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February 23, 2001

Via Hand-Delivery

K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37219

Re: Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunication Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") for Approval for Agreement Between MLGW and A&L regarding Joint Ownership of Memphis Networx, LLC, as Amended to Substitute Memphis Broadband for A&L; Docket No.99-00909

Dear Mr. Waddell:

Enclosed you will find the original and thirteen copies of the Memorandum of Law in Support of Objection of Memphis Networx, LLC, MLGW and Memphis Broadband, LLC to the retention of evidence, filings and arguments of the IBEW in the above captioned proceeding following the IBEW's withdrawal.

Sincerely,

D. Billye Sanders

D. Billye Sanders
Waller Lansden Dortch & Davis
A Professional Limited Liability
Company

John Knox Walkup by DBS

John Knox Walkup
Wyatt, Tarrant & Combs

DBS:lmb
Enclosures
cc: Parties of Record
Ward Huddleston, Esq.
Charlotte Knight Griffin, Esq.
Jeff Bloomfield, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
APPLICATION OF MEMPHIS	)	
NETWORX, LLC FOR A CERTIFICATE OF	)	
PUBLIC CONVENIENCE AND	)	
NECESSITY TO PROVIDE INTRASTATE	)	
TELECOMMUNICATIONS SERVICES	)	DOCKET NO. 99-00909
AND JOINT PETITION OF MEMPHIS	)	
LIGHT GAS AND WATER DIVISION,	)	
A DIVISION OF THE CITY OF MEMPHIS,	)	
TENNESSEE ("MLGW") AND A&L	)	
NETWORKS-TENNESSEE, LLC ("A&L")	)	
FOR APPROVAL OF AGREEMENT	)	
BETWEEN MLGW AND A&L REGARDING	)	
JOINT OWNERSHIP OF MEMPHIS	)	
NETWORX, LLC	)	

MEMORANDUM OF LAW IN SUPPORT OF OBJECTION OF MEMPHIS NETWORX, LLC, MLGW, AND MEMPHIS BROADBAND, LLC, TO THE RETENTION OF EVIDENCE, FILINGS AND ARGUMENTS OF THE IBEW IN THIS PROCEEDING FOLLOWING THE IBEW's WITHDRAWAL FROM THIS PROCEEDING

I. Introduction

Memphis Networx, LLC ("Applicant"), and Joint Petitioners, Memphis Light, Gas & Water Division ("MLGW") and Memphis Broadband, LLC, submit this Memorandum of Law in support of their objection to the Pre-Hearing Officer's ruling that the evidence, filings and arguments of the International Brotherhood of Electrical Workers, Local 1228 ("IBEW") would be retained in the record of this proceeding following the IBEW's withdrawal from this proceeding. The Applicant

and Joint Petitioners herein address the effect of the IBEW's withdrawal from this proceeding and request the Pre-Hearing Officer to reconsider his prior ruling and amend his Order of February 9, 2001 to provide that the issues raised, evidence presented, testimony presented by or elicited from the IBEW's witnesses, filings and arguments made by the IBEW be withdrawn from the record of this proceeding.

II. Procedural History

The IBEW filed a Petition for Intervention dated April 3, 2000 in this proceeding in which, at page 2 therein, it raised concerns regarding a Memorandum of Understanding between MLGW and the IBEW governing the employment of IBEW members by MLGW. The IBEW expressed concerns regarding the effect that the outcome of this proceeding might have on "labor relations between IBEW, MLGW, and the proposed new entity," and maintained that the interest of its members "will not be adequately represented unless it is allowed to intervene." The Pre-Hearing Officer issued a lengthy Order on April 25, 2000 granting limited intervenor status to the IBEW, over the objection of the Applicant and Joint Petitioners. The IBEW subsequently sought to expand its intervention to "participate fully" in this proceeding. By Order dated May 22, 2000, the Pre-Hearing Officer granted IBEW's request, over the Applicant's and Joint Petitioners' objection, for expanded participation in the proceeding.

As an interventor, the IBEW raised issues in addition to the nine issues set forth in the Pre-Hearing Officer's Report and Recommendation, submitted testimony, cross-examined other parties' witnesses, filed briefs and documents, and

made opening and closing arguments. Subsequent to the conclusion of the Hearing before the Tennessee Regulatory Agency ("TRA"), the IBEW filed a "Motion to Withdraw and Dismiss Petition to Intervene," dated December 4, 2000, in which it stated that the sale by A&L Networks-Tennessee, LLC, of its membership interest in Memphis Networx, LLC, to Memphis Broadband, LLC, had "alleviated the concerns of the IBEW with the Application of Memphis Networx, LLC as expressed in its Petition to Intervene" and moved for "the withdrawal of" said Petition to Intervene.

The IBEW's request to withdraw was granted by the Pre-Hearing Officer at a Pre-Hearing Conference on January 29, 2001, as reflected in his Order dated February 9, 2001, at page 5 therein. As reflected in said Order, the Pre-Hearing Officer further "determined that the post-hearing brief filed by the IBEW on November 17, 2000 and the evidence presented by or elicited from the IBEW and its witnesses would remain a part of the record in this proceeding." Id. "Counsel for Memphis Networx and MLGW did not oppose IBEW's withdrawal from the case but objected to the Pre-Hearing Officer's decision to retain in the record of this proceeding all evidence and filings put forth by IBEW during the case." Id. The Applicant and Joint Petitioners were afforded the opportunity to file legal grounds for their opposition until February 23, 2001, id., at 5 & 7, and do so herein.

