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Construction of a Will After a Final Decree in County Court at Time of Settlement of Estate

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CONSTRUCTION OF A WILL AFTER A FINAL DECREE IN COUNTY COURT AT TIME OF SETTLEMENT OF ESTATE*

STATE OF WISCONSIN IN CIRCUIT COURT FOR LINCOLN COUNTY

ELISE MATHILE KLEE, et al.,
Plaintiffs,
vs.
WILLIAM BROWNGARDT,
Defendant.

OPINION

This action is brought to construe the will of George Martin Duering (if the same is now open to construction) and hereby determine the nature and extent of the interests of the parties to this action in certain real estate left by said Duering at his death, and thereupon after the interests of all parties in the real estate described in the complaint shall have been ascertained and determined to partition the said real estate.

There seems to be no contested questions for the court to determine other than two:

First: Is the will of George Martin Duering now open to construction, or must the final decree in the County Court at the time of the settlement of the estate of George Martin Duering, govern?

Second: If open to construction, what is now the proper construction of said will?

I am satisfied that the final decree rendered by the County Court in the George Martin Duering estate, by which the court undertook to assign the real estate to the widow absolutely and free of all claims of any other persons is only presumptive evidence of the widow's right to said real estate so assigned.

It appears that none of the heirs or legatees or devisees of

*This able opinion was submitted by Mr. G. M. Sheldon of the Tomahawk Bar, in reply to Professor Lang's article "The Finality of Decrees of the County Court of Wisconsin," which appeared in the June issue, 1922, Vol. 6, *Marquette Law Rev.* 159. Professor Lang contends that such decrees are final as against collateral attack, *Barker v. Barker,* 14 Wis 131, and against direct attack after the longest statutory period (one year) for allowance of appeals therefrom has elapsed, Sec. 4035, R. S. 1921; except where such decree was obtained by fraud upon the court. *Staab Will Case,* 166 Wis. 587.—Ed.

George Martin Duering entered any appearance in the settlement of his estate, excepting the widow, Barbara Duering, and that no notices were given personally to any persons, and that the only notice of the proceedings taken in such settlement was the usual notice of application for probate of will, notice to creditors, and notice of application for final settlement of accounts, all of which notices were published according to statute.

It seems clear that when a will is propounded for probate, and notice to all persons interested shall have been given, as provided by statute, the County Court acquires jurisdiction to probate the will and to assume charge of the estate for its administration. The devisees under the will take by force of the will, and their rights are determined by it. When a will is probated and a certified copy thereof recorded in the office of the Register of Deeds, title to the real estate described in it passes to the devisee in accordance with its terms, subject only to the rights of creditors and costs of construction. Sec. 2294-2296 Stat.

When administration of an estate is completed by the executor or administrator, and the debt shall have been ascertained and paid and the personal property reduced to possession, such executor or administrator must account to the court for all of the personal estate which shall have come to his hands. Such executor or administrator has no title to or authority over the real estate except insofar as it may be necessary for the settlement of the estate and payments of debts, and except as by specific provisions of will an executor is given some other power. Chapter 168 Statutes.

It is then provided that "Before the administration account of any executor or administrator shall be allowed, notice shall be given to all persons interested, and the time and place of allowing and examining the same." Here follow provisions as to notices (Sec. 3931).

These final proceedings in settlement in no wise refer to real estate. No notice is required to be given to any heir or devisee that at the final settlement of accounts any question will be taken up respecting the construction of a will, or any action taken that might settle, adjust, or cut off the rights of any person claiming under the will. If at any stage in the proceedings the proper construction of a will which has been admitted to probate comes into question, the statute provides for a definite proceeding to determine such construction. (Sec. 3791a).

A petition must be filed, and the court directs the giving of such notice to all persons interested as shall insure, so far as practicable, a day in court for every such person and a reasonable opportunity to be heard. It rather plainly appears that exclusive of that proceedings the County Court is not expected or presumed to pass upon the proper construction of a will.

When it comes to final settlement of the executors or administrators accounts the statute provides that the County Court shall by a judgment, assign the residue of the estate, if any, to such persons as by law are entitled to the same. This statute is found in the chapter relating to distribution of the personal estate after settlement of the accounts of the personal representative. Undoubtedly it is conclusive, unless appealed from, as to all personal estates assigned.

