FIDUCIARY ADMINISTRATION-FRAUD IN SECURING PROBATE-
CONSTRUCTIVE TRUST IMPOSED ON DEVISEE

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Fiduciary Administration—Fraud in Securing Probate—Constructive Trust Imposed on Devisee—Plaintiff's complaint contained the following allegations: that plaintiff was the daughter and defendant the son of the decedent; that defendant had fraudulently destroyed written acknowledgements of the decedent that plaintiff was his daughter; that defendant had falsely secured the
probate of decedent's purported will, in which the plaintiff was in no way mentioned. The complaint sought the recovery of the value of a one-half interest in the estate. The trial court sustained a demurrer to the complaint. On appeal, held, reversed. The complaint stated a cause of action entitling plaintiff to the imposition of a constructive trust on the property held by defendant, to the extent of plaintiff's share of the estate as a pretermitted heir, or as an heir under the statute of intestate devolution. Defendant's concealment of plaintiff's existence from the probate court constitutes extrinsic fraud. 1 Ellis v. Schwank, (Wash. 1950) 223 P. (2d) 448.

It is generally agreed that the power of a court of equity to remedy fraud extends to matters that are probate in nature. 2 Thus, equity may grant relief from probate orders and decrees on the same grounds and conditions as from judgments of other courts. 3 However, matters that relate to wills and the probate of wills may form an exception to this rule, and the limits of the jurisdiction of courts of equity in such matters are not well fixed. 4 It is settled that equity may not cancel or set aside a will or the probate of a will, even though the will was obtained by fraud or undue influence, or is a forgery. 5 However, while the authorities are not entirely consistent beyond this point, there appear to be two well defined types of cases in which equity will give indirect relief by means of constructive trust or injunction from a fraudulent will or fraudulent probate or denial of probate: (1) where the probate court by granting or refusing probate of a will or part of a will, which has been fraudulently obtained, is incapable of doing substantial justice; 6 or (2) where the fraud relates to the procurement of the

1 While the plaintiff's precise theory does not clearly appear from the report, the majority of the court apparently construed the complaint as one alleging concealment of a pretermitted heir's existence. The three dissenting justices clearly adopted this construction and dissent on the procedural ground that counsel's admission that a decree of distribution had been entered in the probate proceedings did not rectify the lack of such allegation in the complaint, and that the pretermitted heir's remedy, where administration has not been terminated, is a petition in the probate court. Van Brocklin v. Wood, 38 Wash. 384, 80 P. 530 (1905). However, the plaintiff's allegation that defendant had destroyed two later wills in which plaintiff was named, and the plaintiff's implication that the probated will might be a forgery, would seem inconsistent with plaintiff's position as a pretermitted heir under the applicable statute. Wash. Rev. Stat. (1932) §1402. But even if plaintiff was thus dependent on a claim of intestacy, the amount and manner of recovery would be the same.

2 Caldwell v. Taylor, 218 Cal. 471, 23 P. (2d) 758 (1933); Weyant v. Utah Sav. and Trust Co., 54 Utah 181, 182 P. 189 (1919); 3 Freeman, Judgments, 5th ed., §1184 (1925).

3 Sohler v. Sohler, 135 Cal. 323, 67 P. 282 (1902); 3 Freeman, Judgments, 5th ed., §1184 (1925).


5 Kerrich v. Bransby, 7 Bro. P.C. 437, 3 Eng. Rep. 284 (1727); Case of Broderick's Will, supra note 4. The reasons usually given are that the probate courts have exclusive jurisdiction, and have power to grant an adequate remedy.

6 Brazil v. Silva, supra note 4; Restitution Restatement §184 (1937); cases
decree granting or refusing probate and is extrinsic and collateral to those pro-
ceedings.\(^7\) Extrinsic fraud is usually defined as fraud which prevents the unsuccess-
ful party from presenting his claim or defense.\(^8\) While the distinction be-
tween extrinsic and intrinsic fraud is no clearer in the probate field than else-
where, where the successful party in probate proceedings has intentionally con-
cealed from the court the existence of a person interested in the estate, the fraud
is generally considered extrinsic.\(^9\) In several earlier cases the Washington court
in effect refused to hold that these facts constitute extrinsic fraud, but the prin-
cipal case is a recognition of the general rule.\(^10\) It should be clear that where
there is no active concealment, a mere failure to disclose does not justify the
intervention of equity unless a duty to disclose exists. If the person so failing is
the executor or administrator, or occupies some other position creating a fiduciary
duty to disclose, such failure, if intentional, is equivalent to concealment and con-
stitutes extrinsic fraud;\(^11\) and several decisions, including the principal case, have
imposed this same duty on the proponent of the will or the person filing the
petition for letters of administration.\(^12\) Since a requirement of personal notice in
probate proceedings is not feasible, equitable relief in these cases is thoroughly
justified. Notice by publication must suffice if probate courts are to function
efficiently.\(^13\) But where the successful party has intentionally taken advantage
of this inherent weakness, equity should divert the fruits of his wrong to the

\(^7\) Caldwell v. Taylor, supra note 2; Sohler v. Sohler, supra note 3; Anderson v. Lyons,
226 Minn. 330, 32 N.W. (2d) 849 (1948).

\(^8\) United States v. Throckmorton, 98 U.S. 61 (1878). See 3 Freeman, Judgments,
5th ed., §1233 (1925); 2 Page, Wills, 3d ed., §578 (1941).

\(^9\) Purinton v. Dyson, 8 Cal. (2d) 322, 65 P. (2d) 77 (1937); and cases collected
following the report of this case in 113 A.L.R. 1235 (1938).

\(^10\) Davis v. Seavey, 95 Wash. 57, 163 P. 35 (1917); In re Christianson's Estate,
16 Wash. (2d) 48, 132 P. (2d) 368 (1942).


\(^12\) Purinton v. Dyson, supra note 9; Schmitz v. Martin, 149 Minn. 386, 183 N.W.
978 (1921). In the principal case, the defendant's destruction of the documents could have
been attacked in the probate proceedings and therefore should not be held extrinsically
fraudulent. The only sound basis of plaintiff's claim was the "procurement" of probate
without disclosure of plaintiff's existence.

\(^13\) See Wash. Rev. Stat. (1932) §§1380, 1477, 1532, providing for probate of will
without notice, notice by publication of the appointment of the executor, and notice by
publication of the hearing on the petition for final distribution. That proponent's failure to
notify by mail a person whose claim and whereabouts is known to him may violate the
due process clause of the 14th Amendment of the Constitution, and thus render the decree
void, appears from Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652
(1950), discussed in a comment in 50 Mich. L. Rev. 124 (1951) and noted in 25 Wash.
L. Rev. 282 (1950) and 1950 Wis. L. Rev. 688.
person injured, through the medium of constructive trust. Of course, to preserve the integrity of probate decrees, the remedy should remain an extraordinary one and should be denied where the interested party has had actual notice and failed to present his claim.  

14 See Krohn v. Hirsch, 81 Wash. 222, 142 P. 647 (1914). But such cases may sometimes present the due process problem observed in note 13, supra, if the claimant's interest and whereabouts are known.

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