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Wills, Trusts and Estates--1956 Tennessee Survey

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WILLS, TRUSTS AND ESTATES (Herein of Future Interests)—1956 TENNESSEE SURVEY

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INTESTACY

Interest of Surviving Spouse: It has been suggested in an earlier article[1] that the intestate laws of the State of Tennessee are in need of revision. It seems absurd to make the distributive share of a surviving spouse depend on whether the property owned by the decedent is real estate or personalty. Assume, for example, a husband, whose sole substantial asset is a large apartment house worth $100,000, dies childless, leaving a wife and brother. The wife is entitled to her dower interest for life, nothing more. If she is about 50 or 55 years of age the value of her share in the estate will run somewhere between $15,000 and $20,000. The brother whom the decedent may not have seen for 20 years will inherit the bulk of the estate. But suppose the husband had incorporated his real estate so that what he owned at the time of his death was all the issued and outstanding shares of Apartment House, Inc. Under these circumstances the wife is entitled to the entire estate. Why should the form in which the real estate is held make all the difference? The plight of the childless husband is even worse. If his deceased wife had owned the apartment house he would receive nothing since his right to curtesy arises only if the couple were blessed with issue. On the other hand, if the wife owned all the stock of the corporation owning the apartment house, the husband, if there are no children, inherits all his wife's estate. *Warmath v. Smith*[2] involved the estate of a deceased wife whose sole asset was a 15 acre tract of land. There were no children. The land was devised to persons other than her husband. He objected to the probate of the will on the ground of lack of capacity, claiming to be a beneficiary under an earlier will which had been accidentally lost or destroyed. However, he had not instituted any action to set up the prior will. Under these circumstances the court properly held he had no standing to contest the probate since: (1) he would take nothing by intestacy, and (2) no action had been commenced to establish the validity of the spoliated will. For these reasons it did not appear that he was an interested party and, obviously, a stranger to an estate will not be heard to question the validity of a will.

Advancements: One Thornton conveyed real estate to his wife for life with a provision that, upon her death, the land was to revert to

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1. Bowe, *Wills, Estates and Trusts—1953 Tennessee Survey*, 6 VAND. L. REV. 1126, 1128 (1953).
2. 279 S.W.2d 257 (Tenn. 1955).

him, if living, otherwise to his son Freed, his heirs and assigns forever.[3] He died intestate and his other son Raymond, one of his heirs, claimed, among other things, that the inclusion of Freed as a contingent grantee constituted an advancement. There was testimony of stepsisters, neighbors, and of one who resided in the home of Thornton, that he did not intend the transfer as an advancement, Thornton having told the witnesses that he had included Freed in the conveyance because "he had been out so much money" to his other son, Raymond.

The Tennessee statute creates a rebuttable presumption that any transfer or conveyance of property to a child shall be treated as an advancement.[4] The above evidence would seem adequate to rebut the presumption but the court went further and stated that, without regard to this evidence, the transfer was not to be so treated since an advancement must be irrevocable and in presentae.[5] Query, if this language may not be misleading and cause confusion in later cases. American case law does not require that an advancement be irrevocable. Thus the proceeds of a life insurance policy, though the decedent retained the right to change the beneficiary, has been treated as an advancement.[6] Further, future interests may constitute an advancement as where Father conveys Blackacre to son, reserving a life estate.[7] It should also be noted that the transfer in the instant case was not subject to revocation by the grantor. The result, however, seems correct since the deed of gift with the retained reversionary interest, preceding the contingent executory interest to the son, may well be thought of as inconsistent with an intent to make an advancement.

