

**IN THE MATTER OF THE PETITION TO APPROVE THE WILL OF
LEODEGARIA JULIAN. FELIX BALANAY, JR., PETITIONER, VS. HON.
ANTONIO M. MARTINEZ, JUDGE OF THE COURT OF FIRST INSTANCE
OF DAV...**

G.R. No. L-39247. June 27, 1975

Ponente: AQUINO, J.

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AQUINO, J.:

Felix Balanay, Jr. appealed by certiorari from the order of the Court of First Instance of Davao dated February 28, 1974, declaring illegal and void the will of his mother, Leodegaria Julian, converting the testate proceeding into an intestate proceeding and ordering the issuance of the corresponding notice to creditors (Special Case No. 1808). The antecedents of the appeal are as follows:

Leodegaria Julian, a native of Sta. Maria, Ilocos Sur, died on February 12, 1973 in Davao City at the age of sixty-seven. She was survived by her husband, Felix Balanay, Sr., and by their six legitimate Children named Felix Balanay, Jr., Avelina B. Antonio, Beatriz B. Solamo, Carolina B. Manguib, Delia B. Lanaban and Emilia B. Pabaonon.

Felix J. Balanay, Jr. filed in the lower court a petition dated February 27, 1973 for the probate of his mother's notarial will dated September 5, 1970 which is written in English. In that will Leodegaria Julian declared (a) that she was the owner of the "southern half" of nine conjugal lots (par. II); (b) that she was the absolute owner of two parcels of land which she inherited from her father (par. III) and (c) that it was her desire that her properties should not be divided among her heirs during her husband's lifetime and that their legitimes should be satisfied out of the fruits of the properties (Par. IV).

Then, in paragraph V of the will she stated that after her husband's death (he was eighty-two years old in 1973) her paraphernal lands and all the conjugal lands (which she described as "my properties") should be divided and distributed in the manner set forth in that part of her will. She devised and partitioned the conjugal lands as if they were all owned by her. She disposed of in the will her husband's one-half share of the conjugal assets.[*]

Felix Balanay, Sr. and Avelina B. Antonio opposed the probate of the will on the grounds of lack of testamentary capacity, undue influence, preterition of the husband and alleged improper partition of the conjugal estate. The oppositors claimed that Felix Balanay, Jr. should collate certain properties which he had received from the testatrix.

Felix Balanay, Jr., in his reply to the opposition, attached thereto an affidavit of Felix Balanay, Sr. dated April 18, 1973 wherein he withdrew his opposition to the probate of the will and affirmed that he was interested in its probate. On the same date Felix Balanay, Sr. signed an instrument captioned "Conformation (sic) of Division and Renunciation of Hereditary Rights" wherein he manifested that out of respect for his wife's will he "waived and renounced" his hereditary rights in her estate in favor of their six children. In that same instrument he confirmed

the agreement, which he and his wife had perfected before her death, that their conjugal properties would be partitioned in the manner indicated in her will.

Avelina B. Antonio, an oppositor, in her rejoinder contended that the affidavit and "conformation" of Felix Balanay, Sr. were void. The lower court in its order of June 18, 1973 "denied" the opposition and reset for hearing the probate of the will. It gave effect to the affidavit and conformity of Felix Balanay, Sr. In an order dated August 28, 1973 it appointed its branch clerk of court as special administrator of the decedent's estate.

Mrs. Antonio moved for the reconsideration of the lower court's order of June 18, 1973 on the grounds (a) that the testatrix illegally claimed that she was the owner of the southern half of the conjugal lots and (b) that she could not partition the conjugal estate by allocating portions of the nine lots to her children. Felix Balanay, Jr., through his counsel, Hermenegildo Cabrerros, opposed that motion. The lower court denied it in its order of October 15, 1973.

In the meanwhile, another lawyer appeared in the case. David O. Montaña, Sr., claiming to be the lawyer of petitioner Felix Balanay, Jr. (his counsel of record was Atty. Cabrerros), filed a motion dated September 25, 1973 for "leave of court to withdraw probate of alleged will of Leodegaria Julian and requesting authority to proceed by intestate estate proceeding." In that motion Montaña claimed to be the lawyer not only of the petitioner but also of Felix Balanay, Sr., Beatriz B. Solamo, Carolina B. Manguib and Emilia B. Pabaonon.

