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Wills, Estates and Trusts

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WILLS, ESTATES AND TRUSTS

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EXECUTION OF WILLS

Formalities. The statutory formalities required for the execution of wills are too frequently brushed aside as trivia. The lawyer, supervising the ceremony of execution, and the testator, as the chief actor, may have feelings of embarrassed self-consciousness in complying with the required minutiae. But the importance of staging a routine ceremony, however silly it may seem at the moment, cannot be overestimated. Law students ought to be told and practitioners reminded to adopt the practice, once the testator and witnesses are assembled, of closing the door, drawing the shades, cutting off the telephone and advising all present that no one may leave the room for the next five minutes. Then explain that they are about to participate in a brief one-act play and that each is to observe what the others do. The testator should sign the document. Then ask him, "What is this document?" Make him answer, "My will." Next question: "Is that your signature?" Wait for his answer. "Do you wish these persons to act as witnesses?" And so forth. The lawyer who always follows this routine may so testify years later, when he has forgotten all about the execution of the particular will in question.[1]

The Tennessee statutes require that (1) the testator shall signify to the witnesses that the instrument is his will; (2) the testator shall sign himself or acknowledge his signature already made; and (3) the witnesses (at least two) must sign (a) in the presence of the testator and (b) in the presence of each other.[2]

In *Lawrence v. Lawrence*,[3] one of the attesting witnesses had died. On direct examination, in response to the question, "Did Mrs. Lawrence acknowledge this instrument as her will?" the other testified, "Yes." But on cross-examination she was asked: "Did you know what it was you were signing?" Answer: "I don't remember. I don't think I did." The court then asked if anyone told her what it was. Answer: "I don't remember." And finally she said: "No, I didn't know it was a will." Probate was refused; an essential requisite of execution was lacking.

In *Miller v. Thrasher*,[4] an unsuccessful attempt was made to break

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1. 1 WIGMORE, EVIDENCE § 92 (3d ed. 1940).
2. TENN. CODE ANN. §§ 8098.1-8098.9 (Williams Supp. 1952). At his direction and in his presence someone else may sign his name for him.
3. 250 S.W.2d 781 (Tenn. App. M.S. 1951).
4. 251 S.W.2d 446 (Tenn. App. E.S. 1952).

a will on the grounds (1) that the testator had not acknowledged the instrument to be his will and (2) that the witnesses had not signed in the presence of each other. In that case, one Morgan, who had prepared the will, read it to the witnesses in the presence of the testator. The testator stood mute, but the Court very properly held that another might act for him and that his silence under all the circumstances satisfied the requirement that he signify the instrument to be his will. On the other point, there was a conflict in the testimony. Nonattesting witnesses, present at the time, testified that the attesting witnesses each signed in the presence of the other. Evidence of due execution is not confined to the testimony of attesting witnesses.[5]

Joint Wills. A joint will is one in which the same paper is executed by two or more persons as their respective wills. Most of the early common law cases held joint wills invalid.[6] It was suggested that a joint will was a single instrument not to become effective until the death of the survivor and that it could not be said to be the will of the first dying party, because it was not effective on his death. But there is no reason why a joint will may not be regarded as the will of each testator and probated twice, once on the death of each. This is the modern, generally recognized view and the position taken by the Supreme Court in *Buchanan v. Willis.*[7]

Insurance. While not strictly an execution problem, it may be noted here that the proceeds of life insurance payable to the estate of the testator do not pass pursuant to the terms of his will unless express provision is so made. Code section 8456 provides that the proceeds of insurance shall "enure to the benefit of the widow and children," and it takes a formal express clause in the will to defeat this.[8] The Court had occasion to reaffirm this rule in *Pope v. Alexander*[9] and in *Crockett v. Webb.* [10]

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5. For an amusing case wherein it appeared that a horse knew more about the formal requirements than did counsel, see Casson v. Dade, 1 Bro. C.C. 99, 28 Eng. Rep. 1010 (1781). *T* went to her attorney's office to execute the will. "Being asthmatical and the office very hot, she retired to her carriage to execute the will, the witnesses attending her: after having seen the execution, they returned into the office to attest it, and the carriage was *accidentally* put back to the window of the office, through which it was sworn by a person in the carriage, the testatrix might see what passed. . . ." The will was held duly executed.