Right of Divorced Parent to Inherit from Child: Our statute provides that where the parents of a person dying intestate have been divorced by a decree which committed the custody of such person to one of the parents to the exclusion of the other, then the personal estate of such person shall be distributed to such parent to whom the custody has been committed, if such person leaves no husband, wife or children surviving.[8]

In *Shelton v. Shelton*[9] a decree of divorce in April 1942 committed the care and custody of the decedent to his father "temporarily until October 1942 Term of this Court, at which time the Court will make further orders regarding the custody of said minor." Neither party made any further application and the minor continued in the custody of his father until his death, 8 years later. The child was then 20

3. Thornton v. Thornton, 282 S.W.2d 361 (Tenn. App. W. S. 1955).
4. TENN. CODE ANN. § 31-702 (1956).
5. Thornton v. Thornton, 282 S.W.2d 361, 367 (Tenn. App. W.S. 1955).
6. ATKINSON, WILLS 720 (2d ed. 1953).
7. *Id.* at 724.
8. TENN. CODE ANN. § 31-201 (1956).
9. 280 S.W.2d 803 (Tenn. 1955).

years of age and unmarried. The court held both parents were entitled to share in a wrongful death recovery because the mother still had the status of next of kin since no permanent award of custody had been made. The decision seems sound in view of the judicial policy of very strictly construing statutes which deprive any person in the bloodline of his inheritance.[10]

Misconduct of an heir will not prevent him from sharing in an estate. The cases have held that a father may inherit from a child even where he has denied the paternity or has abandoned the child.[11] Similarly by the weight of authority, absent a statute, a person wrongfully killing another may inherit, if otherwise entitled under the intestacy laws. Where statutes change these rights they have been narrowly construed to deny inheritance only in cases clearly covered by such statutes.[12]

Effect of Later Discovered Will: In *First Federal Savings and Loan Ass'n. v. Dearth*[13] the decedent had owned real estate, upon the security of which his heirs borrowed shortly after his death, the lender and the heirs assuming the decedent had died without leaving a will. The loan was made three months and eight days after her death on the basis of affidavits of heirship and intestacy, no formal administration having been had. An earlier Tennessee case, *Wright v. Eakin,*[14] had protected a bona fide purchaser from the heir in a case where the lost will came to light 19 years after the death. While the weight of authority is contra[15] the holding of the *Wright* case appears sound; otherwise titles may be left unsettled indefinitely or at least until a title by adverse possession can be established. But the instant case denied the lender any protection. The short period of time plus the lack of evidence showing diligence in searching for a will, failed to satisfy the good faith requirement. Each case will thus depend on its own facts. The problem is not easy of solution. Titles ought not be left uncertain for long periods. Buyers ought to be able to rely on the record. On the other hand, innocent devisees ought not to lose their inheritances because of delays in the discovery of wills. No general rule can be laid down without doing injustice in many cases. The court's solution in examining the facts in each case seems preferable, on balance, to the rule in many other jurisdictions that bona fide purchasers from heirs, where there is no adjudication of intestacy, are not entitled to the property against devisees of later probated wills.[16]

10. See ATKINSON, WILLS 147 (2d ed. 1953).
11. *In re* Green's Estate, 197 Iowa 1169, 196 N.W. 993 (1924).
12. Bird v. Plunkett, 139 Conn. 491, 95 A.2d 71 (1953) (claimant convicted of manslaughter, statute provided forfeiture for murder).
13. 279 S.W.2d 503 (Tenn. 1955).
14. 151 Tenn. 681, 270 S.W. 992 (1925).
15. ATKINSON, WILLS 503 (2d ed. 1953).
16. *Ibid.*

WILLS

Undue Influence: Not all influence is improper. One court, answering the argument that the legatee "had carried on a campaign to secure for himself the estate" of an elderly relative, said, "Fortunately for aged widows, though sometimes unfortunately for their next of kin, the law does not penalize such campaigns."[17] Our supreme court recognized in *Halle v. Summerfield*[18] that there is no presumption of invalidity because of the exercise of influence by a daughter to induce her father to execute a new will in her favor. However, the exercise of influence later the same day by the son to cause the reinstatement of an earlier will by the revocation of the new will was likewise regarded as permissible.

