1957

Restitution - Equitable Remedies - Imposition of Equitable Lien to Carry Out Provisions of Will

David C. Berg
University of Michigan Law School

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

Part of the [Estates and Trusts Commons](#), and the [Legal Remedies Commons](#)

Recommended Citation

David C. Berg, *Restitution - Equitable Remedies - Imposition of Equitable Lien to Carry Out Provisions of Will*, 56 MICH. L. REV. 311 (1957).

Available at: <https://repository.law.umich.edu/mlr/vol56/iss2/17>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RESTITUTION—EQUITABLE REMEDIES—IMPOSITION OF EQUITABLE LIEN TO CARRY OUT PROVISIONS OF WILL—*H* and *W* each conveyed their separate farms to themselves as joint tenants by means of a third-party conduit. The deeds were not recorded, and *H* and *W* continued to regard their respective farms as belonging to themselves individually. In 1951, *W*, faced with imminent death, executed a will calling for the payment of certain bequests out of her farm or its proceeds. *H* agreed to act as executor and promised that the bequests would be paid. *H* had recorded the joint tenancy deeds before *W* died, but had not paid the bequests when he died intestate two years later. *W*'s will was discovered during the administration of *H*'s estate. The legatees under her will brought a successful action in the lower court against *H*'s heir to impress a constructive trust on the property. On appeal, *held*, affirmed. The plaintiffs were entitled to relief in the form of an equitable lien on the property.¹ *Borsgard v. Elverum*, 248 Minn. 405, 80 N.W. (2d) 604 (1957).

¹ The litigants and trial court had used the term "constructive trust" to describe the remedy sought. The Supreme Court of Minnesota concluded that in view of the

This decision permitted a grantor, *W*, to make effective bequests out of the proceeds of land previously conveyed by joint tenancy deed, because of the grantee's subsequent gratuitous promise to carry out her wishes. The court emphasized that if *H* had not so promised, *W* could have taken other action to see that the bequests were paid out of her interest in the farm. *W*'s possible alternatives were to convey her interest to a stranger, and thereby effect a dissolution of the joint tenancy,² to sue for partition,³ or, since the joint tenancy deeds were unrecorded, to convey the entire farm to a stranger who would first register the title.⁴ The first two alternatives remained available until *W*'s death, and the third until the deeds were recorded. *H* had only an expectancy in *W*'s undivided half interest which could be extinguished at any time before her death. His position in relation to the property was very similar to that of a devisee or an heir during the lifetime of the property owner, and the transfer in this case may be compared to those in which *A* allows his property to pass at death to *B* by reason of *B*'s promise to transfer it subsequently to *C*.⁵ If this analogy is acceptable, there is ample authority in Minnesota,⁶ as well as other jurisdictions,⁷ for awarding an equitable remedy. It seems to make little difference whether the bequest was actually induced by the promise, or whether the testator failed to revoke or alter the will in reliance on the promise, or allowed the property to pass by the laws of intestacy because of the promise.⁸ The basis for the relief may be fraud,⁹ constructive fraud,¹⁰ or the existence of a confidential or

trial court's decree and the general nature of the plaintiffs' claim, it was an equitable lien that was involved.

² Greiger v. Pye, 210 Minn. 71, 297 N.W. 173 (1941).

³ Minn. Stat. (1953) §558.01.

⁴ Under the Minnesota version of the Torrens Act, no instrument, except a will or a lease for a term not exceeding three years, shall operate as a conveyance. Registration alone, is the operative act to convey land. Minn. Stat. (1953) §508.47.

⁵ This comparison is supported inferentially by the court's citation of Matheson v. Gullickson, 222 Minn. 369, 24 N.W. (2d) 704 (1946), a case involving specific performance of a contract to leave property by will, in support of its statement that the plaintiff was entitled to equitable relief.

⁶ Ives v. Pillsbury, 204 Minn. 142, 283 N.W. 140 (1938); Laird v. Vila, 93 Minn. 45, 100 N.W. 656 (1904).

⁷ 66 A.L.R. 156 at 157 (1930), supplemented in 155 A.L.R. 106 at 107 (1945); 89 C.J.S., Trusts §§145 and 146 (1955).

