Marquette Law Review

Volume 45
Issue 3 *Winter 1961-1962*

Article 7

Wills: Admissibility of Extrinsic Evidence in the Absence of Ambiguity

Robert J. Bonner

The impact of the present case will undoubtedly produce a different aproach by parties seeking to avoid liability on fraudulently secured negotiable instruments. The decision has effectively cut off any possibility of defending successfully against the holder who took the instrument in good faith and in exchange for a negotiable instrument.

But when a fact situation arises involving an exchange of negotiable instruments, where one is subject to a prior infirmity, the following approach may be useful in setting up a valid defense, assuming the possibility that the Wisconsin Court will modify its flat rejection of the *Jerke* rationale. Unless the transferee knew of the fraud at the time of the exchange, his right to recover should not be questioned by merely asserting N.I.L. 54, or by questioning the transferee's holder in due course status. Rather, the defendant should proceed to establish:

1. The point in time at which the plaintiff was aware of the infirmity;

2. That plaintiff's negotiable instrument was *subsequently* paid to one *not a holder in due course;* and most important,

3. That plaintiff *knew* the payee was not a holder in due course.

In essence the defendant would be arguing the supervening equity of the situation,[24] and denial of recovery would be predicated upon the plaintiff's participation in effectuating the fraud, irrespective of his due course status at the completion of the original transaction.

MICHAEL R. WHERRY

Wills—Admissibility of Extrinsic Evidence in the Absence of Ambiguity: The wills of Mr. and Mrs. George Gibbs each bequeathed one per cent of the residue to "Robert J. Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin." Robert W. Krause, who resided at 2325 North Sherman Boulevard at the time the will was executed, petitioned the County Court for Milwaukee County for construction of the above provisions on the ground that he was the intended beneficiary. Both Robert J. Krause of 4708 North 46th Street and Robert W. Krause were represented at the hearing. The petitioner was permitted to introduce evidence that he was a close friend and former employee of the decedents, over the objection of the named beneficiary. He was also allowed to show that in prior

---

[24] In *Home Savings Bank v. General Finance Corp.*, 10 Wis. 2d 417, 103 N.W. 2d 117 (1960), the Wisconsin Court allowed a restitutional recovery to a plaintiff who relied upon the *oral* acceptance of a sight draft. N.I.L. 132, WIS. STAT. §118.07 (1959), requires a bill of exchange to be accepted *in writing.* Yet the Court felt that the inequity of the situation justified relief even though the plaintiff was seemingly barred by the express wording of the N.I.L. It is interesting to note that principles in another field of law, restitution, took precedence over the more particular area, negotiable instruments.

wills, identical bequests had been made to "Robert Krause of Milwaukee, Wisconsin."

Robert J. Krause testified that at the time of the execution of the will, he was the only person by that name residing at 4708 North 46th Street. He also stated that while working as a taxi driver he had transported an elderly lady across the city, that he had given her his name, and that he had related his financial difficulties to her.

Upon this evidence, the County Court concluded that petitioner Robert W. Krause was the intended beneficiary, and orders were accordingly entered. The Supreme Court, taking judicial notice that the addresses of the two claimants are in the same general direction of Milwaukee, that both are a number of miles from the Gibbs' home, and that the telephone directory listed 14 subscribers by the name of Robert Krause, affirmed, with two dissents. *Estate of Gibbs.*[1]

The decision and opinion in this case mark a departure from prior Wisconsin law of will construction. Although the court stated that there was no ambiguity because "the terms of the bequest exactly fit appellant and no one else,"[2] appellant was not given the bequest. Rather, it was awarded to the person to whom the court found it was intended to go. Extrinsic evidence was admitted to establish this intent despite the absence of any ambiguity in the will.

