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Validity, Interpretation, and Probate of Foreign Wills - Rabe v. Mcallister

VALIDITY, INTERPRETATION, AND PROBATE OF FOREIGN WILLS

Rabe v. McAllister[1]

Testatrix executed her first will while living in Baltimore in 1927, leaving all her property to H. The same year, she went to Germany, where in 1933 she made a holographic will leaving all her property, except a church bequest, to R. In 1935, in Germany, she made a third will, also holographic, which consisted of an express revocation of the 1933 will, and a direction that her heirs should keep the family vault in Germany in order. After testatrix's death in Germany, in 1937, the first will was admitted to probate in Baltimore on December 1st, 1937, and defendant was appointed administrator c. t. a. on renunciation of the executrix. Meanwhile, the two other wills had been probated in Germany, and copies were filed in Baltimore on August 25th, 1938. On November 20th this petition was filed by plaintiff heir-at-law, praying that probate of the first will be revoked, with the letters thereon to the defendant; that the third (1935) will be declared operative, and that letters thereon be granted plaintiff's attorney. Assets consisted of $4000 in Germany and $25,000 in a Baltimore bank. *Held:* Petition dismissed. The Court's decision was based on the theory of revival of the first will by the revocation of the second, with no revocatory conflict between the first and third wills.

The case contains a concise but thorough review of Maryland law on the methods of revocation of wills, and

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[1] 8 A. (2d) 922 (Md. 1939).

reaffirms the *Colvin v. Warford*[2] doctrine as to the revival of a revoked will by revocation of the intervening revoking instrument.

Interest in the decision, however, may be greater because it contains one more application of Article 93, Section 344,[3] dealing with the validity, interpretation, and probate of foreign wills. This statute breaks up into clauses as follows:

> Clause 1. "Every will or other testamentary instrument executed without this State in the mode prescribed by law, either of the place where executed or of the law of the testator's domicil, or according to the forms required by the law of this State shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the law of this State, provided, said will and testament is in writing and subscribed by the testator; . . ."
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> Clause 2. ". . . and if the testator was originally domiciled in Maryland, although at the time of making the will, or at the time of his death he may be domiciled elsewhere, said last will or testamentary instrument so executed shall be admitted to probate in any orphans court of this State; . . ."
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> Clause 3. ". . . and when so admitted shall be governed by and construed and interpreted according to the laws of Maryland, without regard to the lex domicilii, unless the testator shall expressly declare a contrary intention in said will or testamentary instrument."[4]

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[2] 20 Md. 357 (1863). This doctrine is summarized, at 20 Md. 393, in these words: "That the cancellation of a revoking will, prima facie, is evidence of intention to revive the previous will, is true, but it is obvious that the presumption of that intention from the mere act of cancellation may be strengthened, qualified or rebutted altogether, by evidence of the attending circumstances and probable motives of the testator." In Colvin v. Warford the second and inconsistent will was destroyed; in the principal case, of course, the second and inconsistent will was revoked expressly by a third will, which was not inconsistent with the first will.

[3] Md. Code (1924) Art. 93, Sec. 344.

[4] Each clause of the section has been made a separate paragraph for ease in referring back to it. Of course, in the statute the clauses follow each other in a single paragraph.

The applicability of the statute in the instant case was clear, as it was in other earlier cases;[5] but the wording of the statute leaves for speculation several questions as to its effect on the validity, interpretation and probate of foreign wills in this state.

The first clause validates all foreign wills executed according to the laws of (1) the testator's last domicil, or (2) the place where executed, or (3) this State. This has expanded the common-law rules of validity, which required of wills of personalty conformance with the law of the testator's last domicil, and of wills of realty conformance with the law of the situs of the land affected.[6] Its effect in the principal case validated the third will (as also the second, which the third revoked) which would have been ineffective if drawn in Maryland. The clause seems first to have been applied in *Olivet v. Whitworth*,[7] where a holographic Swiss will was held to be a valid exercise of a power of appointment over Maryland-located personalty. Next, in *Lindsay v. Wilson*,[8] a holographic French will by a testator domiciled in France at death was held an effective transfer of Maryland realty; the Court expressly pointed out how Section 344 had changed the common-law rule of validity as to wills of realty. The validity clause has been applied in later cases in the same vein.[9] The effect of this clause seems to raise few problems.[10]

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[5] Olivet v. Whitworth, 82 Md. 258, 33 A. 723 (1896); Lindsay v. Wilson, 103 Md. 252, 63 A. 566, 2 L. R. A. (N. S.) 408 (1906); Johns Hopkins University v. Uhrig, 145 Md. 114, 125 A. 606 (1924); Hunter v. Baker, 154 Md. 307, 141 A. 368 (1927).

[6] As to wills of personalty see: RESTATEMENT, CONFLICT OF LAWS, Sec. 306, and *Ibid.*, MD. ANNOT. (1936) particularly Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448 (1877); 57 A. L. R. 229, 230. As to wills of realty, see: RESTATEMENT, CONFLICT OF LAWS, Sec. 249; Lindsay v. Wilson, 103 Md. 252, 268, 63 A. 566, 2 L. R. A. (N. S.) 408 (1906), and cases cited; 57 A. L. R. 229, 230.

