

TRUSTS AND SUCCESSION

SUPREME COURT REVIEW

TRUSTS

Litigation pursued under a theory of "repudiation of a resulting trust" reached the Nebraska Supreme Court in *Campbell v. Kirby*.¹ The seeds of this legal controversy were planted when Francis and Phillis Kirby entered into a purchase agreement for the acquisition of ranch property. Lacking funds to pay the seller for earnest money and an option to purchase, the Kirbys arranged to procure a loan from Campbell, the president of a bank.² It was understood that in return for the advance, Campbell and the Kirbys would share any profits made on any resale of the real estate.³

When the check was tendered to the land vendors, they refused to specifically perform and convey the parcel. Campbell and the vendees then made a second agreement under which a cashier's check was deposited with the court pending the outcome of the lawsuit. As further consideration for this action, Campbell was to receive a one-half interest in the property itself upon subsequent conveyance under a court decree.⁴

The district court ordered the sale of the land to proceed, but on advice of counsel no conveyance was actually made to the bank president at this point.⁵ Upon acquisition of the fee, Frank Kirby became manager of the ranchland property. While Campbell contributed certain sums to the enterprise to cover operating expenses,⁶ Kirby was apparently reluctant to ask for further advances.⁷ Vincent Kirby, a brother of the ranch manager, made

1. 195 Neb. 610, 239 N.W.2d 792 (1976).

2. *Id.* at 611-12, 239 N.W.2d at 794.

3. *Id.* at 612, 239 N.W.2d at 794.

4. *Id.*

5. The transfer of Campbell's half interest was delayed, *inter alia*, because of dissatisfaction with the lower court's accounting procedures and the necessity of showing a single owner at trial. *Id.* at 617, 239 N.W.2d at 797.

6. *Id.* at 612, 239 N.W.2d at 795.

7. The ranch received, outside of Campbell's advances, income from the sale of wheat, from rent and from the government. *Id.* at 612-13, 239 N.W.2d at 795.

loans to Frank in connection with an unsuccessful speculation in an oil venture at about the same time as the issuing of the order of conveyance under court decree.⁸ Seeking security for his capital, Vincent persuaded his brother to sign a purchase agreement on the land to insure the repayment of the loan.⁹

The court disputed the district court's finding that Campbell's claim was barred by laches and the applicable statute of limitations.¹⁰ Reasoning that the case was tried upon a theory of repudiation of a resulting trust, the court decided that no trust res came into existence until the land conveyance was final.¹¹ Since the district court order was issued well within the permissible statutory period, the district court's erroneous holding was overruled.¹²

After holding that the cause of action was seasonably filed, the court explored Frank Kirby's status as a "resulting trustee" for the benefit of Campbell.¹³ Purchase money paid by a person not holding title to the realty in this case gave rise to what, under Nebraska precedent, is called a "presumptive" or "resulting" trust.¹⁴ While finding that the Kirbys held one-half of the property in resulting trust for Campbell, the court's determination was not conclusive as to the priority of the competing security holders.¹⁵ The Nebraska Supreme Court recognized this in their citation of the RESTATEMENT OF TRUSTS 2d:

If the trustee of a resulting trust in breach of trust transfers trust property to a bona fide purchaser, the transferee takes the property free of the resulting trust; but if the transferee is not a bona fide purchaser, he does not hold it free of the resulting trust¹⁶

Evidence introduced at trial tended to show that Vincent Kirby was not a bona fide purchaser within the meaning of section 408 of the Restatement.¹⁷ Since he was not a transferee who accepted the property without knowledge of the intervening inter-

8. *Id.* at 613, 239 N.W.2d at 795.

9. *Id.*

10. *Id.* at 613-14, 239 N.W.2d at 795.

11. *Id.*

12. The laches question was similarly answered in favor of appellant. *Id.* at 614-15, 239 N.W.2d at 795-96.

13. *Id.* at 615, 239 N.W.2d at 796.

14. *Reetz v. Olson*, 146 Neb. 621, 20 N.W.2d 687 (1945) (purchase money resulting trust); *Woodward v. Woodward*, 89 Neb. 142, 131 N.W. 188 (1911).

15. 195 Neb. at 616, 239 N.W.2d at 797.

