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EXECUTORS AND ADMINISTRATORS-WILL CONTEST-RIGHT TO RECOVER COST FROM THE ESTATE

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EXECUTORS AND ADMINISTRATORS—WILL CONTEST—RIGHT TO RECOVER COST FROM THE ESTATE — Letters testamentary were issued on April 5, 1938 to the Emporium Trust Company under the will of Henrietta Fetter. By the terms of the will the trust company had been named executor and also trustee of the residuary trust. Two-thirds of the income of this trust was to go to the testatrix' son George for life, and the other third to the testatrix' brother, Fred Morse, for life, with remainders over upon the death of the life tenants. On June 20, 1938, George Fetter appealed from the probate of the first will, alleging it was superseded by a later holographic will in the form of a letter written to him by testatrix, giving him all her property outright. He offered this letter for probate. The trust company defended the prior will without consulting the principal beneficiaries, George Fetter and Fred Morse. The defense followed the theory that the second will was a forgery, and to that end, engaged a handwriting expert and counsel. The Orphans' Court adjudged the second will, leaving all the property to the son, valid, struck off the first will and revoked the letters testamentary issued to the trust company. The trust company filed its account: $750, the amount paid the handwriting expert; $1,000, counsel fees; and incidental costs, all of which total $1,891.18. While the appeal was pending, in May 1939, under court order, the trust company repaired buildings damaged by fire for which insurance money had been collected. The total assets of the estate were $2,971.33. *Held,* expenses will not be allowed to the trust company because an executor has no duty to defend a will; if he does defend it, he may do so only at the expense of those to be benefited by his action; and he cannot charge the expense of a will contest to the estate unless it is benefited by successful proceedings. Moreover, the trust company had not entered upon its duties as trustee despite the repair incident, for it knew the validity of the will

was under attack. *In re Fetter's Estate,* 151 Pa. Super. 32, 29 A. (2d) 361 (1942).

The question of charging estates with costs incurred by executors in regard to legal contests over the validity of the instrument appointing them has led to a legion of cases. Opinion is divided pro and con on the subject, both as between jurisdictions and within jurisdictions.[1] Much of the controversy is due to the quantum of "interest" a particular court considers necessary to propose or contest an alleged will. Statutes generally provide that "any person interested" adversely to the will, or "any person aggrieved" by its admission to probate, may contest such a will.[2] The courts which refuse to allow the executor to contest assign a variety of reasons: [3] the interests of the executor are too remote; [4] he derives his interest from appointment of the court, not from the will; [5] fees received are not in the nature of a legacy, but as a quid pro quo for services rendered.[6] Courts have said the executor has no duty to attempt to prefer one group of legatees over the other; [7] and, further, the executor has no duty to defend the instrument appointing him when he is confronted merely with the usual situation upon death of a testator that invites favor to and antagonism of the will.[8] On the other hand, many courts do allow the executor to defend the will, there being no question as to the procedure in those jurisdictions that say the executor is a necessary party in a will contest.[9] The New York court, in an early decision,[10] took a broad view of "interest," and allowed an executor to contest a later will, although the parties beneficially interested under the earlier will had released their

[1] ATKINSON, WILLS 465 (1937); 2 PAGE, WILLS, 3d ed., § 613 (1941); 88 A. L. R. 1158 at 1170 (1934), right and duty of executor to appeal.

[2] 2 PAGE, WILLS, 3d ed., § 610 (1941). An "interested person" or an "aggrieved person" is one who has a direct pecuniary interest in the estate of the alleged testator which will be defeated or impaired if the instrument in question is held to be a valid will.

[3] In re Stewart's Estate, 107 Iowa 117, 77 N. W. 574 (1898), executor not beneficially interested; Helfrich v. Yockel, 143 Md. 371, 122 A. 360 (1923), executor has not enough interest to caveat a codicil.

[4] The writer in 36 MICH. L. REV. 685 at 686, note 8 (1938), points out that other persons with a remote interest have been allowed to contest; e.g., a public administrator, interested in possible escheat to the state; assignee or grantee or disinherited heir or next of kin; or the creditor of such heir or next of kin.

[5] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., § 157 (1923).

[6] Helfrich v. Yockel, 143 Md. 371, 122 A. 360 (1923).

[7] In re Arnold's Estate, 252 Pa. 298, 97 A. 415 (1916).

[8] In re Titlow's Estate, 163 Pa. 35, 29 A. 758 (1894). The court in the principal case felt that the executor overstepped his duties in contesting the second will; for in both instruments George Fetter was the principal beneficiary, and the trust company never consulted the beneficiaries under the first will to learn if they wished it sustained.