III. The IBEW's Withdrawal From This Proceeding Resulted In The Withdrawal Of The Issues That It Raised, The Evidence It Introduced, The Testimony Presented By Or Elicited From Its Witnesses, And The Filings And Arguments It Made.

Although there do not appear to be any reported Tennessee decisions regarding the effect of a party's withdrawal from an on-going legal proceeding, there is ample general authority and precedent from other jurisdictions which support the Applicant's and Joint Petitioners' position that IBEW's withdrawal as a party restructures this TRA proceeding as if the IBEW had not participated as a party. Thus, the Applicant and Joint Petitioners submit that the IBEW's withdrawal results in: (1) a withdrawal of the legal issues raised by the IBEW; (2) a withdrawal of the testimony presented by or elicited from the IBEW's witnesses; (3) a withdrawal of any other evidence introduced by the IBEW; and (4) a withdrawal of the filings and arguments (briefs, documents, opening and closing statements, etc.) made by the IBEW.

As stated in 6 C.J.S., "Appearances", §57 at 94 (1975) (emphasis added):

> When defendant's appearance in the cause has, with proper authority or leave, been withdrawn, this leaves the case as if no appearance had been entered, and of itself effects the withdrawal of all his pleadings therein. Accordingly, if jurisdiction has been acquired over defendant otherwise than by his appearance and pleading, a withdrawal of his appearance may result in the entry of a judgment against him by default or nil dicit, even without notice of application therefore; however, if jurisdiction has not been otherwise obtained, the withdrawal of the appearance takes away the jurisdiction of the court and it has no power to render a judgment against defendant without first acquiring jurisdiction in some other manner.

Similarly, as stated in 64 A.L.R. 2d, "Appearance-Withdrawal or Vacation of Appearance", §19 at 1451 (1959) (emphasis added): "The decisions are generally to the effect that an authorized or otherwise rightful withdrawal or vacation of the appearance of a party defendant leaves the case in the same condition as if it had never been entered. Such withdrawal or vacation carries with it all of the defendant's pleadings...". Accord, e.g., Sawyer v. Sawyer, 261 Iowa 112, 117, 152 N.W. 2d 605, 608 (1967) (stating the rule but finding no withdrawal to have been made in that case) (copy attached).

The following discussion in Smith v. Foster, 59 Ind. 595, 596-97 (1877) (copy attached), is also instructive:

> The only question in this case for our decision may be thus stated: Did the appellants, by withdrawing their appearance in this action, in the court below, withdraw also their answer under oath, denying the execution of the note in suit? If such was the legal effect of the appellants' withdrawal of their appearance in this action, then the judgment of the court below must be affirmed. This is not an open question in this court. In the case of *Carver v. Williams*, 10 Ind. 267, it was said by Perkins, J., delivering the opinion of the court, that, 'If a party appears to a suit and pleads, and then simply fails to appear at the trial, his pleadings stand. But if, after pleading, he comes and withdraws his appearance to the suit, which, by leave of the court, he may do, his pleadings go with his appearance. Without an appearance, a party can not answer in a cause. Nor can he have an answer standing where there is no appearance.'
>
> To the same effect are the cases of *Coffin v. The Evansville, etc.*, R.R. Co., 7 Ind. 413, and *Sloan v. Wittbank*, 12 Ind. 444. The doctrine of these cases has never been questioned in this court, and it meets with our full approval.

Accord Hogan v. Staley, 140 Ind. App. 635, 638, 225 N.E. 2d 582, 584 (1967) ("It is well settled that after the withdrawal of the general appearance, the case stands as if there had been no appearance.") (copy attached). C.f., 67A C.J.S., "Parties,", §67 at 793 (1978) ("The effect of an order striking out the name of a defendant is as if the defendant had never been a party, and to render the court without jurisdiction with respect to such party.").

Although the cited authorities do not distinguish between the withdrawal of an intervenor party and an original party to a legal proceeding, the principle that the withdrawal of a party effects a withdrawal of his filings, testimony, etc. has even more logical force when the withdrawn party was an intervenor. "Intervention . . . is ancillary and subordinate to a main cause of action." In re Berkan, 92 F.R.D. 382, 383 (D. P.R. 1981). Thus, in Chavis v. Whitcomb, 57 F.R.D. 32, 36 (S.D. Ind. 1972), the Court noted that "[i]ntervention contemplates an existing lawsuit and cannot be permitted to breath life into a non-existing suit." The Court accordingly found that where it had pending both a motion to dismiss the lawsuit by the defendant for lack of subject matter jurisdiction and a motion to intervene and proposed amended complaint by the proposed plaintiff, it would determine the status of the case by considering the motion to dismiss without reference to the proposed amended complaint. Id., at 34-35.

