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Wills and Probate

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of the borrower but it is taken in the name of the lender, a constructive is raised.

In one Washington case[7] it was established that the respondent entrusted her money to the husband of the appellant's decedent to pay the remainder of the purchase price of property and to obtain the deed *in her name*. The court held that he took title as "trustee" for the respondent, but did not specify whether resulting or constructive. While the headnote labels it a resulting trust, it has been cited as an example of a constructive trust raised to prevent unjust enrichment.[8]

The case at hand gives no clear indication as to whether the parties intended that the title be taken in McPhaden's name or in Mading's. If it could have been found that it was intended that the title be taken in Mading's name the court could have raised a constructive trust. If it was to be taken in McPhaden's name, then the resulting trust seems correct. FRED BRUHN

WILLS AND PROBATE

Objection to Probate of Will at Time of Original Application for Probate. The Washington court in *Gordon v. Seattle-First National Bank*[1] enlarged the possibility of contesting a will in connection with the original application for probate. Mabel C. Gordon died in Seattle on March 1, 1956. Her surviving spouse was appointed administrator of her estate. Decedent's brother on April 10, 1956, filed a petition for probate of decedent's alleged will. In his petition he prayed that the will be admitted to probate, that Seattle-First National Bank be appointed administrator with will annexed, and that letters of administration theretofore issued to Mr. Gordon be revoked.

Decedent's surviving spouse filed objections to the admission of the will to probate. He alleged that Mrs. Gordon was mentally and physically incapable of executing a valid will and that she had been unduly influenced by her brother. He prayed that probate be denied and, in the alternative, that he, as the surviving spouse, be appointed executor by preference.

The trial court denied petitioner's motion to strike these objections. The petitioner then filed an answer specifically denying the objector's

[7] Banks v. Morse, 17 Wn.2d 18, 134 P.2d 952 (1943).
[8] SCOTT ON TRUSTS, § 508.1.

[1] 49 Wn.2d 728, 306 P.2d 739 (1957).

allegations of fraud and undue influence. The trial court, however, refused to hear any evidence on behalf of the objector pertaining to these issues and entered an order finding that decedent was competent and not unduly influenced when she made the will. The order further admitted the will to probate and appointed Seattle-First National Bank as administrator c.t.a.

The supreme court reversed and remanded the case on the ground that the petitioner's allegations of undue influence and mental incompetency made the proceeding adversary in character. The supreme court specifically held that the trial court erred in not exercising its discretion to hear and determine the issues presented by such allegations.

The decision added a new exception to the basic rule that contests are to be brought after admission to probate by a proceeding under RCW 11.24.010 rather than by resisting admission to probate under RCW 11.20.020. Generally, in the initial hearing brought under RCW 11.20.020, a will is admitted to probate or rejected at an ex parte hearing without notice. The general rule is that an interested person hostile to a will should not be permitted to participate in the probate proceeding. He should proceed rather by way of a will contest, in the manner provided in RCW 11.24.010.[2]

The Washington court has previously recognized two types of situations in which the initial hearing can be made into an adversary proceeding. First there are cases involving jursidictional questions. In *State ex rel. Brisbin v. Frater*,[3] the court held that it was error to exclude evidence at the initial hearing that the decedent at the time of death was not a resident of King County and left no property therein. The court, however, had previously misapplied this jurisdictional concept when it held in *In re Baldwin's Estate*[4] that proof of the sanity of the testator at the time of execution of the will was one of the jurisdictional facts. Strictly speaking, such proof concerns the legality of the will and not the purisdiction of the court over the subject matter or the parties, and raises a problem under the contest statute, RCW 11.24.010.

