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Wills

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WILLS

Joint and Mutual Wills—Lapse of the Interest of The Third Party Devisee. In *Ruchert v. Boyd*,[1] the Washington court analyzed a joint and mutual will and decided that the devise of the survivor's estate to a third party lapsed when the devisee predeceased the surviving testatrix.

Mr. Ruchert and his wife, Anna, executed a will providing that the survivor should have a life estate in all of the property of the first to die, with a remainder over to the husband's nephew. The will also provided that the residue of the survivor's property would upon the survivor's death pass to the same nephew. The relevant portions of the will are as follows:

> *Third.* In event of the prior death of the testator, he gives, devises and bequeaths to the survivor, Anna Ruchert, all of his property, real, personal and mixed . . . for and during her natural life, with remainder over to his nephew, Boyd Ruchert.
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> *Sixth.* Upon the death of the survivor, the entire estate of the testator and testatrix shall pass to and vest in Boyd Ruchert, in fee simple.[2]

Upon the husband's death, Anna accepted a life estate in her husband's estate which included his half of the community property. The remainder in the husband's estate was distributed to the nephew. This nephew predeceased Anna who then revoked the joint and mutual will. After Anna's death, the nephew's widow brought an action for specific performance of the nephew's third party beneficiary right under an alleged oral contract to make and keep in effect mutual wills. The supreme court assumed without deciding that Anna was legally bound not to revoke the mutual will after the death of her husband. The court then stated that the nephew's remainder interest in the husband's estate vested at the time of the husband's death. It held, however, that no interest in the survivor's estate vested at the time of the husband's death. Since the devise of the estate of Anna, the surviving testatrix

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prevent a gift over from one charitable purpose to another. 4 SCOTT, TRUSTS § 401.5 (2d ed. 1956).

[28] 33 Wn.2d 255, 205 P.2d 345 (1949).

[29] *E.g.*, in *In re* Rupprecht's Will, 271 App. Div. 376, 65 N.Y.S.2d 909 (1946), *aff'd*, 297 N.Y. 462, 74 N.E.2d 175 (1947), the settlor desired that a home be established for indigent, orphan Protestants under 16 years of age residing in Genessee County. The court found a general charitable intent.

[1] 156 Wash. Dec. 278, 352 P.2d 216 (1960).

[2] *Id.* at 279, 352 P.2d at 217.

did not take effect until her death, it lapsed when the nephew predeceased her. Thus the revocation of the devise after the nephew's death was immaterial.

The nephew's widow contended that the anti-lapse statute, RCW 11.12.110, which prevents the operation of the common law rule that a devise or bequest will lapse if the devisee or legatee predeceases the testator, should apply in this case. She argued that her husband, the nephew of Mr. Ruchert, fell within the persons intended to be benefited by the statute. These persons are described by the statute as "any child, grandchild, or other relatives of the testator" who died leaving lineal descendants.

Reversing the trial court, the supreme court held that this statute did not prevent a lapse of Anna's devise because the husband's nephew was not a relative of the testatrix within the meaning of the statute. This holding was based on the reasoning in *In re Renton's Estate*,[3] which held that the testator's spouse is not a relative within the meaning of what is now RCW 11.12.110, the anti-lapse statute. The rule in *In re Renton's Estate* has been incorporated into this statute.

The holding that the devise of the survivor's estate to a third party did not become a vested remainder upon the death of the testator who is first to die is consistent with the majority rule.[4] The court rejected the reasoning of a Texas case[5] in which it was held that the ultimate devisee received a vested remainder in the entire community estate at the time of the death of the first to die. The court thought that the flaw in the reasoning of the Texas court was that the will was treated as effecting an inter vivos conveyance of the property of a living person.[6] Such a result would be contrary to the basic wills rule that a will does not take effect until the death of the testator.[7] However, there is a possibility that the *Chadwick* case was under Texas law correctly applying the doctrine of election.[8] The Texas court mentioned the doctrine but did not fully articulate its operation. The doctrine of

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[3] 10 Wash. 533, 39 Pac. 145 (1895).

[4] *In re* Lage, 19 F.2d 153 (D.C. Iowa 1927); *In re* Brown's Estate, 101 Kan. 335, 166 Pac. 499 (1917); Keasey v. Engles, 259 Mich. 178, 242 N.W. 878 (1932). See also *In re* Dunn's Estate, 31 Wn.2d 512, 197 P.2d 606 (1948).

[5] Chadwick v. Bristow, 204 S.W.2d 65 (Tex. Civ. App. 1947), *aff'd*, 146 Tex. 481, 208 S.W.2d 888 (1948).

[6] 156 Wash. Dec. 278, 352 P.2d 216 (1960). The court quoted with emphasis a note in 46 MICH. L. REV. 1005 (1948) which pointed out this flaw.

[7] Grove v. Payne, 47 Wn.2d 461, 288 P.2d 242 (1955).