Montaña in his motion assailed the provision of the will which partitioned the conjugal assets or allegedly effected a compromise of future legitimes. He prayed that the probate of the will be withdrawn and that the proceeding be converted into an intestate proceeding. In another motion of the same date he asked that the corresponding notice to creditors be issued.

Avelina B. Antonio and Delia B. Lanaban, through Atty. Jose B. Guyo, in their comments dated October 15, 1973 manifested their conformity with the motion for the issuance of a notice to creditors. They prayed that the will be declared void for being contrary to law and that an intestacy be declared.

The lower court, acting on the motions of Atty. Montaña, assumed that the issuance of a notice to creditors was in order since the parties had agreed on that point. It adopted the view of Attys. Montaña and Guyo that the will was void. So, in its order of February 28, 1974 it dismissed the petition for the probate, converted the testate proceeding into an intestate proceeding, ordered the issuance of a notice to creditors and set the intestate proceeding for hearing on April 1 and 2, 1974. The lower court did not abrogate its prior orders of June 18 and October 15, 1973. The notice to creditors was issued on April 1, 1974 and published on May 2, 9 and 16 in the Davao Star in spite of petitioner's motion of April 17, 1974 that its publication be held in abeyance.

Felix Balanay, Jr., through a new counsel, Roberto M. Sarenas, in a verified motion dated April 15, 1974, asked for the reconsideration of the lower court's order of February 28, 1974 on the ground that Atty. Montaña had no authority to withdraw the petition for the allowance of the will. Attached to the motion was a copy of a letter dated March 27, 1974 addressed to Atty. Montaña and signed by Felix Balanay, Jr., Beatriz V. Solamo, Carolina B. Manguib and Emilia B. Pabaonon, wherein they terminated Montaña's services and informed him that his withdrawal of the petition for the probate of the will was without their consent and was contrary to their repeated reminder to him that their mother's will was "very sacred" to them.

Avelina B. Antonio and Delia B. Lanaban opposed the motion for reconsideration. The lower court denied the motion in its order of June 29, 1974. It clarified that it declared the will void on the basis of its own independent assessment of its provisions and not because of Atty. Montaña's arguments.

The basic issue is whether the probate court erred in passing upon the intrinsic validity of the will, before ruling on

its allowance or formal validity, and in declaring it void.

We are of the opinion that in view of certain unusual provisions of the will, which are of dubious legality, and because of the motion to withdraw the petition for probate (which the lower court assumed to have been filed with the petitioner's authorization), the trial court acted correctly in passing upon the will's intrinsic validity even before its formal validity had been established. The probate of a will might become an idle ceremony if on its face it appears to be intrinsically void. Where practical considerations demand that the intrinsic validity of the will be passed upon, even before it is probated, the court should meet the issue (*Nuguid vs. Nuguid*, 64 O.G. 1527, 17 SCRA 449. Compare with *Surnilang vs. Ramagosa*, L-23135, December 26, 1967, 21 SCRA 1369; *Cacho vs. Udan*, L-19996, April 30, 1965, 13 SCRA 693).

But the probate court erred in declaring in its order of February 28, 1974 that the will was void and in converting the testate proceeding into an intestate proceeding notwithstanding the fact that in its order of June 18, 1973 it gave effect to the surviving husband's conformity to the will and to his renunciation of his hereditary rights which presumably included his one-half share of the conjugal estate.

The rule is that "the invalidity of one of several dispositions contained in a will does not result in the invalidity of the other dispositions, unless it is to be presumed that the testator would not have made such other dispositions if the first invalid disposition had not been made" (Art. 792, Civil Code). "Where some of the provisions of a will are valid and others invalid, the valid parts will be upheld if they can be separated from the invalid without defeating the intention of the testator or interfering with the general testamentary scheme, or doing injustice to the beneficiaries" (95 C.J.S. 873).

The statement of the testatrix that she owned the "southern half" of the conjugal lands is contrary to law because, although she was a coowner thereof, her share was inchoate and proindiviso (Art. 143, Civil Code; *Madrigal and Paterno vs. Rafferty and Concepcion*, 38 Phil. 414). But that illegal declaration does not nullify the entire will. It may be disregarded.

