Vanderbilt Law Review

Volume 18
Issue 3 *Issue 3 - June 1965*

Article 15

6-1965

Decedents' Estates, Trusts and Future Interest -- 1964 Tennessee Survey

Herman L. Trautman

Decedents' Estates, Trusts and Future Interest—1964 Tennessee Survey

*Herman L. Trautman**

As indicated above, the subject matter for discussion will include for the first time a separate heading for federal tax cases involving Tennessee probate law. It is contemplated that this practice will be followed in future years. The state developments will include only relevant court decisions as the General Assembly was not in session during the 1964 calendar year.

I. DECEDENT'S ESTATES

A. *Wills*

1. *Validity of Instrument Which Only Appoints Fiduciary.*—Is an instrument which makes no testamentary gift, but only designates or appoints the personal representative to administer the estate and provides certain special powers of fiduciary administration entitled to probate as a valid will? While it has been said that there need be no dispositive gift of property to entitle a testamentary writing to probate as a will,[1] there seems to have been no definite court decision in Tennessee so holding until the recent case of *Delaney v. First Peoples Bank of Johnson City.*[2] In that case a writing properly executed with the formalities required for making wills was offered

*Professor of Law, Vanderbilt University; member, Nashville and Tennessee Bars.

1. 1 PRITCHARD, WILLS AND ESTATES § 3 (3d ed. 1955).
2. 380 S.W.2d 65 (Tenn. 1964).

for probate and contested by the decedent's sole heir at law and next of kin. From the writing it appears that the decedent was primarily interested in naming an experienced and dependable personal representative to take charge of his assets, pay claims, expenses and taxes, file all proper tax returns, and distribute the estate according to the laws of intestate succession. Unlike the statutory law of administration, however, the writing authorized "the administrator" to sell at public or private sale, at such prices and terms as he may deem reasonable, such items of personal or real property as the administrator in his discretion may select "and its exercise of such discretion in this determination is absolute and may not be reviewed." In a society in which tax administration has come to require perhaps more than fifty percent of probate administration, here was a decedent whose sole concern seems to have been to have his gross estate administered as an economic unit by a capable fiduciary. The Supreme Court of Tennessee held that the writing was entitled to probate as a valid will, and rejected the petition of the sole heir at law and next of kin to be appointed administratrix of the estate. The decision seems to be in accord with the authorities in other states.[3] Thus, the law accords to a decedent the right to name the one who shall administer his estate, and to define his fiduciary powers, even though he makes no dispositive gifts and allows the statutes of intestate succession to control the devolution of his property.

2. *Widow's Dissent v. Intestate Share.*—Suppose a widow dissents from her husband's will which bequeathed his entire estate, consisting only of personal property, in trust to pay her the income for her life, with remainder over under a power of appointment, and suppose further that there are no children or descendants surviving. After filing the dissent, is the widow a proper party in interest to contest the validity of the remainder gift? If so, and if she is successful, is she entitled to the entire estate under Tennessee Code Annotated section 31-201 (2), as if the husband had died intestate? What precisely is the relationship of Tennessee Code Annotated section 31-606, providing that upon dissent a widow shall be entitled to not more than one-third of the decedent's personal estate, to section 31-201 (2), providing that where any person dies intestate leaving a surviving spouse but no descendants, the surviving spouse shall receive the entire net personal estate? The answers to these questions do not appear to be clear under the reported Tennessee decisions, and, unfortunately, the recent decision of *Allen v. First American National Bank*[4] rendered by the Middle Section of the Court of Appeals seems

3. *Ibid.* See cases and treatises liberally cited in the opinion.
4. 376 S.W.2d 713 (Tenn. App. M.S. 1963).

to make the answers even more equivocal. If this comment is justified by the discussion below, there would seem to be need for either a definitive decision by the Supreme Court of Tennessee or for legislation so that widow's elections can be made intelligently, and needless litigation avoided.

