

Michigan Law Review

Volume 43 | Issue 1

1944

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Recommended Citation

Robert M. Barton, *WILLS-TESTATOR'S MISTAKE AS TO LEGAL EFFECT*, 43 MICH. L. REV. 209 (1944).

Available at: <https://repository.law.umich.edu/mlr/vol43/iss1/11>

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WILLS—TESTATOR'S MISTAKE AS TO LEGAL EFFECT—Testator left the residue of his estate in trust for the benefit of his son, payments to be made in the trustee's discretion. No express provision was made for the disposition of the corpus of the trust in case of the son's death. The contestant, who was one of the testator's heirs, claimed the testator never would have executed such a will had his lawyer informed him that the contestant might be excluded from the remainder interest on the son's death under the rule laid down in *Clyde v. Lake*.¹ Held: The will stands. There was no showing that the testator would have done otherwise. Furthermore, even if the attorney had drawn the will in conflict with the instructions he received from his client, the will would nevertheless be valid if the testator knew and approved its contents. It is immaterial that he mistook the legal effect of the language used or that he acted upon the mistaken advice of counsel. *Leonard v. Stanton*, (N.H. 1944), 36 A(2d) 271.

Even though a will is clear in its provisions and the necessary formalities of execution fulfilled and unchallenged, a court still may be confronted with arguments disputing its validity. The will contestant who can prove that bequests were induced by fraud seems to have a good chance to upset the testamentary apple cart.² The type of fraud allowed, however, has been rather narrowly de-

¹ Where the sole beneficiary of a discretionary support trust set up by a will died before trust funds were exhausted it was held that the balance of the fund should be paid to the administrator of the beneficiary and not back into the estate of the testator. A complete and final disposition of the property was intended with all beneficial interests going to the cestui que trust. *Clyde v. Lake*, 78 N.H. 322, 100 A. 552 (1917).

² Warren, "Fraud, Undue Influence, and Mistake in Wills," 41 HARV. L. REV. 309 (1927).

fined,³ and the defrauder must be one beneficially interested.⁴ Too, as a matter of proof, it is hard to show the necessary intent to defraud.⁵ In the instant case it was admitted that the representations of the testator's attorney were innocent enough, but it was urged that because of his position in "having special knowledge and ability in the drafting of instruments" his failure to ascertain the law amounted to "fraud in law."⁶ The court rightly called this a mere mistake. But what of cases where the scrivener actually draws an instrument contrary to the testator's instructions, and the testator, either through oversight or mistake as to legal effect, executes it? It would seem here, just as in the case of fraud, that the testator never really intended that his property should be distributed in the manner which the language on the face of the will dictates. It is safe to say that mere proof of execution makes a prima facie showing of the testator's intention.⁷ The courts generally refuse to admit parol evidence offered to prove that a will drawn according to plan did not accomplish the legal result desired by testator and his counsel.⁸ The unsatisfactory nature of the proof⁹ and the difficulty of ever "knowing" what the legal effect of an act will be¹⁰ are the reasons usually given. Where the legal effect of the will is not what the testator intended because of a mistake in draftsmanship, it is nevertheless valid if the testator has had a fair opportunity to read it over and it is not shown that he did

³ "Fraud which causes a testator to execute a will consists of statements which are false, which are known to be false by the party who makes them, which are material, which are made with the intention of deceiving the testator, which deceive testator, and which cause testator to act in reliance upon such statements." I PAGE, WILLS, 3d ed., § 176, p. 347 (1941).

⁴ Ater v. Moore, (Tex. Civ. App. 1921) 231 S.W. 457; Gockle v. Gockle, (Mo. 1933) 66 S.W. (2d) 867. See also Dye v. Parker, 108 Kan. 304, 194 P. 640 (1921).

⁵ In re Newhall's Estate, 190 Cal. 709, 214 P. 231 (1923).

⁶ Instant case at 272.

⁷ ATKINSON, WILLS, (Hornbook Series) § 105, p. 232, note 30 (1937).

⁸ Mannikhuisen v. Magraw, 35 Md. 280 (1871); Dunham v. Holmes, 225 Mass. 68, 113 N.E. 845 (1916); Elam v. Phariss, 289 Mo. 209, 232 S.W. 693 (1921); Cleveland v. Havens, 13 N.J. Eq. 101 (1860); same result in England, Garnett-Bottfield v. Garnett-Bottfield, [1901] Prob. 335; and in Canada, In re Davis, 40 N.B. 23 (1910).

⁹ "It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter the testator may by due care, avoid in his lifetime. Against the former he would be helpless." In re Gluckman's Will, 87 N.J. Eq. 638 at 641, 101 A. 295 (1917).

¹⁰ Referring to interpretation of new statutes, "No man knows when he sits down to write a contract or to write his will, but that at the next law or chancery term, under the revised statutes concerning *intent*, he may be stultified in respect to a matter concerning which he knew more and was better qualified to speak, and did speak better than all the world beside. Judging from what we have heard and felt, in the course of this term, I am sure, if we impose our understanding of our new statutes in this branch of the law, upon anyone, as a condition to the making of a will, very few will succeed; and if we undertake to make new wills for every partial failure, while we embark in an interminable labor, I still fear we shall not be better testators than those who were more lawfully employed in disposing of their own estates." Salmon v. Stuyvesant, 16 Wend. (N.Y.) 321 at 332 (1836).

not.¹¹ Mere mechanical reading is not conclusive, however. It must be accompanied by some understanding of the language or its meaning.¹² In scrivener's mistake cases the extrinsic evidence is reasonably reliable, for it does not lie solely within the mind of the deceased as in other mistake situations, and it is not likely that the testator meant to have a will inconsistent with the instructions he gave concerning its creation. The probable lack of intent of the testator is very similar here to the fraud cases yet courts seem more reluctant to upset such wills.¹³

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¹¹ I PAGE, WILLS, 2d ed., § 163, p. 323 (1941). When parol evidence was not allowed to show scrivener's mistake in using a technical term; *Iddings v. Iddings*, 7 Serg. & R. (Pa.) 111 (1821); *Mahoney v. Grainger*, 283 Mass. 189, 186 N.E. 86 (1933); where evidence as to scrivener's omission inadmissible, *Rosborough v. Hemphill*, 5 Rich. (S.C. Eq.) 95 (1852); where a name included as a remainderman through draftsman's mistake, *Hanvy v. Moore*, 140 Ga. 691, 79 S.E. 772 (1913); contra, where draftsman misinterpreted instructions of testatrix, "the instrument would not be her will" even though duly executed, *Christman v. Roesch*, 132 App. Div. 22, 116 N.Y.S. 348 (1909); *In re Kempthorne's Estate*, 188 Iowa 70, 175 N. W. 857 (1920).

¹² *Gonzalez v. Gonzalez*, 13 La. 104 (1839); *In re Hatton*, 10 N.Y. St. Rep. 19 (1887); *Lyon v. Townsend*, 124 Md. 163, 91 A. 704 (1914); *Sansona v. Laraia*, 88 Conn. 136, 90 A. 28 (1914).

¹³ ATKINSON, WILLS (Hornbook Series) § 97, p. 219 (1937).