The corrollary should likewise be true: an intervenor's withdrawal from a proceeding should not result in continued consideration of the issues raised, and interests sought to be protected, by the intervenor nor of its testimony, evidence,

filings and arguments. Here, the IBEW was allowed to intervene in a proceeding based upon representations that it had legal interests at stake that "will not be adequately represented unless it is allowed to intervene." It has subsequently determined that those interests are no longer implicated or potentially impaired by the outcome of this proceeding and was allowed to withdraw. The Applicant and Joint Petitioners maintain that retaining the withdrawn intervenor's issues, testimony, evidence, filings and arguments in the record cannot be "permitted to breath life into" its non-nonexistent claims, which would be the practical result of retaining those items in the record.

IV. Summary and Conclusion

Because the withdrawal of a party "leaves the case as if no appearance had been entered," of necessity the posture and status of this proceeding must be returned, as nearly as possible, to that which it would have been had the IBEW not been allowed to intervene in the first place. The Applicant and Joint Petitioners maintain that it would be erroneous for the Pre-Hearing Officer to allow consideration of: issues raised by the IBEW; the testimony presented by or elicited from its witnesses; any other evidence it submitted; and the filings and arguments it made. Accordingly, the Applicant and Joint Petitioners reiterate their request that the Pre-Hearing Officer reconsider his prior ruling and amend the February 9, 2001 Order to provide that the enumerated items be withdrawn from the record of this proceeding and the brief filed by IBEW not be considered in the Authority's deliberations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, D. Billye Sanders, hereby certify that on this 23rd day of February , 2001, a true and correct copy of the foregoing was delivered by hand delivery, facsimile or U.S. Mail postage pre-paid to the counsel listed below.

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*261 Iowa 112, *; 152 N.W.2d 605, **;*
*1967 Iowa Sup. LEXIS 855, ****

HOWARD L. SAWYER et ux., Individually and as Assignee for their Children, Appellants, v. MERL R. SAWYER et al.; STANLEY L. DAVIS, Executor and Trustee of Estate of Doil S. Hunter, Appellees

No. 52553

Supreme Court of Iowa

261 Iowa 112; 152 N.W.2d 605; 1967 Iowa Sup. LEXIS 855

August 31, 1967

SUBSEQUENT HISTORY: [*1]** Rehearing Denied October 16, 1967

PRIOR HISTORY: Appeal from Benton District Court -- M. C. Farber, Judge.

Action in equity in four counts to set aside a trust created by the will of plaintiff's mother in the share bequeathed to him. Plaintiff appeals from denial of relief following trial.

DISPOSITION: Affirmed.

CORE TERMS: mutual, beneficiary, appearance, sister, oral agreement, terminated, irrevocable, terminate, survive, withdrawal, die, trust property, spendthrift, termination, reciprocal, vested, vest, Rules of Civil Procedure, spendthrift trust, testator, accrued, contractual, prejudged, divided equally, executor-trustee, inalienable, bequeathed, consenting, thereunder, surviving

COUNSEL: John D. Randall, of Cedar Rapids, for appellants.

D. M. Elderkin, of Cedar Rapids, for appellee Stanley L. Davis as executor and trustee of the estate of Doil S. Hunter.

JUDGES: Garfield, C. J. All Justices concur except LeGrand, J., who takes no part.

OPINIONBY: GARFIELD

OPINION: [607] [*115]** Howard L. Sawyer, oldest of four issue to survive his mother Doil S. Hunter, and his wife Hulda, brought this action in equity in four counts seeking, in effect, to set aside a trust created by the mother's will in the share bequeathed to Howard (to whom we refer as plaintiff). Defendants are Howard's two brothers, a sister and the sister's husband as executor and trustee under the will. Following trial relief was denied and plaintiff has appealed. We affirm the decision.

Briefly, count 1 of plaintiff's petition alleges his mother's will, made November 2, 1961, creating the trust, violated an oral agreement **[***2]** between her and her second husband Sam Hunter (plaintiff's stepfather) under which reciprocal wills made by them January 15, 1959, were also mutual and became irrevocable upon Sam's death February 11, 1960. The bequests to plaintiff under the earlier wills were outright, not in trust.

Count 2 alleges the trust provisions of the mother's 1961 will are so unreasonable as to be void.

Count 3 alleges the oral agreement referred to in count 1 and the earlier wills made pursuant thereto were for the benefit of plaintiff, his brothers and sister and their rights thereunder vested upon Sam's death in 1960. It is obvious that if plaintiff could not recover under count 1 no recovery may be had under count 3 since both are based on the alleged oral agreement to make the 1959 wills irrevocable upon the death of the first to die.

Finally, count 4 of the petition alleges the four children of plaintiff (all adults) have assigned to him their remainder **[*116]** interest in the trust property; in the event the court should hold such assignment did not merge in plaintiff all interests in the trust, **[**608]** plaintiff and his wife will waive the assignment and tender into court an assignment **[***3]** from them to their children of the formers' interest in the trust property so title thereto will vest in the children; in the event neither of such assignments is recognized as valid, plaintiff and his wife refuse to take under the will and consent that the interest of plaintiff may vest in the children.

The trial court held proof of the oral agreement declared upon in counts 1 and 3 was wholly insufficient; the alleged unreasonableness of the trust provisions of the mother's 1961 will affords no basis for setting them aside; the trust is a spendthrift one which the beneficiaries may not terminate as attempted here.