The second exception recognized by the Washington court involves cases where two different wills have been presented for probate at the initial hearing. The court has consistently held that a petition

[2] In re Larson's Estate, 187 Wash. 183, 60 P.2d 19 (1936).
[3] 1 Wn.2d 13, 95 P.2d 27 (1939).
[4] 13 Wash. 666, 43 Pac. 934 (1896). Although the reasoning is questionable, the *Baldwin* case has never been overruled and is presumably the law in Washington today.

to probate a will may become an adversary proceeding when the court must choose between two wills in a consolidated hearing.[5]

Apart from these two exceptions, the court has consistently ruled that objectors to the probate of a will must bring their objections under the contest statute RCW 11.24.010 rather than at the initial hearing. In *State ex rel. Stratton v. Tallman,*[6] the state was interested in defeating the will, because there were no heirs and the estate would escheat to the state if intestacy were established. The court held that the state was limited to bringing its action under the predecessor of the present RCW 11.24.010. A recent case, *In re Borman's Estate,*[7] illustrated that if the objecting party does not make reference to the issue of undue influence, nor raise an issue contesting the validity of the will, it is an abuse of the trial court's discretion to adjudicate those issues in the initial hearing for the admission of the will.

The *Gordon* case, however, has added a third exception to the general rule. The court there said:

> Under certain circumstances a hearing upon a petition to probate a will may become an adversary proceeding.... The circumstances must be such that either there is a question of the court's jurisdiction to admit the will to probate, or certain issues are presented which the court could or should determine at the original hearing. As to the first, the court is bound to hear the controversy. As to the second, it is a matter within the sound discretion of the court.[8]

Obviously the addition of the very general language that the court has discretion to consider "certain issues" which it "could or should determine at the original hearing" may open a door of wide but uncertain dimensions. The "certain issues" making it an adversary proceeding in the *Gordon* case were undue influence and mental incompetency. Thus it may be assumed that these objections can now be brought and heard in the initial hearings and that Washington has at least a third exception to the general rule. Beyond this exact situation, the scope of the phrase "or certain issues" is entirely speculative. The generality of the language seems to invite further litigation.

In holding that it was an abuse of the trial court's discretion to refuse to let the objector contest at the hearing for admission to probate, the court said, "To relegate the objector to the statutory remedy

[5] In re Appleton's Estate, 163 Wash. 632, 2 P.2d 71 (1931); In re Ney's Estate, 183 Wash. 503, 48 P.2d 924 (1935); In re Campbell's Estate, 47 Wn.2d 610, 288 P.2d 852 (1955).

[6] 25 Wash. 295, 65 Pac. 545 (1901).

[7] 50 Wn.2d 791, 314 P.2d 617 (1957).

[8] 49 Wn.2d 728 at page 736 (1957)

of contest could have resulted in delay, not only to the hearing of the contest, but to an appeal to this court by either party. Conceivably this could have taken over a year's time."[9]

This does not appear to be a valid legal or factual basis for enlarging the scope of the initial proceeding. From a legal standpoint the contest statute should be exclusive and controlling. If the statutory procedure is too slow or cumbersome the legislature should be asked to amend the statute. From a factual standpoint, it is very doubtful if any real avoidance of delay will result from the decision. A contest based on lack of mental capacity or undue influence will probably be just as prolonged and difficult whether it arises on application for probate or in a contest proceeding. The only delay involved in a contest is the time necessary to start the contest, to get the case at issue assigned, and to conduct the trial itself. Similar steps would undoubtedly have to be taken if the will is resisted on the same grounds when offered for probate. It appears most improbable that any real gain will result from the *Gordon* decision to offset the confusion which may result from its uncertain dimensions.

Executors and Administrators—Mortgagee's Right to a Deficiency Judgment Against Other Assets of the Estate or Against the Executor. In *Meyer v. Johnson*[1] the Washington court considered the question of the right of a mortgagee to get a deficiency judgment against the unmortgaged assets of an estate. The question arose on the following facts: The administrator of a decedent's estate borrowed $8,000 and, pursuant to court authorization,[2] gave the lender a note signed individually and as administrator, secured by a mortgage on certain real property of the estate. The petition for authority to execute the note and mortgage alleged that the purpose was to enable the administrator to pay creditors' claims in the amount of $1,732.74 and to protect the interets of the heir of said estate. The administrator was, himself, the sole heir. After default the lender sued to enforce the note and foreclose the mortgage. Upon foreclosure sale the property was bid upon by the lender for $4,924.90. There remained unpaid a deficiency judgment in the sum of $6,366.38. Prior to the execution of the note and mortgage and without court authority, the administrator had first mortgaged and later sold certain other real

[9] 49 Wn.2d 728 at page 737.