[9] King v. Wetervelt, 284 Ill. 401, 120 N. E. 241 (1918); McIntire v. McIntire, 192 U. S. 116, 24 S. Ct. 196 (1903), attorney's fees; Butt v. Murden, 154 Va. 10, 152 S. E. 330 (1930), unsuccessful defense.

[10] Matter of Greeley's Will, 15 Abb. Pr. (N. S.) 393 (N. Y. 1873). In re Murphy's Estate, 153 Minn. 60, 189 N. W. 413 (1922), and In re Browning's Will, 274 N. Y. 508, 10 N. E. (2d) 522 (1937), both allowed the executor to contest a later will on basis of a representative interest.

interests. The most liberal courts make no distinction between the situation of an executor whose offer of a will for probate is denied, and who then appeals,[11] and the more generally favored position of an already appointed executor who is vindicating the will as against contestants, rather than seeking to establish a speculative right to administer.[12] Once the executor is before the court in a will contest, the cases run the gamut of emphatic denial of costs from the estate to a positive granting of costs from the estate. In between these extremes, many courts allow costs if they feel conditions warrant. In some instances, the test appears to be the good faith of the executor and the reasonableness of his action.[13] Others say the executor acts as a matter of law as the agent of those interested as beneficiaries in the will and at their expense.[14] Courts sometimes adjudge costs from the estate if the executor seeks to defend a genuine will against a forged or spurious one, or if the contestants seek to destroy the trusts created by the will.[15] Writers[16] have pointed out that reimbursement of the executor depends upon many circumstances. If he was simply performing a duty in validating the will, one should expect payment by the estate, whatever be the consequences to the successful contestant. If he voluntarily assumed the burden of a contest which properly belonged to the legatees or devisees, he must look to them, and not to the estate, for payment of the expenses. Some courts base the decision as to who

[11] Quirk v. Pierson, 287 Ill. 176, 122 N. E. 518 (1919) (executor has sufficient direct financial interest to come within statute of wills allowing appeal); Cowan v. Beans, 155 Wis. 417, 144 N. W. 1129 (1914) (executor is a "person aggrieved" within wills statute); Pryor v. Mizner, 79 Ky. 232 (1881).

[12] In re Jewe's Will, 201 Iowa 1154, 208 N. W. 723 (1926) (executor has duty to defend will and sustain same once it is admitted to probate and he is qualified as executor); Medill v. McIntire, 136 Kan. 594, 16 P. (2d) 952 (1932) (based on statute); Douglas' Admr. v. Douglas' Exr., 243 Ky. 321, 48 S. W. (2d) 11 (1932); In re Grover's Estate, 233 Mich. 467, 206 N. W. 988 (1926); In re Shepherd's Estate, 152 Ore. 15, 41 P. (2d) 444, 49 P. (2d) 448 (1935); Matter of Coursen's Will, 4 N. J. Eq. 408 (1843). 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed, 1786-1787 (1923), lists among others, Tennessee, Illinois, Louisiana, Michigan, Maryland, New York, California, Missouri, Kentucky, and Iowa as holding that generally it is the duty of the executor to defend the will after it has been probated, and yet other decisions in Minnesota, California, Pennsylvania and Iowa that hold the opposite.

[13] 2 PAGE, WILLS, 3d ed., § 705 (1941); Henderson v. Simmons, 33 Ala. 291 (1858), allowing costs, but not attorney's fees; In re Johnson's Estate, 100 Ore. 142, 196 P. 385, 1115 (1921); Hazard v. Engs, 14 R. I. 5 (1882) (reasonable expenses incurred are "necessary" expenses for administration of the estate); In re Shank's Will, 172 Wis. 621, 179 N. W. 747 (1920) (executor merely performs his duty); In re Carlin's Estate, 226 Mo. App. 622, 47 S. W. (2d) 213 (1932) (court refused to adopt idea that defense of will is solely up to the legatees and indicated that if executor acts in good faith and in exercise of ordinary prudence in defending will, matter is for benefit of estate, regardless of results).

[14] Mead v. Sherwin, 275 Pa. 146, 118 A. 731 (1922); Yerkes' Appeal, 99 Pa. St. 401 (1882).

[15] In re Titlow's Estate, 163 Pa. 35, 29 A. 758 (1894); Hoffman's Estate, 19 Pa. Super. 70 (1902), spendthrift thrust is to be defended by executor of instrument creating it.

