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Wills, Estates and Trusts -- 1954 Tennessee Survey

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WILLS, ESTATES AND TRUSTS—1954 TENNESSEE SURVEY

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Freedom of Testation:

Other than the statutory forced share of a spouse[1] testators have almost unlimited freedom in the disposition of their property. A devise or bequest will be held invalid only when it runs counter to some well established rule of public policy. Thus gifts in violation of the rule against perpetuities, against accumulations or against restraints on alienations are void. Further, the courts will strike down capricious or whimsical bequests, as well as those which are conditioned upon the performance of illegal or tortious acts.[2] But in absence of any violation of public policy a testator is free to do what he will with his property.

In *National Bank of Commerce v. Greenberg*[3] a decedent established a testementary trust for his granddaughter, the child of a deceased son. He provided, however, that should the granddaughter be adopted by any person other than a member of his immediate family and her name be changed before she attained 18 "then this trust shall terminate and the trust fund shall be paid equally to my three children." The beneficiary's mother remarried and her second husband formally adopted the child and formally changed her name. Thus there was no question that the condition of the gift had been broken. It was argued, however, that the restraint was void as violating public policy and further, because the infant could not consent, she ought not to be penalized for an involuntary breach.

The court held that this limited restraint was not contrary to the public policy of Tennessee. While it is hard to conceive of a non-general restraint of broader scope (since it included all except the testator's immediate family) the objective seems not unreasonable. The testator wanted to deter the mother from permitting the adoption and change of name should she remarry. The restraint created no real risk that the child might become a public charge. It was not whimsical nor wholly arbitrary, whatever one's views as to its fairness may be. While it is arguable that there might be undesirable psychological repercussions upon a child reared in a home where the child does not

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1. TENNESSEE CODE ANN. § 8360 (Williams 1934).
2. 1 SCOTT, TRUSTS § 60, pp. 374-98 (1939).
3. 195 Tenn. 217, 258 S.W.2d 765 (1953).

bear the parents' name, this objection would seem less weighty than the policy in favor of freedom of testation.

The court had no difficulty in disposing of the argument that the forfeiture occurred without the consent of the beneficiary. It was clear that the decedent intended the gift to survive or fail depending on the conduct of third parties—a perfectly permissible objective. For example, I suppose all would agree that donated property may shift from *A* to *B* when and if *C* marries.

Since the court decided that the condition did not violate public policy it did not have to face the question of whether if the condition were void, the child could keep the property.

It seems clear that a bequest to *X* provided he murders his mother-in-law is void and the general rule is that *X* takes and keeps whether the condition is precedent or subsequent.[4] It is believed, however, that draftsmen troubled about the validity of particular conditions may avoid this rule of letting the beneficiary keep by providing for a gift over in the event a court should hold the bequest invalid. This technique may at times be useful in at least partially achieving the testator's intention of keeping the property out of the hands of a donee who, absent the condition, he desires shall not take. Thus in *Girard Trust Company v. Schmitz*,[5] a New Jersey case, a decedent left his property in trust to pay the income to two of his three brothers and two of his three sisters for twenty years and then to pay them the principal if they complied with the provisions of the will. The will then stated that the gifts were upon the express condition that the interest of any beneficiary should cease if he or she should at any time communicate with the excluded brother or sister. In that event the property was to go to a charitable institution. It was further provided that if the court should declare the provision invalid, the property should go directly to the charitable institution. *Held*, the prohibition of family communication was void as against public policy and the gift over took effect. The court said, "The Testator has said in plain language that he did not want the brother and sister legatees

4. In *In re* Sterne's Estate, 147 Misc. 59, 263 N.Y. Supp. 304 (Surr. Ct. 1933), a testator left money in trust to pay the income to a hospital on condition that it should make a rule that physicians should split their fees with the hospital, and it was provided that if the hospital should refuse to make such a rule or should abrogate it or neglect to enforce it, the trust should cease and the trust fund should be paid to the Salvation Army. *Held*, the condition was illegal, and whether it was a condition precedent or subsequent the hospital was entitled to the income.

