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Wills and Estates

John G. Street Jr.

WILLS AND ESTATES

AGREEMENT NOT TO CONTEST

Oklahoma. In *Cook v Morrison*[1] testatrix died leaving a will with three codicils. Certain of her heirs filed contests when the will and codicils were presented for probate. The county court decreed all the codicils were invalid on the ground of lack of testamentary capacity and refused their admission to probate. The part of the will held valid disposed of only a portion of deceased's estate. On appeal to the district court, the contesting heirs agreed with the residuary legatee under the first codicil that, in consideration of certain payment to be made by him, they would withdraw and dismiss their appeals, authorize the district court to hold the will and the first codicil valid, aid him in any future suit over the validity of the will, and bear a pro-rata share of any adverse judgment. The district court approved and confirmed the stipulations, rendered judgment in accordance therewith, and remanded the cause to the county court with directions to admit the will and first codicil to probate. The present plaintiffs, heirs of testatrix who had been omitted from the will and codicil and who made no appearance in the county or district court, filed a petition to vacate the judgment because it was void as beyond the jurisdiction of the court and contrary to public policy. A demurrer to the plaintiff's petition was sustained on the ground that no cause of action was stated.

The Oklahoma Supreme Court held that the judgment was void as beyond the jurisdiction of the court, saying the only issue to be determined on appeal to the district court was the *factum* or validity of the will. The judgment was held to be void on its face and subject to attack at any time on motion or petition of a party affected thereby, with no necessity of setting up a meritorious defense.[2] A dissenting opinion argued the judgment was not void on its face, since the judgment recited that the decree was based

[1] .....Okla....., 217 P. 2d 810 (1950).

[2] 12 OKLA. STAT. ANN. (Perm. Ed.) § 1038.

on the preponderance of the evidence, and there was a recital of jurisdiction of the subject-matter and person.

The court also held the contract not to contest the will, the ultimate purpose of which was to secure the probate of a will which the parties had good reason to believe was an invalid will, and to cut off other relatives, was void as contrary to public policy. It was stated that a bona fide agreement by one interested in testator's estate to refrain from contesting a will is valid.[3]

The result in this case is commendable; an agreement should not bind persons who were not a party to it if they are interested in the will.

CONSTRUCTION OF WILLS

Arkansas. In *Lefeavre v. Pennington*[4] the executor of Dr. Pennington's holographic will brought a proceeding to obtain a construction of the residuary clause, which provided, "The Bal. to be divided equally between all of our nephews and nieces on my wife's side and my niece, Nathalee Pennington, of Lawrenceburg, Tennessee."[5] The trial court held the will gave testator's niece one-half. Appellants, twenty-two nephews and nieces on the wife's side, contended that each residuary legatee should receive 1/23 of the residuary estate.

The court affirmed the holding of the trial court. The word "between" in its literal sense was said to apply to only two subjects, and if reference is to more than two, the proposition should be "among"; however, the court recognized that most people do not always observe this distinction and treated the language as ambiguous. Testator's feelings toward various beneficiaries were then looked to as an aid in arriving at testator's intention. The following facts were held to show that testator had a very warm feeling for Nathalee: the two corresponded often; testator had visited her home in Tennessee; testator had given her various gifts—a fountain pen, a $500 United States bond,

[3] 4 PAGE, WILLS (Lifetime Ed. 1941) § 1759.

[4] .....Ark....., 230 S. W. 2d 46 (1950).

[5] 230 S. W. 2d at 47.

and ten dollars a month for five months while Nathalee was ill. It was noted that testator described appellants merely as a class, apparently not caring whether it increased or decreased, while he singled Nathalee out. As a final argument, the majority of the court said that a per capita distribution would be an unnatural division of the estate, since the usual thing is to have a half-and-half division between the kin on the husband's side and the kin on the wife's side in a situation like this.

