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Article 19

Wills--Administrator C.T.A.--Who May Qualify (Matter of Murphy, 304 N.Y. 232 (1952))

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such an organization, where the enforcement of a substantive right under the United States Constitution is involved.²³ The English courts have taken a similar view and have held that a union may be sued in its registered name.²⁴

It is submitted that the law as it stands today in New York is inequitable. An organization the size of a labor union, which occupies such an important place in our economy, should be made to answer for tortious acts committed in its name, without being permitted to raise, as a condition precedent to its liability, the establishment of the individual responsibility of each of its members. If the courts in their capacity as interpreters of the law feel it impossible so to construe the statute as it presently exists, it would seem desirable that the law be changed.



WILLS — ADMINISTRATOR C.T.A. — WHO MAY QUALIFY. — Testator had named his widow sole beneficiary and executrix. Prior to probate of the will, his widow died, naming a bank her executor. The bank, however, declined to administer testator's estate. Testator's sister, claiming to be his next of kin within the meaning of the Surrogate's Court Act, although not entitled to share in his estate,¹ petitioned for letters of administration c.t.a.² In denying

private statutes for the better government of the corporation' Yet these associations lack that first indicium of corporateness, a charter. They cannot, in most jurisdictions, be sued in their own names."

²¹ See *United Mine Workers v. Coronado Coal Co.*, *supra* note 20 at 388. "It would be unfortunate if an organization with as great power as this International Union has . . . in a wide territory . . . could assemble its assets to be used . . . free from liability for injuries [resulting from their] . . . torts . . ."

²² *United Mine Workers v. Coronado Coal Co.*, *supra* note 20; see Fahy, *supra* note 2.

²³ FED. R. CIV. P. 17(b).

²⁴ *Taff Vale Ry. v. Amalgamated Society of Ry. Servants*, [1901] A. C. 426. In 1906, the Trades Disputes Act was passed, providing that "(1) An action against a trade union . . . or against any members or officials thereof . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

"(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871 . . . except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute." *Trades Disputes Act, 1906*, 6 Edw. VII, c. 47, § 4. See cases construing this statute cited in Note, 27 A. L. R. 786, 797 (1923).

¹ N. Y. DEC. EST. LAW § 83(4). Since the estate was valued at less than \$10,000.00, decedent's sister was not entitled to participate under this statute.

² An administrator c.t.a. (*i.e.*, with the will annexed) is a person appointed

petitioner the letters, the court reversed the decision of the Appellate Division and held that within the meaning of the Surrogate's Court Act, "next of kin" are those actually entitled to share in the estate.³ *Matter of Murphy*, 304 N. Y. 232, 106 N. E. 2d 906 (1952).

The right to administer an estate does not arise because of interest in the estate or relationship *per se*, but rather interest and relationship are made relevant by statute.⁴ In New York, the right has always been conferred upon persons interested in the estate, in the belief that their economic interest and the bond of consanguinity would induce them to administer in a wiser fashion than one without this interest.⁵ The statutory provision regulating the granting of letters of administration c.t.a. stipulates that, except as to the order of priority it enumerates, the requirements of the section governing administration in case of intestacy shall apply.⁶ Though the order of priority among the various classes of persons entitled to letters of administration c.t.a. and in the event of intestacy is mandatory,⁷ the Surrogate may exercise discretion *within* certain classes entitled to letters of administration c.t.a.⁸

The New York statute provides categories of persons entitled to letters of administration c.t.a., among whom are the "next of kin."⁹ Early American decisions interpreted this phrase to mean a person who is a distributee.¹⁰ Later, in *Lathrop v. Smith*,¹¹ the New York

by the surrogate "[i]f no person is named as executor in the will or selected by virtue of a power contained therein or if at any time there is no executor or administrator with the will annexed qualified to act . . ." N. Y. Surr. Ct. Act § 133 (1952).

³ The court declared the necessity of construing the N. Y. Surr. Ct. Act §§ 118, 133, together with the N. Y. Dec. Est. Law §§ 47-c, 83.

⁴ See *Matter of D'Agostino*, 88 Misc. 371, 375, 151 N. Y. Supp. 957, 959 (Surr. Ct. 1914).