I. We first consider a preliminary question. Two weeks after the petition was filed in November 1964 Attorney Keith Mossman entered his appearance and filed answer for all defendants except one brother, Merl Sawyer. Four days before trial was to start in May 1966 Mr. Mossman withdrew his appearance but there was no withdrawal of the answer he had filed which denied the allegations of the original petition consisting only of the first two counts above summarized. Two days before trial Attorney D. M. Elderkin entered his appearance for the estate of Doil S. Hunter and the **[***4]** executor and trustee thereof. Thereafter plaintiff amended his petition by adding counts 3 and 4 and defendants Raymond Sawyer and his sister, as well as the executor-trustee, filed answers to the petition as amended.

At commencement of the trial plaintiff's counsel asked that since Mr. Elderkin represented only the estate and the executor-trustee, judgment be entered as against the individual defendants (two brothers and the sister) for specific performance of the alleged oral agreement for the making of mutual and irrevocable wills. Defendants were all present in court for the trial and all had answers on file. The court reserved ruling on the request of plaintiff's counsel but denied it at the outset of the final decision. Plaintiff contends the ruling was error. We hold it was correct.

[*117] The withdrawal of appearance by an attorney does not have the effect of withdrawing his client's appearance or pleadings filed in the latter's behalf. Baker v. Baker, 248 Iowa 361, 365, 81 N.W.2d 1, 3, 64 A.L.R.2d 1421, 1424 and annotation, 1424, 1434-1435, 1443-1444 and citations, note 20; Harris v. Juenger, 367 Ill. 478, 11 N.E.2d 929, 930; 6 C.J.S., Appearances, section 30a, page **[***5]** 70; 5 Am. Jur.2d, Appearance, section 37, page 510.

However, an authorized or otherwise rightful withdrawal of the appearance of a party defendant leaves the case in the same condition as if the appearance had never been entered and operates as a withdrawal of defendant's pleadings. Annotation, 64 A.L.R.2d 1424, 1451 and citations, notes 9 and 10; 6 C.J.S., Appearances, section 30b, page 70; 5 Am. Jur.2d, Appearance, section 39, page 512. See also rule 230(c), Rules of Civil Procedure. There was no such withdrawal here.

Of some application is the rule that trials upon the merits are favored and defaults avoided if fairly possible. Severson v. Sueppel, 260 Iowa 1169, 1177, 152 N.W.2d 281, 286 and citations.

II. Considering now plaintiff's claim in counts 1 and 3 that the 1959 wills were made pursuant to an oral agreement they were mutual and would be irrevocable upon the death of the first to die (Sam Hunter), we find no substantial evidence to support such claim. Indeed the evidence is these wills were not made in pursuance of such an agreement.

The earlier wills and Doil S. Hunter's 1961 will were all prepared by Attorney Mossman. Plaintiff called him as his first witness. He **[***6]** testified on direct examination Doil and Sam came to his office together **[**609]** the day the 1959 wills were prepared and discussed with him the terms of the two wills each desired to make.

On cross-examination Mr. Mossman said he explained to them that if they drew a joint and mutual

will the survivor could not change it after the death of the other; they both stated they did not want such a will, they wanted the right to make a new will after the death of the first to die and asked him to prepare separate wills without any agreement or provision **[*118]** the wills could not be so changed; accordingly such separate wills were prepared and executed; if the will were intended to be mutual and irrevocable upon the death of the first to die he would have prepared only one joint will for both to execute, reciting therein the agreement under which it was made, as was his custom where irrevocable provisions were desired.

On redirect examination by plaintiff's counsel Mr. Mossman testified: "I recall they came to my office and wanted separate wills prepared. They did not want a joint and mutual will. I prepared separate wills that could be changed after the death of either party **[***7]** as it was their intention expressed to me at that time that is what they wanted."

The term "mutual" is properly applied to wills in this class of cases only where there is sufficient evidence to show a binding agreement to dispose of property of the makers in a certain way. Without such evidence the wills may be reciprocal but they are not mutual. Fr. Flanagan's Boys' Home v. Turpin, 252 Iowa 603, 608, 106 N.W.2d 637, 640 and citations; In re Estate of Croulek, 252 Iowa 700, 704, 107 N.W.2d 77, 79; In re Estate of Logan, 253 Iowa 1211, 1215, 115 N.W.2d 701, 704.

Plaintiff had the burden to prove by clear and satisfactory evidence the alleged oral agreement declared upon in counts 1 and 3. In re Estate of Lenders, 247 Iowa 1205, 1213, 78 N.W.2d 536, 541 and citations; Vilter v. Myers, 255 Iowa 818, 820, 123 N.W.2d 334, 336, 337 and citations.

Prior to our Lenders decision we had said several times the existence of such an agreement might be inferred from the execution of reciprocal wills by a husband and wife, at substantially the same time, each with knowledge of the other. However in Lenders we said: "According to the great weight of authority there must be other evidence of a **[***8]** contract between the testators." (Page 1214 of 247 Iowa, page 541 of 78 N.W.2d.)