In the *Allen* case the holographic will gave the widow a life income interest in a trust of personal property. It provided that at her death the trust would terminate "and is to be disbursed according to instructions of" . . . *A, B* and *C*. The widow filed a dissent in the county court. In it she stated that she expressly reserved the right to question the validity of the remainder gift in the will. She later filed the instant suit in the chancery court to construe the will, asserting the invalidity of the remainder gift and that she was entitled to receive the remainder as intestate property. The defendants—the executor and *A, B* and *C*—answered that having dissented from the will and received (1) exempt property, (2) jointly owned property, (3) a year's support allowance of 9,600 dollars, and (4) being entitled to receive a one-third share of the net estate, the widow had no further interest in the estate. The chancellor held that by her voluntary election to dissent from the will the widow chose to receive the one-third interest in the net personal estate provided in Tennessee Code Annotated section 31-606, in addition to the exempt property and support allowance, and that she had no further interest in the assets of the estate, regardless of what might be a proper construction of the remainder gift. Accordingly, he refused to construe the remainder gift and, instead, dismissed the widow's bill.

Error was assigned because of (1) the decision that the widow's dissent deprived her of the right to question the validity of the remainder gift, and (2) the refusal to pass upon the validity of that gift. The Middle Section of the Court of Appeals first held that the widow's election to dissent from the will did not deprive her of the right to question the validity of the remainder gift, and further, a dictum of apparently new law, that if her position were sustained, "then she would become entitled to the entire residue under section 31-201."[5] Thus, the court states that her right to dissent under Tennessee Code Annotated section 31-606 is not exclusive of her rights under 31-201, but rather her rights under these statutes are concurrent. This would seem to be dictum, however, as the court went ahead to do exactly what the chancery court refused to do,—it construed the remainder and held it to be a valid gift of a general power of appointment to *A, B*, and *C*, which they could exercise by appointing to themselves. Thus, the widow seems to have gained nothing by

5. *Id.* at 718.

the court of appeals decision. But suppose she had been successful in having the remainder gift declared invalid? The court's opinion would seem to make meaningless Tennessee Code Annotated section 31-606.

Turner v. Fisher[6] and *Watkins v. Dean*[7] are early nineteenth century cases in Tennessee which certainly make it clear that, under the act of 1784, a widow who dissents from her husband's will is not entitled to the share of her husband's personalty which would have gone to her if he died intestate. The court in the instant case agrees that Tennessee Code Annotated 31-606 "is a substantial re-enactment" of the 1784 statute. Nevertheless, the court seems to rely on a head-note appended to *Miller v. Miller*,[8] that "the dissent of the widow to the will and having had a year's support assigned her, will not estop her from contesting the will."[9] A reading of that case, however, makes clear that the court refused to "positively adjudicate what may be her rights . . . if the will shall be set aside."[10] Instead, the court held only "that she is not estopped by her dissent from making the contest"[11] in this case because "this question is sought to be raised in a collateral way. . . ."[12] Indeed, the court there agreed that "Undoubtedly upon strict principle . . . we should be bound to hold, that the dissent of the widow from the will of her husband, cut her off from all interest under the will, and that her interest was fixed by this dissent. . . ."[13]

It may well be that the widow's election to dissent, which must be made within nine months after the probate of the will, is indeed a difficult decision to make, especially when there is a reasonable basis for believing that the testamentary plan ultimately may be invalidated; in this event she would receive all of the net personal estate under section 31-201 (2), rather than the one-third limited by section 31-606. If it is regarded as too difficult, or too much of a gamble, perhaps the legislature might be persuaded to repeal section 31-606 and amend 31-605 to provide that upon dissent a surviving spouse should receive the same share as if the decedent spouse had died intestate. Apparently, this was the law from the time of the Code of 1858 to the amendments made by the acts of 1859-1860.[14] It is indeed

6. 36 Tenn. 209 (1856).
7. 18 Tenn. 321 (1837).
8. 52 Tenn. 723 (1870).
9. *Id.* at 724, head-note 4.
10. *Id.* at 732.
11. *Ibid.*
12. *Id.* at 730.
13. *Id.* at 729.
14. 376 S.W.2d at 717. See the interesting comment of Hoffman, *Dissenting Widow's Rights In Personalty, Where There Are No Children*, 19 TENN. L. REV. 941 (1942).

difficult, however, to determine what the law of Tennessee is today with respect to this important election. While the court in *Allen* seems to say that the widow has both the right to dissent from the will and the right to have it set aside and take by intestate succession, the authority cited is not persuasive, and the plain meaning, purpose, and legislative history of Tennessee Code Annotated section 31-606 seem to require an opposite result.