16. RESTATEMENT (SECOND) OF TRUSTS § 408 (1959).

17. 195 Neb. at 617-18, 239 N.W.2d at 797.

est, a constructive trust was imposed upon the vendee's brother.¹⁸ Adopting the logic of Judge Cardozo in *Beatty v. Guggenheim Exploration Co.*,¹⁹ the Nebraska Supreme Court found that the holder of the legal title could not retain his interest without offending equitable principles.²⁰ Directing that Vincent Kirby convey the undivided half interest in the ranch to Campbell, the court reversed and remanded the cause of action to the district court for further proceedings.²¹

INTERPRETATION OF WILLS

Land Contract Proceeds

The Nebraska Supreme Court faced a will construction problem involving land contract proceeds in *McDonald v. Shaughnessy*.²² The testator, Edward McDonald, expressed a desire in his will that his wife receive a life estate in all of his property with an absolute power to sell, convey, and reinvest the corpus of the estate as needed for her support and maintenance.²³ At the death of his wife, the remainder of the decedent's property was to pass to his three children in equal shares.²⁴

After the death of her husband, Gertie McDonald exercised her right to dispose of the estate corpus by selling real estate in which she owned a life interest. The purchaser agreed to a land contract arrangement with payments to be made over a period of years. Upon the death of Mrs. McDonald, outstanding installment proceeds were included in her estate by the county court. The son of the deceased parents, protesting the increased inheritance tax burden resulting from this county court action, filed an appeal.²⁵

Noting that Edward McDonald's will gave his wife less than the full fee title, the court reasoned that inclusion of the balance due in Mrs. McDonald's estate was improper. The intent to give the estate remainder to the McDonald children was clearly expressed in the will, and the power to sell land could not operate to destroy this desire.²⁶ Citing Nebraska precedent,²⁷ the court

18. *Id.* at 618, 239 N.W.2d at 797-98.

19. 225 N.Y. 380, 122 N.E. 378 (1919).

20. 195 Neb. at 618, 239 N.W.2d at 797.

21. *Id.* at 618-19, 239 N.W.2d at 798.

22. 194 Neb. 221, 231 N.W.2d 332 (1975).

23. *Id.* at 222-23, 231 N.W.2d at 333.

24. *Id.* at 223, 231 N.W.2d at 333.

25. *Id.* at 222-23, 231 N.W.2d at 333.

26. *Id.* at 224-25, 231 N.W.2d at 334. The court stated that this result would logically follow without reference to precedent, but the case

held that the power to sell estate corpus did not have the effect of giving the life estate holder absolute ownership of the proceeds. Thus, the unused remainder should have passed directly to the children upon Mrs. McDonald's death without going through probate proceedings.²⁸

Crops as Personalty

The Nebraska Supreme Court was faced with an issue of first impression in *Roberts v. Snow Redfern Memorial Foundation*.²⁹ The county court had considered whether a testamentary order to an executor to sell farmland and pay proceeds over to certain named beneficiaries constituted an intent to authorize disposition of the testatrix's share of crops growing thereon as well.³⁰ When the county court held the produce to be part of the real estate, the residuary beneficiaries filed an appeal.³¹

At the time of the decedent's demise, the farmland in question was leased under a crop-sharing arrangement.³² The produce was sold in a transaction separate from the conveyance of the realty.³³ On appeal to the district court, the residuary beneficiaries of personal property claimed that the farm products were not in the nature of real estate and that the proceeds from sale should pass to them under the will. The district court agreed and reversed the holding of the county court.³⁴

On appeal, the Nebraska Supreme Court acknowledged that the testatrix's intent on this matter was not evident from the will itself.³⁵ Since the decedent had the power during her lifetime to

law was in fact supportive of this conclusion. *Id.* at 224, 231 N.W.2d at 334.

27. *Jones v. Shrigley*, 150 Neb. 137, 33 N.W.2d 510 (1948); *Abbott v. Wagner*, 108 Neb. 359, 188 N.W. 113 (1922).

28. 194 Neb. at 225, 231 N.W.2d at 334-35.

29. 196 Neb. 139, 142, 242 N.W.2d 612, 614 (1976). A subsidiary issue involving the taxing of attorney's fees as costs to the executor was found to have been erroneously decided by the district court, necessitating a reversal and remand for further proceedings. *Id.* at 144-46, 242 N.W.2d at 615-16.

30. *Id.* at 143, 242 N.W.2d at 615. Proceeds from the executor's sale of realty were given to the appellants under the will. The residuary beneficiaries received a bequest of all personal property not otherwise disposed of by specific testamentary instructions. *Id.* at 141, 242 N.W.2d at 614.

31. *Id.* at 142, 242 N.W.2d at 614.

32. The marketing of the land's yield produced a sum of over \$10,000. *Id.* at 141-42, 242 N.W.2d at 614.

33. *Id.*

34. *Id.* at 142, 242 N.W.2d at 614-15.

