Annual Survey of Massachusetts Law

Volume 1954 Article 13

1-1-1954

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Wills, Trusts, and Administration of Estates

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Nothing is so sure as death and taxes, unless it is the need for study and review of the legal decisions which follow them. In the probate field, wild oats sown at random fall upon fertile soil and the harvesting of each year's crop, however unpalatable, is the purpose of this chapter of the SURVEY.

§7.1. **Execution of wills.** The fallacy of *executing copies* of wills was brought home during the past year in *Miniter v. Irwin*,[1] where the probate of a duly executed carbon copy of a will was refused in line with the presumption of destruction (and revocation) by the testator of the original will when it could not be found after his death. A far more serious consequence of executing a will in multiple form arises when, the fact of such execution being known, all the executed copies are not produced in court and the original will itself is disallowed on the possible assumption that the testator destroyed one of the signed copies with intent to revoke the original. To quote from the *Miniter* decision: "And where a will is executed in duplicate, and the testator retains a copy which he destroys or cancels, or which cannot be found after his death, there is at least a presumption that a revocation of the will was intended even though a duplicate is found in apparent good order in the hands of another." [2]

Care is a prime requisite in the drafting of wills, but in some instances, as exemplified by the above, excessive caution may be the handmaiden to sterility. Copies of wills should be *conformed,* but not executed.

§7.2. **Spendthrift trusts.** Nowhere in the crazy patchwork of probate are there more interesting cases to be found than those affecting spendthrift trusts. A celebrated debate by intellectual giants on the

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The author wishes to express his appreciation to George B. Crane, member of the Board of Student Editors of the ANNUAL SURVEY, for his aid in gathering materials for this chapter and for his suggestions in the preparation of the text.

§7.1. [1] 1954 Mass. Adv. Sh. 7, 116 N.E.2d 567.
[2] 1954 Mass. Adv. Sh. at 8, 116 N.E.2d at 568.

social consequences of such trusts occurred as long ago as the 1870's,[1] and although paternalism seems to have won the day, the courts have been ever alert to prevent settlors from being indulgent in their own favor.[2] This principle was extended during the survey year in the case of *Ware v. Gulda,*[3] in which an attorney who, at the behest of (and in behalf of) the settlor, had abortively tried to "break" an irrevocable trust was permitted to tap the trust itself for the value of his services in the unsuccessful venture, even though the settlor was not within the jurisdiction of the Court and the payments of income or principal rested in the sole discretion of an independent corporate trustee. Settlors of trusts can still wrap others with a protective financial cloak which they cannot wear themselves.[4]

§7.3. Ancillary administration: Foreign-situated property. An intriguing situation arose in *Lenn v. Riché.*[1] Suit was brought in Massachusetts (under French law) against an ancillary administrator, with the will annexed, in this state for the value of a fifteenth-century painting and some Renaissance medallions given by the deceased testator to the plaintiff-donee in Germany, who in turn had loaned the articles back to the testator-donor for safekeeping and display in Paris. It was held that the plaintiff-donee, who had taken up residence in Massachusetts, could recover in this Commonwealth from the ancillary administrator the *value* of the painting and medallions, thus avoiding the difficulties and expense of proceeding in the testator's domicile in France. The efficacy of obtaining satisfaction from ancillaries has sometimes been overlooked by jurisdictional purists blinded by exaggerated conceptions of venue, and the *Riché* decision is a happy example of a successful short cut to an equitable result.

