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W. J. Bowe

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W. J. BOWE*

WILLS

Execution of Wills:

Under the Tennessee Code a will valid at the place of execution is valid under the laws of Tennessee.[1] A testator domiciled in Tennessee executed a will in Mississippi in the presence of two witnesses, but thinking that the will should be acknowledged by a notary public rather than subscribed by the witnesses, he had the acknowledgment taken by a Mississippi notary public. As the Mississippi statute is peculiar in that it merely requires "that the Will shall be attested by two or more credible witnesses" rather than the usual "shall be both attested and subscribed" the court held that the will was properly admitted to probate in Tennessee since the less rigid Mississippi requirements had been fulfilled.[2]

Deeds as Wills:

It is well settled that an instrument in the form of a deed may be admitted to probate as the will of the grantor if it was signed and properly attested and subscribed by at least two witnesses, and if the grantor intended it to become operative only upon his death.[3] Thus a deed granting "Blackacre to *A* from and after my death" may be admitted to probate. In *Howell v. Davis*[4] *H* and *W* were tenants by the entirety of certain real property. *W* executed a warranty deed to her husband expressly reserving a life estate. The deed specified "said conveyance to take effect at the death" of *W*. The deed was accepted and recorded. Subsequently, *H* died and *W* thereafter attempted to convey the land, again reserving a life estate. This latter conveyance was held a nullity as she had in fact no transferable interest beyond her life estate.

Whether a deed is effective to convey presently a future interest depends upon the intention of the grantor. The reservation of a life estate clearly shows an intent to accomplish presently an immediate shift in the title and practically all the cases so hold. Such reservation in the *Davis* case was either meaningless or compelled this conclusion and while the statement that the conveyance was "to take effect at death" points the other way, it is consistent with a present transfer

* Professor of Law, Vanderbilt University; member, Tennessee Bar.

1. TENN. CODE ANN. § 8098.7 (Williams Supp. 1952).
2. Ragsdale v. Hill, 269 S.W.2d 911 (Tenn. App. M.S. 1954).
3. ATKINSON, WILLS 188 (1953).
4. 268 S.W.2d 85 (Tenn. 1954).

since it could refer equally well to the time of the change in possession and enjoyment. Thus while it is possible to construe a deed as a will the courts properly lean heavily in favor of an interpretation that an inter vivos rather than a testamentary transfer was intended.[5]

Revocation of Wills by Operation of Law:

At common law the only change in the circumstances of a testator deemed sufficient to revoke his will was marriage plus birth of issue.[6] As divorces were almost unknown no authority existed as to the effect on a will of the termination of the marriage by divorce. While legal separations were not uncommon, it was never held that a judicial separation, even when accompanied by property settlement, effected a revocation of a bequest to a spouse. However, such a separated spouse might forfeit his or her bequest, not because of the separation, but because the terms of the separation agreement might be construed to release her rights.[7] This construction would seem to be justified wherever the agreement indicated that the property transferred was in satisfaction of her inheritable interest. In *Price v. Price*,[8] the Tennessee court followed the general rule that no implied revocation results because of a legal separation even though accompanied by a property settlement. Whether the particular property settlement satisfied the bequest to the spouse was not decided since the issue arose on the probate of the will.

All courts have been extremely hesitant to read into the statute dealing with revocation any new exceptions to the rule that wills may be revoked only by burning, tearing, cancelling, obliterating or otherwise destroying, or by an instrument of equal dignity with a will. In the absence of an express statutory provision divorce alone does not work a revocation, but where the divorce is accompanied by a property settlement, many courts have recognized that after such a change in circumstances it is even less likely than under the common-law exception, *i.e.*, marriage plus birth of issue, that testators would desire their wills be continued in effect.

The Tennessee Supreme Court adopted this view in *Rankin v. McDearmon*.[9] It should be noted that it is not a question of the particular testator's intent. Divorce plus property settlement conclusively revokes a will even though the testator failed to use one of the more traditional methods because he desired that his will should continue to be operative.

5. ATKINSON, WILLS 183 (1953).
6. At common law a woman's will was revoked by subsequent marriage.
7. ATKINSON, WILLS 432 (1953).
8. 269 S.W.2d 920 (Tenn. App. W.S. 1954).
9. 270 S.W.2d 660 (Tenn. App. W.S. 1953).

