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DECEDENTS' ESTATES, TRUSTS AND FUTURE INTERESTS— 1961 TENNESSEE SURVEY

HERMAN L. TRAUTMAN*

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The subject matter will be discussed under the three headings indicated above. The developments of the year¹ include court decisions and relevant new legislation enacted by the Eighty-second General Assembly of the State of Tennessee. Perhaps the most significant development of probate law in Tennessee during the period was the enactment of the Uniform Testamentary Additions to Trusts Act,² referred to generally as the "pour-over" statute.³ Very likely this statute will have a substantial and dramatic impact upon (1) the arrangements of decedents' estates, and (2) the future role that the executor and the lawyer will have in the settlement of decedents' estates. Though this development involves a blending of separate dispositions by an inter vivos trust instrument and a will, it will be discussed under the heading of Decedents' Estates because of its importance to that area of the law.

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1. The year covered by this article extends from June 1, 1960, through May 31, 1961. The court decisions discussed are reported in volumes of the *Southwestern Reporter, Second Series*, beginning with 334 S.W.2d 632 and extending through 345 S.W.2d 600.

2. TENN. CODE ANN. § 32-307 (Supp. 1961).

3. CASNER, *ESTATE PLANNING* 118 (3d ed. 1961).

I. DECEDENTS' ESTATES

A. Wills

There is still no statutory time limit in Tennessee within which a will must be probated in order to be an effective death disposition.⁴ Nevertheless, Tennessee Code Annotated section 30-610 (as amended in 1957) protects a bona fide purchaser and mortgagee from the heir against the title and rights of all devisees and legatees claiming under an unprobated will of a decedent, if the purchase or mortgage is made more than one year after the date of the decedent's death. The legislative amendment eliminated a title hazard which had existed for many years in Tennessee; the full impact of this hazard was realized only after the mortgage banker in *First Federal Savings and Loan Ass'n v. Dearth*⁵ suffered a financial loss.⁶

In *Doughty v. Hammond*⁷ the Supreme Court of Tennessee sustained the 1957 legislative amendment mentioned above against a constitutional attack; it was contended that the act deprived the devisee of his property without due process of law and denied him the equal protection of the laws as guaranteed by both the Tennessee and the United States constitutions. After pointing out that the state has the power to prohibit entirely the transmission of wealth by will or intestate succession, and that this includes the lesser power to prescribe a time limit for probating a will, the court emphasized that a one year time limit cannot be said to be unreasonable, and that it provides an "expeditious administration of a person's estate to be able to know whether there shall be an administrator, or an executor under some will."⁸ Certainly the primary object of any system of administering a decedent's estate should be to provide for an orderly system whereby creditors' claims, taxes and other preferred expenses can be paid, and the remaining property distributed in a way that will be fully protected under the law. In the instant case an heir at law commenced a partition suit with respect to the land within two months after the date of death; a sale to the plaintiffs was confirmed one week after the expiration of the one year period, and the decedent's holographic will was not discovered until seven months after

4. *First Fed. Sav. & Loan Ass'n v. Dearth*, 198 Tenn. 304, 279 S.W.2d 503 (1955). It is said that TENN. CODE ANN. § 30-113 (1956) does not apply to wills. *Doughty v. Hammond*, 341 S.W.2d 713, 717 (Tenn. 1960).

5. 198 Tenn. 304, 279 S.W.2d 503 (1955).

6. For other discussions (a) showing the need for such legislation in Tennessee and (b) commenting upon the legislation as enacted, see Trautman, *Real Property—1956 Tennessee Survey*, 9 VAND. L. REV. 1089-92 (1956); Roady, *Real Property—1957 Tennessee Survey*, 10 VAND. L. REV. 1188, 1201-02 (1957); Trautman, *Wills, Trusts and Estates—1957 Tennessee Survey*, 10 VAND. L. REV. 1238, 1240 (1957).

7. 341 S.W.2d 713 (Tenn. 1960).

8. *Id.* at 717.

the confirmation, or a year and seven months after decedent's death. Though one may understandably sympathize with the defendant who was named as devisee in the unprobated will, the interests of society seem to clearly predominate; without such legislation the title to the property owned by every decedent who died intestate would be unmarketable for many years because of the hazard of an unprobated will.

Two further comments come to mind with respect to this case: First, the holographic will is not only terribly expensive,⁹ but also is frequently difficult to find; one result of this is that the beneficiaries named may lose the substance of their gifts. Secondly, if heirs at law or next of kin of an intestate have any fear that a will of the decedent might eventually be produced, they may wish to arrange a sale to be completed one year after the decedent's death. While there is still no statute of limitations which will prevent the probate of a will in Tennessee, the failure to do so within one year after the decedent's death may indeed result in unfortunate consequences.

*Smith v. Weitzel*¹⁰ is a strange case in the Tennessee law of wills, and it is submitted that it is an unfortunate one. A statement of the facts reflects what would seem to be (1) bad planning of the decedent's will and estate, (2) an abundance of litigation which has occupied the time and attention of five separate courts in Tennessee (the writer is informed that the case is now again in the chancery court for further construction of the decedent's will), and (3) a written opinion by the middle section of the court of appeals which could be construed in a way that would be an unfortunate precedent. The testatrix left a written will and codicil which were duly executed and witnessed. The third item was a special devise of her residence, and the fourth item gave the residue to A, B and C. The difficulty concerns the second item which stated the purpose and intention to give "certain of my relatives . . . stocks and/or bonds, which items I propose to allocate to each and place in envelopes bearing the name of each such relative and leave in my Safe Deposit Box." The testatrix was apparently advised that this would save administration expenses since she stated that "This property I do not wish handled under the executorship hereinafter set up, but my executor shall deliver same to the named relatives without responsibility other than to take the proper receipt therefor and to declare same and pay any inheritance or other taxes due thereon out of the residue of my estate . . ." Before this estate is finally settled the litigation expenses

9. Trautman, *Decedents' Estates, Trusts and Future Interests—1959 Tennessee Survey*, 12 VAND. L. REV. 1157, 1181-82 (1959).