[1] 151 Wash. Dec. 156, 316 P.2d 1090 (1957).
[2] 151 Wash. Dec. at 159-60.

property of the estate to plaintiff. Plaintiff brought suit to quiet title to this property. The lender intervened in this quiet title action and the court established his deficiency judgment as a lien against the property which had been sold to the plaintiff.

The supreme court held that the deficiency judgment could not be enforced against the plaintiff's property. Said the court:

> [O]ur credulity reaches the breaking point when under the phrase 'or for such other purposes as the court may deem right or proper'[3] an eight thousand dollar mortgage is authorized to pay $1,732.74 of estate debts with the balance to protect the interest of the heirs of said estate.[2]

However, the court raised two very controversial questions when it stated:

> A mortgage, of the character held by the intervenors, is essentially different and decidedly less favorable to the mortgagee than is the ordinary mortgage. The point of differentiation is that there is no possibility of a deficiency judgment against anyone, unless, as here, the executor, who is the sole heir, signs the note and mortgage in his *individual capacity.* (Emphasis by the court.)[3]

The first proposition is that no deficiency on an administrator's secured promissory note can be collected from the unmortgaged assets of the estate. This proposition was rested entirely upon a Nebraska case, *Columbus Land, Loan & Bldg. Ass'n v. Wolken,*[4] a case which the Washington court thought was exactly in point with the *Meyer* case. The Nebraska case, however, can be distinguished in that it arose under a Nebraska statute which authorized mortgages by personal representatives pursuant to court authorization but contained no provision authorizing the personal representative to execute a note, as permitted by Washington statute.[5] The Nebraska case thus is not squarely in point.

In *Wisconsin Trust Co. v. Chapman*[6] the Wisconsin court reached the same result as the Washington court did in this case, but proceeded on an entirely different theory. The Wisconsin court distinguished between the executor's rights and duties in handling realty and personalty.[7] The Wisconsin court, however, failed to cite any cases that would justify such a distinction.

[3] 151 Wash. Dec. at 161.
[4] 146 Neb. 684, 21 N.W.2d 418 (1946).
[5] RCW 11.56.040.
[6] 121 Wis. 479, 99 N.W. 341 (1904).
[7] 99 N.W.2d at 344. The court said: "As to the personalty, he was the owner, and held the title for the beneficial interest of the creditors and heirs. In dealing with it

It would seem that the Washington court could have reached the same result on what would appear to be a more proper and logical route. The contracts or other post-mortem obligations of a personal representative never bind the estate as an original obligor. A creditor of a personal representative never has a direct claim against the estate, but only a claim against the executor or administrator personally, plus a right to be subrogated to the administrator's or executor's right to reimbursement. The executor or administrator is entitled to be reimbursed from unmortgaged assets for the amount of a deficiency judgment only if the moneys represented by such deficiency judgment were borrowed and used for reasonable and proper expenditures for the estate.

The effect of the rule can be illustrated by a previous Washington case, *Jones v. Peabody*,[8] where the court stated:

> Where, however, the representatives of the estate, in this case the executors, are insolvent, in the sense that they could not pay the judgment against them for attorneys' fees, an action may be brought against them and after judgment obtained the plaintiffs be subrogated to their right to be compensated out of the estate.

Under this theory the holder of the personal representative's note in the principal case should have been able to collect the deficiency from the estate assets by a derivative proceeding *if* voluntary payment thereof could have been justified as a proper and necessary act of the personal representative.

