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## FINALITY OF ORDERS AND DECREES OF THE COUNTY COURTS OF WISCONSIN IN PROBATE MATTERS

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It is the purpose of this article to discuss briefly the finality of the orders and decrees of the county courts of Wisconsin so far as they relate to matters of probate of wills and the administration of estates. However, it may not be out of place, in this connection, to state the origin of the probate jurisdiction of our county courts.

**Jurisdiction Vested by the Constitution.** The Wisconsin constitution by Article VII, Section 2, provides :

**Judicial Power Where Vested.** Section 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction, and by Article VII, Section 14, it is provided :

**Judges of Probate.** Section 14. There shall be chosen in each county, by the qualified electors thereof, a judge of probate, who shall hold office for two years and until his successor shall be elected and qualified, and whose jurisdiction, powers and duties shall be prescribed by law. Provided, however, that the legislature shall have power to abolish the office of judge of probate in any county, and confer probate powers upon such inferior courts as may be established in said county.

The sections above quoted give the legislature the power to establish inferior courts in any county, confer probate jurisdiction upon them, and abolish the office of probate judge in that county. This in effect gave the legislature the power to establish courts in the various counties inferior to the circuit court, with such jurisdiction as was thought necessary to meet the requirements, but the legislature was obligated to maintain in each county, a court of probate jurisdiction.

**Probate Jurisdiction Conferred on County Courts.** Shortly after the adoption of the constitution, the legislature accordingly established the county courts and provided for their jurisdiction. (See Chapter 86 R. S. 1849.) By Section 3 of that chapter, it was provided that these courts should have the powers and jurisdiction then by law conferred on the judges of probate, and that the

judges thereof should perform all the duties of the judges of probate in the manner provided by law.

By Section 4 of that chapter the office of judge of probate was abolished and the judges of probate were directed on January 1, 1850, to turn over all books, records, and papers belonging to their offices, to the county judges of their respective counties, who from that time were vested with full and exclusive probate powers.

Section 5 of the same chapter gave county courts the usual powers of courts of record under the common law, except so far as limited by statute, and full power to issue all legal process, proper and necessary to carry into effect their jurisdiction.

The legislature has from time to time changed the jurisdiction of the county courts, but they still have full and exclusive probate jurisdiction. (See Chapter 114 R. S. 1921.)

**Judgments of the County Court within the General Rule of Freedom from Collateral Attack.** The general rule, familiar to every lawyer, that a judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding, as stated in 23 Cyc. 1055, is applicable to the judgments of the county courts in Wisconsin. *Barker vs. Barker*, 14 Wis. 131 at 147.

**Direct Attack upon Orders and Decrees of County Courts.** The orders and decrees of the county courts are of course subject to reversal and revision upon appeal to the circuit court, in counties having a population of less than fifteen thousand, and thence to the supreme court, while in counties having a population of fifteen thousands, or more, such orders and decrees are subject to revision by appeal direct to the supreme court (see Section 4031 R. S. 1921.) provided said appeal is taken within sixty days after the entry thereof. But the expiration of that time does not cut off the right to appeal, for Section 4035 R. S. 1921 provides that,

If any person aggrieved by any act of the county court shall, from any cause without fault on his part, have omitted to take his appeal according to law the county court of the same county may, if it shall appear that justice requires a revision of the case, on the petition of the party aggrieved and upon such terms and within such time as it shall deem reasonable, allow an appeal to be taken and prosecuted in like manner and with the same effect as though done seasonably; or the county court may in its discretion reopen the case and grant a retrial of the matter complained of. No such appeal or retrial shall be allowed without reasonable notice to

the party adversely interested, nor unless the petition therefor shall be filed in the office of the clerk of the county court within one year after the act complained of. Whenever the county court shall allow or disallow an appeal, or retrial, as provided in this section, the party aggrieved may appeal therefrom.