10. 338 S.W.2d 628 (Tenn. App. M.S. 1960).

will greatly exceed the cost of competent advice by a professional estate planner. The relatives are not named in the decedent's will, and it does not appear from the will that the envelopes were in existence when the will was executed or that testatrix had made the allocation that she proposed. In the bank deposit box of the testatrix were found seven envelopes which contained corporate securities. She had written upon each envelope only (1) the name of a relative, (2) a description of the contents, and (3) her signature; there was no language of gift or testamentary disposition on the envelopes. One of the original securities allocated among the envelopes was General Motors stock which split three-for-one between the execution of the will and the death of the testatrix. The testatrix had directed her banker to allocate the additional shares among the envelopes in the same proportion.

The written will and codicil were probated in the county court. The executor immediately filed a bill in the chancery court for a construction of the will, raising the question whether or not the seven envelopes containing the major part of the assets of the estate should be considered as parts of the will. Some of the beneficiaries contended that the writing on the envelopes constituted a valid bequest of the contents. Other beneficiaries took the position that the securities passed under the residuary clause to A, B, and C. Still others asserted that the envelopes and their contents were not part of the decedent's estate. The chancery court upon motion suspended proceedings until a petition could be filed in the county court to probate the envelopes as a part of the will. Because the petition to probate the envelopes was opposed, the county court determined that a will contest was presented and certified the proceedings to the circuit court.¹¹ Since the only issue in this case—whether or not the envelopes can be integrated with the written will and codicil—seems to be purely a question of law, it is doubtful that this is the type of issue which can be certified to the circuit court under its statutory authority to determine issues of *devisavit vel non*.¹² In this case, however, the jury decided that the envelopes constituted a part of the decedent's will, and a decree of the circuit court based upon the jury verdict

11. TENN. CODE ANN. §§ 32-401 to -410 (1956) provide that when a will "is contested" the county court shall cause the fact to be certified to the circuit court for trial of the "issue of *devisavit vel non*." This technical Latin phrase means "Did he devise or not? An issue *devisavit vel non* is an issue of fact as to whether a will in question was made by the testator as his own responsible act." BALLENTINE, LAW DICTIONARY cited in 1 PRITCHARD, WILLS § 366 n.1, (1955). The purpose of the statute seems clear—that the trial of facts involving due execution, mental capacity, fraud, undue influence and similar issues of fact are particularly suited for trial by jury, and should therefore be sent to the circuit court, which specializes in jury trials.

12. See note 11 *supra*.

was entered. On appeal, the middle section of the court of appeals held that the verdict of the jury was supported by substantial evidence that the testatrix intended to make testamentary gifts by use of these envelopes and that therefore she intended that her will should be "composed of the type-written document signed, acknowledged and witnessed, plus the envelopes . . ."¹³ Unfortunately, this decision seems to miss the problem completely. As was said by a New York surrogate in a very similar case, "The question is not what did the testator intend to do, but what has he done in the light of the statute."¹⁴ There would seem to be no question of fact at all concerning either the intention of the testatrix or her acts in carrying out her intention. The only real problem in the case seems to be to determine the legal effect of her acts and intention when measured by the Tennessee Statute of Wills. Because it would seem to involve only an issue of law, it is difficult to understand why this case was allowed to be submitted to a jury. Both a demurrer and motion for a directed verdict were overruled by the circuit court, and the writer is informed that those who opposed recognition of the envelopes refused to argue the case before the jury, stating in open court that the question was purely one of law.

It would seem that the first error was made by the chancellor when he was persuaded to suspend the entering of his decree in order to permit the envelopes to be offered for probate; he had already rendered a written opinion holding that the contents of the envelopes passed under the residuary clause. The county court, circuit court, and court of appeals seem to have made the second, third and fourth errors as indicated above. There are those who oppose a single court with exclusive probate and civil jurisdiction to try all issues arising in such matters; they justify the present Tennessee system of divided jurisdiction on the ground that since each court performs a specialized function, it will be done better. This case, however, is apparently an unfortunate example of over-specialization with no one court having a broad enough perspective to recognize the problem raised as only a question of law.

An analysis of the substance of this case should start with the proposition of law that a will is restricted to the papers which were assembled at the formal execution of the decedent's will. There are three doctrines which severely strain, but do not breach, this basic proposition. They are: (1) the doctrine that a will may consist of several separate pages which may be integrated and validated by a single act of execution; (2) the doctrine of incorporation by reference;

13. 338 S.W.2d at 635.

