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WILLS — TESTAMENTARY TRUST PROVISIONS CONSTRUED TO INCLUDE AS BENEFICIARIES CHILDREN BORN AFTER DEATH OF TESTATOR DO NOT VIOLATE RULE AGAINST RESTRAINING ALIENATION. — *First National Bank v. McGuire,* District Court of the First Judicial District, Grand Forks County, North Dakota, O. B. Burtness, Judge.

This is a petition for the construction of provisions of a will. Petitioner, trustee of the trust created by the will of the testator, brings a petition to have certain provisions of the will construed. Since the establishment of the trust, another child has been born to the son of the deceased and she now claims the same benefits under the trust as the other children who were living at the time of the execution of the will and at the time of the death of the testator. The last born child was issue of the son's second marriage. The pertinent provisions of the will are:

> "(3) . . . to pay for the care, education, maintenance and support of the children of my son, J. Earl McGuire, until the death of said children or until they shall have attained their majority, such sum or sums to be paid to the mother of said children if she is living . . .'
>
> "(5) Upon the death of said son, J. Earl McGuire, and if the youngest of his sons and daughters shall have become of the age of twenty five years, my said trustee shall distribute the residue of said trust to the sons and daughters of my said son, J. Earl McGuire, share and share alike . . ."

The Court *held* that the quoted language from the will is not ambiguous and that the children the testator desired to help by monthly payments from the trust as well as by final disposition of the residue of the trust after the death of his son, were the children of his son, regardless of when they might be born. The testator's blood relationship would be the same to all of them. Counsel for the three older children had indicated that provisions for payments to the "mother" meant mother of children in being at the time the will was executed. The Court felt that the use of the word "sons and daughters" when there was only one son and two daughters living at the time will was executed was indicative of the intent of the testator to provide for all the children of his son. The children were therefore to be considered as a class rather than as individuals with possession or use postponed to a future period. This construction is not inconsistent with

section 56-0521 of N.D.R.C. of 1943 providing that "[W]hen possession is postponed to a future period it includes also all persons coming within the description before the time to which possession is postponed."

Counsel for the three older children also contended that to permit the child born after the testator's death to share in the trust would be a violation of the rule against restraining alienation under section 47-0227 of the 1953 Supplement to the Revised Code. That section provides that "[A]lienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition and twenty-one years." The Court, repeating the holding in *Anderson v. Blixt,* 72 N.W.2d 799 (N.D. 1955) that "in this state we have no statute against perpetuities and that the common law against them is not in force in this state" was of the opinion that the inclusion of the child under the trust did not actually violate the statute against restraining alienation. Many of the cases found in the books enforcing the rule against perpetuities cannot apply to this case. The Court therefore relied on *In re Murphy's Estate,* 43 P.2d 233 (Mont. 1935) which dealt with statutory provisions similar to ours, and distinguished between the rule against perpetuities and statutory provisions. *In re Earle's Estate,* 85 A.2d 90 (Pa. 1951) on which the Court seemed to base their holding deals with the possibility of a minor living beyond the date of the trust termination and holds that the minor is at least entitled to an income for his life or until the termination of the trust. That case further holds that the possibility of his living beyond the date of the trust termination is not a controlling factor and that a court need not speculate nor then pass on what may happen if various contingencies occur. This case was similar to the instant one in facts.

Therefore in following that opinion the Court held that no statutory provision is violated by the inclusion of the last born minor child as a beneficiary under the will.

OIL AND GAS—SALE OF LAND BY COUNTY, SUBSEQUENT TO PRIOR MINERAL LEASE OF WHICH NO NOTICE WAS GIVEN TO FORMER OWNER, CONVEYS ENTIRE INTEREST TO SUBSEQUENT PURCHASER. — *Holbeck v. Hull,* District Court of the Fifth Judicial District, McKenzie County, North Dakota, Eugene A. Burdick, Judge.