§7.4. Compensation, undue influence, and fiduciary relationships. The stimulating subject of compensation to members of the bar received the attention of the Supreme Judicial Court, directly and indirectly, in the companion cases of *Reilly v. McAuliffe.*[1] Indirectly, the Court refused to allow the probate of a codicil of a testatrix, enfeebled by age and disease, wherein her attorney was made residuary legatee in place of certain nieces, nephews, grandnieces, and grandnephews named in the will preceding the codicil. Despite findings that the testatrix was not legally incompetent and that the codicil was drafted by other counsel, it was held under the rule of "careful scrutiny" given to all such cases that the heavy duty resting on an attorney in all personal dealings with a client, plus the mere perfunctory services of "out-

§7.2. [1] Nichols v. Eaton, 91 U.S. 716, 23 L. Ed. 254 (1875) *pro;* Gray, Restraints on the Alienation of Property (2d ed. 1895), decidedly *con.*
[2] Merchants National Bank v. Morrissey, 329 Mass. 601, 109 N.E.2d 821 (1953).
[3] 1954 Mass. Adv. Sh. 73, 117 N.E.2d 137.
[4] 1 Scott, Trusts §156 (1939); Griswold, Spendthrift Trusts §478 (2d ed. 1947).

§7.3. [1] 1954 Mass. Adv. Sh. 115, 117 N.E.2d 129.

§7.4. [1] 1954 Mass. Adv. Sh. 153, 117 N.E.2d 811; 1954 Mass. Adv. Sh. 157, 117 N.E.2d 815.

side" counsel, added up to undue influence and precluded the residuary lawyer from taking under the codicil. The pronouncements against doing indirectly that which cannot be done directly have no better exemplification than in fiduciary relationships, and paramount among these is the relationship existing between trustee and beneficiary, the strict standards of which were restated during 1954 in *Attorney General v. Flynn.*[2]

Returning to the *Reilly* decision and its relation to direct compensation, the Court did not hesitate to reduce a fee charged by the same luckless lawyer-legatee for acting as one of the conservators of the enfeebled lady from $1500 to $400, since the period of conservatorship lasted only six weeks, the inventory of the ward disclosed personal property of only $20,264.78, and the estimate of the hours expended seemed out of proportion to the time required to accomplish the work involved. Also, the Court dispelled any notion that multiple fiduciaries are entitled to multiple compensation.

However, in *Phelps v. State Street Trust Co.,*[3] discussed in Section 7.7 *infra,* on another point, the Court, in commenting on total fees of $7700 to counsel and a guardian ad litem with respect to a petition for instructions, said: "Since there was no dispute of fact, and the questions of law are comparatively simple, the total seems large. Some of the beneficiaries object to the allowance. But the record contains no statement of the *value* of the trust. Without knowing its *value,* we cannot say that the amounts allowed were excessive." [4]

Language such as this, buttressed by what was said in *National Shawmut Bank v. Cummings,*[5] can be very helpful to members of the bar in setting fair and equitable fees.

§7.5. Printed probate forms. The sanctity of printed probate forms received the Court's blessing in *In re Lucey.*[1] There, the petitioner for appointment as administrator had stricken out the words "or some other suitable person" from the prayer in the petition. The Court, in finding the striking was improper, said, "The printed forms of the Probate Courts are approved by this court . . . The Probate Courts themselves cannot change a form so approved. Obviously the petitioner cannot." [2] It is suggested that the language of the case is

[2] 1954 Mass. Adv. Sh. 473, 120 N.E.2d 296.
[3] 330 Mass. 511, 115 N.E.2d 382 (1953).
[4] 330 Mass. at 513, 115 N.E.2d at 383.
[5] 284 Mass. 563, 569, 188 N.E. 489, 492 (1933): "In determining what is a fair and reasonable charge to be made by an attorney for his services many considerations are pertinent, including the ability and reputation of the attorney, the demand for his services by others, *the amount and importance of the matter involved,* the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by the controversy, and the results secured. Neither the time spent nor any other single factor is necessarily decisive of what is to be considered as a fair and reasonable charge for such services." (Emphasis supplied.)

§7.5. [1] 1954 Mass. Adv. Sh. 315, 118 N.E.2d 762.
[2] 1954 Mass. Adv. Sh. at 315, 118 N.E.2d at 763.

broader than intended, as such an edict, if carried to extremes, would outlaw practical considerations and the public interest.

