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DECEDENTS' ESTATES, TRUSTS AND FUTURE INTERESTS—
1958 TENNESSEE SURVEY
HERMAN L. TRAUTMAN*

The subject matter of this article will be presented in three parts entitled Decedents' Estates, Trusts, and Future Interests. The developments of the year¹ consist of judicial decisions of the appellate courts in Tennessee, and the work of the Section on Real Property, Probate and Trust Law of the Tennessee Bar Association on a new statute concerning intestate succession for the state. Since the General Assembly was not in session, there were no legislative developments. The part entitled Decedents' Estates will include a discussion of intestate succession, wills, and the problems of fiduciary administration in decedents' estates. The problems of fiduciary administration involving trusts will be discussed under the latter heading.

DECEDENTS' ESTATES

Intestate Succession Among Collaterals: A decedent died intestate leaving as his nearest blood relatives first cousins on the paternal side of his family and third cousins on the maternal side.² The former were related to the decedent in the fourth degree according to the civil law method of computation, and the latter were related in the sixth degree. Who succeeds to the property of the intestate?

Unfortunately, the answer to the question in Tennessee depends upon whether the property is real estate or personalty.³ In the case of Rose v. Blewett⁴ the subject matter was real property. The supreme court affirmed the chancellor who divided the property so that one-half passed to the paternal first cousins and one-half to the maternal third cousins. In so doing the court construed an ancient and vague statute on intestate succession and made a rule of law out of what had been suggested by way of dictum.⁵ If the property had been personalty, however, the paternal first cousins would have taken it

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¹ The year covered in this article extends from June 1, 1957, through May 31, 1958. The Tennessee decisions included are reported in the volumes of the Southwestern Reporter beginning with 302 S.W.2d 340 and extending through 311 S.W.2d 815.
⁴ See note 2 supra.
⁵ Barnes v. Redmond, 127 Tenn. 45, 152 S.W. 1035 (1912); Selby v. Hollingsworth, 81 Tenn. 145 (1884); In the Matter of the Wills of Miller, 70 Tenn. 262, 250 S.W.2d 364 (1952); Beaumont v. Irwin, 81 Tenn. 145 (1884); Beaumont v. Irwin, 81 Tenn. 145 (1884); Beaumont v. Irwin, 81 Tenn. 145 (1884).
all as the nearest blood kin. This is true even though the only property having independent economic value is real property which the intestate had incorporated during his life, so that at death his probate estate consisted of stock in a closely held corporation, which was liquidated by the administrator so that the real property was transferred to the administrator, who thereupon sold it.

Tennessee Code Annotated section 31-101 provides exclusively for the descent of the real property of an intestate. With respect to the acquired real property of an intestate who dies without issue surviving, the statute prefers brothers and sisters and their issue over the parents of the decedent. If neither brothers, sisters, their issue, nor a parent survives the intestate, however, the statute provides that real property shall descend

... in equal moities by the heirs of the father and mother in equal degree, or representing those in equal degree of relationship to the intestate, but if such heirs or those they represent do not stand in equal degree of relationship to the intestate, then the heirs nearest in blood or representing those who are nearest in blood to the intestate, shall take in preference to others more remote.

This statute has been the law since the Code of 1858, which was prepared and edited by Return J. Meigs and William F. Cooper. It was an attempted improvement over the act of 1842, chapter 171, section 1, which changed the law of descent of land in Tennessee rather substantially from the derivative acts of 1784. Judge Cooper later gave Mr. Meigs and attorney General Joseph B. Heiskell credit for the attempted improvement of the statute on descents. The 1842 statute provided that if the intestate was not survived by issue, brothers, sisters, their issue, or parent, acquired land

... shall descend, in equal moities to the heirs of the father, and the heirs of the mother: Provided, said heirs, or those they represent on the part of the father, and said heirs and those they represent on the part of the mother, stand in equal degree of relationship to the intestate; but if such heirs, or those they represent, do not stand in equal degree of relationship to the intestate, then such heirs, or those they represent, who are nearer in blood, shall take the estate of the intestate in preference to others more remote.

In the instant case the common ancestor between the decedent and the complainants, first cousins and first cousins once removed on the paternal side, was the decedent's paternal grandfather, who stood in

8. Tenn. Code Ann. § 31-201 (4) and (5) (1956), applies only to personal property, which prefers parents to brothers and sisters, and makes no distinction between property acquired by the decedent and ancestral property.
9. In the Matter of the Wills of Miller, 70 Tenn. 54, 59-60 (1878).
the second degree of kinship to the intestate. The common ancestor between the decedent and the defendants, third cousins, was the decedent's maternal great-great-grandfather who stood in the fourth degree of kinship to the intestate. Another of the many important differences between the intestate succession of real property and personal property in Tennessee concerns the right of representation among collateral kin. Tennessee Code Annotated section 31-202, applicable only to personal property, provides that there shall be no right of representation after brothers' and sisters' children. The right would thus not exist for cousins of any degree. There seems, however, to be no limit to the right of representation among collateral kin with respect to real property.\textsuperscript{10} The court in the instant case is not clear on this point. If the parties are each allowed to stand in the shoes of their common ancestor with decedent, which seems to be the only rational meaning attributable to the last part of section 31-101 (2)\textsuperscript{c} providing "...but if such heirs or those they represent do not stand in equal degree of relationship to the intestate," the first cousins and first cousins once removed are clearly the nearest in blood to the intestate.

The court says that the manifest intent of the current statute\textsuperscript{11} is that the land of the intestate under these circumstances shall be divided equally between the heirs of the intestate's predeceased father and the heirs of his predeceased mother, as if each had taken when alive, and then died. While the 1858 statute is vague and not nearly as clear in meaning as its predecessor, the act of 1842, the decision of the supreme court seems to make meaningless the words of the statute which provide:

\ldots but if such heirs or those they represent do not stand in equal degree of relationship to the intestate, then the heirs nearest in blood or representing those who are nearest in blood to the intestate, shall take preference to others more remote.\textsuperscript{12}

\textit{A Proposed New Statute of Intestate Succession:} As indicated above, the existing statutes in Tennessee governing intestate succession are ancient and vaguely drafted. It is difficult to believe that twentieth century Tennesseans would consciously want the recipients of intestate property determined by the distinction between real and personal property. The current increase in the incorporation of farms, apartment houses, business buildings, and the other real estate holdings seems further evidence of the economic and social disregard of this feudal distinction. Both section 31-101, applicable solely to real property, and section 31-201 applicable solely to personal property,

\begin{itemize}
\item \textsuperscript{10} Barnes v. Redmond, 127 Tenn. 45, 152 S.W. 1035 (1912); Forrest v. Porch, 100 Tenn. 391, 34 S.W. 676 (1898); Wilson v. Morris, 94 Tenn. 547, 29 S.W. 966 (1894); Alexander v. Wallace, 76 Tenn. 569 (1881).
\item \textsuperscript{11} TENN. CODE ANN. § 31-101 (2)\textsuperscript{c} (1956).
\item \textsuperscript{12} Ibid.
\end{itemize}
became the law of Tennessee as separate articles of the Code of 1858. There would seem therefore to be a genuine need for a modern statute on intestate succession in Tennessee. It is further believed that such a statute should provide that upon intestate succession there shall be no difference in determining the recipients of real and personal property.

