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Libel in a Will

C. William Isaacson

LIBEL IN A WILL

INTRODUCTION

Courts have held the right to one's good name in the highest regard and have protected this right by an action for libel or slander. Where there is no opposing conflict of the public or the general good, the courts have been quick to indemnify those whose names and reputations have been blackened wrongfully by others.

Under some circumstances the courts have allowed the blackening of a person's name, without a corresponding remedy. This occurs when a testator in his last will includes language that is plainly defamatory and injurious to the good name and reputation of the one mentioned. The problems of whether there can be a cause of action for libel in a will has been met squarely in only a few appellate decisions.[1] In several New York lower court cases,[2] the question has been considered at least obliquely. Despite the relative paucity of judicial authority, it is not difficult to conjecture that such libelous statements could increase if the courts do not provide a remedy. It would offer a convenient instrumentality for the malice of some testators, who would be thwarted only to the extent that they do not live to see the results of their testamentary handiwork.

In evaluating the problem of libel in a will there appears to be a clear split of authority on the question of granting relief in such a case.

RELIEF DENIED

A cause of action first was denied in the case of *Citizens and Southern National Bank v. Hendricks.*[3] It is interesting to note that this decision went clearly against the decision of its own lower appellate court[4] and an earlier adjudicated case of neighboring Tennessee.[5] The principle ground upon which a cause of action against the estate was denied was the court's interpretation and application of the ancient maxim, *"actio personalis moritur cum persona"* (personal action dies with the person). The court reasoned that, since the statute dealing with libel demanded both a writing and a publication and, since the

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[1] See Kleinschmidt v. Matthiew, 200 Ore. —, 266 P.2d 686 (1954); Carver v. Morrow, 213 S.C. 199, 48 S.E. 2d 814 (1948); Hendricks v. Citizens & Southern Nat. Bank, 43 Ga. App. 408, 158 S.E. 915 (1931); Citizens & Southern Nat. Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313 (1933); Nagle v. Nagle, 316 Pa. 507, 175 A. 487 (1934); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1914); Brown v. Mack, 185 Misc. 368, 56 N.Y.S.2d 910 (1945); *In re* Gallagher's Estate, 10 Pa. Dist. R. 733.

[2] See *In re* Bomar's Will, 18 N.Y.S. 214 (1892); *In re* Speiden's Estate, 128 Misc. Rep. 899, 221 N.Y.S. 223 (1926); *In re* Payne's Estate, 160 Misc. 224, 290 N.Y.S. 407 (1926); *In re* Draske's Will, 160 Misc. 587, 290 N.Y.S. 581 (1936); *In re* Croker's Will, 201 Misc. 264, 105 N.Y.S.2d 190 (1951).

[3] Citizen's & Southern Nat. Bank v. Hendricks, *supra* note 1.

[4] Hendricks v. Citizen's & Southern Nat. Bank, *supra note* 1.

[5] Harris v. Nashville Trust Co., *supra* note 1.

writing occurred before the testator's death, the maxim applied and, hence, there was no cause of action. A necessary and concomitant factor in this reasoning is the assumption of the court that the executor is not the agent of the testator but rather an agent of the law. Both the maxim and the agency principle that an agency not coupled with an interest is terminated by the death of the principal[6] were held applicable.

> "A libel for which damages may be recovered as defined in the Civil Code, §4428, must in the first instance be 'expressed in print, or writing, or pictures, or signs', and in the second instance 'publication of the libelous matter is essential to recovery.' Both requirements are mandatory, and they are equally essential. If the first be accomplished, and the perpetrator dies, the maxim *actio personalis moritur cum persona* will apply, with the result that what has been done is but naught. If a paper executed as a will expresses libelous matter, and the act of the executor in propounding the will is relied on to complete the offense and afford ground for recovery against the estate, such reliance must fail, because the testator has died. If it be said that the act of the executor in propounding the will could be taken into account, the reply is that the executor was a creature or agency of the law to administer the estate, and was not the testator's representative in the continuation or consumation of the testator's wrong."[7]

The case of *Carver v. Morrow*[8] reaffirmed the application of the maxim and the agency principles promulgated in the *Hendricks* case[9] and purported to reply to the obvious argument that justice demands a cause of action in such circumstances. This was done, not by showing that it is not just, but by showing that justice may be defeated in the case where a person libels another and then dies.

