Vanderbilt Law Review

Volume 15
Issue 3 *Issue 3 - June 1962*

Article 15

6-1962

Decedents' Estates, Trusts and Future Interests -- 1961 Tennessee Survey (II)

Herman L. Trautman

Decedents' Estates, Trusts and Future Interests —1961 Tennessee Survey (II)

Herman L. Trautman[*]

* * *

The developments in these areas of Tennessee law during the first part of the year 1961 have been discussed heretofore in a recently published article.[1] In order to accommodate the transition from a fiscal year[2] to a calendar coverage, however, this article will be limited to those appellate court opinions published after May 31 and not later than December 31, 1961. During this period the General Assembly of Tennessee was not in session.

I. DECEDENTS' ESTATES

A. Intestate Succession

The word "pretermitted" is defined to mean "omitted" or "neglected." One of the few limitations upon the freedom of testamentary disposition in our Anglo-American legal system is the idea that while a parent is free to completely disinherit a child by his will, there must be some indication that such pretermission or omission was intentional. This idea is expressed by statute in most of our states, and, with some variations,[3] it covers both the child in existence but not mentioned in the will when executed, and the child born after the execution of a will with no provision for him. The Tennessee statute is Tennessee Code Annotated section 32-303. It pro-

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

1. Trautman, *Decedents' Estates, Trusts and Future Interests—1961 Tennessee Survey*, 14 VAND. L. REV. 1253 (1961).

2. The article in note 1 *supra* covered the period June 1, 1960 through May 31, 1961, and prior survey articles covered the same period.

3. See the survey of statutes in Rees, *American Wills Statutes* (pts. 1-2), 46 VA. L. REV. 613, 856 (1960).

vides that if a child is born after the execution of a will which neither provides for nor disinherits the child, the pretermitted child takes the same share he would have taken if the decedent had "died intestate."

In *Young v. Young*[4] this statute was construed to result in all of the decedent's real estate passing by intestate succession. A young wife had inherited land from her mother, and in 1908 she executed a will giving all of her property to her young husband. In 1916 her first child, the plaintiff, was born, and in 1918 she died. Her will was probated and her estate settled. In 1923 the plaintiff's father married the defendant, and the plaintiff lived with his father and stepmother. In 1951 the father and stepmother executed a deed to a third party and took back a deed to the father and stepmother as tenants by the entireties. The father died in 1954. This action in the chancery court is essentially an action of ejectment by the plaintiff against his stepmother. In sustaining the plaintiff's exclusive title to the farm land involved, the court held that the plaintiff was a pretermitted child under his mother's will of 1908; it was held that under the statute he was entitled to the fee simple interest in the land subject to his father's right of curtesy—a life estate in all the wife's freehold property, legal or equitable, provided issue has been born alive capable of inheriting the freehold estate.[5] While the plaintiff was twenty-five years of age in 1951 when deeds were executed purporting to transfer title to his father and stepmother as tenants by the entirety, it was held that no rights by adverse possession were acquired against the plaintiff because (1) there was neither actual nor constructive notice to plaintiff of an adverse claim by his father and stepmother, and (2) the father as life tenant is a quasi trustee for the remainderman, and, absent direct notice of a hostile claim of title, can legally do nothing to prejudice or destroy the remainder interest.[6]

B. Wills

When a will has been probated in solemn form, no question of its invalidity can be raised thereafter except by an action to set aside the judgment for fraud in its procurement, as in the case of any other judgment. This is the teaching of *Roland v. Weakley*.[7] The decedent owned a large amount of real estate. He left surviving a widow and two nephews,

4. 349 S.W.2d 545 (Tenn. App. W.S. 1961).

5. For a brief discussion of the Tennessee law on the surviving husband's right of curtesy see Trautman, *Decedents' Estates, Trusts and Future Interests—1961 Tennessee Survey*, 14 VAND. L. REV. 1253, 1259-62 (1961).

6. See discussion of the principle that life tenant will not be allowed to prejudice the remainder interest in Miller v. Gratz, 3 Tenn. App. 498, 507-11 (E.S. 1926); Morrow v. Person, 195 Tenn. 370, 258 S.W.2d 665 (1953), discussed in Trautman, *Future Interests and Estates—1954 Tennessee Survey*, 7 VAND. L. REV. 843, 849-50 (1954); Edwards v. Puckett, 196 Tenn. 560, 268 S.W.2d 582 (1954), discussed in Sides, *Real Property—1955 Tennessee Survey*, 8 VAND. L. REV. 1110, 1120-22 (1955).