The Section on Real Property, Probate and Trust Law of the Tennessee Bar Association had a committee\textsuperscript{13} at work on such a proposed statute during the Association year of 1957-58. A tentative draft of the proposed statute was published in the May 1958 Tennessee Lawyer,\textsuperscript{14} circulated to all members of the Association, and discussed by the many lawyers present for the Section program at the annual meeting of the Tennessee Bar Association at Memphis, Tennessee in June 1958. The proposed statute would abolish the distinction between real and personal property, and ancestral and nonancestral property, upon intestate succession. A complete ownership interest in an appropriate fraction of the intestate's estate would be awarded to the surviving spouse. Issue would be preferred to parents, as under existing law; parents would be preferred to brothers and sisters and their issue, and grandparents would follow brothers and sisters and their issue. After grandparents, the proposed statute would distribute both real and personal property of the intestate to "the next of kin of the intestate in the nearest degree of kinship to intestate without representation."\textsuperscript{15} The statute as proposed placed no limitation on the right to take by representation among issue of deceased brothers and sisters.

While the proposed statute is not in final form, the portion of it limited to intestate succession is fairly complete. This portion of the proposed statute was generally approved by the lawyers present at the 1958 annual meeting of the Association's Section.\textsuperscript{16} The committee\textsuperscript{17} is to be commended for the public service rendered in making its study and for taking the time to draft a proposed new statute on intestate succession. The purpose of the committee was to make available to the State of Tennessee, its people and its lawyers, the most desirable thinking available on the subject. While thoughtful people ought to execute wills, the legal profession performs a commendable public service when it takes the time to study and propose

\textsuperscript{13} The members of the committee were Shields Wilson of Chattanooga, Chairman, Fisher Neal of Paris, and Harry Phillips of Nashville. Ramsey Leathers, Probate Clerk of Davidson County, and Herman Trautman, Chairman of the Section, served as consultants.

\textsuperscript{14} 6 Tennessee Lawyer, No. 5, pages 6-11 (May 1958).

\textsuperscript{15} Id., proposed § 31-102 (2) (f) at page 7.


\textsuperscript{17} See note 18 supra.
a new law of intestate succession for those who are thoughtless enough to die without a will. The 1959 General Assembly would do well to consider the committee's proposal.

Wills: The 1955 General Assembly passed a statute\(^\text{18}\) which provides that if by reason of advanced age, physical incapacity or mental weakness a person is incapable of managing his own estate, a conservator may be judicially appointed to have the charge and management of the property of such person, and also the custody of the person, as the court may direct. The statute provides that the conservator shall have the same duties and powers as a guardian of a minor,\(^\text{19}\) and that so long as there is a duly appointed conservator, the individual whose property or person is in charge of such conservator shall be limited in his contractual powers and obligations to the same extent as a minor.\(^\text{20}\)

Does a person for whom a conservator has been appointed under the statute have the capacity to execute a will? In *Tucker v. Jollay*\(^\text{21}\) the court of appeals for the eastern section held that the purpose of the statute to provide a means of conserving the estates of persons unable to look after their own property due to physical or mental weakness did not create a restriction upon the right of such persons to dispose of their property by will. Thus, while such persons do not have the capacity to make an inter-vivos transfer of their property, it is held that they do have the capacity to execute during their lives a transfer which will take effect at their deaths.

Is a will executed on Sunday valid? Tennessee Code Annotated section 39-4001 makes it a misdemeanor to exercise "any of the common vocations of life" on Sunday. A "vocation" connotes some kind of employment, business, profession, or calling. The court of appeals in *Tucker v. Jollay*, supra, also held that the making of a will is not within the prohibitory policy of the statute. This is in accord with the general rule—that a will is not invalid because made on Sunday even though there are no unusual circumstances or special necessity for its execution on that day.\(^\text{22}\)

A will is not validly executed in Tennessee unless the testator signs it before the witnesses sign it. Section 31-104 requires the testator first to signify to the attesting witnesses that the instrument is his

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19. TENN. CODE ANN. § 34-1012 (1956).
will. He then may take one of three courses: (1) sign the will himself in the presence of the witnesses; (2) acknowledge to the witnesses his signature to the will already made; or (3) have someone else at his direction sign his name for him in his presence and in the presence of the witnesses. In *Wait’s Estate* the testatrix was old and feeble and her hand shook as she took the pen to sign it. She said, “Oh, I can’t write; you all go ahead and sign it and I will sign it later when I can control my hand.” The witnesses signed first and testatrix did not sign; but she later showed them the will completely signed by her and the witnesses. The order of the probate court refusing to admit the will to probate was affirmed.

In *Murray v. Garrison* the testator’s will was signed by a mark. The issue was undue influence and the court held that proponent’s evidence met the burden of proving that testator understood the will. In the opinion, Judge Carney set forth two rules of trial practice of interest in will contests: (1) When testator can read and write and the execution of the will is proved, there arises a presumption that the testator fully understood the contents of the paper writing; (2) but where testator makes a mark, which is prima facie proof that he cannot read or write, the proponent should prove that the testator knew that it was his will, and understood and approved of the disposition of his property therein contained.

