Michigan Law Review

Volume 46 | Issue 4

1948

WILLS-VALIDITY OF A STATUTORY COMPROMISE OF A WILL CONTEST WHICH ALTERS OR REDUCES POSSIBLE INTERESTS CREATED UNDER THE WILL

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WILLS—VALIDITY OF A STATUTORY COMPROMISE OF A WILL CONTEST WHICH ALTERS OR REDUCES POSSIBLE INTERESTS CREATED UNDER THE WILL—Testator's will created a trust of realty and personalty worth about nine million dollars. Small life annuities, subject to spendthrift provisions, were given to various heirs, with remainder on the death of the survivor of two grandsons to *T*'s "legal heirs." Several years after *T*'s death the heirs filed a bill to construe the will, claiming that it gave them vested remainders in the trust estate. Pending decision, all the present heirs executed an agreement to compromise the controversy which provided for immediate distribution to them-

selves of six million dollars from the corpus. The agreement was submitted to the court for approval under the "Dodge Act," [1] providing for the compromise of will contests. Decision was then rendered in the construction suit that by "legal heirs" *T* referred to those persons who would be his heirs at the termination of the trust, rather than the persons who were his heirs at the time of his death.[2] Accordingly, approval of the compromise was denied upon the ground that it was not "fair and reasonable" to work such a substantial reduction in the estate to which unborn persons might ultimately succeed. On appeal by the heirs, *held*, affirmed. *Hay v. LeBus*, 317 Mich. 698, 27 N.W. (2d) 309 (1947).

Where a testator makes outright gifts and all interested parties are sui juris they may compromise contest of the will and the resulting agreement is valid although it alters the intended testamentary disposition.[3] But if a will purports to create a Claflin trust,[4] vest interests in persons under legal disability,[5] or create contingent interests in persons unborn or unascertainable, no compromise at common law is possible.[6] To cure this some states have statutes designed to grant the proper court power to approve compromises of will contests, and to enter a decree conclusive as to all possible parties.[7] Divergent views have been taken on the extent to which compromise under these statutes may alter or reduce contingent or inalienable interests which the testator sought to create. In appropriate circumstances possible contingent interests may be completely extinguished in Massachusetts.[8] New York decided that where the possible contingent interest "may or may not exist" a compromise could be approved as if there were no such interest.[9] There is apparently no objection in Massa-

[1] Mich. Stat. Ann. (1943) § 27.3178 (115-119).

[2] Hay v. Hay, 317 Mich. 370, 26 N.W. (2d) 908 (1947).

[3] The euphuism that the testator may do as he pleases with his property yields to its corollary that the beneficiaries may do as they please with their property, Snowball v. Snowball, 164 Cal. 476, 129 P. 184 (1913); Conklin v. Conklin, 165 Mich. 571, 131 N.W. 154 (1911); Collins v. Collins, 151 Wash. 201, 275 P. 571 (1929); 81 A.L.R. 1187 (1932).

[4] Beneficiaries may find that they cannot effectively contract with respect to interests derived under a trust whose purposes are capable of accomplishment, or whose terms include spendthrift provisions, Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 (1934).

[5] Metzner v. Newman, 224 Mich. 324, 194 N.W. 1008 (1923); Re La Croix, 244 Mich. 148, 221 N.W. 165 (1928).

[6] Compromise fails as a contract binds only those persons who are legally competent and are made parties thereto. 1 CONTRACTS RESTATEMENT, § 19 (1932); Re Sidman's Estate, 154 Misc. 675, 278 N.Y.S. 43 (1935); Stewart's Estate, 253 Pa. 277, 98 A. 569 (1916).

[7] Mass. Gen. Laws (1932) c. 204, §§ 13-17; Mich. Stat. Ann. (1943) § 27.3178 (115-119); N.Y. Dec. Est. Law (McKinney, 1939) § 19; R.I. Gen. Laws (1923) §§ 5439-5440.

[8] Copeland v. Wheelwright, 230 Mass. 131, 119 N.E. 667 (1918).

[9] Fisher v. Fisher, 253 N.Y. 260, 170 N.E. 912 (1930). Some thought this was dangerously close to the Massachusetts doctrine but admitted that "the existence of future interests in the unborn ought not to eliminate the possibility of compromise . . . when all risk loss of the whole gift in the event of litigation." Schnebly, "Extinguishment of Future Interests by Decree," 44 HARV. L. REV. 378 at 398 (1930).

chusetts, New York, and Rhode Island to a compromise which renders transferable an interest which the testator sought to restrain by a spendthrift trust.[10] But the Michigan court in the instant case reiterated its former position [11] that it would not approve a compromise altering a purported spendthrift trust,[12] and alternatively rested decision on the ground that reduction of possible contingent interests was too substantial to be fair.[13] It is doubtful, however, that there is any want of power, in the generic sense, in Michigan, to approve such compromises.[14] Once the power to alter or reduce is admitted, jurisdiction would seem to follow in all cases,[15] with the quantum of alteration or reduction, from

[10] Woodward v. Snow, 233 Mass. 267, 124 N.E. 35 (1919); Matter of O'Keeffe, 167 Misc. 148, 3 N.Y.S. (2d) 739 (1938); Codman v. Comm., (C.C.A. 1st, 1931) 50 F. (2d) 763.