Prior to the *Gibbs* case, when no ambiguity existed the courts were bound to apply the intent of the testator as it was expressed in the will. Where there was a conflict between the intent expressed in the will and the intent as established by extrinsic evidence, the former was given effect.[3] The same policy reasons that prompted statutes requiring wills to be in writing were thought to require that the will be applied as it was written.[4] Even if extrinsic evidence could be presented which would clearly indicate that a mistake was made, and that the person or property named in the will was not the intended beneficiary, in the absence of an ambiguity the words in the will would be applied as written.[5] Also the fact that the mistake may have been occasioned by the scrivener instead of the testator did not affect the application of the rule.[6]

Since an unambiguous will could not be altered by extrinsic evidence of a contrary intent, such evidence was inadmissible in a proceeding for construction because of immateriality. It could not be used to attempt

---

1. 14 Wis. 2d 490, 111 N.W. 2d 413 (1961).
2. *Id.* at 497.
3. Will of Boeck, 160 Wis. 577, 152 N.W. 155 (1915); Will of Cuppel, 206 Wis. 586, 240 N.W. 144 (1932); Will of Tousey, 260 Wis. 150, 50 N.W. 2d 454 (1951); 2 GARY, WISCONSIN PROBATE LAW §§595-97 (5th ed. 1944); Anno. 94 A.L.R. 26, 68, 77-78.
4. Estate of Pierce, 177 Wis. 104, 188 N.W. 78 (1922); Anno. 94 A.L.R. 26, 65.
5. Estate of Gray, 265 Wis. 217, 61 N.W. 2d 467 (1953).
6. Estate of Gray, *supra* note 5; Anno. 94 A.L.R. 26, 38, 70.

to establish the fact that a mistake was made, nor to show what the testator's actual intent was.[7]

As has been indicated, this rule applied only where there was no ambiguity. Where an ambiguity did exist, the courts could resort to extrinsic proof of the testator's intent to resolve it. An ambiguity can be either patent or latent. A patent ambiguity is one that appears on the face of the instrument itself. When a will is insensible and contradicts itself, it is deemed to have such a defect.[8] Technically a will cannot be said to contain a latent ambiguity because it does not appear on the face of the instrument.[9] The will is apparently unambiguous, but when the court attempts to apply it to the designated property or beneficiaries, the defect appears. There are two general circumstances when this situation arises. In the first the description used in the will is unintelligible with reference to any existing object or person.[10] The second is when the description accurately applies to two or more persons or things.[11]

In any case where such defects appear the court can receive extrinsic evidence. Aided by this evidence, the court then can determine which person or property the will intended to describe, and give effect to that intent.[12] This the court can do even if part of the description is false. Thus, if there had been no Robert J. Krause at 4708 North 46th Street, the court could have omitted the initial and address from the description and given the request to the Robert Krause of Milwaukee, Wisconsin, intended by the testator and testatrix under the doctrine of falsa demonstratio non nocet.[13]

Of course, some extrinsic evidence is admissible in every case in order to apply the bequest to the described property or person,[14] but this is limited to only such evidence as is necessary to execute the will i.e., apply its terms to existing facts. If no ambiguity appears upon this bare application of the will to the facts, then the will must be executed strictly in accordance with its terms.[15]

Thus it would seem that under this interpretation of the law, the petitioner could only be given relief if the court found some sort of

---

[7] Estate of Breese, 7 Wis. 2d 422, 96 N.W. 2d 712 (1959); Estate of Gray, *supra* note 5; 2 GARY, *supra* note 3, §598; 95 C.J.S. *Wills* §639; Anno. 94 A.L.R. 26, 31.

[8] Will of Stack, 214 Wis. 98, 251 N.W. 470, 92 A.L.R. 150 (1934); Will of Boeck, 160 Wis. 577, 152 N.W. 155 (1915); Will of Frost, 3 Wis. 2d 603, 89 N.W. 2d 216 (1958); Estate of Grove, 6 Wis. 2d 659, 95 N.W. 2d 788 (1959); Estate of Witwer, 253 Wis. 536, 34 N.W. 2d 671 (1948).

[9] See Estate of Grove, *supra* note 8.

[10] Will of Boeck, 160 Wis. 577, 152 N.W. 155 (1915); Anno. 94 A.L.R. 26, 43.

[11] Will of Boeck, *supra* note 10.

[12] Estate of Witwer, 253 Wis. 536, 34 N.W. 2d 671 (1948).

