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Wills, Trusts and Estates -- 1957 Tennessee Survey

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WILLS, TRUSTS AND ESTATES—1957 TENNESSEE SURVEY

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The subject matter of this article will be presented in four parts entitled *Wills, Trusts, Future Interests* and *Fiduciary Administration.* The latter will include the developments of the year[1] concerning both the administration of decedents' estates and the administration of trust estates because to an increasing extent the statutes and decisions are relevant to both kinds of fiduciary administration. Legislative developments concerning probate law are also included under each heading as well as the court decisional developments.

WILLS

Dependent Relative Revocation: If the terms of a revocation are expressly conditional, the will is revoked only if the condition is fulfilled. It is thus possible that a revocation clause by its terms can be made dependent upon the happening of a condition; and it might perhaps be shown by oral evidence in a few cases of revocation by physical act that the decedent's intention was to revoke only upon the condition that a particular event has occurred. There are probably only a very few cases, however, where such a frame of mind can really be established.

More frequent are instances where a revocation was induced by some mistake of law or fact on the part of the testator. These cases of revocation based on mistake tend to be included with the infrequent cases of true conditional revocation and classified under a doctrine known as "dependent relative revocation." The substance of this doctrine is that the revocation was conditional or dependent upon some other event or fact which did not happen. It would seem more realistic to treat the mistake cases for what they really are in fact and decide them in accordance with the probable intention of the decedent.

In *Briscoe v. Allison*[2] the decedent sat at the breakfast table and tore his will into many parts. He had previously expressed dissatisfaction with it. The proponent contended that there was no revocation because of the decedent's intention to make another will, but the finding of fact implicit in the jury verdict and in the review of the

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1. The "year" covered in this article extends from June 1, 1956 through May 31, 1957. The Tennessee court decisions included are reported in the volumes of the Southwestern Reporter beginning with 289 S.W.2d 695 and extending through 301 S.W.2d 379.

2. 290 S.W.2d 864 (Tenn. 1956).

evidence by the court of appeals is that there was no clear intention to make a new will. The doctrine of "dependent relative revocation" was therefore properly held to be not applicable to this case as there was neither (1) a true conditional revocation, nor (2) evidence of a revocation based upon mistake.

Construction Problem: A little knowledge can be a dangerous thing indeed, and this is often demonstrated by the results in cases involving holographic wills. In *Boulton v. Cochran*[3] the testatrix wrote her will in her own handwriting indicating that she knew something about the procedure for the administration of a testamentary estate by providing that her executor should employ "no lawyer"; "Twill not be necessary. I have utmost confidence in my executor." The report of the case indicated that six lawyers were involved in its solution, however, and because the provisions of the will itself gave rise to the litigation the court of appeals refused to tax the costs to the persons who questioned it, taxing instead all costs to the decedent's estate. It does not seem amiss to say that holographic wills do tend to be penny wise and pound foolish.

In this case the testatrix gave many specific gifts such as a piano to *A*, a big pin with earrings to match to *B*, a wicker chair and celery dish to *C*, a flowered bowl to *D*, etc., for a long list. It is not clear from the opinion whether the following clause is located after all the specific gifts, or between them, but the following clause is in issue: "Should any money come in after other things taken care of give it to Oscar Cochran, also hay and corn if any on hand at my death."

Does this clause constitute a residuary gift of everything else to Oscar Cochran? This was the construction problem before the court. The heirs at law of testatrix were nephews and nieces. They contended that testatrix died intestate with respect to certain government bonds, an automobile, a cow and chickens (all together worth several thousand dollars) which were not specifically bequeathed, and that the word "money" in the above gift to Oscar Cochran meant literally money and not bonds, automobile, cow or chickens. The court held that the above clause was intended as a residuary gift, however, and directed the executor, who really did need a lawyer's help, to distribute accordingly.[4]

Probate and Contest: In *Swindoll v. Jones*[5] one of the witnesses to

3. 292 S.W.2d 511 (Tenn. App. W.S. 1955).

4. Judge Avery's opinion extends over some nine pages in the Southwestern Reporter. Much of this space considers the "rule" in other cases. The Supreme Court has frequently pointed out that comparing cases and distinguishing them does not serve a very useful or important purpose with respect to the solution of construction problems. See, *e.g.*, Hutchison v. Board, 194 Tenn. 223, 231, 250 S.W.2d 82, 85 (1952). For a comment on the relevance of other cases in construction problems in Tennessee see Trautman, *Future Interests—1953 Tennessee Survey*, 6 VAND. L. REV. 1096, 1105 (1953).

5. 292 S.W.2d 531 (Tenn. App. E.S. 1955).

the will stayed at home and thereby failed to testify at the trial in circuit court of a will contest, although he had testified when the will was admitted to probate in common form. His wife, another witness to the will, testified at the will contest trial that he was sick and "not able to be here." Also, it appears that he had once been adjudicated insane and committed to a mental hospital and that there was no legal restoration. The contestor moved the circuit court for a directed verdict against the will on the ground that sections 32-204 and 32-406 of the Tennessee Code require a will to be proved "by all living witnesses, if to be found" when the will is contested. The circuit court overruled the motion and the jury verdict was in favor of the validity of the will. The court of appeals reversed holding that the proof did not adequately show the physical inability of the witness to the will to testify. The court emphasized that this question of the unavailability of the witness should be determined by the trial judge upon detailed evidence, and that the trial judge should not accept the mere conclusion of a witness. In pointing out that it is mandatory in will contests for all attesting witnesses to a will to be produced by proponents if they are available, the court held that a will should not be admitted and read to the jury as a part of the evidence until the trial court has properly determined that all living witnesses available have been produced in court. The prior adjudication that this witness was insane was held not sufficient to excuse his presence without a finding by the trial judge expressly on that point. It would seem that this decision requires an express finding by the trial judge in the record concerning the unavailability of witnesses to the will.