7. 346 S.W.2d 578 (Tenn. 1961).

the plaintiffs, who were his only heirs at law with respect to the real estate. At the time of the decedent's death the nephews were five and two years old. The widow qualified as administratrix and sometime later she announced that she had located a holographic will of the decedent in which she was named as the sole beneficiary; she proceeded to have this will probated in solemn form. The nephews now allege that the will was a fraud and that the probate of it was obtained by fraud. In reversing the trial court for dismissing the plaintiff's action, the supreme court considers the case as an action to set aside a judgment for fraud. While the issue on the trial will be concerned with fraud in procuring the judgment of probate in solemn, evidence that the widow knew when she presented it for probate that decedent did not execute the will would seem to be admissible.

When a will is contested, Tennessee Code Annotated sections 32-204 and 32-406 state the mandatory requirement that the will shall be proved by all the living witnesses, if to be found, regardless of where they may be. In *Lyman v. American National Bank & Trust Co.*[8] the bank was named as executor and trustee and apparently three of its employees served as witnesses to the execution of the will. One of these witnesses was not produced at the trial. The bank accounted for her absence by testimony that she was no longer in its employment, that a letter was written to her which was not returned, that no response was received, and that a search was made for her with no success. The court said that it is the function of the circuit trial judge to determine whether a witness is available or can be found. Here it was apparently felt that not only the trial judge but also the trial attorneys for the contestors had been satisfied with the explanation regarding the absent witness.

Crippled Children's Hospital School v. Camatsos[9] is a case involving dramatic allegations of fact, including the murder of the testator by his wife while on a vacation in Greece. The holding is that pending the determination of an action to contest the decedent's will, neither the devisees nor the executor named in the contested will have sufficient legal standing to bring a separate bill to set aside two deeds which purport to be inter vivos conveyances executed in Greece by the decedent to his wife shortly before his death. If the will is sustained in the action to contest, then the deeds may be attacked. The court does not leave the grantee named in the deeds free to dispose of the property, however, for it holds

8. 346 S.W.2d 289 (Tenn. App. E.S. 1960). It is said that the will was first probated in "solemn form" in this case, and thereafter this will contest was filed. The case seems to have been considered as a probate in common form, however, as the issue *devisavit vel non* was certified by the probate court to the circuit court resulting in a jury verdict sustaining the will upon issues of mental capacity, duress and undue influence.

9. 349 S.W.2d 178 (Tenn. App. W.S. 1960).

that equity should impound all the property in dispute and hold the same until the will contest has been determined. Accordingly, it is held that an administrator *ad litem* or a receiver should be appointed by the chancery court to act under instructions of that court until the determination of the will contest in the circuit court.

C. Fiduciary Administration

Melhorn v. Melhorn[10] reinforces the joint survivorship bank account as a substitute for a will, and it further prohibits recovery by the personal representative of cash on the person of the deceased at death, if it was used to pay funeral expenses; the latter result is justified by the court on the ground that funeral expenses are a preferred claim. In this case the decedent had created survivorship bank accounts with two relatives. The court sustained the right of the survivor against the claims of the administratrix on the ground that the evidence showed an intention to create a survivorship bank account.[11] So it is that the purpose and function of the concept known as the "probate estate" continues to be narrowed.

It is a problem of continuing uncertainty for lawyers and trial courts concerned with probate administration to distinguish those cases in which there is concurrent jurisdiction in the county court, the chancery court or the circuit court, and those cases in which one of those courts has exclusive jurisdiction. *Ferguson v. Moore*[12] is the latest case in this problem area. The decedent's will had been invalidated for fraud and undue influence by a circuit court jury. Following this the county court entered a decree that decedent died intestate, and the plaintiff was appointed administratrix. This is a bill brought in the chancery court by administratrix to recover assets held by the defendant as executrix under the invalid will and for an accounting, a discovery, and an injunction to restrain disposition. The defendant demurred and one basis assigned was that an accounting by the defendant as executrix was a matter within the exclusive original jurisdiction of the county court. The chancellor sustained the demurrer, but the supreme court reversed holding that the chancery court has the inherent jurisdiction to supervise the administration of decedents' estates, and that this was not disturbed by the recent decision in *Teague v. Gooch*.[13] The court's opinion by Judge Felts points out that the defendant had in effect been removed as executrix even though there was no order of the county court revoking her letters, the

10. 348 S.W.2d 319 (Tenn. 1961).