6. ATKINSON, WILLS 174 (1937).

7. 255 S.W.2d 8 (Tenn. 1953).

8. It has been consistently held that this section of the Code in no wise limits the authority of the husband to control policies of insurance upon his life where they are payable to his estate; such insurance is property of the husband and subject to his disposition either during his life or by will. American Trust Co. v. Twinam, 187 Tenn. 570, 216 S.W.2d 314 (1948).

9. 250 S.W.2d 51 (Tenn. 1952).

10. 257 S.W.2d 4 (Tenn. 1953). In the *Pope* case, the will failed to mention the insurance, and the proceeds, even though payable to the estate, were held to pass directly to the wife. In the *Crockett* case, the testator devised and bequeathed "all of the rest and residue of my estate, real, personal and mixed,

INTESTACY

Descent and Distribution. On the death of a husband, childless and intestate, his wife is entitled to all his personalty[11] and a dower interest in his real estate.[12] Thus, if his estate consists solely of real estate, his wife would be limited to a one-third interest therein for life; his brothers and sisters would share two-thirds of the fee outright and own the remaining one-third subject to his wife's life estate.[13] But let title to the real estate be in the deceased husband's wholly owned corporation and his wife will be sole beneficiary of his property. Should the form of ownership determine the recipients of an estate? Are there any reasons having validity today why the distribution of intestate property should turn on the distinction between real and personal property? The nature of wealth in the United States has changed since the industrial revolution. Today, stocks and bonds rather than real estate represent the bulk of individually owned investments, and the old rules seem especially unfair to wives.

In *Hinton v. Carney*,[14] the arbitrary results of this antiquated distinction were illustrated in a much less dramatic case than arises when a husband dies owning only real estate, but the problem was the same. The decedent owned all of the stock in a corporation conducting the business of a funeral home. He dictated its affairs, operating it as though it were his individually owned property. His heirs were an uncle and eight cousins. Under the Tennessee statute, an uncle is preferred over cousins, as to personalty,[15] but uncles and cousins share equally in any real estate.[16] The cousins argued that the decedent was really the equitable owner of the real estate, title to which was vested in the corporation. The Court, however, applied the traditional rule that a corporation is a separate entity from its sole stockholder and held that the stock in the corporation passed to the uncle. Isn't it time that the Tennessee legislature amended the statute to provide that the rules of intestate distribution should apply alike to real and personal property? Most other states have taken this forward step.[17] We may not be particularly concerned about uncles and cousins, but why

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including all life insurance payable to or collectible by my estate in trust" for various beneficiaries. He was survived by his wife but no children. His wife elected to take against the will and contended that, therefore, her interests were not controlled in any way by the terms of that instrument. She claimed the entire amount of the insurance proceeds under the statute. But the Court held that the insurance fund, because of the express words in the will, became a part of the estate, and that her rights were limited to one-third thereof.

11. TENN. CODE ANN. § 8389(2) (Williams 1934).
12. TENN. CODE ANN. § 8351 (Williams 1934).
13. TENN. CODE ANN. § 8380(2)(a) (Williams 1934).
14. 250 S.W.2d 364 (Tenn. 1952).
15. TENN. CODE ANN. § 8389(5) (Williams 1934).
16. TENN. CODE ANN. § 8380(2)(a) (Williams 1934). See Hinton v. Carney, 250 S.W.2d 364 (Tenn. 1952).
17. ATKINSON, WILLS 45 (1937).

should a wife's intestate share depend on the investment medium her husband selects or the legal form under which he chooses to manage and operate his holdings?