In *Jones v. Sands*[6] there was a will contest and the circuit court directed a verdict in favor of the will. The Court of Appeals, Western Section, reversed, holding that the trial court should have let the case go to the jury.

The 1957 Legislature[7] amended section 30-610 of the Tennessee Code to provide a period of grace of one year during which beneficiaries of an unprobated will and creditors of the decedent's estate will be protected against a bona fide purchaser from the heir. After the period of one year from the death of the owner a bona fide purchaser and mortgagee from an heir of decedent will be protected against all persons claiming under an unprobated will of such decedent; also, if no personal representative has qualified during the one year period, a bona fide purchaser and mortgagee shall take title free from the right of a creditor to subject the property to his debt.[8] This statute

6. 292 S.W.2d 492 (Tenn. App. W.S. 1954).
7. TENN. PUB. ACTS 1957, c. 118.
8. See Trautman, *Real Property—1956 Tennessee Survey*, 9 VAND. L. REV. 1089, 1091 (1956), pointing out the need for such legislation.

should remove what has been a substantial hazard[9] in approving a title based upon a conveyance of real property by the heir of a deceased record owner. Heretofore it was always possible that a will might be belatedly probated giving the property to others. The statute does not invalidate the unprobated will after the time limit; it only protects a bona fide purchaser after the time limit. The problem of the unprobated will was presented to the Supreme Court in *First Federal Sav. and Loan Ass'n v. Dearth.*[10] The decision in that case would be the same under this statute because the heir's conveyance was made some three months after the death of the record owner. In *Wright v. Eakin,*[11] however, the heir's conveyance was eleven years after the date of death of the record owner.

TRUSTS

There were only two court decisions[12] in which some aspect of the substantive law of trusts was involved. There are several new statutes, however, which were passed by the 1957 Legislature concerning the administration of trusts. The statutes will be discussed in the section on fiduciary administration.

Constructive Trusts: Terrell v. Terrell[13] involved a bill in chancery filed by an infant, Johnny, against Aunt Lucy. The bill alleged, and the court of appeals and Supreme Court found as facts, contrary to the findings of the chancellor, that Father and Mother had executed a deed conveying a house and lot to Father's sister, Aunt Lucy, who immediately executed her deed to infant son Johnny. It was alleged that the latter deed was delivered to Father who put it in a desk drawer and did not record it. It seems that Father was motivated in this transaction by his alimony problems with his first wife. The alimony problems were apparently settled, possibly on the basis of false testimony by Father that he had sold this property for $10,000 to Aunt Lucy, but the alleged deed from Aunt Lucy to Johnny could not be found after Father's death. The first wife is not in this case, so that there is no claim by a creditor of a fraudulent conveyance. While there was evidence that Aunt Lucy acknowledged that the property "belongs to Johnny," she refused to execute a new deed. The defense sustained by the chancellor was based on the Statute of Frauds, the unclean hands of Father, judicial estoppel based upon

9. See First Federal Sav. and Loan Ass'n v. Dearth, 198 Tenn. 304, 279 S.W.2d 503 (1955) where the Supreme Court held that there is no statute of limitations in Tennessee limiting the time in which a will may be probated, and held for the devisees against the mortgagee.
10. 198 Tenn. 304, 279 S.W.2d 503 (1955).
11. 151 Tenn. 681, 270 S.W. 992 (1925).
12. Terrell v. Terrell, 292 S.W.2d 179 (Tenn. 1956); Range v. Tennessee Burley Tobacco Growers Ass'n, 298 S.W.2d 545 (Tenn. App. E.S. 1956).
13. 292 S.W.2d 179 (Tenn. 1956).

Father's testimony in the alimony matter, and insufficient evidence to establish a lost deed. The court of appeals and the Supreme Court reversed, holding (1) the evidence was sufficient to prove that Aunt Lucy executed a deed to Johnny; (2) the doctrines of judicial estoppel and unclean hands were not applicable to Johnny because he was not a party to the divorce proceeding nor was he claiming as heir of Father, but as grantee from Aunt Lucy; (3) the Statute of Frauds was not applicable to Johnny.

If the theory of the decision is that the court was establishing a lost deed, the law of trusts is not necessarily involved. Assume, however, for the purpose of discussion, that the evidence was not sufficient to establish a lost deed; the same result could be reached upon either of two trust theories, one of which seems clear, the other arguable. They are (1) that there was an oral express trust for Johnny, and (2) that a constructive trust should be imposed upon Aunt Lucy. Both theories seem applicable only because Tennessee is one of approximately fourteen states which have not reenacted the seventh section of the English Statute of Frauds which required all declarations of trust and confidences of land to be in writing.[14] The result is that a trust of real estate may be created orally in Tennessee when the oral agreement of the grantee to hold it in trust is contemporaneous with the execution and delivery of a deed absolute on its face.[15] This theory seems clear.