14. *In re Angle's Will*, 147 Misc. 445, 264 N.Y.S. 29, 37 (Surr. Ct. 1933).

and (3) the doctrine of independent significance or non-testamentary acts. The *Weitzel* case cannot be squared with the doctrine of incorporation by reference on several grounds—the will does not identify particular envelopes; it does not appear that the envelopes were in existence when the will was executed; and since the doctrine contemplates the incorporation of a writing, the words on the envelope do not include words of gift.¹⁵ Nor does the *Weitzel* case square with the doctrine of independent significance of non-testamentary acts because it is perfectly clear from the will itself that the putting of securities in the envelopes had no significance to the testatrix which was independent of a testamentary disposition.¹⁶ The first doctrine mentioned—that the integrated will may consist of separate pages validated by a single act of execution—is the theory which seems to come nearest to sustaining the *Weitzel* decision. Even there, however, it must appear that all the separate writings are present at the time of execution. A close reading of the *Weitzel* opinion does not prove convincingly that this was true. The court talks about the dates on some of the stock certificates in order to imply that the envelope in which it was found was present at execution, but the presence of a particular envelope and the writing on it can hardly be inferred from the dates of some of the certificates in it. It seems clear that this testatrix could have substituted at will new envelopes with new names from time to time, and that she could have changed the contents of existing envelopes as her thoughts varied from day to day. There is nothing in her will to indicate anything other than that this was her purpose in the use of such envelopes.

As a matter of policy this seems to be an unfortunate decision because it provides judicial encouragement to devious methods of frustrating the legislative requirements of the statute of wills.¹⁷ Such decisions contribute to a delinquency in estate planning on the part of many testators, at a cost that frequently runs into many thousands of dollars in litigation expenses and prolonged delay in estate settlements. All this could be largely avoided at nominal cost with the help of competent professional advice. If the will in the instant case had named the legatees whose names were found on the envelopes it would have given the case a somewhat marginal status;¹⁸ but to state nothing more than a purpose to give certain relatives

15. See ATKINSON, *WILLS* § 80, (2d ed. 1953).

16. *Id.* § 81.

17. For another decision of this character see *In re Jones' Estate*, 44 Tenn. App. 323, 314 S.W.2d 39 (W.S. 1957), discussed in Trautman, *Decedents' Estates, Trusts and Future Interests—1959 Tennessee Survey*, 12 VAND. L. REV. 1157, 1163 (1959).

18. *Daniel v. Tyler's Executors*, 296 Ky. 808, 178 S.W.2d 411 (1943); *In Re Le Collen's Will*, 190 Misc. 272, 72 N.Y.S.2d 467 (Surr. Ct. 1947); Atkinson, *op. cit. supra* note 15, § 90, at 395.

some stocks "which . . . I propose to allocate to each . . . in envelopes bearing the name. . . ." does not seem to satisfy the requirements of integrating separate papers as a single will.¹⁹

*In re Eppinger's Estate*²⁰ held that where a previous court of appeals decision had directed that the costs of a will contest on mental capacity should be paid from the estate, the term "costs" does not include the allowance of attorneys' fees for the unsuccessful contestants.

*Kelley v. Brading*²¹ was a will contest in which undue influence was an issue. The trial court was reversed for refusal to give a requested instruction. This instruction was to the effect that if the jury found that a beneficiary named in the will had been in a confidential relationship with the decedent prior to the will and had caused the will to be drafted and executed, the law would presume that the beneficiary had exercised undue influence and would cast the burden of proof upon the beneficiary to show that he did not exercise undue influence. The beneficiary here was the circuit court clerk who for many years had handled the business affairs of the decedent.

In *Patton v. Gleaves*²² the decedent, a marine who was shot down in 1951, was officially declared dead in 1954 after more than \$12,000 had accrued in unpaid salary. Under the statutes on intestate succession his divorced parents would succeed to his estate. The decedent had filled out and sworn to a printed form used by the Marine Corps entitled "Record of Emergency Data" which designated his father as the person to be notified in case of emergency, and as the person to receive all of his pay. On the basis of this form the county judge awarded the accrued salary, which was the decedent's entire estate, to his father. On appeal the supreme court reversed and held that the printed form was in effect a document for the administrative convenience of the Marine Corps in disposing of property and other details, and that it was neither a will nor an assignment of the son's pay to the father; instead the salary was to be administered as estate property and distributed to next of kin—in this instance to both parents.

B. Intestate Succession

While the Married Woman's Emancipation Act of 1913²³ substantially eliminated in Tennessee the common law concept of a hus-

19. For a similar case holding the provision in the will for sealed envelopes void see *In re Angle's Will*, 147 Misc. 445, 264 N.Y.S. 29 (Surr. Ct. 1933).

20. 336 S.W.2d 28 (Tenn. 1960).

21. 337 S.W.2d 471 (Tenn. App. E.S. 1960).

22. 334 S.W.2d 946 (Tenn. 1960).

23. TENN. CODE ANN. § 36-601 (1956). See also § 32-111 concerning a married woman's capacity to make a will. This is an older statute derived from Tenn. Pub. Acts of 1851-1852.

band's estate by curtesy initiate,²⁴ it did not abolish the husband's estate of tenancy by the curtesy consummate.²⁵ Tennessee Code Annotated sections 32-111 and 36-602 expressly so declare. After the wife's death the husband is entitled to a life estate in all her freehold property, legal or equitable, provided issue has been born alive capable of inheriting the freehold estate.²⁶ While it has been said often that the right of curtesy extends only to lands in which the wife had seisin,²⁷ it is clear that the requirement of seisin means that the husband is entitled to curtesy only in those inheritable estates in which the wife has a present possession, or right to present possession,²⁸ regardless of whether she has a legal or an equitable estate of inheritance.²⁹ It does not extend to lands in which she owns a future interest which does not become a present possessory interest during her life.³⁰

These principles of law were involved in a recent Tennessee case. In *Roten v. Hicks*³¹ a father died intestate leaving 210 acres of land and a widow and two married daughters. The daughters and their husbands executed voluntary partition deeds dividing the lands, the deeds in each instance conveying a particular tract to a daughter and her husband as tenants by the entirety. Each deed was "subject to the life estate" of their mother "who holds said land as a homestead during her lifetime."³² Eight days after the partition deeds one of the daughters died leaving her husband and six children as well as her mother surviving her. The mother died three years later, and four

24. *Schaffler v. Handwerker*, 152 Tenn. 329, 278 S.W. 967 (1926); *Day v. Burgess*, 139 Tenn. 559, 202 S.W. 911, (1918).