> "It may be said that since there should be a remedy for every wrong, it would be unjust that one should be allowed to defame another in his will, and his estate not be held responsible. To this it may be replied, as stated above, that, even if one in his lifetime does make and publish a libel in the most offensive manner which might be imagined, the cause of action will not survive his death, in which case there will be no remedy for such wrong. A person who may be defamed in a will is in no worse position."[10]

The court further stated that if such a cause of action were allowed, it would lead to the undesirable result of many law suits.

> "It is also to be considered that if a precedent is set in this sort of case, holding the estate of a deceased person liable for an

[6] RESTATEMENT, AGENCY §120, (1933); AM. JUR., AGENCY §59.
[7] Citizen's & Southern National Bank v. Hendricks, *supra* note 1 at p. 315.
[8] Carver v. Morrow, *supra* note 1.
[9] Citizen's & Southern Nat. Bank v. Hendricks, *supra* note 1.
[10] Carver v. Morrow, *supra* note 1 at p. 817.

act which was not completed in his lifetime, but was consummated after his death, the door would be opened to a great many other different causes of action."[11]

A third case which considered the problem denied the plaintiff recovery for his damages, not by denying that he had a cause of action, but rather by admitting that he had a cause of action, but defeating it by the affirmative defense of privilege.[12] Although the court speaks in terms of privilege, it does not distinguish clearly whether it is speaking in terms of an absolute or a qualified privilege. It appears from analysis that the court refers to qualified privilege, but there is no clear showing that this is so:

"A will is the foundation of a judicial proceeding, the administration of the estate in the orphan's court. It is closely analogous to a plaintiff's statement in a civil action in the respect that it is the beginning of a judicial proceeding. We believe that the rule which makes the pleadings in a judicial proceeding absolutely privileged may properly be applied to a will in which there is no apparent purpose to injure the reputation of anyone, but merely a purpose to insure the distribution of the testator's estate to his intended beneficiaries and to protect it from possible claims of persons whom he does not desire to share in the distribution."[13]

Further the court quotes the following passage with approval:

"One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not unnecessarily made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights, nor to others than those whom he honestly believes will, by reason of knowledge of the matter published, be better enabled to assert, or to protect from invasion, either their own rights, or the rights of others entrusted to their guardianship."[14]

It is to be noted that the requisites of a qualified privilege confine its application to limited fact situations, and, hence, is no general answer to the problem. In the larger number of cases, there would not be the necessary requisites[15] present to qualify the libelous matter as privileged, and if the defense failed, the original question would arise.

Relief Granted

Other courts have allowed a cause of action for libel in a will. Generally, the basis for relief is that of substantial justice in that a testator should not be allowed, with malice and forethought, to make

[11] *Ibid.*
[12] Nagle v. Nagle, *supra* note 1.
[13] *Ibid.* at p. 488.
[14] *Ibid.*
[15] See Prosser, Torts (1941) §94; Restatement, Torts (1938) §§593-598.

his will a vehicle for wrongfully blackening good names and reputations. The court in the first adjudicated case on the subject,[16] taken chronologically, states as follows:

> "Refusal to grant relief in such cases would amount to denial of justice and to premium on irresponsible libel. No one would be safe from the 'slings and arrows of outrageous' malice. It ought not be permitted that a solemn testamentary disposition should be made the vehicle of libelous matter."[17]

In a case[18] that is usually considered the principal authority for allowing relief the court speaks as follows:

> "If relief be denied to this plaintiff in this suit, she is indeed in bad plight. There is no other way in which she may vindicate the virtue and integrity of her mother and establish for herself the position in society which she is entitled to occupy. If relief be denied to her, she, during her lifetime, and her child for generations, must bear the reproach of the bar sinister. It cannot be said that the law affords no remedy for a wrong such as the one perpetrated by this testator."[19]

Another concept that is to be considered and which is closely allied with the idea of substantial justice is the realization that libel in a will is apt to be peculiarly enduring and to be of relatively greater permanence than many other libels. The mere fact that a will becomes part of the permanent records of probate and records affecting title to land guarantees this.[20] All in all, the courts seem to realize the great potential for harm in libel in a will because the stigma is sustained and easily accessible to any who desire to find it or merely chance to find it.