The constructive trust theory is somewhat debatable. If *A* conveys land to *B* upon an oral trust for *C* or upon an oral contract to convey to *C*, it is clear that in most states the seventh section of the Statute of Frauds prevents the enforcement of the express trust or contract. The questions considered then are (1) should *B* be allowed to retain the land? (2) Should a constructive trust be raised in favor of *C*? (3) Should a constructive trust be raised in favor of *A*? While it seems clear that *B* would be unjustly enriched if he is allowed to keep the land, the argument in favor of that result is that to do otherwise is to violate the policy of the Statute of Frauds. The majority of the courts have been unwilling to frustrate this legislative policy and accordingly have allowed *B* to keep it, although there is respectable authority to the contrary.[16] Since the equivalent of the seventh section of the English Statute of Frauds is not a part of the public policy of Tennessee, our courts are not confronted with the problem of frustrating the legislature; it would accordingly seem that Tennessee courts should have no hesitancy in imposing a constructive trust upon

14. Hunt v. Hunt, 169 Tenn. 1, 80 S.W.2d 666 (1935); BOGERT, TRUSTS 62 n. 57 (3d ed. 1952).

15. Brantley v. Brantley, 198 Tenn. 670, 281 S.W.2d 668 (1955); Insurance Co. of Tennessee v. Waller, 116 Tenn. 1, 95 S.W. 811, 813 (1906).

16. 1 SCOTT, TRUSTS § 45 (2d ed. 1956) and cases there cited.

B in order to prevent an unjust enrichment. While the court in the instant case apparently puts the decision on the theory of establishing a lost deed, a relevant quotation from the near end of the opinion states that "a court should not enrich a fraudulent grantee at the expense of parties not responsible for the original grantor's attempt to avoid creditors."[17]

Trust or Debt: The distinction between a trust and a debt is indeed an important one giving rise to fundamentally different results. There are many transactions, however, in which it is not made clear whether the relationship is one or the other. A trust involves a duty to deal as a fiduciary with property for the benefit of another who is regarded as the equitable owner of it. A debt involves a mere personal obligation, the creditor having no ownership in the debtor's specific property until after it is subjected to judicial proceedings. Any capital growth with respect to such property results in an increase in the net worth of the trust beneficiary but not to the creditor. Also, it is fundamental that a trustee is limited in the uses to which the trust property can be put.

The suit in *Range v. Tennessee Burley Tobacco Growers Ass'n*[18] was an attempt by eleven members of a cooperative association, a Tennessee corporation, to bring a class action in behalf of themselves and the other 70,000 or more producers to prevent the corporation from using certain profits for the construction of several new storage warehouses. The Association seems to have agreed that each producer was entitled upon his demand to a share of the profits, but the right of plaintiffs to bring a class action was denied. The court held that the "situation is not unlike that involving depositors in a bank."[19] If a trust had been established, the corporation could not use the profits for its own expansion.

Future Interests

Rule Against Perpetuities: The Rule Against Perpetuities is a rule of public policy developed by the courts in Anglo-American government, aimed against contingent future interests which may vest at a time too remote in the future. The existence of any kind of future interest, vested or contingent, tends to restrict the alienability of property because the title is divided. But if the future interest is contingent, the handicap is greater and perhaps impossible. Prior to the recognition of the executory interest, the usual contingent future interest was a contingent remainder. Because of the common law rule, still in effect in Tennessee,[20] that a contingent remainder is destroyed

17. 292 S.W.2d at 184.
18. 298 S.W.2d 545 (Tenn. App. E.S. 1956).
19. *Id.* at 550.
20. Cochran v. Frierson, 195 Tenn. 174, 258 S.W.2d 748 (1953); Robinson v.

which fails to become a vested remainder prior to the termination of the prior life estate, the contingent remainder was never considered a serious clog upon the marketability of title. When the executory interest was recognized after the Statute of Uses and was held not subject to the destructibility rule,[21] the specter loomed large that the titles to all the land in England would become tied up with contingent interests so as to become unmarketable. The Rule Against Perpetuities was accordingly formulated by Lord Chancellor Nottingham in the *Duke of Norfolk's Case*[22] as a rule of public policy intended to prevent contingent future interests which are not sure to vest, or which fail to vest, within a prescribed period of time. That period of time was originally lives in being, thus parallel to the destructibility of contingent remainder rule. It was later extended to lives in being plus twenty-one years in order to allow for the minority of the ultimate takers. Subject to several variations, the rule generally is as stated by Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[23] Note particularly that the rule is concerned only with contingent future interests; the term "vest" therefore refers to vesting in interest and not to the time when the future interest will become a present possessory interest. Because it is a rule of public policy intended to strike down those gifts by testators and grantors which violate its time limit, the application of the rule generally does not depend upon the intention of the testator or grantor. Likewise, because there is a maximum time limit in which contingent future interests must either vest or fail, expressed in terms of a formula "lives in being plus twenty-one years" there is a mathematical computation implicit in the rule, and court decisions applying it tend to be wrong or right, depending upon the accuracy of the court's computation in each case.

In *Sands v. Fly*[24] the testatrix devised two tracts of land creating contingent future interests which were attacked by the sole heir at law as violative of the rule. The decision of the Supreme Court seems partly right and partly wrong. Tract one was devised to Son for life, remainder to his children living at his death for life, and upon the

Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906); for a discussion of this principle see Trautman, *Future Interests and Estates—1954 Tennessee Survey*, 7 VAND. L. REV. 843 (1954).

21. Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (K.B. 1620).

22. 3 Chan. Cas. 1, 22 Eng. Rep. 931 (1682).

23. GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

24. 292 S.W.2d 706 (1956). The case is discussed in a student note in 45 KY. L. J. 704-10 (1957). While this note seems to present an accurate analysis of the validity of the contingent future interests under the Rule, the conclusion that the case indicates the need for reform in the law of future interests is a non sequitur. Also, it is not true that "Everybody . . . thought this an unjust devise and cast about for ways of invalidating it, but apparently no one came up with any doctrine compelling the desired result." *Id.* at 706.

death of the last surviving child of Son, remainder in fee to *A, B, C, D, E, F,* and *G,*

> with the child or children of any one or more of them who may not be living at the time of the termination of the life estates hereinbefore created to take, per stirpes, the same share or shares in said tract of land that it or their parent or parents would have taken if living at that time. If any one or more of said [named devisees above] . . . should not be living at the time of the vesting of said remainder, and should not be survived by a child or children, then his or her share in the remainder shall pass to the other living nieces or nephews, or to their children as above provided.[25]

Since the rule applies only to vesting in interest and not to vesting in possession, if the remainder to *A, B, C, D, E, F,* and *G* is regarded as vested subject to being divested by the death of any of the named devisees before the death of the last surviving child of Son, the remainder would be good under the rule because it became vested in interest immediately at the death of testatrix. Also, if the remainder to these persons is considered contingent, it would still be good as to them, because they are lives in being and their interests will either become vested, or fail to vest, during their lives. It is thus possible to have valid future interests, indeed contingent future interests, which will become vested in interest within the period of the rule, even though they will not take effect in possession until after the period of the Rule. Under such a construction, however, it is perfectly clear that the two contingent future interests created by the gift over violates the rule because neither must necessarily vest or fail to vest within lives in being plus twenty-one years. Son and his children alive at the death of testatrix and *A, B,* etc., the named remaindermen and their children alive at death of testatrix may be considered as the lives in being at the creation of the interests. Son could have additional children born after the death of testatrix, and then everyone alive at death of testatrix could die with the newly born children surviving for more than twenty-one years thereafter; thus the gift over would not necessarily vest or fail to vest within the mathematics of the rule. Also, the law is clear that the rule operates to make void any future interest which violates it. The mere fact that it is highly improbable that a condition precedent will take effect beyond the period does not make valid the future interest which is subject to it. To be valid, it must be certain from the face of the instrument creating the future interest that it will vest or fail within the time limit.

Survivorship of the last child that Son may have seems to be the essential condition precedent of any recognizable economic interest in the property on the part of the alternate takers and this is the very

25. 292 S.W.2d at 708.

kind of dead hand projection which the policy of the rule seeks to prevent. While there is a rule of construction which favors construing a future interest as vested rather than contingent when there is doubt, it is a mere rule of construing intent when in doubt, and there seems to be very little doubt here that testatrix wanted to control the devolution of this land upon the happening of a contingency which would not necessarily take place within the Rule.

Tract two was devised to Son for life, remainder to his children living at the time of his death for life, and upon the death of the last surviving child of Son one-half was devised in fee simple to the Baptist Orphanage, and the other one-half to *P* "provided she should be then living, and if not then her share in said tract shall go in fee to" *X*, *Y*, and *Z*. It is clear that the future interest to the Baptist Orphanage is perfectly valid because it is a remainder fully vested in interest; not subject to any contingencies other than the normal expiration of the prior life estates. It seems equally clear that the future interests given to *P*, *X*, *Y*, and *Z* are subject to the contingency of survivorship to the death of the last survivor of any children that Son may have. Because the required survivorship is a condition precedent to vesting which need not necessarily take place within the time limit of the rule, this remainder seems contingent and void. If it is argued that the remainder to *P* is vested subject to being divested, then clearly the gift over to *X*, *Y*, and *Z* is void. But realistically, the interests of *P*, *X*, *Y*, and *Z* are alternative contingent remainders dependent upon survivorship to an event which need not take place within the rule.

The Supreme Court upheld as valid all of the future interests created by the will of the testatrix. Because Son was forty-four years old and had four children living at the death of testatrix, the court seems to assume that Son would have no additional children, so that the remainder to children for life would be limited to lives in being at death of testatrix, and thus the remainders in fee would vest at the end of lives in being. This reasoning was not articulated by the court, but it seems to be fairly implicit in the opinion. The difficulty is that the remainder to the children is a class gift of a future interest; the rule of construction normally applied in class gifts of future interests is that membership in the class is usually held open until the future interest becomes a present possessory interest.[26] Thus it would not seem to be the intention of the testatrix to exclude children of Son born after her death. The cases cited by the Supreme Court do not seem relevant to the problem involved. *Armstrong v. Douglass*[27] involved a construction of present section 64-104 of the Tennessee

26. SIMES, FUTURE INTERESTS 292-99 (1951).
27. 89 Tenn. 219, 14 S.W. 604 (1890).

Code which changes the common law construction of the phrase "die without issue" or its equivalent from an indefinite failure of issue—*i.e.* when the lineal line ended—to a definite failure of issue construction—*i.e.* upon the death of the named person. That litigious phrase is not involved here. *Eager v. McCoy*[28] held a power of sale in trust to be void because of the rule. The remainder interests to grandchildren were upheld because the court first construed the gift to vest in those grandchildren living at the death of the last of the sons of the testatrix.[29] *Satterfield v. Mayes*[30] is the old Tennessee class doctrine, criticised and ignored by subsequent Tennessee cases[31] and practically abolished by section 32-305 of the Tennessee Code. *Brown v. Brown*[32] is one of the leading American cases repudiating the spurious English case of *Whitby v. Mitchell;*[33] the case holds that a gift to the unborn child of an unborn child is not necessarily void.