[16] 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 1786 (1923).

shall bear the costs on the outcome of the contest.[17] A minority group simply says, if the executor contests the will, and the court feels in its discretion, he should have costs from the estate, such will be awarded.[18] Professor Page [19] indicates that there is less general agreement on the awarding of counsel fees than on costs, for in addition to the many forms of statutes, there is the question whether attorneys' fees can be classed as costs. There seems to be more or less unanimity in the holdings that trustees shall receive their costs from the estate if the creating instrument is contested. The basis seems to be that the trustee takes the position of a legatee, and thus is permitted to defend the will contest, and that he is in an even stronger position if he has entered upon his duties before contest.[20] The Pennsylvania court in the principal case seems to cut across existing tests and lines; the opinion indicates that the executor was surcharged because the court felt the beneficiaries had not been consulted, and that the expenses incurred by the executor were too large in comparison with the value of the estate. Various

[17] Minneapolis Loan & Trust Co. v. Pettit, 144 Minn. 244, 175 N. W. 540 (1919); Dodd v. Anderson, 197 N. Y. 466, 90 N. E. 1137 (1910); In re Reimer's Estate, 159 Pa. 212, 28 A. 186 (1893); In re Crawfords Estate, 307 Pa. 102, 160 A. 585 (1931).

[18] Marshall's Exr. v. Pogue, 226 Ky. 767, 11 S. W. (2d) 918 (1928); Phillips' Exr. v. Phillips' Admr., 81 Ky. 328 (1883) (nominated executor, acting in good faith, has duty to offer will, and if fails, receives costs, counsel fees, etc.); In re Shepherd's Estate, 152 Ore. 15, 41 P. (2d) 444, 49 P. (2d) 448 (1935); 2 PAGE, WILLS, 3d ed., § 705 (1941). In re Reimer's Will, 261 N. Y. 337, 185 N. E. 403 (1933), modifying 237 App. Div. 343, 261 N. Y. S. 100 (1933), motion denied 262 N. Y. 468, 188 N. E. 23 (1934), held that the surrogate has discretion to make allowance to executor for disbursements and expenses in successful or unsuccessful attempt to sustain will, even though this involves executor's contesting of another will. The court held thus after construing the Surrogates Court Act, § 278, Cahill's N. Y. Civil Practice, 7th ed., (1937). Cf. other statutes cited in note 21, infra.

[19] 2 PAGE, WILLS, 3d ed., § 706 (1941).

[20] In re Alexander's Estate, 211 Pa. 124, 60 A. 511 (1905), allowed expenses from estate on two bases: (1) the estate was enhanced under the will as established, and (2) the trust company had acted as trustee before the contest was prosecuted to an appeal. In re Lowe's Estate, 326 Pa. 375, 192 A. 405 (1937), trustee and executor were one person, and court said he could equitably demand that costs and counsel fees be paid from the estate. In this case, the fight to sustain the will was successful, and while the son of the testator would have gained more by having the will set aside, it was the duty of the trustee to act for all the trust beneficiaries. The federal district court in Grier v. Union National Life Ins. Co., (D. C. Pa. 1914) 217 F. 293, indicated that the trustee could recover costs and expenses either from the property of the trust or from those who accepted the benefits of his efforts. See also Trustees v. Greenough, 105 U. S. 527 (1881); Central Railroad v. Pettus, 113 U. S. 116, 5 S. Ct. 387 (1886). Waller's Estate, 62 Pa. Super. 332 (1916), held that an executor is a mere stakeholder, but when he is also trustee, he ceases to be a mere stakeholder and is guardian of the estate and duty bound to protect the trust against those who would break it down. It is difficult to distinguish between executors and trustees on a pecuniary ground, but perhaps the distinction is based upon the idea that executor's duties are only temporary in character. The court in the principal case rejected the trustee idea because it felt there had been no formal transfer of administration from the trust company as executor to itself as trustee.

state statutes and probate codes have approached the problem,[21] but few have achieved a clear-cut guide for the problem facing many executors.

Dickson M. Saunders

[21] No applicable statute was found in Pennsylvania to govern the principal case. See Ala. Code (1941), tit. 61, § 59 (executor may recover costs from estate as discretion of court directs); Cal. Prob. Code (Deering, 1941), § 383 (if probate is revoked, the costs shall be paid by the party resisting revocation, or out of the property of the decedent, as the court directs); Colo. Stat. Ann. (1935), c. 176, § 72 (executor may recover costs from estate where acts in good faith); Fla. Comp. Gen. Laws (Supp. 1936), § 5541 (14); Ill. Ann. Stat. (Smith-Hurd, 1941), c. 3, § 245 (executor is given duty to defend will, so it seems he should recover necessary costs from the estate); Kan. Rev. Stat. (1935), § 22-919; Mass. Gen. Laws (1932), c. 215, § 45; Mich. Pub. Laws (1939), c. 266 A, Pt. II, § 24 (executors may engage counsel and be allowed reasonable and necessary expenses as a proper charge against the estate, subject to the court's approval); Minn. Stat. (Mason, 1927), § 8788; Tex. Civ. Stat. (Vernon, 1939), art. 3696.