[7] 82 Md. 258, 276, 33 A. 723 (1896). Although the inference is that the testatrix died domiciled in Switzerland, in which event the will would have been valid at common-law in this state, the Court relied entirely on the validating effect of Section 344, first clause.

[8] 103 Md. 252, 268, 63 A. 566, 2 L. R. A. (N. S.) 408 (1906).

[9] See also Johns Hopkins Univ. v. Uhrig, 145 Md. 114, 125 A. 606 (1924); Hunter v. Baker, 154 Md. 307, 141 A. 368 (1928). In De Garmendia's Estate, 146 Md. 47, 51-52, 125 A. 897 (1924) the court held a foreign holographic will invalid in the absence of proof that a use of the testator's name in the text fulfilled the German requirement of such wills that they be "unterschriebene" by the testator.

[10] One possible problem as to the effect of the validating first clause of Section 344 is discussed *infra* n. 18. Note also that the clause only applies to wills executed outside of Maryland.

When we approach the problem of interpretation, we find that here again Section 344 has changed the common law. Prior to the enactment of the second and third clauses, wills of personalty were generally said to be interpreted and given effect according to the law of the testator's last domicil, but the Restatement of Conflict of Laws emphasizes that it is the domicil at date of execution which controls interpretation.[11] Wills of land were usually given effect according to the law of the situs of the land, and were assumed to be interpreted and construed according to the same law.[12] Again, the Restatement has emphasized the importance of considering the domicil at date of execution of the will for interpreting doubtful words.[13] By the above section of the Maryland statute, wills of personal or real estate of a testator who was "originally domiciled" in Maryland will be "governed by, and construed and interpreted according to the laws of Maryland" unless the testator expresses a contrary intention.

In *Olivet v. Whitworth* no problem of interpretation seems to have arisen, and there was apparently no need for an application of Section 344 in this respect.[14] Two cases have applied the interpretation provision. In *Lindsay v. Wilson* the will admitted under Section 344 was in French, by a Maryland-born testator dying domiciled in France. The problem was the effect to be given the words "biens" and "legataire universelle", whose literal translations were "goods" and "universal legatee" respectively, but whose connotations in French legal circles included the idea of realty, and a recipient thereof, as well as personalty and a recipient thereof. The Maryland court cited Section 344 in its entirety, and held that this section did not require that the words be given a meaning different from that which they conveyed in French legal usage, hence that they should include a devise of realty.

In *Johns Hopkins University v. Uhrig*,[15] the testator, born and raised in Maryland, died domiciled in California, leaving a will under which the university was to receive

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[11] See RESTATEMENT, CONFLICT OF LAWS, Sec. 308, and *Ibid.*; MD. ANNOT.; 57 A. L. R. 233.

[12] See RESTATEMENT, *supra* n. 11, Secs. 214, 251; 57 A. L. R. 229, 233, 79 A. L. R. 96, 103.

[13] See RESTATEMENT, *supra* n. 11, Sec. 251.

[14] See *supra* n. 7. The second and third clauses of Section 344 had been enacted two years before the decision in the Olivet case (Md. Laws 1894, Ch. 151) and were not directly adverted to in that opinion.

[15] 145 Md. 114, 125 A. 606 (1924).

all the testator's securities, after intervening life estates, to establish a chair in eugenics. Under California law, the bequest was partially invalid by virtue of a statute limiting charitable bequests to ⅓ of the testator's property, where he died leaving heirs. Assets consisted of $4300 in California, and $15,700 in Maryland. Probate occurred in the former state, and copies were filed in Maryland.[16] The Maryland Court held that this filing was equivalent to an original probate under Section 344; that, under that section, Maryland law was to be used in giving effect to the will; and, hence, that the California statute was inapplicable, at least insofar as Maryland personalty was involved. Summarizing case authority on the provision of Section 344 as to interpretation, then, we find one negative and one positive application of its terms, the latter holding that it will operate on the will of a nonresident "original domiciled" in Maryland, if that will has been probated at the state of domicil and a copy of probate filed under Article 93, Section 364. The principal case *(Rabe v. McAllister)* adds nothing to this.

As to the effect of Section 344 on the probate of foreign wills, most problems will arise as a result of what the statute did not say. In *Lindsay v. Wilson,* original probate was had of the will of a testator dying domiciled in France. The Court pointed out[17] that, as to testators not "originally domiciled" in Maryland, no provision for probate was made thereunder. It was suggested that probate at the domicil and filing a copy of domiciliary probate under Article 93, Section 364 would provide the solution.[17a] But suppose that probate cannot be had, for lack of formal validity, elsewhere. If the testator was not originally domiciled in Maryland, Section 344 does not provide for probate, and Section 364 cannot be invoked, since there is no foreign probate to file thereunder. Suppose, for example, two situations: (1) T, who has lived in state A all his life, draws a will meeting the formal re-

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[16] Md. Code (1924) Art. 93, Sec. 364. This section provides that any person who may be interested in any devise or bequest of property within or brought into this state may obtain a copy of the will and a certificate of the probate thereof in any other state or a foreign country and present it to the Register of Wills of any county within this state; thereafter, a copy of such record is evidence of title to property disposed thereunder, "with the same force and effect as if the original will had been admitted to probate in this state."

