Buffalo Law Review

Volume 12 | Number 1 Article 39

10-1-1962

Decedents' Estates And Trusts—Constructive Trust Imposed Upon a Testamentary Disposition Where a Sufficient Agreement Is Found in the Will

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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.

would be appointed "sole heir of the decedent." The children, the plaintiffs here, were "appointed heirs of the last decedent spouse." Another provision stated that if property should be obtained from Germany, the couple's homeland, Illa Rich would receive $3000 "in order to put both daughters in equal position." In August of 1950, Ludwig died. Upon his death the daughters were advised to sign releases entitling Margaret to deal with Ludwig's estate in Germany and they agreed to do so. In October of 1955, Margaret revoked the will of 1946 and made a new one. She died in 1957, and her 1955 will was admitted to probate. The daughters, Helene Arnhym and Illa Rich, brought an action in equity to impress a trust upon the property left by their mother and to have it distributed under the will of 1946. The trial term of the Supreme Court[1] dismissed the complaint, and the dismissal was affirmed by the Appellate Division.[2] The Court of Appeals reversed, two judges dissenting. *Held*: the language of the joint will established a contract whereby Margaret could not execute any will other than the one agreed upon and the execution of a second will constituted a breach of contract. The Court further imposed a constructive trust in favor of the legatees in the joint will. *Rich v. Mottek*, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962).

A will is normally ambulatory and revocable during the lifetime of the testator; he may, however, bind himself by a joint will to dispose of his estate in any specified manner. Once such a contract is made, it is enforceable in equity.[3] A joint will, according to the generally stated rule, does not by itself establish a contract not to revoke the provisions set forth in the will; in addition to execution of such will further corroborating evidence is needed.[4] There is, however, an indication that a joint will does infer an agreement not to revoke.[5] Whether or not a contract is embodied in the joint will is dependent on the persuasiveness of the cumulative effect of the language in the instrument in light of the surrounding circumstances. Courts have relied on the joint language of the dispositions to establish contractual intent.[6]

The Court of Appeals found that the joint will here did in fact embody language which established contractual intent. While stating that the presence of a joint will did not establish a contract, the joint language "of the will imposed a clear obligation on the part of husband and wife to provide, at death, first for each other and then for their children." The continued use of "we" and "our" in addition to reference to their daughters' positions in relation to the testator's property convinced the Court that they intended to provide unconditionally for the daughters. The reference to the survivor as the "sole heir" of the deceased and the children as heirs of the survivor was passed

1. 28 Misc. 2d 195, 216 N.Y.S.2d 463 (Sup. Ct. 1960).
2. 14 A.D.2d 89, 217 N.Y.S.2d 409 (1st Dep't 1961).
3. Tutunjian v. Vetzigian, 299 N.Y. 315, 87 N.E.2d 275 (1949).
4. Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915).
5. Tutunjian v. Vetzigian, supra note 3; Hermann v. Ludwig, 229 N.Y. 544, 129 N.E. 908 (1920); Rastetter v. Hoenninger, supra note 4.
6. Rastetter v. Hoenninger, supra note 4.

off as merely denoting the singular rather than plural, and the Court held further that there is no difference between an heir and a sole heir. After thus establishing a contract in the will, the Court reasoned that the releases signed by the daughters merely gave up rights to their father's estate under his will, but that they retained their rights under the mother's will and were still entitled to benefit from the contract made between the mother and father for their daughters' benefit. The dissent based its opinion upon the Appellate Division's reasoning. The primary difference was in the omission of the word "sole" in referring to the daughters. Use of the word in reference to the spouses meant a "complete and plenary" interest in each other's property, and as to the daughters, its omission negated any contractual obligation to make absolute gifts to the daughters.