The statute then provides that, "Any finding or determination as to heirship or assignment of real estate in any such judgment shall be presumptive evidence of any fact so found, and of the right to the portion of any estate so assigned, and shall be conclusive evidence thereof as to all persons appearing in any such proceeding, and as to all persons claiming under them." (Sec. 3940, subd. 3.)

This statute very plainly fits in with the spirit and intent of the other statutes relative to administration of estates, and carries into effect the principles that as to personal estate, heirs and legatees take under the judgment of the County Court, whereas as to real estate heirs and devisees take under the law or the will.

The amendment of Sec. 3940, made in 1907, declaring the effect of the judgment therein provided for, appears to have been enacted in order to make clear the rule which had previously prevailed respecting the effect of such judgments. *Ruth vs. Ober-Brunner,* 40 Wis. 236, 269; *Van Matrie vs. Swank,* 147 Wis. 93; *P—. vs. P—.* 181 N. W. 722-724; *McKenney vs. Minahan,* 119 Wis. 651.

I conclude therefore that the question is open to now determine what was the proper construction of the will of George Martin Duering, and whether his real estate left by him at his death was properly assigned by the County Court.

The will, so far as it is here in question, reads:

I give, devise and bequeath to my beloved wife, Barbara Duering, all of my estate of whatever name, title or description, real, personal or mixed to be hers to do with as she wishes; that is to say, that she may sell

convey, mortgage or encumber any or all of it and use it as she sees fit.

"At my wife's decease my property which may be then remaining which belongs to her, real or personal, I give and devise in equal shares to Louis Braungart of Sac Harbor, Long Island, State of New York, and Johanna Glass, of Ostheim," etc.

This will must be construed according to Sec. 2278 of the Statutes to give to Barbara Duering, the widow, all of the estate which George Martin Duering had, "unless it shall clearly appear by the will that the devisor intended to convey a less estate."

Does it clearly appear that the testator intended to give Barbara Duering less than an absolute estate in fee? Many cases have been cited to and considered by the court on this question, but since the language used in each will is always different from that in any other will, no authorities are conclusive, and a discussion of them would be of little value. Those most nearly in point appear to be: Will of Brooks, 167 Wis. 75; Will of Olson, 165 Wis. 409; *Knox vs. Knox,* 59 Wis. 172; *Jones vs. Jones,* 66 Wis. 310; *Colin vs. Sowards,* 129 Wis. 320; *Tabor vs. Tabor,* 85 Wis. 313; *Jones vs. Roberts,* 84 Wis. 465; *Derse vs. Derse,* 103 Wis. 113.

Attention must be given to the very words of the will under consideration. The devise to Barbara Duering of all testator's property was stated to make the property "hers to do with as she wishes." This is followed by a videlicet which explains, defines, and limits the terms previously used, and its meaning is stated to be, "that she may sell, convey, mortgage, or encumber any or all of it and use it as she sees fit." Thus it is clear that it gives to her a free hand to convert the property into other forms than that in which she receives it. "and to *use* it as she sees fit." This gives her a right to consume so much of it as she may desire, but the language used cannot be construed to mean any right to give away or devise, or bequeath the property she receives under her will. She may use it. She may transform it. She may consume it. She may get from it any beneficial interest which she can, but she is not given the right to otherwise dispose of it.

The devise to the widow is followed with a provision that at her decease any property that may then be remaining, which belongs to her, real or personal, I give and devise in equal shares to Louis Braungart . . . . and Johanna Glass . . . ."

These are not precatory words. They are words of devise and bequest. They are apt words to vest an interest.

It is very clear that from the language used that the testator intended to himself devise and bequeath to Louis Braungart and Johanna Glass the residue of his property remaining at the death of his widow, and that he intended to give his wife only a life estate coupled with power to transform the property into different forms and the right to use of it for her own needs.

I am entirely satisfied that under this will all of the estate of George Martin Duering remaining in the hands of his widow at the time of her death passed by force and effect of his will to Louis Braungart and Johanna Glass.

The foregoing, I believe, disposes of all contested questions. The interests of the parties in the various parcels of real estate herein involved will be determined in accordance herewith and in accordance with the laws of descent.

It appears because of the multiplicity of the parties and the varieties of their interests in the several parcels of real estate involved, that it would not be practicable to partition the real estate without sale. There will, therefore, be an order directing the sale of the premises according to statute.

Dated July 11, 1921.

A. H. REID, *Judge.*