Construction Problems: The construction problem discussed above in the section on wills concerned the interpretation of a present interest. The discussion here will be concerned with construction problems involving future interests.

In *Lowe v. Rice*[34] the testator devised land in trust for the benefit of his widow *(W)* for life, and at her death remainder "to all my Grandchildren, six now in number, *i.e.*, [*A, B, C, D, E* and *F*] and any other Grandchildren hereafter born to my three children." Testator was survived by three children, parents of the named grandchildren and his widow. A seventh grandchild was born after testator's death and before *W*'s death. The problem was whether grandchildren who may be born after *W*'s death would have an interest in the land. The Court of Appeals, Western Section, affirmed the decision below holding that the testator's intention to include afterborn grandchildren was clearly expressed and would be upheld. This has the effect, however, of making the title unmarketable for the lives of the testator's three children, a result likely not considered by the testator. While the gift was to named individuals, it was also to "any other Grandchildren hereafter born to my three children." It is difficult to say that it was not in part a class gift, and the court dealt with the problem on that basis, notwithstanding it said that the class doctrine is not applicable. It is certainly true that at best the

28. 143 Tenn. 693, 228 S.W. 709 (1921).
29. *Id.* at 708.
30. 30 Tenn. 58 (1849).
31. Ward v. Saunders, 35 Tenn. 387 (1855); Bridgewater v. Gordon, 34 Tenn. 5 (1854). See 1 SIMES, FUTURE INTERESTS 122 (1936) and Tennessee cases there cited; McSween, *The Tennessee Class Doctrine. A Spectre At The Bar*, 22 TENN. L. REV. 943 (1953).
32. 86 Tenn. 277, 6 S.W. 869 (1887), *rehearing*, 7 S.W. 640 (1888).
33. [1890] 44 Ch. 85 (C.A.).
34. 291 S.W.2d 287 (Tenn. App. W.S. 1956).

various rules about class gifts are mere rules of construction to be used by the courts as an aid to construing the gift when the intention is not clear. The present decision seems to follow a literal interpretation of the gift. Ordinarily, however, a class gift closes to maximum membership at the time of distribution if of personalty, at the time possession is taken if of realty. This rule was developed as a rule of convenience in fiduciary administration, and is applied generally as a rule to both cases of personalty and realty.[35] Under this rule of construction the class of "other Grandchildren hereafter born" would close at the death of the life tenant when the future interest became a present possessory interest so that the then owners could make a marketable title. Under the construction adopted by the court the class will not close until the death of all the testator's children, and the title will remain unmarketable because of the possibility of additional grandchildren being born, but the Rule Against Perpetuities is not violated because the class will close at the end of lives in being.

Ross v. Bateman[36] involved a devise in trust for the benefit of a nephew, W. D. Bateman, for life, and upon his death the trust to terminate and remainder to "the lawful children of said W. D. Bateman surviving him." Could this remainder go to an adopted child? Complainant was the adopted and only child surviving W. D. Bateman. She contended that adopted children are lawful children, and that she was literally included in the gift. But the Supreme Court said that "children" was not intended to include adopted children. While this decision seems to be one of first impression in Tennessee, the decision is consistent with the usual rule of construction in other states, particularly where the gift is not to the testator's own children or grandchildren and where, as here, the adoption had not taken place before the death of the testator.[37] The draftsman of a will should be alert about adopted children.

Butler v. Parker[38] involved a deed to "Ralph Parker and at his death to his bodily heirs." The Supreme Court properly held that section 64-103 of the Tennessee Code abolishing the rule in *Shelley's Case* thereby creates a contingent remainder. The court assumed, however, that the "children" received the contingent remainder. This does not necessarily follow. The word "children" usually means immediate offspring, and does not include grandchildren or more remote issue.[39] The phrase "bodily heirs" would seem to include more remote issue.

35. SIMES, FUTURE INTERESTS 288-299 (1951).
36. 291 S.W.2d 584 (Tenn. 1956).
37. 2 SIMES, FUTURE INTERESTS 223 (1936).
38. 293 S.W.2d 174 (Tenn. 1956).
39. 2 SIMES, FUTURE INTERESTS 218 (1936).

FIDUCIARY ADMINISTRATION

There were eight court decisions and eight items of legislation enacted by the 1957 General Assembly concerning the fiduciary administration of decedents' estates, trust estates, guardianships, and custodians. The court decisions will be discussed first, then the legislation.

