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Wills and Trusts

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WILLS AND TRUSTS

I. Introduction

Only three cases of any significance were decided under this classification, all in the area of wills and intestate succession. Two of these cases[1] merely restated the present law of South Carolina. The third[2] tended to muddy the water on what was previously settled law. There were no significant cases in the area of trusts.

II. Intestate Succession

Porter v. Scott[3] was an action for partition of real estate. The lower court, after deciding the plaintiffs were the children of a woman who lived in illicit cohabitation with the intestate land owner Amos Salters and were therefore not Amos' heirs and could not demand partition, held that Marie Scott was the sole owner of the property. However, the Supreme Court of South Carolina reversed this holding in part, because of evidence pointing to the fact that Amos had married again after the death of his first wife. The second wife was Carrie Brownfield Salters. Marie was the daughter of Amos' deceased son Monroe, who was the only child of Amos' first marriage. It appeared that Amos had died in 1917, the same year he acquired the property. Carrie died in 1931 or 1934, and no evidence was presented at the trial as to the disposition of her share of the property. The court decided, therefore, that Marie could not be held the sole owner of the property, and until the questions surrounding Carrie were settled no further disposition of the land could be made. This decision did not in any way change present law. The Statute of Descent and Distribution provides that when an intestate leaves a spouse and one child surviving, the real property shall be divided equally between them.[4] Thus no determination could be finally made without information as to Carrie and her heirs, if any.

1. Porter v. Scott, 154 S.E.2d 679 (S.C. 1967); Norton v. Matthews, 249 S.C. 71, 152 S.E.2d 680 (1967).

2. South Carolina Nat'l Bank v. Copeland, 248 S.C. 203, 149 S.E.2d 615 (1966).

3. 154 S.E.2d 679 (S.C. 1967).

4. S.C. Code Ann. § 19-52(1) (1962).

III. CONTRACT TO MAKE A WILL

Norton v. Matthews[5] was an action brought for specific performance of an alleged oral contract to make a will. The plaintiffs, Mr. and Mrs. Norton, alleged that in the summer of 1960 Mr. Norton and the intestate, Ernest F. Matthews, had several conversations leading to an oral contract that the Nortons would provide nursing care and handle certain business affairs of the intestate, and the intestate in return would devise his home tract of land to the plaintiffs. The plaintiffs alleged they fully performed the agreed services until December 29, 1961, when the intestate entered the hospital. The intestate had executed a will on August 3, 1961, devising the specified property to the plaintiffs. A dispute over nurses and Mr. Norton's method of accounting for money expended kindled a dispute, the results of which were an end of the services and the destruction of the will. From early January, 1962, there were no further contractual duties performed.

The court found that the intestate had not made it impossible for the plaintiffs to continue the services, and such was an essential element if the plaintiffs were to be awarded specific performance.[6] If impossibility of performance cannot be shown, then complete performance is required.[7] Furthermore, in a contract of this nature the plaintiffs were required to exercise the utmost patience should the intestate prove to be ill-tempered.[8] Since the plaintiffs were unable to show complete performance or impossibility of performance, regardless of the requirement of clear, cogent and convincing evidence of the oral contract,[9] their action failed. The decision merely restated the present law in South Carolina.

IV. THE DOCTRINE OF FACTS OF INDEPENDENT SIGNIFICANCE

The court in *South Carolina National Bank v. Copeland*[10] began by stating that an attesting witness to a will need not see the attestation clause, and, further, need not know that the docu-

5. 249 S.C. 71, 152 S.E.2d 680 (1967).

6. Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1944); Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1899).

7. Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949); Young v. Levy, 206 S.C. 1, 32 S.E.2d 899 (1944).

8. Flowers v. Roberts, 220 S.C. 110, 66 S.E.2d 612 (1951).

9. Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949); Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1944).

10. 248 S.C. 203, 149 S.E.2d 615 (1966).

ment is a will. However, the clarity of the court ended at this point.

The testatrix had executed a will which was intended, and the intention was clearly written out in the will, to incorporate certain provisions of her brother Robert's will into hers as if they were written out in her will. However, the draftsman used this erroneous language: "If at the time of my death my said brother *shall have died leaving a will, duly probated* . . . ."[11] Thus the brother's will could not be incorporated because the language did not refer to the document as already in existence, a prerequisite to incorporation.[12] The issue on appeal, since there was no incorporation by reference, was whether the gift could be upheld as valid through use of the doctrine of facts of independent significance. Courts use this doctrine to incorporate documents that fail to fulfill the technical requirements of incorporation by reference because of their unwillingness to allow frustration of the testator's intentions.[13] Furthermore, the will of a third person can be used because the requirement of attestation by witnesses serves as a sufficient guarantee against fraud.[14]

The South Carolina Supreme Court did not accept the proposition that the will could be sustained under the doctrine of facts of independent significance. The court, through hazy reasoning, seemed to state that the doctrine could be used when the language reads "according to the terms and conditions of the will of my said husband,"[15] but not when the will uses the added language found in the testatrix's will "as if the language in my said brother's will . . . were copied at length herein with appropriate changes to make them a part of my will."[16] Incorporation by reference must be used to the exclusion of facts of independent significance. Where, with the former language, the court could ignore the failure of the attempted incorporation by reference and validate the gift by utilizing the doctrine of facts of independent significance, in the *Copeland* case simply because "this intention was frustrated [did] not justify a construc-

11. South Carolina Nat'l Bank v. Copeland, 248 S.C. 203, 214, 149 S.E.2d 615, 618 (1967) (emphasis added).

12. T. ATKINSON, WILLS § 80 (2d ed. 1953).

13. *See* Comment, 18 S.C.L. REV. 683 (1966).

14. RESTATEMENT OF PROPERTY § 34(f) (1940).

15. *In re* Gregory's Estate, 70 So. 2d 903, 905 (Fla. 1954). This case was referred to by the court as one of many cases setting out the doctrine of facts of independent significance, but was distinguished by its "different" language.

16. South Carolina Nat'l Bank v. Copeland, 248 S.C. 203, 215, 149 S.E.2d 615, 619 (1966).

tion . . . which [was] opposed to the ordinary meaning of the words used."[17] A draftsman would be well-advised to omit such language, because if the incorporation by reference fails and such language is present, *Copeland* seems to say that the doctrine of facts of independent significance will not be used to sustain the validity of the gift.[18]

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17. *Id.* at 215-16, 149 S.E.2d at 619.
18. *Copeland* is thoroughly discussed in Comment, 18 S.C.L. REV. 683 (1966).