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NEW JERSEY
Court of Errors and Appeals

BETWEEN

WILLIAM F. MULLIN,
Complainant-Appellant,

AND

ANNIE E. MULLIN ET AL.,
Defendants-Respondents.

On Appeal from
Chancery and
Reversal.

PETITION FOR REHEARING.

*To Honorable, The Court of Errors and Appeals in the
last resort in all causes:*

I. Your petitioner, Marie M. Rafter, one of the respondents in the above cause, shows unto your Honors that a decision has lately been filed therein in which it is decided that on account of error in the proceedings and judgment of the Court of Chancery in said cause such part of the decree therein wherein it was adjudged that said Appellant should account for the profits of the undertaking business as a part of the assets of the estate of Peter M. Mullin, deceased, and that the legatees under the will of said Peter M. Mullin (among whom was your petitioner), were entitled to share therein, must be reversed and set aside, basing its decision upon a certain alleged agreement made by and between the mother of said William F. Mullin, the

executrix of said will, and himself, under which it was claimed that he was to support, educate, clothe and otherwise maintain the minor children and the widow from the proceeds of said business, and after the youngest child had attained the age of twenty-one years the business was to be his as well as all the profits remaining after the support of the family as aforesaid.

2. Your petitioner further shows that she is aggrieved by said decision from the fact that without her knowledge or consent and during her minority a valuable right, bequeathed to her under the terms of her father's (said Peter M. Mullin) last will and testament, to wit, a share in his undertaking business under clauses of said will as follows:

Second:—I hereby give and bequeath to my children share and share alike my property of every kind and description.

Third:—I hereby direct that my business be continued for the benefit of my wife and children under the direction of my wife and brother Joseph J. Mullin.

Fourth:—I hereby appoint and constitute my wife, Annie E. Mullin and my brother Joseph J. Mullin, guardians of my children and executors of this my last will and testament, with power to sell if necessary for the best interests of my wife and children.

was taken away from her and given to the appellant. In as much as by said decision, it is held: 1. That said Annie E. Mullin had a legal right to make such an agreement, to the exclusion of the children of said testator who had reached full age; and 2. That she had a right to make said agreement without the consent of and joint action with Joseph J. Mullin.

3. Your petitioner further shows that by the second clause of said will above set forth, she took a vested interest in all the property of said testator, including

his undertaking business, and that she is advised that having vested, her interest could not be divested without proper legal procedure, and that such alleged agreement to deliver the profits of the business and the business itself to said appellant is not such legal procedure, and that her rights to said business and its profits still continue and remain to her, but that because of the aforesaid decision she is hindered and prevented from recovering and benefiting by the same.

4. Your petitioner further shows that it is settled law in this State and generally elsewhere that, where a power is given in a will to two persons to act, whether as executors or trustees or merely as individuals, such power cannot be executed by one, nor can any duty or trust so imposed upon two be validly executed by one. And your petitioner is advised that in making said alleged agreement for the conduct of the undertaking business by said executrix, even though after consultation, as alleged, with a brother of the testator and counsel, said executrix acted illegally in as much as she did not act jointly with the testator's brother, Joseph J. Mullin, and with his consent and co-operation in making of said agreement.

5. Your petitioner further shows that it is the function of an executor or trustee to protect and preserve the trust estate for the *cestui que trust*, and not to dissipate or devastate the same either by giving it as compensation for preservation and development, or otherwise disposing thereof to the disadvantage of the ultimate owner; and that an agreement which gives as wages the entire profits of the business after the support of the family, and finally the business itself, is a devastation and dissipation of the estate to the disadvantage of the remainderman. That an executor would not be permitted by law to take such compensation himself for the conduct of a business, and therefore could not do through others what he could not himself do.

6. Your petitioner further shows that said decision

in permitting said appellant to absorb said undertaking business while he was admittedly being paid to preserve the same for the benefit of the family is wholly unwarranted by the law of the State, and such judgment must necessarily proceed from grave mistake and inadvertence.

7. Your petitioner further shows that said decision is based in part upon an act of the Legislature (1906) regulating the business of undertaking and prohibiting under penalty any unlicensed person from conducting the business (*Gen'l Stats.* 5700), holding that from then on said estate of Peter M. Mullin could not legally carry on the business and hence its goodwill was ended by legislation. That such construction of the law is unwarranted, because many corporations and firms are and have been conducting such business under the names of men long dead or retired, merely having a licensed undertaker to take charge of the work and to comply with the law; and your petitioner and her counsel assumed that said law had no bearing upon this case and therefore did not prepare for argument or argue before this Court the legal effect of said act upon this case, and was taken wholly by surprise at the attitude of the Court thereon. She believes that opportunity should be given to further study said act and lay it before the Court as it bears upon this case in order to give it the proper effect, and that otherwise her rights are jeopardized without a chance to protect herself.

8. Wherefore your petitioner prays that by reason of the foregoing errors and mistakes, both of law and fact, she may be granted permission to reargue before this Court, by her counsel, the various matters hereinbefore set forth as they bear upon this case; that said decision of reversal be set aside and for nothing holden; and that she may have such other relief as the nature of the case may require and as shall be agreeable to equity.

And your petitioner as in duty bound will ever pray,
&c.

MICHAEL J. TANSEY,
Solicitor for and of Counsel with Petitioner.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.

Marie M. Rafter, of full age, being duly sworn according to law, on her oath deposes and says, that she is the petitioner in the foregoing petition named; that she has read the same and knows the contents thereof; that the statements therein contained purporting to be of her own knowledge are true, and purporting to be on information and belief she believes them to be true.

MARIE M. RAFTER.

Sworn to and subscribed before me at Newark, N. J.,
March 14, 1916.

MICHAEL A. CASTELLANO,
Attorney-at-Law of New Jersey.