⁸ Ives v. Pillsbury, note 6 supra; Golland v. Golland, 84 Misc. 299, 147 N.Y.S. 263 (1914); Beals v. Villard, 268 Mass. 129, 167 N.E. 264 (1929); Dowd v. Tucker, 41 Conn. 197 (1874); Ransdel v. Moore, 153 Ind. 393, 53 N.E. 767 (1899); Tyler v. Stitt, 132 Wis. 656, 112 N.W. 1091 (1907).

⁹ RESTITUTION RESTATEMENT §184 (1937).

¹⁰ Actual fraud exists where the promisor does not intend to carry out his promise at the time of execution. There is a misrepresentation of present intent. The term "constructive fraud" is sometimes used to characterize the conduct of a promisor who merely fails to perform the promise without a showing of actual fraud. Costigan, "The Classification of Trusts as Express, Resulting, and Constructive," 27 HARV. L. REV. 437 (1914).

fiduciary relationship¹¹ between the parties. The court in the principal case stated that a confidential relationship¹² existed between the parties at the time *H* made the promise, and that his subsequent failure to fulfill that promise was an abuse of confidence which justified equitable relief.¹³

Cases involving enforcement of a promise which caused a certain disposition of the property at the death of the transferor, or which induced an inter vivos transfer, are based on somewhat questionable reasoning.¹⁴ The major criticism of those cases is that to allow a will or conveyance,¹⁵ absolute on its face, to be altered by parol evidence is to violate the policy of either the statute of wills or the statute of frauds.¹⁶ When relief is allowed, as it usually is, this criticism is glossed over by the statement that those statutes were meant to prevent fraud, not to be instruments of it.¹⁷ It is submitted, however, that the principal case is not vulnerable to such criticism. *H*'s heir, the defendant, had been unjustly enriched at the expense of the beneficiaries under *W*'s will by *H*'s breach of a confidential relationship. The identity of the beneficiaries could be ascertained by means of *W*'s properly executed will and thus without resort to oral evidence. Title to realty is only indirectly affected by the decree of the court.¹⁸ There seems to be no abuse of the policy of the statutes of wills or frauds, except possibly in a technical sense. The testatrix gave her husband a choice between allowing the land to remain in her name and to pass through probate or recording the joint tenancy deeds and paying the bequests himself. He selected the second alternative, and the decision of the Supreme Court of Minnesota does nothing more than bind his estate to that election. By looking to the substance rather than the form of the transfer, relief is awarded without appreciable extension of traditional equity doctrine.

David C. Berg

¹¹ Jennings and Shapiro, "The Minnesota Law of Constructive Trusts and Analogous Equitable Remedies," 25 MINN. L. REV. 667 (1941); 34 MICH. L. REV. 140 (1935); 43 ILL. B. J. 246 (1954); 31 N.C. L. REV. 242 (1953).

¹² RESTITUTION RESTATEMENT §182, comment *c* (1937).

¹³ Principal case at 413-414.

¹⁴ 1 SCOTT, TRUSTS, 2d ed., §55.1 (1956); Scott, "Conveyance Upon Trusts Not Properly Declared," 37 HARV. L. REV. 653 (1924).

¹⁵ In the case of inter vivos transfers, relief is usually limited to situations where (1) the transfer was induced by fraud, duress, or undue influence; (2) a confidential relationship existed between the parties; (3) the transfer was made in contemplation of death. RESTITUTION RESTATEMENT §183 (1937); 1 SCOTT, TRUSTS, 2d ed., §§44.1 and 44.2 (1956).

¹⁶ 1 SCOTT, TRUSTS, 2d ed., §55.1 (1956).

¹⁷ Powell v. Yearance, 73 N.J. Eq. 117, 67 A. 892 (1907); Winder v. Scholey, 83 Ohio St. 204, 93 N.E. 1098 (1910).

¹⁸ The defendant had entered into a contract for the sale of the land, and the unpaid portion of the contract price, \$23,000, would be more than adequate to satisfy the claims of plaintiffs, amounting to approximately \$9,500.