WILLS- PARTIAL INTESTACY-EFFECT OF ATTEMPT TO DISINHERIT AN HEIR OR TO LIMIT HIS SHARE

James D. Ritchie

University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Estates and Trusts Commons

Recommended Citation
James D. Ritchie, WILLS- PARTIAL INTESTACY-EFFECT OF ATTEMPT TO DISINHERIT AN HEIR OR TO LIMIT HIS SHARE, 38 Mich. L. Rev. 575 (1940).
Available at: https://repository.law.umich.edu/mlr/vol38/iss4/27
Wills — Partial Intestacy — Effect of Attempt to Disinherit an Heir or to Limit His Share — Where testator bequeathed to one of his brothers “the sum of five dollars, this amount to be in full for any and all bequests I would leave him as a brother or heir,” and certain property passed by intestate succession because of a void residuary clause, held, the share of the brother, an heir, was restricted to five dollars. LaMere v. Jackson, 288 Mich. 99, 284 N. W. 659 (1939).

In an early English case an attempt was made to preclude the widow from sharing in certain intestate property because she had been bequeathed property “in full satisfaction and recompense of all dower and thirds,” but the Lord Chancellor queried, “Being a legal intestacy, I am to control the Statute of

Distributions? How can the court possibly do that?” And so, as in even earlier cases, the court ruled that “neither an heir at law, nor ... next of kin, can be barred by any thing but a disposition of the heritable subject ... to some person capable of taking.” Legalistic reasoning might seem to support that view; succeeding cases lend practically unanimous approbation. Starting with the proposition that effective parts of a will are only those which attempt to make disposition by describing legacy and beneficiary in positive terms, the courts must inevitably reach that conclusion. Its positive provisions having been honored, the will can then be put to one side and any remaining property distributed according to the rules of intestate succession. This procedure, though, smacks of of a mechanical precision which alone would cast suspicion on its validity. And indeed, however convenient in application, the rule is perhaps grounded on questionable analysis. Fundamentally, a will is “the legal declaration of a man’s intentions which he wills to be performed after his death.” If, then, clarity in expression of intention be the criterion, negatively-phrased clauses should not be disregarded so long as their meanings are unambiguous. Viewed realistically, each case would be decided, not by an arbitrary rule, but on the basis of the testator’s intention as shown by the particular set of circumstances involved. The type of language used in the will and the reason for intestacy as to some of the property would then receive more proper consideration. Most of the cases would likely have come to the same result even from this approach, because the evidence is usually not too convincing that the heir was intended to be cut off from intestate property. But some decisions, perhaps influenced by the broad


5 Atkinson, Wills 97 (1937); 1 Page, Wills, 2d ed., 1391 (1926); 18 C. J. 843 (1919); 40 Cyc. 1458 (1912).

6 “... the intention which controls is that which is positive and direct, rather than negative and consequential.” Bill v. Payne, 62 Conn. 140 at 141, 25 A. 354 (1892).

7 It could be argued, for example, that where there is a lapsed or void devise, exclusion of the particular heir would be harder to justify than where testator never did try to make testamentary disposition of the intestate property. This is not necessarily true when, as in the principal case, the void gift was apparently for the benefit of the other heirs.

8 Too often the intention to limit the heir can only be inferred, as where testator has merely provided for a specific gift. Creswell v. Cheslyn, 2 Eden 124, 28 Eng. Rep. 843 (1762); Todd v. Gentry, 109 Ky. 704, 60 So. W. 639 (1901) (heir given a two-dollar goldpiece to be marked: “It is my interest in [testator’s] estate”); In re Kimmel’s Estate, 226 Pa. 47, 75 A. 23 (1909). Sometimes it is reasonable to say that the restriction applies only to taking under the will. Southgate v. Karp, 154 Mich. 697, 118 N. W. 600 (1908) (“all that I intended to give her by this instrument”);
language of earlier cases, do defy the testator's unmistakable intention. Now, however, there are at least three cases on record, including the principal case, which supply amazingly simple solutions to the Lord Chancellor's dilemma. By merely removing the particular heir in question from the group of heirs and ordering distribution to those remaining, these courts seem effectively to demonstrate that the obstacles which usually prevent this result when the facts would support it are illusory, mere verbalisms. Yet, however desirable it may be thus to permit a testator to withdraw persons from the class of his heirs, the prevailing view has not been materially weakened. One of the minority cases has been expressly overruled, while in the principal case the ruling was given only slight consideration and seems to be in unacknowledged conflict with established Michigan doctrine.

James D. Ritchie

Jones v. Warren, 124 Me. 282, 128 A. 1 (1925) (all but wife excluded "from taking under this my last will"). But that argument is not always convincing. Wells v. Anderson, 69 N. H. 561, 44 A. 103 (1899) ("$1 and no more").


Nagle v. Conard, 79 N. J. Eq. 124, 81 A. 841 (1911) ("said granddaughter shall not receive more than $2000 of my estate under any circumstances"); Wells v. Anderson, 69 N. H. 561, 44 A. 103 (1899) ("$1 and no more").

Principal case; Tabor v. McIntire, 79 Ky. 505 (1881) ("For sundry reasons and bad treatment, it is my will that Boone Tabor shan't have any of my property"). Although distinguishable as to certainty of testator's intention, this case was expressly overruled by Todd v. Gentry, 109 Ky. 704, 60 S. W. 639 (1901), note 8, supra. In the third case, Succession of Allen, 48 La. Ann. 1036, 20 So. 193 (1896), wherein certain heirs were given money and were to "have no interest in any other claim," the court excluded them from sharing in the intestate property because "testator must have referred to [the residuum of the estate] for there is no other fund upon which [they] could assert any right." See dicta in Hoyle v. Stowe, 2 Dev. (13 N. C.) 318 (1830), to the effect that an heir can be excluded from intestate property unless there be but one heir. And in Strauss v. Strauss, 363 Ill. 442, 2 N. E. (2d) 699 (1936), an heir is excluded from the class of heirs, which takes, however, under the residuary clause.

In Tabor v. McIntire, 79 Ky. 505 at 506-507 (1881) the court said: "While the testatrix had no right to alter the laws of descent, yet she ... might designate and exclude from participation in her estate persons who would otherwise inherit."

Note 11, supra.

The report indicates that the particular heir in question made no appearance in the proceedings; the question was not argued in the printed briefs of counsel; and the court did not discuss or attempt to justify the ruling.