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Decedents' Estates, Trusts and Future Interests

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DECEDENTS' ESTATES, TRUSTS AND FUTURE INTERESTS— 1959 TENNESSEE SURVEY

HERMAN L. TRAUTMAN*

I. DECEDENTS' ESTATES
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* * *

The subject matter will be discussed under three headings: "Decedents' Estates," "Trusts," and "Future Interests." The section on Decedents' Estates will include developments concerning intestate succession, wills and those problems of fiduciary administration involved in the settlement of decedents' estates; the fiduciary administration problems involving trusts will also be discussed in that section. The developments of the year[1] include court decisions, new legislation, and the work of the Section on Real Property, Probate and Trust Law of the Tennessee Bar Association on proposed legislation.

I. DECEDENTS' ESTATES

A. Intestate Succession

1. Partnership Property.—Another of the dramatic differences between the rules of intestate inheritance applicable to real and personal property in Tennessee is brought forth in sharp focus in *Brown v. Brown*,[2] decided by the middle section of the court of appeals. Two brothers operated a country grocery store as partners. They acquired a seventy-five acre tract of land, apparently with partnership funds, and took title in the partnership firm name. One of the partners lived

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1. The year covered by this article extends from June 1, 1958 through May 31, 1959. The Tennessee court decisions are reported in volumes of the *Southwestern Reporter* beginning with 311 S.W.2d 815 and extending through 322 S.W.2d 384.
2. Brown v. Brown, 320 S.W.2d 721 (Tenn. App. M.S. 1958).

on the land, and when he died, his widow continued to live there during the nine years that the other brother survived. If the inheritance rules applicable to real property apply to the interest owned by the first deceased brother, his widow would take only a statutory dower interest in Tennessee.[3] If the inheritance rules applicable to personal property apply, however, the widow would receive the complete ownership interest in fee simple, assuming there are no surviving issue.[4] The chancellor held that the real property rules were applicable because the farm land was not used for partnership business purposes and was therefore not intended to be partnership property, notwithstanding that title was taken in the firm name. There is authority supporting the view that the answer depends upon whether it was the intention of the partnership to use the realty for partnership purposes.[5] The court of appeals in the instant case reversed the chancellor and held that the farm land descends according to the rules applicable to personal property; accordingly, the widow's sister inherited it upon her death, and the heirs at law of the husband were left out.

The problem involved here has been in a state of more or less confusion in both England and America for hundreds of years.[6] Unfortunately, the Uniform Partnership Act does not expressly solve the problem. So it remains for court decisions construing the statute in relation to the common law rules to show the way. The difficulty and confusion results from a basic ambiguity in partnership law—namely, the entity theory versus the aggregate theory—and this ambiguity haunts us today not only in the substantive law of partnerships but also in the formulation of rules governing the federal income taxation of partnerships.[7] Under the entity theory a partner owns a partnership interest in a business organization which, like corporate stock, is personal property. The partnership interest in the business is thus a separate and distinct property from the assets owned by the partnership. Chancery courts early recognized this entity approach in partnership accounting by giving partnership creditors preferential rights over individual creditors, widows' dower rights, and claims of heirs of a deceased partner. Under the aggregate theory, on the other hand, the partnership is not a legal entity; it is an aggre-

3. One-third of the land owned by the husband *at death* for the life of the widow. TENN. CODE ANN. §§ 31-601, 31-603 (1956).

4. TENN. CODE ANN. § 31-201 (2) (1956).

5. Marks v. Marks, 1 Tenn. App. 436 (1925); and compare TENN. CODE ANN. § 61-107 (2) (1956). But the *Marks* case has been somewhat disapproved. See Cultra v. Cultra, 188 Tenn. 506, 221 S.W.2d 533 (1949); Kaens v. Loftin, 1 Tenn. App. 574 (1926).

6. 40 AM. JUR. *Partnership* §§ 110-12; Annot., 25 A.L.R. 389 (1923); 3 AMERICAN LAW OF PROPERTY §§ 6.8, 6.9, 14.16 (Casner ed. 1952).

7. WILLIS, HANDBOOK OF PARTNERSHIP TAXATION § 1.03 (1957).

gate of individuals who own partnership assets as tenants in common. This is the common law approach which led to the early decision that the legal title to partnership land passed by succession upon the death of the title holder just as in case of his other lands.[8] Since the law governing partnerships came to be so much under the jurisdiction of equity because of the accounting required to wind up a partnership, equity imposed a trust by operation of law against the heirs at law to determine the participating rights of all persons, partners and creditors directly involved in the business organization. Accordingly, there developed in the majority of earlier American decisions,[9] including the earlier Tennessee decisions,[10] the "partial conversion" theory or "trust" theory.[11] This theory is concisely summarized in a nineteenth century Tennessee case as follows: "It should now be regarded as a fixed rule of property in this State, that the real estate of a partnership is held as personalty for the purposes of the partnership, but when not needed for such purposes, it descends as other real estate."[12]

Thus equity used the entity approach for the purpose of determining operational problems and for winding up the partnership, treating the partnership interest as personal property regardless of the nature of the partnership assets. But after the partnership accounting and the payment of firm creditors and expenses, the aggregate theory was applied, *i.e.*, the parties are treated as concurrent owners of the remaining partnership assets. The abolition of dower and the adoption of a single system of inheritance applicable to both realty and personalty went far to eliminate the present problem in most states. Tennessee, however, continues to recognize the dower concept in modified statutory form and to apply different rules of inheritance to real and personal property.

The English courts early adopted an "out and out" equitable conversion theory which is consistent with the entity approach, and this theory was applied not only for purposes of liquidating the partnership affairs but also for purposes of adjusting and determining the rights of the persons who succeed to the deceased partner's interests which

8. Shanks v. Klein, 104 U.S. 18 (1881); 3 AMERICAN LAW OF PROPERTY § 14.16 (Casner ed. 1952).

9. 40 AM. JUR. *Partnership* §§ 110-12; 2 AMERICAN LAW OF PROPERTY § 6.8 (Casner ed. 1952).

10. Williamson v. Fontain, 66 Tenn. 212 (1874); Pifer v. Smith, 38 Tenn. 93 (1858); Yeatman's Heirs v. Woods, 14 Tenn. 20 (1834); McAlister v. Montgomery, 4 Tenn. 94 (1816); Annot., 25 A.L.R. 389, 400 (1923) discussing Tennessee cases.

11. That these are different names for the same theory, see 3 AMERICAN LAW OF PROPERTY § 14.16 (Casner ed. 1952).

12. Williamson v. Fontain, 66 Tenn. 212, 214 (1874).

remain after liquidation.[13] The view had the effect of passing the property to the personal representative rather than to the heir and denying dower to the widow. This position is affirmed by the English Partnership Act of 1890, which expressly provides that partnership land shall be treated as personal property between the heirs and the personal representatives of the deceased partner unless a contrary intention appears.

