Michigan Law Review

Volume 32 | Issue 3

1934

FUTURE INTERESTS -TESTAMENTARY TRUST -ADMISSIBILITY OF EVIDENCE OF BARRENNESS OF DEVISEE

FUTURE INTERESTS — TESTAMENTARY TRUST — ADMISSIBILITY OF EVIDENCE OF BARRENNESS OF DEVISEE — A testator's will devised his residuary estate in trust to his daughter for life, remainder to her lawful issue, in default of which the corpus was to be distributed to certain charities. The daughter died without issue. After her death the trustee brought suit against the United States for refund of taxes paid, both parties agreeing that the sole quesion for determination was the admissibility of evidence of the removal of the daughter's generative organs to prove that at the time of the testator's death it was impossible for her to bear issue. *Held*, such evidence was admissible. *Provident Trust Co. v. United States*, (Ct. of Cl. 1933) 2 F. Supp. 472.

A woman's capacity to beget children becomes a subject of inquiry in the law in at least two widely different situations: (1) where a determination of the character of an estate or interest in land or personalty is involved, and (2) where a distribution of personal property to an ascertained class is to be made, the share of each of the class being subject to alteration in amount because of further issue. This latter situation presents primarily a problem in the administration of trusts and estates, whereas the first involves, speaking very generally, the adjudication of beneficial interests in a larger sense. In the first class of cases it is well settled that the possibility of issue of a female is extinguished only by her death, advanced age creating, legally, no bar to further fruitfulness.[1] This rule is founded upon considerations of judicial convenience and public policy, it being considered that the barrenness of a female is a condition subject to too many variables in age and individual health to be capable of accurate ascertainment by a court of law,[2] and further, that the temptation to artificial sterilization in order to obtain absolute title to large estates might prove difficult to resist were a showing of sterility allowed.[3] This rule finds its most frequent application in working out the rule against perpetuities,[4] though it has been applied, also, in cases involving the parti-

[1] Jee v. Audley, 1 Cox Ch. 324, 29 Eng. Repr. 1186 (1787); In re Dawson, 39 Ch. Div. 155 (1888); Note, 23 COL. L. REV. 50 (1923); 48 L. R. A. (N. S.) 865 (1914); GRAY, RULE AGAINST PERPETUITIES, 3d ed., 190 (1915).

[2] COKE ON LITTLETON, 40 b; Flora v. Anderson, (C. C. S. D. Ohio 1895) 67 Fed. 182.

[3] Ricards v. Safe Deposit Co. of Baltimore, 97 Md. 608, 55 Atl. 384 (1903).

[4] Jee v. Audley, 1 Cox Ch. 324, 29 Eng. Repr. 1186 (1787); Rozell v. Rozell, 217 Mich. 324, 186 N. W. 489 (1922).

tion of lands,[5] quieting of titles,[6] curtesy,[7] and bills for the specific performance of contracts to sell realty.[8] In cases coming within the second category above noted it has been the judicial practice since an early date to allow a distribution to be made where there was a strong probability of no further issue,[9] bond against the event usually being required.[10] Much of the confusion in the American cases may be traced to a failure to keep the distinction here noted clearly in mind and hence following precedents established in the first type of case in arriving at a decision in an administrative case.[11] The principal case represents a clear departure from the weight of previous authority on the question of showing no possibility of issue, the court citing no authority therefor save a general statement from Wigmore[12] to the effect that all facts having a probative value should be heard unless some rule of policy forbids, the court concluding that here no such rule of policy existed. It may be conceded that under the particular circumstances of this case, since there was more than old age barring issue, there being here absolutely no possibility of the event, that portion of the reason for the rule resting upon the doubtfulness of the finality of determination did not exist. As to the public policy, *quaere.* T. S.

[5] Hill v. Sangamon Loan & Trust Co., 295 Ill. 619, 129 N. E. 554 (1920).
[6] Burrell v. Jean, 196 Ind. 187, 146 N. E. 754 (1925).
[7] Riley v. Riley, 92 N. J. Eq. 465, 113 Atl. 777 (1921).
[8] Aulick v. Summers, 186 Ky. 810, 217 S. W. 1024 (1920).
[9] Leng v. Hodges, Jacob 585, 37 Eng. Repr. 971 (1822).
[10] Fraser v. Fraser, Jacob 586, 37 Eng. Repr. 971 (1814).
[11] Thus, note authorities cited in Ricards v. Safe Deposit Co., 97 Md. 608, 55 Atl. 384 (1903).
[12] 1 WIGMORE ON EVIDENCE, 2d ed., secs. 10, 11 (1923).