The dissenting opinion emphasizes that the will was holographic, and, therefore, it was proper not to base the case on the technical use of the word "between." It points out that Nathalee was the only one who testified as to the fact that she was testator's favorite niece and that he had a warm affection for her; that testator saw her only twice since her early childhood; that testator lived with his wife's sister, Mrs. Anderson, after his wife died; that some of the legatees are this sister's children; that a son of Mrs. Anderson was named executor without bond; that the executor's judgment was to be final in all matters as to the sale of decedent's property; that testator listed Nathalee by name because he did not want to leave anything to Nathalee's four brothers.

The majority opinion seems to have ignored most of the matters brought up by the dissenting opinion in arriving at testator's intent. It is difficult enough to arrive at the intent of a live person, much less one who is dead, but the court seems to have failed to meet all the facts. If the facts set out in the dissenting opinion did not justify a different result, they at least justified a discussion by the majority opinion.

Page states that the presumption is that testator intended to make the named person a member of the entire class, where all the members are of the same degree of relationship, but that this presumption is disregarded more often than not.[6]

Louisiana. In *Succession of Tertrou*[7] testatrix executed an holographic will in which she made several bequests of "gold bonds"

[6] 3 PAGE, WILLS (Lifetime Ed. 1941) § 1083.

[7] .....La....., 47 So. 2d 681 (1950).

in named amounts. A typical example of the bequests was as follows: "I bequeath to the Community Chest the sum of one thousand dollars $1000 in Gold Bond."[8] The contention was made that this was a bequest of a specific thing which was adeemed by extinction. The court held ademption did not occur. It said that "gold bonds" is a generic term and does not apply to a particular bond, when it can be seen from the entire will that testatrix used the words "bonds" and "money" indiscriminately and intended that bequests were to be paid either in cash or with bonds. An example given of such indiscriminate use was, ". . . [I]f there is any money left, 'after paying all the legacies,' it is to be given to the Charity Hospital of New Orleans."[9] The court said that this was merely a bequest of a sum of money which testatrix had at the time invested in bonds. At the time of her death she actually had four gold bonds; twelve more were payable in gold coin of the United States; these sixteen bonds were more than enough to pay each legacy except one.

The goal in any case such as this is to find the testator's intent; this court did an excellent job in attaining that goal.

Oklahoma. In *Johnson v. Johnson*[10] testator devised property to his wife for life with an unconditional right to sell, remainder to his children. After stating that the wife had an unconditional right to sell, the will set forth the following provision: ". . .[W]ith the right and power of the said Ollie M. Johnson to use the income from such property or the proceeds from any sale thereof or the sale of any interest therein, as she may see fit, either for the purpose of reinvestment for the benefit of my estate or for her personal or family support."[11] The petition alleged that this provision made the will ambiguous and that the authority to sell was restricted to purposes of reinvestment, support of the wife and her family. The court held that the wife had the power to sell the real estate and convey a fee simple title. The limitation in the will

[8] 47 So. 2d at 682.

[9] *Ibid.*

[10] .....Okla....., 225 P. 2d 805 (1950).

[11] 225 P. 2d at 806.

related only to the use of the income or proceeds, not to the sale. The interest devised to the eighteen children was a contingent remainder. The court added that the wife could use the proceeds in whole for reinvestment or for her personal or family support.

CONTRACT TO DEVISE PROPERTY

Arkansas. Brunk v. Merchants National Bank[12] was a suit filed by Merchants National Bank as executor of the estate of George Brinkman for construction of his will. A husband and wife had executed mutual or reciprocal wills; both wills had a provision that certain property was to go to Lillian Trapp, who had lived with them from the age of seven to nineteen. During this time she turned over wages to them with the understanding that she would share in their estate as though she were their natural child. The wife died first; the husband executed a deed to the property but did not deliver it to Lillian; instead, he placed it in a safe deposit box. The lower court's decree vested title in Lillian.

The Arkansas Supreme Court held that the deed was ineffective due to lack of delivery but that there was a valid contract to devise the property between the husband and wife and Lillian. It was stated that the execution of such a will is not of itself evidence of a contract to devise property, but that in this case there was additional evidence in that the husband and wife had taken Lillian's wages upon the promise that they would devise the property to her. There was evidence that the husband had always talked of the property as belonging to Lillian. The requirement that the evidence of the contract be clear, cogent, satisfactory and convincing was met.