Land had originally been obtained by McKenzie County from J. Y. Hull by virtue of tax title proceedings. Approximately eight years later McKenzie County executed and delivered to Thomas Dorough an oil, gas and mineral lease. Incident to the execution of this oil and gas lease, the county officials failed to transmit to the former owner a notice advising him of the proposed oil and gas lease and giving the former owner thirty days in which to effect a repurchase. (Laws 1939, Ch. 238. *Ulrich v. Amerada Petroleum Corp.*, ——N.D.——, 66 N.W.2d 397.) Dorough then executed a Transfer of Lease to the Texas Company. Thereafter, Ivan Murray made application to purchase the land from McKenzie County. Notice was given to Hull of the pending sale to Murray. Hull failed to repurchase the lands and a "County Deed to Purchase" was issued to Murray, reserving 50% of the minerals to the county. Murray thereafter brought action to quiet title, naming Hull and "all other persons unknown" as defendants. There was no appearance by any defendant and judgment was entered quieting the title of Murray. Subsequently, Murray conveyed the lands in controversy to the United States "subject to the exception of 50% of oil, gas and minerals underlying said land received by McKenzie County in its deed to Ivan Murray." Plaintiff was lessee under an oil and gas lease executed by the United States.

Plaintiff contends the United States acquired a full mineral estate in the lands in controversy. The heirs of Hull, deceased, claim the right to repurchase the leasehold estate in oil and gas because the lease issued to Dorough and held by the Texas Company is voidable so long as the required thirty day notice has not been given to the former owner. Murray claims an undivided half interest in the mineral estate by reason of the "exceptions" contained in his deed to the United States.

The Court, deciding the question of the validity of the oil and gas lease issued to Dorough and assigned to the Texas Company, *held* that the lease, voidable for failure to give notice to the former owner during the time McKenzie County owned the fee, became void when the lands were sold to Murray, a stranger to the title. The Court felt that since Hull, the former owner, could have repurchased either the mineral interest or the entire fee, the notice given to the former owner upon the sale of the entire fee to Murray was sufficient. However, in the Court's language, "There would be little justice in holding that the notice given to the former owner upon the sale of the entire fee to Murray should serve to

satisfy the requirement of notice with respect to the oil and gas lease and at the same time diminish the interest purchased by Murray. Irregularity in the sale to Dorough should not be gratuitously rewarded with the cloak of legality at the expense of Murray." Therefore the sale of lands by McKenzie County to Murray was effective to convey the entire fee to Murray, nothwithstanding the purported reservation of an undivided one half interest in oil, gas and other minerals. *Kopplin v. Burleigh County*, 77 N.D. 942, 47 N.W.2d 137, *State v. California*, 56 N.W.2d 762.

The Court, answering next the question of the effect of the exception of 50 per cent of the minerals in Murray's deed to the United States, said that the language used by Murray in the provision did not operate as a conveyance of any interest to McKenzie County. See Tiffany Real Property, 3rd ed. Sec. 974, 26 C.J.S., Deeds, Sec. 140(3); and 16 Am. Jur., Deeds, Sec. 299. Therefore, the effect of the exception depends on the intention of the grantor as gathered from the four corners of the instrument. See *Rose v. Cook*, 250 P.2d 848 (Okla.); 26 C.J.S., Deeds, Sec. 84. See also *Mitchell v. Nicholson*, 71 N.D. 521, 3 N.W.2nd 83. Considering all the circumstances, the Court concluded that "[B]y the use of the provision in controversy contained in the deed to the United States of America, Murray did not intend to except from its operation any part of the oil, gas, or other minerals." The Court thought it significant that the grantor, Murray, did not purport to make the exception in his favor, but rather to except the mineral interest supposedly retained by McKenzie County in its deed to Murray. However, as previously noted, McKenzie County "received" no mineral interest by virtue of the deed. The entire mineral interest thus passed to the plaintiff, Holbeck, under the oil and gas lease executed by the United States.