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ADMISSIBILITY OF FOREIGN WILL TO PROBATE

In re Will of Pritchard[1]

The testator, a resident of West Virginia, and at no time a resident of Maryland, died in Florida on April 1, 1939. Shortly thereafter, a will (dated 1911) and two codicils (the first dated 1915, the second not dated) were probated in West Virginia. Later, a certain document was offered for probate to the Orphans' Court of Baltimore City. This document was found in a safe-deposit box in

[1] Superior Court of Baltimore City, per Niles, J., Baltimore Daily Record, November 26, 1940.

Baltimore City. It was dated 1936, was entirely in the handwriting of the testator,[2] and constituted a gift to M of certain shares of stock, valued at approximately $30,000. The shares were not mentioned in the previously probated will and codicils; these contained merely certain specific legacies and a residuary clause. The Orphans' Court denied probate on the ground of lack of jurisdiction, and the petitioner appealed to the Superior Court of Baltimore City in accordance with Article 5, Section 69 of the Maryland Code. *Held:* Reversed. The Orphans' Court had jurisdiction to accept the document for original probate.

In reaching this result, the Superior Court confined itself to the question of the *existence* of jurisdiction, expressly eliminating from consideration any question of "whether or not the Orphans' Court, if it had discretion, had properly exercised it". On the limited point, the Court thoroughly analyzed the applicable Maryland statutes, existing Maryland authority, and the state of authority elsewhere. Beginning with the Maryland statutes, the Court quoted the applicable sections,[3] and concluded from them: First, that the shares given to M by the paper were subject to administration in Baltimore City, under the provisions of Art. 93, Sec. 15, since they were found there, and since they formed a "considerable part" of the testator's personal estate; second, that therefore the paper might be probated in Baltimore City, under the provisions of Art. 93, Sec. 356, since the words "any will" contained in this section mean "any writing recognized as a will by Maryland", and not "any will made by a resident of Maryland";[4] third, that the provisions of Sec. 350 of Art. 93, which allow probate of certain types of foreign wills, do not, by failing to include the type of foreign will at issue

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[2] Both the Orphans' Court and the Superior Court assumed that the paper was a valid holographic will under the law of West Virginia.

[3] Md. Code (1939) Art. 93, Secs. 15, 350, and 356.

[4] The conclusion that the words "any will" meant "any will made by a resident of Maryland" was one of the major reasons for the refusal of probate by the Orphans' Court, which analogized the "any will" words of Art. 93, Sec. 356 to the "any administrator" words of Art. 93, Sec. 125. The words of Sec. 125 admittedly mean "any administrator appointed in Maryland", since Sec. 125 purports to regulate the conduct of administrators, and such regulation by Maryland is possible only in the case of a domestic administrator. However, in the principal case, the Superior Court denied that the analogy had any controlling effect; stating that the Maryland statutes in several places recognize foreign wills, and nowhere show an intention to exclude them, and that therefore there is no sound basis for limiting the words of Sec. 356 so as to exclude such wills made by non-residents.

here, restrict the jurisdiction of the Orphans' Court to the enumerated situations.[5]

To reach its result, the Court had to dispose of a statement, found in the case of *Lindsay v. Wilson,* which was quoted by the Orphans' Court to support its refusal of probate: ". . . If the testator was not originally domiciled in Maryland, *there is no provision in this statute for probate in this State,* but then those interested in property can procure a copy and have it recorded here under Section 347 above referred to."[6] This statement, apparently contra to the decision of the Superior Court, was held to be not controlling, for the reasons that it was merely dictum in the *Lindsay* case, and that it was merely a statement that the particular section[7] there under construction had no provision for probate of a non-resident's will, but was not authority for the proposition that there was no such provision in other statutes.[8]

The Court then reviewed the out-of-state authorities, and found that the majority of them supported its conclusions that jurisdictional power was not lacking,[9] and that the statutory provision for the admission of foreign probate records[10] did not preclude original admission.[11]

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[5] The Court said that the purpose of Section 350 was *first* to validate foreign wills according to the laws of either (1) Maryland, (2) the place where executed, (3) the testator's domicil; and *second* to apply the laws of Maryland to foreign wills made by persons originally domiciled in Maryland. As pointed out in Lindsay v. Wilson, 103 Md. 252, 269, 63 A. 566, (1906), this section obviously does not provide for validation and probate of a foreign will made by one who was never a resident of Maryland—but it does not follow that this omission was intended to deny jurisdiction of such wills to the Orphans' Courts. This is especially true in view of the fact that this section would apply even to such a will if, as in this case, it were presumed to have been valid by the law of the testator's domicil.

[6] 103 Md. 252, 269, 63 A. 566, 2 L. R. A. (N. S.) 408 (1906), with italics supplied. The reference to "section 347" is to the Code of 1904. It is now Md. Code (1939) Art. 93, Sec. 369.

[7] At the time the Lindsay case was decided, the statute was Md. Code (1904) Art. 93, Sec. 327, now, Md. Code (1939) Art. 93, Sec. 350.

[8] The principal case is a direct holding that such provision does exist in other statutes, namely, Md. Code (1939) Art. 93, Secs. 15, 356. This result was forecast and approved by a note to the case of Rabe v. McAllister, 177 Md. 97, 8 A. (2d) 922 (1939); in (1940) 4 Md. L. Rev. 400, 405-406.