*Dower and Other Marital Rights:* The Tennessee statutes providing for the right of dower and curtesy were passed at a time when estates consisted mainly of farm lands. To apply them to city property consisting of a house and lot is a matter of some difficulty and adjustment. Indeed, the whole subject of the marital rights of a surviving spouse in Tennessee is fraught with conflicting and unconnected statutes scattered about in different volumes of the Code under such headings as Dower, Partition, Homestead, Exempt Property, Year’s Support, and Life Insurance, and some of these are under more than one title. There seem to be at least seven different types of marital rights of a surviving spouse which are provided for under various Tennessee statutes. Perhaps the most interesting and significant

25. In re Moore’s Estate, 34 Tenn. App. 131, 234 S.W.2d 847 (W.S. 1949); Wyrick v. Hale, 30 Tenn. App. 597, 209 S.W.2d 50 (E.S. 1947) and cases there cited.
26. *E.g.*, Statutes on dower and homestead may be found in *Tenn. Code Ann.* §§ 30-901 to 911; 31-901 to 915; 33-2135; 29-101 to 103; 31-104 (1956).
27. (1) *Tenn. Code Ann.* § 30-508 (1956) provides that the personality of a decedent which is exempt from execution by creditors shall not be included in the probate estate of the decedent. *Tenn. Code Ann.* § 26-201 (1956) provides the list of personalty which is so exempt. *Tenn. Code Ann.* § 30-807 (1956) vests title to exempt property in the widow, without regard to solvency of the estate, as trustee for herself and the decedent’s children.

(2) *Tenn. Code Ann.* § 30-801 (1956) gives the widow of an intestate the
feature of these is the fact that statutes which were primarily intended as debtor exemptions from creditors' rights have been changed, some by legislative amendment and others by judicial construction, to create marital and familial property rights of the surviving spouse and children even though the decedent's estate is completely solvent and all creditors have been paid in full.28

How can the Tennessee right of dower be assigned in a city house and lot? The substantive right of dower is defined by the statute to be a life estate in one-third of all of the lands the husband owned at the time of his death.29 The assignment of dower is always an important allocation, and it can be a very sensitive problem in a city house situation where the widow is a second wife of the decedent and there are children by the first marriage. Since the house cannot be right to take possession of and use the personal property of the decedent.

(3) Tenn. Code Ann. § 56-1108 (1956) provides that any life insurance owned by a husband on his own life shall inure to the benefit of his widow and children upon his death and be divided according to the intestate laws without being subject to the debts of the husband. This includes life insurance payable to the decedent's estate unless "apt words" in the decedent's will indicate clearly his desire that such proceeds pass by his will subject to creditors' rights. Adams v. Garraway, 179 Tenn. 93, 163 S.W.2d 1086 (1942); American Trust Co. v. Sperry, 157 Tenn. 43, 5 S.W.2d 957 (1928); Chrisman v. Chrisman, 141 Tenn. 424, 210 S.W. 783 (1919). See Hartman, Rights of Creditors in Insurance—The Tennessee Exemption Statutes, 5 Vand. L. Rev. 750 (1952).

(4) Tenn. Code Ann. § 20-607 (1956) provides that an action for wrongful death of a married person shall pass to the surviving spouse free from the claims of creditors.

(5) Tenn. Code Ann. § 30-802 (1956) provides for a family allowance or year's support for the widow of an intestate or a widow who dissents, to provide a temporary support for the widow and her family immediately upon the death of the husband. This allowance does not constitute assets of the probate estate and is immune from creditors' rights. Tenn. Code Ann. § 30-803 (1956).

(6) Tenn. Const. art. XI § 11 and Tenn. Code Ann. § 26-301 (1956) provide for an exemption of real estate called a "homestead" from creditors' rights to the extent of $1,000 in value. Interestingly, however, this legislation, like Tenn. Code Ann. § 30-807 (1956), with respect to exempt personal property, has been construed to vest property rights in the widow and children regardless of the complete solvency of the estate. They have developed from exemption statutes into survivorship property rights which exist even though there are no unpaid creditors.

(7) Tenn. Code Ann. §§ 31-601 to -613 (1956) define the widow's substantive statutory right of dower in Tennessee. Tenn. Code Ann. §§ 30-902 to -916 (1956) set forth the procedure for assigning dower. There apparently is no statute in Tennessee defining the substantive rights of the husband with respect to a deceased wife's real estate except when there are no heirs at law, Tenn. Code Ann. § 31-103 (1956), so that the common law right of curtesy exists. McCorry v. King's Heirs, 22 Tenn. 267, 39 Am. Dec. 165 (1842). With respect to personality, Tenn. Code Ann. § 31-201 (1956) seems clearly to give the husband the right to inherit an equal share with the children of the wife's property. But how does one reconcile Baker v. Dew, 133 Tenn. 126, 179 S.W. 645 (1915)? This case surely cannot be the law! While the opinion involves a construction of Tenn. Code Ann. § 36-601 (1956), it seems to ignore the existence of the very old statute on intestate succession of personality which is now Tenn. Code Ann. § 31-201 (1956).

28. See (1) and (6) of note 27 supra.
divided in kind, can the children force a sale of the dwelling by a
partition suit so that the widow is compelled to accept a gross sum of
money?

The Supreme Court of Tennessee was divided on this question in
the case of Cripps v. Cripps. The court said the question had caused
some confusion "because the answer is one of these 'yes, but' an-
swers." The majority opinion by Mr. Justice Burnett held that the
widow cannot be compelled to accept money in lieu of dower in the
dwelling, and in so holding the court reversed the chancery court of
Davidson County. The majority opinion said that the house could be
sold, but it "must be sold subject to the dower and/or homestead"
unless the widow consents to the sale of her interest. The property
in question was a small house and lot in Nashville worth about
$4,000. But suppose it had been worth $50,000? The dissenting opinion
of Mr. Justice Prewitt suggests that the majority opinion was in
effect enlarging the substantive right of dower to a life estate in the
whole property. He would sell the house, allocate the first $1,000
to the widow in satisfaction of her right of homestead and pay the
widow the income for life on one-third of the balance. The problem
is further complicated in Tennessee by the cases holding that while
the value of the improvements must be included in allocating the
widow's $1,000 right of homestead, the value of the improvements—
i.e., the house on the lot—is not to be included in assigning the widow's
dower. Thus, if a $50,000 house covered only one-third of the lot, the
widow could receive that one-third of the lot with the house on it
and live in it during her life.