The Uniform Partnership Act has been in effect in Tennessee since 1917,[14] and it has been adopted in some two-thirds of the American states.[15] *Tennessee Code Annotated* section 61-125 expressly provides that a partner's interest in the partnership is his share of the profits and surplus "and the same is personal property." Section 61-124 (2) (d) provides that on the death of a partner "his right in specific partnership property rests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property rests in his legal representatives." Subparagraph (e) provides that "a partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin." These sections and the provision that realty can be acquired in the partnership name seem to go far towards the adoption of an entity or "out and out" conversion theory, and most court decisions in other states,[16] as well as in Tennessee,[17] have reached this result. Unfortunately, *Tennessee Code Annotated* section 61-123 defines the property rights of a partner to include "(1) his rights in specific partnership property." This is more consistent with the aggregate theory. Also, it is arguable that sections 61-124 and 61-125 were merely intended to declare that partnership property is personalty for the purpose of working out the rights of partnership creditors and of the partners themselves and not for the purpose of declaring the rights of those interested in the estate of a deceased partner. There is some case law and dicta,[18] including a Tennessee Court of Appeals decision,[19] to the effect that these sections are intended to be merely declaratory of the prior common law. But in *Cultra v.*

13. 3 AMERICAN LAW OF PROPERTY § 14.16 (Casner ed. 1952); Burdick, *Partnership Realty*, 9 COLUM. L. REV. 197 (1909).
14. TENN. CODE ANN. §§ 61-101 to -142 (1956).
15. 7 UNIFORM LAWS ANN. 6 (Supp. 1958).
16. Wharf v. Wharf, 306 Ill. 79, 137 N.E. 446 (1922); Hankey v. French, 281 Mich. 454, 275 N.W. 206 (1937); Windone Nat. Bank v. Klein, 191 Minn. 447, 254 N.W. 602 (1934); Note, 19 COLUM. L. REV. 404 (1919); Note, 16 TENN. L. REV. 885 (1941).
17. The instant case of Brown v. Brown, 320 S.W.2d 721 (Tenn. App. M.S. 1958); Cultra v. Cultra, 188 Tenn. 506, 221 S.W.2d 533 (1949).
18. *In re* Perry's Estate, 121 Mont. 280, 192 P.2d 532 (1948); Hannold v. Hannold, 4 N.J. Super. 381, 67 A.2d 352 (1949); State v. Elsbury, 63 Nev. 463, 175 P.2d 430 (1946); 169 A.L.R. 364 (1946).
19. Marks v. Marks, 1 Tenn. App. 436 (1925). But see footnote 5, *supra*.

Cultra,[20] the Tennessee Supreme Court clearly and unequivocally adopts the entity or "out and out" conversion theory so that partnership real estate is considered to be personal property for the purpose of applying the rules of intestate inheritance. The instant case of *Brown v. Brown*[21] follows the supreme court decision in the *Cultra* case; indeed, it is somewhat of an extension in that the real estate was used for partnership purposes in *Cultra*, whereas in the *Brown* case it was not. It was this latter point that caused the chancellor to find that it was not intended as partnership assets, which issue the statute authorizes him to determine. The decisions in both *Cultra* and *Brown* are a boost to the entity theory of partnership law which regards the ownership of an interest in a partnership business as something quite distinct from the assets owned by the partnership firm from time to time. A partnership interest like corporate stock is personal property regardless of how much real property the partnership may own. These cases constitute a reversal or rejection of the "partial conversion" or "trust" theory of earlier Tennessee cases.[22]

2. Ancestral Property.—In *Lewis v. Wilson*[23] the supreme court added another, apparently consistent extension to the somewhat surprising construction given years ago to the ancient and vague statute on the inheritance of ancestral property in Tennessee.[24] The intestate had inherited land from his father and died without spouse or issue. On the paternal side he was survived by first cousins and first cousins once removed. On the maternal side he was survived by nephews who were children of a deceased half-brother, the latter being the son of the intestate's mother by a different marriage. The supreme court reversed the chancellor and held in favor of the children of the deceased maternal half-brother in preference to the paternal cousins. It is apparently a first decision in favor of the issue of a half-brother or sister on the nontransmitting side, although previous decisions have held in favor of a surviving half-brother on the nontransmitting side.

Where an intestate without spouse or issue is survived by whole or half-blood brothers or sisters of the transmitting parent and by half-blood brothers or sisters of the nontransmitting parent, it seems clear that the Tennessee statute gives a preference to those of the transmitting parent to the exclusion of those of the nontransmitting parent. If there are no whole or half brothers or sisters of the transmitting parent, half-brothers and sisters of the nontransmitting parent will be preferred to other blood kin of the transmitting

20. 188 Tenn. 506, 221 S.W.2d 533 (1949).
21. See note 2 *supra*.
22. The earlier Tennessee cases are cited in footnotes 10 and 19 *supra*.
23. 322 S.W.2d 199 (Tenn. 1959).
24. TENN. CODE ANN. § 31-101 (3) (1956).

parent.[25] While a system of inheritance which prefers brothers and sisters to parents seems strange even in a feudal background, a preference for half-brothers and sisters of the nontransmitting parent[26] over the donor-parent himself in a gift situation seems to be an extreme inconsistency for a state which purportedly has an ancestral property doctrine.[27] The instant case simply extends this preference to the issue of half-brothers and sisters of the nontransmitting parent. The last paragraph of the statute provides that if "both parents be dead, then by the heirs of the parent from whom or whose ancestor it came."[28] These words of the statute will apparently not be literally applied if there are brothers or sisters of the whole or half blood or their issue, who survive the intestate even though their relationship to the intestate is not through "the parent from whom or whose ancestor it came."

The Section on Real Property, Probate and Trust Law of the Tennessee Bar Association continued its study on a new statute on intestate succession for Tennessee.[29] The proposed statute as approved by the Section at the 1959 annual meeting of the Association would establish the same rules of inheritance for real and personal property, abolish the doctrine of ancestral property, and give the surviving spouse of a decedent a complete or fee simple ownership interest in an appropriate percentage of the decedent's property. This would be substantially less than the whole of it received by the spouse in the *Brown* case, *supra.* While the abolition of the doctrine of ancestral property would not change the result reached on the facts in *Lewis v. Wilson*, the statute prefers parents to brothers and sisters and their issue and provides that kindred of the half-blood shall inherit the same share which they would have if they had been of the whole blood. The proposed statute is simple and consistent.

B. Wills

Scott v. Atkins,[30] decided by the western section of the court of appeals, is simply a decision that the evidence sustains the verdict of the jury that a holographic will was properly executed. The opinion of the court extended over twenty-two pages of the reporter, setting forth assignments of error and testimony in detail and voluminous

25. Bates v. Sanders, 168 Tenn. 365, 79 S.W.2d 41 (1935); Wills of Miller, 70 Tenn. 54 (1878); Chaney v. Barker, 62 Tenn. 424 (1874); Nesbit v. Bryan, 31 Tenn. 468 (1852).
26. Footnote 25 *supra.*
27. TENN. CODE ANN. § 31-101 (3) (b) (1956).
28. TENN. CODE ANN. § 31-101 (3) (d) (1956).
29. The Committee during the 1958-59 year consisted of Shields Wilson, Harry Phillips, Ramsey Leathers, George H. Cate, Jr., and the writer.
30. 314 S.W.2d 152 (Tenn. App. W.S. 1957).

citation and discussion of legal precedent. Just why such a lengthy written opinion was believed desirable is not known.

Tennessee Code Annotated section 32-301 provides that a will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator. Accordingly, it was held in *Sadow v. Solomon*[31] that a will which gave to one legatee "all stock owned by me at the time of my death in Independent Theatres" meant just that even though this corporation was not in existence when the will was written. If the property is adequately described, there is no reason why a specific legacy cannot be made of property to be subsequently acquired. The court said there was no ambiguity here that would make admissible parole evidence of intention.

In re Jones' Estate,[32] decided by the western section of the court of appeals of Tennessee, is believed to be one of the most extremely liberal decisions in Anglo-American law books on the requirement that a will must be signed by the testator in order to be valid. Significantly, Judge Avery added an appendix which points out that this was an ex parte proceeding to probate a will in which the Probate Court of Shelby County denied probate and that since there was no counsel to file a petition for certiorari to the supreme court, the opinion is published with the express statement that it has not been approved by the Supreme Court of Tennessee.

