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James Lindsay

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THE COURT OF APPEALS, 1954 TERM

Separate Trial

In *In re Albright's Estate*,³⁷ a woman claiming to be the widow of testator filed a notice of election to take her intestate share.³⁸ Subsequently she entered into a settlement agreement with the executor. The executor brought this proceeding to compel the alleged widow to execute deeds in accordance with the settlement agreement. In her opposing affidavit, she asked to be relieved of the settlement agreement.³⁹

The executor moved in the Surrogate's Court under the Civil Practice Act § 443 for a preliminary trial of the issue whether the settlement agreement should be vacated, rather than joining the question with that of whether the alleged widow had been testator's common law wife.⁴⁰ This motion was granted,⁴¹ and the determination was affirmed by the Appellate Division.⁴²

The order of affirmance was the subject of this appeal; was the order of the Surrogate's Court, insofar as it directed a separate trial of the issue respecting the validity and effect of the settlement agreement, properly made? The Court of Appeals found that this order was an appropriate determination, since whether or not the settlement agreement was to be set aside depended on whether the executor had faithfully informed the widow concerning the facts regarding the estate at the time when the agreement was made. It did not depend upon what ultimately proved to be her status as widow. If the widow were defeated upon the preliminary trial, the main trial would be unnecessary. Therefore, the application of Civil Practice Act § 443 would seem most appropriate.⁴³ The granting of a

37. 309 N. Y. 126, 127 N. E. 2d 910 (1955).

38. Pursuant to DECEDENT ESTATE LAW § 18.

39. The Surrogate denied her cross application to be relieved of the settlement, and granted the executor's motion for an order to compel her to execute the deed. On appeal, the Appellate Division, 282 App. Div. 716, 122 N. Y. S. 2d 196 (2d Dep't 1953), reversed and remitted the matter to the Surrogate's Court for a determination after a hearing concerning the validity and effect of the settlement agreement.

40. CIVIL PRACTICE ACT § 443. Order of disposition of issues at the trial 3. The court, in its discretion, may order one or more issues to be separately tried prior to any trial of the other issues in the case.

41. "The cross-relief asked for, viz, a trial of all the issues, is denied at this time, in the exercise of discretion, since the trial of the above-stated issue, if adverse to the respondent (widow) will end the litigation and render a trial on the merits of the other issue unnecessary."

42. 283 App. Div. 1082, 131 N. Y. S. 2d 429 (2d Dep't 1954).

43. §443 "has useful application to an issue which, if determined one way, will end the litigation and render a trial upon the merits unnecessary." *Warner v. Star Co.*, 162 App. Div. 458, 461-62, 147 N. Y. Supp. 803, 805-06 (2d Dep't 1914); *Smith v. Western Pacific Ry. Co.*, 144 App. Div. 180, 128 N. Y. Supp. 966 (1st Dep't 1911), *aff'd* 203 N. Y. 499, 96 N. E. 1106 (1911).

separate trial is in the discretion of the court,⁴⁴ and since the order came within the purpose of § 443, it was certainly not arbitrary — therefore, not subject to review.⁴⁵ There was ample precedent for conducting a preliminary trial upon the validity of a release or settlement agreement.⁴⁶

The decision would seem to be in accord with the law on compromise settlement agreements. The validity of the settlement agreement is not based on the possible success of the party in a litigation under a will. If this were not so, then the very controversy for which the agreement was made would have to be litigated before the agreement could be effective. The validity of the agreement is, and should be, the only concern until the agreement has either been upheld or rejected.⁴⁷

44. *Spencer v. Hunt*, 247 App. Div. 503 286 N. Y. Supp. 767 (4th Dep't 1936).

45. "We do not review discretionary orders unless they are arbitrary." *Lauer v. Board of Education*, 262 N. Y. 416, 418, 187 N. E. 561, 563 (1933); accord, *New York Corporation v. Kelly*, 296 N. Y. 178, 71 N. E. 2d 456 (1947).

46. *Matter of Cook's Will*, 244 N. Y. 63, 154 N. E. 823 (1926); *Matter of Frame's Estate*, 128 Misc. 788, 219 N. Y. Supp. 759 (1926); *Warner v. Star Co.*, *supra* note 43.

47. *Seaman v. Seaman*, 12 Wend. (N. Y.) 381 (1834).