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Decedents' Estates And Trusts—"Attempted Testamentary Trust" Interpreted As Absolute Gift To "Trustee"

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at bar. The present situation is one which, as the precedent in this state suggests, has either never happened before or one that law enforcement agencies have never deemed it worthwhile to prosecute.

The Court also overlooks that this was cast as a *reasonable mistake*, not just a mistake. The courts should have a standard by which to determine whether each particular intervention was indeed innocent or even well-advised under the circumstances. The dissent would remand at this time for a determination of reasonable. The problem which the Court believes it must move to solve, that is, the problem of maintenance of an orderly society, would be as well served by the civil tort law which provides for damages in such instances, without the addition of a criminal record.

This decision leaves the law somewhat unclear. The interests of an innocent intervenor, who mistakenly aids one who is engaged in a fray, where a policeman is not involved, or where a policeman is not making a lawful arrest, suggests the possibilities of muddled interests. Perhaps, the Court had in mind maintaining public respect towards policemen on duty in areas where widespread hostility towards uniformed police officers had resulted in active interference by onlookers where such officers were in the act of making lawful arrests. Such a method of insuring non-intervention by threatened criminal liability, however, is too great a burden to place on one who innocently acts to prevent a breach of the peace.

D. R. K.

DECEDENTS' ESTATES AND TRUSTS

"Attempted Testamentary Trust" Interpreted as Absolute Gift to "Trustee"

Testatrix died in May 1959, leaving a properly executed will dated June 25, 1951, which contained the following provision:

> All the rest, residue and remainder of my property and effects, . . . I hereby give, devise and bequeath to and as the *absolute property* of my friend, Harry T. Gill, of Gloversville, N.Y., whose personal receipt therefor shall be deemed and accepted as sufficient for the discharge of all interests passing hereunder.
>
> The property last herein referred to is to be *received, held, and distributed* in accordance with a letter of instructions accompanying this will, together with possible alterations thereof subsequently to be made either in writing or orally, *and in carrying out my wishes* in such distribution of my estate *I hereby delegate all necessary powers both discretionary and otherwise,* to Harry T. Gill, in whom I hereby place this confidence. (Emphasis added.)

In April 1955 and again in 1956, apparently to effectuate adequate distribution of her property, which she obviously was not prepared to make when she had a lawyer draft her will, testatrix delivered written instructions and orally

told Gill, who took a memo of these instructions, of those she "would like" remembered. After her death, Gill, as executor, sought to have the will construed and his accounts settled and prayed for authority to make distributions to the persons named in the letter and notation. Defendants, distant relatives of decedent in Ireland, appealed from the ruling of the Surrogate's Court which held that Gill received the entire residuary estate. The Appellate Division reversed, holding that the will left the residue in trust, that the trust failed for lack of lawfully designated beneficiaries, and that therefore the property passed by intestacy to the intestate distributees, the relatives in Ireland. The Court of Appeals reversed unanimously. *Held*: reading the controverted clause of the will in light of all surrounding circumstances, including the oral and written instructions to the executor in whom the testatrix had confidence, the Court found her intent *clearly* manifest to make an absolute gift to the executor. *In the Matter of Warren*, 11 N.Y.2d 463, 184 N.E.2d 304, 230 N.Y.S.2d 711 (1962).[1]

An unattested letter and oral instructions cannot be regarded as a valid testamentary disposition, because such instruments and instructions do not comply with the formality required by the Statute of Wills.[2] Nor can such items be incorporated by reference into the will (although New York does not strictly adhere to the requirements of incorporation by reference, e.g., that the writing be in existence at the time of the making of the will), because only documents as formal as wills, documents of independent legal significance, where the possibility of fraud is slight, satisfy New York courts.[3] Such significant instruments nevertheless are admissible only to show the testator's intent.[4] When confronted with a situation such as the case at bar, the court is usually faced with accepting one of two alternative interpretations: either the testator intended a testamentary trust or intended an absolute gift to the "trustee."[5] Where an attempted trust fails for uncertainty, however, a "resulting trust" raises in favor of the heirs or next of kin of the testator.[6] In arriving at a result, courts are often faced with an undesired alternative and will go far to establish testator's intent as something far from apparent on the face of the will. Likewise, rules of construction may aid the court in mechanically effectuating an objective intent, possibly entirely different from that which the testator subjectively intended. Among these rules is the principle that the making of a will according to statutory requirements raises a strong presumption against leaving any property undisposed of by will.[7] Thus intestacy is

1. 13 A.D.2d 269, 216 N.Y.S.2d 285 (3d Dep't 1961).
2. N.Y. Dec. Est. Law § 21.
3. See, e.g., Matter of Fowles, 222 N.Y. 222, 118 N.E. 611 (1918); 1935 N.Y. Law Rev. Comm. Report 431.
4. In the Matter of O'Hara, 95 N.Y. 403 (1884).
5. See generally, Annot., 96 A.L.R. 958 (1934).
6. Reynolds v. Reynolds, 224 N.Y. 429, 121 N.E. 61 (1918).
7. Hadcox v. Cody, 213 N.Y. 570, 108 N.E. 84 (1915).

