Co., 1990

wish, or recommendation, employed in wills, as distinguished from direct and imperative terms.”<sup>15</sup>

Professor Bogert expresses it as follows:

The words “request,” “desire,” and the like, do not naturally import to most persons a legal obligation....but that such an obligation may be shown by other portions of the instrument or by extrinsic evidence.<sup>16</sup>

PRECATORY TRUST is “A trust created by certain words, which are more like words of entreaty and permission than of command or certainty. Examples of such words, which the courts have held sufficient to constitute a trust, are ‘wish and request,’ ‘have fullest confidence,’ ‘heartily beseech,’ and the like.”<sup>17</sup>

Labeling a trust as “precatory” is misleading. For if the words indicating intent are merely precatory rather than directional or imperative, a trust is not created. Where the words are directional or imperative, a trust is created. “If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it a precatory trust.”<sup>18</sup> “The conflict of opinion as to the effect of words of this character is almost

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<sup>15</sup> *Id.*

<sup>16</sup> Bogert, *The Law of Trusts and Trustees*, (Rev. 2nd Ed. 1984)

<sup>17</sup> *Black’s Law Dictionary*, Sixth Edition, West Publishing Co., 1990

<sup>18</sup> *Supra*, footnote 3, at 312

bewildering.”<sup>19</sup> In the strictest sense, a precatory “trust” is an oxymoron but courts have adopted this expression to apply to the implied trust created by precatory words or expressions.

It is not required that the settlor realize that he is creating a trust.<sup>20</sup> It is a question of law for the court to decide.<sup>21</sup> The obvious question then is what is the intent being manifested by the ‘settlor’ by his use of precatory words.<sup>22</sup>

In making the determination “Account should be taken of the relative situations of the parties, the ties of affection subsisting between them, and the motives which would naturally influence the mind of the testator, as well as the existence of a moral duty on his part toward the party who will benefit from compliance with his desires and recommendations.”<sup>23</sup> “... [T]he use of the precatory words... must be given the effect the testator intended them to have.”<sup>24</sup> In other words, all the facts and

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<sup>19</sup> Mitchell v. Mitchell, 42 N.E. 465, 467 (Ind. 1895)

<sup>20</sup> Where the owner of bearer bonds delivers them to X and tells X to sell them and deliver the proceeds to B, X holds the bonds in trust for B. Restatement (Third) of Trusts, § 13, comment a (2003), Illustration 2.

<sup>21</sup> Matter of Bollinger, 943 P.2d 981 (Mont. 1997)

<sup>22</sup> i.e., “...what is the meaning of the language used...,” Stoepel v. Satterthwaite, 127 N.W. 673, 674 (Mich. 1910): a bequest to the owner of a sanitarium “to be used as he sees best for carrying on the work of relieving suffering” did not create a precatory trust.

<sup>23</sup> Cumming v. Pendleton, 153 A. 175, 177 (Conn. 1931)

<sup>24</sup> Lewis v. Atkins, 105 N.E.2d 183, 185 (Ind. 1952). See

circumstances are to be taken into account.<sup>25</sup> It is therefore seen that the same word, e.g., "wish," may give rise to a trust in one circumstance but not in another<sup>26</sup> because "Precedents are of little value in matters involving the construction of wills."<sup>27</sup>

### III HISTORY

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In re Estate of Curry, 988 P2d 505 (Wash.App. 1999) which applied the seven criteria of Restatement (Second) of Trusts § 25, comment b (1959) to find a trust by the use of the words "I trust" the devisee will give an equal share to the other children. See also Penny v. White, *supra*, footnote 4.

<sup>25</sup> Restatement (Third) of Trusts § 13 comment d (2003) states the factors to be considered:

(1) the specific terms and overall tenor of the words used; (2) the definiteness or indefiniteness of the property involved; (3) the ease or difficulty of ascertaining possible trust purposes and terms, and the specificity or vagueness of the possible beneficiaries and their interests; (4) the interests or motives and the nature and degree of concerns that may reasonably be supposed to have influenced the transferor; (5) the financial situation, dependencies, and expectations of the parties; (6) the transferor's prior conduct, statements, and relationships with respect to possible trust beneficiaries; (7) the personal and any fiduciary relationships between the transferor and the transferee; (8) other dispositions the transferor is making or has made of his or her wealth; and (9) whether the result of construing the disposition as involving a trust or not would be such as a person in the situation of the transferor would be likely to desire.