Applying these principles the Washington court should have stated that the estate assets can be reached through the rights of the personal representative with respect to all obligations properly incurred by him unless the statute specifically provides that such assets are not liable for such obligations. There is nothing in the Washington probate mortgage statute to indicate that the holder of the personal representative's secured promissory note should receive less favorable

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he acts voluntarily as the owner, and solely in his personal capacity. In such transaction he represents no principal, and upon well-established rules he assumed all liabilities personal in character, relying upon his lien for indemnity out of the estate for expenses and liabilities incurred in a proper administration of his trust. In the disposition of real estate his duties are imposed by law and directed by the court, under the authority of the statute, and can be carried out only in the prescribed manner. He has no interest in, or control over the property, except as he executes the mandates of the court to enforce creditors' claims against the decedent's real estate. These grounds have been held to furnish the distinction between the administrator's liability in his personal and representative capacities in performing his duties as administrator of the estate."

[8] 182 Wash. 148, 151, 45 P.2d 915 (1935).

treatment than that accorded to the holder of an unsecured note, or any other type of general creditor of the personal representative. This rule would not alter the result in this case because the deficiency here represented money borrowed for expenses which the administrator could not properly charge against the estate. Therefore, in this case the judgment creditor could not assert a derivative right against the other assets of the estate.

The second proposition of the court is the dictum that no deficiency judgment can be collected from anyone unless the personal representative signs in his individual capacity. This statement oversimplifies a rather complex problem.[9] It is doubtful that it represents an established rule. What the court means is that a note signed "X, as administrator of the estate of Y" binds nothing but the mortgaged property; but that if the note is signed "X, individually and as administrator of the estate of Y," the obligation extends to the private resources of X as well as to the mortgaged property. There are authorities which would establish the personal liability of X under the first as well as under the second type of signature.[10] A persuasive argument can be made for the rule that the personal representative is personally liable unless he clearly stipulates that the creditors will not hold him liable beyond his ability to obtain reimbursement from the estate.[11] The rationalization that is often made for the nonliability of an agent in these signature cases cannot be made for a personal representative. Like a trustee the personal representative has no principal. He is the only possible obligor, and the agency argument that the agent should not be liable because it was his intent to contract only on behalf of a principal is not available to an executor, administrator or trustee who has no principal. The normal presumption as to a personal representative or trustee therefore is that he has contracted to be personally liable and will rely on the estate assets for reimbursement.

These rules provide a built-in check on fraudulent transactions in that both the administrator and the mortgagee would know that they can only recover reasonable expenses from the estate. The rule of this

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[9] ATKINSON, WILLS 650-656 (1953); Anno. Personal liability of trustee, executor, administrator, or guardian, as affected by terms or form of signature. 138 A.L.R. 155 (1942).

[10] Call v. Garland, 124 Me. 27, 125 Atl. 225 (1924); Pointer v. Farmers' Fertilizer Co., 230 Ala. 87, 160 So. 252 (1935); Home Ins. Co. v. Parks, 42 Ga. App. 482, 156 S.E. 471 (1931).

[11] East River Savings Bank v. 245 Broadway Corp., 284 N.Y. 470, 31 N.E.2d 906 (1940); Jones Brewing Co. v. Flatherty, 80 N.H. 571, 120 Atl. 432 (1923); Heisler v. Nole, 84 N.Y.S.2d 70 (1948).

case, that no deficiency judgment can be collected from other estate assets, may well be practically undesirable. Its effect may make it inconvenient and even impossible for the personal representative to borrow in a lender's market unless excessive security is given. The rule simply invites lenders in a tight money market to insist on more than the usual amount of security to assure that there will be no deficiency judgment. Its effect may be to put an undesirable added burden on a personal representative who needs to borrow money to preserve and maintain an estate. WILLIAM ROETCISOENDER

Power and Right of a Devisee to Convey and Encumber Real Estate. A recent Washington case, *Kerns v. Pickett*, 49 Wn.2d 770, 306 P.2d 1112 (1957), brought out a rather interesting point of law. The devisee under a will executed a five-year lease of the devised real estate. This lease instrument was executed four months prior to submission of the will for probate and was never approved or ratified by the executor. The devisee-lessor sought to avoid the lease on the ground that she had no power or right to convey her life estate in a one-half undivided community interest in the farm lands without the express written approval of the executors of her husband's will. The trial court rejected this and other arguments and enjoined the devisee-lessor and other parties from interfering with the lease.