11. The court based its decision on Sloan v. Jones, 192 Tenn. 400, 241 S.W.2d 506, 507 (1951) and Peoples Bank v. Baxter, 41 Tenn. App. 710, 298 S.W.2d 732 (W.S. 1956).

12. 348 S.W.2d 496 (Tenn. 1961).

13. 206 Tenn. 291, 333 S.W.2d 1 (1960). See discussion of this case in Trautman, *Decedents' Estates, Trusts and Future Interests—1960 Tennessee Survey*, 13 VAND. L. REV. 1101-03 (1960).

appointment of plaintiff as administratrix being considered as the equivalent of an order of removal. The defendant was then regarded as an adverse claimant and the issue was whether she was wrongfully withholding money from the decedent's estate. This was exactly the substantive issue in *Teague v. Gooch* in which it was held that the county court has the jurisdiction to determine contested litigation of both issues of fact and law in probate matters. But that case made it clear that to hold that the county court has jurisdiction to determine litigated issues is not inconsistent with the concurrent jurisdiction inherent in the chancery courts.[14] The court distinguishes cases in which a controversy is pending in the county court, and cases in which there was no effort to invoke the inherent jurisdiction of the chancery court over the administration of decedents' estates. In *Rowan v. Inman*,[15] decided last year the supreme court held that the chancery court had no jurisdiction of an action for relief of a judgment of the county court on a claim against the decedent's estate; here the county court had acted on the merits. While the jurisdiction of the county court seems to be exclusive with respect to the validity of claims against the decedent's estate, there is a considerable area of concurrent jurisdiction on the part of the county court and the chancery court to supervise generally the administration of decedents' estates. Unfortunately, the problem of distinguishing the cases where the jurisdiction is exclusive and the cases where there is concurrent jurisdiction is not easy.

Should heirs at law be allowed a partition sale of the land of a decedent before it can be determined whether the administrator will need to file a petition to sell it in order to pay debts, expenses, and taxes? It is a maxim of chancery practice that equity delights to do complete justice, and not by halves, in order to avoid a needless multiplicity of suits.[16] In *Crook v. Crook*[17] the supreme court held that the heirs could have such a partition sale even though under Tennessee Code Annotated section 30-610 the purchaser at such a sale would take title subject to the prior rights of the personal representative or any creditor of the decedent. The administrator was made a party defendant and filed a plea in abatement; the other heirs demurred; the common ground of both was that the administrator was in the process of administering the estate. The chancellor sustained both the plea in abatement and the demurrer, holding that the right of partition sale does not exist until the condition of the personal estate has been determined. But the supreme court dismissed the action

14. The opinion of Judge Felts cites the writer's comment on *Teague v. Gooch* to that effect in Trautman, *Decedents' Estates, Trusts and Future Interests–1960 Tennessee Survey*, 13 VAND. L. REV. 1101, 1103 (1960).

15. 338 S.W.2d 578 (Tenn. 1960). See Trautman, *Decedents' Estates, Trusts and Future Interests–1961 Tennessee Survey*, 14 VAND. L. REV. 1253, 1262 (1961).

16. 1 GIBSON, SUITS IN CHANCERY § 47 (5th ed. 1955).

17. 345 S.W.2d 679 (Tenn. 1961).

as to the personal representative, and reversed the chancellor as to the defendant heirs, notwithstanding the admittedly superior right of the personal representative to the extent necessary to pay debts, expenses, and taxes. This seems to be an unfortunate decision, and one which argues loudly that real estate be made a part of the probate estate. What purpose is to be served by subjecting the real estate to the expense of a possibly needless partition sale? Could it be a race for the allowance of attorneys fees?[18]

II. Trusts

A. Charity and the Cy Pres Doctrine

The doctrine of judicial cy pres with respect to charitable trusts has not been expressly recognized in Tennessee,[19] but the courts have recognized the inherent power of equity to direct or permit a deviation from the terms of the trust where compliance is impossible or illegal, or where it is considered necessary in order to sustain the general purpose and intention of the settlor.[20] The rejection of the cy pres doctrine seems to be the result of a failure to distinguish between the judicial and prerogative doctrines of cy pres, as it was early said that "only these powers which in England were exercised by the Chancellor by virtue of his extraordinary as distinguished from his specially delegated jurisdiction, exist in our Chancery Court."[21] To hold, however, that equity has the inherent power to direct or permit a deviation from the terms of the trust in order to accomplish the purpose of the settlor is to announce a principle which is in substance and effect the same as the judical cy pres doctrine concerning charitable trusts; and, indeed, it is broader than cy pres because it is applicable also to private trusts.[22]

