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## District Court Digests

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## BENCH AND BAR

## DISTRICT COURT DIGESTS

ADOPTION — CONSENT OF PARENT REQUIRED, AND HOW GIVEN: STATUTORY INTERPRETATION. — *Wiltse v. Klingensmith*, District Court of the Second Judicial District, Ramsey County, North Dakota, Douglas B. Heen, District Judge. (January 20, 1960).

Mary Ann Klingensmith was a married woman and the mother of two children. In July, 1957, she separated from her husband and instituted an action for divorce in Minnesota. Sometime after the institution of such action, she determined that she was pregnant and that the father of the child was someone other than her husband. Due to the effect this might have had on her contemplated custody of the other children, she stayed with her uncle and aunt in North Dakota till the birth of the child. At some point during the above events an arrangement was entered into whereby such child was to be placed in the custody of Lyle A. Wiltse and his wife. These people are handicapped by a hearing and speech impairment, and without success in the past, have attempted to secure a child for adoption from various agencies. After the birth of the child, the aunt and a County Judge presented Mrs. Klingensmith with a consent of adoption which she signed. A few days after her return to Minnesota, Mrs. Klingensmith wrote to the aunt and uncle stating that she wanted the child returned to her. This request was refused and the Wiltse's executed a petition for adoption of said child, whereupon Mrs. Klingensmith served upon them a formal revocation of the consent to adoption and applied for a writ of habeas corpus. She contended that at the time of the execution of the consent to adoption, the county judge did not give sufficient explanation of the legal consequences and that thereby such natural mother was not fully aware of the implications of her act and can thereby withdraw her consent.

This action involves the interpretation of N.D. Rev. Code § 14-1104 (Supp. 1957) which provides that “. . . an illegitimate child cannot be adopted without the consent of its mother . . . signed before a judge of a court having original jurisdiction in guardianship proceedings . . . and after the acknowledging officer has explained to the parent the effect of the consent and has examined the parent and is satisfied that the consent is voluntary and is freely given . . .”

The court states that legal adoption is purely statutory, and if the essential requirements of the statute are not complied with, the

adoption fails. It follows, therefore that North Dakota subscribes to the proposition that a consent to adoption is jurisdictional and is the basis of an adoption proceeding, and that in an adoption proceeding such a consent is a condition precedent, compliance with which is essential to full validity and effect of the decree.

Examination of Section 14-1104 discloses that a parent's consent to adoption "must" be signed before a proper official who has explained the effect of the consent. For this reason the statute is mandatory rather than directory only.

This decision is concerned solely with the question of whether the jurisdictional requirement has been satisfied by execution of a requisite consent in view of our statutes. From the evidence, it appears that the public official did not give the proper explanation to the mother; therefore, it is the conclusion of this Court that the jurisdictional requirement of a requisite consent did not obtain under these facts as contemplated by N.D. Rev. Code § 14-1104 (Supp. 1957).

Under N.D. Rev. Code § 14-0905 (1943), the mother of an illegitimate child is entitled to the custody of such child. The evidence in the instant case does not indicate in any degree that the natural mother has abandoned or abused the child, and there is no showing that the natural mother is presently unfit or presently immoral, nor that she is unable to properly care for the child. In North Dakota a Writ of Habeas Corpus is in the nature of an equitable action and in determining the custody of a child the paramount consideration is the child's welfare. Accordingly, it is the conclusion of this Court that the child shall be returned and restored to the custody and control of her natural mother.

The proposed adoption is denied, and the writ of habeas corpus is granted.

**EQUITY — SPECIFIC PERFORMANCE OF DECEDENT'S ORAL AGREEMENT TO DEVISE REAL PROPERTY. — *Morkert v. Morkert*, District Court of the Second Judicial District, Benson County, North Dakota, Douglas B. Heen, District Judge. (December 12, 1959).**

Plaintiff, being a nephew and therefore not an heir of his deceased uncle under the law of succession, instituted this action against the heirs of the decedent for specific performance of an oral agreement to devise real property, or for money judgment for services rendered, materials and supplies furnished, and for improvements made.

For many years, plaintiff had devoted much of his time to his uncle's farming operation. After his marriage in 1945, plaintiff resided on the farm, receiving a monthly salary, but there is some doubt that such wages were fully paid. His uncle then purchased another farm which was leased to the plaintiff under the one-half share crop basis, the uncle furnishing seed, farm machinery, and paying all real and personal property taxes.

The plaintiff contends that in 1945 certain conversations were had with the uncle whereby the latter stated that if plaintiff would stay on the farm he could have it when he [the uncle] was through with it, and to that end plaintiff continued to reside upon the farm under the usual one-half crop contract and made many improvements thereon. In addition the plaintiff and his wife furnished the uncle with various meals, laundry, washing, and general care.

The uncle considered the plaintiff in the light of a son, paid practically all expenses in connection with the farming operation, and although suffering to some extent from diabetes, was an able bodied man in full possession of his faculties enabling him to carry on his own farming operations, without the assistance of the plaintiff.