[9] RESTATEMENT, CONFLICT OF LAWS, Secs. 467, 469. See an extensive note in 119 A. L. R. 491.

[10] Md. Code (1939) Art. 93, Sec. 369.

[11] Thompson v. Parnell, 81 Kan. 119, 105 P. 502 (1909); Woodfin v. Union Planters Nat. Bank & Trust Co., 174 Tenn. 367, 125 S. W. (2d) 487 (1939); Varner v. Bevil, 17 Ala. 286 (1850); THOMPSON ON WILLS, Sec. 29; 1 SCHOULER, WILLS, 467. *Contra:* Eaton's Will, 186 Wis. 124, 202 N. W. 309 (1925); In Re Corning, 154 Mich. 474, 124 N. W. 514 (1910). See also (1940) 4 Md. L. Rev. 400, 405-406 for a discussion of this argument.

The objection was also made that granting of probate in Maryland would be a denial of full faith and credit to the West Virginia probate. This was answered by the statement that the full faith and credit clause requires recognition of the result of a foreign litigation of the same subject matter, and has no application if the subject matter of the domestic suit has not been litigated at all in the foreign state. Here, this was unquestionably the case. The paper offered for probate in Maryland had never been so offered in West Virginia, and the courts of that state had never adjudicated the question of its admissibility to probate. Therefore, in respect to this paper, there was no decree of a sister state to which the full-faith-and-credit clause could apply.

Finally, the Court stated that the probate of a second will is not precluded by the probate of a first will, because probate merely establishes *prima facie* that the paper is a testamentary document, and is not an adjudication of the validity and legal effect of the paper.[12] In its conclusion, the Court felt that its view was consistent with the wording of the Maryland statutes, and with one of the general policies of testamentary law, which is to give effect if possible to the intentions of the testator, no matter whether his will was executed in Maryland or elsewhere.

This decision, standing squarely for the rule that Maryland Orphans' Courts have power to admit the wills of non-residents to original probate, appears to answer a troublesome point which had previously been left unanswered by both cases an statutes.[13] Whether the answer is permanent will of course depend mainly on the weight to be given it as an opinion of the Superior Court. More than normal weight might result from the fact that it represented the final disposition of the particular case because of the peculiar nature of appeal involved. This type of appeal[14] was created, and is governed, by Section 69 of

[12] Bradley v. Bradley, 119 Md. 645, 652-653, 87 A. 390 (1912); Decker v. Fahrenholtz, 107 Md. 515, 518-519, 72 A. 339 (1908); Rabe v. McAllister, 177 Md. 97, 105, 8 A. (2d) 922 (1939); 34 WORDS AND PHRASES, 59-61.

[13] See Note (1940) 4 Md. L. Rev. 400.

[14] Baldwin v. Hopkins, 172 Md. 219, 227-228, 191 A. 565, 569 (1937) states that there are three possible appeals from the Orphans' Courts: (1) appeal direct to the Court of Appeals Md. Code (1939) Art. 5, Sec. 64 (this is the usual method); (2) appeal to the Circuit Court of the county under Md. Code (1939) Art. 93, Sec. 254, restricted to controversies arising in connection with allegations of concealment of assets by an administrator or other person, or of omissions by an administrator from the inventory or list of debts, for recent interpretation of this, see Baker v. Forsythe, 16 A. (2d) 921 (Md. 1940); (3) appeal to the Circuit Court of the county or to the Superior Court of Baltimore City under Md. Code (1939) Art. 5, Sec. 69.

Article 5 of the Code, which provides: "If upon an appeal being entered in the Orphans' Court, the parties shall mutually agree, and enter their consent in writing, to be filed by the register of wills, that the appeal shall be made to the Circuit Court for the county, or the Superior Court of Baltimore City, the Orphans' Court shall direct the transcript of the proceedings to be transmitted to the Circuit Court, or Superior Court, *whose decision shall be final.*"[15] This statute has only once come to the attention of the Court of Appeals for construction.[16] It was then held that the essential element of jurisdiction thereunder was the assent of the parties; that if the parties chose to transcribe only a part of the Orphans' Court proceedings, and to have the original papers transmitted in part, by pre-arrangement, such fact would have no effect on the finality of the Circuit or Superior Court's decision on appeal. The assumption was that appeal under this section is similar to appeal to the Court of Appeals, once the proper mutual consent is filed, as far as its finality is concerned. The wording of the statute would seem to allow for no other interpretation. This fact may well lend considerable weight to decisions of the Circuit and Superior Courts on such appeals, under the doctrine of stare decisis.

Aside from this, it is submitted that the opinion derives considerable force from the thoroughness and excellence of its own analysis. It would seem that its conclusions could be taken as law likely to be followed because they have been drawn with such careful consideration of the state of authority elsewhere, the wording of our own statutes, and the policy of our laws; and also because the decision resting on such conclusions was a final disposition of the litigation in hand.

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[15] Italics supplied.

[16] State, use of Wilson, v. McCarty, 64 Md. 253, 260, 1 A. 116, 119-120 (1885).