[13] Anno. 94 A.L.R. 26, 74.

[14] Will of Frost, 3 Wis. 2d 603, 89 N.W. 2d 216 (1958); Anno. 94 A.L.R. 26, 43, 52.

[15] Anno. 94 A.L.R. 26, 54.

ambiguity, and in fact this is the way the parties argued the case. Robert W. Krause claimed that

> . . . a latent ambiguity was necessarily raised in the instant case by the filing of verified petitions for construction of the wills in question on the part of respondent which tended to show his closer relationship to the testator and testatrix than the appellant bore to them, and the probability of a mistake in identification having been made with respect to the subject of the bequests under consideration.[16]

The Supreme Court found no ambiguity, but nevertheless, refused to grant the property to the named beneficiary. As authority for its decision the court cited two Wisconsin cases and several other decisions. The court stated that in decisions such as these the courts have "strained" the strict rule against reformation in the areas of description of persons and property in order to reach "desired" results.

The Wisconsin cases cited are *Will of Stack*[17] and *Will of Boeck*.[18] These cases involved property descriptions. In the former the testator willed "all my real estate . . . in block 64." When the court attempted to apply this language to the property in question it appeared that adjoining the lot in question was another situated in block 175. These two lots had constituted a unit for many years, and the use of the buildings thereon would be destroyed if only one were intended to be conveyed. Thus the court said, "When we apply the will to the property under consideration, the result gives rise to an ambiguity. . . . This ambiguity gives rise to the necessity of construction. . . ."[19] In the *Boeck* case, the will devised the northeast quarter of the northwest quarter of section 13. In fact the testator did not own that land, but did own the southwest quarter of the same quartersection, which property was not otherwise disposed of by his will. The court stated that since, by the terms of the will, the testator intended to devise 40 acres, and since he did not own the 40 acres described, an uncertainty of meaning arose by the application of the will to the subject matter. Thus, extrinsic evidence of intent could be resorted to to resolve it. In the Wisconsin cases cited, then, the court required an ambiguity before extrinsic evidence of intent was admissible. The finding of an ambiguity may have been a "straining" of the law, but it was at least arguable that one actually did exist, and the court recognized that it could not resort to construction without it.

In the comparable cases from other jurisdictions the courts made

---

[16] Brief for the Respondent, p. 12, Estate of Gibbs, 14 Wis. 2d 490, 111 N.W. 2d 413 (1961).
[17] 214 Wis. 98, 251 N.W. 470, 92 A.L.R. 150 (1934).
[18] 160 Wis. 577, 152 N.W. 155 (1915).
[19] Will of Stack, 214 Wis. 98, 251 N.W. 470, 92 A.L.R. 150 (1934) at 102-103.

similar findings. In *Moseley v. Goodman*[20] and *Miller's Estate*[21] there were ambiguities because there were two persons known by the name used in the will—one whose actual name was the one used, and the other who was known to the testator by that name. In *Beaumont v. Feld*[22] and *Masters v. Masters*[23] the ambiguity arose because there was no person claiming the bequest by the name used in the will. In *Groves v. Culph*[24] the fact that the will manifested an intention that the daughter have a remainder in the same property in which the mother had a life estate, and that the mother had a life estate in both lots 15 and 16, rendered the devise of a remainder in just lot 15 to the daughter ambiguous. *Castell v. Tagg*[25] and *Geer v. Winds*[26] are not cases of mistake in identification, but rather complete omissions of intended bequests or devises. Since the court limits its decision here to details of identification,[27] and since Wisconsin has not previously allowed extrinsic evidence to supply omissions,[28] these decisions presumably would not be followed by the Wisconsin court.