Court Decisions

Claims: An apparent conflict between sections 30-516 and 30-517 of the Tennessee Code was clarified by the Supreme Court in *Needham v. Moore.*[40] Within nine months from the date of the publication of the first notice to creditors, all persons having claims against the estate of the decedent must file their claims in duplicate with the clerk of the court in which the estate is being administered.[41] Unless the claim is filed within this period it is "forever barred," and no court has the power to extend this period of time.[42] Section 30-517 of the Code provides that exceptions to claims may be filed at any time up to thirty days after the expiration of the nine months period. Section 30-516 of the Tennessee Code provides first that the clerk shall give the fiduciary written notice of a claim within five days after it is filed; it then provides that if a claim is filed during the ninth month, the fiduciary shall have thirty days after receipt of the notice from the clerk. The problem is whether the fiduciary and other interested parties have less than thirty days after the nine months for filing exceptions to a claim filed during the ninth month. The Supreme Court held that the fiduciary and other interested parties always have the thirty days after the nine month period to file exceptions as provided in section 30-517, and that section 30-516 can only increase this period provided in section 30-517, never decrease it. Suppose a claim should be filed on the last day of the nine month period. The clerk has five days to notify the fiduciary. In this event the fiduciary and other interested parties have thirty days from receipt of the clerk's notice to file exceptions under section 30-516, and this would be a few days longer than the period provided in section 30-517. The court provides an illuminating discussion of how to compute the months and the days provided in the statutes. The exceptions filed by a grandson were filed on the very last day possible in the instant case because the preceding day was a Sunday.

State Department of Public Welfare v. O'Brien[43] holds, however, that the state's claim for moneys paid under the Old Age Assistance

40. 292 S.W.2d 720 (Tenn. 1956).
41. TENN. CODE ANN. § 30-510 (1956).
42. Commerce Union Bank v. Gillespie, 178 Tenn. 179, 188, 156 S.W.2d 425, 429 (1940); 2 PRITCHARD, WILLS 264 (3d ed. 1955).
43. 292 S.W.2d 733 (Tenn. 1956).

Law is not "forever barred" by the failure to file it within the nine month period. This is consistent with a general common law rule that the sovereign's claim is not within the statute of limitation unless expressly so provided.[44]

Brigham v. Southern Trust Co.[45] raises a question whether an executor or administrator can ever be surcharged on a final accounting for failure to file exceptions to a claim within the ten month period provided in section 30-517 of the Tennessee Code. Failure to except to claims filed against the estate within the time prescribed becomes in effect a judgment against the estate, so the claimant will be paid. Can the distributee or next of kin surcharge the fiduciary by objecting to his claim for credit for paying a claim which should have been opposed? It is true that section 30-517 provides that in addition to the personal representative any party interested in the estate either as creditor, distributee, heir or otherwise may file an exception within the time prescribed; and it is true that the claimant cannot be denied if no exceptions are filed. But it certainly does not follow from this that a fiduciary cannot be surcharged on his accounting if he violated a fiduciary duty of loyalty and prudence in fiduciary administration. Also, bear in mind that section 30-516 requires a notice of the claim to be sent only to the fiduciary, not to beneficiaries. An executor or administrator is charged with the duty of exercising due care in the allowance of claims, and he is charged with the fiduciary duty to contest claims to which there is a valid defense or, indeed, a substantial question.[46] It would seem that the very least required of a fiduciary under such circumstances would be a notice to the beneficiaries so that they could oppose the claim. As was said by the New York Court of Appeals:

> The duty of executors clearly does not permit them merely by allowing or paying claims against the estate without regard to their character to shift the burden of proof upon objectors. They are still bound to the exercise of proper care. They must act on satisfactory proofs that the claim is justly due.[47]

The *Southern Trust Company* case was decided by the Tennessee Supreme Court upon appeal from the Circuit Court of Montgomery County where the county judge apparently also sits as circuit judge in such matters. It may be that the case depends upon a procedural point since it arose in a petition to hold the administrator liable to a distributee for failure to file an exception to a claim. The case was

44. Commerce Union Bank v. Gillespie, 178 Tenn. 179, 156 S.W.2d 425 (1940).
45. 300 S.W.2d 880 (Tenn. 1957).
46. Gorham v. Gorham, 54 Ind. App. 408, 103 N.E. 16 (1913); *In re* Taylor's Estate, 251 N.Y. 257, 167 N.E. 434 (1929); ATKINSON, WILLS 703 (2d ed. 1953).
47. *In re* Taylor's Estate 251 N.Y. 257; 167 N.E. 434, 436 (1929).

heard by the circuit court on the record from the county court without any proof, and the beneficiary's petition was dismissed. The record apparently showed only the claim and the fact that exceptions were not filed to it. The lower court's dismissal was affirmed by the Supreme Court. The reasoning of the court was that because the petitioner was eligible to file an exception under section 30-517 of the Tennessee Code, his failure to have done so prevents him from surcharging the administrator for not opposing the claim. It does not appear, however, whether the petitioner as a next of kin had a notice that the claim was filed. Since section 30-516 of the Code requires the clerk to give written notice of the filing of a claim only to the personal representative, it is possible that a beneficiary of an estate would not know about a claim within the time limit. The court's statement that the only basis upon which the administrator could be liable would be proof of malfeasance or misfeasance in office, or collusion seems too broad and inexact. It is generally recognized to be the plain duty of a fiduciary to protect the estate, and to this end to interpose every legal defense available, and to dispute a claim when he has good reason to doubt its validity.[48] Furthermore, it is the general rule in Anglo-American law of fiduciary administration that the question of whether the fiduciary acted with due care and prudence in the payment of a claim is properly raised by objections to the fiduciary's claim for credit on his final account.[49] If there is a reasonable doubt about the validity of a claim a fiduciary is under a duty to file exceptions to it, and his failure to do so is generally grounds for surcharge. The Court in the instant case does not seem to give adequate recognition to this basic fiduciary responsibility.