The court followed the general rule that a contract to make a will is valid even if a third party is the beneficiary.[13] It seems that the court could have found a contract either between the husband and wife, or a contract between the husband and wife as one party and Lillian as the other party.

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[12] .....Ark....., 230 S. W. 2d 932 (1950).

[13] 4 PAGE, WILLS (Lifetime Ed. 1941) §§ 1707, 1712.

JOINT AND MUTUAL WILLS

Arkansas. Proceedings were brought in *George v. Smith*[14] by Henry P. Smith, a brother of deceased, opposed by Mary George, a sister, and others, for the probate of a document alleged to be the will of Peter M. Smith, deceased. Peter M. Smith drew up a joint and mutual will in his own handwriting. He and his brother, James T. Smith, signed it, and a notary public witnessed the execution. At the death of either of the brothers, the property was to go to the other. The will contained the following provision: "If both of the makers * * * should pass away, all of our * * * property shall go to our brother, William I. Smith."[15] The brothers were joint owners of real and personal property worth a little more than $10,000. Peter died in May, 1948; James died in August, 1948; the brother William referred to in the will died in February, 1949.

The court held that this instrument was the valid holographic will of Peter Smith but not of James Smith because it was not in his handwriting; nor was it a valid non-holographic will as to James because there was only one witness. Joint wills were said not to be *per se* invalid but could be upheld if enjoyment of the property was not postponed to the death of the survivor. The clause stating how the property was to be disposed of if both of the makers of the will should pass away was held not an attempt to postpone the enjoyment of the property to the death of the survivor, the court reasoning that the brothers were thinking of a common disaster or concurring deaths.

There were two dissenting opinions. One dissent was on the ground the will was to take effect only on the death of the survivor. The other dissent was on the ground that a joint and mutual will must be valid as to both parties or it will be valid as to neither.

It appears that the court managed to carry out the testator's intentions in the light of the circumstances. The case seems to be in line with the authorities.[16]

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[14] 216 Ark. 896, 227 S. W. 2d 952 (1950).

[15] 227 S. W. 2d at 952.

[16] 1 PAGE, WILLS (Lifetime Ed. 1941) § 104.

REVOCATION BY CHANGE OF CIRCUMSTANCES.

Arkansas. In *Mosey v. Mosely*[17] testator made a will in favor of his first wife during their marriage. In 1945 testator and his first wife were divorced and made a property settlement. Testator married defendant second wife and died without revoking the will. The probate judge held the will was revoked by the divorce and property settlement. The supreme court reversed the trial court. A statute provided that no will should be revoked otherwise than by another written instrument executed with the same formalities, or by burning, tearing, cancellation, obliteration, or destruction, either by testator or by some other person in his presence and by his direction and consent.[18] The court held the methods listed in the statute were exclusive.

The present Probate Code of Arkansas provides that if a testator is divorced after making his will, all provisions in favor of the divorced spouse are revoked.[19] Testator died June 28, 1949, three days before the effective date of the Code.

Logically, no fault can be found with such a decision; this is the normal holding in a jurisdiction having this type of statute.[20] As to whether such a decision carries out the intent of the testator, arguments can be made on both sides. It is odd to think of a man wanting a divorced wife to share in his estate. It is safe to state most divorced people hold little love for each other. However, if such a feeling existed, does it not seem highly probable that one of the husband's first acts after getting a divorce would be to change his will? Regardless of the answer, the present statutory law of Arkansas resolves the question by declaring the will revoked by subsequent divorce.

John G. Street, Jr.

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[17] .....Ark....., 231 S. W. 2d 99 (1950).

[18] ARK. STAT. 1947 ANN. § 60-113.

[19] ARK. STAT. 1947 ANN. § 60-407.

[20] Cases are cited in the principal decision, 231 S. W. 2d at 100; see 1 PAGE, WILLIS (Lifetime Ed. 1941) § 488.