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WILLS - PROBATE - CONTEST - APPEARANCE BY TRUSTEE AND EXECUTOR NAMED IN EARLIER WILL

Edward D. Ransom
University of Michigan Law School

WILLS — PROBATE — CONTEST — APPEARANCE BY TRUSTEE AND EXECUTOR NAMED IN EARLIER WILL — Petitioner, who was the widow of the testator, sought probate of a will dated December 1934 which gave her practically the entire estate. The bank filed opposition to the will. The bank was

named both as executor and as trustee in an earlier alleged will. The earlier will contained certain legacies not included in the later one and a trust of the residue for various beneficiaries. The probate court denied appearance of the bank both as executor and as trustee. *Held*, the bank is not entitled to contest the will as executor but may as trustee. *Reed v. Home National Bank of Brockton*, (Mass. 1937) 8 N. E. (2d) 601.

As a general rule, either by express statutory provision,[1] or, when the statutes are silent on the matter, by common law,[2] "any person interested" adversely in a will or " any person aggrieved" by its admission to probate, may contest such will. The courts have defined an "interested" or "aggrieved" person as one who has some pecuniary interest in the estate of the alleged testator and whose rights and interests would be defeated or impaired if the instrument in question is held to be a valid will.[3] As to whether an executor of a prior dated will may contest a subsequent one, the decisions are irreconcilable.[4] Some courts, as the court in the instant case, hold that the executor of the earlier will is not entitled to contest. Various reasons are assigned for this conclusion; e.g., that the interest of the executor is too remote since he has no direct property interest and no discretion in the disposition of the property; that his interest is not derived from the will but through his appointment by the court [5] and his duties are prescribed by law; that the fact that he is to receive compensation out of the estate cannot be said to give him an interest therein since his fees are the exact equivalent of the services rendered; [6] in short, that he is but a conduit through which the property passes merely for the purpose of administration. On the other hand, there are some courts which contend that the executor named in a prior will does not have a remote interest, but has such a representative interest in the allowance and probate as should entitle him to appear and defend the will,[7] and that it is his right and duty to defend it.[8] In some of the cases going this way the courts have simply taken a broader definition of

[1] For example, see Cal. Prob. Code (1937), § 370; 2 Mass. Gen. Laws (1932), c. 192, § 2.

[2] See note, L. R. A. 1918A 447; Niederhaus v. Heldt, 27 Ind. 480 (1867).

[3] 1 PAGE, WILLS, 2d ed., § 544 (1926).

[4] For a review of authorities pro and con on the subject, see note 31 A. L. R. 326 (1924); 1 PAGE, WILLS, 2d ed., § 547 (1926); ROOD, WILLS, 2d ed., § 798 (1926).

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

[6] Helfrich v. Yockel, 143 Md. 371, 122 A. 360, 31 A. L. R. 323 at 326 (1923).

[7] In re Murphy's Estate, 153 Minn. 60, 189 N. W. 413 (1922); In re Browning's Will, (N. Y. 1937) 10 N. E. (2d) 522.

[8] In re Langley, 140 Cal. 126, 73 P. 824 (1903). It would seem that the interest of an executor under an earlier will is no more remote than is that of the state, as represented by a public administrator, which has a potential interest in a possible escheat [Gombault v. Public Administrator, 4 Bradf. 226 (N. Y. Surr. 1857)], or an assignee or grantee of a disinherited heir of next of kin [1 PAGE, WILLS, 2d ed., § 550 (1926)], or the creditor of such heir or kin [Brooks v. Paine, 123 Ky. 271, 90 S. W. 600 (1906)], all of whom have been allowed appearance as contestants.

an "interested party." [9] A tendency toward favoring the contest by the prior named executor is seen in the situation in which the former will has been actually probated and thus the executor is vindicating rights already granted rather than seeking to enforce a contingent right to administer.[10] In a leading case, the court based its decision, in refusing an executor the right to contest, on the ground that he was a stranger whereas the later executor was an heir of the testator.[11] This fact was present in the principal case.[12] Although the situation has seldom arisen,[13] the same problem is presented by the contest of a trustee of a prior will. The question is whether or not the trustee is sufficiently "interested" in defeating the will. The court in the instant case, in reaching its conclusion, reasoned that it is a general rule that a legatee under an earlier will is entitled to contest a later one.[14] This right is based upon the possible or potential interest created by the earlier will. The interest of the trustee is as important and real as that of a legatee, and, in fact, the trustee is a legatee, taking legal title as such. The executor was distinguished from the trustee on the ground that he is not a legatee, but takes his title by appointment and the possibility of his receiving fees as executor is not enough.[15] Following this general rule that a legatee of a prior will may contest a subsequent one, the court's reasoning is sound in granting the right to a trustee, and, if we assume that no other person under the prior will but a legatee can contest the later will,[16] it follows that the executor could not. However, the right to contest is

[9] In, In re Greeley, 15 Abb. Pr. N. S. (N. Y.) 393 at 395 (1873), the court said, "any interest however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper." In that case the court allowed the executor of a prior will to contest a later one.