There are four elements usually required to establish undue influence: (1) a weak mind subject to influence, (2) an opportunity to exercise the influence, (3) a disposition to unduly influence to effect a wrongful favor, and (4) a result appearing to be the effect of the influence.[19] The disposition to influence means more than an effort to obtain a greater share at the expense of another. It implies a willingness to do something unfair or shocking to bring about the result. As one court put it: "Undue influence . . . denotes something wrong according to the standard of morals which the law enforces in the relations of men, and therefore something legally wrong, something, in fact, illegal."[20] This statement is not very helpful but is indicative of the extreme vagueness of the concept. In the instant case the disposition was in accord with a long settled plan of the testator. This in itself was enough to counteract the effect of the confidential relationship between father and son growing out of a long established business association, plus the fact that the son's lawyer drew the instrument that revoked the daughter-inspired will. However, where a confidential relationship exists extreme care should be taken. Here the son had the good sense not to be present at the time the revoking will was executed. If he had been present the result might well have been different. Legatees will be well advised not to be over-active in the preparation and execution of wills, lest the instruments be thought of as expressing their wishes rather than those of their benefactors. Lawyers, in particular, should refrain from drafting instruments in which they are named as beneficiaries. Where a prospective legatee seeks out a lawyer to draft a will, the lawyer ought to interview the testator privately, arranging for the legatee to be far distant from the place of the interview and the place of execution.

17. MacMillan v. Knost, 126 F.2d 235, 236 (D.C. Cir. 1942).
18. 287 S.W.2d 57 (Tenn. 1956).
19. See *In re* Leisch's Will, 221 Wis. 641, 267 N.W. 268 (1936).
20. Morris v. Morris, 192 Miss. 519, 520, 6 So. 2d 311, 312 (1942).

Formalities in the Execution of Wills: A will that undoubtedly expressed the desires of the testator and executed under circumstances that precluded any possibility of fraud, undue influence or lack of capacity came into question in *Needham v. Doyle.*[21] The will, in every respect fair on its face and containing an attestation clause, was attacked on the ground of failure to publish and declare the instrument to be a will. Testimony of one of the witnesses suggested he might have signed without having been told that he was witnessing a will. "I wouldn't say he [the testator] said come and sign a will. I signed the paper there in his office and in a few days—I don't know just how long it was—he asked me did I know what I signed and he told me it was a will."[22] Other evidence indicated that the witness may have been made conscious of the nature of the document.[23]

Further the attestation clause raised a presumption that the recitals of due execution were true. The supreme court, reversing the trial judge, who had directed a pre-emptory instruction against the will, held the question of publication should have been submitted to the jury. Query, in view of the litigation during the last few years[24] if the publication requirement should be retained in the statute. Most American jurisdictions do not require that the testator signify the instrument to be his will and commentators have criticized the added formality on the ground of the undesirability of overturning a will because the testator omitted to declare the testamentary character of the paper or because a witness failed to remember his statement to that effect.[25]

Joint Wills: Another source of fertile litigation has been the joint will, *i.e.,* a will in which the same paper is executed by two persons as their respective wills. Testators seem to prefer joint wills to mutual wills because the risk of revocation by one without the knowledge of the other is believed to be substantially reduced. However, the drafting of a joint will creates difficult problems in attempting to express the individual intentions of each testator. In *McDaniel v. Owens*[26] the paper writing, wholly in the handwriting of the husband, except for the signature of his wife, read as follows:

> Nov 21 1943
>
> Hear is Our Will At Our death All in Our name goes to W M Owens and Elvis Owens at our Death. All the land of 132 acres in the 11 dis-

21. 286 S.W.2d 601 (Tenn. App. W. S. 1955).
22. *Id.* at 606.
23. "I really thought that was what it was, but to say knowing it, I wouldn't say I personally knowed it was a will." *Id.* at 609.
24. Bowe, *Wills, Estates and Trusts*—1954 *Tennessee Survey,* 7 VAND. L. REV. 977 (1954); Bowe, *Wills, Estates and Trusts—1953 Tennessee Survey,* 6 VAND. L. REV. 1126 (1953).
25. ATKINSON, WILLS 328 (2d ed. 1953).
26. 281 S.W.2d 259 (Tenn. App. W.S. 1955).