The majority opinion in Cripps v. Cripps relies heavily upon the
statute on partition rather than the statute defining the substantive
right of dower. It is true that section 23-2135 provides that the court
may "with the assent of the person entitled to an estate in dower, or
by curtesy, or for life, ... sell such estate with the rest." It seems clear,
however, that this is a statute on the procedure of partition; that it
was not intended to modify or enlarge the substantive right defined
by the statute on dower. Furthermore, it seems obvious that the
partition statute contemplates only farm land, not a city dwelling.
On the other hand section 30-912, which provides the procedure for
assigning homestead and dower does seem to contemplate the city
dwelling situation; and it provides for a sale without the widow's

30. 302 S.W.2d 340 (Tenn. 1957).
31. Ibid.
32. 302 S.W.2d 340, 346.
33. Ibid.
34. Vincent v. Vincent, 48 Tenn. 333 (1870); In re Moore's Estate, 34 Tenn.
    App. 131, 234 S.W.2d 847 (W.S. 1949).
35. Particularly Tenn. CODE ANN. § 23-2135 (1956). But see also §§ 23-2101,
consent; and section 31-604 seems to contemplate assigning a portion of the dwelling to the widow for her residence wherever that may be possible.

The majority opinion raises some sensitive social problems. While it holds that the dwelling may not be sold free of the wife's right to possess it, the court does not hold that she has the exclusive right to possession, and it seems clear that the widow and the children are co-tenants with equal rights of possession. Suppose the children leased or sold their interest to a person or group of persons who would be socially undesirable to the widow? While the right of dower makes some sense when applied to farm land, the holding of the majority seems impracticable when applied to a city dwelling. Thus, if a decedent owned 90 acres, each acre being as good as the others, the widow's dower would include 30 acres with the dwelling. While the present interest in fee simple can be readily partitioned in kind or by sale, and the future interest in remainder in the 30 acres can be sold without the widow's consent, it makes sense to hold, as provided by section 23-2135, that the widow's life estate in the 30 acres with the dwelling cannot be sold without her consent; and this is perfectly consistent with section 30-912 because the requirements of this latter section have not been met—i.e., "and if the real estate is so situated that the homestead and dower cannot be set apart in kind, ... then such realty shall be sold." It seems most doubtful, however, that the partition statute, which contemplates farm land capable of being set apart in kind to the widow, was intended to increase or modify the substantive right of dower as defined in other statutes.

In *Stanton v. Boatright*, the Tennessee Supreme Court again held that a widow cannot be compelled to accept a sum of money in satisfaction of her right of dower, but in this case the property was mortgaged farm land. The bill alleged and the demurrer admits that the property can be divided in kind, so that this point is a basic assumption. Assume as an example a farm of 93 acres worth $100 per acre owned by an intestate decedent survived by a second wife and two children by his first marriage. Assume also that there is a $50,000 house on the property, and that it is all subject to a mortgage indebtedness of $5,000. If 50 acres are needed to satisfy the mortgage indebtedness at $100 per acre, the widow's dower rights would entitle her to a life estate in one-third of the remaining acres. Assuming the acreage is of equal value, she could select that 14 1/3 acres which included the dwelling house without being charged for its $50,000 value. In the instant case the supreme court also held that the widow would be allowed to personally assume the indebtedness of the decedent, $5,000 in our example, and in return for this she would be allotted the 50

36. 302 S.W.2d 347 (Tenn. 1957).
acres in fee simple needed to satisfy this indebtedness. Thus, in our example, the widow would own a life estate in 14 1/3 acres with a $50,000 dwelling on it by virtue of her Tennessee right of dower, and she would own 50 acres in fee simple, all of which would be subject to the mortgage. The children would own a future interest in remainder in the 14 1/3 acres and the dwelling, and a present interest in fee simple in 29 acres, all of which is subject to the mortgage unless a novation is worked out between the widow and the money lender.

The supreme court thus held against the children’s contention that the widow’s right of dower attached only to the surplus funds remaining after the land is sold and trust deeds satisfied. In the instant case the widow’s dower was clearly subordinate to rights of the secured creditor, so that as against the creditor she would have been entitled only to a life estate in one-third of the surplus after satisfaction of the indebtedness. But as against the children, the supreme court held that the widow is not compelled to liquidate the indebtedness where the property can be divided in kind. Also, in allowing the widow to assume the mortgage indebtedness and receive in fee simple the acreage necessary to satisfy this indebtedness the court approved the marshalling arrangement authorized by the Tennessee Court of Appeals in 1927.

The Probate Estate—The Fiduciary’s Title: The “probate estate” is a state property law concept. The “gross estate” is a federal and state tax law concept. It would simplify the work of the probate lawyer so very much if these two concepts, one very old, the other rather recent, could be made somewhat more similar. The tax collector will not be denied his public revenue because of antiquated feudal property concepts of a different era, so the tax concept includes real estate as well as personalty with respect to death transfers, and many types of lifetime arrangements considered similar to death transfers, e.g., jointly held property with the right of survivorship, life insurance owned by the decedent, and revocable trusts. The probate estate concept is allowed to grow smaller, however, with practically no thinking expressed concerning the distortion caused by this lack of coordination between tax and property law. The effort, time, and complexities of the lawyer who practices in this area are in-

37. Because the land was mortgaged by decedent and his first wife, thus prior to decedent’s marriage to complainant widow, and complainant later joined in the mortgage with the surviving children. But compare Tenn. Code Ann. § 31-602 (1958) which gives the widow’s dower priority over the security of the mortgagee if the land was mortgaged during the marriage, if she did not join in it, and if foreclosure proceedings have not been commenced before the decedent’s death. See Hudson v. Conway, 77 Tenn. 410 (1882); Atwater v. Butler, 68 Tenn. 299 (1878); Perkins v. McDonald, 62 Tenn. 343 (1873); Tarpley v. Gannaway, 42 Tenn. 246 (1865).

creased many times because of it.

There were three cases decided by the Tennessee courts which can be said to involve the scope of the probate estate concept. Two of the decisions decreased the probate estate, and one sustained it. In *Hollis v. Thomas* the court of appeals, western section, sustained upon the evidence the creation of joint bank accounts with the right of survivorship created by an aged lady eleven days before her death, thus holding against the administrator of the decedent’s estate. The court reversed the chancery court on a procedural point involving undue influence, the lower court having held that because a confidential relation existed between decedent and the survivor, the survivor had the burden of proving that there was no undue influence. In reversing, the court of appeals held that just because a confidential relation exists between a donor and a donee, undue influence will not be presumed, so that the administrator had the burden of proving this point. Because it was held that there was no evidence of undue influence, the administrator’s bill to recover the bank accounts for the probate estate was dismissed.