[17] 103 Md. 252, 269, 63 A. 566, 2 L. R. A. (N. S.) 408 (1906).

[17a] Johns Hopkins University v. Uhrig, 145 Md. 114, 125 A. 606 (1924) discussed *supra, circa* n. 15.

quirements of Maryland, but not of state A; (2) T, a resident of state A who had never been domiciled in Maryland, executes his will in state B, in compliance with the formal requirements of state B, but not with the internal rules of Maryland or of state A where he died domiciled.[18]

The question would essentially be: Can original probate be had for the wills of non-residents apart from Section 344? Aside from statutory provisions, the better view would seem to allow original probate in a state other than that of the last domicil.[19] Maryland statutes referring to administration and probate generally permit probate wherever administration might have been allowed, had the deceased died intestate;[20] and administration may be taken: (1) at the county of residence of the decedent; (2) the county where he died, if he had no residence within the state; or (3) the county wherein lies a considerable portion of his personal property, if death and residence were both outside the state.[21] Section 344, it may be argued, by its affirmative provision for probate of foreign wills where the testator was "originally domiciled" in this state, might be said to negative the power originally to probate the wills of persons who never lived in Maryland. It would seem, though, that this clause allowing probate is to be read as an adjunct to the clause stipulating that Maryland law shall govern the wills of persons originally

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[18] The will in this second hypothetical situation would have to be validated by the first clause of Section 344, inasmuch as it would be invalid by Maryland common-law principles. Here the question may be posed as to whether this clause was intended to apply only to the wills of persons "originally domiciled" in Maryland. On the history and phrasing of the section as a whole, it would seem that the validating clause should operate on any foreign will, regardless of whether its author ever lived in Maryland. Whether the Court of Appeals has endorsed this view depends on the answer to another question: What does the phrase "originally domiciled" mean as used in this section? If it means that testator's domicil of origin must have been Maryland, Olivet v. Whitworth, *supra* n. 7, is authority to the effect that the first clause of the section does not depend on a domicil of origin in this state; there the will of a testatrix born English was validated under the first clause. However, if the phrase means "domiciled at any time" in Maryland, there has apparently been no case in which the first clause has been applied to a foreign will by a testator never domiciled in Maryland.

[19] A full and interesting discussion of the question of original probate of foreign wills in a state other than that of the domicil is found in 119 A. L. R. 491; see also RESTATEMENT, CONFLICT OF LAWS, Secs. 467, 469.

[20] Md. Code (1924) Art. 93, Sec. 351.

[21] Md. Code (1924) Art. 93, Sec. 14. From this rather ambiguous section, it appears that at least there must be property of some sort within the state before probate of any will will be allowed. As to whether personal property within the state is a requisite, no opinion is ventured. See RESTATEMENT, CONFLICT OF LAWS, MD. ANNOT. (1936) Secs. 467, 469.

domiciled in the State, and that no intention to prevent original probate of the wills of these not falling within its confines is evidenced. Again, it might be argued that Section 364 of Article 93, in providing for filing certified copies of the probate of out-of-state wills in Maryland Orphans' Courts, implies that this is the only means by which a foreign will can be given effect here, outside of Section 344.[22] This would not be a necessary, and probably not a sound, conclusion.

It would seem better to recognize that the general probate provisions referred to above[23] are available to admit probate of foreign wills not specifically covered by Section 344.[24] There would be less uncertainty as to this, of course, in the first illustration above, where the will satisfies the Maryland common-law requirements of validity. As to the second illustration, it might not be too great a strain on the rules of construction to allow the will to be validated under the first clause of Section 344,[25] although its probate would not be under this section but would have to be under the general probate sections.[26] Some legislative or judicial clarification of the statutes would seem desirable, if not necessary.

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[22] This argument has been advanced in other states having statutes closely similar to Art. 93, Sec. 364, with varying success. See cases discussed in 119 A. L. R. 491, 506.

[23] *Supra, circa* footnotes 20, 21.

[24] Space does not permit discussion of possibly applicable dicta and analogies. However, see RESTATEMENT, CONFLICT OF LAWS, MD. ANNOT. (1936), Sec. 469, particularly Harding v. Schapiro, 120 Md. 541, 547, 87 A. 951 (1913), and Brafman v. Brafman, 144 Md. 413, 414, 125 A. 161 (1924). Consider also Kurtz v. Stinger, 169 Md. 554, 182 A. 456 (1936).

[25] See *supra*, n. 18.

[26] *Supra circa* footnotes 19, 20, 21.