3. *Issues and Burden of Proof on Contest of Two Wills.*—When the validity of a will is contested, the statute provides that the county court shall make a certificate of that fact and send it to the circuit court together with the original will[15] for trial on the issue *devisavit vel non.* It is further provided that the specific issues for trial shall be "made up, under direction" of the circuit court.[16] It is said that while the general burden of proof on the issue *devisavit vel non* is on the proponent of the will, when the will is contested upon the ground of want of mental capacity, not only is the burden on the contestor, but in addition there is a presumption against him.[17] Usually, the proponent has the right to open and close the case.[18]

In *Williams v. Bridgeford,*[19] two wills were filed for probate within a fortnight after decedent's death and the interested parties under each will contested the other. Both were certified to the circuit court where the issues for trial were made up on the basis of a trial of the validity of the later will, it being assumed that "if the will of March 31, 1961 had been invalidated by the verdict of the jury, the will of February 13, 1953 would have been established. . . ."[20] Accordingly, there was no error in allowing the proponent of the later will to open and close. *McBee v. Bowman,*[21] where the proponent of the earlier will was allowed to open and close, was distinguished on the ground that there the issues submitted for trial turned wholly upon the validity of the earlier will. While the statute puts procedural problems within the control and discretion of the trial judge, it appears that the proponent of the will usually receives the right to open and close the case notwithstanding that the risk of non-persuasion is on the contestor on the issue of lack of capacity.

---

15. TENN. CODE ANN. § 32-401 (1956).
16. TENN. CODE ANN. § 32-405 (1956). See 1 PRITCHARD, *op. cit. supra* note 1, §§ 364-68.
17. Puryear v. Reese, 46 Tenn. 21 (1867); Williams v. Bridgeford, 383 S.W.2d 770 (Tenn. App. W.S. 1964). See Morgan, *Burden of Proof and Presumptions In Will Contests In Tennessee,* 5 VAND. L. REV. 74 (1951).
18. *Ibid.*
19. 383 S.W.2d 770 (Tenn. App. W. S. 1964).
20. *Id.* at 775.
21. 89 Tenn. 132, 14 S.W. 481 (1890).

B. *Administration and Settlement Problems*

1. *Simultaneous Deaths—Husband's Estate Liable For Funeral Expenses of Wife.*—While ordinarily the husband's duty to support his wife ends with his death, and under the Simultaneous Death Act[22] there is no presumption that one survived the other, *In re Deskins' Estates,*[23] held that the husband's estate was liable for the wife's funeral expenses even though her estate was solvent. Although the court did not believe the Simultaneous Death Act to be relevant because this issue arose as a claim filed by the personal representative of the wife against the husband's estate, whereas that statute deals with the devolution of property on the deaths of two or more persons in a common disaster where there is no evidence as to who survived, the authorities and principles discussed by the court involve the liability of a surviving husband where the deceased wife's estate is solvent. In the instant case the husband and wife were killed in an airplane crash where there was no evidence of who survived.

2. *Claims For Unliquidated Damages—No Exception Required.*—It is said on good authority[24] that the necessity for separate law suits against the personal representative to enforce contractural obligations of the decedent was eliminated in Tennessee in most situations by the enactment in 1939 of the statute which now comprises Tennessee Code Annotated sections 30-509 through 30-518. Under this act claims must be filed with the clerk of the court in which the estate is being administered within nine months from the date of notice to creditors,[25] and are disposed of on exceptions[26] either in the circuit court before a jury[27] or before the judge of the probate court without a jury.[28] The filing of a claim under the provisions of this statute is equivalent to the commencement of an action. The sweeping language of section 30-510 is broad enough to cover all types of claims against the estate. While it has been held that the section does not apply to tax claims[29] and tort claims,[30] it is clear that it applies to all claims arising from contracts and agreements.[31] Until the recent case of *Coin Automatic Company, Inc. v Dixon,*[32] there has been no

