Lorings Vs. Marsh

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Appellant : Lorings

Respondent : Marsh

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Lorings v. Marsh

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APPEAL FROM THE CIRCUIT COURT FOR

THE DISTRICT OF MASSACHUSETTS

SYLLABUS

1. Where a testatrix, having children and grandchildren the issue of one of them, makes a will, in form, leaving the income of her property in trust equally between the children *for life* (saying nothing about the grandchildren), and afterwards to

charities, and on the death of one of the children issueless makes a codicil distributing the income again among the surviving children *for life* (again saying nothing about the grandchildren), and the child having issue dies in the lifetime of the testatrix, leaving these, the grandchildren of the testatrix -- and the testatrix then dies -- the omission of such testatrix to provide for her grandchildren is to be taken (especially if parol proofs, admissible by the law of the state, aid such conclusion) to have been intentional and not to have been occasioned by any accident or mistake. Hence, the case will not come within the 25th section of chapter 92 of the Revised Statutes of Massachusetts (A.D. 1860), which provides for the issue of any deceased child or children, as in cases of intestacy, "unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake."

2. Where two persons, as trustees, are invested by last will with the whole of a legal estate and are to hold it in trust to "manage, invest and reinvest the same according to their best discretion" and pay over income during certain lives, and, on their efflux, these persons or *their successors,* as trustees, are to select and appoint persons who are to be informed of the facts by the trustees and who are to distribute the capital among permanently established and incorporated institutions for the benefit of the poor, the power given to such two persons to select and appoint is a power which will survive, and on the death of one in the lifetime of the testator may he properly executed by the other.

3. By the law of Massachusetts, as administered by her courts, in a devise to charitable institutions, in form such as just above indicated, the objects of the charity are made sufficiently certain. And, as the question of such certainty is to be determined by the local law of the state, any objection of uncertainty cannot be heard here.

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The 25th section of chapter 92, of the Revised Statutes of Massachusetts, A.D. 1860 -- a reenactment, essentially of earlier statutes -- thus enacts:

"When any testator shall omit to provide in his will for any of his children, *or for the issue of any deceased child,* they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless it shall have been provided for by the testator in his lifetime, or *unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake.* "

With this statute in force, Mrs. Loring made her last will. She had living at this time a son (Josiah) who had, living, three children, Mrs. Loring's grandchildren, of course, and two daughters, one married (Mrs. Cornelia Thompson), but not having issue, and the other single, Miss Abby Loring. By her last will, Mrs. Loring left the bulk of her estate to two persons, Marsh and Guild, of Boston:

"To have and to hold the same to them *and the survivor of them,* and their and *his* heirs and assigns forever, to their own use, but in trust &c.; to hold, manage, invest and reinvest the same according to their best discretion; and to pay over one-third of the net income therefrom to my daughter, Abby, *during her life;* to pay over another third of said income to my daughter, Cornelia Thompson, *during her life;* and to pay over another third of said income to my son, Josiah, *during his life,* so that the said income shall go to *them personally,* and shall not be liable for their debts or to the control of any other person; and upon the decease of my said children severally the shares of said income which they would continue to take if living shall be retained and invested by the trustees *until the decease of my last surviving child,* and shall then, with the principal, or trust fund, be disposed of for the benefit of the poor, in the manner hereinafter provided."

The will proceeded:

"It is my will that when, upon the decease of all my children,

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the trust fund is to be disposed of as aforesaid, the said Marsh *and* Guild, or *their successors, as trustees,* shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the

payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect, and my gift may be made most productive of benefit to the poor; and that thereupon the said trust fund shall be disposed of and paid over, in accordance with the determination of the said gentlemen, certified by them in writing, to the trustees."

The daughter, Mrs. Thompson, having died during the life of the testatrix, Mrs. Loring made a codicil to her will, which, after reciting the former disposition of the income, proceeded:

"I revoke so much of my will as provides for the said division of the said income, and its payment in three parts, and order and direct that the said income be paid, under the conditions and provisions in my said will contained, to my daughter Abby and my son Josiah, they me surviving, in equal shares during their joint *lives,* and one-half thereof to the survivor of them, during his or her *life,* it being my intention that my said two children shall have the whole of the said income in equal shares during their joint *lives* if they shall both survive me, and the survivor of them one-half of the said income *during his or her life.* "

After this codicil was made (the testatrix, however, yet living), the son, Josiah, died, leaving three children. Soon afterwards, July 16, 1862, Guild, one of the trustees named in the will, died, and last of all, about four months after this, Mrs. Loring herself. Guild, having thus died in the lifetime of the testatrix, Marsh, the surviving trustee, appointed the committee of three persons whom the testatrix had designated as the persons to determine the charitable institutions among whom her estate should go, and the committee named them.

Miss Abby Loring, the single daughter of the testatrix, having died soon after her mother, unmarried and intestate,

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the three children of Josiah Loring, these being the sole heirs-at-law of Mrs. Loring, the testatrix, now filed their bill against Marsh and others, to have the estate, or their share of it.