From a reading of this statute it will be seen that after the expiration of the sixty-day period and within the year the court can allow an appeal or a retrial of the matter if it shall be made to appear that "justice requires a revision of the case." This would seem to place the matter entirely within the discretion of the court to determine whether such relief should be granted, but the fact that such determination is expressly made appealable by the closing lines of the section, it would seem that the court must act cautiously, and grant the relief in every case that justice requires and only in such cases, otherwise, its determination in granting, or refusing to grant the relief, whichever the case may be, would be subject to revision upon appeal. It therefore seems that the effects of this statute is to extend the time for appeal from orders and decrees of the county courts to the full period of one year, for in order for the appellate court to determine the appeal from the order granting or refusing to grant the appeal or retrial, whichever the case may be, it must determine whether or not "justice requires a revision of the case." In order to determine this question, the court must pass upon the merits of the original case, for, the appellate court will never disturb a determination of a lower court unless justice requires it.

To construe the statute otherwise would lead to this absurdity: An appeal is taken to the supreme court from the order of the county court refusing to allow an appeal after the expiration of the sixty-day period. The supreme court determines that the county court was in error in this refusal and remands the record to the county court with directions to allow the appeal. The county court would then be obliged to obey instructions and send the record back to the supreme court. When the record arrived there, the supreme court would be compelled to examine the very same record as was before it upon the previous appeal and then send it back again to the county court with directions to grant a retrial or such other relief as justice might require. It cannot be expected that our court would indulge in any construction of the statute that would lead to this result.

We may then safely say that after the expiration of one year from the entry of an order or decree of the county court, it is free

from revision or annulment in so far as the record upon which it is based is concerned. It being so free from liability to change, anyone may rely upon its validity unless he has knowledge of facts outside the record that would impeach its validity, or unless he is a party to the record. This leads us to a consideration of the effect of fraud in the procuring the entry of such an order or decree.

**Effects of Fraud upon the Finality of an Order or Decree of the County Court.** It is a fundamental principle that fraud which induces the entry of an order, judgment, or decree of a court renders it voidable by the party injured, but that the judgment will not be set aside for fraud inducing its entry, where to do so would prejudice the rights of innocent purchasers for value without notice of the fraud.

The *Staab Will Case*, 166 Wis. 587 is a good example of the vacation of an order induced by fraud upon the court. In that case the proponents of a will introduced testimony of the testamentary capacity of the testatrix, when they in fact knew that she was wholly incompetent to make a will, the testimony therefore being perjured. Upon application of one of the heirs of the alleged testatrix, the court set aside the order admitting the will to probate, and granted administration of the estate. The supreme court, in affirming this determination of the county court in part said,

The mere fact that the year had gone by in which a formal appeal might be taken from the order admitting the will to probate, or that interested persons, knowing the facts, concealed or withheld them from the court, does not alter the position of the county court itself, having, as here, the matter of the estate still before it to take the proper steps on its own motion to determine whether or not there has been such fraud perpetrated upon it under the guise of regular proceedings. While the estate is still before the court for administration it is still before it to have its proceedings purged of fraud, and the mere passing of the time within which parties might appeal to another tribunal is immaterial.

It is to be noted that the rights of no innocent purchaser for value was involved in this case, and the court expressly limits the application of the rule to those cases in which the innocent purchaser's rights are not involved, and to those cases in which the rights of the innocent purchaser can be protected.

The *Reeves Case*, 186 N. W. 736 recently decided by the supreme court, is interesting from the standpoint or rather lack of finality of the decree of the county court. In this case it was sought to set aside guardianship proceedings in county court and

be retrieved from a stipulation with the guardian, upon a showing that there was no ward in fact and that the alleged ward was an impostor. The court purged its records of the alleged guardianship proceedings. And the supreme court in sustaining this position held that a decree of the probate court may be subsequently annulled when clearly shown to be without foundation in law or fact.

In order to perpetrate the fraud upon the court in the guardianship proceedings, the supposed mother of the imposed ward allowed an order of the county court, prejudicial to her interest, to be entered, and the supreme court relieved her from this order.

The court, however, points out that the vacation of the decree of the county court must be sought in that court because of its peculiar and broad equity powers resting upon the proposition that the deceased person who has disposed of his property, is always a silent party to the proceedings, and it is the supreme duty of courts of probate to carry his wishes into effect wherever they are not inconsistent with law and public policy.

A reading of the cases mentioned, to say nothing of cases from other jurisdictions in accord with them, will show that a decree or order of the county court has no finality where fraud lurks and where the question is raised directly. In fact, so potent is the power of the county court to set things right that relief will be granted to the very person who has fraudulently procured the order to be entered.