⁵ See *Matter of Campbell*, 192 N. Y. 312, 315, 85 N. E. 392, 393 (1908).

⁶ N. Y. Surr. Ct. Act § 133. "Except as to the right of priority as provided in this section, the provisions of section *one hundred and eighteen* of this act apply to an application for letters of administration with the will annexed." This has been construed as applying only to the next of kin. *Matter of Thompson*, 186 Misc. 528, 60 N. Y. S. 2d 508 (Surr. Ct. 1938). *Contra*: *Matter of Baume*, 160 Misc. 563, 290 N. Y. Supp. 981 (Surr. Ct. 1936).

⁷ N. Y. Code Civ. Proc. § 2660, construed in *Matter of Campbell*, *supra* note 5; *Matter of Wolff*, 161 App. Div. 255, 146 N. Y. Supp. 495 (1st Dep't 1914); N. Y. Surr. Ct. Act § 118 (successor to above-mentioned § 2660), construed in *Matter of Weitz*, 69 N. Y. S. 2d 840 (Surr. Ct. 1944); *Matter of Karp*, 163 Misc. 855, 298 N. Y. Supp. 903 (Surr. Ct. 1937). See *Matter of Ireland*, 72 N. Y. S. 2d 248, 253 (Surr. Ct. 1947) (construction of Surr. Ct. Act § 133).

⁸ *Matter of Krackenberger*, 86 N. Y. S. 2d 408 (Surr. Ct. 1949); *Matter of Thompson*, *supra* note 6.

⁹ N. Y. Surr. Ct. Act § 133(4). "If there is no such legatee or none who will accept, then to the husband, or wife, or to one or more of the *next of kin*, or to one or more of the heirs or devisees, so qualified." (Emphasis added.)

¹⁰ *Public Administrator v. Peters*, 1 Bradf. 100 (N. Y. 1849). See *Public Administrator v. Hughes*, 1 Bradf. 125, 127 (N. Y. 1850).

¹¹ 24 N. Y. 417, 35 Barb. 64 (1862).

Court of Appeals ruled that all persons who *might* be entitled to participate in the distribution of the estate in the event of intestacy have a right to letters of administration in the order enumerated by statute. Over a period of time subsequent to the *Lathrop* case, several changes were made in the wording of the statute.¹² This state of flux was reflected in decisional law, since some courts followed *Lathrop v. Smith*,¹³ while others continued to adhere to the prior rule.¹⁴ In a 1914 opinion,¹⁵ Judge Cardozo stated that it was not necessary that a next of kin actually share in the distribution of the estate; but he refused to state his reasons, asserting that a statute which was to become effective after the decision would produce a *new* rule and render obsolete the *Lathrop* decision.

This 1914 amendment substituted the words "entitled to take or share in the (decendent's) personal property" for the phrase "entitled to succeed."¹⁶ The reported decisions of lower courts have recognized this statutory change by consistently holding that "next of kin" meant one who would *actually* share in the estate.¹⁷ In 1951, the First Department of the Appellate Division, in *Matter of Murphy*,¹⁸ ignored these rulings, and adhered to the construction established by the Court of Appeals in the *Lathrop* case. The *Murphy* decision would have created confusion on this point of law, inasmuch as it was a binding precedent on the Surrogate's Courts of the Department, while the other three departments could continue to rule as they had since the 1914 amendment became effective.

In reversing the decision of the First Department, the Court of Appeals upheld the policy followed in the other departments. Relying on the reasoning of the courts subsequent to the 1914 amendment, it held that by "next of kin" was meant one who would *actually* share in the distribution of the estate.

¹² In 1863 that statute relating to letters of administration was amended to read: "This section shall not be construed to authorize the granting of letters to any relative not entitled to succeed to the personal estate of the deceased as his next of kin at the time of his decease." Laws of N. Y. 1863, c. 362, § 3. In 1867 this amendment was deleted. Laws of N. Y. 1867, c. 782, § 27. In 1893 the language "would be entitled to succeed to his personal property" was changed to "entitled to succeed to his personal property." Laws of N. Y. 1893, Vol. 2, c. 686, § 2660.