5. 129 N.J. Eq. 444, 20 A.2d 21 (1941).

named in Clause "Third" of the will to take his property except upon the condition therein expressly set forth. If this condition were held invalid, then, and in that event, he preferred an entirely different and less complicated scheme of disposition of his estate. This alternative scheme he expressed in Paragraph "Seventh" of his will in plain and understandable language, as it was his undoubted right to do."[6]

Execution of Will:

Formalities: Problems with respect to the formal requirements in the execution of wills continue to furnish a fertile field of litigation. In *Lawrence v. Lawrence*[7] discussed in the 1952-53 Survey[8] probate was denied a will because one of the attesting witnesses testified, when the will was offered for probate, that she did not know the nature of the document she had witnessed. The testator had failed to tell her it was his will.

During the last year legatees have faired better. In *Leathers v. Binkley*[9] the will, while it lacked the usual attestation clause, gave every appearance of proper execution. It was objected to, however, on the grounds that (1) the testator did not sign in the presence of the witnesses, (2) she did not declare to them that it was her will, and (3) the witnesses did not sign in the presence of each other. There was no affirmative evidence either way on these issues. Nor were there any witnesses called other than the two who attested the document. They were an employer (in whose office the signing occurred) and his secretary. The employer did not remember whether he requested his secretary to witness before or after the testator signed. The secretary had no recollection of the occasion. She had known the decedent and of course recognized her own signature. She testified in response to the question why had she written her name on the instrument: "I am sure they asked me to." The court sustained the will even though the details of attestation could not be remembered since there was no affirmative evidence that the formalities had not been complied with, thus recognizing a presumption of validity once the paper is shown to have been signed by the testator and the requisite number of witnesses.

There has never been any question about the capacity of persons

6. 129 N.J. Eq. at 472, 20 A.2d at 37.
7. 250 S.W. 2d 781 (Tenn. App. M.S. 1951).
8. Bowe, *Wills, Estates and Trusts—1953 Tennessee Survey*, 6 VAND. L. REV. 1126 (1953).
9. 264 S.W.2d 561 (Tenn. 1954).

who are unable to read, write or see to make wills. But special care is required in the execution of such instruments to guard against imposition upon such handicapped persons. The ecclesiastical courts insisted on proof that the instrument had been read to a blind or illiterate person. While reading is not required today, there must be some proof that the testator had knowledge of the contents of the instrument. Tennessee follows the rule that the otherwise strong presumption that a testator knows the contents of his duly executed will does not apply in the case of persons who cannot read.

In *Morrow v. Person*[10] the will, in the handwriting of an attorney, was signed with an "X" by an illiterate testator. The will left his property, consisting in part of real estate, to his wife for life, "and at her death to my daughter . . . and after her death to her children." The paper was probated in common form. Subsequently (after the wife's death) the daughter mortgaged the fee of certain of the land. The daughter would have taken the fee by intestacy but under the will acquired only a life estate. Thus the mortgagee's full security depended on the invalidity of the will.

The will was fair on its face, properly witnessed but there was no evidence that it had been read to testator. An earlier Tennessee decision had held in the case of an illiterate testator that "there must be other evidence of knowledge of the contents of the will than the mere fact of its formal execution,"[11] before it will be admitted to probate. The court held the circumstantial evidence in *Morrow v. Person* sufficient to satisfy this requirement. Testator had told his wife of its drafting by the attorney and of its execution. "Reason and general knowledge of the common practice requires the conclusion, in the absence of contrary proof, that this attorney placed in the will what his client directed and read the will as written to his client, since he knew that his client could not read. The attesting witnesses had no interest in the matter. The widow, children and grandchildren are the only persons mentioned in this will as the object of the testator's bounty. They are the ones upon whom he would naturally bestow his bounty. There being nothing to arouse suspicion, the circumstantial evidence mentioned was of sufficient strength and character to support the conclusion that McCulley [the testator] was aware of the contents of his will."[12]

10. 195 Tenn. 370, 259 S.W.2d 665 (Tenn. 1953).
11. Bartee v. Thompson, 67 Tenn. 508 (1875).
12. 259 S.W.2d 665, 669 (Tenn. 1953).

Revival of Earlier Will by Revocation of Later Will:

Wrinkle v. Williams[13] reaffirmed the Tennessee rule that a prior will revoked by a later will may be revived by the revocation of the second will if it is affirmatively shown that the revocation was with the intention of reviving the earlier will.