§7.6. Recapture of trust transfers. The irretrievable nature of transfers in trust in the absence of proved fraud or an expressly reserved power of amendment or withdrawal is pointed up in *Markus v. Markus*.[1] A mother set up trusts with her two sons as trustees. One son thereafter (by amendment) became a beneficiary of the trust and ceased to be a trustee. The other son became sole trustee under a provision that his wife would succeed him as trustee in case of his death prior to his mother's. The inevitable occurred and the daughter-in-law became trustee. Trouble ensued. The mother claimed that payments made to her by a corporation owned by the trust did not constitute payments by the trust, and crying "fraud" she and her other children petitioned to have the trust terminated and the daughter-in-law charged. They failed, except to the extent of obtaining an order for an accounting and a restatement by the Court of the usual duties of a trustee.

On the other hand, the Court is quick to afford relief to a settlor who has kept his or her toe in the door as a life beneficiary. In *Chase v. Switzer*[2] a woman advanced in years and impaired in health executed a trust whereby she assigned to the trustee-petitioner all her personal property for her own and a son's (or his wife's) benefit, reserving an unrestricted power to amend or revoke. A few weeks later by amendment she replaced the unlimited amendment clause with a provision retaining power to amend "that part of this trust which is effective during her lifetime," but waiving any right to amend, modify, or revoke that part of the trust "which is to become effective upon the death of the Donor." Subsequently she demanded by letter the return of certain savings bank accounts from the trustees. They refused on the ground that to return them would affect that part of the trust becoming effective upon her death, i.e., the remainder passing to the son. The Court upheld the settlor's contention, saying, "However unfortunate it may seem to the trustees that this elderly lady should be deprived of their protection as to more than half of her property, she acted within her rights, and they must respect her wishes." [3] The case is also interesting in that it touches upon the propriety of an appeal from a Probate Court decree by the trustees, who normally are not considered "persons aggrieved" by such a decree if it *adequately* instructs them as to their duties, however vehemently the trustees may disagree with such instructions.[4]

§7.7. Amendment of trusts: Formalities. It is imperative that modifications to even a freely amendable trust be made *precisely* in accordance with the mandate of the trust. Thus, in *Phelps v. State Street*

§7.6. [1] 1954 Mass. Adv. Sh. 443, 119 N.E.2d 415.
[2] 1954 Mass. Adv. Sh. 327, 118 N.E.2d 749.
[3] 1954 Mass. Adv. Sh. at 328, 118 N.E.2d at 752.
[4] See Newhall, Settlement of Estates §251 (3d ed. 1937); Dockary v. O'Leary, 286 Mass. 589, 190 N.E. 798 (1934).

Trust Co.,[1] the Court refused to uphold a purported amendment by a written instrument signed by the settlor and delivered to the trustee but not *acknowledged* by the settlor as called for by the instrument of trust. It is obvious that such a result would be wholly incomprehensible to a layman, and therefore it behooves lawyers to protect their clients and the objects of their clients' bounty from the rigors of a technical rule comparable only to the precepts covering the execution of wills.

§7.8. Ascendant contingencies and declaratory judgments. The case of *Trustees of Dartmouth College v. Quincy*,[1] is discussed in the chapter on future interests,[2] but the decision is also a guidepost for declaratory judgments in the law of trusts. The Trustees of Dartmouth College petitioned for a declaratory judgment (a present controversy having been admitted) on the question whether the city of Quincy was within its rights in reallocating to income certain accumulated income previously transferred to the corpus of a perpetual fund for educational purposes. The propriety of the petition was upheld under a provision in the testator's will reading as follows: "If the town of Quincy . . . should surrender the property or should use it for any other purpose than contemplated in this will, then I bequeath the said property to the Trustees of Dartmouth College to be used by them, in the manner they may think best, for the promotion of science and literature." [3] The Court, while recognizing the normally exclusive function of the Attorney General in seeing to the proper administration of general educational trusts, found that Dartmouth College had a special interest in overseeing the maintenance of the fund. This is another object lesson in the right of persons with contingent interests to notice of proceedings affecting the trust, and their power to be heard in all such matters "unless, indeed such interests are so utterly unsubstantial as to amount to nothing more than a film of mist."