Holographic Wills:

Our statute provides that no witnesses to a holographic will are necessary but the signature and all material parts of the instrument must be in the handwriting of the testator and his handwriting must be proved by two witnesses.[10] The difficult problem presented by holographs is whether the writing was intended as a last will and testament. Courts have been extremely hesitant to admit letters and other papers expressing vague testamentary intentions. A letter telling Cousin John that Blackacre is to be his when the writer dies smacks more of diplomatic double talk than a solemn testamentary devise. On the other hand such a letter from a convicted felon facing execution within forty-eight hours should be admitted to probate without difficulty. In *Davidson v. Gilreath*[11] the testatrix copied the form of her brother's typewritten will even to the attestation clause, leaving blank spaces for the signatures of the witnesses. While the document was wholly in her handwriting, the court found a lack of the necessary intent since she failed to accomplish all the steps that she indicated she intended to accomplish before the document was to be complete. The provision for witnesses manifested, the court found, that she intended the attestation and subscription by witnesses was to take place before the document would become operative. Her failure to obtain witnesses, after providing for them, showed that the expressions of her wishes still remained in tentative form.[12]

In sharp contrast to this holding is *Nicley v. Nicley*,[13] where the court held that the testator's name in a holograph need not appear at the conclusion of the document but will suffice if the document shows his name was subscribed in the body of the will. Of course it must be subscribed with the intention that it shall operate to fulfill the signing requirement. Generally the signature in the opening paragraph is intended to be merely descriptive of the writer. But evidence of the testator's declarations indicated that in her mind she had completed her testament and of course she may adopt as her signature her name as she had written it in another part of the instrument.[14]

10. TENN. CODE ANN. § 8098.5 (Williams Supp. 1952).
11. 273 S.W.2d 717 (Tenn. App. M.S. 1954).
12. Compare cases where the testator's signature is incomplete. If *T* starts to write his name and his strength fails after he has partially completed it, the part written will not serve as his signature. He must have completed the entire act he contemplated as the authenticating act of signing. Thus in *In re* Male, [1934] V.L.R. 318, *T*, whose name was Rebecca Male, began to write but had only made a mark which appeared to be the letter "R" when she stopped and said "I cannot do any more." The will was denied probate. On the other hand it is well settled that any mark may serve as a signing, and if she had intended to make an "R" as the authenticatmg mark, the will would have been properly executed.
13. 276 S.W.2d 497 (Tenn. App. E.S. 1955).
14. See generally ATKINSON, WILLS 301 (1953).

Construction:

Testators, in drafting holographic wills, usually say: *if* I die, rather than *when* I die, and courts quite properly recognize this human failing. In *Baldwin v. Davidson*[15] the document, quoted in full in footnote,[16] recited "should anything happen to me." It could have been construed as an instrument intended to become operative during the writer's life in the event of incapacity but the second last sentence manifested a testamentary intent. After a sale of the business by one Davidson, Sr., he was to "turn over to my sister my share to be distributed as she sees fit." The writer was clearly thinking of a period beyond his death. This will raised a number of construction problems. It referred to the sale of the decedent's partnership interest and delivery of the proceeds to his sister. As the business was incorporated prior to his death, it was argued that the bequest was adeemed. But the court properly held the change was a formal one. He intended to give his interest in the business and so his stock, which represented his old partnership interest in changed form, passed. Did the bequest fail because the beneficiaries were indefinite? Was his sister required to distribute the bequest to others? While the property was not in terms given to her, she was given a general and unlimited power of appointment over it and the court pointed out that she could acquire it by exercising her power in favor of herself. It was, therefore, properly held the bequest was in substance a gift of the property to her. Particularly, in large estates, draftsmen ought to be careful to spell out the intent of the testator. By using the traditional language that from time immemorial has been used to create particular types of estates, needless litigation and unnecessary taxes may be avoided.

In another case[17] the testator devised and bequeathed his real and personal property to his wife "for and during her natural life, to have and enjoy in anyway she may deem proper, also she may sell or dispose of any or all of my realty as she may desire." The wife transferred certain real estate by deed of gift. It was held on a construction of the above clause that while the wife had the broadest authority to sell and use the proceeds she had no power to give the real estate

15. 267 S.W.2d 756 (Tenn. App. M.S. 1954).

16. "Sept. 16, 1948

"To Whom it May Concern:

"It is my wish & desire, because of a partnership between myself and P. B. Tichenor & B. W. Davidson, Sr., that should *any thing* happen to me to make it impossible to look after this business, that B. W. Davidson, Sr. shall have the right to sign my name on checks—Deeds—or in any other matter B. W. Davidson, Sr. shall have my complete power of attorney. This is to keep the partnership complete until such time the partners shall sell the property & Business. B. W. Davidson, Sr. shall turn over to my Sister Mrs. O. P. Brakefield my share to be distributed as she shall see fit. B. W. Davidson, Sr. to act without bond."