> trict of Gibson County. And all the Bank Shears in Farmers & Merchant Bank. Everything Else goes to them at Our Death for John Owens has got His part of Ething.
>
> Nov 21 1943
> P P Owens
> and Wife Anna[27]

The paper was found in an envelope on which was printed: "Its inside." On the outside of the envelope in the husband's handwriting appeared the following: "This is not to be opened until our death. P. P. Owens and Anna." The court quite properly treated the envelope as part of the will. It also held the will to be a valid holograph of P. P. Owens, on whose death the document was offered for probate, since the words, "and Anna" were immaterial and surplusage.

Probate, however, was denied because the court found an intent that the writing was not to be effective until the death of the survivor. It is well settled in Tennessee and elsewhere that a joint will may be regarded as the will of each cotestator and may be probated twice, once at each death. But if the expressed or implied intent is that the will is not to be probated until the death of the survivor it is invalid on the theory that the estate of the decedent may not be held in abeyance until the later event occurs. Generally, it is possible to construe the words of the testament as creating a life estate in the survivor with no intention to postpone the operation of the will. Perhaps the language in the Owens' document too strongly suggested that it was not to become operative until the second death; but query, if the court might not have used its interpretative power to find an intent only to postpone possession and enjoyment of the ultimate legatee, not probate and administration. This would have caused a life estate for the life of the survivor to go by intestacy or a life estate to the survivor might have been implied. Either result would seem preferable to complete intestacy. And courts have and can do wonderful things when they begin the process of interpreting the inept words of lay draftsman.

Lost Wills: A will, lost, mutilated or destroyed, without intent to revoke, may be admitted to probate upon satisfactory proof of its contents and due execution. If the will was last known to be in the possession of the testator and cannot be found it is presumed to have been destroyed with intent to revoke. But no such presumption arises if the will is shown to have been in the possession of another. In *Wall v. Millsaps*[28] the court recognized these common-law principles.

TRUSTS

Oral Trusts: The seventh section of the Statute of Frauds is not in effect in Tennessee. Hence a trust of real estate may be created

27. *Id.* at 260.
28. 286 S.W.2d 343 (Tenn. 1955).

orally. In *Brantley v. Brantley*[29] after the death of the father, the children claimed they conveyed land to their mother so that she could obtain loans on the property to improve it. It was alleged she agreed to repay the loans and reconvey the interests to the children. It was further alleged that she failed to adhere to the agreement. Held, the bill stated facts sufficient to impress a trust upon the realty.[30]

Future Interests

Rule Against Perpetuities: In *Crockett v. Scott*[31] the Court had occasion to reaffirm three basic perpetuity rules:

1. Men and women are considered as capable of having children as long as they live.
2. The rule is predicated on what conceivably might happen rather than on what actually happens or is likely to happen.
3. Where a gift to any member of a class fails, the entire gift to the class fails.[32]

The will of the testatrix in the *Crockett* case gave her estate to her sister A for life, upon A's death, to A's then living children and a niece C, for their lives and "after their death to their children free and discharged of any further trust, And if any of my sister's children or said [C] should die without children, his or their share to go to its next of kin. After my sister's death said property is to go to her children and the heirs of such as may be dead and said [C] per capita and not per stirpes for and during their lives and after their death to their children if they have any and if they have none to their next of kin."[33]

Thus sister A was given a life estate. This was followed by life estates to A's then living children and to C, with remainder to the grandchildren of A and the children of C. At the time of the testatrix's death her sister A was 50. She had six children, one of whom predeceased her. C, at the death of the testatrix, was 13 and resided in the household of A.

Gray's classic definition of the Rule Against Perpetuities states, "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." It is not sufficient that it probably will vest or in the light of subsequent events

29. 281 S.W.2d 668 (Tenn. 1955).
30. For a further discussion of oral trusts, see Bowe, *Wills, Estates and Trusts—1954 Tennessee Survey*, 7 Vand. L. Rev. 977, 982 (1954).
31. 284 S.W.2d 289 (Tenn. 1955).
32. "To this doctrine there are two exceptions: first, where there is a gift of a stated amount to each member of the class; and, second, where there is a gift to a class, the membership in which is certain to be determined within the period of the rule, and this is followed by a gift over of the share of each member of the class, or of the share from which each member of the class has been given income, to his children, issue, heirs or the like." Simes, Handbook on the Law of Future Interests 387 (1951).
33. 284 S.W.2d at 290.