Suppose an owner of real estate executes a coal lease for a term of years under which he is entitled to receive royalties for the coal mined. Upon the death of the owner, is the right to receive royalties personal property and therefore a part of the probate estate, or real property passing to the heirs at law? In *Mullins v. Evans* the eastern section of the court of appeals held against the probate estate concept and in favor of the heirs. Indeed, because of the difference between personal property and real property in Tennessee concerning the marital rights of a surviving spouse, the decedent’s spouse was excluded from the royalties.

In *First National Bank v. Howard* the middle section of the court of appeals sustained upon the evidence an action brought by an executor to recover a diamond brooch which the defendant claimed she had received as a gift from the 85 year old decedent. The decedent’s will bequeathed the brooch to another, and the defendant asserted that the executor was not a party in interest entitled to sue for its recovery; that the property right, if any, was in the special legatee. The court held that an executor and administrator succeeds to the legal title to decedent’s personal property in trust for the purpose of administration, and that the fiduciary has the right to maintain all actions to recover the possession of such property in law and in equity. The fiduciary’s title vests upon his qualification, apparently relating back to the instant of decedent’s death, and the fiduciary has

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40. 308 S.W.2d 494 (Tenn. App. E.S. 1957).
41. 302 S.W.2d 516 (Tenn. App. M.S. 1957).
the exclusive right to possess and dispose of the property in the course of his administration, subject to the responsibilities of proper fiduciary administration. Legatees and distributees have only a right to call upon the fiduciary to make distribution of surplus property after the payment of claims and taxes. While there are authorities in other states to the contrary, this seems to be a well settled rule in Tennessee. If the executor during the course of his administration transfers the property to the legatee, then the latter has the title to the property and the right to maintain actions concerning it, but this title and right does not accrue to the legatee before the executor transfers the property to him pursuant to the will.

Claims—Fiduciary’s Duty To Pay: An executor or administrator is liable for failure to pay personal property taxes due to the county trustee for each year during the administration of the estate. In Hamilton National Bank v. Richardson the eastern section of the court of appeals held that the nine months limitation period for filing claims against decedents’ estates does not apply to a claim for state and county taxes. Indeed, the county trustee is not required to file a claim for taxes at all. Instead, Tennessee Code Annotated section 30-520 is held to impose upon the fiduciary the affirmative duty to pay such taxes. Section 67-1211 makes it the duty of the county or probate clerk to examine and compare the assessment rolls of the county with the inventories or reports of administrators and executors as soon as filed for the purpose of ascertaining whether any personal property of any estate is subject to back assessment or reassessment. In case there is any personalty subject to the back assessment or reassessment, the statute imposes upon the county clerk the duty to report the same to the county trustee, who shall back assess or reassess the same and add penalties. County and probate clerks have traditionally ignored this statutory duty so that, as illustrated by the instant case, if the county trustee wants his taxes, he had better file a claim for them. Since, however, the county trustee is not foreclosed by the nine months statute of limitations provided by section 30-510, there is cause for concern about the duty of the fiduciary to volunteer to pay such taxes. In the instant case the county trustee made the assessments and gave notice of them to the fiduciary, so the fiduciary was denied a discharge because it had disbursed all the funds in its hands after receiving notice of the assessment. Perhaps of some

42. See Annot., 150 A.L.R. 90 (1944).
45. 394 S.W.2d 504 (Tenn. App. E.S. 1957).
comfort to fiduciaries in estates where the county trustee has not made an assessment for personal property taxes is the statement by the court that:

It should be borne in mind that we are not dealing here with a case where no assessment was made until after the personal representative had disposed of the assets of the estate.

In Solomon v. Estate of Witt\(^\text{46}\) the eastern section of the court of appeals held that a claimant against a decedent's estate assumes the risk of the inaccuracy of his own arithmetic. A claim was filed against the estate for the maintenance and care of the decedent "from March 1943 to March 1953, ten years at fifty dollars (50.00) per month, (600.00) annually—Total $600.00." No exceptions were filed by the fiduciary and fifteen months later the claimant filed a motion to amend his claim by changing the total to $6,000. The court affirmed the county court which had refused to allow the amendment.

**Trusts**

There were three cases\(^\text{47}\) involving the law of trusts decided by the appellate courts of Tennessee during the period of this review. While all three cases are interesting to the probate lawyer, one is comparatively simple,\(^\text{48}\) and the other two are both more complex and more significant. They will be stated inversely to what is believed to be their complexity and significance to the probate bar.

**Chappel v. Dawson**\(^\text{49}\) sustained a bill brought by the mistress of an intestate decedent to impose a resulting trust on a dwelling house inherited by the decedent's heirs. The bill alleged that complainant had paid for the construction of a dwelling house on a lot purchased by the intestate in his own name, and that the complainant and the decedent had lived together as husband and wife as a result of which they had one child. The heirs demurred on the ground of unclean hands and laches and the chancery court below sustained their demurrer. The supreme court reversed, holding that the defense of unclean hands must relate to the particular transaction which is the subject of the litigation.\(^\text{50}\) Accordingly, the court held that the immoral conduct of complainant was collateral to the transaction in which complainant paid for the construction of the dwelling. A resulting trust was imposed against the heirs and in favor of the decedent's paramour.

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\(^{46}\) 311 S.W.2d 815 (Tenn. App. E.S. 1957).

\(^{47}\) Chappel v. Dawson, 308 S.W.2d 420 (Tenn. 1957); Miller v. Miller, 304 S.W.2d 74 (Tenn. 1957); McFadden v. Blair, 304 S.W.2d 93 (Tenn. App. W.S. 1956).

\(^{48}\) Chappel v. Dawson, 308 S.W.2d 420 (Tenn. 1957).

\(^{49}\) Ibid.

\(^{50}\) The court cited Gibson, Suits in Chancery § 42 (3d ed. 1929).
Miller v. Miller\textsuperscript{51} involved the somewhat more complex and controversial doctrine of merger—i.e., whether or not an attempt to create an express trust fails because the legal and equitable interests are in the same people. The testator's will left a large residuary estate to his widow and two sons, W, C\textsuperscript{1} and C\textsuperscript{2}, as trustees for a term of ten years, in trust to pay the net income in equal one-third shares to W, C\textsuperscript{1} and C\textsuperscript{2}. At the termination of the trust, the surplus and any accumulation was to be paid to W, C\textsuperscript{1} and C\textsuperscript{2} in equal shares. W filed a suit for a declaratory judgment concerning the validity of the express trust, alleging a failure to create a valid trust because of the alleged merger of the legal title of the trustees and the equitable title of the beneficiaries resulting from the complete identity of the persons holding those interests. The chancery court sustained the trust against the attack, and this decision was affirmed by the supreme court in the present decision. The court stresses: (1) that the testator had complete freedom to tie up his property in trust for a period of ten years so long as it is not contrary to some public policy, and (2) because co-trustees must act unanimously except, as here, where a majority was expressly authorized to act, it is not unreasonable to suppose that testator felt that W needed the advice and cooperation of her sons in managing her individual share for the period of the term.