The minority view disregarded the joint language that seemed to imply a joint disposition of property as well as provisions that showed the daughters' right to the property. Examples of the latter were (1) the provision that provided for settlement with them before remarriage and (2) provisions for the division of additional property received. On the other hand, the majority also directly disregarded two instances where the will gave property to the survivor without restriction, thus implying no contractual obligation. The minority's view of the use of the word "sole" seems more sound and by its use denotes more than distinguishing singular from plural. Its use seems to place emphasis upon the fact that the survivor is to receive everything unrestricted. Its omission when referring to the daughters negated the idea of a contractual obligation. It was brought out in the minority opinion that Margaret made a will after her husband's death revoking the will of 1946, but giving the property to the daughters. If the majority view is adopted, why would she revoke a previous will in order to dispose of the property in exactly the same way? She could have believed herself under a contractual obligation to make a will of this sort, not fully cognizant of the operation of a joint will. Presuming, however, that she was acting under the advice of counsel, she probably believed that the joint will merely gave her the property, and she merely wished to dispose of it according to her own wishes. If we, however, take the majority view and accept this as a contract, it contains no provision stating whether or not the parties may revoke during their joint lifetimes. Whether or not the parties are entitled to revoke during their joint lifetimes, or at any time, should depend upon the contract which was made. If evidence of the terms of such an agreement is lacking, or the agreement appears to be indefinite or hazy, the parties should be allowed to revoke at any time, prior to the death of the co-testator or thereafter. It also seems that a logical argument can be made to bar the contractual obligation through the releases signed by the daughters. This joint will operates as a third party beneficiary contract, a concept so ingrained in the law that recent cases do not bother to discuss it. Usually courts which disfavor third party beneficiary contracts will enforce them where there is a moral obligation

of the promisee to the third party. This is the case here because of the relationship of father and daughters. *Seaver v. Ransom*[7] stated that the plaintiff could recover at law because the promisee had in substance bequeathed the promise to the plaintiff. Therefore, any release of all claims and rights under the terms, provisions, conditions, and trusts of the father's will would release the mother from any contractual obligation to convey the property to her daughters. There is some merit to the majority opinion; however, it is not difficult to see that the Appellate Division's decision could have reasonably been affirmed had the Court been so inclined.

B. D. K.

RESIDENCE OF FOREIGN AUTOMOBILE INDEMNITY CARRIER DEEMED TO BE COUNTY WHERE POLICY WAS ISSUED FOR PURPOSES OF CONFERRING JURISDICTION UPON SURROGATE'S COURT

This case concerns the issuance of ancillary papers of administration with will annexed to continue an automobile cause of action against the estate of decedent Riggle, a former resident of Illinois, commenced during his lifetime. The respondent is a resident of Nassau County, New York. She was a passenger in an automobile owned by her husband and driven by Riggle in the State of Wyoming when an accident occurred in which she was injured. The automobile was covered by a liability policy that had been issued in Nassau County to her husband. An "additional insured" provision obligated the insurer to defend the driver. While Riggle was alive respondent commenced a negligence action against him by personal service of summons and complaint in New York. Subsequently he died and the action could not be continued in personam against the Illinois executor of his estate due to the federal constitution.[1] It was necessary for an ancillary administrator with will annexed to be appointed and served in New York. This could only be done if Riggle had left some property in the State, and a judgment rendered against Riggle's estate would have to be executed against such property. It was claimed that the personal obligation of the indemnity insurance carrier to defend him as an additional insured under the policy was personal property in the nature of a debt left by him in New York State. The Surrogate's Court of Nassau County issued the letters,[2] and an appeal was taken to the Supreme Court, Appellate Division, which affirmed.[3] Upon appeal to the Court of Appeals, *held*: that the insurer, incorporated in Illinois, but authorized to do business in New York State, is to be considered

7. 224 N.Y. 233, 120 N.E. 639 (1918).

1. See McMaster v. Gould, 240 N.Y. 379, 388, 148 N.E. 556, 559 (1925): "[T]he constitutional requirement of due process of law precludes the legislature from providing generally for continuing actions for judgments in personam against the foreign executors or administrators of deceased defendants."

2. 18 Misc. 2d 988, 188 N.Y.S.2d 622 (1959).

3. 11 A.D.2d 51, 205 N.Y.S.2d 19 (2d Dep't 1960).