(Signed) "J. D. Baldwin"

17. Black v. Pettigrew, 270 S.W.2d 196 (Tenn. App. W.S. 1953).

away. While it is difficult to argue with the result since it turns on a determination of the intention of the testator as found from the language used, cases restricting the power of invasion given widows may cause estates to lose the benefit of the enlarged marital deduction provision of the 1954 Code,[18] unless will draftsmen spell out the equivalent of a general power of appointment.

Under the 1954 Code a legal life estate in a spouse with an unrestricted general power to appoint either by will or by deed qualifies the property for the marital deduction. But a right to sell, "for her needs" or "for her welfare," or "to dispose of as she may think proper under the then existing circumstances," for example, place limitations upon her power which would seem to defeat the marital deduction. Life estates with broad powers over the fee are extremely common in Tennessee. Cases like the above indicate, where the surviving spouse is the life tenant, extreme care must be used to assure the marital deduction, whenever it is desired by the testator.

Intestate Succession

Intestacy:

The failure of the legislature to abolish the common distinction between real and personal property in our laws of descent and distribution continues to cause unhappy results, particularly where widows are concerned. In *Moore v. Carter*[19] the mother of the intestate left about one-third of her estate to the wife of a deceased son and about two-thirds to her surviving son. She had told the son and his wife that she was leaving them two-thirds in such a way that on the death of either the other would own the property. Part of the son's share consisted of two specific devises of real property. The son, who had always enjoyed excellent health, died unexpectedly two days after his mother. He left no will. He had no issue, no parent, no brother, no sister, no issue of deceased brother or sister who survived him. Under our statute of descent the land descended to the heirs of his mother,[20] his cousins. Had it been personal property his widow wonld have been entitled to the entire fund. It seems inconceivable that the decedent would have preferred his cousins to his wife or that his mother ever contemplated such a possibility.

An attempt was made to work an estoppel based upon the mother's

18. Int. Rev. Code of 1954 § 2056(B) (5).
19. 277 S.W.2d 427 (Tenn. App. M.S. 1955).
20. "(3) (b) By parent from whom or whose ancestors estate came, when.—If he have no brothers or sisters, then it shall be inherited by the parent, if living, from whom or whose ancestors it came, in preference to the other parent. "(c) By other parent, when.—If the transmitting parent be dead, the other surviving parent shall take.
"(d) By heirs of which parent, when.—If both parents be dead, then by the heirs of the parent from whom or whose ancestor it came." Tenn. Code Ann. § 8380 (3) (b), (c), (d) (Williams 1934).

representation, but there was nothing to indicate that the mother intended by her statement to cause the son not to make a will, that he failed to make a will because of it or that, if he had made a will, his wife would have been sole beneficiary.

It seems foolish in this day and age that the character of the assets should determine the recipients of an estate. Why, when there are no children, should the wife get all the personalty but only dower in the real estate? There were valid reasons for these rules in feudal days but they have long since disappeared.[21]

Partial Intestacy:

In *Pinkerton v. Turman*,[22] the testator left the income from his estate to his wife for life with authority in the executor to sell the assets as needed for her support. The will provided for the payment, upon her death, of three general legacies totaling $4,000. The residuary estate was in excess of $50,000. Thus there was a substantial intestacy following the wife's life estate. The widow failed to elect to take against the will. Did she thereby forfeit her right to share in the intestate property? The court held she did but the result seems unduly harsh.

Where a will disposes of only a part of an estate owner's property, his state of mind, assuming the event is not accidental, is that, other than for the property specifically given away, he is willing for the distribution to take place according to law. It may be assumed that he supposes his wife, along with his children, constitute the preferred group. Presumably he does not expect the law to work any injustice. Thus he may desire that his widow be given the family residence and his sons Blackacre. Other than that, he is willing to let the law divide his estate. Would he not be shocked to learn that if his widow accepts the residence, she thereby forfeits her statutory share in the property he failed to devise or bequeath?