25. *Schaffler v. Handwerker*, 152 Tenn. 329, 278 S.W. 967 (1926); *Hull v. Hull*, 139 Tenn. 572, 202 S.W. 914 (1918).

26. *Shearin v. Shearin*, 161 Tenn. 172, 29 S.W.2d 254 (1930); 1 *AMERICAN LAW OF PROPERTY* § 5.57, at 770 (Casner ed. 1952).

27. *Shearin v. Shearin*, 161 Tenn. 172, 174, 29 S.W.2d 254 (1930); *Guion v. Anderson*, 27 Tenn. 298 (1847); *McCorry v. King's Heirs*, 22 Tenn. 267, (1842); 1 *AMERICAN LAW OF PROPERTY* §§ 5.57-.61 (Casner ed. 1952).

28. A constructive seisin of lands not adversely held will suffice. *McCorry v. King's Heirs* and *Guion v. Anderson*, *supra* note 27. Where a daughter endows her mother, marries, has issue, and then dies before her mother, it was held that the husband of the daughter will not be entitled to an estate of curtesy in the lands endowed "because the daughter's seisin was defeated by the endowment." *Reed v. Reed*, 40 Tenn. 491 (1859). See in addition the instant case of *Roten v. Hicks*, 338 S.W.2d 225 (Tenn. App. W.S. 1960); *Verhine v. Ragsdale*, 96 Tenn. 532, 35 S.W. 556 (1896); *Upchurch v. Anderson*, 62 Tenn. 410 (1874); *Prater v. Hoover*, 41 Tenn. 544 (1860); 1 *AMERICAN LAW OF PROPERTY* §§ 5.59, 5.61, at 780, 785-87 (Casner ed. 1952).

29. *Travis v. Sitz*, 135 Tenn. 156, 185 S.W. 1075 (1916); *Templeton v. Twitty*, 88 Tenn. 595, 606, 14 S.W. 435 (1890); 1 *AMERICAN LAW OF PROPERTY* § 5.61, at 787 (Casner ed. 1952).

30. *Reed v. Reed*, 40 Tenn. 491, (1859). See additional Tennessee cases cited in note 28 *supra*. Also 1 *AMERICAN LAW OF PROPERTY* §§ 5.59, .61 (Casner ed. 1952).

31. 338 S.W.2d 225 (Tenn. App. W.S. 1960).

32. *Id.* at 228, 229.

years after that the land was sold for failure to pay taxes. The purchasers were the two sons-in-law, who divided the land between themselves individually in the same way that it had been divided before in the deeds executed by the daughters. The husband of the deceased daughter then conveyed his land to one of his sons, who is the principal defendant; the plaintiffs were some of his other children. The chancellor held that upon the death of the daughter her six children became the owners as tenants in common, subject to the homestead and dower rights of their grandmother, and subject to the estate by the curtesy of their father. Accordingly, the chancellor further held that because the son-in-law held a life estate by curtesy in present possession after the death of his mother-in-law, his later purchase of the property for delinquent taxes amounted to a repurchase which "operated as a redemption of the land for the benefit of himself and children."³³ Therefore, only a life estate was conveyed by deed to the defendant, the remainder being owned by all the six children of the deceased daughter. The court of appeals reversed the chancellor and held that no estate of curtesy could attach to the interest of the deceased daughter because her interest was a future interest subject to a life estate of her mother; after the death of their grandmother, the six children owned her land in fee simple, and their father was not held to be in a relationship of confidence to them when he purchased their land for delinquent taxes. Accordingly, the court of appeals sustained the sole ownership of the property by the defendant grandson on the basis of the conveyance to him and the tax deed to his father.

Three additional technical points are implicit in this case. (1) Since the right of curtesy attaches to all the wife's lands, rather than to a fractional share, there apparently is no necessity for a petition for an assignment as in the case of dower.³⁴ (2) While there was no petition for an assignment of dower in favor of the grandmother, the court held that the voluntary partition deeds executed by the daughters expressly provided for the life estate of the grandmother. (3) The grandmother's dower would ordinarily be a life estate in only one-third of the land owned at death by her husband, giving the daughter's husband an estate of curtesy in that portion of the land not subject to dower on the death of the daughter; in this case, however, (a) there was nothing in the record to indicate that the value of the land was more than the value of a homestead as fixed by the con-

33. *Id.* at 232. See *Morrow v. Person*, 195 Tenn. 370, 259 S.W.2d 665 (1953) and Trautman, *Future Interests and Estates—1954 Tennessee Survey*, 7 VAND. L. REV. 843, 849 (1954) for a further discussion of this principle and authorities.

34. 1 AMERICAN LAW OF PROPERTY § 5.57, at 770 (Casner ed. 1952).

stitution, and (b) the daughter in any event would be estopped to deny that they gave their mother a life estate in all the lands by their partition deeds.