Goodman v. State[23] was a petition for a declaratory judgment brought by the Commissioners of Goodwyn Institute of Memphis to construe a will creating a charitable trust to authorize the consummation of a contract of exchange of the Goodwyn Institute building for the First National Bank building and to authorize the Commissioners to maintain the Goodwyn Library and the Goodwyn Lecture Series at locations other than the presently owned building. The decision for the Commissioners relied on the opinion of Chief Justice Neil in *Henshaw v. Flenniken*[24] which held

18. See Tenn. Code Ann. § 23-2125 (1956) authorizing the allowance of attorneys fees for the complainant and defendant where the property is sold for partition.

19. Johnson v. Johnson, 92 Tenn. 559, 23 S.W. 114 (1893); Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541 (1945).

20. Henshaw v. Flenniken, *supra* note 19; Goodman v. State, 351 S.W.2d 399 (Tenn. App. W.S. 1960).

21. Green v. Allen, 24 Tenn. 170 (1844); Dickson v. Montgomery, 31 Tenn. 348 (1851); Johnson v. Johnson, 92 Tenn. 559, 23 S.W. 114 (1893).

22. 4 Scott, Trusts § 399, at 2826 (2d ed. 1956).

23. 351 S.W.2d 399 (Tenn. App. W.S. 1960).

24. 183 Tenn. 232, 191 S.W.2d 541 (1945).

that a court of equity has the inherent jurisdiction to deviate from a prohibition of sale and to authorize a sale or exchange of property for the accomplishment of the trust purpose. The court of appeals for the western section in the instant case paraphrased the rule of the *Henshaw* case as follows:

> That the means and/or details for the administration of charitable trust should be molded so as to meet any exigency which may be disclosed by a change of circumstances so as to relieve the trust from conditions which imperils or endangers the charity trust or the funds provided for its endowment and maintenance and to further the dominant purpose for which the trust was established, are natural and necessary branches of equitable jurisdiction.[25]

While the grammar is rather bad, this is in substance and effect a statement of the doctrine of judicial cy pres.

III. FUTURE INTERESTS

A. Testamentary Gift of Land to "Next of Kin of H"

Fariss v. Bry-Block Co.[26] raises a construction problem of apparent first impression in Tennessee—a problem in which the western section of the court of appeals reversed the chancellor and the supreme court reversed the court of appeals. Unfortunately, the several issues and alternatives in this case do not appear readily from the written opinion. The decedent who died in 1919, wrote her will in 1918 at a time when her family consisted of her husband, a married daughter who was 25-years-old and without children, and a son who was 23 and without children. In addition her husband had two brothers, William and Albert each of whom had children. Item III of the decedent's will disposes of her real estate only; she gave it to her husband for life, then to her son and daughter for their lives and at the death of each to his issue "per stirpes and not per capita," and after several prior alternative contingent remainders, there was a gift of an ultimate contigent remainder in the event both children die without issue after the death of the husband "to the next of kin of my said husband, John F. Kimbrough." The daughter died without issue in 1925, the husband died in 1927, and the son died without issue in 1959, so the problem is to determine the meaning of the ultimate contigent remainder. The husband's two brothers, William and Albert, had died in 1931 and 1934. In 1959 at the death of decedent's son there were seven children of William living; these were nephews and neices of the decedent. At that time there also were living one child and thirteen grandchildren

25. 351 S.W.2d at 409.
26. 346 S.W.2d 705 (Tenn. 1961).

of Albert, the grandchildren being children of deceased nephews and nieces of the testatrix.

The issues in this case are (1) whether or not the decedent's testamentary gift is limited to the nephews and nieces of her husband, or whether it includes the great nieces and nephews, and (2) if it is limited to the eight nieces and nephews, whether it is to be distributed per capita or per stirpes among them. The Bry-Block Company was a tenant of one of the business buildings, and it had purchased the interest of four of the eight nieces and nephews; if the gift to "next of kin of my said husband" includes great nieces and nephews, Bry-Block owned only a 11/35ths interest; if the gift is limited to nieces and nephews on a per capita basis, Bry-Block owned a ½ interest; and if the gift is to nieces and nephews per stirpes, Bry-Block owned a 10/14ths interest.