<sup>26</sup> "The use of precatory words in a given will may be sufficient to create a precatory trust whereas the same words in another will may not." *Centerre Trust Company of St. Louis v. The United States of America*, 676 F.Supp. 928, 934 (U.S.D.C., E.D. Mo. 1988)

<sup>27</sup> *In re Hellman's Estate*, 266 N.W. 36, 38 (Iowa 1936)

A Pennsylvania case traces the origin of precatory trusts to

Roman law:

It was part of the Roman law that the devisee or legatee, accepting the estate of a decedent, became at once personally charged with the payment of all his debts, whether the estate was sufficient to discharge them or not; and by way of compensation it was made discretionary with him to pay any of the legacies bequeathed by the testator. Hence, when all such bequests could be thus defeated at the pleasure of the devisee or legatee, there was no alternative left to the testator but to incorporate in his will an appeal to the devisee or legatee to make the desired disposition. *Pennock's Estate*, 20 Pa. St. 268. The hardship of this law finally compelled the courts to declare that words of recommendation, request, entreaty, wish, or explanation, addressed to the devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, (1 Jarm. Wills, 385;) whence precatory trusts.<sup>28</sup>

The early view was that precatory words were mandatory. In the 1704 case of *Eeles v. England*,<sup>29</sup> the devise was of £300 "my will and desire is, that he will give the said £300 unto his daughter Susan at the time of his death or sooner...." The equity court held that the words "I desire, or I will, in a will amount unto an express devise."<sup>30</sup>

This view continued in *Harding v. Glyn*.<sup>31</sup> There the

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<sup>28</sup> Board of Foreign Missions of United Presbyterian Church v. Culp, 25 A. 117, 118 (Pa. 1892).

<sup>29</sup> 2 Vern. 467, 23 Eng. Rept. 901 (1704); see also *Forbes v. Ball*, 3 Mer. 437, 36 Eng. Rept. 168 (1817)

<sup>30</sup> *Id.* at 901.

<sup>31</sup> 1 Atk. 489, 26 Eng. Rept. 299 (1739)

testator's will gave a house and belongings to his wife "but did desire her at or before her death to give" such estate among his own deserving relations. She bequeathed the property to others. The court found two issues. First, whether the wife was intended to take only a beneficial interest and second, if so, who was to take after her death. As to the first issue, the court found "... it is clear the wife was intended to take only beneficially during her life...and the words *willing or desiring* have been frequently construed to amount to a trust...." However, because there was doubt as to who was to take after her, the court awarded the property to the husband's next of kin.

In *Brown v. Higgs*,<sup>32</sup> the testator "authorized and empowered" his nephew to receive excess rents from certain real estate and "to employ" that excess to children of other nephews as he shall think most deserving. The court held that a trust was created. In affirming the decision,<sup>33</sup> the court said that by using the term "to employ," he is clearly made a trustee.<sup>34</sup>

Again, in *Cruwyn v. Colman*,<sup>35</sup> the bequest was to the testator's sister, also the executrix, adding that "... it is my absolute desire that [she]... bequeaths at her own death to those

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<sup>32</sup> *Brown v. Higgs*, 4 Ves. Jun. 708 (1799)

<sup>33</sup> 5 Ves. Jun. 495 (1800)

<sup>34</sup> *Id.* at 506

<sup>35</sup> 9 Ves. Jun. 319, 37 Eng. Rept. 626 (1804)

of her own family what she has in her own power to dispose of, that was mine....” The court, Sir William Grant, without discussion said, “There is no doubt, that in this instance the words are sufficiently certain to raise a trust.”<sup>36</sup>

Weeks after the *Cruwyn* case, Sir Grant decided the case of *Morice v. The Bishop of Durham*.<sup>37</sup> There the bequest was to the Bishop “to dispose of the ultimate residue to such objects of benevolence and liberality as [he] in his own discretion shall most approve of....” Although there was a trust, the court said it failed for want of certainty of an object.<sup>38</sup>

In *Wright v. Atkyns*,<sup>39</sup> the devise was of all real estate to the testator’s mother (he, the son, being unmarried) “and her heirs forever, in the fullest confidence that after her decease

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<sup>36</sup> *Id.* at 323

<sup>37</sup> 9 Ves. Jun. 399, 32 Eng. Rept. 656 (1804), affirmed at 10 Ves. Jun. 522, 32 Eng. Rept. 947 (1805) by Lord Chancellor Eldon; also cited in *Knight v. Knight*, *infra*, footnote 46.

<sup>38</sup> In affirming on appeal, Lord Chancellor Eldon said at p. 952: “Prima facie an absolute interest was given; and the question was, whether precatory, not mandatory, words imposed a trust upon that person; and the Court has said, before these words or request or accommodation create a trust, it must be shewn [sic], that the object and the subject are certain; and it is not immaterial to this case, that it must be shewn [sic], that the objects are certain. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust .... Where the subject ... and objects are to be found in a Will not expressly creating a trust, [the indefinite subject and objects] are always used by the Court as Evidence that the mind of the testator was not to create a trust.”