Pretermitted Children. Our common law tradition has been one of almost complete freedom of testation. The principal restrictive limitation on the power to dispose of property at death as one wishes has been the almost universal forced-share provision for the widow. Almost everywhere in the United States, the widow is given a share in the personalty — frequently an amount equal to her intestate share, sometimes less — of which she cannot be deprived by will.[18] Children, however, may be freely disinherited.[19] The child is protected only against negligent oversight. In all states, there are statutes similar to our own[20] that a child born after the execution of a will may take an intestate share unless it appears that the omission was intentional. The objective here is to protect against testamentary carelessness. Any reference to children or provisions otherwise made for them will defeat their rights under these statutes, since they are not designed to override the intention of a testator but to avoid an accidental disinheritance.[21]

In *Couch v. Couch*,[22] the decedent, the father of an illegitimate son, had entered into a contract of adoption with the child's mother that he would provide for his son, who was to bear his name, and "that said child will inherit from my estate or estates, in whole or in part, as any other son or child of [mine]."

The decedent's will, omitting any reference to his son, was executed in 1926. The contract of adoption was entered into in 1929. His son claimed as an adopted, pretermitted child, but the Court properly held that, in the absence of a statutory adoption, he had no standing in court as an adopted child. An earlier case had indicated, however, that the benefits of this statute extended to legally adopted children.[23]

The problem of construing the contract was more difficult. While, as the Court pointed out, the language, strictly read, gave the son only the expectancy that any other child would have, it seems arguable that something more than this was contemplated when the mother surrendered the child on the execution of the contract. Was she merely exposing the son to a likelihood of inheriting, or was the contract intended to be a definite assurance of it? While the Court probably

18. TENN. CODE ANN. § 8358 (Williams 1934).
19. ATKINSON, WILLS 91 *et seq.* (1937).
20. TENN. CODE ANN. § 8131 (Williams 1934) provides: "A child born after the making of a will . . . not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if he had died intestate."
21. *In re* Horst, 264 N.Y. 236, 190 N.E. 475 (1934).
22. 248 S.W.2d 327 (Tenn. App. W.S. 1952).
23. Marshall v. Marshall, 25 Tenn. App. 309, 156 S.W.2d 449 (M.S. 1941).

was right in holding that the contract reserved to the father the right to disinherit his son, a lingering doubt remains. If draftsmen would only struggle to make their meanings crystal clear, much litigation would be avoided.

Interpretation. Careless and inept draftsmanship continues to account for a very large segment of litigation throughout the United States. The law schools have yet to train students in the skills of draftsmanship, in the precise use of words so essential to the practice of law. The busy lawyer too often accepts the written expression of his client's wishes in the words drafted by the client. There is no substitute for time and thought in the preparation of documents if the draftsman is to envisage and cover the many and varied circumstances against which his words may have to be read. In *Cansler v. Unknown Heirs of Chairs,*[24] the testatrix, without close kin, wanted to leave her money to those who cared for her and gave her companionship and the benefits of family life during her last illness. She left certain real estate in trust to her executor to convey it "to the person or persons who shall stay with me *in my home* continuously during my last illness." The determination of such person or persons was to be made by her executor.[25] The will was drawn in August of 1949, and for about six weeks thereafter a Mrs. Browder resided in her home and attended her as a nurse. When Mrs. Browder could no longer remain with her, testatrix moved to the home of her long-time friends, Mr. and Mrs. Beck, where she remained until her death. Mrs. Browder came closer than did the Becks to meeting the literal terms of the gift, but Mr. and Mrs. Beck met the spirit of the bequest. The Court held that the words *in my home* were not to receive a literal construction, that what the testatrix intended by the expression was to reward those who gave her companionship and attention during her last illness, whether in her home or elsewhere, and that the Becks satisfied this test.