The testatrix had properly signed and executed a typewritten will in 1932. In 1952 she detached all the pages from the last page containing her 1932 signature and wrote in her handwriting in the space between her signature and the attestation clause the following words: "I have nothing much to leave anyone but want Loretta to have everything I have. A little money in Citizens Bank in Collierville & some in Plaza Bank joint account Maude & Loretta. *My last will.*" The testatrix did not sign her name to the handwritten dispositive provision. A photostatic copy is reprinted in the reporter. The probate court denied probate as a holographic will because it was not signed, holding that the 1932 signature to the typewritten will was a separate writing and "can not be a signature to or for said holographic will" written in 1952. The court of appeals reversed the probate court, holding that because both the 1932 signature and the 1952 dispositive provisions are in the admitted handwriting of the deceased, the 1932 signature "has been perfectly validated as the genuine signature of the holograph."

This case goes farther to dispense with the legislative policy requirement that a will must be signed than any case found by the

31. 319 S.W.2d 83 (Tenn. 1958).
32. 314 S.W.2d 39 (Tenn. App. W.S. 1957).

writer. While there has been admittedly a great deal of liberality in decisions as to what constitutes a sufficient signature, it is believed that in all other cases the courts have been impressed by clear evidence of an overt act by the testator which was intended as a signature or adoption of a signature. Examples in other cases are: putting a rubber stamp signature on a will;[33] cutting out a signature on a previous will and pasting it on a new one;[34] a previous signature acknowledged to witnesses at a new execution after testator had inserted a bequest by interlineation—the witnesses thereupon subscribing their names anew.[35] In the present case there seems to be no overt act adopting the 1932 signature to the 1952 dispositive direction. Judge Avery says that "all our Act requires is that the script, together with the signature, be in the handwriting of the testatrix."[36] It is believed that the decision is not sound; it seems to ignore the policy of the Tennessee statute that requires that a death transfer be formally signed by the testator. This is the type of court decision which is intended to be lenient, but actually is a disservice because it encourages loose, inaccurately prepared holographic wills. The end result is a disservice to the legislature's policy decision, a disservice to people generally because it encourages inaccuracy, and a disservice to the legal profession which is well equipped to assist people in the writing and execution of their wills.

C. Fiduciary Administration in Decedents' Estates

There were five decisions involving points of interest in the administrative settlement of decedents' estates. *In re Thompson's Estate*[37] held that where the widow and next of kin declined to qualify and no creditor sought letters of administration, the county court nevertheless has original, general and exclusive probate jurisdiction to select and appoint an administrator of its own choosing. The decedent was involved in a two car auto accident in which he was killed as were the occupants of the other car. The administrator of the estates of the occupants of the other car filed a petition in the county court to have *X* appointed administrator of the estate of the decedent Thompson for the purpose of bringing tort actions against the estate of Thompson. The county court appointed the administrator, whereupon the widow and children of Thompson objected by

33. Jenkins v. Gaisford, 3 Sw. & Tr. 93, 164 Eng. Rep. 1208 (1863) (testator's hand paralyzed).
34. Bennett v. Bennett's Exec., 303 Ky. 565, 198 S.W.2d 301 (1947).
35. *In re* Bullivant's Will, 82 N.J. Eq. 340, 88 Atl. 1093 (1913), 51 L.R.A.N.S. 169 (1914). See generally ATKINSON ON WILLS, 297, 298-301, 307 (2d ed. 1953).
36. 314 S.W. 2d 39, 47 (Tenn. App. W.S. 1957).
37. 314 S.W.2d 6 (Tenn. 1958).

a petition for certiorari in the circuit court on the ground that a tort claimant is not a creditor entitled to the preference for appointment under *Tennessee Code Annotated* section 30-109. The supreme court agreed that a tort claimant is not a creditor of the type included in the statute, but the court significantly holds that the statute is only a priority statute, not one that exclusively determines eligibility. Thus it is held that when the statutory preferences have been exhausted the county court has original and exclusive jurisdiction to appoint a fiduciary to meet the needs of justice and efficiency.

Rose v. City of Bristol[38] held that the right of an injured employee to receive workmen's compensation does not survive as an asset of his estate after his death from a cause not connected with his former employment. The purpose of workmen's compensation acts is to provide somewhat of a substitute for wages. Since wages cease at death, compensation in lieu of wages must also cease. The decision was based on two previous Tennessee cases on related points.[39]

Hogan v. McDaniel[40] held that the personal representative of an unborn child has no tort action for its wrongful death because it is not a "person" within the meaning of *Tennessee Code Annotated* section 20-607 which creates the right of action for wrongful death. While this is primarily a tort case, the court was confronted with the argument that property law has traditionally recognized the child *en ventre sa mere*. The court said that while it is true that property may vest in a conceived but unborn child which courts of equity will protect for them, if the child is stillborn, it has no estate that will pass to its heir or next of kin. The court also said that there is no authority that an action may be brought by next of kin prior to the child's birth to share in its estate. Apparently, while the property rights of a child *en ventre sa mere* will be protected by equity, the child must be born alive in order for the right to be realized.

Moore v. Moore[41] is an example of expensive litigation that results from not thinking administration problems through carefully when the will is drafted. The decedent's will gave annuities of $100 per month to each of three cousins for life and the residue of his estate to his brother who was also named executor of his will. The will also provided that the annuities "shall be subject to whatever Inheritance taxes as may be applicable thereto."[42] The problems of

38. 315 S.W.2d 237 (Tenn. 1958).
39. Marshall v. S. Pittsburgh Lumber & Coal Co., 164 Tenn. 267, 47 S.W. 2d 553 (1932); Bry-Block Merc. Co. v. Carsen, 154 Tenn. 273, 288 S.W. 726, 728 (1926).
40. 319 S.W.2d 221 (Tenn. 1958).
41. 315 S. W.2d 526 (Tenn. 1958).
42. 315 S.W.2d 526 at 528 (Tenn. 1958).

fiduciary administration were (1) how should the executor deal with the annuities so that the administration of the estate can be settled and the executor discharged, (2) is the tax apportionment liability of the annuitants limited to Tennessee inheritance, or does it include both federal estate and the Tennessee tax. The chancellor held that the gift of the annuities made the executor a trustee; he directed the executor to put $35,000 on deposit with the clerk and master to secure the payment of the annuities and out of which they were to be paid. The chancellor directed that the executor could be discharged after such payment and the completion of his accounting and that the residuary estate could be turned over to the residuary beneficiary subject to any claim of the annuitants if the $35,000 deposit is exhausted. The supreme court approved this handling of the problem, holding that the annuities are both an in rem charge against the residuary estate and an in personam charge against the residuary beneficiary. The latter point is pure dictnm, however, since no claim individually was made against the residuary beneficiary, although the court seems to indicate that it will imply a personal promise by acceptance of the residuary.

On the tax apportionment problem, the supreme court held that the annuitants were responsible only for their share of the Tennessee inheritance tax and not their share of the federal estate tax. The court looked at the language, "shall be subject to whatever Inheritance taxes as may be applicable thereto," and said that the will was drawn by a lawyer and that the difference between the state inheritance tax and the federal estate tax is so widely known that the express mention of "inheritance taxes" indicates an intention not to include federal estate taxes. It is inconceivable that any professional man would counsel such a result, or that any prudent testator would desire it. From the client's point of view the allocation of the burden of tax shrinkage is the problem to be decided. This shrinkage may be allocated to each beneficiary in proportion to the percentage of the estate received by him, or it may be allocated entirely to some beneficiaries such as the residuary takers so that specific and general legacies are not reduced by the tax shrinkage. The idea of apportioning the state tax but not the federal is an irrational result. Nevertheless, it must be borne in mind that the only question of law involved is: what did the testator intend by "said bequest shall be subject to whatever Inheritance taxes as may be applicable thereto." It is certainly arguable that he intended to apportion all death transfer taxes to the annuitants.