<sup>39</sup> Turn. & R. 156, 37 Eng. Rept. 1051 (1823)

she will devise the property to my family....” Lord Chancellor Eldon held that the words were imperative.<sup>40</sup>

This view prevailed in the United States as well. In *Ingram v. Fraley*,<sup>41</sup> the testator gave his entire estate to his friend, having the confidence “that he will entirely carry out my wishes and desires... and knowing that my said friend will, by this will, be able much more effectively to dispose of my estate.” The Georgia Supreme Court held that the court must determine whether, from the terms employed, an absolute gift was intended or whether only legal title was conveyed to enable him to carry out a fiduciary duty. It concluded that even though a trust was intended to be created, it failed because it was not sufficiently declared.<sup>42</sup>

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<sup>40</sup> *Id.* at 1056: “In order to determine whether the trust is a trust this Court will interfere with, it is a matter of observation. First, that the words must be imperative, **that the words are imperative in this case there can be no doubt**; Secondly, that the subject must be certain, and that brings me to the question what is meant by the words “the property”; and Thirdly, that the object must be as certain as the subject, and then the question will be, whether the words “my family” have as much of the quality of certainty, as this species of trust requires.” [emphasis added].

<sup>41</sup> 29 Ga. 553 (1859)

<sup>42</sup> “...[W]ould any Court hold, that the words of this will were not imperative ....? Surely not. Chancery would decree, it has done often, upon words less mandatory, that there was no discretion left to the legatee, but an obligation imposed upon his conscience by the will, not inclining him merely, but compelling him to execute the testator’s purpose. Such, at any rate, is our interpretation of the will.” The court relied on *Briggs v. Penny*, *supra* footnote 12.

In *Board of Foreign Missions of United Presbyterian Church v. Culp*,<sup>43</sup> the Pennsylvania court said:

Where, however, words of recommendation, request, and the like are used in direct reference to the estate, they are *prima facie* testamentary and imperative, and not precatory. Thus, should the testator say merely, 'I desire A.B. to have one thousand dollars,' it would be as effectual a legacy as if he was expressly to direct or will it, or were to add 'out of my estate,' or that it should be paid by his executor.<sup>44</sup>

The *Eels* case<sup>45</sup> was cited as authority in *McRee's Adm'rs v. Means*,<sup>46</sup> where a wife gave, devised and bequeathed all her property to her husband, "his heirs and assigns forever, to his use, behoof and benefit, in fee simple; but should my said husband die without issue of his body, it is my wish and will he shall give all of said property to Robert P. Means." Upon her husband's death "intestate and without issue of his body," his administrators took possession of the property and Robert P. Means brought a Bill in Equity to establish a precatory trust. The court said, "While the word 'will,' *per se*, has an imperative force, we do not doubt that its meaning may be controlled by the context..." yet held that a trust was created for Means' benefit.

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<sup>43</sup> *Supra*, footnote 27.

<sup>44</sup> *Id.* at 118

<sup>45</sup> *Supra*, footnote 28

<sup>46</sup> 34 Ala. 349 (1859), 1859 WL 745 (Ala.)

#### IV TRANSITION

Near the middle of the 19<sup>th</sup> century, courts in England and the United States began to abandon the idea that mere precatory words created an imperative interpretation. In its place they searched for the real intent of the settlor which was rightfully becoming the hallmark in the creation of a trust.

Foundation for the trend was given impetus as early as 1839 by Lord Langdale in *Knight v. Knight*<sup>47</sup> where he agreed with the language of *Wright v. Atkyns*,<sup>48</sup> that precatory language will create a trust:

1. If the words are so used that, upon the whole, they ought to be construed as imperative; 2. If the subject of the recommendation or wish be certain; and 3. If the objects or persons intended to have the benefit of the recommendation or wish be also certain.

However, Lord Langdale did not agree with the result in *Wright* and held a trust was not created. The language, "I trust to the liberality of my successors to reward any other of my old servants and tenants according to their deserts..." was not sufficiently imperative,<sup>49</sup> the subject to be affected and the

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<sup>47</sup> 3 Beav. 148, 49 Eng. Rept. 58 (1839)

<sup>48</sup> *Supra*, footnote 38.

<sup>49</sup> This is in contrast to the words "absolute desire" in *Cruwyn v. Coleman*, *supra*, footnote 34, which case was cited in *Knight v. Knight*, *supra*, footnote 46.

interests to be enjoyed by the objects were not sufficiently defined to create a trust. In modern terms, Lord Langdale would be adopting a “plain meaning” of the precatory words.

Some 45 years later, Lindley, L.J., expresses his agreement in *In re Adams and the Kensington Vestry*.<sup>50</sup> “I am very glad to see that the current is changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator.” In the same case, Cotton, L.J. states, “I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust... we have to see what is their true effect.”

The *Ingram* case<sup>51</sup> that holds precatory words are imperative was effectively overruled when, in 1863, Georgia enacted Code § 2299 causing *Ingram* to fall short of meeting the requirements of that section. The Code section read:

Precatory or recommendatory words will create a trust if they are sufficiently imperative to show that it is not left discretionary with the party to act or not, and if the subject matter of the trust is defined with sufficient certainty, and if the object is also certainly defined, and the mode in which the trust is to be executed.<sup>52</sup>

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<sup>50</sup> 27 Ch.Div. 394 (1884)

<sup>51</sup> *Supra*, footnote 40

<sup>52</sup> The current statute, § 53-12-21(b), is similar: “Words otherwise precatory in nature will create a trust only if they are sufficiently imperative to show a settlor’s intention to

It is clear that precatory words alone will not now, per se, establish a trust in Georgia.