§7.9. Trusts of real property and the Statute of Frauds. The Statute of Frauds concerning alleged trusts of real property continues to rise to plague the consciences of the courts, and in *Herman v. Edington*,[1] decided during the survey year, the justices probably went about as far as they could go in satisfying the statute and the plaintiff, though not the decedent's devisees. The decedent delivered to the plaintiff an envelope containing his (the decedent's) deeds to certain Florida real estate and inscribed, dated, and initialed on the envelope that the property now belonged to the plaintiff in consequence of unreimbursed payments advanced by the latter to the decedent. Despite the fact that the decedent retained legal title to the property and paid the taxes thereon

§7.7. [1] 330 Mass. 511, 115 N.E.2d 382 (1953).

§7.8. [1] 1954 Mass. Adv. Sh. 243, 118 N.E.2d 89.
[2] Section 3.4 *supra*.
[3] 1954 Mass. Adv. Sh. 243, 245, 118 N.E.2d 89, 91.

§7.9. [1] 1954 Mass. Adv. Sh. 337, 118 N.E.2d 865.

until his death, and notwithstanding the disquieting imponderable that the plaintiff was a woman with whom the decedent was on intimate terms without benefit of clergy, the Court found a valid trust of the real estate in the woman's favor.

§7.10. Probate of wills: Notice to legatees and devisees. An enactment during the survey year requiring notice to legatees and devisees following the probate of a will is deserving of special mention. Chapter 465 of the Acts of 1954, effective September 1, 1954, amending General Laws, Chapter 192, Section 12, reads as follows:

> Within three months after the allowance of a will and the appointment and qualifications of an executor, it shall be the duty of the executor to notify by mail the devisees and legatees named in the will whose addresses are known to him that devises, legacies or bequests have been made to them and to file in the probate court an affidavit showing the names of those notified and the addresses to which notices were mailed. In case an administrator with the will annexed is appointed he shall have the same duty unless it has already been performed by an executor.

The new section typifies the trend toward alerting persons interested in an estate, who will now receive required notices both before and after probate of a will, as well as a citation upon the presentation for allowance of an executor's account.

§7.11. Safekeeping of distributive shares. Judicial notice of the Iron Curtain (see General Laws, Chapter 206, Section 27A, enacted in 1950) and the international aspects of probate law came into view in Massachusetts during 1954 when the Court, in *Petition of Mazurowski*,[1] upheld an order of the Probate Court requiring the petitioners, being nationals of Poland, to appear personally in court to claim their distributive shares in the intestate estate of the deceased husband and father of the claimants. The reasoning behind the decision is succinctly stated in one paragraph therefrom:

> The result of the best information we have been able to obtain is that there is no reasonable assurance that money sent to many of the countries behind the "Iron Curtain" will be received by the payees at full value, and that as to Poland, the payees would receive no more than about twenty per cent of full value, the remaining eighty per cent being in effect confiscated by the Polish State.[2]

§7.12. Miscellaneous statutes. In probate matters nearly every legislative enactment or judicial decision is significant. The following are therefore called to the attention of the reader.

Chapter 465 of the Acts of 1954, effective September 1, 1954,[1] permits a legatee to recover a legacy and enforce all rights in respect thereto by

§7.11. [1] 1954 Mass. Adv. Sh. 35, 116 N.E.2d 854.
[2] 1954 Mass. Adv. Sh. at 40, 116 N.E.2d at 858.

§7.12. [1] Amending G.L., c. 197, §19.