A third problem of fiduciary administration involved in this case was whether the annuitants were entitled to interest, and if so, whether it accrues from date of death or from one year after. The

court held that neither was true and that the annuitants were entitled to interest beginning one year after the qualification of the executor. There is some inconsistency in this part of the opinion. Again, the only rule of law applicable is that whatever the testator intends shall control. In the absence of an expression of intent, however, certain rules of construction are adopted by the courts generally. Where the testator intends the legacy to provide an immediate support, it is generally held that interest is payable from date of death,[43] and testamentary trusts usually fall in this category. On the other hand, in the absence of an intent to provide immediate support, general legacies usually draw interest beginning one year after date of death in Tennessee,[44] although cases elsewhere are divided between one year after date of death, one year after the issuance of letters of administration, and interest only from the date distribution was ordered by the court upon an accounting.[45] In the instant case the court found that the annuities were intended as immediate support; nevertheless, interest was allowed only from one year after the executor's qualification.

In *Nicholas v. Wright's Estate*[46] the supreme court was concerned with the circumstances under which an attorney's fee, other than the normal fee for the fiduciary's attorney, may be allowed as an expense of the estate. *A*, *B*, and *C* were beneficiaries of the decedent's estate, and *C* had been the court appointed guardian of the decedent for approximately two or more years prior to death. *A* and *B* asserted in legal proceedings that *C* was indebted to the estate as a result of the handling of funds in the guardianship. After a protracted litigation, *C* was successful in obtaining an adjudication of no liability to the decedent's estate, and *C* then filed a petition to have her attorney fees paid by the decedent's estate. *C* insisted that the legal services were rendered to her in her capacity as guardian of the decedent's property and not in her capacity as a beneficiary of the decedent's estate, and one judge of the court of appeals was apparently so convinced. The supreme court affirmed the chancellor's conclusion that the contest really was between the beneficiaries as such rather than a benefit to the settlement of the decedent's estate. The several Tennessee cases are cited and summarized in *Gilpin v. Burrage*[47] where the court comments: "Our cases seem to reflect it as a fact that the test by which the question is to be determined is whether the services rendered enure to the benefit of the entire estate as distinguished from

43. Fidelity Trust Co. v. Service Laundry Co., 160 Tenn. 57, 60, 22 S.W.2d 6, 10 (1929).
44. *Ibid.*
45. ATKINSON, WILLS, 751-53 (2d ed. 1953).
46. 322 S.W.2d 223 (Tenn. 1959).
47. 188 Tenn. 80, 89, 216 S.W.2d 732, 736 (1949).

services that enure to the benefit of one or more of the individuals interested in the estate or trust. The difficulty is in the application rather than in the ascertainment of the controlling rule." Would it have made a difference in the instant case if *C* had claimed a credit for the attorney fee as a part of her accounting in the guardianship? While the court concludes that this is really a contest between beneficiaries of the decedent's estate as such, it seems to be more impressed by the form of the procedure by which the estate through *A* and *B* brought suit against *C*, rather than the nature of the defense which *C* was required to make, namely, whether the accounting of the guardian was the essence of the litigation between the beneficiaries.

D. Legislation

Chapter 100 of the Public Acts of 1959 amends *Tennessee Code Annotated* section 30-805 so that a "year's support" (family allowance) may be paid for children under the age of eighteen if there is no widow. Prior to this amendment the statute limited the allowance to or for the benefit of children under fifteen. The statute is in a sense a recognition that children of fifteen are not as mature as they were in the mid-nineteenth century when the statute was originally enacted in Tennessee. Likewise, Chapter 101 changes from fifteen to eighteen the age of minor children benefitted by *Tennessee Code Annotated* section 30-807 which provides that personal property exempt from creditors rights shall not go to the executor or administrator to be administered as a part of the probate estate but shall be vested in the widow in trust for herself and the children of the deceased. Where there is no widow, such exempt property will now be allocated to or for the benefit of minor children under eighteen as compared to the prior law which was limited to minor children under fifteen.

Chapter 147 of the Public Acts of the 1959 Legislature amends *Tennessee Code Annotated* section 34-108 so that when a personal representative has administered an estate and a distribution not exceeding $500 is to be made to a minor, *regardless of whether the minor has a regular guardian*, the court may order distribution in such manner and upon such terms as will in its judgment best promote the minor's interest. This will apparently authorize an order of court directing distribution to the minor himself even though he has a guardian, whereas the prior law authorized such an order only for a minor who had no regular guardian.

Chapters 226 and 227 amend *Tennessee Code Annotated* section 30-804 in two respects. Chapter 227 raised from $250 to $500 the amount which an employer is authorized to pay to the widow of a deceased

employee from wages or salary due at the time of death. Chapter 226 adds a provision that if the employee is a woman, wages or salary not to exceed $500 may be paid to the children of the deceased employee to be charged against the year's support or other exemption claims of such children. *Tennessee Code Annotated* section 30-805 as amended by Chapter 100 of the Public Acts of 1959 seems to authorize the same payment by employees for the benefit of children under eighteen where there is no widow or where she dies before the year's support is set apart.

Chapter 240 amends *Tennessee Code Annotated* section 20-607 which provides for the survival and succession of a cause of action resulting in death. The amendment seems to authorize succession of the right of action for the death of a minor to the adoptive parents when the child is not in the custody of his natural parents. The prior law seemed to limit the succession to adoptive parents to situations "where his or her natural parents or parent or next of kin are unknown." This language was deleted.

Chapter 86 makes it a felony for any person to intentionally create the false impression that he is dead. This apparently is a legislative reflection of the interesting and adventuresome episode presented in a recent case allowing restitution to an insurance company for money it had been ordered to pay upon proof of absence for more than seven years.[48]

By Chapter 246 of the Public Acts of 1959 Tennessee becomes one of the first states in the country to enact the new Uniform Act for the Simplification of Fiduciary Security Transfers. *Tennessee Code Annotated* section 35-204, which was section 3 of the Uniform Fiduciaries Act passed in 1953, was repealed by this new substitutionary legislation. The purpose of this important legislation is to simplify the procedure and to save the excessive amount of time and expense incident to the transfer of stocks, bonds and other securities by a fiduciary. In England it has always been the law that neither the transfer agent nor the corporation had a duty to investigate a transfer of stock by a fiduciary to see whether or not that fiduciary was exceeding his powers or violating his trust.[49] As Mr. Partridge has said, "It has taken us several generations of naughty swear words and nervous breakdowns to find out that mother knows best."[50] The trouble began with a decision rendered by Chief Justice Taney on circuit in 1848.[51]

48. New York Life Ins. Co. v. Nashville Trust Co., 200 Tenn. 513, 292 S.W.2d 749 (1956).

49. Partridge, *Help Wanted: Operation Simplification*, 45 A.B.A.J. 476 (May 1959).

50. *Ibid.*

51. Lowry v. Commercial & Farmers Bank, 15 Fed. Cas. 1040 (No. 8581)

The Chief Justice thought that the corporation was a trustee for everyone interested in the shares, and that the corporation should take notice of wills as publicly recorded documents. When registering a transfer of stock by a fiduciary the Taney doctrine made the corporation liable for participation in a breach of trust if it had reasonable ground for knowledge of the breach. The result is that transfer agents have required voluminous documentation of the fiduciary's right to transfer the security, and this has become unreasonably time consuming and expensive, particularly to the small estate administered in a small town.