There have been differences of conclusion concerning the instances where an express trust fails because of the merger or identity of the legal and equitable estates.\textsuperscript{52} A sole trustee cannot be sole beneficiary of a trust because there would be no one to enforce it. A, as trustee, is not a juristic person separate from A, as an individual. One cannot bring a bill in equity solely against himself. Hence a trust is created only when a trustee holds property subject to an equitable obligation to deal with it for the benefit of another. According to the American Law Institute's \textit{Restatement of Trusts},\textsuperscript{53} this is the only instance where a trust fails because of the identity of the legal and equitable estates.

Suppose a trust, however, in which A and B are named as trustees for A and B. Is this situation substantially different? Bogert justifies a distinction which sustains the trust here on the technical point that A and B as trustees hold legal title as joint tenants with the right of survivorship, whereas A and B as beneficiaries take their equitable interests as tenants in common.\textsuperscript{53} Scott argues for the validity of the trusts, however, solely on the ground that there is no good reason for

\textsuperscript{51} 304 S.W.2d 74 (Tenn. 1957).
\textsuperscript{52} \textit{Compare In Re Selous}, 1 Ch. Div. 921 (1901); Greene v. Greene, 125 N.Y. 508, 26 N.E. 739, 21 Am. St. Rep. 743 (1891); and \textit{Lewin, Trusts} 12 (15th ed. 1950), with 1 Scott, \textit{Trusts} § 99.5 (2d ed. 1956); 1 Bogert, \textit{Trusts and Trustees} § 129, at 554 (1951); and \textit{Morgan v. Murton}, 181 N.J. Eq. 481, 26 A.2d 45 (1942).
\textsuperscript{53} 1 Bogert, \textit{Trusts and Trustees} § 129 at 554 (1951).
thus defeating the intention of the settlor.\textsuperscript{54} He says that a rule that there is necessarily a merger here would be purely arbitrary. The reasoning of Chief Justice Neil in the \textit{Miller} case stresses the intention of the testator, and is thus consistent with the reasoning of Professor Scott. The weight of authority clearly sustains the trust in this situation on one ground or another, although there are several highly respectable but older cases contrary.\textsuperscript{55}

\textit{McFadden v. Blair}\textsuperscript{56} presents an interesting and difficult problem of first impression in Tennessee. The decision was rendered by the western section of the court of appeals. The supreme court denied certiorari, probably upon the assumption that the case involved an application of the principles adopted in \textit{American National Bank v. Embry}.\textsuperscript{57} That case, however, involved two very different propositions,\textsuperscript{58} so that the difficulty here presented was not considered in it.

In this case the decedent was a partner in a well established and successful cotton firm in Memphis. The partnership agreement provided that in the event of the death of a partner during any fiscal year the partnership shall continue until the end of such year and the interest of the deceased partner shall be continued by being credited with profits less withdrawals or charged with losses plus withdrawals. The value of the decedent's partnership interest at the date of his death was \$1,694,378. The decedent's share of the partnership profits for the period between the date of his death on February 14, 1948, and the end of the fiscal year of the firm on July 31, 1948, was \$186,823. The decedent's will gave his entire residuary estate in trust to pay the income to his widow for life, then the income to his children and issue until termination twenty-one years after death of the survivor of certain lives in being at testator's death. This suit is a bill filed in chancery by the executors and trustees under decedent's will for instruction as to whether the decedent's share of post-death partnership profits was allocable to the widow, as life income beneficiary of the residuary trust, or to the issue of the children, as corpus-remainder beneficiaries. The chancellor apportioned the post-death partnership profits between the income account and the corpus, basing

\begin{itemize}
\item \textsuperscript{54} 1 Scott, \textit{Trusts} § 99.5 (2d ed. 1956).
\item \textsuperscript{55} Note 52 supra, and cases cited by Scott and Bogert supra, notes 52, 53, and 54.
\item \textsuperscript{56} 304 S.W.2d 93 (Tenn. App. W.S. 1956).
\item \textsuperscript{57} 181 Tenn. 392, 181 S.W.2d 356 (1944).
\item \textsuperscript{58} \textit{American National Bank v. Embry}, supra note 57, held (1) that the income beneficiary of a residuary trust was entitled to income from the date of the testator's death, not from a date one year after the testator's death as in the case of a general legatee, and (2) that the income received during estate administration by the executor on assets ultimately used to pay taxes, debts, and expenses goes entirely to the trust income beneficiary, not wholly to corpus, nor apportioned between corpus and income.
\end{itemize}
his decision upon the Massachusetts apportionment doctrine.\textsuperscript{59} The court of appeals, western section, reversed and allocated all of the post-death partnership profits to the income beneficiary, thus rejecting the apportionment principle in this situation.\textsuperscript{60}

There is no doubt that the rule is established in Tennessee that the income beneficiary is entitled to income earned by the residuary assets from and after the decedent's date of death.\textsuperscript{61} The difficulty is that post-death partnership profits received by the executor at the end of the partnership's fiscal year may consist of three different items: (1) the deceased partner's share of the undistributed profits realized and collected by the partnership prior to his death, plus his share of the profits realized and collected after his death which are attributable to work completed prior to his death; (2) the deceased partner's share of partnership income attributable to work in process at the time of his death but completed and realized after his death; (3) the deceased partner's share under the partnership agreement of income attributable to work commenced after his death and realized before the date agreed upon for the termination of his partnership interest.

It would seem clear that (1) and (2) above do not reflect income earned after the date of death so as to be allocable to the income beneficiary. Item (3) would seem to be so allocable. The court of appeals made no such analytical distinction in its award of the entire post-death partnership profits to the income account. It is further clear that the executor must include all three of the above elements in his inventory as assets of the decedent, because the decedent owned a vested contract right to the receipt of such post-death partnership profits. Their value should be the value at death of the right to receive in the future—the end of the fiscal year or other termination date—either the amount actually received or a reasonable estimate of such profits. Thus, these post-death profits are estate assets, or corpus, for probate accounting purposes.