The grounds of the claim as made here, and in the court below, were:

1. That the omission of Mrs. Loring was "unintentional, and occasioned by accident or mistake," and the case so within the statute.

2. That the power conferred by the will upon the trustees, Marsh and Guild, to appoint persons to designate the objects of the testatrix's charity had not been and could not, owing to the death of Guild, in Mrs. Loring's lifetime, be legally executed.

3. That the devise to the charitable uses was void because, from defect of capacity to appoint, they were now uncertain and incapable of being ascertained.

In accordance with the law of Massachusetts, [Footnote 1] oral evidence was taken on both sides as to the intention of Mrs. Loring to exclude her son's children. On the one hand, there was the positive testimony of a girl or young woman, named Pratt, who stated that she had lived in Mrs. Loring's family for over seven years, as a "companion" to Mrs. Loring, but whose services, Mr. Thompson, the son-in-law of Mrs. Loring, testified were purely servile. This person, who the record showed had been called by Mrs. Loring as a witness to her will, testified that she had often, very often, heard Mrs. Loring say that her son's children should not derive any benefit from her estate after her death; that this was said both when the will and after the will and codicil were made, the cause being a dislike which she had of her son's wife's family. On the other hand, there was testimony by the same son-in-law that Mrs. Loring exhibited no dislike to her grandchildren, the complainants, and never expressed to him any intention of the sort above mentioned. But beyond this there was no attempt to impeach the testimony

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of the first witness, and her character appeared to be fair.

The court below dismissed the bill.

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MR. JUSTICE NELSON delivered the opinion of the Court.

The first question in the case arises on the following provision of a statute of the state of Massachusetts:

"When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless it shall have been provided for by the testator in his lifetime, or *unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake.* "

As it is admitted that no provision was made by the testatrix in her lifetime for the issue of the deceased son, the question turns on the remaining clause of the statute, and, so far as regards an examination of it with reference to the terms of the will, depends on facts, which may be stated as follows: at the date of the will, in which a life estate was given to the son, his children were living, but were not noticed therein by the testatrix, nor in the codicil of the 14th July the year following, in which the life income of the son was increased.

There is therefore an entire omission to make any provision for the issue, or even to notice them in the will, which brings the complainants directly within the enacting clause of this statute and entitles them to a share of the estate the same as if the testatrix had died intestate, unless, in the language of the act, "it shall appear that such omission was intentional, and not occasioned by any accident or mistake." Whether or not the omission was intentional or by mistake may be ascertained from a careful perusal of the terms of the will or by parol. This is the settled construction of the statute by several decisions in the courts of Massachusetts, where it is said that whenever it appears the testator has, through forgetfulness or mistake, omitted to bestow anything upon the child or grandchild, the legislature intended to effect that which it is highly reasonable to believe, but for such forgetfulness, he would himself have done. And speaking of an examination of the will as bearing upon the subject, it is observed that whenever it may fairly be presumed

from the tenor of the will or from any clause in it that the testator intentionally omitted to give a legacy or make a devise to a child or grandchild (whose parent is dead), the court will not interfere.

In the present case it is claimed that by a perusal of the will or by the parol proof or both it satisfactorily appears that the omission by the testatrix was intentional, so as to cut off the grandchildren, the complainants.

The grounds upon which this is urged on the part of defendants are:

(1) That the grandchildren were living at the time of the execution of the will and of the codicil, as was also their father, for whom particular provision was made out of the estate. It is insisted that the testatrix, in settling upon the portion thus devised to the father on both of these occasions, must have had present to her mind the grandchildren; that it is not natural or reasonable to suppose she could on each of them have deliberately and solemnly made provision for the father without taking into consideration the state and condition of his family, which then consisted of his wife and the three grandchildren, and in confirmation of this view, cases are referred to where the gift was to the grandchildren, omitting the parent, and the mere statement in the will that the grandchildren were the children of the son or daughter omitted was held conclusive that the son or daughter was not forgotten, but intentionally omitted -- such as a gift "to the children of her son Edward" -- or "to grandchildren of his daughter Sarah." [Footnote 2]

(2) The studied exclusion of the grandchildren, then living, by limiting the provision made for the father to a life estate, and, at his death, giving it over to charitable uses -- and repeating the same limitation in the following year on the execution of the codicil. In view of these circumstances and this posture of the case, it is insisted that the testatrix must have had called to her mind the children of the son, and also the further fact that, in the ordinary course of

nature, the children, or some of them, would survive the father, notwithstanding all which she limited the provision for the father to a life estate and devised the remainder over from the children.

It has been argued that the time to which the question of omission has reference is the time of Mrs. Loring's decease. This, in a general sense, may be true, because till then it was possible for her to make provision in a codicil, or by a new will, for the grandchildren. It could not, therefore, be absolutely known before her decease that such provision would not be made. But whether the omission was intentional or by mistake is not confined to this period; on the contrary, when the question is answered from a perusal of the will, it is necessarily limited to the time of its execution. And even when it depends on oral proof, that proof is received for the purpose of ascertaining the mind of the testatrix at the same period. For it is the state of her mind at the time of the execution, generally speaking, that is to be looked to in the contemplation of the statute, with a view to determine whether the omission was intentional, or by mistake.