We have followed the statement just quoted in many subsequent decisions, including In re Estate of Ramthun, 249 Iowa 790, 802, 89 N.W.2d 337, 344; Allinson v. Horn, 249 Iowa 1351, 1356, 1357, 92 N.W.2d 645, 648; Barron v. Pigman, 250 Iowa 968, 972, 95 N.W.2d 726, 729; Fr. Flanagan's Boys' Home v. **[*119]** Turpin, supra, 252 Iowa 603, 609, 106 N.W.2d 637, 640; Vilter v. Myers, supra, 255 Iowa 818, 820, 123 N.W.2d 334, 337.

We find no substantial evidence of the claimed oral agreement here in addition to the inference that might arise under our earlier decisions from the simultaneous execution of reciprocal wills, each with knowledge of the other maker. Even under such decisions certainly the inference referred to could not prevail over the positive testimony of the scrivener, a reputable attorney, that the makers instructed him they did not want a mutual will or mutual wills. Under our cases commencing with In re Estate of Lenders, supra, it is clear plaintiff is not entitled to the relief asked in counts 1 and 3.

III. Reference should be made to the new Iowa Probate Code, now chapter 633, Code 1966, **[***9]** enacted in 1963. By its terms it took effect January 1, 1964. Code section 633.2, subsection 1. However, section 633.2, subsection 2 in part provides "no accrued or vested right shall be impaired by its provisions."

[610]** This action was commenced in May 1964. However, as stated, Sam Hunter died February 11, 1960. If the 1959 wills were mutual as plaintiff claims, his rights thereunder accrued and vested upon Sam's death. This is the plain effect of our decision in Floerchinger v. Williams, 260 Iowa 53, 148 N.W.2d 410, 413, 414. See also In re Estate of Croulek, supra, 252 Iowa 700, 703, 107 N.W.2d 77, 79 and citations. Until then either Sam or Doil could have changed his or her will by giving notice thereof to the other. Citations last above.

Section 633.270 of the Probate Code provides: "No will shall be construed to be contractual or mutual, unless in such will the testator shall expressly state his intent that such will shall be so construed." See comment concerning this provision quoted in Floerchinger v. Williams, supra, of the

committee of the State Bar Association which formulated the Probate Code.

If the quoted provision were applicable here, the 1959 wills could **[***10]** not be construed to be contractual or mutual since they contain no statement of intent they should be so construed. However, since, as stated, plaintiff's rights under the 1959 **[*120]** wills, if they were mutual, accrued or vested in 1960 and would be impaired by application of 633.270, supra, the section, by the express terms of section 633.2, subsection 2, supra, does not apply to this case.

In this respect there is a vital distinction between the facts here and those in Floerchinger v. Williams, supra. There the death of the first spouse to die did not occur until December 1964 and no rights vested under his will alleged to be mutual until then -- nearly a year after the effective date of the Probate Code.

IV. Plaintiff is not entitled to relief on the ground stated in count 2 that the trust provisions in his mother's 1961 will are so unreasonable as to be void. The will directs that the maker's property be converted into cash and divided into four equal parts; plaintiff's share to be held in trust for his benefit; $ 500 thereof paid to him as soon as practical; $ 30 per month shall be paid to plaintiff during his life from the income and principal of his share; at plaintiff's **[***11]** death the monthly payments shall go to plaintiff's wife; upon her death the balance shall be divided equally among the surviving children of plaintiff and his wife and the trust terminated; if no children survive plaintiff and wife such balance will be divided equally among plaintiff's surviving brothers and sister.

The 1961 will also provides that the right of any beneficiary to receive the income from the trust shall be free from interference or control of his or her creditors and shall not be anticipated by assignment or applicable to payment of his or her debts.

We would be justified in ignoring plaintiff's count 2 on the ground no proposition is stated or argued to the effect relief should have been granted under this count. Hence the proposition is deemed waived. Rule 344(a)(4)(Third), Rules of Civil Procedure. However since a large part of the evidence plaintiff offered was an attempt to show the trust provisions were unreasonable we will say no relief could properly be granted under count 2.

It is elementary a will must be given effect unless it contravenes some positive rule of law or public policy. No **[*121]** such contravention appears here. The property bequeathed **[***12]** was that of plaintiff's mother and she had a sacred right to dispose of it as she saw fit subject only to the qualification just stated. Courts may not make a will for a testator nor impose upon it a forced or unnatural construction to accomplish what may seem a more just or appropriate distribution of the estate. Guilford v. Gardner, 180 Iowa 1210, 1224, 162 N.W. 261; In re Estate of Heller, 233 Iowa 1356, 1365, 11 N.W.2d 586, 591; In re Estate of Logan, supra, 253 Iowa 1211, 1217, **[**611]** 115 N.W.2d 701, 705; 95 C.J.S., Wills, section 590.

V. Plaintiff claims there was a merger of all interests in the trust property by the assignment to him from his adult children (remaindermen) or by his assignment to them.

This trust is a spendthrift trust at least as to the income payable to plaintiff, the life beneficiary, in that by the terms of the trust a valid restraint is imposed on the voluntary and involuntary transfer of the beneficiary's interest. In re Estate of Tone, 240 Iowa 1315, 1324, 1325, 39 N.W.2d 401, 407 and authorities cited; Gunn v. Wagner, 242 Iowa 1001, 1009, 48 N.W.2d 292, 296, 297; In re Estate of Bucklin, 243 Iowa 312, 51 N.W.2d 412, 34 A.L.R.2d 1327; 89 C.J.S., **[***13]** Trusts, section 21, pages 733, 734. Of course, without the corpus or principal of the trust estate it would yield no interest.