In 1922 the Conference of Commissioners on Uniform State Laws approved the Uniform Fiduciaries Act, which was passed in Tennessee in 1953.[52] Section 3 of this act was designed to simplify fiduciary transfers. The method imployed for this purpose was a limitation of liability for fiduciary transfers to cases where the transfer is made with "actual knowledge" of a fiduciary breach, or "knowledge of such facts that the action in registering the transfer amounts to bad faith."[53] Transfer agents are large corporate organizations, however, and some have branches in different states. There was, therefore, the possibility of "knowledge" because of some documents actually forgotten. The result is that transfer agents have not been willing to rely on section 3 of the Uniform Fiduciaries Act and have insisted on documentation which causes quite a burden in the administration of estates and trusts.[54]

The new Uniform Act for the Simplification of Fiduciary Security Transfers provides that the corporation or transfer agent making a transfer of a security pursuant to an assignment or transfer by a fiduciary may assume without inquiry that the transfer is not in breach of his fiduciary duties, even though to himself, and that the fiduciary has complied with the controlling instrument and the law of the jurisdiction governing the fiduciary relationship. It is also provided that the corporation or transfer agent is not charged with notice of and is not bound to examine any court record or any recorded or unrecorded document relating to the fiduciary relationship of the assignment even though it may have possession of such a document.[55] Thus, the new statute is a return back to the English

(C.E.D. Md. 1848). Additional cases are collected in SCOTT, TRUSTS, § 325 (2d ed. 1956).

52. TENN. CODE ANN. §§ 35-201 to -214 (1956).

53. See the repealed section 3, TENN. CODE ANN. § 35-204 (1956).

54. See, *e.g.*, Daily v. Universal Oil Products Co., 76 F. Supp. 349, 371 (N.D. Ill. 1947); First Nat. Bank v. Pittsburgh Ry., 31 F. Supp. 381 (E.D. Pa. 1939); Harris v. General Motors Corp., 263 App. Div. 261, 32 N.Y.S. 2d 556 (1942), *aff'd*, 288 N.Y. 691, 43 N.E.2d 84 (1942).

55. TENN. CODE ANN. § 35-903 (Supp. 1959).

rule providing that there shall be no duty of inquiry into the rightfulness of a fiduciary transfer on the part of the transfer agent[56] or the broker or bank guaranteeing the fiduciary's signature.[57] While the corporation and the transfer agent are relieved of responsibility for transfers in breach of trust by a fiduciary, they continue to be responsible for forged transfers and accordingly will continue to require a guarantee of the signature of the transferor.[58] Under the new law it is believed that the only transfer requirements for executors, administrators, guardians, and other court appointed fiduciaries henceforth will be: (1) a currently dated certified copy of letters of administration, (2) an inheritance tax waiver from the State of Tennessee, (3) the old certificates endorsed by the fiduciary with signature guaranteed, (4) the federal and state transfer taxes.[59] In the case of fiduciaries who are not appointed by courts, the transfer agents are authorized to adopt standards of proof evidencing appointment to the fiduciary position which may or may not include a copy of the trust instrument or other document.[60] Certified copies of wills, trusts and court records will generally not be required. It is reported that the act was passed upon the initiative and recommendation of the Trust Division of the Tennessee Bankers Association with the cooperation of the Tennessee Commissioners on Uniform State Laws. The American Bar Association, the National Conference of Commissioners on Uniform State Laws, banking groups, security dealers and transfer agents have been interested in simplifying the stock transfer procedures in fiduciary transfers for several years, and this new statute represents the combined thinking of all interested groups.[61]

Chapter 51 of the Public Acts changes the date for the filing of the return and payment of the Tennessee gift tax from March 15th to April 15th following the close of the calendar year in which the gift

56. Note 55 *supra*.
57. TENN. CODE ANN. § 35-908 (Supp. 1959).
58. Braucher, *Security Transfers by Fiduciaries*, 43 MINN. L. REV. 193, 204 (1958).
59. TENN. CODE ANN. § 35-904 (a) (Supp. 1959).
60. Note 59 *supra*, §35-904 (b).
61. See Braucher, *Security Transfers by Fiduciaries*, 43 MINN. L. REV. 193 (1958) for a complete citation to relevant articles, books, and cases in the history of the new legislation, citing in particular Christy, *Responsibilities in the Transfer of Stock*, 53 MICH. L. REV. 701 (1955); Conard, *A New Deal for Fiduciaries' Stock Transfers*, 56 MICH. L. REV. 843 (1958); Conard, *Simplifying Securities Transfers*, 30 ROCKY MT. L. REV. 33 (1957). See also for shorter, summary discussion, Partridge, *Help Wanted: Operation Simplification*, 45 A.B.A.J. 476 (May 1959); Partridge, *Simplification of Security Transfers by Fiduciaries*, 97 TRUSTS & ESTATES 906 (1958) setting forth in Appendix I a copy of the new Uniform Act with comments. For a discussion of Massachusetts developments under article 8 of the *Uniform Commercial Code* (not yet the law in Tennessee), see Kelley, *Security Transfers Eased*, 98 TRUSTS & ESTATES 94 (1959).

was made. This now conforms to the date required by the federal gift tax law.[62]

Chapter 156 amends the Tennessee gift tax and Chapter 158 similarly amends the Tennessee inheritance tax so that a charitable deduction for gifts to charities in other states will be allowed only when the other states grant a like exemption for gifts to charitable institutions in Tennessee.

Tennessee Code Annotated section 32-502, which is section 2 of the Foreign Probate Act passed in 1919, was amended so as to authorize a contest of the validity of a will probated in another state with respect to real property in Tennessee. The foreign will properly admitted to probate in the state of domicile is conclusive as to personal property in Tennessee. This amendment apparently overrules two comparatively recent decisions of the Supreme Court of Tennessee, *Robertson v. Robertson*[63] and *Efferson v. Buck Investment Co.*,[64] and returns the rule on the contest of foreign probated wills to the common law rule as applied in several earlier Tennessee cases.[65] In the *Robertson* case the decedent had died seven years previously in Maryland, where she was domiciled. Her will had been probated there and never contested. The executor then probated the will in Davidson County, Tennessee, where the testatrix had real property. A petition was filed in Davidson County to contest the probate for lack of capacity of the testatrix. The court held against the contestor, saying that "probate proceedings of the foreign state are proceedings in rem and conclusive to all persons having an interest under the foreign will."[66] While *Tennessee Code Annotated* section 32-506 has for many years authorized a contest of a foreign will as to realty, the *Robertson* and *Efferson* cases held that this section of the statute had reference only to unprobated wills from other jurisdictions. The 1959 amendment will now authorize the contest remedy to foreign probated wills too.

II. Trusts

A. Construction

Miller v. Miller[67] was a construction-of-intent problem to determine whether the income beneficiary or the remainder beneficiaries owned the equitable property right to $100,000 of income accumulated by the trustees. The trust instrument directed the trustees to pay

62. Int. Rev. Code of 1954, § 6075 (b).
63. 197 Tenn. 218, 270 S.W.2d 641 (1954); Wade, *Conflict of Laws—1955 Tennessee Survey*, 8 Vand. L. Rev. 964, 968 (1955).
64. 176 Tenn. 358, 141 S.W.2d 887 (1940).
65. See Kirkland v. Calhoun, 147 Tenn. 338, 248 S.W. 302 (1923); Goodrich, Conflict of Laws 527-28 (3d ed. 1949).
66. 197 Tenn. 218, 220, 270 S.W.2d 641, 642 (1954).
67. 315 S.W.2d 101 (Tenn. 1958).

"the net income monthly or quarterly, or as often, in the judgment of my Trustees, as their needs shall require to my wife, during her lifetime, for the support of herself and the support and education of my children." The supreme court reversed the chancellor and held that the wife (the income beneficiary) is entitled to all the income each year and that the trustees have no power to accumulate income during the life interest. The court said that the discretion of the trustees under the will with respect to the life income beneficiary was limited to (1) how frequently during each year the income would be paid, and (2) invasion of corpus to support the wife. Both sides cited and argued cases, collected in an annotation,[68] involving a different but important proposition in the drafting of wills and trusts, *i.e.*, when the trustee does have the power to accumulate income, who owns the equitable property right to the accumulated income. This problem will produce many law suits, particularly upon the death of the income beneficiary when the beneficiary's personal representative may very well be obliged to contend that the accumulated income should be paid to him to be administered as probate assets. The answer in each case depends upon the court's construction of the trustor's intent, and so the problem should be dealt with clearly in the trust instrument.