22. TENN. CODE ANN. §§ 31-502 to -508 (1956).
23. 381 S.W.2d 921 (Tenn. 1964).
24. 2 PRITCHARD, *op. cit. supra* note 1, § 717.
25. TENN. CODE ANN. § 30-510 (1956).
26. TENN. CODE ANN. § 30-517 (1956).
27. *Ibid.*
28. TENN. CODE ANN. § 30-518; see 2 PRITCHARD *op. cit. supra* note 1, § 717.
29. Hamilton Nat'l Bank v. Richardson, 42 Tenn. App. 486, 304 S.W.2d 504 (1957).
30. Collins v. Ruffner, 185 Tenn. 290, 206 S.W.2d 298 (1947).
31. *Ibid.;* see also Eslick v. Friedman, 191 Tenn. 647, 235 S.W.2d 808 (1951); Wilson v. Haffey, 189 Tenn. 598, 226 S.W.2d 308 (1950); Warfield v. Thomas' Estate, 185 Tenn. 328, 206 S.W.2d 372 (1947).
32. 375 S.W.2d 858 (1964) (Clement, R., Spec. J).

apparent indication that a distinction would be made in the application of the 1939 statute for unliquidated claims arising in contracts and liquidated claims.[33] In this case, however, the claim was for damages in the total amount of 20,000 dollars against the estate because of an alleged breach of contract by the decedent of a promise not to compete. The claim was filed within the nine months period allowed by the statute, but the personal representative neglected to file the exception provided in section 30-517 within the thirty days after the expiration of the period for filing claims. The creditor asserted that his claim had become a final judgment because of the executor's failure to except, and, indeed, it has been so held in cases involving claims based upon the theory of *quantum meruit* for the reasonable value of services performed for a decedent.[34] But the court in *Coin Automatic* states that the 1939 statute contemplates "a liquidated claim,"[35] and therefore the claimant for uuliquidated damage had no right to have his claim adjudicated in this manner, *i.e.,* by the executor's neglect to except. The court states that to so hold would be a dangerous precedent, and if this is new law, "we believe it to be good law."[36] It may be that Tennessee Code Annotated section 30-517 should be amended to relieve the harsh effect of the fiduciary's failure to file an exception to a claim against the estate. It would seem reasonable to provide that any claim not paid within thirty days after the expiration of the period for filing claims shall be transferred to the issue docket of an appropriate court for trial after due notice to the parties in interest.

II. Federal Taxation of Tennessee Wills, Trusts and Estates

A. *Tennessee Support Allowance and the Marital Deduction*

The widow's support allowance authorized by Tennessee Code Annotated sections 30-802 and 30-803 was held to qualify for the federal estate tax marital deduction[37] in *Hamilton National Bank of Knoxville v. United States.*[38] A second wife for whom no provision was made in decedent's will dissented and commissioners set apart for her 8,400 dollars as a support allowance. The court emphasized the

33. See cases cited note 31 *supra.* Brigham v. Southern Trust Co., 201 Tenn. 466, 300 S.W.2d 880 (1957); see also Needham v. Moore, 200 Tenn. 445, 292 S.W.2d 720 (1956).

34. Brigham v. Southern Trust Co., *supra* note 33; Needham v. Moore, *supra* note 33; Warfield v. Thomas' Estate, 185 Tenn. 328, 206 S.W.2d 372 (1947).

35. 375 S.W.2d at 861.

36. *Id.* at 862.