This case has been likened in the argument to that of a child born after the making of the will, because the grandchildren only became the issue of a deceased son after the death of their father, and which occurred subsequent to the execution of the will and codicil. Whether this be so or not cannot change the aspect of the case or the principles that must govern it.

Undoubtedly, in the case of a son born after the making of the will and before the death of the father, the omission to provide for him cannot be known till the death of the father, for till then it was competent for him to make the suitable provision. This was the case of *Bancroft v. Ives.* [Footnote 3] But even in that case it was conceded to be competent for the adverse party to prove that the omission was intentional, and evidence was received and examined on the point. It

was held to be insufficient for the purpose. But, in the case of *Prentiss v. Prentiss,* [Footnote 4] it was held that a child born after the will and before the decease of

the father was intentionally omitted, as appeared plainly on the face of the instrument. It is doubtless more difficult to establish that the omission was intentional in the case of children born after the will than if born before and living at its date. But it would seem from the course of decisions that this is the only distinction, if it be one, in the statute.

Our conclusion on this branch of the case is that upon a perusal of the provisions of the will, regard being had to the course of decision under the statute in the courts of the state, it sufficiently appears, especially in connection with the oral proof, that the omission to provide for the issue of the deceased son in the will was intentional, and not by accident or mistake.

The next question in the case is whether or not the power conferred by the testatrix upon the trustees, L. H. Marsh and S. E. Guild, to appoint three or more persons to designate the objects of her charities under the will, has been legally executed.

It is insisted on the part of the complainants that the power of appointment is a naked authority to appoint persons who were to act for the testatrix in choosing the objects of her bounty, and to make known to them such facts as the two trustees should deem proper to guide or influence them in the selection; that it was a personal power which looked to the merit and qualification of the individuals for the discharge of the particular duty; and that being a naked power, the survivor was incompetent to execute it.

If the premises are well founded, the conclusion is undeniable. [Footnote 5]

We are satisfied, however, that this is a mistaken view of the authority conferred on the trustees. They were invested

with the whole of the legal estate, and were to hold the same in trust to "manage, invest and reinvest the same according to their best discretion," and pay over the income to the three children of the testatrix during their lives, and, on their

decease, the said Marsh and Guild, or their successors, as trustees, shall select and appoint the three persons &c.;, and thereupon the said trust fund shall be disposed of and paid over in accordance with the determination of the said persons, as certified by them in writing. And then direction is given in the will to the trustees to sell and convey any and all the real estate which may be in their hands, at their discretion, for the benefit of the charities.

Now it is quite clear from this reference to the will that the trust conferred upon Marsh and Guild could not have been intended as a personal trust looking to the fitness of the donees of the power, as it is conferred upon them and their successors, and, as the execution of the trust for charitable uses was postponed by the terms of the will until after the decease of the three children of the testatrix, it was natural and reasonable to have supposed that it would not take place in the lifetime of the trustees named, but would descend to their successors.

But what is more decisive of the question is that inasmuch as the trustees are invested with the legal estate in order to enable them to discharge the various trusts declared, it is well settled that the power conferred is a power coupled with an interest, which survives on the death of one of them, and may be executed by the survivor. (*See* the authorities above referred to.) It is not necessary that the trustees should have a personal interest in the trust; it is the possession of the legal estate, or a right *virtute officii* in the subject over which the power is to be exercised, that makes an interest, which, when coupled with the power, the latter survives. A trust, therefore, will survive when in no way beneficial to the trustee.

We have said the trustees were invested with the legal estate for the purpose of enabling them to perform the various trusts devolved, such as managing the estate, investing

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and reinvesting the funds belonging to it, paying over the income to the children during their lives, converting the real estate into personal, and, among others, the selection and appointment of the committee of gentlemen who were to designate

the donees of the charity. This was one of the incidental trusts or duties devolved upon them by the testatrix, as trustees of the estate, upon whom she had conferred such large powers over it, and which, on the death of Guild, survived with the other trusts to the co-trustee. No well grounded distinction can be made between these trusts. If the power survives as to one of them it survives as to all, as it is apparent on the face of the will that the trustees were to act in the same capacity in the execution of all of them.

As it respects this devise to charitable institutions, there can be no doubt upon the law of Massachusetts, as habitually administered in her courts, but that the objects of the bounty are made sufficiently certain by the mode pointed out in the will, and as the question is to be determined by the local law of the state, there is an end of the objection.

Decree affirmed.

[Footnote 1]

Wilson v. Fosket, 6 Metcalf 400; *Converse v. Wales,* 4 Allen 512.

[Footnote 2]

Church v. Crocker, 3 Mass. 17; *Wild v. Brewer,* 2 *id.* 570. *Wilder v. Goss,* 14 *id.* 357.

[Footnote 3]

3 Gray 367.

[Footnote 4]

11 Allen 47.

[Footnote 5]

Peter v. Beverly, 10 Pet. 564; 2 Story's Equity 1062, and cases.