The court states that an oral agreement to devise real estate will be specifically enforced, without reference to the Statute of Frauds, where such a contract is established and the promisee has fully complied with the contract and compensation for services thereunder cannot be computed in an action at law, and a denial of specific performance would be a fraud upon the promisee. It further states that North Dakota has approved the doctrine that a court of equity will enforce an agreement to devise property after the death of the promisor as against heirs, devisees, and personal representatives of the deceased, provided the agreement is fair, just, reasonable, and based on adequate consideration. In addition the evidence must be clear and convincing, and the parol contract must be clearly and definitely established by greater certainty than in an action at law. The court further states that where it appears that the promisee in a contract of the kind under consideration occupies some peculiar relation to the promisor because of the latter's physical or mental condition the services performed were of a kind the value of which could not be fairly estimated according to any peculiar standard, the contract, whether oral or written, will be specifically enforced if it is otherwise equitable.

Judge Heen in denying specific performance stated that the alleged agreement in the instant case related to labors of a joint farm-

ing operation and did not pertain to personal care of the decedent in any degree. Further, this court fails to ascertain that any of plaintiff's acts are other than may be generally expected and actually performed by the ordinary ambitious tenant, and it further appears that such acts as performed by the plaintiff nephew in this respect are not clearly referable to the contract. Rather, it appears that such services were furnished gratuitously and more because of mutual love, affection, esteem, high regard, gratitude, and hope of some future but undetermined reward than in performance of the claimed contract.

As to the money judgment demanded, plaintiff has filed a claim in the County Court in which the probate is pending. Since the County Court has original exclusive jurisdiction to determine the validity of claims against estates, the District Court has no jurisdiction to pass upon validity of claims other than in the exercise of appellate jurisdiction.

The decree of specific performance is denied.

**WILLS — PROOF NECESSARY TO SHOW THE EXISTENCE OF A CONTRACT TO MAKE RECIPROCAL AND MUTUAL WILLS. — *Hagen v. Schlucher*, District Court of the Second Judicial District, Pembina County, North Dakota, Douglas B. Heen, District Judge. (May 5, 1960).**

Plaintiff is the daughter of Adolph Steinbach and his first wife. Defendant is the survivor of children born to Steinbach and his second wife, Elizabeth. During the second marriage, a joint tenancy warranty deed was executed by Steinbach whereby the real property in issue was deeded to himself and Elizabeth as joint tenants with the right of survivorship. Subsequent to this, Adolph and Elizabeth executed separate wills, which wills are similar and identical in provisions except for the 5th clause of each respective will relating to encroachment or use of the properties for necessities of the surviving spouse. Adolph preceded his wife in death, and thereafter she executed a contract for deed on the real estate in issue to defendant. Elizabeth died several months later. The wills executed by Adolph and Elizabeth divided the residue of the estate after the death of the survivor to the plaintiff and the defendant in equal amounts.

The plaintiff in this action contends that Adolph and Elizabeth Steinbach pursuant to an oral contract during their lifetime executed mutual wills containing provisions in favor of third parties, and that upon the death of Adolph Steinbach, certain benefits were received

by Elizabeth and that the latter by accepting such benefits made irrevocable the alleged compact created by such alleged oral contract and purported mutual wills. It is further contended that Elizabeth lacked authority to dispose of such real estate, and plaintiff is thereby entitled to specific enforcement as a third party beneficiary and the contracts for deed should be set aside.

The court states that a mutual will is one executed pursuant to a compact or agreement by or between two or more persons to dispose of their property in a particular manner, each in consideration of the other, and such compact or agreement, if in existence, is irrevocable and enforceable in equity. One line of decisions support plaintiff's contention that wills containing reciprocal provisions are in themselves proof sufficient to establish a compact. This court, citing *O'Connor v. Immele*, 77 N.D. 346, 43 N.W.2d 649 (1950), states: "Accordingly, it follows in this State that while such reciprocal provisions, while raising no presumption, are some evidence of compact or agreement, yet the same is inconclusive and reference must be had to the particular facts and circumstances of each case to establish such contract, compact or agreement. And especially is such examination of surrounding circumstances necessary where, as in the instant case, no reference is made, or precatory language employed, in the term of the wills to any compact or agreement."

The court goes on to say that the existence of separate wills, without clear and convincing evidence in addition, indicates ". . . nothing more than common life, mutual affection, common purposes, and a common affection for third party beneficiaries".

"Such interpretation is consistent with the fact of the execution of the joint tenancy deed by which instrument title to the real property upon death of Adolph vested immediately in Elizabeth, the survivor, and by virtue thereof Elizabeth was empowered to dispose or encumber the property without the necessity of court order . . .".

The court found no contract to exist.

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## DIGEST OF ATTORNEY GENERAL OPINIONS

November 25, 1960

### COUNTY AUDITOR — CONTRIBUTIONS OR TAXES

Is a county required to pay the taxes or contributions arising out of the situation where the County Auditor accepts applications, processes same, transmits them to the State Hail Insurance Department and is reimbursed by them for such work?