In deciding the cases that favor the granting of the action, the courts have tried to refute the reasoning of the cases holding to the contrary. They hold that the reasoning of the maxim, *"actio personalis moritur cum persona"* does not apply because, since publication is necessary for the tort and this occurs only after death, the cause of action arises only after death and cannot, therefore, die with the testator because it did not exist until after his death.[21] The court in the *Harris* case[22] went even further and attacked the maxim itself by showing its ancient and not particularly honored existence and implying that it is anachronistic and has outlived its usefulness.

The agency argument was considered in the most recent case on

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[16] *In re* Gallagher's Estate, *supra* note 1.
[17] *Ibid.*
[18] Harris v. Nashville Trust Co., *supra* note 1.
[19] *Ibid.* at p. 587.
[20] *In re* Gallagher's Estate, *supra* note 1; Harris v. Nashville Trust Co., *supra* note 1.
[21] Harris v. Nashville Trust Co., *supra* note 1.
[22] *Ibid*

the subject,[23] and the court admitted that under the strict common law view it would be hard to show how the executor's "agency", since it was not coupled with an interest, could survive the testator's death. The court stated that, since the executor had certain duties to perform before he was by proper process appointed by the court, he did act for or represent the testator.

> "It, therefore, appears that there is a hiatus between the testator's death and the court appointment of the executor. During this period when he, or the custodian of the will files the same with the clerk, he is not acting for the court but necessarily for the deceased. When the testator executes his will he does the same with full knowledge that the same will be made public, and although the executor or custodian in such instance is not what would strictly be called an agent under the common law rule, yet he is an instrumentality through which the will is published, and when he does thus act, he in effect publishes the will at the behest of the testator."[24]

The question of privilege was dealt with in *Brown v. Mack*[25] by demonstrating that the testator had no right to privilege under the circumstances since he was not a party to the probate proceedings.

Thus far, the arguments brought forth are purely those drawn from the case law on the subject. It is to be noted that in no case considered here is any attempt made to predicate liability for the executor as an individual. It is proper that he should not be liable because it is the duty of the executor to publish the will under the statutory law of most states.[26] It is well to note further that none of the survival statutes come into play[27] since by their very nature the cause of action comes into existence during the lifetime of the one whom the cause of action is said to survive. There can be no survival unless the cause of action occurs before death. The survival statutes would be relevant if the action were brought for any publication by the testator before his death. Thus, if there were a survival statute broad enough to cover libel and slander, as most do not,[28] then it would be relevant in these jurisdictions that apply the maxim *"actio personalis moritur cum persona."* Otherwise it would be irrelevant.

One other category of cases, bearing obliquely on the problem is that which allows libelous material to be deleted from the will under circumstances where such material is not necessary for disposition of the estate and could be termed surplus.[29] However, this process

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[23] Klienschmidt v. Matthiew, *supra* note 1.
[24] *Ibid.* at p. 689.
[25] Brown v. Mack, *supra* note 1.
[26] See WIS. STATS. (1953) §310.02.
[27] See WIS. STATS. (1953) §331.01.
[28] See WIS. STATS. (1953) §§311.01, 287.01.
[29] See cases cited *supra* note 2.

could not effect the existence of a cause of action since it only deals with mitigating the harm done by the publication.

