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The fifth situation is when the decree awards complete legal title to the custodial parent. In the absence of any indication to the contrary, the custodial parent would receive full credit for lodging support because it is contemplated that as owner she is entitled to exclusive use and possession of the property.<sup>30</sup>

Missouri attorneys and judges should carefully weigh the tax implications of *Pugel* when drafting separation agreements and decrees of dissolution. In so doing they can control the allocation of lodging support and often determine which parent can claim dependency exemptions.

GARRETT R. CROUCH II

## WILLS--DIRECTION IN WILL TO DESTROY ESTATE PROPERTY VIOLATES PUBLIC POLICY

*Eyerman v. Mercantile Trust Co. Nat'l Assoc.*<sup>1</sup>

Testatrix directed in her will that her house be razed and the land upon which it was located be sold, the proceeds to become part of the residue of her estate. Neighboring lot owners and trustees of the subdivision<sup>2</sup> appealed from the denial of their petition seeking an injunction to prevent destruction of the house.<sup>3</sup> Plaintiffs contended that razing the house would violate the terms of the trust indenture, create a private nuisance, and be contrary to public policy. The St. Louis District of the Missouri Court of Appeals reversed the trial court and held that to allow the house to be destroyed would violate public policy.<sup>4</sup>

A Missouri statute provides that all courts shall give due regard to the testator's intention and directions in a will.<sup>5</sup> This policy, coupled with the basic right of owners to the exclusive possession and control of their property,<sup>6</sup> establishes the substantial freedom of a testator in the

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30. O'Connor v. Comm'r, 32 CCH Tax Ct. Mem. 156 (1973).

1. 524 S.W.2d 210 (Mo. App., D. St. L. 1975).

2. The house was located at #4 Kingsbury Place in St. Louis. Kingsbury Place is a "private place" established in 1902 by a trust indenture. The indenture limits the type and quality of the structures that may be constructed by the owners. The trustees are empowered to protect the area from encroachment, trespass, nuisance, or injury, and the indenture empowers both the lot owners and the trustees to bring suit to enforce the covenants.

3. The trial court had dissolved the temporary restraining order and decided all issues against the property owners and trustees.

4. The majority did not reach the issues whether the provision of the will violated the restrictions in the trust indenture and whether enforcement of the provision would create an actionable private nuisance. The dissent would have decided these issues against the plaintiffs. 524 S.W.2d at 219.

5. § 474.430, RSMo 1969.

6. *Lastofka v. Lastofka*, 339 Mo. 770, 790, 99 S.W.2d 46, 58 (1936); *City of Fredericktown v. Osborn*, 429 S.W.2d 17, 22 (St. L. Mo. App. 1968); *Reutner v. Vouga*, 367 S.W.2d 34, 42 (St. L. Mo. App. 1963).

disposition of his property.<sup>7</sup> However, this right to dispose freely of one's property is not absolute. The right is created by statute, and therefore the state may foreclose the right completely or place such limitations on it as it deems proper.<sup>8</sup> One such limitation established by the courts is that the intention of the testator will not be carried out if it violates an established rule of law or public policy.<sup>9</sup>

The term "public policy" is neither precise nor easily defined. One definition frequently quoted by Missouri courts is that public policy is that principle of law which declares that "no one can lawfully do that which has a tendency to be injurious to the public or against the public good."<sup>10</sup> The courts state that the term is synonymous with "the public good" and "policy of the law."<sup>11</sup> They also state that the public policy of Missouri is to be determined from the state's constitution, laws, and judicial decisions and not from the judges' personal opinions of what the public interests are.<sup>12</sup> Unless a will provision contravenes "some positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic," courts should exercise extreme caution in holding it void as against public policy.<sup>13</sup>

In their basic approach to the principle of public policy, Missouri courts are in accord with all other jurisdictions<sup>14</sup> and the *Restatement (Second) of Trusts*.<sup>15</sup> Therefore, although the situation in *Eyerman* had not arisen before in Missouri,<sup>16</sup> the decisions of other jurisdictions as to similar provisions provide persuasive precedent.<sup>17</sup>

7. *Teller v. Kaufman*, 426 F.2d 128, 131 (8th Cir. 1970); *Geyer v. Bookwalter*, 193 F. Supp. 57, 61 (W.D. Mo. 1961); *In re Rahn's Estate*, 316 Mo. 492, 502-03, 291 S.W. 120, 124, *cert. denied*, 274 U.S. 745 (1927).

8. *State ex rel. McClintock v. Guinotte*, 275 Mo. 298, 314, 204 S.W. 806, 808 (En Banc 1918).

9. *Teller v. Kaufman*, 426 F.2d 128, 131 (8th Cir. 1970); *Geyer v. Bookwalter*, 193 F. Supp. 57, 61 (W.D. Mo. 1961); *Mississippi Valley Trust Co. v. Ruhland*, 359 Mo. 616, 621, 222 S.W.2d 750, 752 (1949); *In re Rahn's Estate*, 316 Mo. 492, 503, 291 S.W. 120, 124, *cert. denied*, 274 U.S. 745 (1927).