We are satisfied this trust cannot be terminated by the court in the manner attempted here. In the first place, there are contingent interests in the trust which are not represented in the case and those where the holders do not consent to termination of the trust. The trust, supra (division IV), provides that upon the death of plaintiff and his wife the balance shall be divided among their children who then survive, and if there are none, among plaintiff's brothers and sister who then survive. It is

entirely possible issue, yet unborn, of plaintiff and his wife may survive them. Obviously, consent of such issue to terminate the trust cannot be had. "Equity will not terminate a trust under which after-born children may take an interest." 89 C.J.S., Trusts, section 93d, page 930. See also 54 Am. Jur., Trusts, section 76, page 78.

[*122] The tendency of American decisions is to treat the possibility of issue as one which prevents the distribution of trust property and American courts generally refuse to terminate a trust which would be affected by the **[***14]** birth of issue. 54 Am. Jur., Trusts, section 71; Annotations, 67 A.L.R. 538, 548, 146 A.L.R. 794, 799; In re Bosler's Estate, 378 Pa. 333, 107 A.2d 443, 444 and citations note 1.

It is also possible, although unlikely, no issue may survive plaintiff and his wife. As stated, plaintiff's surviving brothers and sister would then become beneficiaries. One brother and the sister object to termination of the trust and want the mother's will carried out. Thus, not all beneficiaries of the trust consent to its termination.

Moreover, a spendthrift trust created by will cannot be terminated by a court if contrary to the express wish of the settlor even though all beneficiaries desire that it should be. Of course Doil S. Hunter is incapable of consenting to termination of the trust.

"The cases are adamant in holding that where the life interest is limited by a spendthrift provision the trust cannot be terminated by the court. [citations] * * *

"'* * * The law's only concern is to give effect to the will of the donor as he has expressed it.' * * *

"But if * * * the settlor be deceased and therefore incapable of consenting, such a [spendthrift] trust cannot be terminated even though all **[***15]** the beneficiaries desire that it should be." In re Bosler's Estate, supra, 378 Pa. 333, 337, 338, 107 A.2d 443, 445.

"Also, a spendthrift trust is not terminable by the consent of those whom it is designed to protect. Furthermore, a trust ordinarily cannot be terminated by the consent, contract, conveyance, or transfer of a beneficiary unless the object of the trust has been attained, or at least practically accomplished, * * *." 54 Am.Jur., Trusts, section 75, page 77.

"*Spendthrift trust.* If by the terms of the trust * * * the interest of one or more of the beneficiaries is made inalienable by him * * * the trust will not be terminated while such inalienable **[**612]** interest still exists, although all of the beneficiaries desire to terminate it or one beneficiary acquires the whole **[*123]** beneficial interest and desires to terminate it." Restatement, Trusts, Second, section 337(2), Comment 1. See also id., section 338, Comment a.

As stated at the outset, plaintiff's count 4 alleges that if neither the assignment from his children to him nor the one from him and his wife to the children is recognized as valid then plaintiff and wife refuse to take under the will and **[***16]** consent that the court make such orders as vest their one-fourth share in their children.

The share left in trust for plaintiff cannot be transferred to the living children in this manner anymore than by the attempted assignment to them from plaintiff and his wife. If plaintiff and his wife desire to renounce all interest under the will, of course they may do so, but refusal to take under the will upon condition such interest be held to vest in the children now living is not such a renunciation. Plaintiff is attempting to acquire outright for either him and his wife or for their living children the share the mother left in trust. This they may not do under the circumstances here.

VI. One contention of plaintiff is that the trial court prejudged the case by expressing an opinion as to its merits after hearing Mr. Mossman's testimony and part of the testimony of the second witness. The court indicated some impatience at the offer of evidence he felt, not without reason, was immaterial under the issues. In any event, we do not reverse an equity case upon a complaint such as this. Our review of both the facts and the law is de novo and we draw such conclusions therefrom

as we deem proper. **[***17]** Rule 334, Rules of Civil Procedure; Arnold v. Arnold, 257 Iowa 429, 433, 133 N.W.2d 53, 56 and citation. We are unwilling to admit we have prejudged the case.

Upon consideration of all propositions presented the decree is -- Affirmed.

All Justices concur except LeGrand, J., who takes no part.

*59 Ind. 595, *; 1877 Ind. LEXIS 779, ***

Smith et al. v. Foster et al.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF INDIANA

59 Ind. 595; 1877 Ind. LEXIS 779

November Term, 1877, Decided

PRIOR HISTORY: **[**1]** From the Hamilton Circuit Court.

DISPOSITION: The judgment is affirmed, with ten per centum damages, at the costs of the appellants.

CORE TERMS: appearance, new trial, assigned, irregularity, withdraw, withdrew, parties appeared, defaulting, default, dollars, peace

HEADNOTES: Practice. -- *Withdrawal of Appearance Withdraws Pleadings.* -- Where a defendant who has appeared and pleaded to an action voluntarily withdraws his appearance, he thereby withdraws his pleadings.