Tennessee is not alone in holding that a widow who takes under a will is not permitted to share in intestate property even though if she elects to defeat the will she gets her full intestate share. These cases and the Tennessee holding that a spouse who takes under a will is deprived of her intestate share are, it is submitted, based on a too literal reading of the election statute and run counter to the statute of distributions which covers all cases of intestacy—both total and partial. It is believed that the rule laid down by the court will work an injustice in the majority of cases.[23]

Legatees other than spouses share in intestate property even where such a result defeats the apparent intention of the testator. In another

21. For a further criticism see Bowe, *Wills, Estates and Trusts*, 6 VAND. L. REV. 1126, 1128 (1953).
22. 268 S.W.2d 347 (Tenn. 1954).
23. For a further criticism see ATKINSON, WILLS 123 (1953).

case[24] decided this year the testatrix devised the east one-third of Blackacre to her son *A* for life, remainder to the heirs of his body; the west one-third to her son *B* for life, remainder to the heirs of his body; the middle one-third to *C* for life, and upon *C*'s death the east one-half of the middle third to *A* for life, remainder to the heirs of his body; the west half of the middle one-third to *B* for life, remainder to the heirs of his body. *C* died before the testatrix. On *A*'s later death without issue *A*'s wife was held entitled to a one-half interest in the fee of the east one-half of Blackacre under *A*'s will devising his entire estate to her.

Evidence made it clear that the testatrix intended the property to go ultimately to the issue of *A* and *B*, that she merely tolerated *A*'s wife and intended that she should not share in her estate. While the general rule is that a testator is presumed to dispose of his entire estate by his will, the court refused to imply a gift over in this case because of the absence of any language upon which such a construction could be based. *A* had a life estate and the heirs of his body a contingent remainder. There being no residuary clause the possibility of reverter in the east half passed by the law of descent to *A* and as *A* died without children his residuary interest in the east one-half of Blackacre passed under his will.

TRUSTS

Administration:

In the widely publicized *Harvey-Cain Sloan* litigation[25] involving the real estate occupied by the Harvey Department Store, the Supreme Court enunicated two principles affecting trust law in Tennessee which it is hoped will be only narrowly applied.

Stripping the situation to its barest essentials the trustees executed, subject to court approval, a twenty-five (25) year lease on a large parcel of real estate situated in the heart of Nashville's business section to the Cain Sloan Company a competitor of the then tenant, Harvey. As the trust was to terminate upon the death of a life tenant the lease obviously might extend beyond the actual or probable duration of the trust. Court approval was sought because it was not clear whether the trustees had implied authority validly to bind the property beyond the duration of the trust and, if so, for what period. At this juncture, Harvey made a proposal to execute a lease which offered a larger probable return and which the court later found was, in its opinion, the superior lease. The court (1) determined the trustees were without power, in the absence of court approval, to lease beyond the duration of the trust; and (2) ordered the trustees to execute the Harvey lease which in its judgment was superior.

24. Bedford v. Bedford, 274 S.W.2d 528 (Tenn. App. W. S. 1954).
25. Nashville Trust Co. v. Lebeck, 270 S.W.2d 470 (Tenn. 1954).

Originally, a trustee had no implied power to sell trust assets.[26] This early rule existed because it was believed by courts to represent the intention of most settlors. But such a rule was and is at obvious odds with modern day investment policies and practices. And so for many years courts have been implying a power of sale upon the flimsiest pretext. Today it may be safely said that in the absence of a manifestation to the contrary a trustee has an implied power to sell trust assets.[27] Ordinarily, a trustee may not bind a remainderman by a lease beyond the duration of the trust unless specifically authorized. Again, this rule was based upon a presumed intent. But with the advent of long-term leases on commercial properties any such presumed intent becomes absurd if the property is commercially valuable since no substantial tenant can be found who would consider a short-term lease or one of uncertain duration. Such facts ought to be sufficient to warrant a court in implying an authority to lease beyond the term of the trust wherever necessary, as will almost always be true, to accomplish the purposes of the settlor.

The second principle is the more troublesome and if applied generally will represent a basic and fundamental departure from trust law as heretofore understood. Courts do not and should not substitute their judgment for the judgment of the trustees in matters wherein the trustees are given a discretionary choice. In a leading Connecticut case[28] the corporate trustee wanted to invest the trust funds in bonds—the individual trustee in stock. Being unable to agree they sought the aid of the court. The court properly refused to decide the dispute pointing out that the settlor had selected the trustees because he desired their judgment; he did not desire the judgment of the court. Of course, the court ought to use its power to prevent a trustee from abusing his discretion or acting outside his authority, but the court ought not to substitute its judgment for the judgment of a trustee. In the *Harvey* case it is submitted that what the court should have done, if it decided, as it did, that there was no authority to lease for the twenty-five year period, was then to have determined whether the particular lease submitted for approval by the trustees was in the best interest of the beneficiaries. If not, as it found, it should have refused to authorize its execution. But to go further and direct the trustees to execute another and different lease which the trustees in their judgment had determined ought not to be executed seems a usurpation of power never conferred on the court. If the settlor had wanted the court's judgment he should have conferred the power of decision on the court. But he wanted the judgment of his trustees; that is why he selected them.