The Court was less liberal in *Long v. Wood,*[26] because the problem raised the use of technical language and the words actually indicated that the draftsman understood the technical aspects of the bequest. Yet the writer is not satisfied that the result reached was what the testator intended. In that case, testator gave his wife a life estate in his property. At her death, the property was to be held in trust for their two sons. Each child was to receive "in equal portion the income of said fund until such time [as the trustees] shall consider him capable of controlling absolute ownership of his share of estate, when it shall

24. 250 S.W.2d 579 (Tenn. App. E.S. 1951).
25. The Court held that the bequest did not fail for indefiniteness, since the power was circumscribed by a readily ascertainable objective standard. *Id.* at 581.
26. 253 S.W.2d 731 (Tenn. 1952).

be given to him outright. Should either child die before end of the Trust his share shall continue in trust for his legitimate heirs. Should he be without legitimate issue then his share reverts to his brother. Should both children die before their mother she may dispose of estate as she sees fit." What the draftsman neglected to cover was the situation where both children predeceased the wife, one or both leaving issue. The two sons did in fact predecease their mother, one of them leaving issue. May she now "dispose of the estate as she sees fit?" The Court held that she could.

In my classes in draftsmanship, I find that the most common error which the students make in their efforts to draft clauses disposing of remainder-interests under any one of the several contingencies that may arise is to cover all but one possible event. That would seem to be what happened here. Why should the testator have wanted to take care of a deceased son's child if, but only if, the other son happened to survive his mother? Why should he want to disinherit a grandson because his only uncle happened to die before his grandmother (testator's wife)? The Court, however, pointed out that the draftsman knew to anticipate deaths in other than their natural order and that he knew how to provide for such occurrences. In each of two quoted sentences, the testator mentioned legitimate heirs or issue. "Can the Court assume that in the writing of the very next sentence the testator forgot to mention the issue or heirs to which he had expressly twice referred in the two immediately preceding sentences?"[27]

Tax Clause in Will. In *American Nat. Bank & Trust Co. v. Mander*,[28] the question was whether the estate taxes should be charged against specific assets bequeathed to a charitable foundation or against the residue, which went to the testator's relatives. If the taxes were payable out of the assets that were earmarked for charity, they would be greater by more than $6,000,000 than if payable from the shares going to the residuary legatees. The reason for this is that the money used to pay death taxes is itself subject to tax. Thus if a $4,000,000 estate is given half to a son and half to Vanderbilt with the requirement that the share allocable to Vanderbilt shall be used to pay all taxes and administration expenses, Vanderbilt will in fact receive nothing, since the estate tax on a $4,000,000 estate is approximately $2,000,000. But if the taxes are to be borne by the half going to the son, Vanderbilt will get its $2,000,000, and the son will get slightly in excess of $1,000,000.

The testator in the *Mander* case had created a charitable foundation during his life. By his will he left specific assets, amounting in value to approximately two-thirds of his estate, to this foundation. The resid-

27. *Id.* at 733.
28. 253 S.W.2d 994 (Tenn. App. E.S. 1952).

uary estate he left to named beneficiaries. Paragraph 1 of the will directed the executor to pay all debts, including funeral expenses and expenses of administration. Paragraph 6 directed "my executors . . . to . . . charge against my residuary estate any and all . . . Death Taxes. . . ." About a year later, testator executed a codicil, directing that "expenses of administration . . . be paid from the fund bequeathed . . . [to charity] so that the bequest . . . [to charity] . . . shall consist of the assets described in said Section Four (4) diminished by such part thereof as may be necessary to pay said administration expenses."

Did he have a change of heart? Did he want to throw all the costs of dying against the charitable gift so that his individual donees would receive an amount which he could now calculate with some degree of certainty, or did he want only partially to relieve them of these costs. While estate taxes are generally not regarded as part of the costs of administration,[29] they, like administration expenses, were at common law payable from the residue, in the absence of a contrary provision in the will.[30] This rule served well enough before taxes began to skyrocket. But, since the thirties, taxes in many cases have wiped out the entire residue. Statutes have now been enacted in most jurisdictions to modify this rule by requiring that taxes be apportioned among the legatees unless the will provides otherwise.[31]

The decision in this case followed the traditional view that estate taxes are not part of the "administration expenses" and, therefore, are chargeable against the residue under the will. But it seems possible that the testator intended to revoke this provision by the codicil.