[8] Under the doctrine of election a devisee cannot assert rights inconsistent with the will after electing to take under it. Tacoma Sav. & Loan Ass'n v. Nadham, 14 Wn.2d 576, 128 P.2d 982 (1947). See also Annot., 60 A.L.R.2d 736 (1958), and Annot., 60 A.L.R.2d 789 (1958); *cf.* Parr v. Davison, 146 Wash. 354, 262 Pac. 959 (1928).

election is not applicable in the *Ruchert* case because there was no attempt to devise more than was owned.[9]

The Washington court added a note of confusion by referring to the third devisee's right as a remainder interest. The confusion in the court's language may have been caused by the fact that the nephew did receive a vested remainder in the husband's half of the community property when the husband died. The denomination of the nephew's devise under the survivor's half of the mutual will as a remainder is inconsistent with the words of the will as quoted above. Notice that only the paragraph disposing of the property of the first to die mentions a remainder. The sixth paragraph is the only provision of the will which concerns the disposition of the property of the survivor. It says nothing about a remainder.

A second reason why it was incorrect to refer to the nephew's right as a remainder is that such an analysis is inconsistent with the implicit holding that the property right would not vest before the death of the testator. The effect of this holding was to negate the widow's argument that Anna's interest in her half of the community estate was only a life estate. Since Anna's estate was not just a life estate but a fee simple there could be no remainder after it.[10] There is no indication of any other intervening estate, after which the interest the nephew might have received by the will, could have been a remainder. In fact, the will specifically states that the survivor's estate shall vest in him in fee simple.

As a third objection to the court's statement it is submitted that the use of the word "remainder" is inconsistent with the holding of lapse. Although the word "lapse" has been used in talking about remainders,[11] it would appear preferable to reserve this word for application to devises and to use future interest law terms to describe future interests such as remainders. Thus one would say that a property interest, such as the nephew's remainder in the husband's estate, which has already passed by devise is no longer subject to the doctrine of lapse. The lapse of a devise under the law of wills should not be confused with the failure to vest of a contingent remainder under the law of future interests because of the non-satisfaction of a condition precedent. For example, a testator might devise to *A* for life, and if *B* survives *A* then to *B*. *B*'s survival of *A* is a condition precedent which must be satisfied before the remainder can vest. If *B* predeceases the testator, the de-

[9] *In re* Cooper's Estate, 32 Wn.2d 444, 202 P.2d 439 (1949).
[10] SIMES, FUTURE INTERESTS § 10 (1951).
[11] *Id.* § 10.

vise of the remainder would lapse under the law of wills. If *B* survives the testator, but predeceases *A*, the devise would take effect at the testator's death. However, under the law of future interests, the contingent remainder will not vest because the condition precedent can never be satisfied.[12]

The confusion in the court's language is illustrative of the confusion which generally attends mutual will situations. This confusion results from the dual nature of mutual wills. Often a mutual will is both a will and also an implementation of a contract to devise. The will is controlled by the law of wills which says that wills are ambulatory. Because of the ambulatory nature of wills, the will can always be revoked.[13] On the other hand, the contract to devise is governed by the law of contracts. After the surviving testator has accepted benefits under the joint and mutual will the contract upon which the will is based cannot be revoked.[14]

In the *Ruchert* case the court assumed that the contract had become irrevocable. Since it was the contract and not the will which was irrevocable,[15] the right of the nephew should have been determined by his status as a donee third party beneficiary under the contract, rather than by his status as a devisee under the will.[16] Thus the question is what is the quantum of his contract right.

Courts have analyzed the contract right in several different ways. One possible analysis is that the third party beneficiary has only a right to have the devise appear in the will.[17] Such a devise is subject to lapse. A second possibility is that the third party beneficiary has a contract right to receive the property regardless of whether it was ever devised to him. Under this analysis the contract itself gives him a right to the property. The rule of lapse does not apply to contract rights so the third party beneficiary's right to receive the property would not lapse.[18] The third possibility is that he has a contract right which can not be affected by lapse, but his contract right is personal and therefore does not descend to his personal representative.

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[12] *Id.* § 10.

[13] Grove v. Payne, 47 Wn.2d 461, 288 P.2d 242 (1955).

[14] Auger v. Shideler, 23 Wn.2d 505, 161 P.2d 200 (1945); Prince v. Prince, 64 Wash. 552, 117 Pac. 255 (1911).

[15] *In re* Krause's Estate, 173 Wash. 1, 21 P.2d 268 (1933); Doyle v. Fisher, 183 Wis. 599, 198 N.W. 763 (1924).

[16] See SPARKS, CONTRACTS TO MAKE WILLS 91 (1956), for a full development of this analysis and a collection of the applicable cases.

[17] Keasey v. Engles, 259 Mich. 178, 242 N.W. 878 (1932).

[18] See *In re* Traub's Estate, 354 Mich. 263, 92 N.W.2d 480 (1958); Sparks, *op. cit. supra* note 16.