10. *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. En Banc 1954), *cert. denied*, 361 U.S. 964 (1960); *Dille v. St. Luke's Hospital*, 355 Mo. 436, 446, 196 S.W.2d 615, 620 (1946); *In re Rahn's Estate*, 316 Mo. 492, 500, 291 S.W. 120, 122, *cert. denied*, 274 U.S. 745 (1927).

11. Cases cited note 10 *supra*.

12. *In re Rahn's Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123, *cert. denied*, 274 U.S. 745 (1927).

13. *Id.*

14. 57 AM. JUR., WILLS, § 1134 (1948).

15. A trust or a provision in the terms of a trust is invalid if the enforcement of the trust or provision would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee.

RESTATEMENT (SECOND) OF TRUSTS § 62 (1959). In comment K following this section it is stated that it is against public policy to carry out the testator's directions if the result would be either detrimental to the community or capricious.

16. Past Missouri court decisions applying public policy arguments to invalidate will provisions have usually involved unreasonable restraints on marriage or interference with freedom of religion.

17. *In Schulte v. Missionaries of La Salette Corp. of Mo.*, 352 S.W.2d 636, <http://scholarship.law.missouri.edu/mlr/vol41/iss2/15>

In *Colonial Trust Co. v. Brown*<sup>18</sup> the Supreme Court of Errors of Connecticut refused to uphold a provision in a will which restricted the duration of leases of the property devised to one year and provided that no buildings erected on the property exceed three stories in height. The court stated that the testator's only purpose was to require the property to be managed according to his own peculiar ideas. The court based its finding that the provision was contrary to public policy on three factors: the property was located in the city's business district, the restrictions in the will would prevent the trustees from obtaining suitable tenants, and carrying out the testator's intention would seriously hinder the city's growth and development. The court therefore concluded that to carry out the testator's intention would be detrimental to both beneficiaries under the will and the public.<sup>19</sup>

In *In re Scott's Will*<sup>20</sup> a provision in a will directed the executor to destroy all money or other evidence of credit belonging to the estate. The Minnesota Supreme Court held the provision void as against public policy.

In *Brown v. Burdett*<sup>21</sup> the testatrix directed that all but four rooms of her house be blocked up for twenty years. The Chancery Division, frowning upon such a useless disposition of property, held that the provision violated public policy.

In *M'Caig's Trustees v. Kirk-Session of United Free Church of Lismore*<sup>22</sup> the testatrix directed that M'Caig Tower be converted into a private enclosure and that statues of her family be placed inside. There were no living descendants of the family to visit the area, and the public was prohibited from doing so. The court discussed the fact that no beneficiary had a right to enforce the provision for the erection of the statues. The court concluded that, although the testatrix could not have been prevented from doing this during her lifetime,<sup>23</sup> the provision was nevertheless contrary to public policy<sup>24</sup> and therefore invalid.<sup>25</sup>

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638-39 (Mo. 1961), the court stated that where there is no applicable legislation the courts have the power and duty to declare the state's public policy looking to all available sources including authorities outside the state.

18. 105 Conn. 261, 135 A. 555 (1926).

19. The basic facts of this case are utilized in an example in the *Restatement (Second) of Trusts*, as an illustration of a provision, which, if performed, would be injurious to the community and to the beneficiary and therefore invalid. RESTATEMENT (SECOND) OF TRUSTS § 62 (v) (1959).

20. 88 Minn. 386, 93 N.W. 109 (1903).

21. 21 Ch. D. 667 (1882).

22. [1915] Sess. Cas. 426 (Scot.).

23. In *Egerton v. Brownlow*, 10 Eng. Rep. 359 (H.L.C. 1853), the court stated that an owner of property may do many things himself which he cannot require his successor to do where it is against public policy to so use the property.

24. The court stated that the bequest was contrary to public policy because it involved a "sheer waste of money" and pointed out that during a man's lifetime he is usually restrained from such wasteful expenditures by a desire to enjoy and increase his property. The court also stated it was "dangerous to support a bequest that can only gratify the vanity of testators." 10 Eng. Rep. at 434.

25. An executor is ordinarily permitted to carry out a direction in a will to

Two common elements are present in these cases. First, each contested will provision involved the destruction or wastage of property, which the *Restatement (Second) of Trusts* calls a capricious and non-charitable purpose.<sup>26</sup> This element is clear in *Scott's Will, Burdett*, and *M'Caig's Trustees*, but is also present in *Colonial Trust*, because materially hampering the development of the city's business district is equivalent to wasting property. The second characteristic present in all four cases is the absence of a definite beneficiary. This is important because, absent a definite beneficiary, there is no tangible benefit which could outweigh the harm to the public resulting from the destruction or wastage of property. Whenever these two elements are present, courts are justified in overriding a testator's intention on the basis of public policy.<sup>27</sup>

The *Eyerman* court, after concluding that plaintiffs had standing<sup>28</sup>

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erect a monument on testator's grave suitable to the testator's means and station in life. Thus, in *Detwiller v. Hartman*, 37 N.J. Eq. (10 Stew.) 347 (1883), a trust to buy a burial plot and erect a monument thereon was held valid. See also *Odom v. Langston*, 355 Mo. 115, 195 S.W.2d 466 (1946); *Wendell v. Hazelwood Cemetery*, 3 N.J. Super. 457, 67 A.2d 219 (1949); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); SIMES AND SMITH ON FUTURE INTERESTS § 1394 (1973 Supp.); Fratcher, *Bequests for Purposes*, 56 IOWA L. REV. 773, 780-83 (1971).