*Delamotte v. Stout*³⁵ held that a child adopted under a Missouri adoption statute was not entitled to inherit real and personal property located in Tennessee from a deceased sister of the adopting parent, notwithstanding the fact that the Missouri statute creates for an adopted child the right to inherit from a brother or sister of the adopting parents. Tennessee Code Annotated section 36-126 limits the right of inheritance to those within the adoptive family, and does not include a right to inherit from collaterals. The court said that the law of the place where the property is situated, or the law of the decedent's domicile controls the right of inheritance when in conflict with the law creating status.³⁶ The court felt that it should not grant to citizens from other states a right which this state does not grant to its own citizens.

C. Probate Administration

Tennessee Code Annotated section 30-518 provides that the probate or county court "shall hear and determine all issues arising upon all" exceptions to claims filed against an estate; it further provides for an appeal from the judgment entered thereon to the court of appeals or to the supreme court, as the case may be. In *Rowan v. Inman*³⁷ a claim was filed against an estate in the county court and efforts were made to negotiate it. The time for filing exceptions to the claim expired, so that the county court sustained a motion to strike the exceptions which were later filed. The executrix filed an original bill in chancery for relief from the judgment of the county court, alleging that the attorney for the claimant initiated negotiations to compromise the claim and misled the executrix by assurances that the rights of neither party would be prejudiced if no compromise was attained. The supreme court affirmed the chancellor who dismissed the bill for lack of jurisdiction. The county court has exclusive jurisdiction to determine all issues concerning claims and exceptions thereto, and the lawyer handling a case involving such issues must make his record in the county court. An appeal can be taken to the court of appeals or the supreme court, depending on whether the case was considered by the county court on evidence presented at a trial, or was decided on a demurrer or other method not involving a review of the facts; the former are appealed to the

35. 340 S.W.2d 894 (Tenn. 1960).

36. Citing *Cole v. Taylor*, 132 Tenn. 92, 177 S.W. 61 (1915); *Finley v. Brown*, 122 Tenn. 316, 123 S.W. 359 (1909).

37. 338 S.W.2d 578 (Tenn. 1960).

court of appeals, and the latter to the supreme court.³⁸ The statute is held to exclude any basis for jurisdiction in the chancery court.

*Trice v. Cheatam*³⁹ involves the same problem. The supreme court affirmed a judgment of the circuit court dismissing an action for a declaratory judgment and for writs of error and certiorari to the county court to bring claims filed in the county court to the circuit court for trial by jury. The court said that Tennessee Code Annotated sections 30-517 and 30-518 provide a speedy and an adequate remedy at law for the handling of all issues involving claims against an estate and exceptions to claims.

While there are many instances in our statutes where the chancery and circuit courts have concurrent, appellate, or special jurisdiction with respect to certain issues presented in the county court, it seems crystal clear from supreme court decisions during the last two years that issues arising out of claims and exceptions thereto are not in this category.⁴⁰ It is indeed a difficult problem for lawyers concerned with probate administration to keep in mind those matters which can be considered by chancery and circuit courts and those in which the trial record must be made in the county court above.

D. Legislation

Tennessee Code Annotated section 35-611 provides that the designation of a death benefit to a beneficiary contained in a pension, profit-sharing, stock-bonus or retirement plan in accordance with rules prescribed in the plan shall be exempted from the formalities of the Statute of Wills. Tennessee Code Annotated section 32-602 authorizes a testamentary gift by will of the human anatomy or parts thereof to certain classes of institutions.

The most important legislation concerning decedents' estates enacted in 1961, however, is the Uniform Testamentary Additions to Trusts Act. It is chapter No. 303 of the Tennessee Public Acts of 1961, all four sections of which are published in the pocket supplement as Tennessee Code Annotated section 32-307. This type of statute is generally referred to as a "pour-over" statute.⁴¹ As indicated in the introduction, it is entirely possible and perhaps likely that this statute will have a substantial and dramatic impact upon (1) estate planning arrangements for decedents' estates, and (2) the future role that the

38. TENN. CODE ANN. § 16-408 (1956) and cases cited in notes 3-5 under it.

39. 344 S.W.2d 358 (Tenn. 1961).

40. Compare *Teague v. Gooch*, 333 S.W.2d 1 (Tenn. 1960), with the comment in *Trautman, Decedents' Estates, Trusts and Future Interests—1960 Tennessee Survey*, 13 VAND. L. REV. 1101-03 (1960).

41. CASNER, *ESTATE PLANNING* 118 (3d ed. 1961); Polasky, "Pour-Over" Wills—*And the Statutory Blessing*, 98 TRUSTS AND ESTATES 949 (1959).

executor and the lawyer will have in the settlement of decedents' estates.

A "pour-over" is usually a testamentary gift of all or a portion of the residue to the trustees of an existing inter vivos trust, the testamentary gift to be added to the corpus of the living trust.⁴² Among the objectives sought to be accomplished by this coordination of an inter vivos trust and a will are the following: (1) to keep the terms of the trust secret by not having them probated as a part of the will; (2) to choose the law of a state more favorable than the law of the domicile to govern the inter vivos trust; (3) to save the bulk of probate expenses by reducing the size of the decedents' estate; (4) to avoid the necessity of administering two separate smaller trusts—*i.e.*, the inter vivos trust and a testamentary trust—with its consequent higher fees, double accountings, income tax returns, etc. It has not always been possible to accomplish all of these objectives in the absence of statutory authorization; yet the increasing popularity of the "life insurance trust," the "living trust" or "family trust" provided the stimulus for a continued resort to "pour-over" techniques.