Joint Wills: The needless use of joint wills continues to cause litigation.[14] There is no reason why two persons may not execute the same writing as the last Will and Testament of each. The instrument is treated as the separate disposition of the property of each and may be admitted to probate on two separate occasions. But where two testators attempt by a single writing to treat their separate estates as a joint possession to be vested in beneficiaries only on the death of the survivor the disposition is invalid. The first estate may not be held in abeyance until the death of the survivor for the purpose of then probating the instrument as the will of both.[15]

Beach v. Cobble[16] again raised the problem of the validity of a joint will. Fortunately there was sufficient language evidencing an intent that the writing should operate immediately upon the death of the first dying signer to enable the court to sustain it as his will. Presumably the joint will technique, rather than two separate wills, is used to deter revocation by one party without the consent of the other. As a practical matter it may decrease the risks of revocation by act to the document. However, the objective of preventing revocation is not necessarily accomplished since a joint will, by the better view, does not conclusively establish a contract not to revoke.[17] Separate wills, identical in terms, to carry out the wishes of the testators, accompanied, if desired, by a contract not to revoke, seem preferable. The real objection to the use of joint wills is the extremely difficult draftsmanship problem they present. The terms must be equally applicable to both deaths and provide for a disposition of the property or the first to die during the interval between deaths. It can be done but the pitfalls are many as those who have attempted it will attest. Invariably some phrase will appear capable of being construed as indicating an intention to hold the first estate in abeyance until the death of survivor. Such phrases invite will contests. It is this difficulty

13. 260 S.W.2d 304 (Tenn. App. E.S. 1953).
14. Bowe, *Wills, Estates and Trusts—1953 Tennessee Survey*, 6 VAND. L. REV. 1126, 1127 (1953).
15. Epperson v. White, 156 Tenn. 155, 299 S.W. 812 (1927).
16. 260 S.W.2d 212 (Tenn. App. E.S. 1953).
17. ATKINSON, WILLS 226 (2d ed. 1953).

of draftsmanship that has caused most if not all the litigation in this field.

Holographic Wills:

Some nineteen states, including Tennessee, recognize the validity of holographic wills, *i.e.*, wills wholly in the handwriting of the testator.[18] The perennial problem in these cases is whether the writing was really intended as a will, was merely an expression of the testator's hopes and wishes, or was motivated by a desire to placate the persons mentioned.

In *In re Bramlitt's Estate*[19] the paper offered was in the form of a letter written by the decedent to her mother but it was written at a time when the decedent was living in the mother's home. This indicated that it was not in the way of ordinary correspondence. In addition the terms of the document showed a clear testamentary intent.[20]

Correcting Mistakes in Wills:

Omissions and misdescriptions in wills are distressingly common and account for a large body of case law on the extent to which words may be added, deleted, or read as describing objects they clearly fail to describe. In *Greer v. Anderson*[21] the will, after providing for the payment of debts, stated "Secondly, I give and bequeath to my sister . . . so long as she may live, and then to Fred Anderson and Mary Alma Greer." The third and last paragraph appointed an executor. Here there was a complete absence of words indicating the property the testator intended to give. However, his intention, found within the four corners of the instrument, was obvious. He intended to give the residue of his estate and the court so found. But in part at least it placed its decision on a supposed rule that a court of equity has

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18. TENN. CODE ANN. § 8098.5 (Williams Supp. 1952). "No witness to a holographic will is necessary, but the signature and all material provisions must be in the handwriting of the testator and his handwriting must be proved by two witnesses."

19. 195 Tenn. 471, 260 S.W.2d 181 (1953).

20. The paper writing produced was in the words and figures as follows:
"Mrs. W. L. Coley May 11, 52
"I'm so tired & lonesome Mother I love you with all my heart and if anything were to happen to me, I want you to have my son Walter Lee Bramlitt & my home at 3156 Hull & everything I have—8 yrs. I've worked hard for a home & now it is on the rocks—I've tried to get Eddie to lets try it again but he wouldn't do it. Please mother dont let my son go to that farm. Daddy Coley has been so good to Walter & Me. I love you.
"Yvonne Bramlitt"

21. 259 S.W.2d 550 (Tenn. App. M.S. 1953).

power to reform wills; that there is a power in equity to supply omissions.

