Michigan Law Review

Volume 50 | Issue 2

1951

FIDUCIARY ADMINISTRATION-FRAUD IN SECURING PROBATE-CONSTRUCTIVE TRUST IMPOSED ON DEVISEE

Patrick J. Ledwidge S. Ed.
University of Michigan Law School

FIDUCIARY ADMINISTRATION—FRAUD IN SECURING PROBATE—CONSTRUCTIVE TRUST IMPOSED ON DEVISEE—Plaintiff's complaint contained the following allegations: that plaintiff was the daughter and defendant the son of the decedent; that defendant had fraudulently destroyed written acknowledgements of the decedent that plaintiff was his daughter; that defendant had falsely secured the

probate of decedent's purported will, in which the plaintiff was in no way mentioned. The complaint sought the recovery of the value of a one-half interest in the estate. The trial court sustained a demurrer to the complaint. On appeal, *held*, reversed. The complaint stated a cause of action entitling plaintiff to the imposition of a constructive trust on the property held by defendant, to the extent of plaintiff's share of the estate as a pretermitted heir, or as an heir under the statute of intestate devolution. Defendant's concealment of plaintiff's existence from the probate court constitutes extrinsic fraud.[1] *Ellis v. Schwank*, (Wash. 1950) 223 P. (2d) 448.

It is generally agreed that the power of a court of equity to remedy fraud extends to matters that are probate in nature.[2] Thus, equity may grant relief from probate orders and decrees on the same grounds and conditions as from judgments of other courts.[3] However, matters that relate to wills and the probate of wills may form an exception to this rule, and the limits of the jurisdiction of courts of equity in such matters are not well fixed.[4] It is settled that equity may not cancel or set aside a will or the probate of a will, even though the will was obtained by fraud or undue influence, or is a forgery.[5] However, while the authorities are not entirely consistent beyond this point, there appear to be two well defined types of cases in which equity will give indirect relief by means of constructive trust or injunction from a fraudulent will or fraudulent probate or denial of probate: (1) where the probate court by granting or refusing probate of a will or part of a will, which has been fraudulently obtained, is *incapable* of doing substantial justice;[6] or (2) where the fraud relates to the procurement of the

[1] While the plaintiff's precise theory does not clearly appear from the report, the majority of the court apparently construed the complaint as one alleging concealment of a pretermitted heir's existence. The three dissenting justices clearly adopted this construction and dissented on the procedural ground that counsel's admission that a decree of distribution had been entered in the probate proceedings did not rectify the lack of such allegation in the complaint; and that the pretermitted heir's remedy, where administration has not been terminated, is a petition in the probate court. Van Brocklin v. Wood, 38 Wash. 384, 80 P. 530 (1905). However, the plaintiff's allegation that defendant had destroyed two later wills in which plaintiff was named, and the plaintiff's implication that the probated will might be a forgery, would seem inconsistent with plaintiff's position as a pretermitted heir under the applicable statute. Wash. Rev. Stat. (1932) §1402. But even if plaintiff was thus dependent on a claim of intestacy, the amount and manner of recovery would be the same.

[2] Caldwell v. Taylor, 218 Cal. 471, 23 P. (2d) 758 (1933); Weyant v. Utah Sav. and Trust Co., 54 Utah 181, 182 P. 189 (1919); 3 FREEMAN, JUDGMENTS, 5th ed., §1184 (1925).

[3] Sohler v. Sohler, 135 Cal. 323, 67 P. 282 (1902); 3 FREEMAN, JUDGMENTS, 5th ed., §1184 (1925).

[4] Brazil v. Silva, 181 Cal. 490, 185 P. 174 (1919); Case of Broderick's Will, 21 Wall. (88 U.S.) 503 (1874); Seeds v. Seeds, 116 Ohio St. 144, 156 N.E. 193 (1927); Stowe v. Stowe, 140 Mo. 594, 41 S.W. 951 (1897). See Warren, "Fraud, Undue Influence and Mistake in Wills," 41 HARV. L. REV. 309 (1928); Stansell, "The Power of a Court of Equity to Give Relief from Decrees of the Probate Court," 13 CHI.-KENT L. REV. 91 (1935).

[5] Kerrich v. Bransby, 7 Bro. P.C. 437, 3 Eng. Rep. 284 (1727); Case of Broderick's Will, supra note 4. The reasons usually given are that the probate courts have exclusive jurisdiction, and have power to grant an adequate remedy.