In the absence of a special statute, a pour-over from a will to an inter vivos trust must depend for its validity upon either (1) the doctrine of incorporation by reference, or (2) the doctrine of "facts of independent significance" or "non-testamentary acts."⁴³ If the inter vivos trust is irrevocable and in existence when the will is executed and the will makes appropriate references to the trust instrument, the residuary gift can be sustained upon the doctrine of incorporation by reference. Logically, however, this would result in two trusts, one inter vivos and the other testamentary, because under this doctrine it is the writing in the inter vivos trust instrument which is incorporated into the will. The residuary pour-over can also be sustained under the doctrine of independent significance when the trust is irrevocable, if the settlor did not reserve the power as trustee or otherwise to control beneficial enjoyment; in such instances the trust is a fact having a significance which is independent of a testamentary disposition. Under this theory it is the trust itself which is the fact of independent significance, not the writing of the trust instrument. Accordingly, the pour-over is to a single trust for

42. It would be possible to have a pour-over from the inter vivos trust to a testamentary trust, but this is not the usual pattern of estate planning techniques. See Trachtman, *Pour-Overs*, 97 TRUST AND ESTATES 416 (1958); CASNER, ESTATE PLANNING 120, problem 5.8 (3d ed. 1961).

43. For excellent references see 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956); Trachtman, *Pour-Overs*, 97 TRUSTS AND ESTATES 416 (1958); Note, *Pour-over Trusts: Consequences of Applying The Doctrines of Incorporation by Reference and Fact of Independent Significance*, 34 N.Y.U.L. REV. 1106 (1959), reprinted in 39 Trust Bull., Oct. 1959, p. 23; Polasky, "Pour-Over" Wills—*and The Statutory Blessing*, 98 TRUSTS AND ESTATES 949 (1959).

purposes of fiduciary administration. The difficult problem has been with the revocable trust. There has been considerable uncertainty and difference of opinion concerning whether or not a revocable trust is a fact with a significance independent of a testamentary disposition;⁴⁴ notwithstanding Professor Scott's argument that it should be so regarded,⁴⁵ the consensus seems to be that it does not have such a significance.

Tennessee Code Annotated section 32-307 removes these uncertainties with respect to pour-over clauses even though the trust is revocable. It also makes clear that the pour-over can be made to an inter vivos trust created by a person other than the testator. Thus a wife or other relative can put a pour-over clause in her will which will give her residue to a trust established by her husband. The act expressly provides that "the devise or bequest shall not be invalid because the trust is amendable or revocable." This statute is a legislative exception to the policy of the Statute of Wills; by creating a revocable inter vivos trust and pouring over the residue under his will to the trust the testator can thereafter amend the trust from time to time without conforming to the wills act. Perhaps more important from the standpoint of the role of executors and lawyers, most people are reluctant to create irrevocable trusts notwithstanding the income and estate tax advantages, because they feel a need or a desire to retain control. The revocable trust has no tax advantages, but it has been the more popular form of inter vivos trust, and this legislation will likely increase its popularity substantially. For an extreme example, if a person is contemplating a testamentary trust, he might be encouraged to set it up first as a revocable inter vivos trust and watch it work during his lifetime; his will can then be written much shorter, without disclosing the terms of the trust, but nevertheless pouring over the residue of his estate to the trust. He can thereafter amend the trust as he experiments with it, and since the corpus is small, the annual trustee's commission is nominal. After a while when he becomes accustomed to the two instruments which now constitute his estate plan, he may become impressed with the possible substantial savings in executor's commissions, attorneys' fees and probate costs by transferring a larger part of his estate to the trust during his lifetime; he still retains control and can amend the trust without changing his will. As he grows older and his financial needs are less, he might even be persuaded to make the trust irrevocable during his life and thus save tax dollars as well as probate expense dollars.

44. See references in note 43 *supra*.

45. Scott, *Pouring Over*, 37 Trust Bull. 25 (1958) and 97 TRUSTS AND ESTATES 189 (1958); 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956).

This statute makes more obsolete the Tennessee practice of scheduling probate fees for executors and attorneys as a percentile of the "probate estate." This is particularly true with respect to attorneys' fees. The larger part of the settlement of a decedent's estate is legal and often concerned with the solution of tax problems, and many tax attorneys consider the "gross estate" or the "gross income" of the estate in arranging their fees. This permits a smaller percentile to be used and makes for a better public relations than a very high percentile of an increasingly narrower concept called the "probate estate." The pour-over statute in Tennessee does indeed have the potentiality for a substantial impact upon (1) estate planning arrangements for clients, and (2) the future role of the executor and the lawyer in the settlement of decedent's estates.

II. TRUSTS

A. Spendthrift Trusts

Can the beneficiary of a spendthrift trust effect an assignment of his interest in the trust by entering into a consent decree in a court proceeding? This question was latent in *Burton v. Burton*,⁴⁶ but the supreme court did not discuss it. In this case a husband and wife were divorced and a property settlement was agreed pursuant to which the father of the husband created a trust to pay an income of \$2,400 per year to the wife "until her death or remarriage," the balance of the income to the husband. The husband's interest in the trust was limited by a spendthrift clause. The couple were later remarried and shortly afterwards divorced a second time. The husband apparently contended that the remarriage terminated the wife's interest in the trust, because she filed a bill for an adjudication that the word "remarriage" as used in the trust instrument meant remarriage to someone else. A consent decree was entered on this petition in favor of the wife, but the husband then contended that he did not have the legal capacity to enter into this consent decree because of the spendthrift clause. The court held for the wife again, treating the consent decree as a resolution of a latent ambiguity in the trust instrument rather than an assignment by a spendthrift beneficiary. There is some authority, however, that a claim for support and alimony might be regarded as an exception to the spendthrift trust protection.⁴⁷

46. 343 S.W.2d 867 (Tenn. 1961).