In the *Ruchert* case, the court evidently viewed the contract right as limited to having a devise appear in the will. It is submitted that the better approach would be to say that the will is only an unnecessary implementation of the contract. Such a conclusion follows from the fact that very often contracts to devise are enforced where there is no devise to implement the contract.[19] Indeed, most of the reported cases have arisen because the promisor did not leave a will consistent with the contract.

The basic issue of the *Ruchert* case should have been whether the third party beneficiary contract right was descendable, not whether the devise lapsed. The weight of authority appears to be that in the ordinary contract to devise the right of the promisee is descendable.[20] However, the Washington court reached a contrary result in *Alexander v. Lewes*.[21] It was held that the right of the promisee is personal and therefore dies with the death of the promisee. The effect of the holding in the *Ruchert* case, that the contract right did not descend, appears to be consistent with this previous holding of non-descendability. However, the promise to devise in *Alexander v. Lewes*[22] was given in exchange for a promise to support for life. The actual reason for refusing to allow the promisee's heir to recover was probably that the testator's duty to devise was discharged by failure of consideration when the promisee's performance was rendered impossible because she predeceased the testator. In a third party beneficiary contract to make mutual wills the performance bargained for is by alternative analysis either the execution of the mutual wills or a testamentary right to the property regardless of whether a will is executed. Either way it is the promisor's performance that is bargained for and performance by a donee beneficiary should have no effect upon his contract right.[23] Although it impliedly followed this reasoning, the court may have been influenced by the fact that the nephew's actual relationship to the parties bore some similarity to that of the promisee in the *Alexander* case. At some time before the execution of the mutual will the

[19] Raab v. Wallerich, 46 Wn. 2d 375, 282 P.2d 271 (1955), *appeal dismissed*, 46 Wn.2d 905, 290 P.2d 697 (1955). See Shattuck, *Contracts in Washington*, 34 WASH. L. REV. 467, 503 (1959) for a collection of cases in which enforcement of a promise to execute a will was either granted or denied.

[20] Cuenin v. Lakin, 146 Cal. App. 2d 855, 304 P.2d 157 (1957); Trower v. Young, 40 Cal. App.2d 539, 105 P.2d 160 (1940); Powell v. McBlain, 222 Iowa 799, 269 N.W. 883 (1936); Torgerson v. Hauge, 34 N.D. 646, 159 N.W. 6 (1916). See also Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729 (1923) in which an assignee was granted specific performance.

[21] 104 Wash. 32, 175 Pac. 572 (1918).

[22] *Ibid.*

[23] See 2 WILLISTON, CONTRACTS § 395 (rev. ed. 1936).

nephew entered into a partnership with the testator and testatrix. Under this partnership agreement, the nephew was to manage the property in question and pay part of the proceeds to the testator and testatrix of the survivor thereof. Of course, he could not perform this duty after he died. Furthermore, there was evidence that he did not satisfactorily perform while alive.

The oral contract to devise did not indicate the quantum of his right.[24] The only evidence of the quantum of the nephew's contract right was the language of the will. Under the circumstances it is not surprising that the court reached its conclusion without an adequate differentiation and discussion of wills, future interests, and contract law aspects of the problem.

The contractual analysis of the facts of the *Ruchert* case which the court could have used to reach the same result is as follows: The nephew had a third party beneficiary right under the contract to make mutual wills. The only evidence of this right was the language of the joint and mutual will made in pursuance of this contract. Since only the nephew was named in the will and not his wife or children, the right was personal and did not descend. The duty under the contract was discharged because of the impossibility of performance caused by his death. Or, alternatively, no duty of performance under the contract ever arose because there was an implied condition of survival.

The possibility of such an analysis suggests that where the right of the third party beneficiary is not personal, a result contrary to the result in the *Ruchert* case might be expected. The confusion evidenced in the *Ruchert* case and its many predecessors should warn the draftsman to approach a joint and mutual will with great care if not outright trepidation. The will, future interests, and contract problems should be differentiated both in study and execution. The execution of the will and the underlying contract, as separate documents, appears to be essential to adequate drafting.

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[24] Because the contract to devise was oral it would be unenforceable under the staute of frauds unless there was something to take the case out of the statute. Allen v. Dillard, 15 Wn.2d 35, 129 P.2d 813 (1942). Because the language of the joint and mutual will was donative rather than promissory it does not suffice as a memorandum of the contract. Nor was the making of a joint and mutual will sufficient part performance to take the contract out of the statute. *Ibid.* However, the acceptance of an estate given under the mutual wills was sufficient performance of the contract to take the case out of the statute. Cummings v. Sherman, 16 Wn.2d 88, 132 P.2d 998 (1943); *In re* Fischer's Estate, 196 Wash. 41, 81 P.2d 836 (1938). Since the court assumed an enforceable contract, it did not consider whether the requirement of clear and convincing proof of the contract had been satisfied. See Annot., 169 A.L.R. 9 (1947) for a general discussion of joint and mutual wills.