On appeal the supreme court sustained the trial court's judgment and stated that there was no merit in the contention that the lease was invalid because the executors were not parties to it or because it was executed by the devisee without proper authorization or approval of the executors. The supreme court declared that the power of an executor to manage and control the real property of the estate is not necessarily inconsistent with and does not override the power and the right of a devisee to encumber or convey his interest in real property. Under RCW 11.04.250 the title to realty vests immediately in an heir subject to the payment of the debts, expenses and charges against the estate.

Since in this case there were no creditors whose rights were in any way involved, the court properly rejected the devisee's argument that the lease was invalid. It is submitted, however, that in a case involving creditors the personal representative could avoid or postpone the lease under the authority granted him under RCW 11.48.020 which provides:

> Every executor or administrator shall... have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs, or devisees,...

Executors and Administrators—Creditors' Rights Against Property in the Hands of a Special Administrator. A recent Washington case, *Peterson v. Johnson*, 49 Wn.2d 869, 307 P.2d 564 (1957), involved the following issue: may the vendor of personal property sold on a conditional sales contract maintain a replevin action against a special administrator in possession thereof, the deceased vendee having defaulted in his payments, when the vendor had not, prior to the vendee's death, declared his intention to forfeit the vendee's rights under the contract and had not taken any legal steps to terminate the contract before the death of the vendee?

The trial court sustained a demurrer to the vendor's complaint on the ground that the special administrator could not be sued by a creditor of the deceased by reason of the last part of RCW 11.32.050, which reads:

> Such special administrator shall not be liable to an action by any creditor of the deceased, and the time for limitation of all suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted.

The supreme court held that the trial court was correct in sustaining respondent's demurrer to the complaint, and affirmed the trial court's order dismissing the complaint. The case is consistent with two previous Washington cases: In *re Holm's Estate,* 141 Wash. 475, 252 Pac. 145 (1927), and *Ward v. Magaha,* 71 Wash. 679, 129 Pac. 395 (1913), which both held that a special administrator has no power to exercise the powers and duties conferred upon a regular administrator, such as the allowance of claims. The cases all emphasize the fact that a special administrator is authorized to do little other than collect and preserve the effects of the deceased pending appointment of a personal representative.

WORKMEN'S COMPENSATION

Longshoremen's Act—Right to Sue Fellow Employees. Can an employee covered by the Longshoremen's and Harbor Worker's Compensation Act[1] sue his fellow employee? The Washington Supreme Court in *Ginnis v. Southerland*[2] has said no. In that case a longshoreman, injured while working on the S.S. Santa Anita, owned by the Grace Lines, Inc., elected to sue the master of the vessel rather than receive compensation under the act. Southerland, the master, did not deny his alleged personal negligence but raised the defense that he was an agent of the Grace Lines, Inc., which was also the employer of the injured workman. He claimed that since his employer was immune under the compensation act,[3] he, as agent, shared the Grace Lines' immunity. The court held that the acts of the agent were the acts of the employer because he acted through his employer.[4] Thus, the master was not a third person under section 933 of the act,[5] which permits the workman to sue "some person other than the employer." Therefore, the master was necessarily excluded from liability by section 905,[6] which states that the liability of the employer under the

[1] 44 STAT. 1424 (1927), 33 U.S.C. 901-950 (1952).

[2] 50 Wn.2d 557, 313 P.2d 675 (1957).

[3] 44 STAT. 1426 (1927), 33 U.S.C. 905 (1952). "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative....

[4] Ginnis v. Southerland, 50 Wn.2d at 558, 313 P.2d 675 (1957): "The privity between principal and agent is expressed in the ancient maxim *qui facit per alium facit per se.* Therefore, the master's negligent act was the act of the Grace Lines, Inc., and appellants were not injured by the act of *some person other than the employer.*"

[5] 44 STAT. 1440 (1927), 33 U.S.C. 933a (1952). "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third persons."

[6] Note 3 *supra.*