it would have vested within the period. There must, as of the date the interest is created, be no possibility that it could fail. Looking at the instant bequest, the remainder is bad. A's life may not be used as the measuring life since her children might survive her by more than 21 years and hence delay vesting in the grandchildren beyond the permissible period. The lives of A's children and C may not be used since it is possible that all of A's children might die and others be born and live beyond 21 years. These latter would have life estates, good since they must vest at the death of A (a life in being at the creation of the interest) but bad as to the grandchildren, since, if this remote contingency occurred, the vesting of the estates in the grandchildren would be delayed beyond a life in being and 21 years.

It was argued that the gift to C's children was valid since it must vest at the termination of C's life. But the court quite properly held that this was a class gift as the testator was obviously group-minded.[34] It is well settled that a class gift, subject to certain recognized exceptions,[35] is treated as a unit for the purposes of the rule; if it is bad as to any possible member of the class it is bad as to all.

The rule too often operates as a trap. It rarely prevents desired dispositions since the average testator wants only to benefit or restrict those he knows. It is hard to have favorable or unfavorable opinions about those not yet born. Since testators are primarily interested in their children and grandchildren rather than in more remote generations, and since violations of the rule are generally inadvertent, wills and trusts ought to contain a protective clause such as the following:

> Notwithstanding the directions heretofore given my Trustee as to the distribution of income and principal, the trust established by this will shall terminate, if it has not previously terminated, 21 years after the date of the death of the last survivor of my wife, my children and any grandchildren of mine in being at the date of my death and my trustee shall pay over the then remaining principal and any undistributed income to those of my lineal descendants then living, per stirpes.

A bequest to those of my nieces who survive distribution of my estate is generally held bad since conceivably the estate may not be distributed for 22 years, and all nieces living at the testator's death may die the next day and a new niece be conceived and born. The suggested clause, with variations to specify the estate rather than the trust, and nieces living at the testator's death as the measuring lives, would save such a gift, since we may safely assume distribution will in fact take place within a few years, certainly within 21 years after the deaths of all nieces living at the date of the testator's death. Such a clause will effectuate the intent of the testator in practically all cases since gifts are voided in most instances because of some fanciful

34. SIMES, *op. cit. supra* note 32 at 289.
35. *Ibid.*

possibility which every one knows will never occur. In the instant case it would have achieved the decedent's objective since five of her sister's children and C survived her and no further children were born. Thus distribution would have been made under the dispositive clause and not under the protective clause.

Construction: In *Johnson v. Speer*[36] Item 4 of the will of a Mrs. Potter read as follows:

> I give and devise unto my sister, Lotta S. Johnson, the real estate and improvements owned by me in Memphis, Tennessee, known as Eight Hundred Fourteen (814) Court Avenue; provided, however, that in the event my said sister should predecease my brother, Charles E. Speer, then the said property shall vest in and belong to him.[37]

Lotta, whose brother survived her, conveyed the real estate in fee during her life and the litigation involved her grantee's title. Lotta had more than life estate but less than an indefeasible fee. Technically, she had a fee simple subject to a shifting use in her brother. Interests such as his were early recognized as indestructible. It was these early holdings that prompted the courts to announce the Rule Against Perpetuities.

As Lotta predeceased her brother, the fee shifted to him. The grantee argued that the will should be construed to mean that the brother was to take only if Lotta died before the testatrix. But the court noted that in other parts of the will the testatrix had clearly expressed this intent where she had it. Thus in one item she gave property to her brother "if he survives me"; in another, she gave property to grandchildren and "if either predeceased me"; etc. In view of the careful phraseology the court ruled out any possibility of an intent to limit the gift over to her brother, only if Lotta failed to survive testatrix. This case indicates that the will draftsman should not aspire to the literary excellence that dictates changes in the form of language where identical ideas are being expressed. Exact repetition of words, rather than use of synonyms, may become monotonous in English composition but it is a quality much to be desired in wills.

36. 279 S.W.2d 711 (Tenn. App. W.S. 1954).
37. *Id.* at 712.