The administration of these rights is further complicated by the federal income tax and estate tax consequences involved. Section 691

\textsuperscript{59} Westcott v. Nickersen, 120 Mass. 410 (1876). Under the chancellor's method of apportionment $46,840.18 was allocated to the widow as income, and $140,183.26 to corpus. This was said to be computed upon the basis of determining what sum which if invested at 6% interest for the period from February 14, 1948, to July 31, 1948, would produce $1,740,121.61. Just where this latter sum comes from is not clear from the opinion. It would seem that the proper method of apportioning the post-death partnership profits would be by ascertaining the sum which if invested at 6% for the period in question would have equalled the decedent's share of the post-dated partnership profits. This is accomplished by a well-known algebraic computation. This method would allocate approximately $5,000 to the income account and $181,000 to the corpus account.

\textsuperscript{60} 304 S.W.2d 93, 101.

of the Internal Revenue Code of 1954 defines a tax concept called “Income In Respect of a Decedent.” This concept came into our tax law in 1934, was amended in 1942 and became section 126 of the 1939 Code, and was revised further in the 1954 Code as section 691. The purpose of the concept is to subject to the income tax that income earned but not received by a taxpayer prior to his death. The concept is in need of further refinement and simplification for convenient fiduciary administration. It is clear that items (1) and (2) above are income in respect of a decedent. It is debatable whether (3) is, but the trend of recent decisions is to include it. The right to receive these post-death partnership profits must also be included in the federal estate tax return. Again, it is clear that items (1) and (2) above must be so included, but it is debatable whether item (3) should be; indeed, there is a United States Supreme Court decision which says that there is no federal estate tax payable upon that part of the post-death partnership profits which reflect item (3) above, but the Commissioner has succeeded in convincing the first and second circuits that the Supreme Court decision in Bull v. United States is obsolete—that the scope of the estate tax has been enlarged by the section of the income tax law which creates the tax concept known as income in respect of a decedent. This has been a controversial tax issue under the 1939 Code, and the 1954 Code has not answered the question. In an estate the size of that in the instant case the total of both the federal income and estate taxes on these post-death partnership profits would exceed the gross amount received but for the complicated provision in section 691 (c) of the Internal Revenue Code of 1954 which is intended to allow a deduction against the income tax for the amount of the estate tax attributable to income in respect of a decedent.

Thus, both the Tennessee state law of fiduciary administration and the federal tax law require the fiduciary to treat these post-death partnership profits as both assets of the decedents estate and as income. This seems to be a paradox in need of clarification at both the state and federal levels. The western section of the court of appeals awards the entire amount of the post-death partnership profits to the trust income beneficiary even though the decedent’s vested right to receive these profits, reasonably valued, must be included in the executor’s inventory of estate assets. The Commissioner of Internal Revenue is apparently going to insist that even the right to

62. Commissioner v. Linde, 213 F.2d 1 (9th Cir. 1954); Estate of Riegelman v. Commissioner, 253 F.2d 315 (2d Cir. 1958).
65. McClennon v. Commissioner, 131 F.2d 165, 144 A.L.R. 122 (1st Cir. 1942).
post-death profits resulting from work commenced after the decedent's death be included in his gross estate, even though this element as well as profits from work completed or commenced before death are subject to the assessment of an income tax.

It would seem that post-death partnership profits could be better handled by both the state law of fiduciary administration and the federal tax law in terms of the three elements mentioned above.

As indicated, the court in McFadden v. Blair did not, and probably was not provided with such a break-down of the $186,823 of post-death partnership profits. If such an analysis is not feasible from the method of accounting used, it would seem more just to apportion the post-death profits between the corpus and the income account, and between the estate tax and the income tax. To the extent that elements (1) and (2) above are included in the $186,823 allocated entirely to the income account, the decision in McFadden v. Blair seems wrong for the very reasons used by the court—i.e., the trust income beneficiary is entitled only to income earned after the decedent's death. To the extent that the suggestion made here would relieve elements (1) and (2) from federal income tax, it may be justified by noting that (1) these elements would be subject to the federal estate tax, and (2) to skip the income tax on this economic increase in wealth is more consistent with the general stepped-up basis of appreciated assets resulting at death as provided by section 1014(a) of the Internal Revenue Code of 1954 than the exception to that general principle now provided by section 691 of the Code concerning income in respect of a decedent.

FUTURE INTERESTS

There were two cases decided involving the principles of future interests law. One was a reported decision of the Supreme Court of Tennessee, the other was an unreported decision of the western section of the court of appeals which was sent to the writer by one of the attorneys in the case. Both cases involved class gifts, one involving the Rule Against Perpetuities, and the other the Tennessee doctrine of class gifts.

Marks v. Southern Trust Co. involved an irrevocable inter vivos trust executed January 16, 1928, in which Mother conveyed 800 acres to Bank as Trustee to pay income to Mother for life, then to pay...

67. It would seem reasonable to apportion the post-death partnership profits on the basis of an amount at the decedent's death which at 6% would equal the amount actually received when it was received. This obviously is a formula, however, and therefore not as satisfying as an actual break-down of the firm post-death profits.


69. The opinion of the western section of the court of appeals in Johnson v. Span was sent to me by Mr. J. R. Avery, Jr., of Alamo, Tennessee.

70. 310 S.W.2d 435 (Tenn. 1958).
income to Son for life, then to pay income to Son’s wife, Louise, for her life or until her remarriage, and upon the death of Son and the death or remarriage of Louise to pay the income for life to the children then living of Son and to the issue per stirpes of any that may be dead. The trust instrument then provides that “this trust shall not continue longer than the life or lives of the beneficiaries hereinbefore mentioned; that is myself, my said son, his said wife, and their said three children, and twenty-one (21) years thereafter.” At the time the inter vivos trust was created in 1928 Son had three children born and living, but a fourth child was born 34 days after the trust was created. While it was contended that the fourth child was not a beneficiary of the trust, the chancellor properly held that the dispositive gift of the future right to receive the income was to the children then living at the death of Son and the death or remarriage of Son’s wife, Louise; thus the dispositive gift was a class gift to all the children of Son whenever born, and was not limited to the three children who were living when the trust was created, who were individually named in the habendum clause along with the Settlor, Son, and Louise as measuring lives in being. The supreme court affirmed the chancellor’s construction on this point.