But a trust may still be established there. In 1886, parents wanted to make a settlement of all their property to their daughter by will of the father to protect the property for the daughter's benefit. The wife was granted permission to execute a quit claim deed of real estate to her husband to enable him to will it to their daughter. The husband died, his wife having predeceased him, without a valid will. The property was taken possession of by his administrator and the daughter sued contending the transaction between her parents amounted to a trust for her and thus she was entitled to possession of the property.<sup>53</sup> The court held that under the circumstances, a valid trust was created. It said:

Whenever a manifest intention is exhibited that another person shall have the benefit of the property, the grantee shall be declared a trustee.<sup>54</sup>

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impose enforceable duties on a trustee, and if all other elements of an express trust are present.”

<sup>53</sup> McCreary v. Gewinner, 29 S.E. 960 (Ga. 1898)

<sup>54</sup> *Id.* at 963; also at 963: “And where a person has used language from which it can be gathered that he intended to create a trust, and such intention is not negatived by the surrounding circumstances, and the settler [sic] had done such things as are necessary in equity to bind himself not to recede from that intention, and the trust property is of such a nature as to be legally capable of being settled, and the object of the trust is lawful, and the settler [sic] has complied with the provisions of law as to evidence, a good and valid declaration of trust has

This transition is also pointed out in *Knox, Exec'r v. Knox, et al*:<sup>55</sup>

While, on the one hand, we are inclined not to go to the extent of older cases in England and in this country, in establishing trusts upon the strength of precatory words used by a testator in his will, on the other, we are not disposed to repudiate the whole doctrine of such trusts.

The Supreme Judicial Court of Massachusetts agreed with the transition in *Aldrich v. Aldrich*,<sup>56</sup>: "If an arbitrary rule seems to have been laid down at one time in regard to what would constitute a precatory trust, there can be no doubt, we think, that the tendency of later decisions has been, if not to relax the rule thus laid down, at least not to extend it." This is evidenced in *Lloyd v. Lloyd*<sup>57</sup> where that same court, a mere three months later, affirmed *Aldrich* where the devise was to a wife: "Having full faith and confidence in my beloved wife... [to] look after the welfare of our children" and held no precatory trust

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(prima facie) been made."

<sup>55</sup> 18 N.W. 155, (Wisc. 1884)

<sup>56</sup> 51 N.E. 449 (Mass. 1898); see also *Pratt v. Trustees of Sheppard and Enoch Pratt Hospital*, 42 A. 51 (Md. 1898): "Whatever may have been the results reached in the earlier cases on this subject, there is a strong tendency nowadays to restrict the doctrine of precatory trusts within more reasonable, and somewhat narrower, bounds than formerly...." In *Pratt*, the words "my wish and will" did not give rise to a precatory trust.

<sup>57</sup> 53 N.E. 148 (Mass. 1899)

was created.<sup>58</sup>

And yet in *Temple v. Russell*,<sup>59</sup> the court said, "The words 'It is also my will' are more than a mere entreaty or expression of desire. They are words of command. They express an imperative testamentary design." The bequest of real estate "to hold or dispose of as he desires or deems best" was coupled in the same paragraph that it was the testator's "will and wish" that the devisee give the property to a charity. The later case of *O'Reilly v. Irving*,<sup>60</sup> distinguished *Temple* because the devise of the residue to Mary Irving was in the eleventh paragraph and a second devise of the residue - to be effective on her death - was in the fourteenth paragraph to a charity.

Kentucky also expressed its agreement in *Igo v. Irvine*:<sup>61</sup>  
"... the later English and American cases have departed from the

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<sup>58</sup> See also *Rector v. Alcorn*, 41 So. 370 (Miss. 1906), where similar words were in the will of a Mississippi Governor, the Supreme Court declaring that no precatory trust was created. Cf. *Seefried v. Clarke*, 74 S.E. 204 (Va. 1912) and *Harrison v. Harrison*, 43 Va. 1, 1845 WL 2887 (Va.), to the contrary.

<sup>59</sup> 146 N.E. 679 (Mass. 1925); and in *In re Hochbrunn's Estate*, 244 P. 698 (Wash. 1926), the court held a trust was created where the testator, in one continuous paragraph, devised his residuary estate with a "special request" that the brother pay their sister \$10,000. "...[T]he courteous language used makes it no less imperative...." The reasoning in *Hochbrunn* was applied in *In re Estate of Curry*, 988 P2d 505 (Wash.App. 1999) in finding the words "I trust" were imperative.

