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Recent Case

RECENT CASE

WILLS — RIGHT OF GUARDIAN OF INCOMPETENT WIDOW TO ELECT TO TAKE AGAINST WILL — RIGHT OF GUARDIAN OF INCOMPETENT HEIR TO CONTEST WILL: Until its decision in *In re Brindle's Estate*[1] it was clear that the Pennsylvania Supreme Court would not direct the guardian of a mentally incompetent husband or wife to take against the will of the latter's spouse unless, upon consideration of all the circumstances, the welfare of the incompetent was better served by such election.[2] Since this case, however, there is a real basis for doubting the future affirmation of the above rule, or at least considerable uncertainty as to its future application.

In the leading case of *Harris Estate*[3], one of the issues was whether the guardian of testator's mentally incompetent widow should be directed to elect to take against the will. Considering only the interests of the incompetent woman, the court concluded that disallowance of such election would better serve her "current welfare".

Although *Brindle's Estate* did not involve an election to take against a will, it did include the question of whether the court should authorize the guardian of a mental incompetent to attack the probate of a will. As pointed out by Mr. Justice Stern, ". . . the two situations, from a legal standpoint, are not only analogous but identical" since the court is called upon to elect that course of conduct which will be in the best interests of an individual who is unable to make the determination himself.

In the case under consideration, it appeared that Anna Fox Brindle died leaving a will which was probated. It contained substantially the following provisions: Testatrix's estate[4] was to be placed in trust for the life-time use of her brother, Frank Fox, a weak minded person; his income therefrom was to be supplemented by certain rights to consume any and all of the principal; remainder of the estate to be equally divided between two designated persons, friends of decedent. Mrs. Brindle was survived by her brother and numerous cousins.

For the purpose of this discussion, it may be stated that in subsequent proceedings in the lower court, the guardian's authority to appeal was revoked and the appeal (taken by the incompetent's guardian ad litem) from the probate on grounds of lack of testamentary capacity, fraud and undue influence in procuring the will

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[1] 360 Pa. 53, 60 A. 2d 1 (1948).

[2] Cited by the dissent: 65 Pa. 451 (1870), 250 Pa. 9 (1915), 279 Pa. 341 (1924), 311 Pa. 189 (1933), 318 Pa. 200 (1935), 351 Pa. 368, 41 A. 2d 715 (1945).

[3] 351 Pa. 368, 41 A. 2d 715 (1945).

[4] Distributable estate, approximately $140,000.00.

was stricken from the record. These orders were reversed by the Pennsylvania Supreme Court upon appeal by the guardian and first cousins of Frank Fox.

The majority opinion of the court, by Mr. Justice Linn, bases its decision on the following:

1. Since the record of the appeal from probate shows a substantial dispute upon a matter of fact,[5] the orphans' court erred in failing to direct a precept to the common pleas of the trial of an issue *devisavit vel non.*[6]

2. Whether or not the will is to be set aside as a void instrument must be determined before the court can decide what is best for the ward, since the next of kin and their heirs have rights under the intestate law if the will fails. "It is this possibility which distinguishes this case from the *Harris* case"[7] in that in the latter there was a valid will.

The concurring opinion by Mr. Justice Stearn states that if the will is set aside, Frank Fox will inherit the entire estate under the intestate law, and since it has been shown that there exists "a well defined issue between the contestant and proponents....of the....will" the guardian should be allowed "to prosecute the contest to its final conclusion."

In the dissent in which Mr. Chief Justice Maxey joins, Mr. Justice Stern strikes at the crux of the problem where he contends that the only question for determination is whether the court's granting permission to Frank Fox's guardian to petition for an issue *d. v. n.* would be in the best interests of the incompetent, *regardless*[8] of the outcome of the will contest; that the present proceedings are in no way concerned with the "merit or lack of merit of the attack upon Mrs. Brindle's will".

Further, that the rule established by the courts of this[9] and other states[10] is that the guardian of a mental incompetent will not be authorized to attack the integrity of a will unless the court, considering all the circumstances, decides that the grant of such authorization is solely in the best interests of the incompetent's current welfare. In addition, the leading case of *Harris Estate*[11] states that the fact that the incompetent may receive a larger portion of the decedent's estate by attacking the will is not controlling, while the possibility of ultimate enrichment to said incompetent's kin is of no moment whatsoever.

Briefly, the pertinent circumstances in the instant case are that the aged and "hopelessly" demented heir has been amply provided for by the will, whereas an

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5 *Viz.*, lack of testamentary capacity, fraud and undue influence in obtaining the will.
6 The Orphans' Court Act of June 7, 1917, P. L. 363, §21 (b), as amended, 20 P. S. 2582.
7 Note 3, supra.
8 Italics supplied.
9 Note 2, supra.
10 Cited by the dissent: 59 Wis. 483, 17 N. W. 289 (1883); 88 Minn. 404, 93 N. W. 314 (1903); 254 Mo. 65, 162 S. W. 252 (1913).
11 Note 3, supra.

attack thereon entails only the doubtful advantage of his receiving additional property which could be of no real benefit to him. Besides, even if such contest were successful, it would actually work to the disadvantage of the incompetent since during the course of the proceedings the payments of income to him might be threatened, and this additional property he would eventually receive would represent an estate diminished by the expenses of protracted litigation, not to mention a larger inheritance tax (approximately $11,000.00) on his share.

On the other hand, the only persons who could benefit by a contest of the will are individuals who are ineligible to bring the action, the cousins of decedent. As Justice Stern further points out, Frank Fox is the only next of kin of Mrs. Brindle, not the cousins. They cannot question the will's validity.

Notwithstanding, the majority, apparently disregarding the welfare of the court's ward, chose to give considerable attention to these cousins' contingent interests, contingent in that if the will is struck down, there exists the possibility of their eventually coming in for a share of the decedent's estate under the law. In disposing of similar considerations in *Harris Estate*[12], the Court specifically stated it would not be concerned with such kindred.

Therefore, some of the problems presented by the holdings in *Brindle's Estate*[13] may be restated as follows:

1. Where the rights of a mentally incompetent heir are concerned, does the court distinguish between these situations:

   a. Those in which the question is whether authorization to elect to take against the will should be granted to the guardian of the surviving spouse, and,

   b. Those in which the issue is whether authorization to attack the probate of a will should be granted to the guardian of the next of kin.

2. If the court does not make this differentiation, has it changed its former rulings by subordinating consideration of the incompetent's immediate welfare to:

   (1) Determination of the validity of the testamentary instrument, and,

   (2) Deliberation upon the rights of the incompetent's next of kin.

It is the opinion of this writer that the dissenting opinion in *Brindle's Estate* by Mr. Justice Stern is not only in accord with the court's previous reasoning and decisions, but that the conclusion reached therein is the better under the circumstances.

John Paul Martin

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[12] Note 3, supra.
[13] Note 1, supra.