Michigan Law Review

Volume 45 | Issue 7

1947

DEEDS-TESTAMENTARY CHARACTER

James R. Bliss S.Ed.
University of Michigan Law School

DEEDS—TESTAMENTARY CHARACTER—In 1929 J. J. Coulter and wife signed, acknowledged, and delivered to be recorded an instrument granting in customary form certain described land to their daughter, Eliza Coulter. The instrument then recited, "It is understood between the parties hereto that the grantors are to have the possession, control and occupancy of said lands during their natural life, and at their death the title to said lands shall vest in the said Eliza Coulter, but not until the death of both grantors herein, does the title pass." The present action, presumably instituted after the death of the makers, sought construction of the instrument.[1] From a determination that the instrument was a deed, one D. W. Coulter appealed to the Mississippi Supreme Court. *Held*, the instrument is testamentary in character and must be authenticated and probated as a will. Two justices dissented. *Coulter v. Carter*, (Miss. 1946) 26 S. (2d) 344.

The necessity for classifying a given instrument as a deed or as a will may arise because of the requirement of delivery of a deed[2] or of probate of a will,[3] or

[1] The published report does not indicate the legal interests which the litigants in the case claimed in the property.

[2] Gibson v. Dymon, 281 Mich. 137, 274 N.W. 739 (1937).

[3] 2 PAGE, WILLS, 3d ed., § 566 (1941).

of the use of the word "heirs" to pass a fee in a deed.[4] Again, the problem may arise under a statute giving to the spouse of a decedent an estate defeasible by deed but not by will,[5] or because of an effort on the part of the maker to revoke the instrument,[6] or because of a difference in the formal requirements prescribed by statute for the execution of the two types of instruments.[7] The formula almost invariably proposed in determining the nature of the instrument is the legal effect contemplated by the maker, rather than the form employed by the draftsman. The instrument is construed to be a deed if it purports to create some existing interest in the transferee, even though the maker reserves a life estate or otherwise postpones the vesting in enjoyment of the transferee's estate until the maker's death.[8] On the other hand, if the instrument does not pass any interest until the death of the maker, it is considered a will.[9] The apparent simplicity of this test belies the difficulty of its application. It has been held that reservation of a power to revoke a present interest does not compel classification as a will an instrument otherwise operative as a deed.[10] It will be seen that the extension of this holding to future estates vesting in enjoyment at the death of the maker would render deeds and wills indistinguishable by the above test.[11] It would seem that where the maker stated "this instrument to take effect only on my death," or "title to pass only on my death," the law as above stated would invalidate every instrument executed as a deed which did not also conform to the requirements of the Statute of Wills.[12] Many courts, however, perhaps impressed with the social utility of a device which transmits small estates at the death of the owner without the delays and expenses of probate, construe such instruments as deeds reserving a life estate to the maker, construing "title" to mean "possession."[13] The transferee is thus regarded as

[4] 3 PAGE, WILLS, 3d ed., § 1088 (1941).

[5] Newman v. Dore, 275 N.Y. 371, 9 N.E. (2d) 966 (1937).

[6] 1 PAGE, WILLS, 3d ed., § 71 (1941).

[7] Warsco v. Oshkosh Savings & Trust Co., 183 Wis. 156, 196 N.W. 829 (1924). The reason for raising the question in the principal case is nowhere clearly stated, although the majority opinion suggests that authentication or probate requirements necessitated the determination. The dissenting opinions, construing the instrument as a deed, assume that the holding of the court results in the nullification of the instrument.

[8] 4 TIFFANY, REAL PROPERTY, 3d ed., § 1070 (1939).

[9] Ibid.

[10] Bear v. Millikin Trust Co., 336 Ill. 366, 168 N.E. 349 (1929); 4 TIFFANY, REAL PROPERTY, 3d ed., § 1071 (1939).

[11] For a criticism of this doctrinal approach see Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L. J. 1 (1941), where it is proposed that the result should vary according to the reason for raising the question. Where the transferor has attempted to avoid some policy of the state, a strict construction is suggested. See Newman v. Dore, 275 N.Y. 371, 9 N.E. (2d) 966 (1937). But where the occasion for classification is the difference between statutory formal requirements for the execution of deeds and wills, a construction favoring validity is advocated on the theory that either group of requirements is adequate safeguard against fraud. The argument is especially persuasive in the present case where the challenged instrument apparently was on the public records for twenty-five years—a circumstance not usually associated with forged conveyances.

[12] Cases reaching this result are Elrod v. Schroader, 261 Ky. 491, 88 S.W. (2d) 12 (1935), and Mims v. Williams, 192 Miss. 866, 7 S. (2d) 822 (1942).

[13] Stubblefield v. Haywood, 123 Miss. 480, 86 S. 295 (1920); Reynolds v.

having received a present interest in a future estate. So far has this sympathetic attitude toward the inexpert draftsman gone in doubtful cases, that it has been proposed that the transferee's estate be classed as an executory limitation rather than as a vested remainder to obviate an action for waste by the transferee against a maker who has declared in his grant that it is to have no effect during his life.[14] In the principal case the result reached by the majority seems unfortunate. Where, as here, the makers have apparently regarded the instrument as a deed, have expressly reserved only the "possession, control and occupancy" to themselves for their lives,[15] and have further indicated the finality with which they regard the transaction by placing the instrument on the public records to preclude any future contrary disposition of the property,[16] the instrument should be construed to be a deed. The majority of the court, in disregarding these factors, ascribes to the term "title" an inflexibility which is probably not necessitated by the history of the term in American law.[17]

James R. Bliss, S.Ed.

Balding, 183 Ark. 397, 36 S.W. (2d) 402 (1931); Shackleton v. Sebree, 86 Ill. 616 (1877); Barnett v. Barnett, 283 Ky. 710, 142 S.W. (2d) 975 (1940).

[14] KALES, FUTURE INTERESTS, §§ 158b and 159 (1905). The same result, except perhaps as to dower rights, could be reached by implying the reservation to be without impeachment of waste, where the estate is not specifically reserved. See Ballantine, "When Are Deeds Testamentary?" 18 MICH. L. REV. 470 (1920).

[15] Thus, in a sense, the makers define the word "title" which follows this reservation.

[16] See Pelt v. Dockery, 176 Ark. 418, 2 S.W. (2d) 62 (1928).

[17] For examples of varying shades of meaning of the term, see 41 WORDS AND PHRASES 663 to 679.