<sup>60</sup> 188 N.E. 253 (Mass. 1933)

<sup>61</sup> 70 S.W. 826 (Ky. 1902)

doctrine of the early cases, and have inclined toward the doctrine giving precatory words and expressions only their natural force." And in interpreting Missouri law, the 8th Circuit said: "The tendency of the modern decisions, both in England and in this country, is to restrict the practice which deduces a trust from the expression by a testator of a wish, desire, or recommendation regarding the disposition of property absolutely bequeathed."<sup>62</sup> "The tendency of modern decisions, however, is not to extend the rule of practice which, from words of doubtful meaning, deduces or implies a trust."<sup>63</sup>

Maine's Judicial Court<sup>64</sup> expressed the transition in this manner:

It is said that the leaning of the courts is against the implication of a trust from words of confidence, that the current of decisions is now changed, and that many expressions formerly held to be indicative of a trust would not now be so held. Pom.Eq.Jur. § 1015. We think this means merely that courts now place less reliance than formerly upon the precise words used, and more upon the meaning of the will or the particular bequest, taken as a whole. The intention of the testator must be found from the whole will.

Despite this trend, Virginia has held that a bequest of a

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<sup>62</sup> Burnes, v. Burnes, 137 F. 781 (8th Cir. 1905)

<sup>63</sup> Bryan v. Milby, 24 A. 333, 334 (Del.Ch. 1891); See also St. James Parish v. Bagley, *supra*, footnote 5.

<sup>64</sup> Clifford v. Stewart, 49 A. 52 (Me. 1901)

wife to her husband "with one simple request" created a precatory trust,<sup>65</sup> yet Michigan held that a bequest "with the earnest request" that the funds be used for religious works did not.<sup>66</sup>

In *Ryder v. Myers*<sup>67</sup> the Court said that the early construction that if a testator "recommended," entreated," "requested," or "wished," to dispose of absolutely devised property, would be held to be imperative and create a trust. However, it modified that stance by also stating that, despite that being the rule for more than half a century and cannot be questioned, "an implied trust will not arise unless the person or object intended to be benefitted thereby is properly and definitely described, and the amount of property to which the trust shall attach is sufficiently defined." It then held a bequest of "all... my jewelry" to one Mrs. Blumenthal coupled with a "request" to honor requests of family members created a precatory trust.

## **V OTHER ASPECTS**

There are other early decisions that decide the issue by relying on the rule that once a fee estate is conveyed, later language limiting that estate is repugnant and will be ignored.

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<sup>65</sup> Seefried v. Clarke, 74 S.E. 204 (Va. 1912)

<sup>66</sup> In re Stuart's Estate: Slingerland v. Cederlund, 264 N.W. 372 (Mich. 1936)

<sup>67</sup> 167 A. 22 (N.J.Chanc. 1933)

In other words, a distinction is drawn between cases where the gift is for life only and those in which the gift is absolute, with super-added words.<sup>68</sup>

In *Irvine v. Irvine*,<sup>69</sup> the testator left his wife real estate “to have and to hold the same during her natural life... and at her death the said land is to be sold, and the proceeds of that sale is to be divided equally among my children living at the time of my said wife’s death.” The court held that the gift was in fee and the subsequent words did not take away or diminish the fee.<sup>70</sup>

The result in an earlier Virginia case was the same. While the testator devised his wife a life estate, he also gave her the right to dispose of it during her life with anything remaining to be distributed in various shares and estates to his children and grandchildren. The court held no precatory trust was created. “It is enough that the testator places the subject at the disposal of his wife... it has been decided that the whole interest and

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<sup>68</sup> Williams v. Worthington, 1878 WL 6817 (Md.); see also Spears v. Ligon, 1883 WL 9141 (Tex.) where the Texas Supreme Court discussed both rules (citing Massachusetts case law) but decided the issue on the basis that, under the circumstances, a precatory trust was not created. See Morice v. Bishop of Durham, *supra*, footnote 36: “There can be no trust, over the exercise of which this Court will not assume control; for an uncontrollable power of disposition would be ownership, and not trust.”

<sup>69</sup> 136 P. 18 (Or. 1913)

<sup>70</sup> In accord, Harkness v. Zelly, 135 A. 347 (N.J.Chanc. 1926).

property of the subject vests in her.”<sup>71</sup>

Reasons for this view are stated in *Fullenwider v. Watson*.<sup>72</sup> ... [I]t would be very difficult or impossible to determine whether any part of the fund remained undisposed of or not;<sup>73</sup> it would be contrary to the party’s well being to lead him to spend all that was given him and might be at the expense of those for whom he was under a moral obligation to make some provision; he might be disposed to convert the property and dispose of the avails lavishly thus defeating the method of distribution directed by the law.

In considering all the surrounding circumstances, courts sometimes rely on to whom the precatory words are addressed.<sup>74</sup>

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<sup>71</sup> May v. Joynes 1871 WL 4870 (Va.); however see Bohon v. Barrett’s Exec’r, 1881 WL 8255 (Ky.), where it is said, “... where a testator makes an *absolute* gift to one person, accompanying it with a request to appropriate a particular sum to the use of another, that the immediate devisee becomes a mere trustee to the extent of such sum .... An absolute gift does not contravene either an express or implied trust annexed to the gift.”

