Michigan Law Review

Volume 50 | Issue 4

1952

WILLS-ASSERTION OF RIGHTS UNDER MORTMAIN STATUTE AS VIOLATION OF NO-CONTEST CLAUSE

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WILLS—ASSERTION OF RIGHTS UNDER MORTMAIN STATUTE AS VIOLATION OF NO-CONTEST CLAUSE—An action was brought by an executor for construction of a will, made five months before testator's death, which attempted to make bequests to various charities. The bequests were "invalid" under the terms

of the Ohio mortmain statute[1] because the will was executed less than a year before death. A no-contest clause[2] in the will declared that any person attacking it in any way would be barred from any beneficial interest, but there was no gift over in the event of such a contest. The charitable gifts were in the residuary clause, and there was no substitutionary gift in the event that the charitable bequest failed. The probate court held the bequests to the charities invalid, declaring that the property passed to testator's son and daughter by intestacy. On appeal, *held*, affirmed. Since the gifts to the charities were void and not merely voidable under the statute, the action by the children did not amount to a contest in violation of the no-contest provision. *Kirkbride v. Hickock*, 155 Ohio St. 293, 98 N. E. (2d) 815 (1951).

The question of whether a charitable bequest which is "invalid" under a mortmain statute is void or merely voidable seems never before to have been litigated in the context of an attack on a will containing a no-contest clause.[3] Such statutes have been most frequently construed in cases involving the problem of whether or not those in the protected class may waive their statutory rights.[4] Since it has been universally held,[5] even in Ohio, that such statutes are designed only to protect the testator's issue from ill-considered disinheritance by a dying parent and not to prevent charities from holding property, bequests of the sort in the principal case are deemed voidable and not void where waiver is involved. This interpretation leaves the children free to waive their rights, which seems proper inasmuch as the statute was designed for their exclusive benefit. In at least one jurisdiction[6] the right is automatically waived unless a contest is

[1] The relevant portions of the statute are as follows: "If a testator dies leaving issue of his body . . . and the will of such testator gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational or charitable purpose . . . such will as to such gift, devise or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator." Ohio Gen. Code (Page, 1938) §1054-5. The other type of American "mortmain" statute limits the percentage of his estate which a testator can leave to charity, rather than requiring him to make his will a designated number of months before death. These statutes are to be distinguished from the English Statutes of Mortmain, which were not concerned with the private needs of the testator's heirs but rather with effectuating a public policy against the holding of property in perpetuity by the "dead hand" of a charity. See 1 PAGE, WILLS §39 (1941).

[2] Such provisions are also loosely called "in terrorem" clauses. The term "contest" is used here in a somewhat broader sense than usual to include an attack on specific bequests in an admittedly valid will. Generally a contest means only opposition to the admission of the will to probate—an attack on the whole will on such grounds as improper execution or revocation. See 4 PROPERTY RESTATEMENT §428, comment *b* (1944).

[3] Unger v. Loewy, 202 App. Div. 213, 195 N.Y.S. 582 (1922), reversed on other grounds, 236 N.Y. 73, 140 N.E. 201 (1923), is apparently the only case in which the possibility of a conflict between a no-contest provision and the policy of a mortmain statute has arisen. The court was not called upon to resolve the question because the charities involved did not even contend that the statute could be avoided by a no-contest clause.

[4] The cases are collected in 154 A.L.R. 682 (1945). The question of waiver was also raised in the instant case, but the court dismissed it without any very illuminating discussion of the problems involved.

[5] Id. at 684.

[6] New York: In re Sonderling's Will, 157 Misc. 231, 283 N.Y.S 568 (1935).

brought; the Ohio probate court's express holding in a recent waiver case[7] that a bequest like the one under consideration was not void but voidable seems to indicate that some affirmative action is necessary in that jurisdiction to prevent a named charity from taking under the will and to avail the protected heirs of their statutory right. Logically, in view of the courts' pronouncements on the "waivability" of the statute-given right, it would seem that they would have to hold such charitable bequests only voidable in all situations. In the instant case the court faced that logical difficulty unnecessarily,[8] but in cases where there is a gift over or a residuary clause separate from the provisions for charity it will be of considerable importance whether a court calls the bequest void or voidable. Where there is a gift over in event of contest, for example, an attack will deprive the contesting party of his inheritance if the charitable gift is only voidable, whereas if it is considered to be void he will be able to prevent the charity from taking without having made a contest within the legal meaning of the term.[9] The Ohio court could have reached the result in the principal case and still remained consistent with its earlier analysis of such bequests by admitting them to be voidable in all cases, but refusing to give effect to a no-contest provision where it would render the statute nugatory. The court would seem to be on sounder ground, however, in enforcing a no-contest clause, even where doing so would nullify the protection given by the statute; for if such a statute can be set aside by waiver, there is no logical reason why it should not be permitted to be suspended by a no-contest clause, particularly when the policy behind the American statutes is considered.[10]

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[7] Deeds v. Deeds, 42 Ohio Op. 384, 94 N.E. (2d) 232 (1950), noted in 20 UNIV. CIN. L. REV. 308 (1951).

[8] In the absence of a gift over or a residuary disposition to others, the children would have taken their shares under the will as well as the shares intended for the charities by intestacy even if the court had declared the latter only voidable and hence found a breach of the no-contest provision. By holding the charitable bequests void and finding no breach of the no-contest clause, the court permitted the children to have the same net share as they would have received by the alternative interpretation, though they took in this case only part by intestacy and took their originally intended share under the will.

[9] Even where a charitable bequest is deemed void, it is presumably necessary that someone in the protected class raise the issue in order to prevent the charity from taking. As this court conceives of it, however, such affirmative action technically does not amount to a contest; but it is doubtless mincing words to say, "No action of testator's children made the gifts to the charities invalid; the statutory law of Ohio accomplished that." Principal case at 302.

[10] This is the position of the *Restatement* as to the instant type of statute. It would not, however, give effect to a no-contest provision where the attack was based on the invalidity of a bequest under the English type of mortmain statute, "primarily designed to curtail charitable ownership." 4 PROPERTY RESTATEMENT §429(2)(b) and illustration 2 (1944). This view is approved in Browder, "Testamentary Conditions against Contest Re-examined," 49 COL. L. REV. 320 at 331 (1949).