47. 2 SCOTT, TRUSTS § 157 (2d ed. 1956).

B. Restraint of Marriage

*Harbin v. Judd*⁴⁸ was an interesting case. The problem was whether or not a provision in the trust which provided for the defeasance of a beneficiary's interest upon marriage was void as an unreasonable restraint upon marriage. The court held the limitation valid. Ten minor children were left a home by their grandmother under a trust which provided that upon the marriage of a child his interest should vest in his unmarried sisters during their unmarried state, but that upon the marriage of the last unmarried sister, the property should revert again in all the children and then terminate. Two of the girls never married and the survivor of these died in 1957. All the children were dead at the time of the action except one, and this was a suit for partition. The court held that the purpose of the trust was not to restrain marriage, but to provide a home for the children which would not be broken up by the marriage of the older children. It was thus a reasonable provision and not an unreasonable restraint on marriage.

C. Constructive Trusts

In *Williams v. Burmeister*⁴⁹ the western section of the court of appeals imposed a constructive trust upon the proceeds of a sale of real estate by a grantee who took title under a warranty deed; the court held that the deed transaction was really a mortgage lending situation which gave rise to an oral trust of the land, and that the sale was a breach of fiduciary relation. Since Tennessee does not have a statute based on section seven of the English Statute of Frauds, a trust in real estate may be proven by parol evidence.⁵⁰

D. Legislation

Chapter 337 of the Tennessee Public Acts of 1961 amends Tennessee Code Annotated sections 34-107 and 34-108 by increasing the amount from \$500 to \$1000 which a court is authorized to dispose of for the best interests of a minor without requiring the appointment of or distribution to a regular guardian for the minor. Chapter No. 232 of the Tennessee Public Acts of 1961 amends Tennessee Code Annotated section 35-802 in the pocket supplement, the Uniform Gifts to Minors Act, to give the county court and chancery court concurrent jurisdiction under this statute.

48. 340 S.W.2d 935 (Tenn. App. M.S. 1960).

49. 338 S.W.2d 645 (Tenn. App. W.S. 1959).

50. *Watkins v. Watkins*, 160 Tenn. 1, 22 S.W.2d 1 (1929); *Kelley v. Whitehurst*, 37 Tenn. App. 360, 264 S.W.2d 1 (W.S. 1953) and cases cited therein.

III. FUTURE INTERESTS

A. Rule Against Perpetuities

It has been said several times in these survey articles that holographic wills are generally the most expensive wills that a client can pay for. Such wills must also be the most painful and frustrating to the intended beneficiaries. Both results are well illustrated in *Ross v. Stiff*,⁵¹ in which a physician prepared his own will disposing of an estate valued at approximately a half million dollars, setting up trusts intended to last until the death of his last grandchild even though born after his death (he was survived by a wife, two daughters, and grandchildren), with gifts over after the death of the last grandchild. The chancellor, the court of appeals, and all parties to a suit to construe the will seem to have agreed that the gift over violated the Rule; the principal problem in the case resulted from differing views about the effect of voiding the gift over. Separate guardians *ad litem* were appointed to represent the interests of (1) the grandchildren living at the testator's death, (2) grandchildren born after the testator's death, and (3) all grandchildren regardless of when born. After payment of the costs of this suit to construe the will, including the fees of counsel and guardians *ad litem*, a summary of this physician's skill in writing a will might be as follows: He left a will which cost many thousands of dollars to interpret, and which nevertheless frustrated both his testamentary intention and some of the beneficiaries included in his plan.

During the life of the testator's widow the trustee was directed to pay 30% of the income to *W*, the widow, 30% to *D*¹, 20% to *D*², 10% to *GC*¹, a grandchild, and 10% was to be accumulated and used for the education of all his grandchildren whenever born. After the death of *W* the trustee was directed to distribute the income 45% to *D*¹, 30% to *D*², 15% to *GC*¹, and 10% to the educational fund for all grandchildren. The testator directed that the trust should be kept intact until the death of his wife and "the death of the last living grandchild,"⁵² and if at that time there be no issue of his grandchildren then living, gift over to his two brothers, "and if they be not living the corpus . . . divided among their children."⁵³ The gift over after the death of the last grandchild whenever born clearly violated the Rule. While it was clear that the trust was intended to last until the death of the last grandchild, there was no direction concerning the distribution or accumulation of income after the death of the daughters. The will is so poorly written it will not serve a

51. 338 S.W.2d 244 (Tenn. App. M.S. 1960).

52. *Id.* at 247.

53. *Ibid.*

useful purpose to list the distributive problems which were not dealt with. Both the chancellor and the court of appeals held that not only the gift over after the death of the last grandchild, but also the gift to the grandchildren must fail. The chancellor decreed that the trust would continue until the death of the widow, and that the gift of income thereafter to *D*¹, *D*², and *GC*¹ without limitation carried with it the fee, so that distribution of the corpus according to the stated percentages could be made at the death of the widow. The court of appeals affirmed.