35. *Id.* at 143, 242 N.W.2d at 615.

sell the real estate while reserving the growing crops themselves,³⁶ the court found that the proceeds were properly given to the residuary beneficiaries,³⁷ thus affirming the district court's decision. In rationalizing this conclusion, the court stated that to rule otherwise would make the amount of the testamentary bequest vary with the seasons.³⁸ Finally, since the will was not drawn with the assistance of legal counsel, rules of strict construction normally implemented were not necessarily applicable.³⁹

INTERPRETATION OF STATUTES

Jurisdiction of County Court

The Nebraska Supreme Court, in *Fischer v. Lingle*,⁴⁰ explored the prerequisites to a county court's attaining of jurisdiction over the res of an estate. A creditor, who wished to realize his outstanding claims against the decedent, filed a petition for the appointment of an administrator. The wife of the deceased filed objections to such an appointment.⁴¹ The county court sustained the wife's objections and dismissed the creditor's pleading. The district court on appeal remanded the case to county court despite noncompliance with certain state statutes by the petitioner.⁴²

The wife, alleging two grounds for reversal, appealed the district court's decision to the Nebraska Supreme Court. The first involved the failure of the creditor to mail copies of published notice to the decedent's heirs-at-law within five days as required by section 25-520.01 of the Nebraska statutes.⁴³ Neither the creditor nor his attorney made any effort to determine the names or addresses of such heirs. A further violation of statutory law occurred when no affidavit of "diligent investigation" was executed.⁴⁴

36. *Id.* The executor apparently reserved rights to the crops when he sold the farmland. *Id.* at 141-42, 242 N.W.2d at 614.

37. *Id.* at 143, 242 N.W.2d at 615.

38. *Id.*

39. *Id.* at 143-44, 242 N.W.2d at 615.

40. 195 Neb. 108, 237 N.W.2d 110 (1975).

41. *Id.* at 108-09, 237 N.W.2d at 111-12.

42. *Id.* at 109, 237 N.W.2d at 112.

43. *Id.*

In any action or proceeding of any kind or nature, as defined in section 25-520.02, where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him.

NEB. REV. STAT. § 25-520.01 (Reissue 1975).

44. 195 Neb. at 109, 237 N.W.2d at 112.

The second ground for reversal was based upon the doctrine of *res judicata*. Alleging that the county court had entered an order to the effect that the decedent had no assets subject to administration during proceedings involving the calculation of inheritance taxes, the wife argued that the previous action was binding on all subsequent parties seeking to litigate that factual issue.⁴⁵

Addressing the first ground of the prayer for reversal, the court explored the jurisdictional character of estate proceedings within Nebraska. Reasoning that the appellant had subjected herself to the jurisdiction of the county court by filing objections to the creditor's petition, the court held that the wife could not complain of lack of statutory notice.⁴⁶ The only other heir-at-law, a daughter of the decedent, was not before the court.⁴⁷

The problem as to jurisdiction over an estate *res* under Nebraska law was squarely framed by the court:

The question then to be determined is whether or not the county court obtains jurisdiction of an estate of a deceased person upon the filing of a petition containing the necessary averments, or whether it acquires jurisdiction on completion of service by notice of publication, or whether it acquires jurisdiction upon compliance with the provisions of section 25-520.01⁴⁸

The court came to the conclusion that the statute requiring the mailing of notice was not jurisdictional as far as the *res* was concerned. Relying on Nebraska case law⁴⁹ as well as a germane statute,⁵⁰ the court stated that upon the filing of a petition in

Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice. Such affidavit of mailing of notice shall further be required to state that such party and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post-office address of any other party appearing to have a direct legal interest in such action or proceeding other than those to whom notice has been mailed in writing.

NEB. REV. STAT. § 25-520.01 (Reissue 1975).

45. 195 Neb. at 109-10, 237 N.W.2d at 112.

46. *Id.* at 110, 237 N.W.2d at 112.

47. *Id.* The name and the address of the daughter could have been obtained if the statutory procedure had been followed. *Id.*

48. *Id.* at 111, 237 N.W.2d at 113.

49. *State ex rel. Coulter v. McFarland*, 166 Neb. 242, 88 N.W. 892 (1958); *In re Estate of Glover*, 104 Neb. 151, 175 N.W. 1017 (1920). *Accord*, *Rohn v. Kelley*, 156 Neb. 463, 56 N.W.2d 711 (1953); *In re Estate of Marsh's*, 145 Neb. 559, 17 N.W.2d 471 (1945); *In re Estate of Sweeney*, 94 Neb. 834, 144 N.W. 902 (1913); *In re Estate of Sieker*, 89 Neb. 216, 131 N.W. 204 (1911).