[10] Connely v. Sullivan, 50 Ill. App. 627 (1893); In re Davis' Will, 45 Misc. 306, 92 N. Y. S. 392 (1904).

[11] Helfrich v. Yockel, 143 Md. 371, 122 A. 360, 31 A. L. R. 323 at 326 (1923). See also In re Stewarts Estate, 107 Iowa 117, 79 N. W. 574 (1899).

[12] Note facts, supra.

[13] There is apparently but one other case [Johnston v. Willis, 147 Md. 237, 127 A. 862 (1925)] which is precisely in point. The facts of that case are almost identical to those of the principal case. The same person was named both as executor and as trustee in a prior will and sought to contest a later one. The court held that as trustee he could contest but as executor he could not. The case was relied upon by the court in the principal case. See Munnikhuysen v. Magraw, 57 Md. 172 (1881), for dictum to the same effect.

[14] Crowell v. Davis, 233 Mass. 136, 123 N. E. 611 (1919); Machovina v. Machovina, 132 Ohio St. 171, 5 N. E. (2d) 496 (1936); Crowley v. Farley, 129 Minn. 460, 152 N. W. 872 (1915); In re Wynn's Estate, 193 Mich. 223, 159 N. W. 492 (1916).

[15] Two dissenting justices were of the opinion, however, that the same considerations which led the court to allow the trustee to appear and contest should also permit the executor to appear.

[16] The court in making this assumption relied upon the broad language of the opinion in Conley v. Fenelon, 266 Mass. 340 at 344, 165 N. E. 382 (1929), where the right to contest was limited to those named as executor in the instrument offered for probate, the heirs at law of decedent, a legatee under a prior will given less by a later will, and one exception not here material. The court said, "No other persons rightly are parties to a will contest."

not usually considered so exclusive.[17] No valid distinction excluding the executor may be drawn which is based on a difference in pecuniary interest arising out of the estate through compensation for services. In fact, the trustee at common law was expected to lend his services gratuitously.[18] In modern practise, the compensation for both executor and trustee is commonly fixed by statute and is often placed on the same basis.[19] It seems, however, that there are several factors, in addition to that pointed out by the court, tending to favor the position of the trustee over that of the executor. The trustee derives his authority from the testator through the will itself[20]; the executor's authority comes from the appointment by the court.[21] The duties of the executor, which are fixed by statute,[22] are limited to the winding up of the estate and are temporary in character.[23] The duties of the trustee, on the other hand, are derived, in the main, from the provisions of the will and usually vest in him considerable control and management of the property; [24] if he acts within certain limits, he has an implied power of discretion beyond that which appertains to an executor.[25] It is submitted that the courts which allow an executor in an earlier will to contest a later one should, a fortiori, allow the contest of a trustee in the same situation and that, since courts may reasonably differ over the allowance of contest by executor of the prior will, a decision like that of the instant case, which denies the right to an executor but grants it to a trustee, is not necessarily inconsistent.

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[17] See examples note 8, supra. Also it is plain that courts which do allow an executor of a prior will to contest do not limit such contest to "legatees."

[18] Barrett v. Hartley, L. R. 2 Eq. 789 (1866); Ayliffe v. Murray, 2 Atk. 58 at 60, 26 Eng. Rep. 433 (1740).

[19] See 65 C. J. 910 (1933); 1 TRUSTS RESTATEMENT, § 242 (1935).

[20] In re Ripley, 101 Misc. 465, 167 N. Y. S. 162 (1917).

[21] The early common law rule, however, was to the effect that title of executor vested on the testator's death and the probate was considered mere ceremony of authentication. This doctrine has been almost entirely repudiated by modern authorities and the authority of the executor is now said to come from his appointment by the court. See 1 WOERNER, LAW OF AMERICAN ADMINISTRATION, 3d ed., § 172 (1923); 23 C. J. 1019-1020 (1921) and cases cited therein.

[22] In re Munger, 168 Iowa 372, 150 N. W. 447 (1915); 24 C. J. 49 (1921).

[23] 1 TRUSTS RESTATEMENT, § 6, comment b (1935).

[24] Caruso v. Caruso, 103 N. J. Eq. 487, 143 A. 771 (1928); Johnston v. Willis, 147 Md. 237, 127 A. 862 (1925).

[25] 65 C. J. 644 (1933) and cases cited.