26. SCOTT, TRUSTS § 190 (1939).
27. RESTATEMENT, TRUSTS § 190 (1935).
28. McCarthy v. Tierney, 116 Conn. 588, 165 Atl. 807 (1933).

Does the rationale of the *Harvey* case mean that, if a trustee is trying to decide between General Motors and Chrysler as an investment, he may toss his problem in the lap of the court? If so, our courts will be busy and settlors, wary of the business acumen of judges, may well cease to create trusts. Because action beyond the terms of the trust is to be authorized, it should not follow that the court is permitted to exercise its business judgment in preference to the judgment of the trustees. The writer saw a trust many years ago which authorized the trustee to invest only in municipal bonds paying at least four per cent. The trustee obviously required court authority to depart from the terms of this instrument. Just as obviously the court should grant such a departure. But would or should the court then determine the particular securities in which the fund was to be invested? The question would seem to answer itself.

Laches:

Contrary to the law of most jurisdictions oral trusts of real property may be established by parol proof in Tennessee but the proof must be "clear, cogent and convincing."[29] The children in *Askew v. Mills*[30] conveyed the fee to certain real property to their mother with the understanding that she was to have only a life estate. With the knowledge and tacit approval of the children the mother expended part of the principal. The court properly held that any claim the children might have had for breach of trust against the mother's executor was barred by laches. For another informal trust case involving a father and son, where the son's failure promptly to insist on his rights resulted in a refusal to recognize his claim, see In re *Costello's Estate.*[31]

LEGISLATION

The Uniform Principal and Income Act was adopted by the 1955 Legislature.[32] The act provides rules for the apportionment of receipts and the allocation of expenditures between life tenant and remainderman. It clarifies a number of situations on which there was little or no case law. For example, we have no law on the allocation of the proceeds of a long delayed sale of unproductive property. The primary importance of the new act, however, lies in the fact that it changes the rule in the *Tyne* stock dividend decision.[33] In *Tyne* the court had held that stock dividends were income rather than principal and belonged to the life tenant, at least to the extent

29. Bowe, *Wills, Estates and Trusts—1954 Tennessee Survey,* 7 VAND. L. REV. 975, 982 (1954).
30. 268 S.W.2d 569 (Tenn. 1954).
31. 269 S.W.2d 602 (Tenn. App. W.S. 1954).
32. Tenn. Pub. Acts 1955, c. 81.
33. Nashville Trust Co. v. Tyne, 250 S.W.2d 937 (Tenn. 1952). See Bowe, *supra* note 21, at 1133.

they were paid from surplus earned after the creation of the estate. This result ran counter to the rule in practically all jurisdictions and was generally regarded as unsound. But the court felt that being a rule of property and having been the case law of Tennessee for more than fifty years, any change should be made by the legislature.

The difficulty with the result of the *Tyne* holding was that too much turned on the form of a stock distribution. A stock split and a stock dividend have much the same economic effect to the stockholder. Whether National Life splits its stock two for one or declares a 100 per cent stock dividend makes little difference to the shareholder. In either case if the shares were selling for $80, they will sell for $40. He is better off in both cases because a wider market has been created for his stock. Either action suggests equally well that the company is prospering. To lawyers and accountants the techniques are, of course, different. The dividend method requires moving surplus to capital; the split leaves surplus untouched. But these are technical changes that rarely affect the value of the stock. The evil of the *Tyne* rule was that it left in the hands of the directors of a corporation, consciously or unconsciously, the decision to enrich either the life tenant or the remainderman where there were present and future interests in the same shares of stock. Thus the life tenant received a substantial portion of the corporate assets if the dividend device was used, none if the recapitalization method was adopted.

Under the new law all dividends in stock of the declaring company are capital. Grantors and testators desiring to make stock dividends available to income beneficiaries may so provide in the instruments of transfer. The rule of the statute operates only in the absence of a contrary provision by the grantor or testator. Will and trust draftsmen should consider the advisability of providing that the trustee in his discretion may apportion stock dividends, in whole or in part, between income and principal. Companies that make a practice of paying stock dividends are becoming increasingly popular mediums of investment, because of the income tax advantage inherent in the receipt of earnings by way of stock. A rule that deprives a life tenant of such dividends would seem to make the stock of these growth companies improper trust investments under our prudent man statutes, absent any authority in the trustee to apportion to income stock dividends that represent recurrent distributions of earnings.