[11] Rose v. Southern Mich. Nat. Bank, 255 Mich. 275, 238 N.W. 284 (1931). The court announced that it was "without power to terminate" a spendthrift trust, id. at 282. Where compromise resolves a contest on admission of the will to probate, the will is arrested, no decision is had as to the effect or validity of the original disposition, and the estate is administered according to the terms of the compromise, Lyeth v. Hoey, 305 U.S. 188, 59 S.Ct. 155 (1938); Matter of O'Keeffe, 167 Misc. 148, 3 N.Y.S. (2d) 739 (1938); Barber v. Westcott, 21 R.I. 355, 43 A. 844 (1899). To speak of termination seems erroneous as it presupposes a valid trust, and in these cases no trust has yet come into being, 2 TRUSTS RESTATEMENT, § 337 comment (m) (1935); and cases cited note 10.

[12] Compromise was attempted in the instant case more than twenty-one years after the will had been probated and the trust set up. Hence there is more force in the argument that it was terminating or altering a valid spendthrift trust and approval has been refused on this ground, Matter of Caswell, 185 Misc. 599, 56 N.Y.S. (2d) 507 (1945), affd., 269 App. Div. 809 (1945); but in other cases approval has been given, Chauvet v. Ives, 173 N.Y. 192, 65 N.E. 971 (1903); In Re Gould's Estate, 172 Misc. 396, 15 N.Y.S. (2d) 392 (1939). In the noted case, however, so far as the record discloses contest was solely over the remainder interest and the compromise could have been approved without disturbing the spendthrift provisions. As a matter of fact these interests had been largely wiped out by a prior compromise on admission of the will to probate, Hay v. Hay, 317 Mich. 370, 26 N.W. (2d) 908 (1947). Compare note 11.

[13] Inasmuch as controversy was solely over construction of the trust terms, validity being admitted, that major factor favoring approval, possible complete collapse of the testamentary scheme through contest, was absent from the case. Also since the heirs continued the contest after executing the agreement it could be said that consideration had failed. Kunzie v. Nibbelink, 199 Mich. 308, 165 N.W. 722 (1917); or that since the contest had been concluded there was now no controversy to be compromised, In re Mayer's Will, (Westchester Co. Surr. Ct. 1940) 21 N.Y.S. (2d) 460, affd., 261 App. Div. 982 (1940).

[14] The Michigan statute applies to controversies arising before or after probate and provides that wherever necessary it be considered a grant of power, see 31 MICH. L. REV. 268 (1933). In two cases the Michigan court has held decrees approving elimination of spendthrift provisions to be res judicata when unappealed, Gifford v. First Nat. Bank, 285 Mich. 58, 280 N.W. 108 (1938); Hay v. Hay, 317 Mich. 370, 26 N.W. (2d) 908 (1947) and an unappealed decree was held to be res judicata as to possible contingent interests in Dodge v. Detroit Trust Co., 300 Mich. 575, 2 N.W. (2d) 509 (1942).

[15] 3 SIMES, FUTURE INTERESTS, § 679 (1936).

slight to complete, limited in each particular case by the requirement that it be "fair and reasonable." [16] No testator can foresee all the possible conflict into which his estate may be plunged.[17] Hence, there must be a power somewhere in the community to deal with those cases where "frequently, through an overabundance of caution, accompanied by a lack of foresight to provide for contingencies, the testator directs that his hand, though stilled by death, shall continue to conduct and control his property." [18]

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[16] That a competent tribunal must scrutinize the compromise would seem adequately to guard property rights. This is the position taken by the courts in sustaining the constitutionality of the statues, 69 A.L.R. 924 (1930).

[17] The Michigan statute, colloquially called the "Dodge Act," was passed in response to problems created by the estate of John F. Dodge, the motor magnate, Dodge v. Detroit Trust Co., 300 Mich. 575, 2 N.W. (2d) 509 (1942).

[18] Young v. Young, 255 Mich. 173 at 179, 237 N.W. 535 (1931). Chief contingencies favoring compromise are: dissipation of the estate through litigation, Dodge v. Detroit Trust Co., supra, note 17, Gould v. Gould, supra, note 12; and complete failure of the testator's plan through successful contest of the will, Callaghan v. Corbin, 255 N.Y. 401, 175 N.E. 109 (1931); Re Watson, 124 Misc. 216, 207 N.Y.S. 265 (1924).