37. Int. Rev. Code of 1954, § 2056.

38. 229 F. Supp. 885 (E.D. Tenn. 1964) (well written opinion by Chief Judge Robert L. Taylor).

statutory language providing that the money "so set apart shall be the *absolute property* of the widow for said uses."[39] Unfortunately, twenty days after the date of this decision the Supreme Court of the United States decided *Jackson v. United States*[40] which held specifically that a widow's support allowance awarded by a California probate court does not qualify for the marital deduction, even to the extent actually paid to her, and is not refundable. The result is that the basic premise upon which was based the decision of the United States District Court for Eastern Tennessee, and the several other court decisions there cited, was substantially rejected. It is not inaccurate to say that the position taken by the Supreme Court in the *Jackson* case will defeat the estate tax marital deduction for the widow's support allowance in the large majority of American states. The Court adopted the government's argument that the widow's support allowance is a non-qualified terminable interest because it must be ascertainable as of the instant of the husband's death; it was said that her death or remarriage prior to the award of the probate court would defeat her right to it. The emphasis on *date of death* rather than the *date of payment* as the time when the right to a support allowance must become indefeasible is not expressed in the Internal Revenue Code. There is, however, a report of the Senate Finance Committee, that in considering terminability of an interest for purposes of a marital deduction "the situation is viewed as at the date of the decedent's death."[41] Congress rejected an amendment which would have exempted from the terminable interest rule a widow's allowance to the extent of payments made within one year of the decedent's death.[42] Another attempt was made in 1959 when the House passed a bill exempting support payments made within fifteen months after the decedent's death, but the measure was not reported out of the Senate.[43] The American Bar Association has recommended an amendment which would permit deduction of all allowance payments made to widows within the three years within which tax assessments must be made[44]—a generous period indeed.

It may be that Congress will someday amend the Code to incorporate the time-of-payment standard rather than the possible contingencies-as-of-date-of-death test adopted by the *Jackson* case. By way of analogy, one may compare the common law rule against perpetuities,

39. TENN. CODE ANN. § 30-803 (1956) (Emphasis added.)
40. 376 U.S. 503 (1964).
41. S. REP. No. 1013, Part 2, 80th Cong., 2d Sess. 10 (1948). See Note, *The Widow's Allowance and the Marital Deduction*, 77 HARV. L. REV. 533 (1964).
42. H. R. REP. No. 1337, 83d Cong., 2d Sess. 318-19 (1954).
43. Note, *supra* note 41, at 542.
44. H. R. MISC. Doc. No. 10591, 86th Cong., 2d Sess. (1960). See ABA, SECTION OF TAXATION PROGRAM AND COMMITTEE REP. 55-57 (1959).

under which a contingent future interest is invalidated on the basis of a possibility rather than actuality, to the current "wait and see" developments in that field. Prior to *Jackson* many lower Federal courts sustained a tax deduction on the basis of the actuality, after waiting and seeing, that the widow did not die or remarry before receiving the award. On a policy basis it is difficult to say that the lower courts so holding were wrong, because the widow's estate would be taxable on the award if she had died immediately after receiving it. For the present, however, the Tennessee widow's support allowance would seem not to be entitled to the federal estate tax marital deduction unless it can be established that her estate could recover the support allowance from the husband's estate, if she were to die the day after her husband's death.[45]

B. *Beneficiary's Power To Invade Corpus Is a Power of Appointment*

In *Ewing v. Rountree*,[46] the testator bequeathed his estate in trust to pay the income to his wife with remainder to others. He directed the trustee, however, to sell annually upon the wife's request one hundred shares of Humble Oil stock and pay the proceeds to her, and "*Should my wife at any time request sale of more stock*" of the company mentioned, "she may to that extent invade the corpus . . . having such sale made and the proceeds paid over to her." The testator wrote the will in 1945 and died in 1947 when the power given to the wife would not have been taxable in her estate at her death. She died in 1958, however, and the 1951 Powers of Appointment Act, which is now section 2041 of the Internal Revenue Code, changed the tax law existing at the testator's death. The problem in the instant case was whether the Humble Oil stock[47] should be included in the gross estate of the wife. The executor's position was (1) that under the law of Tennessee the wife's power to invade corpus was limited by an "ascertainable standard," *i.e.*, for health, support and maintenance, and thus, not a taxable power, and (2) that the government is forbidden under the fifth amendment to apply the 1951 Powers of Appointment Act retroactively to a power which was non-taxable when created in 1947. The wife never exercised the power, and no steps were taken after 1951 to disclaim or limit the extent of her power.