Query if this approach is sound. It clearly is not the traditional judicial approach to the problem. A will must be in writing but the courts have always assumed the power to determine what words in the paper offered are the words of the testator. As one famous English judge has put it, "I can strike out words but I cannot insert anything."[22] The court may delete words which it finds are not words of the testator but it cannot add words. Suppose that a will clause reads, "I give Jones $. "[23] Would not such a bequest fail no matter how clearly it was established by oral evidence or by non-testamentary writing that the testator intended the sum of $5,000.00? On the other hand where a will gave *A* "my forty shares" of *Y* stock and the evidence clearly established that the testator intended to give all his *Y* stock an English court struck out the word forty as not a word of the testator and left the will minus the stricken word to be construed.[24]

In a leading Kentucky case the court in holding that it did not have the power to carry out the intent of the testator but only his *expressed* intent as found in the words of the will, said "it is incompetent . . . to show what the testator *intended* to say, but did not, but it may be shown what was intended by what he *did* say."[25] (Italics supplied).

The result of the *Greer* case is sound because from the very words of the instrument the intent of the testator to give his residuary estate to Elsie Greer appears. The words lend themselves to such a construction. Indeed it is doubtful if they lend themselves to any other construction. And in fairness to the court it should be stated that much of the language of the opinion indicates that the result was in fact reached through the technique of construction rather than by supplying the words omitted by mistake. This discussion is merely to suggest that that portion of the opinion stating that equity may reform wills by adding words omitted through inadvertence perhaps states the law too broadly. The earlier Tennessee case relied on for this startling proposition states "The face of the will itself not only demonstrates the mistake, but likewise furnishes the evidence by

22. See Goods of Shott, [1901] P. 190.

23. *Cf. In re* Wirsig's Estate, 128 Neb. 297, 258 N.W. 467 (1935); see generally ATKINSON, WILLS 281 (2d ed. 1953).

24. Morrell v. Morrell, [1882] 7 P.D.68; See also Waite v. Frisbie, 45 Minn. 361, 47 N.W. 1069 (1891).

25. Eichhorn v. Morat, 175 Ky. 80, 193 S.W. 1013, 1014 (1917).

which the palpable omission may be supplied."[26] Thus the rule in Tennessee, despite the language of the court, may well be the traditional one of construing existing words, rather than supplying new ones.

Oral Trusts of Real Property:

In *Kelly v. Whitehurst*[27] land had been conveyed to *A* under an agreement that she would sell such portions as might be necessary to satisfy the mortgages thereon and would thereupon reconvey any unneeded parcels to the grantors. Some of the land was sold and the liens satisfied in full. The grantors continued in possession of the unsold parcels but no demand for a reconveyance was made prior to *A's* death. Proof of the agreement was "clear, cogent and convincing." The court held that the grantors, following *A's* death, were entitled to a decree divesting *A's* heirs and vesting them with the title and that their failure to demand a reconveyance during *A's* life did not constitute laches in view of all the circumstances.

Contrary to the rule in most jurisdictions, it has long been settled in Tennessee that trusts of land may be established by oral evidence. No writing is required since Tennessee never adopted Section VII of the original Statute of Frauds. However, the proof must be clear and convincing. This seems to furnish an adequate safeguard.

The rule permits gift and death tax advantages in Tennessee not available in most other jurisdictions. It does not appear whether this was a factor in the present proceeding but there is a lurking suggestion that it may have been, since the court, for no apparent reason, notes that the decedent's net personal estate exceeded $60,000.00. This is the federal estate tax exemption and as the decedent was unmarried the marital deduction was not available.

Not infrequently on the death of one parent intestate and owning real property the children will convey their interests to the surviving parent under an oral agreement that he will devise the land to them upon his death. In most jurisdictions the parent owns the fee and it is subject to death taxes upon his death. However, in Tennessee and a few other states the land should not be included as an asset in the estate of the surviving parent since, because the oral agreement is enforcible, he has only the naked legal title to the fee, the equitable

26. Eatherly v. Eatherly, 41 Tenn. 461, 469 (1860).
27. 264 S.W.2d 1 (Tenn. App. W.S. 1953).

fee is in the children subject to the parent's equitable life estate. This precise point was decided in a case arising in Texas where the rule as to oral trusts is the same as in Tennessee.[28]

28. In Reed v. Commissioner, 36 F.2d 867 (5th Cir. 1930), a father orally agreed with his children to devise his estate to them, including property to be received from them, in return for their conveyance of their interests in the estates of their father's first and second wives. Pursuant to the agreement the children executed warranty deeds to their father. The court held that a trust was created in favor of the children, with the result that they remain the equitable beneficial owners of the property conveyed, and such property was therefore not subject to estate tax as property of the father's estate.