

10-1-1962

Decedents' Estates And Trusts—Confidential Relationship Itself Insufficient to Impose a Constructive Trust Upon A Testamentary Disposition

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Recommended Citation

Barry D. Knox, *Decedents' Estates And Trusts—Confidential Relationship Itself Insufficient to Impose a Constructive Trust Upon A Testamentary Disposition*, 12 Buff. L. Rev. 155 (1962).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol12/iss1/38>

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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 court¹ 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

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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).

been used as an instrument to induce the promisee to part with his property, so that the retention of it by the promisor in violation of the promise would . . . constitute a fraud. It is not the promise only, nor the breach only, but the promise and the breach combined with the extortion of property from the owner upon the faith of the engagement, which puts the court in motion.⁵

Whether there was sufficient proof of an express promise by a testator's wife and whether there were unequivocal circumstances under which a constructive trust could be maintained were the problems confronting the Court in the instant case. The plaintiffs had to attempt to obtain a constructive trust for a share of the estate because there obviously was no joint will and there was nothing in the wording of the wills that would make them reciprocal. Therefore, they had to establish a promise either express or implied from Grace to her husband to convey the property in question as provided in his will and to combine this with the confidential relationship to create a ground for a constructive trust. The instant case held that there had been insufficient proof that a promise had been made and that the mere fact of a confidential relationship did not itself imply such a promise, nor was it a sufficient basis for a constructive trust. A promise, express or implied, is necessary to the constructive trust; however, it must be combined with other factors,⁶ primarily with a confidential relationship.⁷ In *Wood v. Rabe*⁸ it was held that the plaintiff's interest in the property, the confidential relationship of the parties, the youth and inexperience of the plaintiff, and the injustice which would result from maintaining the status quo, were all factors to be considered in establishing the trust. The Court was there dealing with property rights between a mother and her son, a relationship which "if not fiduciary in the strict sense, was nevertheless one ordinarily involving the greatest confidence on one side, and the greatest influence on the other."⁹ In the instant case, however, the plaintiffs were unable to establish the fact that an oral or written promise had been made. The Court held that the necessary promise could not be implied from the mere similarity of the wills or the confidential relationship of the parties. In order to attribute to a will the quality of irrevocability, the Court demands the most indisputable evidence of the agreement, which is relied upon to change the "ambulatory" nature of the will, and presumptions will not, and should not, take the place of proof. It is usually held that the making of mutual separate wills is insufficient evidence of a contract not to revoke. While the form and content may indicate that each testator had knowledge of the other's will and, if it can even be inferred that there was concert in making them, it should not infer a contract not to revoke without further proof.¹⁰ *In the Matter of Estate*

5. *Golland v. Golland*, 84 Misc. 299, 306, 147 N.Y. Supp. 263, 268 (Sup. Ct. 1914).

6. *Wood v. Rabe*, 96 N.Y. 414 (1884).

7. *Friedman v. Katz*, 271 App. Div. 836, 65 N.Y.S.2d 731 (2d Dep't 1946).

8. *Wood v. Rabe*, supra note 6.

9. *Wood v. Rabe*, supra note 6, at 425.

10. *In the Matter of Bekker*, 283 App. Div. 609, 129 N.Y.S.2d 126 (3d Dep't 1954).

of *Rosenblath* the Court stated that "it is well settled that to establish an agreement for mutual wills and defeat the right to revoke a will, there must be full and satisfactory proof of the agreement, which cannot be supplied by presumptions. Merely establishing that the parties made similar wills with cross provisions in favor of the survivor is not enough to establish a contract to make mutual wills."¹¹

When a person, through the influence of a confidential relationship, acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief.¹² This is the essence of the equitable doctrine upon which the constructive trust rests. A desire to prevent the abuse of such a relationship, coupled with Oursler's reliance, led the Appellate Division to affirm the use of its equitable jurisdiction. Its statement that "the conduct of one having a legal title acquired in a confidential relationship, who denies or withholds rights which should under equitable principles be recognized, itself lies within the term 'fraud,' as the courts of equity use that term in this context,"¹³ gives a key to its basis for affirming relief. A person who obtains title through the abuse of such a relationship is committing a fraud, which equity must be able to redress. Under these circumstances Grace Oursler, while probably not acting with any intent to defraud, did act in such a manner which would reasonably lead her husband into reliance that the general purpose and scheme of his will would be carried out. The Court of Appeals could have easily affirmed the Appellate Division, as that lower court was using its equitable powers to prevent an act which "amounts" to a fraud from having legal effect. While the Court is sympathetic to the Appellate Division's desire to enforce a moral obligation, it was primarily concerned with upholding the policy against restricting the power of testation. The Court should give this policy its proper consideration, but it may be doubted whether a preference for this policy over that of preventing an unconscionable disposition of property is desirable. While a court of equity has always been able to redress a wrong which results from actual fraud or something which amounts to fraud, it may now be the policy, however unfortunate, to restrict this power when dealing with testamentary dispositions.

B. D. K.

CONSTRUCTIVE TRUST IMPOSED UPON A TESTAMENTARY DISPOSITION WHERE
A SUFFICIENT AGREEMENT IS FOUND IN THE WILL

In March 1946, Ludwig and Margaret Mottek made a joint will. The will provided that if, upon the death of the other, neither remarries, the survivor

11. In the Matter of Estate of Rosenblath, 146 Misc. 424, 425-26, 263 N.Y. Supp. 303, 304 (Surr. Ct. 1933); See also Edson v. Parsons, supra note 3; Kingsbury v. Kingsbury, 120 Misc. 362, 198 N.Y. Supp. 512 (Sup. Ct. 1923).

12. Goldsmith v. Goldsmith, 145 N.Y. 313, 39 N.E. 1067 (1895); Wood v. Rabe, supra note 6.

13. Oursler v. Armstrong, supra note 2, at 198, 186 N.Y.S.2d at 834.