Case Western Reserve Law Review

Volume 5 | Issue 3

1954

Future Interests

Marshall I. Nurenberg

rendered by the physician did not violate the privileged communications statute because it did not disclose, nor was it based upon, any confidential communication or information protected by the ban of the statute. The weight of authority supports this view. But one may well ask: Is it possible for an attending physician to answer the question solely upon its hypothetical basis wholly uninfluenced by his personal knowledge of his patient's condition?[8] And who is to decide whether the physician can really perform this intellectual feat? the court?[9] the witness?[10] The case also suggests an ethical problem: Is it indelicate for a physician who has once attended a patient to permit himself to be hired by another for the purpose of testifying as an expert against his former patient? Two New York courts emphatically have said it is.[11]

CLINTON DEWITT

FUTURE INTERESTS

In *Braun v. Central Trust Co.*,[1] the court of appeals held that a will providing that the executor, after certain deductions, should select one half the inventory value of the assets, selecting such assets which qualify for the marital deduction in the federal estate tax, and deliver these assets to a named trustee for the benefit of the testator's wife does not violate the rule

---

[8] In *In re* Ross, 173 Cal. 178, 159 Pac. 603 (1916), the question was answered in the negative. "It cannot be disputed but that if the hypothetical question correctly stated the truth, it was a direct effort to elicit from the testator's family physician in violation of the confidential relationship a statement which of necessity would be based, not upon the facts stated in the question, but on the facts as known to and believed by the physician himself — facts which the law forbade him to disclose. In other words, under the thinnest of disguises the question was an effort to have the witness declare that which the law has said that he should not declare. The rule excluding the inquiry was proper." See also Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 143 So. 483 (1932).

[9] Hutchins v. Hutchins, 48 App. D.C. 495 (1919); Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 143 So. 483 (1932).

[10] People v. Schuyler, 43 Hun. 88, 91, *aff'd*, 106 N.Y. 298 (1887.) "The witness testified that he could exclude from consideration all information acquired in attending the defendant, and form and give an opinion upon the facts assumed, and this court cannot declare, as a question of law, that he could not."

[11] Matter of Gates, 170 App. Div. 921, 154 N.Y.S. 782 (1915); Bauch v. Schultz, 109 Misc. Rep. 548, 551, 180 N.Y.S. 188, 190 (1919) "A more serious question presented for the consideration of the Associations of the Bar and Medical societies is whether such deliberate and flagrant disregard of the ethics of the medical and legal professions should go unchecked, or whether steps should be taken, by statutory amendment or otherwise, to prevent a recurrence of such incidents."

against perpetuities.[2] The court's reasoning seems unnecessarily complex, but the result is sound.

It should be sufficient to hold that the trust comes into being and relates back to the issuance of letters testamentary to the executor, and that the law provides sufficient standards so that the interim period between the death of the testator and the appointment of the executor does not violate the rule.

In *Knightlinger v. Hulvey*,[3] a court of common pleas was confronted with construing the following clause of a will:

> In the event of any of my said nieces and nephews shall have predeceased me or shall die before distribution shall have been made by my executors, then I direct that the share of such deceased beneficiary shall be distributed among the survivors of said named nieces and nephews.

Another clause named the executors and granted unto them a power of sale of any real or personal property not otherwise disposed of in kind. A niece survived the testator but died leaving direct heirs before distribution. The court determined that all named beneficiaries who survived the testator were immediately vested with an interest in the realty as tenants in common, and that a power of sale in the executor without a direction to sell does not divest this interest. However this vested interest is subject to divestment by the exercise of the power. But inasmuch as legal title to personalty passes to the executor for distribution, the death of the beneficiary during the normal period of administration prior to distribution divested the deceased niece and her heirs of any interest in the personalty.

This latter holding is subject to attack since the executor, prior to distribution, holds merely a naked legal title to personalty as trustee for the distributees.[4] The equitable interest of the deceased niece must therefore vest immediately. It would seem sounder and more consistent with the testator's intent to hold that the vested interest of the deceased niece in both the realty and personalty was divested by her failure to survive the normal period of administration in favor of the surviving named beneficiaries.

Routzong v. Minsterman,[5] contains a lesson for the draftsman. The will provided:

> To N for her use in any manner she may deem proper without any limitation or restriction whatsoever with full power and authority, to sell

[1] 158 Ohio St. 374, 109 N.E.2d 476 (1952).
[2] OHIO REV. CODE § 2131.08 (OHIO GEN. CODE § 10512-8) "No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law rule against perpetuities."
[3] 51 Ohio Op. 402, 114 N.E.2d 542 (Trumbull Com. Pl. 1953).
[4] 21 AM. JUR. 281.
[5] 94 Ohio App. 281, 115 N.E.2d 54 (1952).