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WILLS-VALIDITY OF CONDITION AGAINST CONTEST-CONTEST BY MINOR

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WILLS—VALIDITY OF CONDITION AGAINST CONTEST—CONTEST BY MINOR—Defendant, a minor, contested his mother's will which provided that if a beneficiary should make any effort to invalidate or alter the will, the provisions made for such person should be void. Defendant's father, who had been appointed guardian *ad litem*, filed notice of contest and petitioned the probate court that the general guardian be compelled to contest the will. After hearing, it was so ordered, and a will contest was held in the circuit court, in which mental incompetency and undue influence were alleged. The contest being unsuccessful, the will

was admitted to probate. Plaintiff, as executrix and beneficiary, unsuccessfully sought a decree that she was entitled to the entire estate, on the ground that defendant, the only other beneficiary, had disqualified himself to take by contesting the will. On appeal, *held,* affirmed. The condition against contest was void against a minor as tending to deprive the probate court of its duty to protect the interests of minors. *Farr v. Whitefield,* (Mich. 1948) 33 N.W. (2d) 791.

There is a paucity of decisions bearing on the question of the effect of an infant beneficiary's contesting a will in the face of a no-contest provision.[1] The Michigan court appears to have followed the reasoning of the New York court in *Bryant v. Thompson,*[2] where, on facts strikingly similar, the same result was reached.[3] The *Bryant* decision was criticized in a later New York decision,[4] and a contrary result was reached in another jurisdiction.[5] There is a division of authority in this country regarding the validity of no-contest provisions; one line of decisions strictly enforces the forfeiture provision in the event of contest;[6] another recognizes an exception to the strict rule and does not enforce the forfeiture provision if there is a showing of probable cause.[7] While the strict view does carry out the apparent intent of the testator, lead to uniformity in the law and reduce litigation, the liberal view precludes the possibility, in the case of fraud or undue influence, that the person perpetrating the fraud or unduly influencing the testator may benefit by his wrongdoing. If it is possible to unduly influence the testator in making his bequests, the same influence may result in the inclusion of a forfeiture provision. Furthermore, difficulty of proving the necessary elements means that not all justifiable contests succeed,[8] and fear of forfeiture may prevent the contest

[1] The Property Restatement specifically declined to take a position on this question because of the lack of sufficient authority and clearly applicable analogies. 4 PROPERTY RESTATEMENT, §428f (1944).

[2] 59 Hun (N.Y.) 545, 14 N.Y.S. 28 (1891), aff'd 128 N.Y. 426, 28 N.E. 522 (1891).

[3] The court refused to enforce a forfeiture where the contest was by the guardian *ad litem* of an infant legatee. The ground principally relied on was that a contrary result would deprive the court of its right and duty to protect the rights of the infant. See Boughton v. Boughton, 2 Ves. Sen. 12, 28 Eng. Rep. 8 (1750), where on similar facts it was ruled that the infant heir must wait and make his election to contest on coming of age.

[4] In Re Kathan's Will, (Sur.) 141 N.Y.S. 705 (1913).

[5] Moorman v. Louisville Trust Co., 181 Ky. 30, 203 S.W. 856 (1918); see Perry v. Rogers, 52 Tex. Civ. App. 594, 114 S.W. 897 (1908), where the gift to the infant was forfeited by the act of other beneficiaries in making a contest. The Bryant and Moorman cases are criticized by Browder, "Testamentary Conditions against Contest," 36 MICH. L. REV. 1066 at 1102 (1938).

[6] Donegan v. Wade, 70 Ala. 501 (1881); Smithsonian Institute v. Meech, 169 U.S. 398, 18 S.Ct. 396 (1898); Estate of Miller, 156 Cal. 119, 103 P. 842 (1909); Rudd v. Searles, 262 Mass. 490, 160 N.E. 882 (1928); Schiffer v. Brenton, 247 Mich. 512, 226 N.W. 253 (1929); In re Estate of Chambers, 322 Mo. 1086, 18 S.W. (2d) 30 (1929).

[7] In re Friend's Estate, 209 Pa. 442, 58 A. 853 (1904); Rouse v. Branch, 91 S.C. 111, 74 S.E. 133 (1912); South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 A. 961 (1917); Tate v. Camp, 147 Tenn. 137, 245 S.W. 839 (1922); Will of Keenan, 188 Wis. 163, 205 N.W. 1001 (1925); Dutterer v. Logan, 103 W.Va. 216, 137 S.E. 1 (1927).

[8] See Goddard, "Forfeiture Conditions in Wills as Penalty for Contesting Probate," 81 UNIV. PA. L. REV. 267 at 282 (1933).

altogether.[9] In the instant case it is likely that there was probable cause, since the probate court determined, after adequate hearings, that the will should be contested. By the same token, the litigation cannot be considered vexatious, and avoidance of vexatious suits is frequently the reason that the testator includes the no-contest provision in his will.[10] There is a tendency for courts adhering to the strict view to change to the liberal view when a case arises where a good faith contestant has proceeded with probable cause.[11] Although Michigan has been committed to the strict view since the decision *Schiffer v. Brenton*,[12] the court has had no occasion to rule on a contest where there was probable cause since that decision was handed down. The principal case represents such an opportunity, but the Michigan Supreme Court prefers to find an exception to the general rule of the *Schiffer* case, on the ground that public policy opposes enforcement of a forfeiture clause against a minor. As a result it may be expected that, although the Michigan court will continue to follow the strict view, other exceptions will be created in the future in hard cases where manifest injustice would otherwise be done.

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[9] 3 PAGE, WILLS 818 (1941).

[10] 8 ALABAMA LAWYER 144 at 151 (1947).

[11] In re Estate of Cocklin, 236 Iowa 98, 17 N.W. (2d) 129 (1945), specifically overruling Moran v. Moran, 144 Iowa 451, 123 N.W. 202 (1909); Moskowitz v. Federman, 72 Ohio App. 149, 51 N.E. (2d) 48 (1943) [dictum indicating the strict view early announced in Bradford v. Bradford, 19 Ohio St. 546 (1869), may not be followed in the future]; Tate v. Camp, 147 Tenn. 137, 245 S.W. 839 (1922), [where the good faith exception was added to the earlier pronouncement in Thompson v. Gaut, 82 Tenn. 310 (1884)]. The California court has retreated from the strict view rendered in Estate of Hite, 155 Cal. 436, 101 P. 443 (1909), by strictly construing the provision against contest. See In re Estate of Bergland, 180 Cal. 629, 182 P. 277 (1919); Lobb v. Brown, 208 Cal. 476, 281 P. 1010 (1929); 33 IOWA L. REV. 686 (1948).

[12] 247 Mich. 512, 226 N.W. 253 (1929), 28 MICH. L. REV. 356 (1930).