Carson v. Nashville Bank & Trust Company[69] also raises a construction problem. The issue is whether a charitable trust fails because the testator intended that only the particular trustee named by him should administer the trust. In the instant case the individual named as trustee failed to qualify and subsequently died. The supreme court sustained the chancellor in holding in favor of the charitable trust and against an attack by the heirs of the trustor. The decedent-trustor's will gave his residuary estate to Walter R. Sanders "to be used by the said Walter R. Sanders for the education of any child or children whom he deems worthy of assistance."[70] In previous litigation[71] the supreme court had sustained this gift as a valid charitable trust.[72] When the individual named as trustee died without qualifying, the heirs made this second attack on the ground that even if a valid charitable trust was created, the named trustee's administration of it is such an essential part of the trustor's plan that the trust will expire or fail upon his death. While the cases

68 Annot., 172 A.L.R. 455 (1948).

69. 321 S.W.2d 798 (Tenn. 1959).

70. *Id.* at 800.

71. Ratto v. Nashville Trust Co., 178 Tenn. 457, 159 S.W.2d 88 (1941), 141 A.L.R. 341 (1942).

72. See annotation that the absence of geographical or territorial limitations upon the selection of beneficiaries of an otherwise valid charitable trust will not render the trust void. Annot., 141 A.L.R. 346 (1942).

often reach this result when the courts are convinced that the named trustee's discretion is such an essential element in the trust plan, the courts generally are inclined to hold that the primary and controlling purpose of the trustor is the charitable purpose and that it would be contrary to the intention of the testator to allow the charitable trust to fail.[73] Indeed, *Tennessee Code Annotated* section 35-120 seems to go quite far in providing that no charitable trust shall fail "for lack of a trustee . . . or of a provision deemed insufficient for any reason, or in case of failure of the original trustee or any successor to act so as to carry out and keep alive the provisions of the trust." However, it is doubtful that this statute will prevent termination in a clear case where continuation of the charity is conditioned upon the personal discretion of the trustee named. The court reaffirmed *Vanderbilt Univ. v. Mitchell*[74] wherein it was held that the attorney general for the county in which the trust is being administered has the duty of enforcement, the heirs not being given the status of parties in interest unless the trust fails for some reason.

B. Inheritance Taxation

An interesting and significant development in the interpretation of the Tennessee inheritance tax involved an inter vivos trust in *Hickox v. Boyd*.[75] In 1921 the decedent had created the inter vivos trust which directed the trustee to pay the income therefrom "not to exceed $5000 in any one year" to the grantor. All income above that amount was to be added to corpus. Upon death of the grantor the trust was to continue for her children until as each child attained twenty-five years the trust shall terminate as to that child. The decedent-grantor's estate was willing to pay the inheritance tax upon that portion of the trust corpus needed to produce the $5000 annual income reserved by decedent for her life. The issue involved was only whether or not the estate was liable for the tax on that portion of the estate above the amount needed to produce $5000 annually. The supreme court affirmed the chancellor and held that the entire trust estate was a transfer by the decedent "intended to take effect in possession or enjoyment at or after death" taxable under *Tennessee Code Annotated* section 30-1602 (d), (e) and (g). The case is an extension of *Baker v. McCanless*[76] wherein the specific holding is only that the portion of the trust needed to produce the annual income reserved to the grantor was taxable. The court in the instant case went to the briefs in that case in order to

73. 4 SCOTT, TRUSTS § 397 (2d ed. 1956) and cases there cited.
74. 162 Tenn. 217, 36 S.W.2d 83 (1930).
75. 321 S.W.2d 549 (Tenn. 1959).
76. 177 Tenn. 571, 151 S.W.2d 1082 (1941).

show that the state there erroneously assumed that the amount of the trust in excess of that needed to produce the income reserved by the grantor vested in the possession and enjoyment of the corpus beneficiaries when the trust was created during the life of the grantor, and not at death. In the instant case the court holds that the entire trust, regardless of the fact that title was vested in the children, did not pass into the "possession and enjoyment" of the children until the death of the trustor.

The Tennessee inheritance tax was passed in 1919, revised in 1932, and patterned after the federal estate tax as it then existed. The result in the instant case is accordingly consistent with the result which was reached under United States *Internal Revenue Code of 1939*,[77] where the emphasis was placed on the possession or enjoyment realized by the successor at death, rather than the possession or enjoyment retained by the decedent until death. It is interesting to note, however, that the portion of the trust corpus above the income interest retained by the grantor-decedent would not be subjected to the federal estate tax under the *Internal Revenue Code of 1954*.[78] The federal statute now places the tax emphasis on the economic benefit retained by the grantor until death rather than the enjoyment realized by the successor at death, depending solely upon the gift tax for the hiatus.[79] The result is that to the extent that the decedent created an irrevocable accumulation trust with no reversionary interest there is no federal death tax, and to this extent the federal tax is more lenient than the Tennessee tax. There apparently is no serious desire on the part of the state to keep the Tennessee inheritance tax abreast of the developments from time to time in the federal estate tax, although this would provide the same tax rules for both governments, the amount of revenue produced being made to depend upon the rate structure rather than the determination of the tax base.

III. FUTURE INTERESTS

With some bright exceptions, the treatment of complex future interest cases by the Tennessee appellate courts over the years has not been without difficulty. Basic principles involved in such fundamental concepts as the doctrine of worthier title, the destructibility of con-

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77. INT. REV. CODE OF 1939, § 811 (c) (1) (C).
78. INT. REV. CODE OF 1954, § 2036. See LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 137 (1956).
79. INT. REV. CODE OF 1954, § 2036 includes in the gross estate of the decedent the value of property transferred during life "to the extent of any interest therein" of which he made a transfer "under which he retained for his life . . . the possession or enjoyment of, or the right to the income from, the property."

tingent remainders, the construction problems involved in class gifts, the Rule Against Perpetuities, the differences between general and special powers of appointment, and other widely recognized concepts of future interest law have not been expounded by the Tennessee Courts with complete clarity; and, perhaps as one of the unfortunate consequences of the generally held view that future interests is a somewhat esoteric field, inconsistent principles are sometimes enunciated. Tennessee cases involving gifts to classes provide an illustration.

A gift to a class is a gift to a group which can increase or decrease in membership after the execution of the will. It may be that in one case the class is so defined that it can only increase in membership. In such a case, as each individual becomes a member of the class, he has a vested interest which cannot be completely divested but can only be partially divested as new members come into the class to share the gift with him. In another case the class may be so defined that it can decrease as well as increase. In this case, the interest of each member of the class is not vested but remains contingent until the future interest becomes a present interest upon distribution. A basic proposition frequently misunderstood in the decisions is that there is no "law" of class gifts. The whole body of principles applied to the problem of determining who is included and excluded from membership in the class as a result of a gift to a group are mere rules for construing the intention of the donor when that intention is not otherwise clear. The only relevant rule of law involved in determining participation in a class gift is that the intention of the donor shall control.

The mid-ninteenth century case of *Satterfield v. Mayes*[80] reflects this lack of understanding concerning the principles of construction involved in gifts to classes.[81] The "Tennessee Class Doctrine" spawned by this precedent has become somewhat unique in Anglo-American law.[82] As pointed out last year,[83] the doctrine is that in a

80. 30 Tenn. 58 (1849).