Therefore none of the prior authority cited has approved the proposition that the court can refuse to apply an unambiguous will according to its terms and resort to extrinsic evidence to discover the real intent of the testator and give that intent effect. However, this is not to say that the court should not have decided the case as it did. There was no Wisconsin case directly in point forbidding the development of an exception to the general rule.[29] The court evidently did not feel that "the judicial hands were so tied to the rock of precedent that they could not be so loosened as to do justice in the particular case."[30]

As the court stated, the result in the instant case is "desired" in that the bequest is given to the person for whom it was intended, and the stranger is not unjustly enriched. Although the former result could possibly be obtained by an action against the attorney on a contract or negligence theory[31] (assuming that it could be established that this was the cause of the mistake), the latter effect would not be obviated, and there would be a more difficult burden of proof placed on the intended beneficiary. The policy reasons for the opposite view are the same as

---

[20] 138 Tenn. 1, 195 S.W. 590 (1917).
[21] 26 Pa. Super. Ct. 443 (1904).
[22] 24 Eng. Rep. 673 (1723).
[23] 24 Eng. Rep. 454 (1718).
[24] 132 Ind. 186, 31 N.E. 569 (1892).
[25] 163 Eng. Rep. 102 (1836).
[26] 4 S.C. Eq. (4 Desauss.) 84 (*85) (1810).
[27] *Supra* note 1, at 497, 499.
[28] 2 GARY, *supra* note 3, §598 citing Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757 (1878).
[29] For cases in point in other jurisdictions, see Tucker v. Seaman's Aid Soc., 7 Met. (Mass.) 188 (1843); Dunham v. Averill, 45 Conn. 61, 29 Am. Rep. 642 (1877), and other cases cited at 94 A.L.R. 77-79.
[30] Will of Boeck, 160 Wis. 577, 580, 152 N.W. 155 (1915).
[31] See Lucas v. Hamm, 15 Cal. 821, 364 P. 2d 685 (1961).

for requiring the will formalities in general, i.e., to avoid fraud, uncertainty, litigation, etc.[32] Some of these objections may be overcome by requiring proof establishing to the "highest degree of certainty that a mistake was, in fact, made."

The exception to the general rule created by this case is given two limitations by the opinion of the court. The proof must establish to the highest degree of certainty that a mistake was, in fact, made, and the mistake must be as to some detail of identification. As to the first requirement, the degree of certainty need not be absolute, because in the instant case there was a possibility that the testator intended the taxi driver as the beneficiary. Evidently more than a clear preponderance of the evidence is necessary; however, as to details of identification, the court only gives middle initials and addresses as examples. The prior cases cited cannot be used to help define the limits of the new test since they involved ambiguities. Once an ambiguity was shown, recovery was allowed, whether the mistake was in a detail of identification or not, and whether or not the proof of a mistake was established to the highest degree of certainty. The precise limitations of the new test will therefore have to await further cases for a more complete definition.

ROBERT J. BONNER

Family Law—Annulment of Fraudulent Marriage Contract: Plaintiff was intentionally induced to marry defendant by her false representations of pregnancy based, in part, upon certificates executed by a reputable local doctor stating the fact of pregnancy. Following the ceremony and upon discovery that defendant was not pregnant, plaintiff discontinued marital relations with her, renounced her as his wife, left their residence, and commenced proceedings for annulment under Section 247.02(4) of the Wisconsin Statutes.[1] Reversing the lower court, the Supreme Court granted

[32] "The statute prescribing the manner in which wills shall be executed is in the nature of a statute of frauds. Perhaps no other legal document requires such solemnity in the manner of its execution. This is for the purpose of securing the highest degree of assurance that the testator's property will go as he wills it and to make it correspondingly difficult to divert it into other channels. To permit this judgment to stand would open up an alluring field for frauds and perjuries and neutralize to a great degree the safeguards which the statute throws about the estates of deceased persons. It would permit anyone having a claim against an estate of a deceased person, and being fraudulently disposed, to manufacture evidence, . . . and the estate of the testator would not go according to his written declaration executed in accordance with the solemnities required by the statute but according to parol testimony produced at a time when the testator cannot be present to refute it. While justice might be done in the instant case, a recognition of such a rule would point the way for contravention of a statute designed by the legislature to prevent the distribution of estates except in accordance with the will of the testator." Frieders v. Estate of Frieders, 180 Wis. 430, 433-34, 193 N.W. 77, 31 A.L.R. 118 (1923).

[1] WIS. STAT. §247.02(4) (1959):
"... A marriage may be annulled for any of the following causes: ...