<sup>72</sup> 14 N.E. 571 (Ind. 1887)

<sup>73</sup> See Bryan v. Milby, *supra*, footnote 62, where, in a case of first impression, the Delaware court said that “... there being no certainty as to the existence of a remainder, that no precatory trust arose ....”

<sup>74</sup> One California case does not agree: in *In re Shirley’s Estate*, 181 P. 777, 778 (Cal. 1919), the court said: “The fact that the clause here involved is not formally addressed or directed to any person as one by whom the bequest should be set aside is of no importance. Where words are used which dispose of property or impose a condition upon a bequest given elsewhere in the will, they need not be addressed to any one. It is enough that they show the intent and will of the testatrix regarding the

For example, in *In re Hood's Estate*,<sup>75</sup> the testator devised her estate to trustees and "authorized and empowered" them to distribute the estate to such charities or individuals as they should see fit, while also enumerating her "express desire[s]." The court held that the precatory words, since they were directed to trustees, were mandatory. "The usual rule is that an expression of desire on the part of a testator is a mere request when addressed to his devisee but is to be construed as a command when addressed to his executor...."<sup>76</sup> No good reason appears why the expression of such a desire should not similarly be construed as a command when it is addressed to a trustee, particularly when it is expressly set forth as a part of the directions to the trustee and as stating one of the purposes of the trust."<sup>77</sup>

*Penny v. White*<sup>78</sup> combines precatory words not only to a

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property or legacy. If they do this, the court and the law will carry it out by probating the will and distributing the estate as is provided therein."

<sup>75</sup> 135 P.2d 383 (Cal.App.2d 1943)

<sup>76</sup> Citing *In re Estate of Lawrence*, 108 P.2d 893 (Cal. 1941); *In re Estate of Mallon*, 93 P.2d 245 (Cal.App.2d 1939)

<sup>77</sup> *In re Hood's Estate* at 385, *supra*, footnote 74; see also *Baker v. McBride*, 111 N.W.2d 407 (Wisc. 1961), where a trust was established when the precatory words "my executor shall pay" were addressed to the executor who was an unrelated party, an attorney and the scrivener of the will: "Precatory words directed to an executor indicate a trust while the same words to a devisee do not."

<sup>78</sup> *Supra*, footnote 4

spouse but also to the spouse as trustee. It found the surrounding circumstances expressed an intent to create a trust where the language used was a "request." In the course of contempt proceedings for failure to comply with an order of child support, the court construed the parties' property settlement agreement. It provided, *inter alia*, that the residence be conveyed to the wife. It further provided that the husband "requests" that his equity in the jointly owned residence, \$7,000 at the time of the divorce, upon the sale of the residence, be held in trust for their children. The trial court awarded the \$7,000 to the husband outright. On appeal, the court held the precatory word established a trust because the extrinsic evidence showed that the husband intended to command his equity be taken by the wife as trustee. The wife assumed the equity was for the children's college education and the trust was the device to accomplish that purpose; the husband "understood" that the equity would be applied toward child support or "put in a trust fund for the kids." Thus testimony from both parties showed that they agreed that the husband's equity would be held by the wife as trustee for the children.<sup>79</sup>

Other courts do not so regard that direction. In *Estate of*

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<sup>79</sup> Bohon v. Barrett's Exec'r, *supra*, footnote 70 combines precatory words to a brother/executor and finds the bequest was to be in trust. "... the slightest wish of the testator should be binding upon the conscience of his brother." [emphasis added]

*Reynolds*,<sup>80</sup> the testatrix made a “request” that the Trustee distribute any funds remaining after the death of her father to a Rev. Armstrong who “shall use the money so received by him in the promotion and furtherance of his Radio Ministry and the spreading of the Gospel as he may see fit....” The court said, “A testator’s use of the word ‘request’ does not necessarily create a precatory trust, and it never does unless in other parts of the will a plain intention appears to create a trust.” Since the language of the will allowed him to either apply the funds for religious purposes or keep it for his own benefit, no trust was created. He was free “to do as he liked with the property.”<sup>81</sup> In this case the Trustee was an unrelated party who was an attorney.<sup>82</sup>

That the testator “recommends” the devisee to will the property to certain persons at her death fares no better. In *Goslee’s Adm’r v. Goslee’s Exec’r*,<sup>83</sup> the husband “recommended” to the wife certain persons as proper ones to inherit should she die intestate. The court held that no precatory trust was created and that the wife took the estate in fee simple.

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<sup>80</sup> 800 S.W.2d 798 (Mo.App.E.D., 1990)

<sup>81</sup> *Id.*, at 800

<sup>82</sup> See also *Norris v. Commissioner of Internal Revenue*, 134 F.2d 796 (7th Cir., 1943) where individual trustees (one the testatrix’s son) were “authorized and empowered” not only to name charities as legatees but to determine the amount of the gift. The court held no trust was created.