A second and somewhat more perplexing question raised before the chancellor was whether or not the inclusion of the fourth child en ventre sa mere at the execution of the trust but born 34 days later would violate the rule against perpetuities. The chancellor concluded that the inclusion of the fourth child born after the execution of the trust did not result in a violation of the rule, and the supreme court affirmed this conclusion. The surprising thing about this is the assumption by the supreme court that but for the saving clause—“this trust shall not continue longer than the life or lives of the beneficiaries hereinbefore mentioned; ... and twenty-one years thereafter”—the rule against perpetuities would be violated with respect to the future interests given to Son’s children and issue then living.71 Here the emphasis taken by the court’s opinion seems to be misguided. The life income interests become vested at the death of Son and the death or remarriage of Louise in Son’s children then living and the issue then living of deceased children of Son. Thus, even if Son and Louise had a dozen children and two dozen grandchildren born after the execution of the trust instrument, these life income interests cannot possibly violate the rule against perpetuities, because all of them become vested life income interests at the death or remarriage of Son and Louise, who were lives in being. While the income interests become vested in children and the issue of deceased children living at

71. See 310 S.W.2d 435, 440, the discussion under (13).
the end of lives in being, the trusts do not terminate then, but continue on until a point in time identified as twenty-one years after the death of the survivor of a group of six named lives in being at the duration of trusts. According to the common law, a private trust with beneficiaries whose interests become ascertainable within lives in being and twenty-one years is not void merely because the trust may endure longer than lives in being and twenty-one years. It does not seem that the Tennessee Supreme Court intended to suggest that but for the saving clause the trust would fail because of its duration. So far as the writer knows, there is no Tennessee case which restricts the duration of a private trust to the maximum period allowed for the vesting of contingent future interests—lives in being plus twenty-one years—and there are at least two Tennessee cases where the trusts were sustained against the attack that they might endure for a longer period.

The third and most perplexing question about this trust instrument, which is set out in full as appendix A to the supreme court's opinion, is that it seems to be silent about the gift over of the remainder interest upon termination of the trust after the successive life income interests. Because the ultimate remaindermen to take upon termination of the trust are not described in the trust instrument, it is possible that the settlor died owning a reversion which passed by her will or by intestate succession, unless a contingent remainder can be inferred or implied, or unless Son can be said to have been given a special power of appointment in trust. While, as pointed out above, the life income interest of the fourth child and any other children that could have been born to Son and Louise would have to vest by the end of lives in being, which seems to be the comparatively simple point in issue in this case, the problem concerning the vesting and identification of the ultimate takers of the contingent remainder interest in this land is a very different question; and, it is one which does not seem to have been litigated or adjudicated in this case.

Johnson v. Span, decided by the western section of the court of appeals was not a reported decision. The decision is mentioned here only because the opinion of the court relied upon the much criticized Tennessee class doctrine of Satterfield v. Mayes—that in a gift of a

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73. Eager v. McCoy, 143 Tenn. 663, 228 S.W. 700 (1920); Tramell v. Tramell, 162 Tenn. 1, 32 S.W.2d 1025 (1930), rehearing denied 35 S.W.2d 574 (1931).
74. See 310 S.W.2d 435, 441-43 (1958).
75. Compare Bridgewater v. Turner, 161 Tenn. 111, 29 S.W.2d 659 (1930).
76. See note 69 supra.
77. 30 Tenn. 57 (1849). Compare Bridgewater v. Gorden, 34 Tenn. 5 (1854). See Denisen v. Jowers, 192 Tenn. 356, 241 S.W.2d 427 (1951), and the many Tennessee cases cited and discussed in SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 146, (2d ed. 1858). See also, Chambers, HISTORY OF THE CLASS DOC-
remainder to a class there is a condition precedent of survivorship to the time of distribution or possession, which will be implied by the court, so that no member of the class can take a vested interest before the remainder becomes a possessory interest. Thus suppose a gift to A for life, remainder to the children of A. If at the time of the gift A has no children, all courts including Tennessee agree that the remainder to the class is contingent. But if thereafter a child, C1, is born to A, the overwhelming weight of authority in other states is that C1 takes a vested interest as a member of the class, subject to the rights of additional members of the class who may come in existence later. Thus as C2 and C3 are later born to A, the vested remainder of C1 is diminished from a whole, to a half, to a third, etc., until the remainder becomes a present possessory interest upon the death of A, when the fractional interest of each child becomes indefeasibly vested. Thus, the interest of C1 can never be completely divested. If during the life of A, C1 should die, according to the predominant rule of construction in other states, the interest of C1 is not destroyed; it is only subject to decrease by the birth of additional children to A. The Tennessee class doctrine, however, implies by court construction an intent on the part of the grantor that survivorship to the death of A is a condition precedent, so that the fractional interest of C1 is destroyed. Obviously, the grantor could express such a condition precedent by saying "remainder to the children of A then living." If he does not say "then living," why should the courts imply that condition as a rule of construing his intention? It has been characterized by the Tennessee Supreme Court as a hard rule and it is a rule of construction which ought to be abandoned. Because it is only a rule for construing the intention of the grantor, it cannot be a rule of property law which disregards intention. As a rule of construction, it is contrary to countless decisions of the Tennessee appellate courts announced year after year, that the intention of the grantor or testator as expressed in the written instrument will control the property interests created. It does not make sense for the courts to feel bound by a misguided construction of intent in an old case, and thereby hoist it into the status of a rule of property, when to do so is contrary to the sound rules of construction employed by the Tennessee courts in all other construction problems. It seems clear, however, that Tennessee Code Annotated section 32-305, which some thought was designed to abolish the Tennessee class doctrine, could at best have been only a partial solution, so that it is not surpris-
ing that it has been held inapplicable.\textsuperscript{81} The doctrine will apparently continue as an unfortunate trap to the general practitioner in drafting wills, deeds and trusts until changed by the legislature. The result produces an unfortunate strain among members of a family when a member of the class dies leaving issue; it cuts them off completely. This is a harsh result, and one which cannot be said to have been intended by a testator or grantor. If the testator or grantor does not provide for such a harsh result, it seems strange that the appellate courts should impose this construction upon the deceased child's family.

\textsuperscript{81} Denison v. Jowers, 192 Tenn. 356, 241 S.W.2d 427 (1951).