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Conditional Wills

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NOTES

CONDITIONAL WILLS

There has been a considerable amount of litigation in South Carolina on last wills and testaments, yet the precise problem of a conditional will has never been presented squarely to the Court until the recent case of *Capps v. Richardson,* 53 S. E. (2d) 876 (S. C. 1949). Briefly, the facts in the case are these: The testator executed a will which contained only two provisions other than the formal matters.

"ITEM 1: Whereas, I am indebted to Draytford Richardson, as is evidenced by a mortgage bearing equal date with these presents, and whereas on account of the amount now due and in order to save any foreclosure proceeding of the said mortgage in the case of my death, I hereby will, devise and bequeath unto the said Draytford Richardson all of the property, real or personal, of which I may die seized. ITEM 2: I hereby nominate, constitute and appoint my sister Mrs. Willie Richardson as Executrix of this Will, she to serve as such without Bond." The beneficiary of the sole dispositive provision of the will was the son of the sister, who was appointed executrix. The testator paid off the note and mortgage to Draytford Richardson in 1943 and died some three years later in 1946. The will was admitted to probate in common form and the complaint in this action was filed before a year had elapsed. The theory of the complaint was that the will was conditional or contingent, and on failure of the contingency, the will was void and the heirs and distributees were entitled to take from the decedent under the Statute of Descent and Distribution. The defendants denied this and set out the intention of the decedent that Richardson should take the property anyhow. The case was referred for the taking of testimony followed by a hearing at Chambers before Judge Lide. Judge Lide held that the will was conditional yet declared the will to be effective to the extent of the appointment of the executrix. On appeal to the Supreme Court, the decree was unanimously affirmed. Mr. Justice Oxner in the opinion goes into the matter of conditional wills at great length and cites ample authority for his conclusion. Citing 57 Am. Jur., Wills, Section 671, the Court says, "A conditional or contingent will is one which is dependent for its operation upon the happening of a specified condition or contingency. If the condition fails, the will is inoperative and void thereafter, unless it is republished." The Court further quoted from Corpus Juris as follows: "Whether a will is to be regarded as contingent turns upon the point whether the contingency is referred to merely as the occasion of or reason for making the particular disposition of property which is provided for, and is intended to specify the condition upon which the will is to become operative, it being only in the latter case that the will is contingent." 68 C. J., Wills, Section 256, page 631.

Yet this writer is concerned as to the reasoning behind this opinion in the light of the cases on this particular topic. There are a great many cases like that of *Eaton v. Brown*, 193 U. S. 411 (1904). There, the testator, about to depart on a journey into peril or engage in some hazardous enterprise, makes a statement to that effect saying, "If I do not return, this is my last will and testament." The issue is plain. Was this intended to be a contingency or condition precedent to the operation of the will or was this merely a statement of the purpose or motive behind the execution of the will? The cases rest largely on the factual situation presented in each controversy and it is not the bone of contention here, though it seems plain that the testator's will in the principal case was contingent. The more important facet of the dilemma is the effect of the failure of the contingency. In *French v. French*, 14 W. Va. 458 (1877), the prior cases are exhaustively reviewed including *Jacks v. Henderson*, 1 DeSaussure 543 (1797). The court held that the language, "If I die before my return from my journey to Ireland", was a contingency which affected the *whole* will and the *entire will* was ineffectual.

In *Dougherty v. Holscheider*, 40 Tex. Cv. A. 31, 88 S. W. 1113 (1905), the court said, "A will which is to become effective only upon the happening of a contingency is a contingent will, and in case the contingency does not arise is by the failure of the happening of the event annulled and revoked." The point is concisely stated in *Morrow's Appeal*, 116 Pa. 440, 9 Atl. 660 (1887). "No text writer seems to have distinguished between a condition attached to particular testamentary disposition and a condition attached to the operation of the instrument." *Damon v. Damon*, 8 Allen 192 (Mass. 1864) is to the same effect, where the distinction was clearly drawn between a conditional will which is void in its entirety on failure of the condition and a contingent disposition which is invalid, the remaining portion of the will being valid. Finally, in the very case cited as authority by Mr. Justice Oxner, the court made this statement: "A conditional or contingent will takes effect as a will only on the happening of a specified contingency, which is a condition precedent *to the operation of the will." Barber v. Barber*, 368 Ill. 215, 13 N. E. (2d) 257 (1938). The inescapable conclusion from these cases is that once having decided the will is a contingent will and that the contingency has failed, it is idle to talk of other effectual provisions of that instrument. If the will is contingent, and the contingency has failed, the entire will is void and of no effect. The case of *Jacks v. Henderson, supra,* is not at all clear and the most that can be gleaned from its muddy waters is a recognition of the doctrine regarding contingent wills.

An example of a conditional provision in a will is to be found in *Shuman v. Heldman*, 63 S. C. 474, 41 S.E. 510 (1902), where the testator attached a condition precedent to a devise in remainder. The devisee failed in her performance and subsequent remaindermen, named by the testator in the event of such failure, took under the will.

In the instant case the better view would seem to be the theory followed in the complaint. The will was conditional. The condition failed. Therefore, the entire will was void and the respondents were entitled

to take the property in distributive shares as intestate property. The case also gives rise to an interesting speculation in the field of mortgages. Under the doctrine of "Once a mortgage, always a mortgage" would the Court have held the disposition to be a security transaction if the debt had not been paid?

In the light of the foregoing analysis, there is another question which must receive consideration in litigation of conditional wills. Whether or not the will is contingent is a matter of construction. The crucial query is whether this should be done in the Probate Court or the Circuit Court. There is a division among the Courts of this country and until the question arises directly in South Carolina, it must remain a moot one.

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