The provision of the will that the properties of the testatrix should not be divided among her heirs during her husband's lifetime but should be kept intact and that the legitimes should be paid in cash is contrary to article 1080 of the Civil Code which reads:

"ART. 1080. Should a person make a partition of his estate by an act inter vivos, or by will, such partition shall be respected, insofar as it does not prejudice the legitime of the compulsory heirs.

"A parent who, in the interest of his or her family, desires to keep any agricultural, industrial, or manufacturing enterprise intact, may avail himself of the right granted him in this article, by ordering that the legitime of the other children to whom the property is not assigned, be paid in cash. (1056a)"

The testatrix in her will made a partition of the entire conjugal estate among her six children (her husband had renounced his hereditary rights and his one-half conjugal share). She did not assign the whole estate to one or more children as envisaged in article 1080. Hence, she had no right to require that the legitimes be paid in cash. On the other hand, her estate may remain undivided only for a period of twenty years. So, the provision that the estate should not be divided during her husband's lifetime would at most be effective only for twenty years from the date of her death unless there are compelling reasons for terminating the coownership (Art. 1083, Civil Code).

Felix Balanay, Sr. could validly renounce his hereditary rights and his one-half share of the conjugal partnership (Arts. 179[1] and 1041, Civil Code) but insofar as said renunciation partakes of a donation of his hereditary rights and his one-half share in the conjugal estate (Art. 1050[1], Civil Code), it should be subject to the limitations prescribed in articles 750 and 752 of the Civil Code. A portion of the estate should be adjudicated to the widower

for his support and maintenance. Or at least his legitime should be respected.

Subject to the foregoing observations and the rules on collation, the will is intrinsically valid and the partition therein may be given effect if it does not prejudice the creditors and impair the legitimes. The distribution and partition would become effective upon the death of Felix Balanay, Sr. In the meantime, the net income should be equitably divided among the children and the surviving spouse.

It should be stressed that by reason of the surviving husband's conformity to his wife's will and his renunciation of his hereditary rights, his one-half conjugal share became a part of his deceased wife's estate. His conformity had the effect of validating the partition made in paragraph V of the will without prejudice, of course, to the rights of the creditors and the legitimes of the compulsory heirs.

Article 793 of the Civil Code provides that "property acquired after the making of a will shall only pass thereby, as if the testator had possessed it at the time of making the will, should it expressly appear by the will that such was his intention". Under article 930 of the Civil Code "the legacy or devise of a thing belonging to another person is void, if the testator erroneously believed that the thing pertained to him. But if the thing bequeathed, though not belonging to the testator when he made the will, afterwards becomes his, by whatever title, the disposition shall take effect."

In the instant case there is no doubt that the testatrix and her husband intended to partition the conjugal estate in the manner set forth in paragraph V of her will. It is true that she could dispose of by will only her half of the conjugal estate (Art. 170, Civil Code) but since the husband, after dissolution of the conjugal partnership, had assented to her testamentary partition of the conjugal estate, such partition has become valid, assuming that the will may be probated.

The instant case is different from the *Nuguid* case, *supra*, where the testatrix instituted as heir her sister and pre-terited her parents. Her will was intrinsically void because it preterited her compulsory heirs in the direct line. Article 854 of the Civil Code provides that "the preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator, shall annul the institution of heir; but the devises and legacies shall be valid insofar as they are not inofficious." Since the preterition of the parents annulled the institution of the sister of the testatrix and there were no legacies and devises, total intestacy resulted (Art. 960 [2] Civil Code).

In the instant case, the preterited heir was the surviving spouse. His preterition did not produce intestacy. Moreover, he signified his conformity to his wife's will and renounced his hereditary rights.

It results that the lower court erred in not proceeding with the probate of the will as contemplated in its uncanceled order of June 18, 1973. Save in an extreme case where the will on its face is intrinsically void, it is the probate court's duty to pass first upon the formal validity of the will. Generally, the probate of the will is mandatory (Art. 838, Civil Code; *Guevara vs. Guevara*, 74 Phil. 479 and 98 Phil. 249; *Fernandez vs. Dimagiba*, L-23638, October 12, 1967, 21 SCRA 428).