never favored where a fair reading of the will allows a contrary finding.[8] Mere inconsistency between sections of a will and extrinsic evidence of testator's intent will be subordinated by the principle that the law favors sustaining a will. Similarly, a court may subordinate particular language to arrive at testator's intent.[9] So when there is language constituting an absolute gift followed in the same articles by words which do not disclose a clear and unambiguous intent to cut down the previous gift, the Court favors giving effect to the entire gift.[10]

In the case at bar, both parties conceded the invalidity of the gift by way of the extrinsic instructions; the sole question was whether, notwithstanding this failure, the will passed the residuary estate absolutely to the executor or whether the entire will failed because of the failure of a testamentary trust for lack of named beneficiaries. The Court of Appeals took the wording "absolute property of my friend" as contravening a testamentary intent to create a trust. It believed that it would not allow the notion of a gift, made in "clear" words, to be destroyed by subsequently ambiguous limitations superimposed by the testatrix in the same clause.

The difficulty in dealing with matters of testacy, where a blunder or lack of foresight in drafting is apparent, is that the court must always look to the particular will and interpret it within historically sanctioned rules. What oftentimes results is a battle of rules, some courts preferring to apply those which will give effect to the will rather than result in intestacy, others preferring not to where a result will occur which was obviously not the testator's intention. In the *Warren* case, the court was faced with balancing the interests of requiring strict enforcement of the Statute of Wills and of giving effect to the testator's true intent even at the expense of sacrificing conformity to the statute. As between the intestate distributees and the executor, Gill received the residuary estate absolutely. The case cannot end there, however, for certainly this was not what the testator intended; it is unthinkable that the Court of Appeals believed the disposition to terminate there. The Surrogate's Court made the point, and it is implicit in the affirmance of the Surrogate's decision, that as between the executor who got an absolute gift and the beneficiaries designated by the testatrix in her instructions, the question might be resolved subsequently (if the executor were to work a fraud on the testatrix' intent), with the imposition of a constructive trust in favor of these beneficiaries.[11] No fraud was yet perpetrated; in fact, the executor specifically intended to comply with the testatrix' wishes. In ultimately evading the requirements of the Statute of Wills, a court of equity acts in strange ways, but perhaps gratifyingly so, to

8. Ibid.
9. In the Matter of Miner, 146 N.Y. 121, 40 N.E. 788 (1895).
10. In the Matter of Hayes, 263 N.Y. 219, 188 N.E. 716 (1934).
11. See Amherst College v. Ritch, 151 N.Y. 282, 323, 45 N.E. 876, 887 (1897); In the Matter of O'Hara, supra note 4, at 412 (1884).

arrive at a result which resembles the testatrix' true intent. Though gratifying, it would be far wiser to caution the drafter that careful drafting avoids litigation.

W. A. C.

CONFIDENTIAL RELATIONSHIP ITSELF INSUFFICIENT TO IMPOSE A CONSTRUCTIVE TRUST UPON A TESTAMENTARY DISPOSITION

C. F. Oursler had two children by his first wife, and in 1951 he and his second wife executed simultaneous wills. His will gave his residuary estate to his second wife, but if he survived her, the estate would go to the four children of both his marriages or their children. The wills were reciprocal. However, after his death Grace Oursler changed her will giving her estate only to the two children of her marriage. The children of C. F. Oursler's first marriage brought a suit to impress a constructive trust on a portion of Grace Oursler's estate. The trial court[1] granted the trust and the Appellate Division affirmed on the ground that she took the property by the husband's will in a relationship of confidence from which he believed she would dispose of the property as he would do it himself.[2] The Appellate Division stated that these wills, executed simultaneously, which made identical dispositions of property, show an intent based upon confidence that all four children would share the property. Upon appeal, the Court of Appeals, in reversing the decision, *held* that the circumstances of this case were insufficient to show a promise and that mere confidential relationships are insufficient to raise a constructive trust. *Oursler v. Armstrong,* 10 N.Y.2d 385, 179 N.E.2d 489, 223 N.Y.S.2d 477 (1961).

A joint will has been held to be irrevocable after the death of one spouse, and the surviving spouse thereupon becomes a trustee for the remainder of the property devised to him.[3] To invoke the intervention of equity to enforce a mere reciprocal will as irrevocable however, it has not been sufficient that the wills are simultaneously made and similar in their cross provisions. The existence of a clear and definite contract must be shown, either by proof of an express agreement, or by implication from unequivocal circumstances.[4]

A confidential relationship is not a sufficient basis by itself for a constructive trust; it must be coupled with a promise. A constructive trust is established by the court when the receiver of the property has become unjustly enriched by means of a promise. The court then decrees that the holder of the property becomes a trustee for the benefit of those intended to have received the property.

> A court of equity in such cases exerts its power, not merely because there has been a breach of a contract, but because the promise has

1. 10 Misc. 2d 654, 170 N.Y.S.2d 458 (Sup. Ct. 1958).
2. 8 A.D.2d 194, 200, 186 N.Y.S.2d 829, 836 (1st Dep't 1959).
3. Edson v. Parsons, 155 N.Y. 555, 50 N.E. 265 (1898).
4. Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915).