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WILLS — RIGHT OF ASSIGNEE OF AN EXPECTANCY TO CONTEST THE PROBATE OF A WILL — The plaintiff filed a bill in equity to set aside the probate of a will which disinherited the testator's heir apparent. The plaintiff alleged that the will was void because of undue influence and the testator's incompetency and that his right to contest was based on an assignment by the heir apparent of his interest in his living ancestor's estate as security for a loan. *Held*, the plaintiff received no interest in the testator's estate by the assignment and therefore is not a proper contestant within the statute. *Burk v. Morain*, (Iowa, 1937) 272 N. W. 441.

Whether the assignee of an expectancy should be regarded as an interested

party within the meaning of the statutes¹ dealing with will contests should depend on the nature of the expectancy in the light of the general background pertinent to will contests and to expectancies. At common law² the heir apparent and devisee apparent had no assignable interest on the theory that one could have no interest in the estate of a living ancestor. The courts of equity,³ however, influenced by the belief that fair dealing required that the assignor make good his purported transfer, have considered the transaction, where it is supported by adequate consideration, as an executory contract to convey upon the death of the ancestor provided the estate devolve as contemplated by the parties at the time of the agreement.⁴ A few courts further require that the assignment be made with the consent of the ancestor or testator, as the case may be.⁵ The policy arguments against the assignability of expectancies seem to be that the assignment is a fraud on the ancestor,⁶ where it is made without his knowledge, in that it varies the intended course of distribution; that it is also in the nature of a fraud on the expectant distributee,⁷ since it permits the

¹ 2 WOERNER, *AMERICAN LAW OF ADMINISTRATION*, 3d ed., § 217, p. 724 (1923); 68 C. J. 902 (1934). *Dickson v. Dickson's Estate*, (Tex. Civ. App. 1926) 286 S. W. 295, where the court by way of dictum assumed that under the Texas statutes an assignee of an expectancy would be a proper contestant; the decision was approved with respect to this matter in *Dickson v. Dickson*, (Tex. Comm. App. 1928) 5 S. W. (2d) 744. But see *ATKINSON, WILLS*, § 241, p. 685 (1937).

² 1 SIMES, *LAW OF FUTURE INTERESTS*, § 230 (1936); 25 L. R. A. (N. S.) 436 (1910); *Ann. Cas. 1916E 1241*. "Viewed realistically . . . the interest of an expectant distributee consist[s] of a 'chance' to become the owner of property." *PROPERTY RESTATEMENT (Tentative Draft No. 4, 1933)*, § 500, comment a.

³ 17 A. L. R. 597 at 601 (1922); 44 A. L. R. 1465 at 1466 (1926); 25 COL. L. REV. 215 (1925); 3 POMEROY, *EQUITY JURISPRUDENCE*, 4th ed., §§ 1285-1291 (1918), discussing the basis of equity jurisdiction in this situation. See *Lennig's Estate*, 182 Pa. 485, 38 A. 466 (1897), to the effect that an agreement to assign an expectancy may not be sustained as a gift.

⁴ 5 C. J. 859 (1916); see *PROPERTY RESTATEMENT (Tentative Draft No. 4, 1933)*, § 501, requiring a "fair consideration" to bind the transaction.

⁵ *ATKINSON, WILLS*, § 241 (1937); 5 C. J. 861 (1916).

⁶ The Massachusetts court, in *Boynton v. Hubbard*, 7 Mass. 112 at 121 (1810), felt this problem keenly, as indicated by the following picturesque language: "And what is the consequence of deceits of this kind upon the publick? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who had no other influence over them than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously and prudently, are, with the aid of money speculators, let loose from this salutary control and may indulge in prodigality, idleness and vice: and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens." See also *Ann. Cas. 1916E 1241* at 1248. "The person as to whose property an expectant distributee is expectant is designated here in as the 'source.'" *PROPERTY RESTATEMENT (Tentative Draft No. 4, 1933)*, § 500 (2).

⁷ See 1 SIMES, *LAW OF FUTURE INTERESTS*, § 234 (1936), where the author compares this policy argument with that involved in contingent remainders and execu-

assignee to take unfair advantage of the assignor, on the supposition that a man will yield to less pressure in dealing with something he does not have than in dealing with property within his immediate command. The policy of free alienability of property and the fact that the distributee could have disposed of the property as he pleased after the ancestor's demise would seem to cast some doubt, at least, on the fraud-on-the-ancestor argument. One may question, too, the soundness of the premise that the expectant heir is at the mercy of the assignee. On the other hand, the policy of administration, that the estate be expeditiously settled, would require that litigation be minimized as reasonably as possible. General creditors⁸ of the expectant distributee have generally been denied the right to contest, although the prevailing opinion would give such right to a judgment creditor.⁹ It would seem that the assignee stands in as meritorious a position as the latter. It would be unfair to refuse to allow the assignee to contest in a situation where the heir himself could not contest the status of the assignment; nor should the right to contest be denied where to do so would encourage a real fraud,¹⁰ to wit, tempting the heir to offer a forged will, or unduly to influence the ancestor to execute a will. It is respectfully submitted that there is no overwhelming policy in support of the instant decision, but that such policy as exists would point to a contrary result.

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tory interests and concludes that the same rule should apply to these situations as well.

⁸ *Shepard's Estate*, 170 Pa. 323, 32 A. 1040 (1895), is often cited for this proposition. 46 A. L. R. 1490 (1927); 1 PAGE, WILLS, 2d ed., § 551 (1926). But see *Brooks v. Paine's Exr.*, 123 Ky. 271, 90 S. W. 600 (1906), where a general creditor of an insolvent disinherited heir was allowed to contest the will upon the heir's refusal to do so.

⁹ 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., § 217, p. 728 (1923); *In re Langevin*, 45 Minn. 429 at 430, 47 N. W. 1133 (1891), "This right to resist the probate is not materially different in principle from that of a judgment creditor to assail a prior forged or fraudulent deed, apparently conveying the lands of the judgment debtor." But see 36 YALE L. J. 150 (1926); 12 CORN. L. Q. 247 (1927).

¹⁰ *Komorowski v. Jackowski*, 164 Wis. 254, 159 N. W. 912 (1916); *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478 (1898); *In re Langevin*, 45 Minn. 429, 47 N. W. 1133 (1891); *Brooks v. Paine's Exr.*, 123 Ky. 271, 90 S. W. 600 (1906); 36 YALE L. J. 150 (1926).

A somewhat analogous situation would seem to exist where the vendee of an executory land contract enters into another agreement to resell the property and the second vendee brings a bill for specific performance against the first vendee to compel him to perform the first agreement that he might be able to perform the second contract.