Practice. -- *Judgment Without Defaulting Defendant. -- New Trial. -- Supreme Court. -- Assignment of Error.* -- The fact that judgment is rendered against a defendant who has not appeared, without defaulting him, is an irregularity constituting a cause for a new trial, but can not be assigned independently as error, for the first time, in the Supreme Court, on appeal.

COUNSEL: W. Garver and J. S. Losey, for appellants.

J. W. Evans and R. R. Stephenson, for appellees.

JUDGES: Howk, J.

OPINIONBY: Howk

OPINION: **[*595]** Howk, J.--In this action, the appellees, as plaintiffs, sued the appellants, as defendants, before a justice of the peace of Hamilton county, Indiana, upon a promissory note, of which the following is a copy:

"$ 92.50. April the 22d, 1875.

"Eight months after date, we promise to pay to Harry Peeky, or order, the sum of ninety-two dollars and fifty cents, for value received, without any relief whatever **[*596]** from valuation or appraisement laws. Interest after maturity.

(Signed,)

Hiram Smith,

"F. M. Lane."

Before the justice, the appellants filed an answer, duly verified, denying the execution of the note. The trial before the justice resulted in a judgment, in favor of the appellees, for the amount of the note and costs of suit, from which judgment the cause was appealed to the court below.

In this latter court, the parties appeared in person and by counsel, and the appellants withdrew their appearance herein; **[**2]** and thereupon, on the appellees' motion, the cause was submitted to the court for trial, without a jury. "The court, having heard all the evidence," found for the appellees, and assessed their damages on the note in suit at the sum of ninety-eight dollars and five cents, and judgment was rendered accordingly, on the 11th day of May, 1876. Afterward, at the same term of the court, on the 17th day of May, 1876, the parties appeared, and the appellants filed their written motion for a new trial, which motion was overruled by the court, and to this decision they excepted and filed their bill of exceptions, signed and sealed by the court.

In this court, the only error properly assigned by the appellants is the decision of the court below in overruling their motion for a new trial. In this motion, the following causes for a new trial were assigned by the appellants:

"1st. Because the evidence is not sufficient to sustain the finding and decision of the court; and,

"2d. Because the finding and decision of the court are contrary to the law and the evidence in the case."

The only question in this case for our decision may be thus stated: Did the appellants, by withdrawing their appearance **[**3]** in this action, in the court below, withdraw also their answer under oath, denying the execution of the note in suit? If such was the legal effect of the appellants' withdrawal of their appearance in this action, then **[*597]** the judgment of the court below must be affirmed. This is not an open question in this court. In the case of *Carver* v. *Williams,* 10 Ind. 267, it was said by Perkins, J., delivering the opinion of the court, that, "If a party appears to a suit and pleads, and then simply fails to appear at the trial, his pleadings stand. But if, after pleading, he comes and withdraws his appearance to the suit, which, by leave of the court, he may do, his pleadings go with his appearance. Without an appearance, a party can not answer in a cause. Nor can he have an answer standing where there is no appearance."

To the same effect are the cases of *Coffin* v. *The Evansville, etc., R. R. Co.,* 7 Ind. 413, and *Sloan* v. *Wittbank,* 12 Ind. 444. The doctrine of these cases has never been questioned in this court, and it meets with our full approval.

In this case we hold, that, when the appellants withdrew their appearance in the court below, they thereby withdrew **[**4]** their special answer of *non est factum,* and the cause then stood for trial, like any other appeal from a justice of the peace, "without plea."

It was also assigned by the appellants, as error, that the court below erred in rendering judgment against the appellants, without taking or entering a default against them. At most this was only an irregularity in the proceedings of the court; and, if it prevented the appellants from having a fair trial, it then constituted the first statutory cause for a new trial, and should have been assigned as such in their motion for such new trial. 2 R. S. 1876, p. 179, sec. 352.

This irregularity was not assigned by the appellants as a cause for a new trial, in their motion therefor, and therefore it can not be assigned as error in this court. Besides, in the case of *Sloan* v. *Wittbank, supra,* it was held by this court, on the authority of the cases of *Key* v. *Robinson,* 8 Ind. 368, and *Shaw* v. *Binkard,* 10 Ind. 227, that the failure to call and default a defendant, who, after **[*598]** having appeared and answered, had withdrawn his appearance, was an irregularity, but such an irregularity as the court below might have amended, **[**5]** and would be deemed to have been amended in this court.

We find no error in the record of this cause, and no merit in the appeal.

The judgment is affirmed, with ten per centum damages, at the costs of the appellants.

*140 Ind. App. 635, *; 225 N.E.2d 582, **;*
*1967 Ind. App. LEXIS 425, ****

Hogan v. Staley et al.

No. 20,437

Court of Appeals of Indiana

140 Ind. App. 635; 225 N.E.2d 582; 1967 Ind. App. LEXIS 425

April 19, 1967, Filed

SUBSEQUENT HISTORY: [*1]**

No Petition for Rehearing Filed.

PRIOR HISTORY: From the Marion Superior Court, Room No. 5, *Addison M. Dowling*, Judge.