81. In Satterfield v. Mayes, 30 Tenn. 58, 60 (1849), the court said: "We do not deem it necessary to enter into any discussion of the question whether the remainder in the present case be vested or contingent—a question that perhaps admits of but little discussion. Regarding it as a vested remainder, as we do, the question is, when, and in whom does the interest vest? To which we answer, that it vests . . . in the persons constituting such class at the period when payment or distribution of the fund is to be made." This in effect is a holding that it is contingent, *i.e.*, that no one has an interest unless he survives to the time of distribution. Thus, the court simply did not realize that it was stating inconsistent sentences.

82. SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 146 (2d ed. 1956). For the case by case details concerning the development of this doctrine in Tennessee, see Chambers, *History of the Class Doctrine in Tennessee*, 12 TENN. L. REV. 115 (1934); Comment, *Tennessee Class Doctrine: A Spectre at the Bar*, 22 TENN. L. REV. 943 (1953).

gift of a remainder to a class the court will imply a condition precedent of survivorship to the time of distribution by each member of the class, thus making all such gifts contingent so that the class can decrease in membership by death prior to distribution, even though the testator expressed neither the contingency nor anything from which it can be inferred. Indeed, some Tennessee decisions have elevated this doctrine from a rule of construction to a rule of "property law" without apparently recognizing the respect Tennessee courts have shown for the rule that the testator's intent is always the controlling element. These two "rules" are simply not consistent.[84] In 1927 the legislature clearly intended to abolish this misconceived and inconsistent "Tennessee Class Doctrine," and to establish the rules of judicial construction generally applicable in Tennessee and in other common law jurisdictions. It passed a statute 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 . . . ."[85] Nothing could be more clear than the legislative intention to abolish the sporadic and ill-conceived doctrine. But in *Denison v. Jowers*,[86] the supreme court, speaking through the late Mr. Justice Gailor, applied with reverence the old "rule from *Satterfield v. Mayes*," apparently unaware of the purpose of the legislature in passing the 1927 statute. The court said that by this statute the "legislature did no more than enact a rule which this Court had eagerly followed without the legislation."[87] This statement indicates that neither the lawyers involved in the case nor the court checked the title of the act. Interestingly, the scholarly opinion of the late Judge Anderson in *Harris v. France*[88] construing the 1927 act in accordance with its stated purpose was not even referred to by the supreme court in *Denison v. Jowers*. Instead the court substituted for a clear understanding of class gifts the statement that "this is often a hard rule, and if there be even a slight ground on which to base a construction of a devise to the individuals, rather than to a class, the Court will seize the opportunity to do so as a matter of equity."[89]

Karsch v. Atkins[90] was a gift of a remainder interest in trust to

83. Trautman, *Decedents' Estates, Trusts and Future Interests—1958 Tennessee Survey*, 11 VAND. L. REV. 1237, 1256 (1958).
84. Pugh v. Frierson, 221 Fed. 513 (6th Cir. 1915); Cutshaw v. Shelley, 13 Tenn. App. 580, 584 (1931); Sanders v. Byron, 112 Tenn. 472, 29 S.W. 1028 (1903).
85. TENN. CODE ANN. § 32-305 (1956).
86. 192 Tenn. 356, 241 S.W.2d 427 (1951).
87. *Id.* at 360.
88. 33 Tenn. App. 333, 232 S.W.2d 64 (1950).
89. 192 Tenn. 356, 359, 241 S.W.2d at 428.
90. 313 S.W.2d 253 (Tenn. 1958).

a class in which the issue was whether the taxpayer was entitled to a Class A exemption of $10,000 or a Class B exemption of $5,000 under the Tennessee gift tax.[91] The taxpayer had created an inter vivos trust in 1942 for the benefit of her daughter for life, and then for the benefit of any child or children of the body of this daughter "or by legal adoption." The taxpayer made gifts to the trusts in 1955 and 1956 which are the subject of this litigation. At the time of these gifts, the daughter had no children of her body, but she did have an adopted child. The State Commissioner of Finance and Taxation agrees that the portion of the gifts allocable to the daughter's life income interest is entitled to a Class A gift tax exemption, but he asserted that the portion allocable to the corpus of the trust held for the remaindermen is entitled only to a Class B exemption because there are no existing members of the class entitled to a Class A exemption. It was conceded that the only existing member of the class—the adopted child—was entitled only to a Class B exemption.[92] The taxpayer asserted that the law will always recognize the possibility that a woman may have a child regardless of her age and urged the court to incorporate such a rule into the gift tax statute since the inheritance tax statute provides for a wait-and-see rule to tax these contingencies.[93] The court refused to do this. Instead, it held that the adopted child was the only member of the class defined by the taxpayer-grantor in existence and that his interest is vested under *Tennessee Code Annotated* section 32-305 (the 1927 act intended to abolish the "Tennessee Class Doctrine") subject only to partial divestment by the birth of additional children; accordingly, the court said the gift tax is immediately payable upon the basis of the class of beneficiaries in existence when the gift is made. It was in this respect that the supreme court made some significant comments relevant to the future of the ill-conceived "Tennessee Class Doctrine," which was not expressly mentioned.

The application of the "Tennessee Class Doctrine" would have supported the argument that the gift of the remainder interest to the class was contingent upon survivorship of the daughter-life income beneficiary, and that since the contingent class defined included lineal descendants[94] of the taxpayer as well as adopted children of the income beneficiary, all or at least a portion of the Class A exemp-

91. TENN. CODE ANN. §§ 67-2501 to -2526 (1956).

92. Since the child was adopted by the life income beneficiary, and is not the adopted child of the taxpayer-grantor, he is clearly a "class B" beneficiary.

93. TENN. CODE ANN. § 30-1615 (1956).

94. See TENN. CODE ANN. § 67-2505 (1956) which includes a lineal descendant and an adopted child of the donor in "class A," but does not include an adopted child of the donee.

tion ought to be applied to gifts to the remainder portion of the trust. The court relied upon the abovementioned statute enacted "to change what is known as 'The Class Doctrine'" to hold that the adopted child now owned a vested interest in the class gift. Speaking of this statute, the court said that "the rule now is that notwithstanding that the time of payment or distribution of the estate is fixed at a subsequent period, or upon the happening of a future event, the individual members of the class will take vested transmissible interests unless the will, considered as a whole in the light of all the circumstances, manifests a clear intention to the contrary."[95]

While no mention is made of the old judicial class doctrine, the above language is a clear recognition of the purpose of the 1927 statute, an approval of the views expressed by the late Judge Anderson in *Harris v. France*,[96] and an indication that the supreme court will now either ignore or overrule the opinion of Justice Gailor in *Denison v. Jowers*. Indeed, there is reason to believe that the legislative purpose to bury the ill-conceived "Tennessee Class Doctrine" will yet be realized!

Rodgers v. Unborn Child or Children of Rodgers[97] presents an important but difficult procedural problem with respect to the determination of future interests. It may be that there is a hiatus here between the policy of procedural due process and the policy against direct and indirect restraints on the alienation of property. If the court's decision is sound, corrective legislation is needed to keep the title to property marketable. A decedent's will gave the plaintiff a life estate in land, remainder in fee simple to her children who survive her; if no children survive, to *A*, if then living; if neither children nor *A* survive her, to *B* in fee. The plaintiff is 46 years old, has no children and is not *enceinte;* both *A* and *B* are dead, and the plaintiff has a quitclaim deed from the heirs of *B*; and the property is a residence which is badly in need of repairs which plaintiff is financially unable to make. The plaintiff sought three different kinds of relief in the chancery court: (1) that the property should be sold and the proceeds invested and the income paid to the plaintiff; (2) that plaintiff be authorized to mortgage the property and make the needed repairs; and (3) that the court declare the plaintiff to be the sole owner free of any contingent remainder interests. Notice by publication pursuant to *Tennessee Code Annotated* sections 23-2201 and 23-2202 was made and a guardian ad litem for the unborn children of the plaintiff was appointed pursuant to section 23-2203. The guardian demurred to the bill challenging the jurisdiction of

95. 313 S.W.2d at 255.
96. See note 88 *supra*.
97. 315 S.W.2d 521 (Tenn. 1958).

the court over the unborn children, asserting that any decree of sale would not be binding upon them and that because of a conflict of interest with respect to the title the plaintiff is not a proper party to serve as a virtual representative of any unborn children she may have. The chancellor overruled the guardian's demurrer; but the supreme court, speaking through Mr. Justice Swepston reversed the chancellor and dismissed the plaintiff's bill. The court held that there was no valid service of process upon the unborn children, and because of the conflict of interest as to title, plaintiff could not serve as the virtual representative of her unborn children. Apparently, the property will just stand there rotting away, constituting a loss not only to the plaintiff but to the entire community. This is the kind of indirect restraint on the alienation of property which is against the established public policy of Tennessee and other Anglo-American governments.