Today, a large and constantly growing number of testators are so planning their estates that their families will receive a fixed dollar amount without regard to the uncertainty of taxes, and, after fulfilling their family obligations, they give the excess to charity in fulfillment of their community obligations. The technique is to charge against the charitable bequests administration expenses, *including taxes*. While the Court in the instant case seems to have reached a result which most probably reflects this testator's wishes, the shifting by the codicil of the administration expenses to the charity leaves a lingering doubt that he may have wanted to assure his individual beneficiaries gifts that would not vary with our ever-changing death costs, of which taxes are the major item. Modern-day testators think of death taxes as just as much a part of the expense of transmitting property as executors' fees, attorneys' fees and other costs of administering their estates.

The case, because of the large amount involved, shows graphically

29. 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 13.54 (1942).
30. *Ibid.*
31. TENN. CODE ANN. §§ 8350.7-8350.9 (Williams Supp. 1952).

the need for a tax clause and the care with which it should be drafted, if a testator's desires are not to be thwarted.

TRUSTS

Stock Dividends. The most important decision of the year in the trust field was *Nashville Trust Co. v. Tyne.*[32] The problem involved was the proper apportionment of stock dividends between the life tenants and the remaindermen. Should a stock dividend be treated as corpus or income?

It is clear everywhere that stock dividends paid in stock of other than the declaring corporation constitute income. Thus, if General Motors were to distribute shares of X stock to its shareholders, no one would dispute that the X shares are to be treated as income. Here, the dividend is being paid in property rather than cash. But the courts have had trouble with dividends paid in the stock of the declaring company. Such dividends effect changes in the capital structure; they do not result in the transfer of property from a corporation to its stockholders. It is for this reason that the Supreme Court of the United States has held that any attempt to tax them as income is unconstitutional.[33] After the dividend, the stockholder's interest is no different than it was before. His capital investment is merely measured by a different unit; the change is formal, not substantial. But there may be other considerations present in determining whether a stock dividend should be treated as distributable income to the life tenant rather than as corpus to be preserved for the remainderman. Not all stock dividends are prompted by recapitalization plans. A growing number of corporations follow a consistent policy of declaring periodic stock dividends in lieu of regular cash dividends.

This problem has produced considerable litigation in the courts. Their holdings are not harmonious. There are, in fact, three divergent rules, known as the Massachusetts, Pennsylvania and Kentucky rules.[34] Under the Massachusetts rule, all stock dividends are treated as corpus. Under the Kentucky rule, all such dividends are income. The Pennsylvania rule requires an apportionment. It gives to the life tenant whatever portion of the dividend is attributable to earnings of the corporation subsequent to the creation of the trust; the balance is treated as corpus.

In the *Tyne* case, the Supreme Court awarded the entire stock dividend to the life tenants. As the entire dividend was attributable to earnings arising after the creation of the trust, the Court left open the

32. 250 S.W.2d 937 (Tenn. 1952), 22 TENN. L. REV. 975 (1953), 6 VAND. L. REV. 416 (1953).

33. Eisner v. Macomber, 252 U.S. 189, 206-9, 40 Sup. Ct. 189, 64 L. Ed. 521 (1919); cf. Helvering v. Griffiths, 318 U.S. 371, 63 Sup. Ct. 420, 87 L. Ed. 571 (1943); see 6 VAND. L. REV. 936 (1953).

34. 2 SCOTT, TRUSTS §§ 236.3, 236.7 (1939).

question whether Tennessee would follow the Kentucky or the Pennsylvania rule.