The great nieces and nephews contended that because only real estate was involved the gift to "next of kin" should be construed to mean "heirs," in which case the right of representation is unlimited in Tennessee, so they would be included. The court of appeals adopted this view. There is certainly authority in Tennessee that the converse is true, *i.e.*, that the word "heirs" when applied to personalty will be held to mean next of kin.[27] The supreme court rejected this view, however, and reversed the court of appeals, notwithstanding that this is a logical point of view. The differences in our Tennessee law of descent and distribution between personal property and real property are so many and so agonizing!

Of the eight living nephews and nieces, seven were children of brother William, and one was the child of brother Albert. Those who had not sold their interests to Bry-Block contended for a per capita definition of next of kin and based their argument on the ancient restrictive meaning of this phrase developed prior to the first Statute of Distribution in 1670. It simply limited the class of takers to the nearest blood relatives; no statute on intestate succession is involved in this determination. Suppose a decedent left a sister and a niece, the child of a deceased brother; the sister would take to the exclusion of the niece because the former is the nearer in blood relation. It is believed that this is a technical deviation from the common understanding and popular meaning of the term "next of kin," and that it creates a pitfall into which both laymen and lawyers are apt to fall. It is a position, however, which still has some following among American jurisdictions today,[28] and the supreme court of Tennessee adopted this construction in the instant case. Accordingly, the eight nieces and nephews took equal shares on a per capita basis, even though

27. Spofford v. Rose, 145 Tenn. 583, 593, 237 S.W. 68 (1922) and cases cited therein; 1 PRITCHARD, WILLS AND ADMINISTRATION OF ESTATES § 435, at 382 n.2 (Phillips ed. 1955) and cases cited therein.

28. 3 POWELL, REAL PROPERTY § 374 n.69 (1952); see also the excellent Annot., 32 A.L.R.2d 296, 303 (1953).

the decedent in 1918 no doubt thought of her husband's brothers, William and Albert and their respective children, as two separate families. Bry-Block was accordingly held to own a ½ interest in the land it was interested in.

A modern view with a growing acceptance and adoption by the *Restatement of Property* is that the phrase "next of kin" should be interpreted to mean those who under the applicable local statute on intestate succession would succeed to the personal property of the designated person if he had died when the prior estate ended.[29] In this case, if the decedent's husband had died in 1959 immediately after the son's death, his personal property would have been distributed to his eight nephews and nieces on a per stirpital basis—as representatives of their fathers.[30] It is believed that this view conforms to the current common understanding of both laymen and lawyers, and that the state policy decision implicit in the statute on intestate succession provides a comfortable, and probably an intended reference for determining the recipients of such an end limitation—an ultimate contingent remainder. To adopt the ancient nearest-in-blood definition of "next of kin" is complicating because it decrees two very different standards for determining "next of kin"—one to be used for statutes on intestate succession; the other to be used for construing wills and trust instruments.

While the instant problem seems to be a case of first impression in Tennessee, there are at least two cases which, while involving a different problem, are concerned with the meaning of the phrase "next of kin." *Frank v. Frank*[31] was a testamentary gift of a trust to *W* for life, remainder to *S* "or in the event of his prior death, to his next of kin." *S* predeceased *W* and the court held that the widow of *S* was not intended as a next of kin. In this case the court said that the phrase has two meanings, and where there is nothing in the context to show a different intent, the words "next of kin" must be given their ordinary meaning of relatives in blood. On the other hand, in *American National Bank v. Meaders*[32] the testator's will gave his personalty in trust to his wife for life and after her death "equally between my relatives and her relatives." The court first construed "relatives" to mean "next of kin." Having done this, the court then determined that it meant next of kin under the statute on intestate succession. While these cases tend in opposite directions, the *Meaders* case seems more closely similar to the instant case, it being generally

29. 3 POWELL, *op. cit. supra* note 28; SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 727 (1956); RESTATEMENT, PROPERTY § 307 (1940); Annot., 32 A.L.R.2d 296, 307 (1953).

30. TENN. CODE ANN. § 31-201 (1956) provides for distribution in such cases to "brothers and sisters, or the children . . . *representing* them." (Emphasis added.)

31. 180 Tenn. 114, 172 S.W.2d 804 (1943).

32. 161 Tenn. 184, 30 S.W.2d 246 (1930).

agreed that widows are not included in the concept of next of kin.

Lastly, it is suggested that this difficult construction problem should be avoided in wills and trust instruments by writing such end limitations to read "to the next of kin of my husband, to be determined under the statutes on intestate succession in Tennessee in effect at the time of such distribution."