Michigan Law Review

Volume 55 | Issue 3

1957

Wills - Construction - Conditional Wills

Richard Rosenthal
University of Michigan Law School

WILLS—CONSTRUCTION—CONDITIONAL WILLS—Testator executed a holographic will immediately prior to departing on an intended journey abroad. The will, making a friend and creditor his sole beneficiary, provided, "This is my will if I should die on this my trip to India You are my sol heiress." Although the trip was postponed, it was never abandoned. Testator subsequently repaid a substantial part of his debt to the beneficiary. Soon

thereafter, testator died without having made the journey. His will was contested by his widow and brother. On remand to the surrogate's court from the court of appeals, *held,* the will is conditional and hence ineffective because the condition never occurred. *In re Pascal's Estate,* 152 N.Y.S. (2d) 185 (1956).

Courts generally tend toward finding wills unconditional,[1] but there is no well-defined basis for explaining their decisions.[2] In determining whether a will is conditional or absolute, courts look to the testator's intent but if this is not clear, it is ascertained by rules of construction.[3] The design of these rules is to declare wills absolute unless by their language and the circumstances they are clearly conditional. Pervading these devices is the policy that testacy rather than intestacy is preferred when a capable testator executes a will. Nevertheless, whether or not a particular will is contingent depends largely upon the factual situation.[4] Presumptions and rules are so common in this area that the language of the will, when combined with extrinsic evidence, may conceivably fit one rule establishing a condition and another negating one. As a result, opposite results have been reached on insignificant differences in language.[5] In the principal case there is legitimate reason for holding the will conditional, although similar wills have been found absolute.[6] The language of the will is conditional, and equivalent to, or stronger than, that found in most other conditional wills.[7] The decision, however, certainly raises some questions. Generally, parol evidence is inadmissible to show that a will absolute on its face is conditional. On the other hand, it is admissible to show that

1 PAGE, WILLS, 3d ed., §96 (1941).

2 McMerriman v. Schiel, 108 Ohio St. 334 at 338, 140 N.E. 600 (1923).

3 1 PAGE, WILLS, 3d ed., §92 (1941). The following rules of construction are commonly applied to conditional wills. (1) If the contingency is referred to in the will as the reason for a particular disposition, and the disposition and contingency are interdependent, the will is contingent, but the language must clearly show the intention to make a will operative only during a certain period or emergency. [Barber v. Barber, 368 Ill. 215 at 221, 222, 13 N.E. (2d) 257 (1938)]; (2) If the contingency expressed refers to the occasion for making the will at that time, or to a possible danger or threatened calamity, the will is not contingent. [Forquer's Estate, 216 Pa. 331 at 332, 333, 66 A. 92 (1907)]. (3) The fact that testator left a will implies intestacy was not desired. If there are two constructions possible, the court will prefer the one preventing intestacy. [Ferguson v. Ferguson, 121 Tex. 119 at 122, 45 S.W. (2d) 1096 (1932)]. See also 1 PAGE, WILLS, 3d ed., §96 (1941).

4 ATKINSON, WILLS, 2d ed., §83 (1953); Barber v. Barber, note 3 supra, at 222, 223. Courts consider change in circumstances of the testator or beneficiaries after the will is executed, or the seemingly unjust or unnatural dispositions of property, as well as the seeming wisdom and justice of dispositions. McMerriman v. Schiel, note 2 supra, at 340.

5 See 11 A.L.R. 846 (1921); 79 A.L.R. 1168 (1932). The wills were held conditional in Bagnall v. Bagnall, 148 Tex. 423, 225 S.W. (2d) 401 (1949); Dougherty v. Dougherty, 4 Metc. (61 Ky.) 25 (1862). The wills were held unconditional in National Bank of Commerce of Charleston v. Wehrle, 124 W.Va. 268, 20 S.E. (2d) 112 (1942); In re Marque's Will, 123 N.Y.S. (2d) 877 (1953).

6 National Bank of Commerce of Charleston v. Wehrle, note 5 supra; French v. French, 14 W.Va. 458 (1877); In re Moore's Estate, 322 Pa. 257, 2 A. (2d) 761 (1939).

7 In most cases holding wills conditional the words, "if I never get back," referring to a certain journey, or "should anything happen to me," referring to a particular time or event, were used. Ferguson v. Ferguson, note 3 supra, at 126.

testator intended to make an unconditional will.[8] In the principal case, the surrogate's court makes questionable use of extrinsic evidence. In admitting evidence of payment of the testator's debt to the beneficiary, the court apparently introduced a new condition to the will, viz., that it was to exist until the debt was paid. How much the court was influenced by payment of the debt is mere conjecture. Such evidence was not absolutely necessary to the result, yet a small change in the evidence might have swung the pendulum the other way.[9] An alternative approach might have been used by the court. They could have recognized that the will is conditional, but yet found the condition to be subsequent[10] rather than precedent. In other words, it was reasonable for the testator to assume that the will was in force from the time it was executed, and that it would become null and void upon his return home (condition subsequent), rather than that the will would be effective only from the time of departure until his return (condition precedent). In cases like the present one, the elementary and higher goal should not be obscured—that is, to follow the testator's intention when it is clear. In cases where the intention is unclear, the area of conflict can be narrowed and the principles favoring testacy best served by following rules of construction which will hold a will absolute unless the operative condition is clearly shown.

Richard Rosenthal

8 Barber v. Barber, note 3 supra, at 222.

9 An interesting point not mentioned in the decision was that testator left an estate worth more than $20,000 while the debt was $7,500. This might indicate that the debt was insignificant, and he desired the beneficiary to have his estate for other reasons. The value of the estate was stated in the record of the Court of Appeals, 309 N.Y. 108, 127 N.E. (2d) 835 (1955). There may have been reason for not having mentioned it in the surrogate's decision.

10 If the condition is held to be a condition subsequent, it would read, "this is my will until I return from India."