The decision seems to be subject to criticism on at least two counts. First, the court holds that the statutory notice authorized by *Tennessee Code Annotated* sections 23-2201 to 23-2205 is not applicable because "the bill shows on its face that there is no controversy or doubt about the condition of the title."[98] Quite the contrary, the bill alleges that plaintiff owns a life estate and has acquired a quitclaim deed from the sisters of the ultimate remaindermen.[99] It would seem entirely possible here that the plaintiff has acquired a present fee simple through the doctrines of merger and the destructibility of contingent remainder rule in Tennessee.[100] Secondly, while the interests of the plaintiff and the unborn children are adverse with respect to the status of the title, *they are not adverse with respect to the preservation of the economic value of the property.* The court admits that there is no doubt about the broad inherent jurisdiction of the chancery court, independent of statutes, to protect the interests of persons under disability and to order the property sold and hold the proceeds for the owners of the present and future interests therein.[101] While there are several Tennessee cases[102] which recognize the inherent power of the chancery court to order the sale of real property and convert it into personal property to be held for the owners of both present and future interests, paying only the income therefrom

98. *Id.* at 523.
99. *Id.* at 522.
100. See Trautman, *Future Interests and Estates—1954 Tennessee Survey,* 7 VAND. L. REV. 843, 847 (1954) and cases there cited.
101. 315 S.W.2d at 525.
102. Bransford Realty Co. v. Andrews, 128 Tenn. 725, 164 S.W. 1175 (1914); Ridley v. Halliday, 106 Tenn. 607, 61 S.W. 1025 (1900); Hurt v. Long, 90 Tenn. 445, 16 S.W. 968 (1891); Thompson v. Mebane, 51 Tenn. 370 (1871); Barnett v. Daniel, 11 Tenn. App. 443 (1930). See Annot., 120 A.L.R. 876 (1939); 2 GIBSON'S SUITS IN CHANCERY § 1018 (5th ed. Crownover 1956).

to the owner of the present interest, the leading Tennessee case of *Ridley v. Halliday*[103] presents a very scholarly opinion, widely cited for its review and analysis of English and American authorities. Indeed, *Tennessee Code Annotated* sections 34-606 to 34-621, and particularly 34-619 are especially designed to give legislative sanction to the inherent chancery jurisdiction recognized by the above Tennessee cases. Such an action would seem to be a *pure in rem action* where the need to prevent deterioration and to preserve marketability of titles in the community is shown and the interests of the unborn contingent beneficiaries is preserved in the proceeds fairly obtained. In such instances the service of process can be dispensed with because the interests of the unborn are protected by the appointment of a competent guardian ad litem.[104] There seems to be an inconsistency between that part of the court's opinion holding that there is not a conflict of interest between the life tenant and the unborn contingent remaindermen with respect to the quiet title statute and that part of the court's opinion holding that this is not a plenary action with respect to the issue of whether or not the interests of all would be better served by converting the real property into personal property. From the standpoint of the development of the state commercially, this case is subject to criticism; it has the effect of taking an old residence out of the free flow of commerce, leaving it to stand as an "eye-sore" while the plaintiff lives.

Moore v. Stanfill[105] involved a construction problem in a deed. The problem was whether the 1889 deed created a common law fee tail which was converted by statute into a present interest in fee simple or whether the present interest is a life estate only with a contingent remainder. The court affirmed the chancellor who reached the latter result on the basis of the rather clear expression of intent in the deed. Unfortunately, the western section of the court of appeals felt disposed to fill up eight pages of the South Western Reporter to reach this result. It may be that the paragraph numbered "3" of the chancellor's decree should be modified to change "child or children of W. H. Moore" to "issue of W. H. Moore" if the latter's only child should die leaving children or issue.

Holographic wills certainly come expensive! A review of the Tennessee appellate court opinions in cases involving wills, trusts and future interests during the last several years will reveal that the large percentage of construction problems arise out of holographic wills. As a result, many times the normal costs of having a will pro-

103. 106 Tenn. 607, 61 S.W. 1025 (1900).
104. See the procedure outlined in TENN. CODE ANN. §§ 34-607, 34-619, 21-212 (1956).
105. 313 S.W.2d 486 (Tenn. App. W.S. 1957).

fessionally planned and executed are lost to the estate because of litigation expenses, and often personal relationships become estranged. Would the people of Tennessee as a community be better served if the statutes authorizing holographic wills were repealed and attestation required in all cases?

Weiss v. Broadway National Bank[106] involved a holographic will in which the testatrix simply wrote "Should anything happen to me want Mr. Gus Weiss to open box and dispose of contents as he sees fit too." The testatrix was a life-long employee of the Gus Mayer Store in Nashville; and Mr. Weiss, who predeceased the testatrix by two years, was one of the owner-managers. The chancellor held that since only a power of appointment was given to Mr. Weiss the next of kin succeeded. The supreme court reversed and held that Mr. Weiss' only child took a complete ownership interest under the lapse statute. This seems to be a problem of construing the intention of the testatrix, not a rule of law arising from words of art. But the opinion by Mr. Justice Burnett goes far to generalize as a rule of law that whenever a power of absolute disposition is given to a devisee or legatee, a fee simple or complete ownership interest is given. The trouble with the generalization is that it conflicts with the established common law concept of collateral powers of appointment.[107] This is a somewhat different problem from the situation where an ownership interest such as an apparent fee simple is given the first taker who is also given an absolute power of disposition or consumption, with a gift over on death of anything not disposed of by the first taker.[108] In this latter situation there is a conflict between early American cases including the Tennessee cases which held that there was a repugnancy between the interest of the first taker and the gift over, and the earlier long established future interest concept of a fee simple subject to a gift over which is an executory interest in the nature of a shifting use, and the extension of these real property concepts to gifts of future interests in personal property.[109] Assuming, however, that the instant case is only a problem of construing the intention of the testatrix, and the testator's desire being so very unclear, one guess seems as good as another. It is the nature of the judicial process that the court must decide one way or another. Holographic wills certainly do come expensive!

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106. 322 S.W.2d 427 (Tenn. 1959).
107. 5 AMER. LAW OF PROPERTY 493 (Casner ed. 1952).
108. Hodges v. Stegall, 169 Tenn. 202, 83 S.W.2d 901 (1935); Eaton v. Nashville Trust Co., 145 Tenn. 575, 238 S.W. 865 (1922); Meacham v. Graham, 98 Tenn. 190, 39 S.W. 12 (1897); Bradley v. Carnes, 94 Tenn. 27, 27 S.W. 1007 (1894); Smith v. Bell, 8 Tenn. 302 (1827); Remke v. Remke, 11 Tenn. App. 301 (1929).
109. See the excellent and comprehensive Annot., 17 A.L.R.2d 36 (1951).