While it is difficult to have sympathy for this badly written will, the courts in the instant case might have saved the trust for the grandchildren of the testator, including those born after his death. The Rule Against Perpetuities does not invalidate the gift to his grandchildren, because they must all be born within the lives of his two daughters, and thus it could have been held that they took vested interests within the Rule. If their interests in the trust are vested in ownership within the Rule, they are not invalid because they are continued in trust for a period longer than that prescribed by the Rule; at worst the beneficiaries owning vested interests at the expiration of lives in being plus twenty-one years could compel termination of the trust and distribution of the corpus at that time.⁵⁴ This would have saved the corpus for all the grandchildren as opposed to distributing it to the two daughters and one grandchild—one step short of the testator's desires rather than two steps. In order to do this the court would have had to construe the will so as to complete several gaps left in the will with respect to such problems as (1) whether income was to be distributed or accumulated for the grandchildren, (2) whether distribution to grandchildren should be per stirpes or per capita, (3) at what times or upon what events should distributions of income or corpus be made to grandchildren. The court refused to write the decedent's will for him and imply the terms and conditions of the gift to his grandchildren, and for this the court should not be criticized. To do so is to encourage people to write badly drafted wills. As indicated by *Smith v. Weitzel*⁵⁵ in the first part of this article, there is already too much of that in Tennessee.

B. Tennessee Class Doctrine

In *Wilson v. Smith*⁵⁶ the testator died in 1934 and his will gave his

54. SIMES & SMITH, *FUTURE INTERESTS* § 1393, n.18 (2d ed. 1956) and cases cited therein points out that while there is no well formulated rule of law restricting the duration of trusts, the trust is not subject to external attack by the heirs; at worst, the beneficiary owning the vested equitable interest could come into court and compel a termination and distribution to him.

55. 338 S.W.2d 628 (Tenn. App. M.S. 1960).

56. 337 S.W.2d 456 (Tenn. App. W.S. 1960).

estate to *W* his wife for life, remainder to "be equally divided between my brothers and sisters, and the children of any deceased brother or sister, per stirpes. . . ."⁵⁷ *W* died in 1957. There were certain brothers and sisters of *T*, and certain children of deceased brothers and sisters, who survived *T* but did not survive *W*. Some of these made deeds during their lives conveying whatever interest they might have in *T*'s estate, and others of these left wills which would dispose of whatever transmissible interest they might have in *T*'s estate, and still others died intestate. The court reversed the Common Law and Chancery Court of Dyer County and applied the Tennessee Class Doctrine to hold that these members of the class who died before the future interest became a present possessory interest did not have transmissible interests in the estate. While the testator did not say that the remainder was given to only those who survived his wife, the court implied a condition precedent of survivorship.

This is the fourth consecutive year in which this survey article has discussed an appellate decision involving the Tennessee Class Doctrine.⁵⁸ *Johnson v. Span* was an unreported decision of the western section of the court of appeals which applied the doctrine and held that the members of the class owned non-transmissible future interests which were contingent upon their survival to the time of distribution. *Karsch v. Atkins*⁵⁹ was a supreme court decision holding that because of Tennessee Code Annotated section 32-305 the members of the class "take vested transmissible interest unless the will . . . manifests a clear intention to the contrary."⁶⁰ *Burdick v. Gilpin*⁶¹ was a supreme court decision adopting the written opinion of Judge Howard of the court of appeals which omitted any reference to the *Karsch* case and applied the doctrine that members of the class own contingent non-transmissible interests. The instant case of *Wilson v. Smith*⁶² also holds the interests non-transmissible. The ready inference is that the court of appeals is at least consistent in holding that the doctrine is applicable even though there is no expression of intention to make the interests of the members of the class contingent, whereas the supreme court has reached opposite conclusions in the last two years, apparently without realizing it. In the instant case the

57. *Id.* at 457.

58. See prior discussion in Trautman, *Decedents' Estates, Trusts and Future Interests—1958 Tennessee Survey*, 11 VAND. L. REV. 1237, 1256 (1958); *Decedents' Estates, Trusts and Future Interests—1959 Tennessee Survey*, 12 VAND. L. REV. 1157, 1175 (1959); *Decedents' Estates, Trusts and Future Interests—1960 Tennessee Survey*, 13 VAND. L. REV. 1101, 1116 (1960).

59. 203 Tenn. 350, 313 S.W.2d 253 (1958).

60. *Id.* at 354.

61. 205 Tenn. 94, 325 S.W.2d 547 (1959).

62. 337 S.W.2d 456 (Tenn. App. W.S. 1960).

court of appeals also does not mention the *Karsch* case, whose rationale is just the opposite.

Perhaps the most significant development in *Wilson v. Smith* is the discussion concerning the contention that Tennessee Code Annotated section 32-305 abolished the class doctrine in Tennessee. It rejected this contention notwithstanding the statute is entitled "An Act to so change what is known as 'The Class Doctrine' concerning property to be paid or distributed or divided among members of a fluctuating class at a future time . . ." The court said that its construction of this statute is that without abolishing the class doctrine, the statute "merely adds to membership in the class entitled to take, at the falling in of the life estate . . . the then surviving issue of anyone who would have been a member of the class if he or she had survived until that time."⁶³ Thus, if a child of a deceased brother or sister of *T* failed to survive *W*, but left issue who survived *W*, his interest would pass to such issue under the statute even though such issue are not "children" of a deceased brother or sister. Such issue would take from *T* under the statute and not from their ancestor. On the other hand, if a member of the class attempted to convey his interest by deed and failed to survive *W*, the statute would have no application. This is a significant argument and it is persuasive that the statute itself cannot be said to be a complete abolishment of the Tennessee Class Doctrine; at best it is only a modification of the rule with respect to those members of the class who leave issue surviving. But for this statute the issue would not be included in the membership of the class.

63. *Id.* at 461.