50. NEB. REV. STAT. § 30-317 (Reissue 1964) (to be repealed January

county court, the proceedings take on the nature of an in rem action to which everyone interested therein is a party.⁵¹ While the court has an affirmative duty to protect the interests of all parties to the probate action, whether before the court or not,⁵² the jurisdiction of the county court is retained despite noncompliance with notice laws relating to individuals. Since the filing of a petition in county court was characterized as being beneficial to all interested persons rather than in the nature of an adversary proceeding,⁵³ the Nebraska Supreme Court found that the act of filing triggered the attachment of in rem jurisdiction.

After deciding the jurisdictional question, the court turned to the res judicata issue. Giving the argument little weight, the court observed that the creditor was not a party to the former proceedings involving inheritance tax determinations. Thus, the finding of fact was not binding upon him.⁵⁴ As a result, the court held that the petition was properly admitted to county court despite appellant's objections.

Inheritance Tax Exemption

Qualification for an inheritance tax exemption by the step-daughter of the decedent under section 77-2002 was the main issue in *Wondra v. Platte Valley State Bank*.⁵⁵ The statute in question provides tax advantages on inheritances for certain close relatives to the decedent. Specifically, the law provides for a complete exemption for the first ten thousand dollars and a favorable tax rate for the excess.⁵⁶ These favorable rates are qualified by a statutory provision stating that regular tax percentages apply unless the beneficiary "shall have been a member of the household of the deceased and shall have had his permanent home in the home of the deceased for at least five continuous years during his

1, 1977 by virtue of passage of L.B. 354, § 316, [1974] Laws of Neb. 134-35) allows the judge of probate to appoint a special administrator pending a decision regarding allowance of the will into county court. The creditor argued that this statute evidenced a legislative desire that jurisdiction over the estate res begin upon the filing of the petition. 195 Neb. at 114, 237 N.W.2d at 114. Citing *In re Hanson*, 105 Minn. 30, 117 N.W. 235 (1908), the court agreed. 195 Neb. at 114, 237 N.W.2d at 114.

51. *Id.* at 112, 237 N.W.2d at 113.

52. *Id.* at 113, 237 N.W.2d at 113.

53. *Id.* Another factor in the court's decision was a fear of statutory manipulation for fraudulent purposes. *Id.* at 113-14, 237 N.W.2d at 114.

54. *Id.* at 114, 237 N.W.2d at 114.

55. 194 Neb. 41, 230 N.W.2d 182 (1975). A secondary issue involved the construction of a will's residuary clause. *Id.* at 48-55, 230 N.W.2d at 187-90.

56. NEB. REV. STAT. § 77-2004 (Reissue 1971).

minority."⁵⁷ Since the stepdaughter was not a lineal descendent, a second requisite had to be satisfied; the deceased must have been in the "relation of a parent" to the will beneficiary for a period of not less than ten years prior to death.⁵⁸

Applying the rule requiring strict construction of statutes exempting property and legacies from taxation, the county and district courts both denied the exemption to the appellant.⁵⁹ While the ten year requirement was fulfilled, the lower courts found the five year provision to be decisive.⁶⁰

The physical absence of the stepdaughter from the state while she was attending school was undisputed on appeal. Despite her attendance at a high school in Oregon during the years in question, the court found the fact that she spent her summers in Nebraska significant.⁶¹ In an attempt to determine the legislative intent in the use of the terms "household" and "home" in the statute, the court examined the purpose of the law. Concluding that the statute was passed to deter irresponsible parties from claiming unwarranted exemptions, the court found that a stepchild who has been accepted in a home for a reasonable period of time should be able to take advantage of the same tax benefits that accrued to close relatives in the same household.⁶² The court additionally justified the reversal of the lower courts in light of the temporary nature of the stepchild's absence and the lack of ability on the part of minors generally to independently determine their own place of residence.⁶³

57. *Id.*

58. *Id.*

59. 194 Neb. at 43, 230 N.W.2d at 184. This strict construction rule was also applied in *Todd v. County of Box Butte*, 169 Neb. 311, 99 N.W.2d 245 (1959).

60. 194 Neb. at 43, 230 N.W.2d at 184.

61. *Id.* at 45, 230 N.W.2d at 185.

62. Quotations from the chairman of the Judiciary Committee of the legislature proved particularly persuasive. *Id.* at 47, 230 N.W.2d at 186.

63. *Id.* at 48, 230 N.W.2d at 186-87.