[6] Brazil v. Silva, supra note 4; RESTITUTION RESTATEMENT §184 (1937); cases

decree granting or refusing probate and is extrinsic and collateral to those proceedings.[7] Extrinsic fraud is usually defined as fraud which prevents the unsuccessful party from presenting his claim or defense.[8] While the distinction between extrinsic and intrinsic fraud is no clearer in the probate field than elsewhere, where the successful party in probate proceedings has intentionally concealed from the court the existence of a person interested in the estate, the fraud is generally considered extrinsic.[9] In several earlier cases the Washington court in effect refused to hold that these facts constitute extrinsic fraud, but the principal case is a recognition of the general rule.[10] It should be clear that where there is no active concealment, a mere failure to disclose does not justify the intervention of equity unless a duty to disclose exists. If the person so failing is the executor or administrator, or occupies some other position creating a fiduciary duty to disclose, such failure, if intentional, is equivalent to concealment and constitutes extrinsic fraud;[11] and several decisions, including the principal case, have imposed this same duty on the proponent of the will or the person filing the petition for letters of administration.[12] Since a requirement of personal notice in probate proceedings is not feasible, equitable relief in these cases is thoroughly justified. Notice by publication must suffice if probate courts are to function efficiently.[13] But where the successful party has intentionally taken advantage of this inherent weakness, equity should divert the fruits of his wrong to the

granting and denying such right are collected in 52 A.L.R. 779 (1928). Thus, as hypothesized in Marriott v. Marriott, 1 Strange 666, 93 Eng. Rep. 770 (1726), if *B*, the scrivener, inserts *B*'s name in a legacy intended for *A*, while the probate court could refuse on the ground of fraud to probate that portion of the will, the benefit would fall to the residuary legatee rather than to *A*. Hence the probate court could not do substantial justice, and equity should intervene to impose a constructive trust. See 3 SCOTT, TRUSTS §489 (1939), and the extensive annotation in 11 A.L.R. (2d) 808 (1950).

[7] Caldwell v. Taylor, supra note 2; Sohler v. Sohler, supra note 3; Anderson v. Lyons, 226 Minn. 330, 32 N.W. (2d) 849 (1948).

[8] United States v. Throckmorton, 98 U.S. 61 (1878). See 3 FREEMAN, JUDGMENTS, 5th ed., §1233 (1925); 2 PAGE, WILLS, 3d ed., §578 (1941).

[9] Purinton v. Dyson, 8 Cal. (2d) 322, 65 P. (2d) 77 (1937); and cases collected following the report of this case in 113 A.L.R. 1235 (1938).

[10] Davis v. Seavey, 95 Wash. 57, 163 P. 35 (1917); In re Christianson's Estate, 16 Wash. (2d) 48, 132 P. (2d) 368 (1942).

[11] Hewitt v. Hewitt, (9th Cir. 1927) 17 F. (2d) 716; Seeds v. Seeds, supra note 4.

[12] Purinton v. Dyson, supra note 9; Schmitz v. Martin, 149 Minn. 386, 183 N.W. 978 (1921). In the principal case, the defendant's destruction of the documents could have been attacked in the probate proceedings and therefore should not be held extrinsically fraudulent. The only sound basis of plaintiff's claim was the "procurement" of probate without disclosure of plaintiff's existence.

[13] See Wash. Rev. Stat. (1932) §§1380, 1477, 1532, providing for probate of will without notice, notice by publication of the appointment of the executor, and notice by publication of the hearing on the petition for final distribution. That proponent's failure to notify by mail a person whose claim and whereabouts is known to him may violate the due process clause of the 14th Amendment of the Constitution, and thus render the decree void, appears from Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950), discussed in a comment in 50 MICH. L. REV. 124 (1951) and noted in 25 WASH. L. REV. 282 (1950) and 1950 WIS. L. REV. 688.

person injured, through the medium of constructive trust. Of course, to preserve the integrity of probate decrees, the remedy should remain an extraordinary one and should be denied where the interested party has had actual notice and failed to present his claim.[14]

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[14] See Krohn v. Hirsch, 81 Wash. 222, 142 P. 647 (1914). But such cases may sometimes present the due process problem observed in note 13, supra, if the claimant's interest and whereabouts are known.