Analysis and Criticism

When the cases have been considered and their reasoning analyzed, the lines of conflict are clearly drawn. The first conflict is that revolving about the maxim *"actio personalis moritur cum persona."* The courts in favor of the cause of action deny its application since the cause seeking to be interred cannot be so interred because it had no existence at the time of the testator's death. If it is assumed that the maxim does not apply, the problem of who is the tortfeasor arises. If it is the testator how can he be a tortfeasor after his death? If it is the estate, how can it be held to be liable for something it did not do itself but rather was done by the testator, at least as the efficient cause thereof? The estate itself is sought to be held as an entity, but only vicariously, for the testator's wrong. Logically it appears that the testator, by setting in motion the machinery resulting in libel, is the real tortfeasor. Once it is agreed that he is the tortfeasor, the applicability of the maxim returns as an obstacle to suit.

When one turns to the question of whether the executor is the agent of the testator, the answer is that the common law cuts off the agency relationship at the death of the principal. Yet from a common sense viewpoint, it is apparent that in some way the executor is acting for the testator since he is directly serving the testator's wishes and instructions.

Probably the most realistic argument is that to deny relief leads to injustice, and this logic seems unanswerable. It cannot be denied that a reputation has been blackened. If this is true, under the fundamental tort premise of indemnity the maligned person should definitely have a remedy, especially in view of the permanent nature of the injury inflicted. Those who oppose granting a cause of action do not question the justice of it but rather attempt to dull the force of this argument by pointing out analogous situations where justice may be thwarted, and by raising the argument that to allow such an action would result in a multiplicity of new causes of action. It is plain that the first can be refuted by showing that it is actually irrelevant to the merits of the problem at hand, since it in no way denies the "justice" argument but only avoids it. The second is irrelevant in that it has no relation to the merits of the action at hand and, further, the mere fact that a multiplicity of actions might arise is certainly not a fair reason for denying a just cause. Eminent authorities in the field of torts admit the just result attained when the cause is allowed.[30]

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[30] See Prosser, *op. cit., supra* p. 814; Harper, Torts, p. 675.

One other argument raised by text writers is that such a case might furnish a means of circumventing statutes forbidding bequests and legacies to certain people.[31] In Wisconsin this is not a problem because there are no such statutes. In those states having such statutes, the problem can be minimized by the fact that the amount recoverable in damages by a person in the prohibited class would be negligible or the publicity of such libel suit would be detrimental to their reputation. Besides, in these special cases recovery could be refused, not on the ground that no such cause of action exists but on the ground that it is plainly against public policy to allow the statute to be circumvened where it can be shown that this is the intention. It is to be noted that no adjudicated case thus far has considered this argument.

Thus, in the final analysis, the problem reduces itself to a clash of common law principles with the principle of substantial justice. The lower appellate court faced this issue squarely in the *Hendricks* case saying:

> "Upon consideration of the question, we find ourselves squarely facing a choice between two courses; on the one hand the orthodox course of adhering strictly to the rigid rule of the common law, which in any case of the character of that before us would do violence to our innate sense of what is fair and right; or, on the other hand, of falling in line with the constantly changing concepts of the law and its administration, by conforming with what appears to be a modern doctrine, 'pure drawn from the fountains of justice.' In the instant case, notwithstanding our natural aversion to do anything in the nature of 'judicial legislation', we are impelled, in good conscience, to adopt the latter alternative. Though the doctrine that we have decided to follow, it is true, does not seem to be derived from any ancient legal lore, it has the merit, in our judgment, of being deep rooted in the moral sense;***."[33]

It appears difficult to refute this line of reasoning. Clearly a cause of action should be allowed for libel in a will, in the interests of justice. Perhaps the courts opposing this view are too firmly committed to their line of reasoning and will not retract in the absence of legislative enactment. However, this view should be followed in states, like Wisconsin, where the issue has not been decided. If relief were allowed, lawyers in the drafting of wills would be more able to insist that their clients keep such irrelevant matter out of their wills.

C. WILLIAM ISAACSON

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[31] *E.g.*, S. C. CODE OF LAWS (1922) §5217; LA. REV. CIV. CODE (Sanders 2nd ed. 1920) §1470.
[32] Hendricks v. Citizen's & Southern Nat. Bank, *supra* note 1.
[33] *Ibid.* at p. 916.