In deciding the questions raised in this case the United States District Court for the Middle District of Tennessee[48] reviewed the

45. Jackson v. United States, 376 U.S. 503 (1964).

46. 228 F. Supp. 137 (M.D. Tenn. 1964).

47. The Humble Oil stock was exchanged for Standard Oil of New Jersey stock in 1954 under a plan of reorganization. The stock involved in the instant case is really Standard Oil stock.

48. A well written opinion by Chief Judge William E. Miller.

power of appointment cases in Tennessee and came to the conclusion that there is no Tennessee decision which requires a holding that a trust beneficiary's power to invade corpus is limited by an ascertainable standard for health, support and maintenance. The court noted *Black v. Pettigrew*,[49] however, as a limitation to the extent that she could not give the stock to others. This was not considered to be a relevant limitation with respect to Federal taxation. The court said that the Tennessee power of appointment cases fall into two categories: (1) Cases to determine whether under the particular will the widow had a power to invade corpus to *any* extent,[50] and (2) cases seeking to determine whether the power was unlimited so as to create a fee when joined with a life estate.[51] While the court admitted that some of the cases in the second category imposed limitations on an apparently unlimited power, it was believed that the primary purpose there was to avoid the much criticized rule, now changed by statute in Tennessee,[52] that the life beneficiary with an unlimited power owns a fee simple which descends to his heirs, next of kin, or testamentary beneficiaries, and thus defeats the interests of the takers in default or remainder beneficiaries named by the donor of the power. These cases did not impress the court in the instant case as establishing a general rule that an otherwise unlimited power to invade corpus can be exercised only to provide support and maintenance.

The constitutional issue seemed more difficult as the court agreed that at the time the testator executed the will and died, and until the 1951 Act the power would not have been includable in the donee's estate. "Does inclusion of the stock in her estate under the 1951 Act result in retroactive and constitutionally impermissible taxation?" asked the court.[53] It was agreed that if the donor had been writing his will under the 1951 Act, he could have limited his wife's power of invasion by the ascertainable standard defined in the Code and thereby retained a non-taxable power. It is certainly the custom of Congress, although not without exception, to make tax changes prospective only in application, or to provide a reasonable period of time for taxpayers to adjust their affairs. In the instant case it was argued by taxpayer's counsel that since the donor-testator had died in 1947 and the beneficiary had enjoyed the trust for four years when the 1951 Act was enacted, it was too late to renounce the unlimited power

49. 38 Tenn. App. 1, 270 S.W.2d 196 (1953).

50. As examples the court cited Williams v. Coldwell, 172 Tenn. 214, 111 S.W.2d 367 (1937); Downing v. Johnson, 45 Tenn. 229 (1867).

51. Redman v. Evans, 184 Tenn. 404, 199 S.W.2d 115 (1947); Mauk v. Irwin, 175 Tenn. 443, 135 S.W.2d 922 (1940); Waller v. Sproles, 160 Tenn. 11, 22 S.W.2d 4 1929), were cited as examples.

52. TENN. CODE ANN. § 64-106 (1956).

53. 228 F. Supp. at 142.

to invade. The court decided that while she had accepted the income from the trust for four years, she had not exercised the power and was not precluded from renouncing or disclaiming within a reasonable time after the 1951 Powers Act. The court agreed that this may have put the beneficiary to a hard choice, but that a hard choice does not render the imposition of the tax unconstitutional.

At bottom the issue is whether the 1951 Act is indeed being applied retroactively against the estate of the widow who died in 1958. While the donor-husband died in 1947 leaving the donee-widow a general power of appointment which would nevertheless not be taxed in her estate under the law existing in 1947, the Government will probably contend that it is applying the 1951 Act prospectively in 1958 to a situation then existing. The answer to the problem would seem to turn in part on whether the donee-widow could have done anything after enactment of the 1951 Act by release or otherwise which would have converted her unlimited general power of appointment into a non-taxable limited power.[54]

54. The district court decision has now been affirmed in all respects by the Court of Appeals for the Sixth Circuit. Ewing v. Ronntree, 65-2 U.S. Tax Cas. ¶ 12,323 (6th Cir. June 4, 1965) (Phillips, H., J.).