<sup>83</sup> 94 S.W. 638 (Ky.App. 1906)

And in *Murphy v. Carlin*,<sup>84</sup> the Testator provided that it was his "wish and desire that my wife<sup>85</sup> continue to provide for care comfort, and education" of the five year old whom they took into their family when he was orphaned and raised as their own. After stating that precatory words will impose a binding duty upon the devisee, by way of trust, provided there is certainty as to subject matter and object of the trust (which were sufficiently and clearly pointed out in this case), it said "... it is to be remembered that the devisee is the wife of the testator, between whom it is not expected that commands would be expressed in such forcible language as between strangers."<sup>86</sup>

In a later Nebraska case, *Page v. Buchfinck*,<sup>87</sup> a bequest to the testator's wife "upon the hope, desire and belief" she would leave her property to their children did not create a trust by precatory words, finding that the choice of words only "indicates a suggestion of a result he would like to see accomplished."

The same mandatory interpretation does not prevail where the

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<sup>84</sup> 20 S.W. 786 (Mo. 1892); see also *Major v. Herndon*, 1879 WL 6692 (Ky.)

<sup>85</sup> who was not also named as a trustee

<sup>86</sup> *Id.* at 787; cf: *Thompson v. Smith*, 300 S.W.2d 404 (Mo.1957) where "wish" was held insufficient to create a precatory trust. In *Hayes v. Hayes*, 145 S.W. 1155 (Mo. 1912), the Missouri Supreme Court said "...the law does not undertake to enforce duties of imperfect obligation. These rest in *foro conscientiae*."

<sup>87</sup> 275 N.W.2d 826 (Nebr. 1979)

words are directed to a devisee who is a relative other than a spouse. In *Morris v. Morris*,<sup>88</sup> the precatory words, “her wish that the property would be used” for children, were directed to a relative, the court holding that a trust was not established.<sup>89</sup>

And even where the words were directed to a son, also an executor, a “request that my Executors see that [a granddaughter] is given sufficient funds to complete her education” did not create a trust.<sup>90</sup>

This is also the case when the words are directed to siblings. In *Sanger v. Sanger*,<sup>91</sup> testator provides, “In the event I own a home as of the date of my death, it is my wish that if any child of mine wishes to reside in such home he or she shall be allowed to by my other children.” No trust arose. And see *In re Campbell*<sup>92</sup> that lists cases where “wish” is held to create a trust and cases where it does not and also stating that, “Generally speaking, a wish is a wish, and nothing more, unless the testator used it in such a way as to indicate a different

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<sup>88</sup> 327 N.E.2d 917 (Mass.App. 1975)

<sup>89</sup> Decedent’s father’s testamentary “wish” that his stocks be placed in trust was insufficient to create a precatory trust under Missouri law. *Centerre Trust Co. of St. Louis, v. The United States of America*, 676 F. Supp. 928 (D.C.E.D. Mo., 1988)

<sup>90</sup> *Pittman v. Thomas*, 299 S.E.2d 207 (N.C. 1983)

<sup>91</sup> 673 N.W.2d 411 (Wisc.App. 2003)

<sup>92</sup> 229 N.W. 247 (Iowa 1930)

intention.”<sup>93</sup>

Also compare *Magnus v. Magnus*,<sup>94</sup> where the disposition was to a niece “to dispose of in accordance with my instructions to her,” the court finding a trust had been created and *Newhall v. McGill*,<sup>95</sup> where the disposition was for the property to be “disposed of according to my personal directions,” the court finding a trust was not created.

In a curious decision, a Georgia court held that where a wife devised her home to her mother for life with remainder to her son, but that “it is my wish” her husband be permitted to reside in the residence for his life, the will did not create a precatory trust but created a joint life estate between the parties.<sup>96</sup>

The difficulty courts have in determining the settlor’s intent when precatory words are used is illustrated by two cases decided by the Supreme Court of Washington. In *Woodcock v. McCord*,<sup>97</sup> the testator gave the residue of his estate to trustees and “suggested” that they sell his sawmill plant to a corporation to be organized by his employees, also suggesting that all

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<sup>93</sup> *Id.* 248

<sup>94</sup> 84 A. 705 (N.J.Chanc. 1912); in this case, however, the trust failed for uncertainty as to the objects to be benefitted.