Appellant, Robert J. Hogan, appeals from the denial of relief by appellant to set aside a default judgment.

DISPOSITION: *Affirmed.*

CORE TERMS: appearance, default judgment, default, notice, withdrawal, personally, contrary to law, well settled, Rules of Practice, sufficient evidence, opposing counsel, return date, new trial, overruling, withdrawn, withdrew, sending, summons, notify

COUNSEL: *Thomas L. Davis*, of Indianapolis, for appellant.

Joseph L. Kivett and *Kivett* and *Kivett*, both of Indianapolis, for appellees.

JUDGES: Pfaff, P. J. Bierly, Cook and Smith, JJ., concur.

OPINIONBY: PFAFF

OPINION: [*635] [583]** This appeal arises as a result of a verdict denying relief in an action by appellant to set aside a default judgment.

[*636] The facts material to a determination of the issues raised in this appeal may be summarized as follows:

On June 28, 1956, appellees filed suit against appellant, Robert J. Hogan, for damages for breach of contract. The appellant appeared by counsel on September 4, 1956. On May 9, 1957, the appellant's counsel withdrew his appearance and purportedly sent notice of said withdrawal to the appellant. There was a conflict of evidence as to whether the appellant received the notice of his counsel's withdrawal of appearance. The trial court after reviewing the facts held that **[***2]** appellant had received the Notice of Withdrawal.

On December 13, 1963, a default judgment for $ 4,468.00 was entered against appellant Hogan and notice of said intention was not sent to appellant.

On September 15, 1965, appellant filed his complaint to set aside the default judgment alleging that it was obtained by mistake, inadvertence or excusable neglect, or in the alternative that the judgment was void for failure of appellees to notify appellant of their intent to move for a default judgment. Acts 1933, ch. 10, § 2-1068, p. 272, Burns' Replacement (Cum. Supp.); Acts 1933, ch.

26, § 2-2605, p. 526, Burns' 1966 (Spec. Supp.).

Trial was had in Marion County Superior Court No. 5 and judgment entered for appellees. Appellant's motion for a new trial and/or to amend the findings and judgment was overruled.

The appellant in his assignment of error alleges that:

> The trial court erred in overruling his motion for a new trial or in the alternative in overruling his motion to amend the findings and judgment.

More specifically, appellant alleges that the trial court's finding was not sustained by sufficient evidence and was contrary to law. He further contends that **[***3]** appellees' failure to send a Notice of Motion to Default was contrary to law since it violated due process of law.

[*637] It is well settled that the decision of the trial court will not be disturbed on appeal where there is evidence to sustain it. *Milbourn* v. *Baugher* (1909), 43 Ind. App. 35, 42, 86 N.E. 874; *Wells et al.* v. *Bradley, Holton & Co. et al.* (1891), 3 Ind. App. 278, 280. Thus it must be assumed that the trial court was correct in finding that the Notice of Withdrawal was received by appellant Hogan inasmuch as its decision was supported by sufficient evidence.

[584]** Appellees argue that the decision of the trial court was not contrary to law in that under Rule 7 of Official Rules of Practice and Procedure of the Circuit and Superior Courts of Marion County, their counsel was not required by law to notify the appellant of a Notice of Motion to Default. Rule 7 reads as follows:

> "* * * Said motion shall represent and show that notice thereof has been served upon opposing counsel by either personal service which shall bear acknowledgment thereof or by mailing the notice to such opposing counsel by first class U.S. Mail.
>
> "In any case where **[***4]** the parties to be defaulted are not represented by counsel but have appeared personally, motion of intention to default shall be sent by regular mail to the last known address of said party or parties."

The real issue is in determining the status of a case after the defendant's counsel has withdrawn his appearance and the defendant failed to enter an appearance either personally or by another attorney, after the return date on the said summons, but before the default judgment was taken.

Appellant employed another counsel to represent him in a bankruptcy proceeding which generally involved the subject matter of this litigation.

Rule 7 makes provision for the sending of a Notice of Motion to Default to the appellant when he appeared personally or to his attorney when he appeared by counsel. The record in this case is devoid of any showing that the appellant ever appeared **[*638]** personally for himself, after his counsel had withdrawn from the said case.

It is well settled that after the withdrawal of the general appearance, the case stands as if there had been no appearance. *Baker* v. *Wambaugh* (1884), 99 Ind. 312; *Dunkle et al.* v. *Elston et al.* (1880), 71 **[***5]** Ind. 588; *Gunel et ux.* v. *Cue, Administrator* (1880), 72 Ind. 34; *Lodge* v. *State Bank* (1843), 6 Blackford 557.

The application of this rule of law to the case at bar would mean that after appellant's attorney had filed his withdrawal of appearance, the case stands as if there had been no appearance.

The appellee herein was not required by law under Rule 7 of the Official Rules of Practice and Procedure of the Circuit and Superior Courts of Marion County to send a Notice of Motion to Default

to the appellant. The appellees, could any time after the return date on said summons, take a default judgment against the appellant without sending a Notice of Motion to Default because appellant had failed to enter an appearance, after his counsel withdrew his appearance.

For reasons stated herein, the judgment of the trial court is affirmed.

Judgment affirmed.

Bierly, Cook and Smith, JJ., concur.