As aptly stated by Mr. Justice Barredo, "the very existence of a purported testament is in itself *prima facie* proof that the supposed testator has willed that his estate should be distributed in the manner therein provided, and it is incumbent upon the state that, if legally tenable, such desire be given effect independent of the attitude of the parties affected thereby" (*Resolution, Vda. de Precilla, vs. Narciso*, L-27200, August 18, 1972, 46 SCRA 538, 565).

To give effect to the intention and wishes of the testatrix is the first and principal law in the matter of testaments *Dizon-Rivera vs. Dizon*, L-24561, June 30, 1970, 33 SCRA 554, 561). Testacy is preferable to intestacy. An

interpretation that will render a testamentary disposition operative takes precedence over a construction that will nullify a provision of the will (Arts. 788 and 791, Civil Code).

Testacy is favored. Doubts are resolved in favor of testacy especially where the will evinces an intention on the part of the testator to dispose of practically his whole estate. So compelling is the principle that intestacy should be avoided and that the wishes of the testator should prevail that sometimes the language of the will can be varied for the purpose of giving it effect (*Austria vs. Reyes*, L-23079, February 27, 1970, 31 SCRA 754,762).

As far as is legally possible, the expressed desire of the testator must be followed and the dispositions of the properties in his will should be upheld (*Estorque vs. Estorque*, L-19573, June 30, 1970, 33 SCRA 540, 546).

The law has a tender regard for the wishes of the testator as expressed in his will because any disposition therein is better than that which the law can make (*Castro vs. Bustos*, L-25913, February 28, 1969, 27 SCRA 327, 341).

Two other errors of the lower court may be noticed. It erred in issuing a notice to creditors although no executor or regular administrator has been appointed. The record reveals that it appointed a special administrator. A notice to creditors is not in order if only a special administrator has been appointed. Section 1, Rule 86 of the Rules of Court, in providing that "immediately after granting letters of testamentary or of administration, the court shall issue a notice requiring all persons having money claims against the decedent to file them in the office of the clerk of said court" clearly contemplates the appointment of an executor or regular administrator and not that of a special administrator.

It is the executor or regular administrator who is supposed to oppose the claims against the estate and to pay such claims when duly allowed (Sec. 10, Rule 86 and sec. 1, Rule 88, Rules of Court).

We also take this occasion to point out that the probate court's appointment of its branch clerk of court as special administrator (p. 30, Rollo) is not a salutary practice because it might engender the suspicion that the probate Judge and his clerk of court are in cahoots in milking the decedent's estate. Should the branch clerk of court commit any abuse or devastation in the course of his administration, the probate Judge might find it difficult to hold him to a strict accountability. A court employee should devote his official time to his official (duties and should not have as a sideline the administration of a decedent's estate.

WHEREFORE, the lower court's orders of February 28 and June 29, 1974 are set aside and its order of June 18, 1973, setting for hearing the petition for probate, is affirmed. The lower court is directed to conduct further proceedings in Special Case No. 1808 in consonance with this opinion. Costs against the private respondents.

SO ORDERED.

Fernando, (Chairman), Barredo, Antonio, and Concepcion, Jr. JJ., concur.

[*] The pertinent provisions of the will are as follows:

"II. That I am the absolute owner of the southern half of the following conjugal properties which I acquired during my married life with my husband, Felix Balanay, Sr., namely: (Here follows an enumeration of mine lots).

"III. I am the absolute owner of the following paraphernal properties which I inherited from my deceased father, Cecilio Julian, namely: (Here follows a description of two lots).

"IV. It is my desire and I direct that in the interest of my family, my properties shall not be divided among my heirs during the lifetime of my husband, Felix Balanay, Sr. but should be kept intact. The respective legitimes

of my husband and my children should be paid in cash out of the proceeds of sale of the produce and rents derived from said properties.

"V. After the death of my husband, Felix Balanay, Sr., my properties shall be divided and distributed in the manner as follows:" (There follows as partition of the nine conjugal lots and the two paraphernal lots. The testatrix divided among her six children not only her two paraphernal lots, one of which she devised to Emilia Pabaonon and the other lot to Felix Balanay, Jr., but also the nine conjugal lots. She did not restrict the partition to her one-half conjugal share but included her husband's one-half share.).

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