<sup>95</sup> 212 P.2d 764 (Ariz. 1949)

<sup>96</sup> *Marshall v. Cozart*, 95 S.E.2d 729 (Ga. 1956)

<sup>97</sup> 295 P. 734 (Wash. 1931)

employees who have been employed for five years or longer should hold stock in the new corporation. The trustees had not sold the sawmill to the employee's corporation and three of its incorporators sued. The trial court sustained the trustees' demurrer and the incorporators appealed. In a 5-4 decision, the court held that the will created a precatory trust that the complaint was sufficient as against the general demurrer, and remanded the case for the trustees to submit a plan to carry out the intent of the testator, i.e., that the "suggestion" created a mandatory duty upon the trustees to sell the sawmill, but leaving discretion to the trustees the details of the transfer.<sup>98</sup> The case came to the court again. The court held, 6-3, no trust was created: "In the case at bar, there was no imperative duty upon the trustees to sell the stock of merchandise, mill, and mill plant to a corporation to be organized by decedent's employees."<sup>99</sup> It further held that the will bestowed upon the trustees a complete discretionary power to convey or not to convey and that the class of persons referred to as employees of decedent was indefinite. In deciding the latter issue, it stated it had not been decided in the case below and based its decision on *Morice*

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<sup>98</sup> See 7 Washington L. Rev. 296 at 299

<sup>99</sup> 10 P.2d 219 (1932) at 223; only one judge had been replaced (with the writer of the new majority opinion), but four judges changed their minds, three of the opinion that the words did not create a trust, one deciding a trust was created.

v. Bishop of Durham.<sup>100</sup>

## VI Negative Precatory Words

Would it be useful for the settlor to express his intent not to create a trust? He could provide that "The precatory words used are not intended to create any obligation on the part of the trustee/executor/devisee and are not to be considered mandatory." This language could go a long way to avoid litigation.

For example, in *Cooke v. King*,<sup>101</sup> the testators executed a mutual will devising their property to the husband's brother "with the hope" he would dispose of the property in accordance with the testators' wishes known to him. The will went further to express their intent not to impose any obligation "to carry out any such personal wishes or desires" but having confidence that their wishes will be carried out so far as practicable. The court, in holding no trust was created, said: "The great weight of authority is to the effect that where the testator uses words disclaiming an intention to create a trust, no trust will be implied from the inclusion of precatory or recommendatory language."<sup>102</sup>

On the other hand, such a statement may not be sufficient. In *Bohon v. Barrett's Exec'r*,<sup>103</sup> a precatory trust was established

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<sup>100</sup> *Supra*, footnote 8.

<sup>101</sup> *Cooke v. King*, 61 P.2d 429 (Or. 1936)

<sup>102</sup> *Id.* at 434

<sup>103</sup> *Supra*, footnote 70.

despite the following language: "... these requests are not to be legally binding upon [the executor], but I desire to leave the same entirely to his discretion, and to make no requirement of him that would be legally binding upon him in a court of equity or elsewhere-it being my wish to leave the whole matter to his sense of right and discretion...."

## VII CONCLUSION

Courts<sup>104</sup> continue to remind us that an implied (precatory) trust will be created:

1. If the words are so used that, upon the whole, they ought to be construed as imperative; 2. If the subject of the recommendation or wish be certain; and 3. If the objects or persons intended to have the benefit of the recommendation or wish be also certain.<sup>105</sup>

It is the first factor that has been redefined over the centuries - from mandatory, *per se*, to the modern trend of determining the settlor's intention based on all the facts and circumstances. The cases illustrate the complexities of determining the settlor's intent when precatory expressions are used.

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<sup>104</sup> Lines v. Darden, 5 Fla. 51 (1853); and scholars: Bogert, *The Law of Trusts and Trustees*, § 1, Rev. 2nd Ed. (1984).

<sup>105</sup> Knight v. Knight, *supra*, footnote 46; Magnant v. Peacock, 25 So.2d 566 (FL. 1946); see also William H. Namack, III, *Administration of Trusts in Florida*, Chapter 2, p. 53, The Florida Bar, 2001.

In the early years, the courts were not interpreting intent in accordance with its “plain language” and gave the precatory words mandatory meaning. It would clearly not be appropriate to go in the opposite direction by always giving precatory words their plain meaning. After all, the settlor’s intent is the hallmark of a trust.

With the mantra that courts consider all the surrounding circumstances,<sup>106</sup> there is no reason to believe there will or should be a bright line test emerging at any future time.<sup>107</sup> The point was succinctly put as early as 1851 by Vice-Chancellor Cranworth in *Williams v. Williams*:<sup>108</sup> “I doubt if there can exist any formula for bringing to a direct test the question whether the words of request, or hope, or recommendation are or are not to be construed as obligatory.”

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<sup>106</sup> Scott, *The Law of Trusts* § 25.2 (4th Ed., 1987): “In each case, in reaching its determination the court will examine the whole of the will and examine it in light of all the circumstances.”

<sup>107</sup> In the twenty-seven states where holographic wills are valid, issues concerning precatory words and expressions are bound to continue. The states that allow holographic wills are: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Such wills are permitted for soldiers and sailors in Maryland and New York. *Wills, Trusts, and Estates*, Dukeminier, Johanson, Lindgren & Sitkoff, 7<sup>th</sup> Edition, Aspen Publishers, 2005, p. 263.

<sup>108</sup> 1 Sim. (N.S.) 358, 369, 61 Eng. Rept. 139, 143 (1851)