¹³ *Matter of Blake*, 60 Misc. 627, 113 N. Y. Supp. 944 (Surr. Ct. 1908); *Matter of Lowenstein*, 29 Misc. 722, 62 N. Y. Supp. 819 (Surr. Ct. 1899).

¹⁴ *Matter of Wolff*, 161 App. Div. 255, 146 N. Y. Supp. 495 (1st Dep't 1914); *Matter of Kroog*, 84 Misc. 676, 147 N. Y. Supp. 887 (Surr. Ct. 1914); *Matter of Seymour*, 33 Misc. 271, 68 N. Y. Supp. 638 (Surr. Ct. 1900).

¹⁵ See *Matter of D'Adamo*, 212 N. Y. 214, 218, 106 N. E. 81, 82 (1914).

¹⁶ Laws of N. Y. 1914, c. 443, § 2588. "Administration in case of intestacy must be granted to the *persons entitled to take or share in the personal property . . .*" (emphasis added).

¹⁷ *Matter of Grant*, 253 App. Div. 504, 3 N. Y. S. 2d 867 (2d Dep't 1938); *Matter of Franco*, 169 Misc. 356, 7 N. Y. S. 2d 594 (Surr. Ct. 1938); *Matter of Elder*, 87 Misc. 79, 150 N. Y. Supp. 114 (Surr. Ct. 1914).

¹⁸ 278 App. Div. 51, 103 N. Y. S. 2d 148 (1st Dep't 1951).

This is the first authoritative ruling on the definition of "next of kin" since the above mentioned amendment became effective. The result has been to check conflicting interpretations among the various departments of the Appellate Division.¹⁹



WILLS—DUPLICATE WILLS—RETENTION OF BOTH BY TESTATOR DURING HIS LIFE.—Decedent executed her will in duplicate and retained both copies. After her death, the ribbon copy was missing and only the carbon copy offered for probate. The contestant argued that, since all the executed copies were not produced, there arose a presumption of revocation of the will. In reversing a decree denying probate, the Appellate Division *held* that, since both copies were retained by the decedent, the discovery of one of them at her death is sufficient to support a jury's finding of non-revocation. *Matter of Mittelstaedt*, 280 App. Div. 163, 112 N. Y. S. 2d 166 (1st Dep't 1952).

When a *single* will has been executed and it is established that it was not within the testator's possession or control prior to his death, no presumption of revocation arises in the event that the will is missing.¹ Any such presumption would be entirely overcome by the inaccessibility of the instrument to the testator and the consequent improbability of his having destroyed it.² However, when a single will is last traced to the testator and, upon his death, cannot be found, there arises the presumption that he destroyed it *animo revocandi*.³ The disappearance is presumed intentional, in the latter case, because of the ambulatory character of the will, coupled with its availability to the testator.⁴

The presumption of revocation, in such circumstances, may be rebutted by proof that the will was ". . . in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime . . ." ⁵ The burden of such proof is on the proponent.⁶ It

¹⁹ A recent amendment substituted "persons interested in the estate" for "next of kin." Laws of N. Y. 1952, c. 350, § 133 (effective Sept. 1, 1952). By definition, "next of kin" are included among "persons interested in the estate." N. Y. SURR. CT. ACT § 314(10).

¹ *Schultz v. Schultz*, 35 N. Y. 653 (1866).

² See *id.* at 654.

³ *Matter of Staiger*, 243 N. Y. 468, 154 N. E. 312, reversing 217 App. Div. 743, 216 N. Y. Supp. 920 (1st Dep't 1926); *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442 (1901), affirming 53 App. Div. 105, 65 N. Y. Supp. 879 (1st Dep't 1900); *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110 (1888); *accord*, *Matter of Cunnion*, 201 N. Y. 123, 94 N. E. 648 (1911).

⁴ See *Matter of Kennedy*, *supra* note 3 at 168, 60 N. E. at 443; *Betts v. Jackson*, 6 Wend. 173, 181 (N. Y. 1830).

⁵ N. Y. SURR. CT. ACT § 143.

⁶ *Matter of Staiger*, 243 N. Y. 468, 154 N. E. 312, reversing 217 App.