Survivorship Bank Deposits: In *Peoples Bank v. Baxter*[50] there was a certificate of deposit made by decedent payable to the order of herself "or payable on death to" X. The next of kin contended that this item should be included in the inventory of assets in the decedent's estate. There was a division of opinion among the judges of the Court of Appeals, Western Section, the majority opinion affirming the chancellor who held for X "subject to the just debts of" the decedent. If the certificate is subject to the debts of the decedent, it would seem that it should be inventoried as an asset of the estate. Actually, the majority opinion seems to uphold the right of the survivor on the theory of a third-party beneficiary contract. The dissenting would deny the survivor named in the certificate of deposit upon the plain

48. 2 WOERNER, THE AMERICAN LAW OF ADMINISTRATION 1023 (3d ed. 1923); ATKINSON, WILLS 703-04 (2d ed. 1953).

49. Rutledge v. Trautman, 49 N.E.2d 551 (Ind. App. 1943), *superseded,* 221 Ind. 623, 51 N.E.2d 4 (1943); 3 WOERNER, THE AMERICAN LAW OF ADMINISTRATION 1796-1803 (3d ed. 1923) and cases there cited; ATKINSON, *supra* note 46.

50. 298 S.W.2d 732 (Tenn. App. W.S. 1956).

policy of the Wills Act,[51] and this makes much sense. Quite regardless of what other states may hold on the so-called "poor man's will," to uphold a bank certificate like that in the instant case is a bit of judicial legislation which flies in the face of the legislative policy expressed in the Wills Act. When one adds up all the exceptions to this policy created by the courts, it is found that there is frequently nothing left in the probate estate.

Petition To Sell Realty: On a petition to sell realty to make assets for the payment of debts, the chancery court has jurisdiction to order a sale even though the decedent's interest was fractional and the other concurrent owner was a nonresident incompetent; so held the Court of Appeals, Eastern Section in *Goins v. Yowell.*[52] The nonresident was served by publication, and upon affidavit of incompetence a guardian ad litem was appointed to defend her rights.

Apportionment of Estate Taxes: Section 30-1117 of the Tennessee Code requires the amount of the federal estate tax paid by the fiduciary to be equitably prorated among those persons who receive the estate "except in a case where a testator otherwise directs in his will." In *Commerce Union Bank v. Albert*[53] the testator's will contained a tax clause directing the executor to pay from his residuary estate all taxes for which his estate or any beneficiary might be liable, including taxes on *"property not passing by my will."* The widow dissented from the will, however, and the fiduciaries then contended that because she took by intestate succession, she must pay her proportionate part of the taxes. The Supreme Court held that the widow did not have to pay a part of the taxes because the testator's will directed otherwise. The court said that notwithstanding the widow's dissent, the testator's will continued as an effective document for the proration of taxes. This is an interesting case of first impression in Tennessee.[54] Should tax clauses in estate planning be made conditional upon no dissent by the widow?

Miscellaneous: Lakins v. Isley[55] held that a mother who had custody of the infant child of her deceased daughter had no standing in court to remove the divorced husband of the decedent from the office of administrator, because the mother would not inherit anything. The court said that there was no charge that the divorced husband was not a proper and suitable person to serve as administrator, and that the surplus assets would pass to the infant. While the mother of a deceased daughter who was divorced would seem to be among the

51. TENN. CODE ANN. § 32-104 (1956).
52. 293 S.W.2d 251 (Tenn. App. E.S. 1956).
53. 301 S.W.2d 352 (Tenn. 1957).
54. *Accord* Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1956). *Contra,* Merchants Nat'l Bank & Trust Co. v. United States, 246 F.2d 410 (7th Cir. 1957).
55. 292 S.W.2d 389 (Tenn. 1956).

next of kin eligible under section 30-109 of the Tennessee Code, the court in effect holds that only those next of kin who will inherit can question the qualifications of the fiduciary.

Chapman v. Tipton[56] held that the minor children of a deceased father who was divorced are not entitled to a year's support out of proceeds of the sale of decedent's property. While the husband's homestead exemption was not assigned to the mother in the divorce proceeding, the decision seems to be based on policy grounds—the common law obligation of a father to support his minor children terminates with death; hence, his estate cannot be charged with the support of his minor children after the date of death.

1957 Legislation

Decedents' Estates: While section 30-501 of the Tennessee Code continues to require that the inventory be verified before the clerk, the statute was amended[57] to allow the inventory to be verified before any person authorized to administer oaths when it appears to the judge of the county court that the fiduciary is unable to appear before the clerk.

Section 30-602 was amended by substituting a new first sentence which provides the procedure to be followed when all of the land of a decedent lies outside the county of administration.[58]

While section 30-1001 prohibits any action by a creditor of the estate other than filing claims and reviving pending actions for a period of six months from the issuance of letters, the section was amended to provide that the state may enforce its tax lien during this period.[59]

Fiduciaries Generally: Section 30-119 of the Tennessee Code, found in the pocket supplement, was enacted by the 1955 Legislature. It prohibited a non-resident from being appointed to act as personal representative in Tennessee unless a resident was appointed to serve with him. The 1957 Legislature amended this section, and renumbered it as section 35-610, so that it now prohibits the appointment of all types of non-resident fiduciaries, e.g. as trustee, executor, administrator, guardian, "or in any other fiduciary capacity" unless a resident fiduciary is appointed as a co-fiduciary.[60] This would apparently prevent the appointment of a fiduciary from another state serving as ancillary administrator in Tennessee unless a resident fiduciary was appointed. This legislation was apparently sponsored by the banking interests in Tennessee. An exception was provided allowing

56. 292 S.W.2d 25 (Tenn. 1956).
57. Tenn. Pub. Acts 1957, c. 34.
58. Tenn. Pub. Acts 1957, c. 395.
59. Tenn. Pub. Acts 1957, c. 242.
60. Tenn. Pub. Acts 1957, c. 52.

a foreign bank or trust company to serve as sole fiduciary when the state in which the foreign bank or trust company is organized or has its place of business grants authority to Tennessee banks to serve as sole fiduciary in the foreign state. Does this legislation discriminate unlawfully against human beings and in favor of corporate banks? Is it constitutional? It would seem possible that non-resident banks could be lacking in financial responsibility as well as professional competence to about the same extent as individuals, since corporations realistically are only aggregates of human beings. Very probably a county judge could nevertheless refuse to appoint such banks.

Section 35-325, which allows trustees to hold stocks and registered bonds in the name of a nominee without mention of the trust provided certain safeguards are observed, was amended by the 1957 Legislature so as to become applicable to all fiduciaries and fiduciary relationships; it is no longer limited to trustees and trust estates.[61]

Section 34-411, which authorized a guardian to sell securities for reinvestment if he obtained the approval of the court was repealed.[62] This repeal, sponsored by the state banking interests, seems to serve a useful purpose. Sections 35-319 to 35-325 constitute the statutory prudent man rule on investments in Tennessee. The prudent man statute is applicable to all fiduciaries, trustees, guardians and other fiduciaries, and within the limitations of the standard therein stated, a guardian as a fiduciary may buy and sell securities for purposes of reinvestment without a court order. Because section 34-411 continued in the Code, however, cautious transfer agents tended to require a court order when guardians sought to sell notwithstanding section 35-320. It will no longer be a problem.

Section 34-107 was amended to provide that when a guardian shall have only a fund not exceeding five hundred dollars, the appointing court may dispose of it by order for the best interests of the ward.[63]

The Uniform Gifts To Minors Act was enacted by the 1957 Legislature.[64] It constitutes sections 35-801 to 35-810 in the pocket supplement of the Code. This new legislation was sponsored by the Tennessee components of the New York Stock Exchange and the Investment Bankers Association. This legislation, enacted in several other states, has generally been opposed by the trust-banking industry. The purpose is to facilitate the gift of securities to minors by creating the concept of a statutory custodian who may receive, buy and sell property for a minor. The act provides the exact form of the gift necessary in order to gain the protection provided the "custodian." It is pro-

61. Tenn. Pub. Acts 1957, c. 49.
62. Tenn. Pub. Acts 1957, c. 48.
63. Tenn. Pub. Acts 1957, c. 102.
64. Tenn. Pub. Acts 1957, c. 112.

vided that the gift conveys the "vested legal title" to the security or money to the minor, but no guardian has any right, power or authority over it. The custodian, however, has very broad powers parallel to a discretionary accumulation trust with power to invade. Income and principal may be applied for the minor's support. Probably the major reason for the phenomenal spread of this legislation has been its apparent simplicity of concept and operation. By giving broad managerial powers to a simple custodianship, lifetime giving to minors has been made possible without necessary resort to formal guardianship or a trust.

That the "custodian" is a fiduciary, however, there would seem to be no doubt. The broad powers carry correlative responsibilities which parallel trusts so closely that there seems no doubt of their fiduciary character. Likewise there are certain federal tax consequences which might come as some surprise.

For gift tax purposes, it is a completed gift, and it qualifies for the $3,000 annual gift tax exclusion.[65] If the donor transfers the security to himself as custodian for the minor, and if the income from the security is thereafter used to support the minor whom the donor is under a duty to support, the donor is taxed on the income from the security to the extent so used.[66] Where the donor transfers the securities to himself as custodian and thereafter dies before the minor reaches twenty-one, the securities are included in the donor's gross estate.[67]

The three rulings, taken together, are a reminder that a lifetime gift may be complete for gift tax purposes, not complete for the estate tax, and a hybrid for the income tax. Also, the Treasury's attitude in treating the custody arrangement as analogous to a trust is indicative of a likely future development; it is very likely that the Treasury will require custodians to file Form 1041 fiduciary income tax returns.

Perhaps a discussion of the legal issues tends to exaggerate the dollar-cents importance of the problem, however. The income tax ruling would not seem serious. The estate tax ruling can be avoided by having the donor designate someone other than himself as custodian. While trusts will continue to be used as the tool for gifts to minors by people of wealth, the stock exchange legislation may provide a convenient alternative tool for some.

65. Rev. Rul. 56-86, 1956-1 CUM. BULL. 449.
66. Rev. Rul. 56-484, 1956-2 CUM. BULL. 23.
67. Rev. Rul. 57-336, 1957 INT. REV. BULL. No. 32, at 20.