None of the rules are free from criticism. Trustees prefer a rule of thumb in the interest of certainty of administration. Either the Massachusetts or the Kentucky rule assures this. And probably because in the past most stock dividends had more of the aspects of recapitalizations than of regular dividend distributions, the overwhelming weight of authority follows the Massachusetts rule.[35] But for tax reasons investors are becoming increasingly interested in corporations that pay regular stock dividends. These so-called "growth stocks" are very attractive, since they represent a medium for converting what would be ordinary income into capital gain. But in jurisdictions following the Massachusetts rule, it is doubtful if a prudent trustee in fairness to the life tenant may invest in such stocks.[36] While the Pennsylvania rule would seem to be fairer, it has been criticized as administratively unworkable or at least undesirable.[37]

Will and trust draftsmen have long solved the problem by providing in the instrument itself that the determination of whether a stock dividend shall be treated as income or corpus, or partly as income and partly as corpus, shall be made by the trustee in the exercise of his discretion or (alternatively) that all such dividends shall be treated as capital except that those paid in lieu of periodic cash dividends or recoupment of dividends defaulted or accumulated while the shares are held in the trust shall be treated as income. Because of the almost universal practice of draftsmen to include such provisions in trust instruments, this problem is much less common than it once was. It would nevertheless seem desirable (particularly as the Court left open whether the Pennsylvania or Kentucky rule would be adopted by it) to enact legislation to take care of the cases where no provision is made in the instrument.

It is suggested that the legislation should (1) take the form of the customary provision,[38] found in carefully drawn trusts, that such dividends shall be capital except to the extent that they are paid in lieu of regular cash dividends or recoupment of dividends defaulted or accumulated while the shares were held in trust or (2) provide that the determination to apportion between or to wholly allocate a stock dividend to income or corpus be left to the discretion of the trustee. Either of these solutions would reflect the considered opinions of the bar throughout the country. This seems preferable to the proposal sub-

35. *Id.* at § 236.3.
36. Rhode Island Hospital Trust Co. v. Tucker, 52 R.I. 277, 160 Atl. 405 (1932).
37. 2 SCOTT, TRUSTS § 236.3 (1939).
38. TWEED AND PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 90 (Rev. ed. 1951).

mitted to the 1953 Tennessee General Assembly[39] (which failed to get out of committee) to adopt the provision of the Uniform Principal and Income Act, which provides "all dividends of shares of a corporation forming part of the trust corpus which are payable in the shares of the corporation shall be deemed principal."[40]

LEGISLATION

The 1953 session of the Tennessee General Assembly enacted two important pieces of trust legislation. Trustees were authorized (1) to invest in common trust funds[41] and (2) to hold security investments in the names of nominees.[42]

Common Trust Funds. To an increasingly large extent, trust institutions have found it desirable to maintain common trust funds in which to invest the funds of small estates. The obvious advantage to the beneficiaries is the wide diversification (and hence reduction of risk of loss) that the common fund makes possible. The cost of administering small trusts is also considerably diminished. This legislation may be confidently expected to very substantially increase the number of small trusts in Tennessee. A survey of trust funds throughout the country in 1950 showed that the 107 funds then in operation had an aggregate principal value of $634,315,895 and were administered for about 75,000 beneficiaries in about 37,000 individual accounts.[43]

Nominees. When securities are registered in the name of a trustee as such, the corporation registering the transfer of the securities may be liable for participation in a breach of trust, because it is chargeable with notice of the trust instrument.[44] Thus it must study the trust instrument and determine the authority of the trustee. Under the new law, the trustee, subject to certain safeguards, may hold trust securities in the name of a third person without disclosing the trust ownership. The purpose of nominee ownership is, of course, to avoid the necessity of an examination of the trust instrument by the corporation or its transfer agent with the resulting delay. The speed-up in transferability may be very important in a rapidly fluctuating market.

39. Report of the Tennessee Board of Commissioners for the Promotion of Uniformity of Legislation in the United States to the 1953 Session of the General Assembly of Tennessee in Accordance with TENN. CODE ANN. § 1015 (Williams 1934).
40. UNIFORM PRINCIPAL AND INCOME ACT § 5, 9A U.L.A. 233 (1951).
41. UNIFORM COMMON TRUST FUND ACT, Tenn. Pub. Acts 1953, c. 148.
42. Tenn. Pub. Acts 1953, c. 165.
43. 90 TRUSTS AND ESTATES 100 (1951).
44. SCOTT, CASES ON TRUSTS 447 (3d ed. 1952).