26. RESTATEMENT (SECOND) OF TRUSTS § 124 (g), at 266. The comment continues:

It is impossible to draw a clear line between purposes which are capricious and those which are not. A purpose is not capricious merely because no living person benefits from its performance, provided it satisfies a natural desire which normal people have with respect to the disposition of their property. Thus, such purposes as the erection or maintenance of tombstones or the care of dogs, is not capricious unless the value of the property to be devoted to these purposes is unreasonably large. On the other hand, it is capricious to provide that money shall be thrown into the sea or that a field shall be sowed with salt or that a house shall be boarded up and remain unoccupied. Public policy may forbid the creation of a power where no one benefits by the exercise of the power and the donee of the power does not lose anything by its exercise. Although a person may deal capriciously with his own property, his self-interest ordinarily will restrain him from so doing. Where an attempt is made to confer such a power upon a person who is given no other interest in the property, there is no such restraint and it is against public policy to allow him to exercise the power if the purpose is merely capricious.

*Id.* at 267.

27. *Id.*

28. The court noted that the plaintiffs were not invoking the rights of the beneficiaries under the will, but were seeking protection of their own competing interests and the interests of the community. 524 S.W.2d at 212. It further stated that the test to be applied in determining whether plaintiffs have standing to raise the public policy issue is "whether the challenged action will cause plaintiffs injury in fact, and whether the injury is within the 'zone of interests' created by statutes which plaintiffs contended were being violated." *Id.* at 213. There must be some connection between the provision challenged and the alleged injury if the test is to be met. *Coalition for the Environment v. Volpe*, 504 F.2d 156, 165 (8th Cir. 1974). Satisfying the test as legally protectible interests are aesthetic, environmental and economic interests. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). See also *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Trafficante v. Metropolitan Life Ins.* <http://scholarship.law.missouri.edu/mlr/vol41/iss2/15>

to challenge the will, discussed several factors which led it to conclude that the provision violated public policy. The court said that the estate would suffer a loss<sup>29</sup> and adjacent property values would decline.<sup>30</sup> The court also stated that the fact that the area where the property was located had been designated as a landmark by the St. Louis Commission on Landmarks and Urban Design demonstrated the importance of preserving the area intact.<sup>31</sup> The court emphasized that there was a need for dwelling units in St. Louis.<sup>32</sup> The court also said that the devise was not one of land to definite beneficiaries, but one of cash to be distributed as part of the residue of the estate. In addition, no purpose or reason was suggested for carrying out the will's provisions. Finally, the court relied on the decisions from other jurisdictions previously discussed and the *Restatement (Second) of Trusts* in reaching its conclusion that such a senseless waste of property cannot be tolerated where there are no offsetting benefits.

The dissent in *Eyerman* said that there was no basis for the court's holding that the razing would be contrary to public policy, and that the case was not a proper one for court-defined public policy. The dissent argued that an owner has exclusive control of his land as long as he does not impair another's right to enjoy his property and that razing the house would not impair plaintiffs' right to the enjoyment of their properties. The dissent also emphasized that the testatrix' intention should not be defeated unless it clearly prejudices the public interest.<sup>33</sup>

As stated earlier, each of the cases relied on by the *Eyerman* court involve both a destruction or wastage of property and an absence of a definite beneficiary. These two elements were also present in *Eyerman*. Therefore, it would seem that the court's decision is in accord with other jurisdictions which have dealt with similar factual situations.

Although the court mentioned these two factors, it also seemed to emphasize other factors as being even more important. It stressed such factors as a loss in value of neighboring property, the designation of the surrounding area as a landmark, and the need for dwelling units in the city. Although seemingly relevant, these factors are not of the type that would justify directly contravening the testatrix' unambiguous intention.<sup>34</sup>

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Co., 409 U.S. 205 (1972); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

29. 524 S.W.2d at 213. The value of the house and lot was \$40,000, whereas the value of the lot alone was only \$5,000. With the cost of demolition being \$4,350, the estate would lose \$39,350 if the intention of the testatrix were carried out.

30. *Id.* The court stated that the value of the adjoining properties would depreciate \$10,000.

31. *Id.* at 213. The dissent pointed out that this action by the Commission was prompted by the application of several residents of Kingsbury Place and that it did not take place until after the testatrix' death. *Id.* at 219.

32. *Id.* at 214.

33. The dissent objected to the court conferring a benefit upon testamentary beneficiaries and the city, both nonparties to the suit. *Id.* at 218.

34. In *Mamlin v. Genoe*, 340 Pa. 320, 17 A.2d 407 (1941), the Supreme Court of Pennsylvania stated: