INTRODUCTION

The wonders of the computer age over the past fifty years have made it possible for you, as a practicing paralegal, to complete your legal research tasks faster and with greater accuracy and efficiency. In fact, the former drudgery of doing legal research in a stuffy law library has now become an enjoyable, and even entertaining, experience that can be accomplished easily at home.

Each chapter from the corresponding textbook has a chapter review in this electronic study guide. The chapters are divided into two sections: Section One—Review Activities includes finding and reading court decisions (cases), accessing a website to obtain statutes including current federal and state tax laws, and locating assistance for drafting legal documents or an estate plan; and Section Two—Vocabulary Review helps you to learn and utilize the legal terminology and concepts essential to the practice of wills, trusts, and estate administration.

Often student assignments refer you to a website or to an actual case. The growth and development of the internet make it possible to quickly and accurately verify your sources that authenticate your research.

Because the American population is living longer, major changes in the utilization of legal services have occurred especially in the area of estate planning. Elder Law was unheard of twenty years ago. Today, wills, trusts, and estate planning sites are available on the internet and many professionals (financial advisers), in addition to attorneys, are offering estate planning advice. The advancement of computer technology has been so rapid that, while doing your own research, you may find other internet sites easier to use than those suggested and you may also find case law from your jurisdiction that better answers a question or solves a problem.

In addition to assignments in the study guide, your instructor may require other tasks or research, but you might want to use your acquired knowledge and training to prepare your own will and estate planning documents. For example, access http://consumer.pub.findlaw.com/nllgf/forms/132.html to find a sample will form you could use to draft your will. Also, a sample living will can be found at http://laussmart.lawinfo.com/documents/living_will.html if you are interested in having a living will. You can read the wills of several famous people at http://www.courttv.com/legaldocs/neusmakers/wills.

As technology changes and advances, the rules of ethics and the law will have to be established or change as well. For example, some conflicts that are currently unresolved are the issues surrounding ownership of frozen preembryos and in vitro fertilization concerns. Cases that address these issues are: A.Z. v. B.Z. 431 Mass. 150, 725 N.E.2d 1051 (2000), Litowitz v. Litowitz, 102 Wash. App. 934, 10 P.3d 1086 (2000), and Kass v. Kass, 235 A.D.2d 150, 663 N.Y.S.2d 581 (1997).

Tax legislation is constantly changing. For example, the federal estate tax has been revised and will be repealed in 2010. Caveat: For current federal estate tax rates and revisions, access http://www.irs.gov.

Good luck with your studies and have fun keeping up with the ever-changing law!

SHEPARDIZING YOUR WORK

Once you find a case or a statute on point that answers your estate planning issue, you will want to make sure the legal authority is still good law. Pocket parts and supplements to resources should always be checked, but that is not enough. All sources should be shepardized. Shepardizing will show how other courts have treated the case, and if laws have been changed.

When shepardizing a case, it is important to check both the official and unofficial cites for the case. If book volumes are available, carefully locate all of the necessary volumes. The front of each book will have a listing of materials your library should have. YOU MUST PULL ALL THOSE BOOKS AND CHECK YOUR CASE CITE IN EACH BOOK! The information contained in the Shepard’s Citation books is listed by book volume. Once you locate the volume, you need to find the appropriate page number and make sure your case has not been reversed or overruled. Of course you would want to make sure that there has been no negative treatment of your case, although positive information can be obtained from shepardizing as well. Also listed, will be other cases that have followed your case. These cases may add to your research and provide an even better case on point. The information contained on a page is abbreviated. At the beginning of each volume, you can find the abbreviations for the history and the treatment of the case. A Shepard's cite will also list citations where the case has been criticized, distinguished, explained, harmonized, and questioned.

Shepardizing a statute will show you how that law has been treated by the courts. Again, all necessary volumes must be pulled and checked.
The material contained in the Shepard’s Citation books is also available on CD-ROM. The correct CD
needs to be selected and inserted. When the case cite is typed, its history will appear on screen.
Whatever resources are available to you, be sure to check them all. The opposition in every case will be
doing the same and you will want to avoid the professional embarrassment (career suicide?) of providing bad
law to your supervising attorney or instructor.

HOW TO BRIEF A CASE

Several assignments in this electronic study guide refer to real cases. You may find it helpful, when reading
the cases, to brief them. Briefing cases is a topic given extensive treatment in legal research and legal writing
courses, but these introductory steps to briefs may prove helpful.

1. Identify the parties. Who is the plaintiff, the party bringing the lawsuit? Who is the defendant, the party
   being sued?
2. Ascertain the prior proceedings. What is the judicial history of this case?
3. Decide on key or material facts. A material fact or key fact is one that, if it were different, the court’s result
   would be different or it would not have been included in the court’s opinion.
4. Identify the issue. What is the legal question before the court? Stay away from such issues as, Will the
   plaintiff win? Will the appeal be successful? Rather, incorporate the key facts into the legal question. For
   example, is a will valid when the name of the executor has been erased? Is a holographic will valid when
   it was written by an alcoholic who had been drinking the day she wrote the will? There are many ways to
   write an issue, and there may be more than one issue in a case.
5. Identify the court’s holding and reasoning. How did the court reach its decision? What is that decision?

Many textbooks provide more extensive coverage to this topic. There are five point briefs and twelve
point briefs. Regardless of the number of points or parts you have in a brief, reading and analyzing cases
and looking for the parties, prior proceedings, facts, issue, reasoning, and holding will assist you as you
read and comprehend cases. It is helpful to write out a brief, and some cases take several readings to
understand.

The site at http://www.casenotes.com/how2brf.html is helpful.

To illustrate how to brief a case, read Trumbull County Bar Association v. Hanna et al., 684 N.E.2d 329
(1997 Ohio) and the following brief.

Parties

Trumbull County Bar Association, relator
Deiwerts, injured clients/public/victims of UPL
Roger D. Hanna, respondent
Estate Assurance, Inc. (EAI), respondent
Estate Counseling Associates, Inc. (ECA), respondent

Prior Proceedings

Complaint was filed against Hanna and Estate Assurance, Inc., alleging the unauthorized practice of law.
Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court held hearing and
determined that Hanna and ECA had engaged in the unauthorized practice of law.

Facts

Hanna, a financial planner, met with Deiwerts and advised them about estate planning and living
trusts. The Deiwerts knew that Hanna was not an attorney. The Deiwerts completed an estate analysis
form. Based on Hanna’s analysis, they were to receive two wills, two living wills, four deeds, and
registration documents for bank accounts and bonds. The documents and estate analysis were forwarded
to ECA and were to be reviewed by Boyle, a Pennsylvania lawyer, legal advisor, and director of ECA.
Documents were prepared and Hanna explained them to the Deiwerts and then assisted them in their
signing. The Board found that the documents were not properly witnessed and that the trust prepared
prevented the Deiwerts from using their home as collateral and from using their bank accounts. They had
to hire counsel to put their affairs in order. EAI purchased ECA after the incident. Parties stipulated ECA
had engaged in UPL.
Issue

Is a financial planner engaged in the unauthorized practice of law when he counsels clients about estate planning and trusts and obtains and helps execute estate planning documents like a will and trust?

Holding

Yes, such activities constitute the practice of law.

Reasoning

The Supreme Court held that Hanna was engaging in the practice of law. The court had held in earlier cases that the practice of law includes legal advice and counsel and the preparation of legal documents. Hanna, in conjunction with an out-of-state attorney, reviewed an estate planning analysis, told the clients what documents they needed, arranged for the preparation of the needed documents, and helped with executing the documents. These actions went far beyond financial planning advice; this was practicing law without a license.

The Board’s conclusion was adopted.

Case Study

80 Ohio St.3d 58
TRUMBULL COUNTY BAR ASSOCIATION
v.
HANNA et al.
No. 97–1021.

Supreme Court of Ohio.

The Trumbull County Bar Association, relator, charged in a complaint that in 1991, respondents, Roger D. Hanna of Youngstown, Ohio, and Estate Assurance, Inc. (“EAI”), a Pennsylvania corporation, entered into a joint venture to prepare and offer for sale documents constituting an inter vivos trust. Relator further alleged that in April, May, and June 1991, Hanna, who was not an attorney, advised Frederic and Georgeanna Deiwert of Niles, Ohio, that it would be desirable for them to have an inter vivos or “living trust.” Relators charged that on Hanna’s advice the Deiwerts paid Estate Counseling Associates, Inc. (“ECA”) for documents establishing an inter vivos trust and that Hanna answered questions about and supervised the execution of the documents by the Deiwerts.

Hanna filed an answer, stating that he was a financial planner, licensed in insurance and investment products, that he met with the Deiwerts to advise and implement a financial plan for them, and that any questions he answered were incidental to selling financial products to the Deiwerts. Hanna stated that the legal documents were prepared by a Pennsylvania attorney. EAI filed an answer stating that it had purchased the stock of ECA after the incidents described in relator’s complaint, that it has never engaged in trust counseling or preparation activities in Ohio, and that it never approved of ECA’s method of operation.

On October 28, 1996, the parties filed a stipulation with the Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court (“board”) that a now-deceased Pennsylvania attorney, William D. Boyle, who was not admitted in Ohio, was the legal advisor and director of ECA and established its procedures. Part of the fees paid by the Deiwerts to ECA in March and June 1991 was transmitted to Boyle for his legal work in preparing the trust documents. The owners and officers of ECA found that Boyle had not given good legal advice and in June 1991 dismissed him as counsel. EAI, formed in 1990, purchased ECA in early 1994, and since then ECA has not marketed estate-planning services in Ohio. EAI never approved, ratified, or continued ECA’s methods of operation as conducted in 1991. The parties stipulated that ECA, through Boyle, did engage in the unauthorized practice of law, but that EAI did not do so.

The board held a hearing on December 13, 1996, and found that after Hanna attended a seminar sponsored by ECA in 1990, he sold living trusts as a means to avoid probate, using ECA promotional materials and forms. In 1991, Hanna advised the Deiwerts about estate planning and the advantages of a living trust. On April 1, 1991, the Deiwerts completed a form which acknowledged that they retained the services of Hanna to assist them in estate planning, that they were aware that Hanna was not an attorney, and that they appointed ECA as their attorney-in-fact to do all things necessary in connection with estate
planning. They also completed an “estate planning analysis” form, which described Hanna as “Counselor” and “Reviewing Office Manager.” As part of the analysis, Hanna indicated that the Deiwerts were to receive two wills, two living wills, four deeds, two registration documents for their checking account and savings account, and one registration document for their municipal bonds. Hanna forwarded the estate-planning analysis and the Deiwerts’ payment to ECA, retaining $60 for himself. Boyle reviewed the documents. Although ECA told Hanna that Boyle would review the information submitted by Hanna and reject any applicant not suited for a living trust, neither the Deiwerts’ application nor any others submitted by Hanna were ever rejected. Hanna explained the documents prepared by ECA to the Deiwerts and assisted the Deiwerts in signing them.

The board found that, contrary to Hanna’s assurances, the *inter vivos* trust as written for the Deiwerts may not have been suitable for their needs, that contrary to the statement at the conclusion of each will, the witnesses were not present and did not observe the Deiwerts sign the wills, and that in operation the *inter vivos* trust as written precluded the Deiwerts from using their home equity as collateral and from using their checking account. The Deiwerts employed a local attorney to put their affairs in order.

The board concluded that Hanna gave legal advice and counsel to the Deiwerts and thus was engaged in the unauthorized practice of law. The board also determined that ECA, but not EAI, had engaged in the unauthorized practice of law.

Paul W. Newendorp and Robert F. Burkey, Warren, for relator.

Lynn A Sheftel, Niles, for respondent Roger D. Hanna.

Mark H. Aultman, Columbus, for respondent Estate Assurance, Inc.

PER CURIAM.

In *Land Title Abstract & Trust Co. v. Dworken* (1934), 129 Ohio St. 23, 28, 1 O.O. 313, 315, 193 N.E. 650, 652, we held that the practice of law “includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured * * *.” In *Green v. Huntington Natl. Bank* (1965), 4 Ohio St.2d 78, 33 O.O.2d 442, 212 N.E.2d 585, we held that a bank’s act of providing “specific legal information in relation to the specific facts of a particular person’s estate” constituted the practice of law and should be enjoined. In *Green*, we specifically declared that comments or advice that a bank might give on the form of investments or the management of assets did not constitute the practice of law.

In this case, Hanna, in conjunction with a non-Ohio corporation and an attorney not admitted in Ohio, reviewed an “estate planning analysis” completed by the Deiwerts, advised them that an *inter vivos* trust would be suitable for their needs, arranged the preparation of the trust and related documents, including wills and conveyances, and supervised their execution.

Hanna’s actions went far beyond advice to the Deiwerts with respect to the form of their investments and management of their assets. Hanna advised the use of a particular estate-planning device and then, rather than recommending that the Deiwerts contact their attorney about employing an *inter vivos* trust, he personally arranged for the review of the information and the preparation of the documents. By so doing, Hanna, a nonlawyer, engaged in the practice of law. Gov.Bar R. VII(2)(A) provides that “[t]he unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio * * *.” Hanna, therefore, engaged in the unauthorized practice of law.

Admittedly, an *inter vivos* trust may be useful as an estate-planning device. Unfortunately for the Deiwerts, the device was both inappropriate and ineffective in this case. Hanna gave erroneous advice about the effect of an *inter vivos* trust on estate taxes, arranged for the preparation of trust documents which needlessly complicated the Deiwerts’ daily life, and failed to provide for proper witnessing and acknowledgments of the documents that were prepared.

We adopt the board’s conclusion that respondent EAI did not engage in the unauthorized practice of law. Having concluded that respondent Hanna did engage in the unauthorized practice of law, we hereby enjoin Hanna from any further activity involving the counseling of persons with respect to their legal rights and the preparation of legal instruments and documents to secure the legal rights of any person.

All costs and expenses of this action are taxed to respondent Hanna.

Judgment accordingly.

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER, COOK and LUNDBERG STRATTON, J.J., concur.
CHAPTER 1

THE PURPOSE AND NEED FOR A WILL

SECTION ONE

Review Activities

1. You have just recently graduated from college, and you have your paralegal degree. The law firm of Daniel, Duncan, and Morris—a five-attorney firm that has a general practice—has hired you. Your supervising attorney, Jordan Morris, handles real estate matters for the firm, but he is trying to expand his area of practice by including estate planning and estate administration matters. Attorney Morris wants you to prepare the following:
   a. An internal checklist that will be used by the attorney to ascertain if a client needs a will.
   b. A brochure detailing the advantages of having a will.
2. Assume a client calls your office that day after his initial estate planning interview and asks to speak with you. The client cannot remember what a letter of instructions is. How would you respond? Ethically, can you explain the advantages of having a letter of instructions? Is this the practice of law?
3. Access your state's statutes via the internet. Locate and list all state statutes that govern making a will. A helpful website is www.findlaw.com.
4. Has your state adopted the Uniform Probate Code? Access more information about the UPC at www.law.cornell.edu/uniform/probate.html. Has the state of Alaska adopted the Code?
5. Is your supervising attorney liable to intended beneficiaries when the firm's client dies without having executed his estate planning documents? Read what the court held in Krawczyk v. Stingle, 208 Conn. 239, 543 A.2d 733 (1988).

SECTION TWO

Vocabulary Review

Internet Assignments

1. Define estate planning in your own terms. Compare your definition with the definition found at www.law.cornell.edu/topics/estate-planning.html.
2. Define ten key terms from Chapter 1 using the law dictionary at www.dubaime.org.

True/False

1. T F Statutes are laws passed by courts.
2. T F Another name for a will is trust.
3. T F A testator is a man who makes a will and/or dies with a valid will.
4. T F A handwritten will is also called a holographic will.
5. T F Persons who are entitled by statute to receive any gift from an intestate are called next of kin.
6. T F Ambulatory means subject to change.
7. T F A codicil is the same thing as a letter of instructions.
8. T F A legatee is always the person who receives the residuary estate.
SECTION THREE
Case Study

208 Conn. 239
Josephine KRAWCZYK, et al.
v.
Kathleen D. STINGLE, et al.
Nos. 13313, 13314.
Supreme Court of Connecticut.

PETERS, Chief Justice.

The dispositive question in this appeal is whether an attorney’s negligent failure to arrange for timely execution of estate planning documents permits the intended beneficiaries of the estate to pursue a cause of action for legal malpractice. The plaintiffs, Josephine Krawczyk, Stella K. Rabiega, Genevieve Krawczyk, Helaine Kania, Francis Krawczyk, Edmund Krawczyk and Henry Taylor, relatives of the decedent, Joseph C. Krawczyk, brought suit against the defendants, Kathleen D. Stingle and Trantolo & Trantolo, P.C., for legal malpractice. The gravamen of their complaint was that the defendants, who had been engaged by the decedent to prepare documents for the disposition of his estate, had been negligent in failing to provide them to the decedent for execution prior to his death. At the conclusion of the plaintiffs’ evidence and again at the conclusion of all the evidence, each defendant filed a motion for a directed verdict, which was denied. After trial, a jury returned a verdict for the plaintiffs, awarding them $65,000 in damages. Each defendant thereafter filed a motion to set aside the verdict and for judgment notwithstanding the verdict. The trial court denied the motions and rendered a judgment against the defendants in the amount of $65,000, from which they appeal. We find error.1

1. The plaintiffs cross appeal from the trial court’s denial of their motion to set aside the verdict as to the issue of damages and for an order of additur. Our conclusion that under the circumstances the defendants owed no duty to the plaintiffs renders consideration of the cross appeal unnecessary.
account identification numbers and a legal description of his real property.

On Friday, March 11, 1983, when the decedent delivered some of the necessary information to Stingle’s office, Stingle’s secretary explained to him what other documentation was still required for the completion of the trust instruments. The decedent did not, however, deliver the additional information until the scheduled meeting of Tuesday, March 15. As a result, the trust documents were not ready to be executed at that time. Stingle and the decedent accordingly agreed to meet the following Saturday, March 19, to execute the documents. During the course of the March 15 meeting, the decedent instructed Stingle to delete one of his brothers from the trust instruments and to make some further alterations.

On Thursday, March 17, 1983, Stingle received a phone call from the plaintiff Genevieve Krawczyk, the decedent’s sister. Genevieve Krawczyk informed Stingle that, because the decedent had suffered a massive heart attack and was in the intensive care unit at Hartford Hospital, the decedent would be unable to keep his appointment for that Saturday. Stingle did not inquire further as to the decedent’s condition nor did she proceed, after the conversation, to complete the trust instruments.

The next afternoon, Stingle received another call from Genevieve Krawczyk, who told her that the decedent was very ill and instructed her to bring the trust instruments to the hospital. Stingle spent the next two hours completing the preparation of the documents. Upon her arrival at the hospital, however, she was informed by a physician that she would be unable to see the decedent due to his deteriorating condition. He died shortly thereafter without having signed the documents.

During trial, the plaintiffs called James R. Greenfield, an attorney, as their expert witness to testify concerning the appropriate standard of care. In his view, Stingle’s conduct had deviated from the appropriate standard on two occasions: During the phone conversation of Thursday, March 17, Stingle should have inquired whether the decedent was in any condition to sign the documents and whether it was possible for her to come to the hospital to have him execute them; and after the conversation of Friday, March 18, she should either have brought hand-written documents to the hospital for the decedent’s signature or alternatively have prepared a simple will that she could have presented to him for his immediate signature.

The defendants’ expert witness, attorney William H. Wood, Jr., testified that Stingle’s conduct conformed to the standard of care ordinarily required of an attorney under the circumstances. On the question of causation, he testified that implementation of the trust plan would have required further steps to be taken subsequent to the execution of the trust instruments themselves. Furthermore, he emphasized that an attorney had a duty in preparing estate planning documents to make sure that his or her client understood their meaning and legal significance.

On appeal, the defendants claim that the trial court erred in: (1) denying their motions for a directed verdict and for judgment notwithstanding the verdict because under the circumstances the defendants did not have a duty to the plaintiffs; (2) denying their motions for a directed verdict and for judgment notwithstanding the verdict because there was no evidence that Stingle’s conduct caused the plaintiffs’ alleged losses; and (3) refusing to charge the jury that expert testimony was necessary to prove causation. In addition, the defendant Trantolo & Trantolo, P.C., argues separately that the court erred in allowing, over objection by the defendants, a hypothetical question propounded to the plaintiffs’ expert. Because we agree with the first ground for reversal raised by the defendants, we need not consider the others.

At the outset, we note the appropriate standard of review. In considering the trial court’s denial of a motion for directed verdict, we view the evidence in the light most favorable to the prevailing party. Mather v. Griffin Hospital, 207 Conn. 125, 130, 540 A.2d 666 (1988). Nevertheless, a verdict will be set aside and judgment directed “if we find that the jury could not reasonably and legally have reached their conclusion.” Id., quoting Bound Brook Assn. v. Norwalk, 198 Conn. 660, 667, 504 A.2d 1047, cert. denied, 479 U.S. 819, 107 S.Ct. 81, 93 L.Ed.2d 36 (1986). If, as a matter of law, the defendants did not owe a duty to the plaintiffs under the circumstances of this case, then the trial court was required to direct a verdict in the defendants’ favor.

As a general rule, attorneys are not liable to persons other than their clients for the negligent rendering of services. A number of jurisdictions have recognized an exception to this general rule when the plaintiff can demonstrate that he or she was the intended or foreseeable beneficiary of the attorney’s services. Mozzochi v. Beck, 204 Conn. 490, 499, 529 A.2d 171 (1987); see 3 F. Harper, F. James & O. Gray, The Law of Torts (2d Ed.1986)
§ 18.6, pp. 725–32; R. Mallen & V. Levit, Legal Malpractice § 80, pp. 156–60, and § 622, pp. 778–82. An attorney alleged to have erred in the preparation of a will may be held liable to the intended beneficiary of the will under either a tort or a contract theory of liability. Stowe v. Smith, 184 Conn. 194, 199, 441 A.2d 81 (1981). Accordingly, courts have held that the intended beneficiary has a cause of action against an attorney who failed to draft a will in conformity with a testator's wishes; see, e.g., Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685, 15 Cal.Rptr. 821 (1961), cert. denied, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962); Needham v. Hamilton, 459 A.2d 1060 (D.C.App.1983); Ogle v. Fuiten, 112 Ill.App.3d 1048, 68 Ill.Dec. 349, 445 N.E.2d 1344 (1983), aff'd, 102 Ill.2d 356, 80 Ill.Dec. 772, 466 N.E.2d 224 (1984); failed to supervise the proper execution of a will; see, e.g., Licata v. Spector, 26 Conn.Sup. 378, 225 A.2d 28 (1966); Succession of Killingsworth, 292 So.2d 536 (La.1973); Auric v. Continental Casualty Co., 111 Wis.2d 507, 331 N.W.2d 325 (1983); or failed to advise a client of the consequences of not revising a will; see, e.g., McAbee v. Edwards, 340 So.2d 1167 (Fla.App.1976); or of using one type of estate planning instrument. See, e.g., Bucquet v. Livingston, 57 Cal.App.3d 914, 129 Cal.Rptr. 514 (1976). The question before us is whether such liability should be further expanded to encompass negligent delay in completing and furnishing estate planning documents for execution by the client.

[1] Determining when attorneys should be held liable to parties with whom they are not in privity is a question of public policy. 3 F. Harper, F. James & O. Gray, supra, § 18.6, p. 730. In addressing this issue, courts have looked principally to whether the primary or direct purpose of the transaction was to benefit the third party. See, e.g., Needham v. Hamilton, supra, 1062–63; Pelham v. Griesheimer, 92 Ill.2d 13, 21, 64 Ill.Dec. 544, 40 440 N.E.2d 96 (1982). Additional factors considered have included the foreseeability of harm, the proximity of the injury to the conduct complained of, the policy of preventing future harm and the burden on the legal profession that would result from the imposition of liability. Lucas v. Hamm, supra, 56 Cal.2d at 588, 364 P.2d 685, 15 Cal.Rptr. 821; Auric v. Continental Casualty Co., supra, 111 Wis.2d at 514, 331 N.W.2d 325. Courts have refrained from imposing liability when such liability had the potential of interfering with the ethical obligations owed by an attorney to his or her client. See, e.g., Parnell v. Smart, 66 Cal.App.3d 853, 387–38, 136 Cal.Rptr. 246 (1977) (in adversary proceedings, attorney for insurance carrier owed no duty to insured); Pelham v. Griesheimer, supra, 92 Ill.2d at 22–23, 64 Ill.Dec. 544, 40 N.E.2d 96 (attorney representing parent in custody dispute owed no duty to child); Clagett v. Dacy, 47 Md.App. 23, 29–30, 420 A.2d 1285 (1980) (attorneys conducting foreclosure sale owed no duty to highest bidders); see also R. Mallen & V. Levit, supra, § 80, p. 158. We conclude that the imposition of liability to third parties for negligent delay in the execution of estate planning documents would not comport with a lawyer’s duty of undivided loyalty to the client.

A central dimension of the attorney-client relationship is the attorney’s duty of “[e]ntire devotion to the interest of the client.” G. Sharswood, An Essay on Professional Ethics (5th Ed.1896) p. 78; see Rules of Professional Conduct 1.7; and see Mozzi v. Beck, supra, 204 Conn. at 497, 529 A.2d 171. This obligation would be undermined were an attorney to be held liable to third parties if, due to the attorney’s delay, the testator did not have an opportunity to execute estate planning documents prior to death. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney’s primary responsibility to ensure that the proposed estate plan effectuates the client’s wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client’s estate, where the testator’s testamentary capacity and the absence of undue influence are often central issues. See, e.g., Stanton v. Grigley, 177 Conn. 558, 564–65, 418 A.2d 923 (1979).

[2] The facts of this case illustrate the serious potential for conflicts of interest inherent in such situations. The record suggests that, in making provisions for the final disposition of his estate, the decedent had two separate concerns: that his estate pass to certain relatives; and that it not go through probate. To accommodate both concerns, he chose to transfer his property through a relatively complex trust plan rather than by executing a simple will. Under one theory of liability espoused by the plaintiffs, when Stingle became aware that the decedent was gravely ill, she should have abandoned completion of the trust instruments in order to furnish a will for the decedent to sign. Thus, according to them, in order to fulfill her duty to the plaintiffs, she was required to encourage the decedent to forego his desire to avoid probate. The record further discloses that, approximately one week before his death, the decedent made some changes in the
distribution of his estate, in particular omitting one brother whom he had previously included. Had Stingle been concerned about liability to the intended beneficiaries of the estate, she might have resisted making the requested changes, fearing that the ensuing delay would make her vulnerable to a claim of malpractice. Finally, a rush to execution of the estate plan would have put pressure on Stingle to urge the decedent to sign whatever documents she had had time to prepare without further inquiry into the effect of his illness on his testamentary capacity at the time of their execution. Prophylactic principles of public policy counsel against rules of liability that promote such conflicts of interest.

There is error, the judgment is set aside and the case is remanded with direction to render judgment for the defendants in accordance with their motions for a directed verdict.

In this opinion the other Justices concurred.
CHAPTER 2

THE CONCEPT OF PROPERTY RELATED TO WILLS, TRUSTS, AND ESTATE ADMINISTRATION

SECTION ONE

Review Activities

1. Your supervising attorney wants you to create a worksheet that can be used by clients to list all their assets, both real and personal property. Then take the sample worksheet and list all of your assets, or give the worksheet to a friend who is not a paralegal student or involved in the legal profession and have that person complete the form. Is your form self-explanatory? User friendly?

2. List all the fixtures in your home.

3. Locate your state’s intestate statutes. On the internet you can access your state’s laws at www.findlaw.com. Is your state a community property state? How about a neighboring state?

4. What are the advantages and disadvantages of owning property as a joint tenant? Read the material at www.volinlaw.com regarding the dangers of owning property in joint tenancy.

5. Interview a married couple. Make a listing of their property and how it is owned. Is all property community? Separate? Jointly owned?

6. Some states require specific language when a joint tenancy with a right of survivorship is being created. If clients own a real property as “joint tenants,” does that adequately create a right of survivorship? Read Hoover v. Smith, 248 Va. 6, 444 S.E.2d 546 (1994).

SECTION TWO

Vocabulary Review

Internet Assignment

Access www.living-trusts.net/intro-living-trusts.html and define the following: joint tenancy, tenancy in common, per stirpes; and personal property.

Deed Phrases

1. If a deed read as follows, how would the parties own the real property? What interest does each person have? Answer according to your state laws.
   a. “To Dick James and his wife Jane James.” Assume they are married when they take the deed.
   b. “To Dick James and John James.” Assume Dick and John are brothers when they take the deed.
   d. “To Dick James for life, then the remainder to his son Jordan James.” Assume Dick and Jordan are father and son.
   e. “To Dick James for the life of Kelsey James, then to his son Jordan James.”

2. If Marilyn deeds 20 acres in northern Iowa to Joe, who is the grantor? Grantee? Does Joe have a life estate? Explain.
Susan M. Shoemaker HOOVER, et al.

v.

David Martin SMITH, et al.

Record No. 930853.

Supreme Court of Virginia.


One grantee's heirs filed bill of complaint as to whether deed conveying land to grantees “as joint tenants, and not as tenants in common” created an estate with survivorship. The Circuit Court, Rockingham County, Dennis L. Hupp, J., held that deed created estate with survivorship. Appeal was taken. The Supreme Court, Carrico, C.J., held that deed did not create an estate with survivorship. Reversed and remanded.

1. Joint Tenancy

Deed conveying land to grantees “as joint tenants, and not as tenants in common” did not create an estate with survivorship statute required that intention to create survivorship be made manifest and deed did manifest such an intent as word survivorship was never mentioned nor was there any statement to the effect that the part of one dying should then belong to the other and there did exist such an estate as joint tenancy without survivorship. Code 1950, §§ 55–20, 55–21.

2. Joint Tenancy

To satisfy statutory requirement that survivorship estate be made manifest, parties need only use language that passes a simple test, one inherent in the meaning of the word “manifest” as being obvious to the understanding, evident to the mind, not obscure obscured, hidden, and synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident. Code 1950 § 55–21.

See publication Words and Phrases for other judicial constructions and definitions.

* * * * *

C. Waverly Parker, Stanardsville, for appellants.

Richard A. Baugh, Harrisonburg, for appellee Shelby J. Moubray, a/k/a Shelby Mowberry.

Benjamin H. Carr, Jr., Broadway, for appellees David Martin Smith and Vivian Secrist Smith.

No brief or argument on behalf of appellants Alvin Leon Shoemaker, et al.

Present: All the Justices.

CARRICO, Chief Justice.

[1] The question for decision in this case is whether a deed conveying land to grantees “as joint tenants, and not as tenants in common” creates an estate with survivorship. The trial court answered the question in the affirmative. Finding that the trial court erred, we will reverse.

The question arose from a deed dated November 1, 1928, conveying to Add Shoemaker and Bessie Shoemaker, his wife, one acre of land on Gap Road, near Peak Mountain, in Rockingham County. The deed contained this provision:

It is hereby mutually understood and agreed, that the grantees herein named are to have and to hold the said land and tenements as joint tenants, and not as tenants in common.

Add Shoemaker died intestate in 1951, survived by his wife, Bessie, and several children. Bessie passed away in 1984. During her lifetime, but subsequent to Add’s death, she conveyed to Wilmer A. Shoemaker, one of her sons, what purported to be the entire interest in a 0.542-acre portion of the land she and Add Shoemaker had acquired by the 1928 deed.

Wilmer died testate some time before 1988 and, in his will, devised the 0.542-acre tract to Shelby Jean Moubray. By deed dated January 28, 1988, Moubray conveyed the tract to David Martin Smith and Vivian Secrist Smith.

On February 19, 1992, the complainants, Susan M. Shoemaker Hoover, Catherine G. Shoemaker Smith, Sarah P. Shoemaker Pennington, and Margie C. Shoemaker Hoover (collectively, the Hoovers), all children of Add and Bessie Shoemaker, filed a bill of complaint against Alvin Leon Shoemaker, Nellie Craun, and Charles Shoemaker, also children of Add and Bessie Shoemaker. Named as defendants in addition were Shelby Moubray and David and Vivian Smith (collectively, the Smiths), the parties to the 1988 deed.

The bill alleged that by virtue of the provisions of Code §§ 55–20 and –21, infra, and the language of the 1928 deed, Add and Bessie Shoemaker became “joint tenants of such real estate having only those rights of a tenant in common” and, accordingly, “each . . . obtained by such conveyance a one-half moiety in such real estate.” As a result, it was alleged, upon the death of Add Shoemaker, his one-half moiety passed by intestate
succession to his surviving children, who had never conveyed away any interest in the moiety. The bill alleged that the real estate was not susceptible of convenient partition in kind and prayed for its sale, with a division of the proceeds among those entitled as their respective interests may appear.

Shelby Moubray filed a demurrer to the bill of complaint, and David and Vivian Smith demurred separately. In each demurrer, it was alleged that the bill of complaint failed to state a cause of action because, as a matter of law, the 1928 deed established in Add and Bessie Shoemaker a joint tenancy with the right of survivorship. After argument, the trial court sustained the demurrers and, in a final decree, dismissed the case with prejudice as it concerned the 0.542-acre tract conveyed by Moubray to David and Vivian Smith in 1988. We awarded the Hoovers this appeal.

Code §§ 55–20 and –21 are at the heart of the controversy. Formerly §§ 5159 and 5160 of the Code of 1919, respectively, they read now as they did at the time of the 1928 deed, except for some inconsequential amendments added to § 55–20 in 1990. Section 55–20 provides as follows:

§ 55–20. Survivorship between joint tenants abolished.—When any joint tenant dies, before or after the vesting of the estate, whether the estate is real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts or distribution, as if he had been a tenant in common. And if hereafter any estate, real or personal, is conveyed or devised to a husband and his wife, they shall take and hold the same by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance.

Section 55–21 provides as follows:

§ 55–21. Exceptions to § 55–20.—Section 55–20 shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of or on any contract with two or more one of whom dies.

(Emphasis added.) The crucial inquiry, therefore, is whether it manifestly appears from the tenor of the 1928 deed that it was intended Add and Bessie Shoemaker would hold the one-acre tract with the right of survivorship. The Hoovers maintain that the deed does not manifest an intention to create a survivorship estate; the word “survivorship” is never mentioned, nor is there any statement to the effect that the part of the one dying should then belong to the other.

On the other hand, the Smiths argue that the statement in the deed, “and not as tenants in common,” does manifest the necessary intention to establish a survivorship estate. The Smiths point out that, at common law, three characteristics distinguished joint tenants from tenants in common, namely, (1) joint tenants were required to convey to each other by release rather than deed, (2) they could only sue and be sued jointly, and (3) they enjoyed the right of survivorship.*

The Smiths argue that “all these points of the common law distinction of survivorship, the only meaningful reason for parties to give us directions and we are obligated to follow them.”

We are not obligated to follow directions, however, that are unclear, that are derived from language that is susceptible of more than one meaning. It is true that “no particular words are necessary” to create a survivorship estate. Wallace v. Wallace, 16 Va. 216, 229, 190 S.E. 293, 298 (1937). Also it may well be that the parties to the 1928 deed did intend to create such an estate.

However, they used uncertain language to accomplish their purpose. And for all that the language tells us, the parties may have had a different intention. There still does exist such an estate as a joint tenancy without survivorship, and if the parties, for whatever reason, desired to create such an estate, they might have thought they could accomplish that purpose with precisely the same language they employed in the 1928 deed.

[2] Code § 55–21 requires only that the intention to create a survivorship estate be made manifest. To satisfy this requirement, parties need only use language that passes a simple test, one inherent in the meaning of the word “manifest.” According to Black’s Law Dictionary 962 (6th ed. 1990), manifest

*The first of these common law distinctions, conveyance by release, has been abolished by statute. See Code §§ 55–5 and 55–6.
means “obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident.” We think the language of the 1928 deed wholly fails this test and is insufficient, as a matter of law, to create a survivorship estate.

Accordingly, we will reverse the judgment of the trial court and remand the case for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.
SECTION ONE

Review Activities

1. Your supervising attorney, Jordan Morris, wants to create a web page devoted to estate planning and administration. He wants you to prepare a web page outline. Please include the necessary information about the services your office can offer to a potential estate client. A webmaster will create the page, but you need to furnish the content to him.

2. Prepare an easy-to-read brochure that will be distributed to clients who serve as a personal representative. Detail the responsibilities of a personal representative.

3. A few days after an initial interview, you receive a telephone call from a client who is having a will prepared by your office. The client has substantial assets, but few relatives. The client has recently relocated to your state, and she has no relatives in this state. During the initial interview, she was unable to name a personal representative. She left the interview, saying she would contact your office within a few days after she had given careful consideration to the matter of naming a personal representative. During this current telephone call, she states that she was so impressed with your professionalism that she wants you to be the named personal representative in her will. What will be your response? How would you respond if she said she wanted your supervising attorney to serve?


5. Assume you are asked to train a new paralegal in the area of estate administration who has no prior estate experience. All his previous work experience has been in the area of bankruptcy. Prepare an outline of the routine duties you perform from the first estate planning interview through the closing process of estate administration.


SECTION TWO

Vocabulary Review

Fill in the Blank

1. The __________________________ is a person or corporate institution appointed by the proper court to administer the estate of a decedent who died with or without a will.

2. __________________________ will be given to the executor by the proper court, allowing the executor to carry out the administration of the decedent’s estate according to the terms of the will.
3. An administrator receives _______________ _____ _______________ from the court, allowing the adminis-
trator to properly carry out the administration of the intestate’s estate.
4. A ________ system greatly assists in the administration of an estate since it will list all important dates
and deadlines involved in estate administration.
5. The __________ is an officer of the probate court who is in charge of keeping records and at times acts
on behalf and in place of the court.
6. __________ is the term used for the procedure by which a document is presented to the court to confirm
it is a valid will.
7. Litigation filed to overturn a decedent’s will is called a __________ _______________.
8. __________ means legal home, and __________ means a temporary place of dwelling.
9. The state in which the decedent’s legal home is located is called the _________ state.
10. _________ is the geographical place where a court having jurisdiction may hear and decide a case.

SECTION THREE
Case Study

240 Mich.App. 462
Virginia BULLIS, Plaintiff–Appellant,

v.
Walter J. DOWNES, Defendant–
Appellee.
Docket No. 206276.

Court of Appeals of Michigan.
Decided April 11, 2000, at 9:00 a.m.
Released for Publication June 22, 2000.

PER CURIAM.

In this legal malpractice claim, plaintiff appeals
as of right from an order granting defendant’s
motion for summary disposition under MCR
2.116(C)(8). We reverse and remand.

This lawsuit is based on the estate planning
services defendant provided to the decedent,
E. Bernadette Timm. Plaintiff and her two brothers,
Charles Timm and Michael Timm, are the adult
children of the decedent. In June 1994, defendant
drafted a will and a revocable trust pursuant to the
decedent’s instructions. The decedent’s will and trust
were first executed on June 16, 1994. However,
because the decedent was unhappy with the
appearance of her signatures on those documents,
defendant prepared another will and trust agreement,
which the decedent signed on July 29, 1994. On the
same day, defendant also had the decedent execute
two deeds, transferring the decedent’s home, located
in Lyons, Michigan, and her cottage, located in
Kalkaska, Michigan, to the trust.

Under the terms of the will, plaintiff was to
receive both the Lyons and the Kalkaska properties.
The decedent’s remaining real property, a Florida
townhouse, was devised to Charles Timm. The will
also contained a pour-over provision, which stated
that the residue of the decedent’s estate was to be
delivered to plaintiff as successor trustee of the
revocable trust. After the decedent’s death, all trust
property was to be divided equally between the
decedent’s three children, unless otherwise provided
for in the trust. The trust did not contain any
provision addressing how any real property was to
be distributed.

After the decedent’s death, plaintiff’s brothers
filed a petition in the probate court seeking to have
plaintiff removed as personal representative of the
estate. The brothers alleged that plaintiff had
indicated the intent to convey the Lyons and
Kalkaska properties to herself, which the brothers
claimed was contrary to the express terms of the
trust. The brothers argued that because the two
parcels had been previously deeded to the trust,
they should be equally divided between the
decedent’s three children. During the hearing
regarding on the brothers’ petition, defendant
testified that it was always the decedent’s intent that
plaintiff receive the Lyons and Kalkaska properties.
He stated that the two parcels were deeded to the
trust in order “to avoid . . . the Probate Court getting
involved and so that it would pass through the trust,
rather than creating a joint tenancy, or gifting during
her lifetime.” Defendant also testified that when he
drafted the trust, he believed that the two parcels
could be conveyed to plaintiff pursuant to the
following provision:

1. Plaintiff’s brothers also alleged certain other
irregularities that are not part of the appeal.
The Trustee is authorized, but not required, to pay directly to the Settlor's estate from the principal of the trust estate, such amounts as may be needed to pay all or any part of Settlor's funeral and cremation expenses, debts and legally enforceable claims against the Settlor or Settlor's estate, reasonable expenses of administration of Settlor's estate, gifts provided for in Settlor's Last Will and Testament, and any allowances by court order for those dependent upon Settlor.

When asked by plaintiff why he did not specify in the trust that the decedent's real property should be distributed according to the terms of the will, defendant responded, "I—hindsight, I guess, is always twenty/twenty. The provisions of the will were clear .... Also there's [sic] other references within the trust agreement to the fact that the provisions of the will are to be adhered to first."

Eventually, plaintiff and her brothers settled their dispute. According to the terms of their agreement, the Lyons property was donated to St. Peter and Paul Catholic Church in Ionia, Michigan, the Kalkaska property was given to plaintiff, and the Florida property was given to both the brothers. Plaintiff then sued defendant, claiming that as a result of defendant's negligent handling of the estate, gifts provided for in the trust estate, such amounts as may be needed to pay all or any part of Settlor's funeral and cremation expenses, debts and legally enforceable claims against the Settlor or Settlor's estate, reasonable expenses of administration of Settlor's estate, gifts provided for in Settlor's Last Will and Testament, and any allowances by court order for those dependent upon Settlor.

In Mieras, our Supreme Court held "that beneficiaries named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by nature of the beneficiary's third-party beneficiary status." Mieras, supra at 308, 550 N.W.2d 202 (opinion by Boyle, J.). Recognizing that the imposition of such a duty ran counter to the general rule that ""an attorney will be held liable for . . . negligence only to his client,"" id. at 298, 550 N.W.2d 202, the Court indicated that this duty would be "narrowly circumscribed. . . ." Id. at 302, 550 N.W.2d 202. "The duty owed to named beneficiaries," the Court observed "only requires the attorney to draft a will that properly effectuates the distribution scheme set forth by the testator in the will." Id.

The discussion in Mieras was framed in terms of examination of a will simply because the only document involved in that case was a will. We do not take this to mean, however, that the rule of Mieras is only applicable when the document at issue is a will. Given the realities of modern estate planning, with the proliferating use of alternative methods of estate disposition, we see no reason to deny third-party standing to those beneficiaries identified in these alternative instruments. The reasons that support extending standing to beneficiaries of a will apply with equal force in such situations. We believe this is also true even when the instruments at issue are will substitutes. See In re Estate of Davidson, 177 Misc.2d 928, 929–931, 677 N.Y.S.2d 729 (Surrogate’s Ct.1998); Mann v. Cooke, 624 So.2d 785, 786, n. 1 (Fla.App., 1993).

[1] Indeed, given that the modern estate plan often involves several interlinked modes of distribution, we conclude that it is better to speak of a third-party beneficiary’s standing as having arisen out of the individual’s status as a named beneficiary in a decedent’s overall estate plan. See Mieras, supra at 299, 550 N.W.2d 202 (observing that pursuant to “the named beneficiaries’ status as third-party beneficiaries . . ., the attorney also owes the beneficiaries a tort-based duty to draft the documents with the requisite standard of care”) (emphasis added). After all, the contractual promise

2. Plaintiff also claimed to have lost other property the decedent had wanted her to receive. For purposes of this appeal, the only property at issue is the Lyons property.
between an attorney and a decedent that underlies a negligence action is the promise to establish a testamentary scheme by which the decedent’s intended disposition of property will be accomplished. That might entail the drafting of a single testamentary document, or it might require the establishment of a more complex testamentary design.

[2] The Court in Mieras also took great pains to explain that extrinsic evidence is not to be relied on in a negligence cause of action brought by a named beneficiary against the attorney who drafted a will. In fact, the Court observed that not only is extrinsic evidence not to be used “to prove that the testator’s intent is other than that set forth in the will,” id. at 303, 550 N.W.2d 202, but it also implied that extrinsic evidence should not be used to establish that the testator’s intent has been frustrated by the attorney’s drafting of the will, id. at 303–304, 550 N.W.2d 202. When the estate plan at issue involves more than one instrument, the Mieras prohibition on the use of extrinsic evidence means that standing is limited to those third-party beneficiaries who can establish that the decedent’s intent as expressed in the overall estate plan has been frustrated by the attorney who drew up that plan.

[3] The question then becomes one of identifying those instruments that make up a decedent’s estate plan. We believe it is clear under the circumstances of the case before us that the Timm revocable trust was an integral part of the decedent’s estate plan. “The revocable trust is a valid will substitute.” Haskell, Preface to Wills, Trusts & Administration (2d ed., 1994), p. 126. Although not testamentary in nature, the decedent’s trust functions essentially as a testamentary instrument. In re Estate of Tisdale, 171 Misc.2d 716, 719, 655 N.Y.S.2d 809 (Surrogate’s Ct.1997) (“[T]o consider a revocable trust as a traditional instrument fails to recognize that it actually functions as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor’s property.”). Indeed, the decedent’s testamentary scheme cannot be fully understood unless the revocable trust is examined.

[4] We also believe that contemporaneously executed instruments that transfer property into a revocable trust in order to effectuate a decedent’s intended disposition of estate property are part and parcel of the estate plan. See In re Estate of Crooks, 266 Ill.App.3d 715, 719–721, 202 Ill.Dec. 861, 638 N.E.2d 729 (1994); In re Estate of Smith, 256 Cal.App.2d 496, 498, 64 Cal.Rptr. 295 (1967). Such instruments are executed so that the transferred property will pass to the intended beneficiaries under the terms of the trust, free of court supervision. In defendant’s words, the goal is “to avoid . . . the Probate Court getting involved.” Accordingly, examining the Lyons deed in order to prove both the decedent’s intent and frustration of that intent is not a reference to extrinsic evidence.

[5] We recognize that situations will arise where there will be some question whether a transferring instrument like a deed was actually a contemporaneous document executed in order to effectuate the decedent’s intent with respect to the overall estate. However, in the case before us there is no doubt that the deed, which was executed on the same day as the will and revocable trust, was drafted with the intent of effectuating the decedent’s distributive design. Defendant himself testified that the deed was a part of the decedent’s overall estate plan. We see no good reason to turn a blind eye to defendant’s own sworn admissions regarding the purpose of the deed. We stress that we are not expressing any opinion regarding the relative merits of plaintiff’s case. We only conclude that plaintiff has pleaded a legally sufficient claim of legal malpractice.5

Accordingly, we conclude that the trial court erred in granting defendant summary disposition on the basis of MCR 2.116(C)(8) because plaintiff has stated a claim upon which relief can be granted.

Reversed and remanded. We do not retain jurisdiction.

5. We state no opinion regarding whether the error in this case occurred in the drafting of the deed itself or in the failure to include in the trust a provision stating that the provisions of the will must be followed by the trustee.
CHAPTER 4

THE LAW OF SUCCESSION: DEATH TESTATE OR INTESTATE

SECTION ONE

Review Activities

1. You are an employee of Daniel, Duncan, and Morris, a five-attorney firm with a general practice. Your supervising attorney, Jordan Morris, is attempting to increase his estate practice. Another attorney in the firm, Victoria Clark, handles only domestic matters. Mr. Morris has decided that he wants you to prepare a draft of a letter that will be sent to all of Ms. Clark’s divorce clients advising that they should consider revising their wills since their marital status has recently changed. Prepare a draft of this form letter. Is this letter solicitation? If Mr. Morris decides to use the letter, can it be sent with your signature or should it be signed by Mr. Morris?

2. Your office received a call from Jonathan Riggs, age 25, who has just recently been determined to be the child of a man who died one week before the paternity results were obtained. The father died intestate and was never married to the mother of Jonathan. Does Jonathan have a claim to the estate? See Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991).

3. Assume you were to die today. Distribute your assets according to your state’s intestate succession laws. Access your state’s laws at www.findlaw.com. Compare your asset distribution with the laws of a neighboring state.

4. Your office has been contacted by the Johnson family. Mr. and Mrs. Johnson married over ten years ago. Mrs. Johnson had a child by another man—a daughter, Rebecca—prior to her marriage to Mr. Johnson. Mr. Johnson has adopted his stepdaughter. Rebecca’s natural father has just passed away. Is Rebecca entitled to inherit from her natural father? Prepare an internal memorandum and submit it to your instructor. Be sure to read In Re Estate of Ryan, 187 Ariz. 311, 928 P.2d 735 (1996).

SECTION TWO

Vocabulary Review

1. The concepts of per stirpes and per capita are confusing. Access the following websites and look up the definitions for these terms, www.recer.com/bcfplannedgiving/dostripe.htm and www.aaaattorneys.com/wills glossary.htm. Using the information from the textbook and these websites, prepare a diagram, illustrating these terms, in a clear manner.

2. Assume you had a client with little formal education, who had many children—some natural born, some adopted, some foster, and some nonmarital. Explain how these children would take under your state’s intestate succession act.


4. What is a nuncupative will? Is this type of will recognized in your state?
True/False
1. T F Relatives related by blood are issue.
2. T F Affinity refers to persons related by marriage.
3. T F The house and adjoining land occupied by the owner as home is a householder.
4. T F In most states a posthumous child is not given an intestate share of the deceased father’s estate.
5. T F Escheat is when the property of a deceased passes to the state.

SECTION THREE
Case Study


No. 9126SC31.
Court of Appeals of North Carolina.

Administrator filed declaratory judgment action seeking to determine which parties making claims against decedent’s estate were lawful heirs. The Superior Court, Mecklenburg, Shirley L. Fulton, J., determined that only decedent’s legitimate children were lawful heirs, and decedent’s legitimated children appealed. The Court of Appeals, Lewis, J., held that: (1) legitimation action, either foreign or domestic, must be reduced to judgment prior to death of putative father in order for illegitimate child to inherit under intestate succession, and (2) this result does not violate equal protection or the full faith and credit clause.

Affirmed.

1. Evidence 51
Although notice of appeal did not have stamp on face of document indicating date it was filed, Court of Appeals, having obtained a stamped file copy from clerk’s office in county, would take notice of fact that appeal was timely filed and would hear the appeal. Rules App.Proc., Rules 3(c), 9(b)(3), 25(b), 34(b)(1).

2. Children Out-of-Wedlock 86
Absent statute to the contrary, illegitimate children have no right to inherit from their putative fathers.

3. Children Out-of-Wedlock 90
Legitimation action, either foreign or domestic, must be reduced to judgment prior to death of putative father in order for illegitimate child to inherit under intestate succession. G.S. § 29–18.

4. Children Out-of-Wedlock 90
Constitutional Law 225.1

5. Judgment 815
Full faith and credit clause did not require North Carolina court determining heirs for purposes of intestate succession to give effect to foreign legitimation action initiated after putative father’s death. G.S. § 29–18; U.S.C.A. Const. Art. 4, § 1.

* * * *


Norwood, Burke, McIntosh & Edmonds by Barry S. Burke and Robert G. McIntosh, Charlotte, for defendants-appellees Phyllis Young-Woodard and Marcella Baker.

Faison, Fletcher, Barber & Gillespie by Reginald B. Gillespie, Jr., Durham, Barbara M. Sims, Buffalo, N.Y., for defendants-appellants Linda Alexander and Caroline Alexander.

LEWIS, Judge.

The issue in this case is whether a foreign legitimation action must be initiated prior to the death of the alleged father for illegitimate children to inherit under North Carolina’s intestate succession laws.

The facts are not contested. Plaintiff-appellee, H. Parks Helms (administrator), is the duly qualified
 administrator of the estate of Jessie Hogan Jackson (decedent) who died intestate in Mecklenburg County, North Carolina on 8 August 1988. The administrator filed a declaratory judgment action seeking to determine which of the four parties making claims against decedent’s estate are the lawful heirs. Defendant-appellees, Phyllis Young-Woodard and Marcella Baker, are decedent’s legitimate children. Defendant-appellants, Linda and Caroline Alexander, claim to be decedent’s legitimated children. Both Alexanders, domiciliaries of New York, obtained default orders of filiation from the New York Family Court on 24 February 1989, six months after Mr. Jackson’s death. The Mecklenburg Superior Court reasoned that because North Carolina determines rights of inheritance at the date of death, only Young-Woodard and Baker were the lawful heirs. The trial court held that the Alexanders were not permitted to inherit by intestate succession because they were not legitimated, nor were they in the process of being legitimated, prior to decedent’s death. The Alexanders appeal.

The Alexanders allege that it was error for the trial court to read into North Carolina’s intestate succession laws a requirement that foreign legitimation proceedings must begin prior to the putative father’s death. They allege that their exclusion from the class of heirs violates both the Full Faith and Credit (Article IV, § 1) and the Equal Protection (14th Amendment) Clauses of the United States Constitution. As their brief does not pursue their allegation of error regarding the award of attorneys’ fees to defendant-appellees, we decline to address this matter. See N.C.R.App.P. 28(a).

First we will consider the administrator’s claim that this Court lacks jurisdiction to hear this appeal. He alleges that the Alexanders’ appeal was not timely filed because the notice of appeal in the record does not have a stamp on the face of the document indicating the date that it was filed. Appeals must be filed within 30 days of the entry of judgment. N.C.R.App.P. 3(c). Timely appeal is noted by the file stamp on the face of the notice of appeal. All papers included in the record must show the date filed by this file stamp. N.C.R.App.P. 9(b)(3). Failure to comply with the Rules of Appellate Procedure may result in dismissal of the appeal. N.C.R.App.P. 25(b) and 34(b)(1).

[1] We recognize that “[f]ailure to give timely notice of appeal . . . is jurisdictional, and . . . must be dismissed.” L. Harvey and Son Co. v. Shivar, 83 N.C.App. 673, 675, 351 S.E.2d 335, 336 (1987) (citation omitted). This Court would be required to dismiss this appeal if the Alexanders failed to meet the 30 day filing deadline. However, it is within this Court’s discretion to dismiss or to apply another sanction for placing an unstamped copy of a timely filed notice of appeal in the record. N.C.R.App.P. 25 and 34(b)(1). This Court has obtained a stamped file copy of the notice of appeal from the Office of the Clerk of Superior Court of Mecklenburg County which indicates that the appeal was timely filed. We take notice of this fact and hear this appeal. We caution future appellants to be more diligent in complying with the Rules of Appellate Procedure.


[3] The basis of the Alexanders’ argument is that they have been legitimated by a foreign court and should, therefore, be permitted to inherit from their North Carolina father pursuant to N.C.G.S. § 29–18 (1984). Neither the trial court, nor this Court disputes their legitimacy. The issue before this Court is not whether North Carolina recognizes the Alexanders' foreign legitimation, but is whether this state recognizes a foreign legitimation which occurred after the death of the intestate for purposes of intestate succession. The issue before this Court is essentially one of timing. Read in pari materia, we conclude that North Carolina’s intestate succession laws require that all legitimation actions, both foreign and domestic, be reduced to judgment prior to the death of the putative father.

North Carolina recognizes foreign legitimations. Under N.C.G.S. § 29–18:

A child born an illegitimate who shall have been legitimated in accordance with G.S. 49–10 or 49–12 or in accordance with the applicable law of any other jurisdiction, . . . is entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock. . . .
N.C.G.S. § 29–18 (1984). On its face, this statute does not set a time requirement in which a foreign proceeding must be completed. However, read along with the other intestate succession laws enacted with it, it is clear that the legislature set the intestate’s date of death as an internal statute of limitations for the completion of an action to legitimate. See Jefferys v. Tolin, 90 N.C.App. 233, 368 S.E.2d 201 (1988). The internal statute of limitations is illustrated by the fact that the statutes will not permit an illegitimate North Carolinian to be legitimated after the putative father’s death, much less to inherit. All of the legitimation routes authorized by the North Carolina statutes require the proceeding to be completed prior to the putative father’s death. The verified petition and marriage routes of legitimation obviously require a live putative father. The civil paternity suit means of legitimation specifically provides that “[n]o such action shall be commenced nor judgment entered after the death of the putative father.” N.C.G.S. § 49–14 (1984). Even the adjudication of criminal non-support, which does not legitimate, but provides an avenue for the illegitimate child to inherit, requires a live putative father at the time of the criminal proceeding. Hence, an illegitimate North Carolina child who cannot be legitimated after the death of his alleged father, is summarily denied the right to inherit from the intestate. We reiterate the sentiments of another panel of this Court. “The intestate succession statute[s] mandate what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change.” Hayes, 83 N.C.App. at 54, 348 S.E.2d at 610.

Accordingly, it does not seem reasonable to read N.C.G.S. § 29–18 as permitting a foreign illegitimate child to inherit by use of a foreign order of affiliation obtained after the intestate’s death when an illegitimate North Carolinian could not obtain such relief in a North Carolina court. Therefore, we hold that foreign legitimation actions must be completed prior to the intestate’s death in order for the child to inherit under North Carolina law.

The Alexanders claim that North Carolina law permits all illegitimate children six months in which to prove their legitimacy. We do not agree. See Hayes (where an illegitimate North Carolinian who was not legitimated prior to the death of the intestate was denied the right to inherit from the putative father’s estate). The Alexanders base their argument upon N.C.G.S. § 29–19(b) which provides:

Notwithstanding the above [legitimation] provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

N.C.G.S. § 29–19(b) (1984). We agree that this statute sets out a statute of limitations. However, it is incorporated within this section in order to set a time limit for claims against a putative father’s estate after legitimation. The beginning word “notwithstanding” indicates that “in spite of” the claimant’s ability to prevail on the legitimation issues listed above, any person who intends to file a claim must do so within the 6 month period. As it is possible that illegitimate children, like creditors, may not be known to the decedent’s survivors, this time limit assures the finality of decrees and protects “those rightfully interested in [the] estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs.” Mitchell v. Freuler, 297 N.C. 206, 215, 254 S.E.2d 762, 767 (1979) (quoting Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978)). This time limitation was not meant to extend the positive law enumerated above. Because the Alexanders did not begin their legitimation action until after the decedent’s death, they are not entitled to inherit from his estate and the trial court is affirmed.

[4] The Alexanders allege that the trial court’s determination that they could not inherit from decedent’s estate violates the Equal Protection Clause. We disagree. Our Supreme Court has upheld the intestate succession statute’s requirement of legitimation prior to the intestate’s death against Equal Protection challenges. In Mitchell, a plaintiff whose parents never married, but whose alleged father “acknowledged him,” supported him, lived with his mother, maintained insurance policies and savings accounts for him, and gave him a job claimed that North Carolina’s statutory requirements of legitimation prior to death violated his Constitutional rights. Our Court held that “G.S. 29–19 and the statutes in pari materia are substantially related to the lawful State interests they are intended to promote. We therefore find no violation of the Equal Protection and Due Process Clauses.” Id. 297 N.C. at 216, 254 S.E.2d at 768.

[5] Further, the Alexanders allege that because they have been legitimated by the laws of another jurisdiction, North Carolina’s determination that they are not heirs and their subsequent exclusion from their father’s estate violates their Constitutional rights. We disagree. In Olmsted v. Olmsted, 216 U.S. 386, 30 S.Ct. 292, 54 L.Ed. 530 (1910), the United States Supreme Court held that the Full Faith and
Credit Clause did not require one state to give effect to another state’s legitimizations which disturb “interests already vested.” Id. at 395, 30 S.Ct. at 295, 54 L.Ed. at 533. In general, North Carolina determines rights of inheritance at the date of death. Those children who are legitimate and those who are legitimated prior to the intestate’s death are lawful heirs with rights vested immediately thereupon. Mr. Jackson’s only legitimate children were Ms. Young-Woodard and Ms. Baker. Ms. Young-Woodard and Ms. Baker’s right to inherit were vested, under North Carolina law, at the instant Mr. Jackson died. Therefore, no other state can divest Ms. Young-Woodard and Ms. Baker of their inheritance by a judicial or legislative act subsequent to this vesting. Id. at 394–95, 30 S.Ct. at 294–95, 54 L.Ed. at 533. Accordingly, we find no violation of the Full Faith and Credit Clause in the case at bar.

Affirmed.

ARNOLD and COZORT, JJ., concur.

Case Study

In the Matter of the ESTATE OF Donald Lee RYAN, Deceased.
Tracy CHAMPAGNE, Personal Representative–Appellee,
v.
Donna RYAN and Donald Ryan, parents of Donald Lee Ryan Deceased, Respondents–Appellants.
No. 1 CA–CV 96–0193.

Court of Appeals of Arizona,
Division 1, Department B.

Decedent’s parents filed action to probate decedent’s estate, claiming they were his only heirs. Mother of decedent’s illegitimate son petitioned for adjudication of intestacy, determination of heirs, appointment of personal representative, and removal of court-appointed personal representative. Personal representative moved for summary judgment, which parents joined. The Superior Court, Maricopa County, Cause No. PB 96–02134, Pamela J. Franks, J., denied motion, entered order of intestacy, determination of heirs, and mother’s appointment as personal representative. Parents appealed. The Court of Appeals, Gerber, J., held that: (1) application of statute providing that child adopted by natural parent’s spouse retains right to inherit from other natural parent, which became effective after decedent’s son was adopted by stepfather but before decedent’s death, did not contravene statute indicating that no statute is retroactive unless expressly declared to be such, despite preexisting statute terminating adopted child’s right to inherit from severed biological parent; right to inheritance vested only when decedent died, and properly flowed from law existing at time of death, rather than at time of adoption, and thus statute would not be applied retroactively. A.R.S. §§ 1–244, 8–117, subd. B, 14–2114, subd. B.

2. Descent and Distribution

Ability to take property by intestate succession is not natural or immutable right.

3. Descent and Distribution

Right to inherit by intestate succession does not vest until decedent’s death.

4. Descent and Distribution

Changes in inheritance laws are effective as to any unvested inheritance right.

5. Adoption

Generally, adoptee’s right to inheritance results from law in force at time of decedent’s death, rather than law existing at time of adoption.

6. Constitutional Law

Statute is retroactive if it takes away or impairs vested rights acquired under existing laws or creates new obligations with respect to past transactions.

7. Adoption

Children Out-of-Wedlock 86

Decedent’s illegitimate son retained right to inherit from decedent, despite adoption by
stepfather, pursuant to statute providing that child adopted by natural parent’s spouse retains right to inherit from other natural parent, notwithstanding statute ending legal relationship between adopted child and child’s severed biological parent. A.R.S. §§ 8–117, subd. B, 14–2114, subd. B.

8. Statutes 188

Appellate court gives effect to legislature’s intent as found in words of statute.

9. Appeal and Error 893(1)

Statutory interpretation is issue of law that appellate court reviews de novo.

10. Statutes 223.1

Court reads statutes in harmony to avoid leaving any part of them superfluous, void, contradictory, or insignificant.


Fenton J. McDonough, Scottsdale, for Respondents–Appellants.

OPINION

GERBER, Judge.

In this inheritance case, Donna and Donald Ryan (the Ryan parents), parents of decedent Donald Lee Ryan (Donald Ryan), appeal the trial court’s grant of summary judgment in favor of Tracy Champagne (Ms. Champagne), personal representative of her son Trevor Jon Champagne (Trevor). Trevor filed a response in opposition. In denying the personal representative’s motion, the trial court ruled that Trevor was entitled to inherit from Donald Ryan despite the adoption. It entered an order of intestacy, determination of heirs, and appointment of Ms. Champagne as personal representative. The Ryan parents filed this timely appeal. We have jurisdiction pursuant to Arizona Revised Statutes Annotated (A.R.S.) section 12–2101(J).

Discussion


In 1970, the Arizona Legislature enacted the following adoption statute:

Upon entry of the decree of adoption, the relationship of parent and child between the adopted person and the persons who were his parents just prior to the decree of adoption shall be completely severed and all the legal rights, privileges, duties, obligations and other legal consequences of the relationship shall cease to exist, including the right of inheritance, except that where the adoption is by the spouse of the child’s parent, the relationship of the child to such parent shall remain unchanged by the decree of adoption.

A.R.S. § 8–117(B) (Laws 1970, Ch. 205, § 2). This statute ends the legal relationship between an adopted child and the child’s severed biological parent.

Effective in 1995, the Legislature adopted changes to the Uniform Probate Code to add a seemingly different statute:

An adopted person is the child of that person’s adopting parent or parents and not of the natural parents. Adoption of a child by the spouse of either natural parent has no effect on the relationship
between the child and that natural parent or on the right of the child or a descendant of the child to inherit from or through the other natural parent.

A.R.S. § 14–2114(B) (Laws 1994, Ch. 290, § 6, effective Jan. 1, 1995) (emphasis added).

In adding A.R.S. section 14–2114(B) the legislature did not repeal section 8–117(B). Section 14–2114(B) became effective on January 1, 1995. Donald Ryan died on March 19 of that same year.

A. Retroactivity

[1] We must first determine which of these two statutes applies. On November 16, 1992, when Mr. Champagne adopted Trevor, section 14–2114(B) did not exist. Under A.R.S. section 8–117(B), the legal rights between Trevor and Donald Ryan, including the right of inheritance, had “cease[d] to exist.” The Ryan parents argue that applying the more recent section 14–2114(B) contravenes A.R.S. section 1–244 which provides that no statute is retroactive “unless expressly declared therein.”

[2] The ability to take property by intestate succession is not a natural or immutable right. In re Simmons’ Estate, 64 Cal.2d 217, 49 Cal.Rptr. 369, 411 P.2d 97, 100 (1966); In re Broders’ Estate, 224 Or. 165, 355 P.2d 738, 741 (1960); 26A C.J.S. Descent & Distribution § 2 (1956); 23 Am.Jur.2d Descent & Distribution § 9 (1983). The legislature may define the child’s legal status vis-à-vis both the biological father and the adoptive stepfather and may change that definition.


[5] Generally, the adoptee’s right to an inheritance results from the law in force at the time of the decedent’s death rather than the law existing at the time of the adoption. E.g., Aldridge ex rel. Aldridge v. Mims, 118 N.M. 661, 884 P.2d 817, 819 (App.1994); In re Mooney’s Estate, 395 So.2d 608, 609 (Fla. App.1981). See 2 Am.Jur.2d Adoption § 197 (1994) (the majority applies the law in existence at the time of death; a minority applies the law as it stood at the time of the adoption). See also C.R. McCorkle, Annotation, What Law, in Point of Time, Governs as to Inheritance from or through Adoptive Parent, 18 A.L.R.2d 960 (1951) (citing cases going both ways). Because the legal right to inherit does not vest until the decedent’s death, we find the majority view more logical.

[6] A statute is retroactive if it takes away or impairs vested rights acquired under existing laws or creates new obligations with respect to past transactions. See State v. Martin, 59 Ariz. 438, 445–46, 130 P.2d 48, 51 (1942). Because the right to an inheritance vested not at adoption but only when Donald Ryan died, section 14–2114(B) is neither retroactive to the date of adoption nor does it deny any vested inheritance right. Cf. American Fed’n of Labor v. American Sash & Door Co., 67 Ariz. 20, 39, 189 P.2d 912, 925 (1948) (“a statute is not retroactive merely because it relates to antecedent facts”), aff’d, 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222 (1949). Stated differently, the logic of vesting requires the inheritance right to flow from the law existing at time of death rather than at the time of adoption.

B. Reconciliation of the Statutes


Section 8–117(B) and section 14–2114(B) can be harmonized. The statutes address in tandem different facets of adoption. Section 8–117(B) states that when a child is adopted by a step-parent, the child’s legal relation to the non-severed biological parent remains constant. Section 14–2114(B) addresses the other biological parent: it provides that the child does not lose the right to inherit from the biological parent whose parental rights were otherwise terminated by adoption. In a word, both statutes mean that an adopted child retains inheritance rights from both biological parents.

CONCLUSION

The trial court properly applied A.R.S. section 14–2114(B) in holding that Trevor was Donald Ryan’s heir. For the reasons given, the trial court’s ruling is affirmed.

PATTERSON, P.J., and LANKFORD, J., concur.
CHAPTER 5

WILLS: VALIDITY REQUIREMENTS, MODIFICATION, REVOCATION, AND CONTESTS

SECTION ONE

Review Activities

1. Family members of a deceased client have called your office. They cannot locate their mother’s original signed will. Your office drafted the will about five years ago. Your office only has a copy. A note in the file states that said she was going to put her will in her safe deposit box at First Bank. The will was not found in the client’s only safe deposit box. Can the copy your office has be probated? See Estate of Mason, 289 S.C. App. 273, 346 S.E.2d 28 (1986), and Hanners v. Sistrunk, 245 Ga. 293, 264 S.E.2d 225 (1980).

2. Has a will been successfully revoked when the decedent has torn his name off the page where he signed? Prepare a short response and submit it to your instructor. See what a court decided at Cutler v. Cutler, 130 N.C. 1, 40 S.E. 689 (1902).

3. Access your state’s laws. Who lacks capacity to make a will? Use www.findlaw.com to check your state law.

4. Should your office have a policy addressing the issue of codicils? In particular, if your office has prepared a client’s will, and now the client wants to make a minor change, should a new will be prepared or a codicil? What are the advantages and disadvantages of preparing a new will?

5. A family member of a deceased has come to your office with a will from the deceased. The deceased had “whited out” the name of the executor, and he did not name a new executor. Is this still a valid will? Prepare a short response and submit it to your instructor. See what the court did in a similar case in Watson v. Hinson, 162 N.C. 72, 77 S.E. 1089 (1913).

6. A client calls your firm. He has received nothing from his mother’s estate. His mother, an alcoholic, wrote a holographic will six months prior to her death. Several people can testify that she was drinking the day she wrote the will. Do you think this will is valid? Read In Re Estate of Rhodes, 436 S.W.2d. 429 (Tenn. 1968).

SECTION TWO

Vocabulary Review

1. Draft an interrorem clause.
2. According to your state statutes, who is a competent witness?
3. What is the difference between attesting a will and subscribing a will?
4. List three ways a will can be revoked.
5. If a deceased wrote a document that said, “I want Louisa to take care of my daughter and property,” does this writing clearly state the deceased’s testamentary intent? Discuss.
6. List three persons who have standing to contest a will.
True/False

1. T F Case law is law made by state legislatures.
2. T F Friends cannot be referred to as natural objects of the testator's bounty.
3. T F Witnesses are required to read a will before they attest it.
4. T F To subscribe a will means to sign one's name at the end of a will.

SECTION THREE
Case Study

In Re ESTATE OF Roma MASON, Deceased, Ruth H. Carlton, Respondent,

v.

Charles Calvin MASON, Ruby Ingle, Alma Spooner, Clyde Mason, Larry Crymes, Jerry Crymes, Lonnie Crymes, Defendants,
of whom Alma Spooner is Appellant.

Appeal of Alma SPONNER.

No. 0736.

Court of Appeals of South Carolina.

Heard April 21, 1986.

Appeal was taken from order of the Common Pleas Court, Greenville County, Dan F. Laney, Jr., J., holding that testator did not destroy animo revocandi his will, and order for exemplification of photocopy of will and its probate in due form of law. The Court of Appeals, Gardner, J., held that will proponent's testimony as to her tearing up of will was proscribed by Dead Man's Statute.

Reversed and remanded.

1. Wills 290

When testator takes possession of his will, and when that will cannot be found at time of his death, presumption arises that testator destroyed his will animo revocandi, which means he destroyed will with intent to revoke it; once this presumption arises, proponent of missing will has burden of rebutting it by showing either that will existed at time of testator's death, was lost after his death, or was destroyed by third party without testator's knowledge of consent. Code 1976, § 21–7–210.

2. Wills 309

Court should proceed with extreme care in matter of proving lost will and should be thoroughly satisfied that no fraud is being attempted. Code 1976, § 21–7–210.

3. Wills 306

To establish alleged destruction of will so as to entitle it to probate, there must be sufficient evidence of its destruction which, under the circumstances, would defeat inference of cancellation by testator. Code 1976, § 21–7–210.

4. Wills 302(8)

One who seeks to establish as a valid will one that has been destroyed and unrevoked must produce evidence that is clear and convincing, especially where proponent of will receives more under will than under intestate laws. Code 1976, § 21–7–210.

5. Witnesses 164(2)

Self-serving testimony about destruction of will, whether testimony is negative or positive as to presence and direction of testator, is proscribed by Dead Man's Statute. Code 1976, §§ 19–11–20, 21–7–210.

6. Witnesses 164(2)

Will proponent's testimony as to her tearing up of will pertained to transaction or communication with deceased, was self-serving, and therefore was proscribed by Dead Man's Statute. Code 1976, §§ 19–11–20, 21–7–210.

1. Mrs. Carlton died before the trial of the matter. The record before us does not reflect a substitution for her.

Apparent Ruby Ingle, whose testimony is at the center of this controversy, was substituted.
the will of Roma Mason (Roma) in due form of law by the exemplification of a photocopy of the will. The original will was admittedly destroyed before Roma's death. The appealed order held that the testator did not destroy animo revocando his will, ordered the exemplification of the photocopy of the will and its probate in due form of law. We reverse and remand.

In summary, the trial court ruled, over objection, that Ruby Ingle's testimony was admissible and that the testimony of Alma Spooner and other opponents of the proof of the will was not admissible.

The dispositive issue before us is whether the trial judge erred by ruling, over objection, that Ruby Ingle's testimony did not bring her within the purview of the Dead Man's Statute.

By agreement the case was tried by the judge without a jury. At the outset of the trial, the parties agreed that objections would be reserved but that at that time a blanket objection was made to any evidence which the trial court might determine inadmissible. The court summarized their agreement thusly: "In other words, what you are doing now is you are making a blanket objection, both of you, to any testimony you feel is not admissible, and I will rule on that later."

Although the specific objections made at the conclusion of the testimony are not of record, from the exceptions of appellant Alma Spooner, we conclude that she objected to the testimony of Ruby Ingle, a proponent of the proof of the will, on the grounds that the testimony violated the Dead Man's Statute. The trial judge ruled that Ruby Ingle's testimony did not violate the Dead Man's Statute and, therefore, there was no waiver to permit rebuttal testimony by Alma Spooner, among others, which was proscribed by the Dead Man's Statute.

Roma's will, executed on April 29, 1976, prior to the death of his third wife, Mae, provided in summary: (1) a devise of a lot to his daughter Ruth Carlton, (2) a devise of a life estate to his wife of a lot on which his home was located and another lot, with remainder to the home to his daughter Ruby Ingle and the lot to his son Calvin C. Mason, (3) a life estate in what apparently is a rental house to his wife, with remainder to his son Clyde Mason, (4) a devise to his wife, Mae, of the rest and residue of his property for life with the remainder to his children Ruby Ingle, Calvin Charles Mason, Ruth Carlton and Clyde Mason, share and share alike. He appointed his daughter Ruth Carlton executrix of the will.

Roma, who could not read or write, died at age 91 on January 2, 1983; his statutory heirs at law were his daughters, Ruth Carlton, Ruby Ingle, Alma Spooner and Frances Crymes and his sons, Charles Calvin Mason and Clyde Mason.

Thus, it is observed, Ruby Ingle stands to receive much more under the will than under the Statutes of Descent and Distribution.

We summarize the pertinent testimony.

First, it is admitted by all parties that Roma did execute the purported will with all of the formalities of law and further that the will was not found in his possession at the time of his death. After Roma's death, Ruth Carlton obtained a photocopy of the executed will from the lawyer who prepared it and the proponents seek to prove the will in due form of law.

Ruby Ingle testified that (1) in April of 1976, Mae Mason, the third and last wife of Roma Mason, before her death in November 1977, called Ruby Ingle to come to her home, (2) upon Ruby's arrival, and in Roma's absence, Mae took the will from "a little tin box," (3) Mae could not read or write, (4) she asked Ruby Ingle to "read this will," (5) Ruby read her the will and discovered that her sister, Ruth, was made the executrix, and (6) "it made me angry and I tore it up." Ruby Ingle then identified the photocopy of the will as being the same as the one she tore up. She then testified as follows.

Q. After you did that, did you ever have any discussion prior to his death with your father about it?
A. No, sir, I did not.

Q. Did you have any discussion with any one [sic] in this world about it?
A. No.

Ruby then testified that after her father's death, some five years later, her sister Ruth, who subsequently died, after obtaining the will from the lawyer, asked her, Ruby Ingle, to accompany her, Ruth, to the judge of probate's office. There Ruby Ingle signed an affidavit, the effect of which is given in the above testimony.

Appellant, Alma Spooner, testified that her father, Roma, told her that he had made a will but had destroyed it and further that he had had Ruby tear the will up and that he himself burned the scraps. Alma also testified that Roma told her that Ruth had made the will and she was not supposed to do that, that attorney Richard Tapp, the scrivener, and Ruth drew the will and further that her father told her that he did not want a will.

With these facts before us, we review the applicable law.
Section 21–7–640, Code of Laws of South Carolina (1976) sets forth the procedure for proving a will in due form of law. In substance it provides that every person who would have been entitled to distribution of the estate if the deceased had died intestate shall be summoned to answer the petition of the person seeking to prove the will, and upon trial, the judge shall hear the testimony of the witnesses for and against the confirmation of the will upon all matters touching upon its legality or formal execution.

Section 21–7–210, Code of Laws of South Carolina (1976) provides:

Section 21–7–210, Revocation of wills generally.

No wills or testament in writing of any real or personal property or any clause thereof shall be revocable but by some other will or codicil in writing, or other writing declaring the same, attested and subscribed by three witnesses as required by Section 21–7–50, or by destroying or obliterating the same by the testator himself, or some other person in his presence, and by his direction and consent. [Emphasis ours.]

[1] Despite the above, under the law of South Carolina, when a testator takes possession of his will, and when that will cannot be found at the time of his death, a presumption arises that the testator destroyed his will animo revocandi, which simply means he destroyed the will with the intent to revoke it. Davis v. Davis, 214 S.C. 247, 255, 52 S.E.2d 192, 195 (1949). Once this presumption arises, the proponent of the missing will has the burden of rebutting it by showing either that: the will existed at the time of the testator’s death, was lost after his death, or was destroyed by a third party without the testator’s knowledge or consent. Lowell v. Fickling, 207 S.C. 442, 447, 36 S.E.2d 293, 295 (1945).

[2–4] With respect to this burden of proof, stringent requirements for proof of lost or destroyed wills are imposed to avoid fraud and the courts should proceed with extreme care in the matter of proving a lost will and should be thoroughly satisfied that no fraud is being attempted. To establish an alleged destruction of a will so as to entitle it to probate, there must be sufficient evidence of its destruction which, under the circumstances, would defeat an inference of cancellation by the testator. Accordingly, one who seeks to establish as a valid will one that is destroyed and unrevoked must produce evidence that is clear and convincing. 95 C.J.S. Wills Section 419 (1976). This cogent rule is especially applicable in a case such as the one before us where the proponent of the will (Ruby Ingle) receives more under the will than under the intestate laws.

By preface to discussion of the Dead Man’s Statute, we note that this statute is directed not to the admissibility of evidence but to the competency of the witness; the testimony, otherwise admissible, of non-interested persons is inadmissible perforce of Section 19–11–10, Code of Laws of South Carolina (1976) which removes the common law disability of a party to testify in his own behalf.

With that in view, we review the Dead Man’s Statute.

The Dead Man’s Statute, Section 19–11–20, Code of Laws of South Carolina (1976) in substance provides that a witness may not testify (will not be a competent witness) should the witness be in either of four designated classes.2 Both Ruby Ingle and Alma Spooner are within the classes of witnesses to which the statute pertains. See Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574 (Ct.App.1984).

Then the statute provides that if a witness within that class testifies, the competency of such a witness must be further subjected to three tests, viz., (a) is the testimony in regard to any communication or transaction between the witnesses and the deceased (b) is the testimony offered against a party prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of the deceased person and (c) does the testimony potentially affect the present or previous interest of the witness.

The second part of the Dead Man’s Statute creates an exception or waiver and is as follows:

But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication or when testimony of such deceased or insane person or lunatic in regard to such transaction or communication, however the same may have been perpetuated or made competent, shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee, interest which may be affected by the trial, and (4) an assignor of the thing in controversy. Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965).
then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. [Emphasis ours.]

The word “however,” i.e., by whatever means, whether by subtle legerdemain or direct testimony, is significant. By the use of the words “testimony . . . however the same may have been perpetuated or made competent, . . . shall be made competent witnesses,” the legislature clearly intended to proscribe circumvention and fraud.

The very essence of this case is whether Roma Mason either destroyed the will himself or directed that it be destroyed in his presence. When a will is not found upon the death of the testator, one cannot imagine a more suspicious set of circumstances than a proponent’s (of the proof of the will) testifying that he or she destroyed the will in the absence of the testator, thus circumventing the mandate of the General Assembly by Section 21–7–210 and the accompanying interpretation thereof requiring that the proponent of the will affirmatively show the absence of fraud.

The law and the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair or expose the omission, mistake or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf. Any other view of this subject, I think, would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and the unscrupulous. [Emphasis ours.]

Owens v. Owens, 14 W.Va. 88, 95 (1878).

Stated differently, the Dead Man’s Statute aims to prevent testimony as to communications and transactions with persons deceased and the cases therein mentioned on the grounds that it is against public policy to allow witnesses to testify as to matters, of which, if such testimony is untrue, it cannot be contradicted by the deceased. Trimmier v. Thompson, 41 S.C. 125, 19 S.E. 291 (1894).

The matter which Ruby Ingle testified to related to the manner in which the will was allegedly destroyed, a matter which Roma Mason cannot testify to because he is dead.

While, admittedly, Mrs. Ingle’s testimony that she destroyed the will is, on the surface and at first blush, neither a communication nor a transaction between the witness and the deceased, this highly suspicious testimony might well be subtle legerdemain to circumvent Section 21–7–210, supra, relating to the revocation of wills. The effect of Mrs. Ingle’s testimony is clearly that the will was neither destroyed in Roma’s presence nor at his direction. This effect is a denial that Roma Mason directed her to destroy the will in his presence. It is testimony amounting to a denial of the material issue of the case.

While we cannot find a case exactly on point, it is generally held that the Dead Man’s Statute precludes a witness from testifying that he was not indebted to a person since deceased. See, 8 A.L.R.2d 1096. In the case of Daniel v. O’Kelly, 227 Ga. 282, 180 S.E.2d 707 (1971), it was held that testimony that the deceased positively did not make a contract is as much with reference to a statutory transaction as testimony that she did so contract. The effect of these authorities is simply that testimony that a testator did not do a certain act is equivalent, under the Dead Man’s Statute, to testimony that he did do that act.

[5, 6] The General Assembly, by using the words “however . . . made competent” by clear inference recognized that camouflaged testimony might be, in reality, fraudulent testimony of a transaction with a deceased person. It naturally follows that self-serving testimony about the destruction of the will, whether the testimony is negative or positive as to the presence and direction of the testator, is proscribed by the Dead Man’s Statute. We therefore hold that Ruby Ingle’s testimony pertains to a transaction or communication with the deceased. The testimony is also self-serving and therefore proscribed by the Dead Man’s Statute. See 22 S.C.L.R. 558 (1970) and Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965) and Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574 (Ct.App.1984). And we so hold.

For the reasons stated, the appealed order is reversed and the case is remanded for a trial de novo.

REVERSED AND REMANDED.

CURETON and GOOLSBY, JJ., concur.
Caveators, nieces and nephews or children of deceased nieces and nephews of decedent, appealed from judgment of the Fulton Superior Court, Eldridge, J., granting probate in solemn form to decedent’s will. The Supreme Court, Bowles, J., held that evidence presented jury question as to whether will had been revoked.

Affirmed.

Wills 324(4)

Evidence presented jury question as to whether testator had revoked will.

* * * * *

Mackay & Elliott, James A. Mackay, Philip R. Cordes, Decatur, for appellants.

E. Dale Dewberry, William S. Rhodes, Atlanta, for appellee.

BOWLES, Justice.

Appellants, hereinafter caveators, appeal from a jury verdict affirming an order of the probate court of Fulton County granting probate in solemn form to the will of Ernest Conrad Sistrunk. They are nieces and nephews or children of deceased nieces and nephews of the decedent. The propounder of the will is decedent’s purported widow.

We find this evidence illustrated the improbability that decedent revoked his will and tends to rebut any presumption of revocation raised by the trial court’s charge. See Saliba v. Saliba, 202 Ga. 791 at 803 and 810, 44 S.E.2d 744 (1947). The weight of the evidence and the credibility of witnesses is for the jury. We find this evidence sufficient to withstand caveators’ motion for directed verdict and to support the jury’s verdict in favor of propounder. See Williams v. Swint, 239 Ga. 66, 235 S.E.2d 489 (1977). See also Saliba v. Saliba, supra, 202 Ga. at 814, 44 S.E.2d 744.

Judgment affirmed.

All the Justices concur.
1. There is a revocation of a will where it is defaced and mutilated by vermin, and testator adopts this with intent to revoke the will.

2. Where the will had been in testator's possession, and is presented with his name torn off, or eaten off by vermin, the propounders have the burden of showing it was not revoked.

3. Admission of fact “in the trial of this action,” made to prevent continuance for absence of witness, cannot be used on a subsequent trial, the witness being present, and notice having been given that the admission would be objected to.

4. It is immaterial that witnesses sign the will before the testator does, where all sign in the presence of each other.

Appeal from superior court, Beaufort county; Allen, Judge.


FURCHES, C. J. This is an action of devisavit vel non of the will of Nathan C. Cutler. It is not contended but what he at one time intended the paper writing offered for probate as his last will and testament; and while there are other exceptions to other matters, which will be considered, the principal question is as to whether it was revoked or not, and, as this is the main question, we will assume that it was properly executed, and consider the question of revocation first. There was a motion to nonsuit the plaintiff at the close of the evidence, and the whole evidence is sent up as a part of the case on appeal, including the script offered as the will, and the clerk is instructed in the case on appeal to attach and send this as a part of the record evidence in the case. This script is therefore legitimately before us as a part of the evidence, to be considered for whatever it may be worth. The script was written, and, we will say, executed some 10 years or more before the death of Cutler, and, his children all having married and left him, he abandoned his home with the purpose of living among his children; and, without moving his household furniture, a few months before he died he rented to one James Ashbury, who moved into his dwelling house. Ashbury, according to his evidence, found this script in an unsealed envelope in an unlocked drawer of an old wooden safe belonging to the testator, left by him in said house, in which there were other papers. He said nothing to the testator about finding the will. The will had been seen by others who had been using the house for the purpose of storing grain, before the death of the testator, but they had not mentioned it to him. The script, as it comes to us, is badly mutilated. The name of the testator, if it was ever there,—and we take it that it was,—is entirely gone; and it is badly mutilated in other respects. Much of the work of mutilation was the work of moths or vermin, and it is contended by the propounder that it was all done by them. But it looks to us as if it had been torn where the signature of the testator should have been. These were all matters for the jury upon the evidence and proper instructions from the court. The paper itself showed the mutilations, and, as there was much evidence tending to show that the testator knew of the defaced condition of this paper long before his death, it was contended by the caveator that, if he did not tear the paper himself, there is abundant evidence showing that he accepted it as a destruction of his will, and that he intended to die intestate. And while it was not denied that there was evidence tending to show this to be the fact, the propounders contended that, unless the script had been defaced by the maker, or by some one for him in his presence and by his direction, the will was not revoked; that he could not ratify the obliteration or destruction of the will by the vermin if he wished to do so; that a will properly executed could only be revoked in the manner above stated or by making another will; and his honor, being of the opinion that the law was as contended by the propounders, so instructed the jury in substance. In this, we think, there was error. Revocation consists of two things,—the intention of the testator, and some outward act or symbol of destruction. A defacement, obliteration, or destruction, without the animo revocandi, is not sufficient. Neither is the intention—the animo revocandi—sufficient, without some act of obliteration or destruction is done. It seems to us that the court placed too strict a construction upon the statute. The will was in the possession of the testator, and it seems from the evidence that he knew of the obliteration, if he did not himself tear his name off the paper. He must have gotten this information by handling and inspecting the same,
and, if so, it was done in his presence, or it was done and in his presence. And if he then had the animo revocandi, why was this not a compliance with the statute, and a revocation? We find it stated in Pritch. Wills, § 267, that “every act of canceling imports prima facie that it was done animo revocandi, yet it is but a presumption, which may be repelled by accompanying or subsequent circumstances.” And we find that this quotation is taken from the opinion of the court by Ruffin, C. J., in Bethell v. Moore, 19 N. C. 311. We also see in Pritch. Wills, § 269, the following: “But it has been held that the failure of the testator, after being informed of the loss or destruction of his will, to execute another, when he has time and opportunity to do so, furnishes a presumption of intention to revoke the lost or destroyed will; but this presumption may be rebutted or explained away by proof of the declarations of the testator or other evidence.” We find these views expressly stated in Steele v. Price, 44 Ky. 58. We are therefore led to the conclusion that, if the obliteration was entirely by vermin, the question of revocation animo revocandi should have been left to the jury to say, from all the evidence, whether Nathan C. Cutler intended said script to remain his will or not; and it was error in the court to take this question from the jury, and to instruct them in effect that, if this was so, it did not amount to a revocation of the will.

The court also instructed the jury that if the testator found the will in its mutilated condition, and, thinking this was in law a revocation, and for that reason he said he had thrown it away or destroyed it, that would not amount to a revocation. The language of the witness Respass is that Cutler told him that he had destroyed the will. The language of the witness John B. Respass is as follows: “I said to him: Your business is all fixed. I wrote your will. He said: ‘No; the will you wrote for me I have destroyed. There were such changes in my property that the will would not fit anyway.’ ” He said nothing about his “opinion of the law,” but simply, “I have destroyed” it. But we are unable to see what effect his opinion of the law would have had on the case if he had destroyed it. The question for the jury upon this evidence was, had he destroyed it? Had he purposely torn his name from the will, and thereby destroyed it? If he had, it was no longer his will. But the court instructed the jury that, “if the jury should find that the will was properly executed by Nathan C. Cutler, then the burden of proof shifted to the caveators to show by the greater weight of the evidence that the will had been revoked.” This was error. If there had been no evidence of erasure or destruction on the script itself,—if the paper had been perfect,—this charge would have been correct. But, where the name of the testator was gone,—torn off by the testator, as the caveator alleges, or destroyed by moths, as the propounder contends,—the propounders did not establish it as the will of Nathan C. Cutler by proving that it was originally executed by him. This would not have been so in an action on a note or bond, and is not in this case. And the burden of proof did not change to the caveators at this stage and place the burden upon them to explain and show how the testator’s name came to be off the paper. The will had been in the possession of Cutler. When produced, it had upon it these marks of mutilation, the testator’s name being gone. It devolved upon the propounders to account for this, and it was not Cutler’s will until they did so to the satisfaction of the jury. When the will was produced without the name of Nathan C. Cutler, this was prima facie evidence of a revocation, and the law presumed that it had been revoked. It is true this presumption might be repelled, but the burden of doing so was on the propounders. If this was not so, it would be to require the caveator to rebut the presumption that was in his favor: Bethell v. Moore, 19 N. C. 311; Steele v. Price, 44 Ky. 58; Pritch. Willis, §§ 267, 269, Underh. Wills, § 225; Theob. Wills, p. 45. There was error in this instruction.

Upon the trial of this case at July term, 1901, the propounders offered the following admission as a part of their evidence: “In the trial of this action the caveator, Samuel A. Cutler, admits the following facts: That, John B. Respass, in the presence of the alleged testator, Nathan C. Cutler, signed the script propounded as his will as a subscribing witness thereto, at the request and in the presence of the said Nathan O. Cutler, who also signed it in the presence of the said witness, and declared it to be his last will.” The caveator objected to this evidence, and C. F. Warren, Esq., made affidavit that he was the attorney of the caveator at February term, 1898; that when the case was called at that term the caveator announced his readiness for trial, and the propounders stated that they were not ready for trial for the want of the testimony of John B. Respass, a subscribing witness to the will; when the caveator, for the purpose of getting a trial at that term, made the admission simply because the witness Respass was absent that at that term the caveator did not know that said Respass knew any other facts material to the execution or revocation of the will; and before the case was called for trial at this term he, as the attorney of the caveator, had notified one of the attorneys for the propounders that Respass was then present, attending court as a witness, and that he should object to the introduction of said admission in evidence. This testimony of Mr. Warren...
was not disputed by the other side. But the court admitted this admission as evidence, and the caveator excepted. In this, we think, there was error. It is not like a solemn admission of a fact in an answer, or otherwise, where it is intended by the parties to be permanent, and in this respect differs from Guy v. Manuel, 89 N. C. 83. In this case it was made on account of the absence of Respass. At this trial Respass was present, and the reason for making it ceased, and the propounders were notified of the fact of his presence, and that its admission would be objected to. As the reason ceased, the admission should have ceased. The propounders lost nothing they had before the admission was made. But the admission itself says “in the trial of this action.” The admission is in the singular,—in the trial,—and it was used in that trial. The point presented is a singular one, and we have found nothing like it in the practice, and have put what we think is a just construction upon it, and do not think it should have been admitted.

There is one other question presented by the record that should be passed upon, and that is this:

It seems that the witnesses signed the will before the testator, Cutler. But it was all done at the same time, and in the presence of each other; the witnesses seeing the testator’s presence, and the testator seeing the witnesses’ presence. It therefore differs from In re Cox’s Will, 46 N. C. 321, where the witness signed the will at home, and not in the presence of the testator. In that case it was held to be an insufficient execution of the will; but it is there intimated that, had the witness signed in the presence of the testator, though before the testator, it would have been sufficient. It seems singular that the witnesses should have signed before the testator, as there was nothing at that time for them to attest. It was certainly awkward and illogical for them to do so, and can only be sustained by its being all a part of one and the same transaction. This exception of the caveator is not sustained, and there was no error in the ruling of the court upon this exception. But for the errors pointed out in the opinion, there must be a new trial.

Case Study

WATSON et al. v. HINSON et al.  
(Supreme Court of North Carolina.  
April 23, 1913.)

1. WILLS (§§ 118, 123*)—ATTESTATION—SUBSCRIPTION BY WITNESSES.

Under Revisal 1905, § 3113, providing that a written will with witnesses must have been prepared in the testator’s lifetime, and signed by him or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, it is not necessary that the testator should sign the will in the presence of the witnesses if it is acknowledged by him in their presence, nor that the witnesses should subscribe to the will in the presence of each other.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 321–331; Dec. Dig. §§ 118, 123.*]

2. WILLS (§ 303*)—PROBATE—SUFFICIENCY OF EVIDENCE.

Under Revisal 1905, § 3127, providing that a written will with witnesses may be admitted to probate on the oath of at least two of the subscribing witnesses, if living, but that when one or more of such witnesses are dead, reside out of the state, or cannot after due diligence be found in the state, or are insane or otherwise incompetent, such proof may be taken of the handwriting of the testator and of the witness or witnesses so dead, absent, insane, or incompetent, and also of such other circumstances as will satisfy the clerk of the genuineness and due execution of the will where satisfactory proof of the handwriting of the testator and a deceased witness is produced, it is not necessary that the surviving witness should testify that he saw the other witness subscribe his name to the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711–723; Dec. Dig. § 303.*]

3. WILLS (§ 288*)—CONTESTED PROBATE—EVIDENCE.

On the trial of an issue of devisavit vel non on caveat duly entered, the proof as to the formal execution of the will must be made de novo, and the proof before the clerk on the probate in common form cannot be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 651, 652, 662, 664; Dec. Dig. § 288.*]
4. WILLS (§ 302*)—PROBATE—SUFFICIENCY OF EVIDENCE.

The testimony of a witness that a testator brought a will to the witness “all fixed up” and spoke of it as his will, while relevant on the question of due execution, did not dispense with proof of the handwriting of the testator and a deceased witness, as required by Revisal 1905, § 3127, in cases where one or more of the subscribing witnesses are dead.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700–719; Dec. Dig. § 302.*]

5. WILLS (§ 98*)—FORM AND CONTENTS—REFERENCE TO OTHER INSTRUMENTS.

A will properly executed may so refer to another unattested will or other writing as to incorporate the defective instrument, and make it a part of the properly executed will, if the instrument so incorporated is in existence at the time and referred to in terms so clear and distinct that from the second will, or with the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 234, 235; Dec. Dig. § 98.*]

6. WILLS (§ 324*)—FORM AND CONTENTS—REFERENCE TO OTHER INSTRUMENTS.

A will stating that it was an addition to the testator’s last will and testament, and was not to interfere with his former will, but “the said will to stand as at present intended,” sufficiently referred to the former will to permit parol or other proper proof as to its identity, and in connection with testimony of a subscribing witness that the testator said he had made a will already, and did not want the second will to interfere with his former will, and testimony of another witness that the testator brought him a paper “all fixed up,” had him erase the name of the executor, and insert another’s name, and asked him to put it away and keep it for him, there being no evidence that there was any other “former will” except that delivered to the last-mentioned witness, required the submission to the jury of the issue whether the paper delivered to such witness was the one mentioned in the second will, and hence a part thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767–770; Dec. Dig. § 324.*]

7. WILLS (§ 173*)—ALTERATION—EFFECT.

The erasure from a will of the name of the person therein designated as executor who was then deceased, and the insertion in place thereof of another name, had no effect on the instrument, and the testator died testate, but without naming an executor, the insertion being inoperative because not properly made or witnessed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 452; Dec. Dig. § 173.*]

Appeal from Superior Court, Richmond County; S. C. Bragaw, Judge.

Action by K. A. Watson and others against D. D. Hinson and others. From the judgment, defendants appeal. New trial ordered.

Propounders offered in evidence a paper writing purporting to be the last will and testament of D. W. Watson, deceased, and to be signed at bottom and sealed by D. W. Watson, deceased, and to be witnessed as follows: “Test: W. I. Everett, W. T. Covington.” This paper as in the issue and proceedings below will be referred to as Exhibit A. This being handed to the witness W. T. Covington, he testified thereto as follows: “That D. W. Watson brought this paper (Exhibit A) into my office, and told me that it was his will; that he wrote his name signed to the will, ‘That is my name,’ and he asked me to witness it and sign my name as subscribing witness to Exhibit A. I signed my name where it appears on Exhibit A in his presence. I knew Capt. W. I. Everett, and know his handwriting. His name where it appears above mine on Exhibit A is in his own handwriting. W. I. Everett is dead. His name appeared above mine on Exhibit A. I cannot say whether his name appeared on the paper when I signed or not. I think Mr. Kelly was present when I signed the paper, but I am not positive about that.” Evidence was then offered of the death of W. I. Everett, and that his signature as witness to said will was in his own proper handwriting.

Propounders then offered another paper writing purporting to be an addition to the last will and testament of D. W. Watson of date November 1, 1911, the same purporting to be signed by him and witnessed by A. W. Porter and W. M. Hale, and said witnesses, being sworn, testified to the due execution of said will and to their signatures as subscribing witnesses, etc.

This paper writing referred to as Exhibit B was in form as follows: “North Carolina—Richmond County. I, Daniel W. Watson, of the aforesaid county and state, being of sound mind, do make and declare this addition to my last will and testament, and this addition is in no wise to interfere with former will. First. I give and devise to my beloved wife, Laura Hinson Watson, one-half acre of land on which is now situated my ginhouse, together with said ginhouse, all machinery, farming implements, and farm produce, that may belong to me at the
time of my death, that may be on said half-acre of land. The said half-acre of land is situate on the left-hand side of the road leading from my present dwelling to the road from Rockingham to Mrs. Hattie Diggs' place, and is known as the Sand Hill Road.

Second. I hereby constitute and appoint my beloved wife, Laura Hinson Watson, my lawful executrix to all intents and purposes of this addition to my formed will, according to the true meaning of the same, but in no wise is my former will to be affected by this addition, but the said will to stand as first intended. In witness whereof I, the said Daniel W. Watson, do hereunto set my hand and seal this the first day of November, 1911. D. W. Watson (seal) Signed, sealed, published, and declared by the said Daniel W. Watson to be an addition to his last will and testament, in presence of us, who at his request and in his presence (in the presence of each other) do subscribe our names as witnesses thereto. A. W. Porter. W. M. Hale.

One of the witnesses to this will testified that, when the same was executed, D. W. Watson said that he had made a will already, and did not want this in any way to interfere with his former will. Propounders then offered the records of probate court showing the admission of Exhibit A will to probate on the testimony of W. I. Covington, the death of the witness W. I. Everett, proof that his signature as subscribing witness was in his own handwriting and on proof of the signature to handwriting of D. W. Watson. This, on objection, was excluded by the court and propounders excepted.

Propounders then offered D. E. Hinson as witness, who testified as follows: “I live in Rockingham. Mrs. Laura Hinson Watson is my sister. She and Mr. Watson have been married something like 12 or 13 years. I never saw the paper writing marked Exhibit B but once up to the time of Mr. Watson's death. Exhibit A was exhibited to me at my office at the livery stable. Mr. Watson came in and had this paper all fixed, and said, ‘Ed, your brother M. T. is dead’; and I said, ‘Yes, that is right.’ He came and gave me this paper that had M. T.'s name on it, and said, ‘I want you to mark out M. T. and put D. D. there.’ I wrote the name and gave it back, and he took it and sealed it up and told me to keep it; that I had a safe place to keep it, and he did not. So I put it in my safe and kept it until he died. I got Exhibit B after Mr. Watson's death. Mr. A. W. Porter told me he had some papers of Mr. Watson's. I told him I would like to get them, and he gave them to me. After Mr. Watson's death, I gave the two papers to Major Shaw. He opened them and read them to me, and I found out what they were. Major Shaw put the papers to the clerk's office. They were probated before the clerk. Mr. Watson put Exhibit A in an envelope.”

Issues were submitted to the jury as follows:

“(1) Is the paper writing propounded for probate, bearing date January 27, 1903, purporting to be witnessed by W. I. Everett and W. T. Covington, being 'Exhibit A' in evidence, the last will and testament of D. W. Watson, deceased, or any part thereof?

“(2) Is the paper writing propounded for probate, bearing date November 1, 1911, purporting to be witnessed by A. W. Porter and W. M. Hale, being 'Exhibit B' in evidence, the last will and testament of D. W. Watson, deceased?”

The court charged the jury that, if they believed the testimony, to answer the first issue, “No.” The jury rendered their verdict, answering the first issue “No,” and the second issue “Yes.”

Judgment on the verdict, and plaintiff excepted and appealed.

J. D. Shaw and J. P. Cameron, both of Rockingham, for appellants. J. R. McLendon, of Rockingham, and Robinson & Caudle and Lockhart & Dunlap, all of Wadesboro, for appellees.

HOKE, J. [1] Under our present law (Revisal, § 3113), “a written will with witnesses must have been prepared in the testator's lifetime and signed by him or some other person in his presence and by his direction and subscribed in his presence by two witnesses at least,” etc. Construing this law, the courts have held “that it is not necessary always that the testator should sign the will in the presence of the witnesses, it is sufficient that the will be acknowledged by the testator in their presence, the will being physically present and identified.” In re Herrings' Will, 152 N. C. 258, 67 S. E. 570; Nickerson v. Brick, 66 Mass. (12 Cush.) 332. Nor is it required that the witnesses should subscribe to the will in the presence of each other. In re Herrings' Will, supra; Payne v. Payne, 54 Ark. 415, 16 S. 1; Eelbeck's Devisees v. Granberry et al., 3 N. C. 232; Gardner on Wills, p. 217. With these authoritative interpretations in mind, it is always required that, in order to a valid written will with witnesses, the same should, as stated, be signed by the testator or some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses.

[2] In regard to the proper probate the method by which these essential facts should be established, the statute (section 3127) makes provision as follows: “In case of a written will, with witnesses, on the oath of at least two of the subscribing
witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the state, or can not after due diligence be found within the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the state, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid.” It will thus be noted that, when any one of the subscribing witnesses survive or is competent to testify, proof may be taken of the handwriting both of the testator and the other witness or witnesses and of such other circumstances as shall satisfy the clerk of the superior court of the genuineness and the due execution of such will, with the proviso that, when the testator has signed by making his mark, proof of his handwriting is not necessary. According to the express provisions of the law, therefore, whenever the facts indicated have been properly established before the clerk, he may adjudge the will to be duly proven and record the same; and, when such testimony is offered on an issue of devisavit vel non, if affords evidence from which the will may be established by the jury, and it is not required, as contended by the caveators, that, in order to a valid probate, the surviving witness should testify that he saw the other witness subscribe his name to the instrument. In the case of Thomas’ Will, 111 N. C. 416, 16 S. E. 229, one of the authorities relied upon by the caveators to sustain their position, the original will was lost, and, in the endeavor to prove the will, it was shown, apparently without exception, that when the instrument was offered for probate in common form one of the subscribing witnesses had testified to having subscribed the same as witness, and another, who was not a subscribing witness, testified that the signature of the other subscribing witness was in his own proper handwriting. This, with proof of the death of J. W. Thomas, the other subscribing witness, was the entire evidence offered on the issue. There was no evidence offered as to the handwriting of the testatrix, and Associate Justice Avery, delivering the opinion denying probate, said: “The propounders failed to produce any witness who had ever seen the signature of Ada W. Thomas to the original will or the signature of either of the witnesses, or that would testify to their genuineness. Indeed, the only evidence offered to show the loss of the original paper was that of D. C. Mangum, who last saw it in possession of the sole legatee and devisee.” And in Railroad v. Mining Co., 113 N. C. 241, 18 S. E. 208, another case to which we were referred by counsel, the court only held that a certificate of probate in another state disposing of property in this state would not suffice here when it did not affirmatively appear that the provisions of our statute had been complied with as to the due execution of a will. Rev. § 3133. The other authorities relied upon were chiefly cases under the old Revised Statutes, where proof in common form was permissible by one of the subscribing witnesses; and it was held that, when proof of that character was resorted to, the witness who was examined, if his evidence was set out, should appear to have testified to the proper attestation of the other witness (In re Thomas, supra; Blount v. Patton, 9 N. C. 237), but these decisions do not bear on the requirements of the present statute, nor should they be allowed to control the positive provisions of our present law as to the proper probate of a will.

[3] While the ruling on this question favors the propounder’s position, it would probably not avail them on this record, because we find no direct evidence admitted by the court as to the handwriting of D. W. Watson and the genuineness of his signature to the will. Such testimony was had before the clerk, on the probate, in common form, but this was ruled out by his honor; and the authorities seem to have held that in the trial of an issue of devisavit vel non, on caveat duly entered, the proof as to the formal execution of the will shall be made de novo. In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025; In re Thomas, supra, 111 N. C. 416, 16 S. E. 226.

[4] True, the witness D. E. Hinson testified that Mr. Watson brought this will (Exhibit A) to him “all fixed up” and spoke of it as “his will,” and this undoubtedly is a relevant circumstance, but the statute seems to require that, when the will purports to be signed by the testator himself and only one of the subscribing witnesses is alive and competent, some evidence should be introduced as to the handwriting of the testator or the genuineness of the signature.

[5, 6] Without further reference to this feature of the case, we are of opinion that the propounders
are entitled to a new trial of the cause by reason of the fact that from the form of the issues and the charge and rulings of the court the execution of the second will (Exhibit B) has been allowed no effect whatever as to the validity of the first (Exhibit A). It is well recognized in this state that a will, properly executed, may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, the conditions being that the paper referred to shall be in existence at the time the second will is executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will or with the aid of parol or other proper testimony full assurance is given that the identity of the extrinsic paper has been correctly ascertained. The principle is sometimes referred to as “the doctrine of incorporation by reference,” and is very well stated by Chief Justice Gray in Newton v. Seaman’s Friend Society, 130 Mass. 91, 39 Am. Rep. 433, as follows: “If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such.” While there are some discrepancies in the application of the principle to the facts of the different cases, this statement is in accord with the great weight of authority here and in other jurisdictions in this country and in England, where the subject has been very much considered. Siler v. Dorsett, 108 N. C. 300, 12 S. E. 986; Bailey v. Bailey, 52 N. C. 44; Chambers v. McDaniel, 28 N. C. 220; Bullock v. Bullock, 17 N. C. 307; Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 761; Allen v. Maddox, 11 Moore P. C. 427; 14 English Rep. Reprint, 757; Smart v. Prujean, 6 Ver. Chan. 559; 1 Redfield on Wills, p. 262; Theobald on Wills, p. 50; 1 Jarman on Wills (5th Amer. Ed.) p. 265. And the position we think should undoubtedly prevail in the present instance. In the opening clause of Exhibit B the declaration is: I do make and declare “this addition to my last will and testament and this addition is in no wise to interfere with my former will,” and in the closing paragraph the language is: “I hereby appoint my beloved wife, Laura Hinson Watson, my lawful executrix of this addition to my former will, according to the true meaning of the same, but in no wise is my former will to be affected by this addition but the said will to stand as at present intended.” At the time of the execution of this later instrument, the testator said to one of the subscribing witnesses “that he had made a will already, and did not want this in any way to interfere with his former will,” and the witness D. E. Hinson testified that Mr. Watson brought the first paper (Exhibit A) to him “all fixed,” had the witness to erase the name of M. T. Hinson as executor, he having died, and insert the name of D. D. Hinson, and asked witness to put it away and keep it for him, as the witness had a more secure place for the purpose, and this the witness did, and handed same to propounder’s attorney after Mr. Watson’s death. The second instrument clearly refers to the one former will, and there is no evidence or suggestion that any other will had ever been made or prepared by or for the testator. On this record, therefore, we are of opinion that the references in Exhibit B to the extrinsic paper are sufficiently clear and definite to permit that parol or other proper proof should be received as to the identity of Exhibit A, and that a perusal of the second will and the facts in evidence dehors afford testimony of a kind and character to require that the question as to such identity should be determined by the jury. If, on a second hearing, this Exhibit A should not be declared a valid will, as an original and separate proposition, then on the first or some issue properly responsive the question should be decided whether Exhibit A is the “former will” referred to in Exhibit B, and has its identity been established by clear and satisfactory proof. In the Appeal of W. J. Bryan, 77 Conn. 240, 58 Atl. 748, 107 Am. St. Rep. 34, 1 Ann. Cas. 393, reported with an elaborate note in 68 L. R. A. 353, to which we were referred by counsel, while the principle of “incorporation by reference” is stated in somewhat more exacting terms than in some of the other decisions, the doctrine is recognized as the basis of the court’s ruling. In that appeal the sum of $50,000 was given “in trust for the purposes set forth in a sealed letter which will be found with this will”; and Chief Justice Torrance, delivering the opinion, thus states the ratio decidendi of the case: “There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter or any number of them, setting forth the purposes of the trust, made by anybody at any time after the will was executed, and found with the will, would each fully and accurately answer the reference; and, if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is ‘so vague as to be incapable of being applied to any instrument in
particular' as a document existing at the time of the execution of the will." And like statement will serve to distinguish a recent case in our own Reports of Shields v. Freeman, 158 N. C. 123, 73 S. E. 805. All the authorities agree that, in order to a proper application of the principle, the paper referred to should be in existence at the time the valid instrument is executed; to hold otherwise would be to repeal the statutory requirements as to valid execution of written wills. An extrinsic paper could not be incorporated with the proper formalities unless it then existed. But the decision in any aspect should not control or affect the disposition of the present appeal when it appears, as heretofore stated, that the second and valid will makes clear and distinct reference to "my former will," directing further that said will is to stand as first intended and with no evidence or suggestion that there had ever been more than one such former will or any other paper of that character. The case of Bryan v. Bigelow, 77 Conn. 604, 60 Atl. 266, reported with a full note in 107 Am. St. Rep. 64, simply holds that "the letter" referred to having been properly rejected is a constituent part of the will was not efficient as a declaration of trust, and has no bearing on the question presented on this record.

Case Study

In re ESTATE of Elizabeth L. RHODES, Deceased.
Harry James ALEXANDER, Petitioner-Plaintiff in Error,
v.
Charles T. RHODES, Proponent of the Alleged Will of Elizabeth L. Rhodes,
Respondent-Defendant in Error.
Supreme Court of Tennessee.
May 6, 1968.

Will contest. The Circuit Court, Shelby County, John W. Wilson, J., rendered judgment, and appeal was taken. The Court of Appeals affirmed, and error was brought. The Supreme Court, Humphreys, J., held that there was no credible evidence that alcoholism had produced in testatrix any mental derangement.

Affirmed.

1. Wills 400

In will contest, court of appeals will consider only whether there is any material evidence to support verdict and judgment of trial court.

2. Wills 400

Court of appeals and Supreme Court must try will contest in light of evidence which illuminates and justifies judgment and verdict, rather than otherwise.

3. Wills 286

In will contest, original statement of issues to jury and subsequent filing of declaration and written pleas reducing issues to writing constitute sufficient compliance with statute delineating practice in will contest. T.C.A. § 32–402.

4. Pleading 427

Statute delineating practice in will contest was not intended to supplant general rule that, by proceeding to trial voluntarily, without objecting to pleading by motion for judgment thereon, or by default, or for confessed judgment for lack of pleas, a party is deemed to have waived failure to raise, form, or join issues properly, or at all. T.C.A. § 32–402.

5. Pleading 427

Where parties have voluntarily and without objection tried case as if certain matters were in
issue, one party will not be permitted afterwards to object that such matters were not properly put in issue by the pleadings, the doctrine of waiver or estoppel being applied.

6. Wills 302(6)

Evidence in will contest disclosed that will was entirely in handwriting of testatrix. T.C.A. § 32–105.

7. Evidence 576

Where husband was dead, his testimony under oath at former trial on identical issue, where he was cross-examined by counsel, was competent proof as to handwriting in wife's will, as an exception to the hearsay rule.

8. Wills 163(2)

The burden of proof will not be shifted from proponent in undue influence case where relationship of testator and beneficiary is not such as to create presumption of undue influence.

9. Wills 55(6)

In will contest, evidence was insufficient to show that alcoholism had produced in testatrix any mental derangement.

10. Wills 400

Concurrent finding of trial judge and court of appeals in will contest is binding on Supreme Court.

[1] The first proposition to be dealt with is, the basis upon which appellate courts must review the facts on an appeal of a will contest case. This proposition arises because it would appear that the Court of Appeals opinion accepted as true certain facts, and drew inference from others, which were controverted by material evidence introduced by proponent. This was erroneous. Judge Phillips, in his Revision of Pritchard Law of Wills and Administration of Estates, Third Edition, § 377 says:

"The same rules apply as to the scope of review in will contests as in other cases at law. The court of appeals will consider only whether there is any material evidence to support the verdict and judgment of the trial court." § 377, p. 345.

In Parker v. West, 29 Tenn.App. 642, 647, 199 S.W.2d 928, this proposition is amplified, the following being said:

"[8] Upon review of a judgment of the circuit court based upon the verdict of a jury we are governed by the rule that where a trial judge approves a verdict of a jury and enters judgment thereon, this court does not consider the question of the preponderance of the evidence, but only whether there is any material evidence to sustain the verdict and judgment of the trial court. Kurn v. Weaver, 25 Tenn.App. 556, 161 S.W. 2d 1005.

"[9] This rule applies with respect to every material issue in the case. All reasonable inferences must be resolved in favor of the verdict which was approved by the trial judge. Anderson v. Carter, 22 Tenn.App. 118, 118 S.W.2d 891, 892; and all countervailing evidence must be discarded. Davis v. Mitchell, 27 Tenn.App. 182, 178 S.W.2d 889.

"[10] These rules apply upon a review of a judgment of a trial court based upon the verdict of a jury in a will contest case. Bridges, Ex'r. v. Agee, 15 Tenn.App. 351; Flanary v. Lannom, Adm'r, 12 Tenn.App. 236; Hackworth et al., v. Hackworth et al., 6 Tenn.App. 452." 29 Tenn.App. 647, 199 S.W.2d 930. (Emphasis supplied.)

[2] This being the rule, it was necessary for the Court of Appeals, as it is for us, to try the case in the light of the evidence which illuminates and justifies the judgment and verdict, rather than otherwise.

Stating the case without the garnishment of the details of the proof: In March, 1964, Elizabeth L. Alexander Rhodes died from suffocation, from a fire in her home. She left a paper writing which was found in her lockbox purporting to be her holographic will. It was dated August 15, 1963, and devised her entire estate to her husband, Charles T. Rhodes. Harry James Alexander, her son by a former husband, from whom she had been divorced in
1951, received nothing under the will. The bulk of the property willed had been left to her by John J. Donnelly. It appears that Mrs. Rhodes’ only relationship to Donnelly had been such that she considered filing a federal inheritance tax return as his common law wife. Shortly after she received this property, she married Charles T. Rhodes, with whom she had been associated on a familiar basis for some time prior to Donnelly’s death. The marriage occurred in Mississippi, in the presence of members of the family of both parties. In March, 1964, Mrs. Rhodes was found dead in her home, from suffocation. The homicide report states that she had one-half a lethal dose of alcohol, and a fatal saturation of carbon monoxide from smoke caused by a fire in her room. There is no evidence Mr. Rhodes had anything to do with Mrs. Rhodes’ death. In April, 1964, Mr. Rhodes offered the purported will for probate in Shelby County Probate Court. He testified he had found the paper writing among her valuable papers, her lockbox being mentioned during this testimony, and that it was in his wife’s handwriting. However, another handwriting witness qualified his opinion on the handwriting so that the matter of probate was not disposed of at that time. Pending this, on May 20, 1964, Harry James Alexander petitioned the probate court to transfer the case to the circuit court to be tried on the issue of devisavit vel non, and this was done.

In August, 1964, Charles T. Rhodes committed suicide, shooting himself in the head with a revolver. There is no warrantable inference this act was in any way related to the probate and contest of his wife’s will. He had already had another personal representative appointed to attend to his wife’s will, because of bad health. The act can more reasonably be attributed to his having been sick for some time with cancer.

Rhodes left a will by which he devised one-half of the property he expected to receive under Mrs. Rhodes’ will to Harry James Alexander.

After the case was removed to the circuit court, and had been revived as to Union Planters Bank of Memphis, as executor of the estate of Charles T. Rhodes, it was tried to a jury demanded by the contestant, resulting in a verdict in favor of the will.

During the trial of the case two things occurred which were made the primary basis of the appeal to the Court of Appeals, and are the primary basis of the assignments of error in this Court. After the case was called and announced ready for trial, the parties stated their contentions to the jury. The proponent stated that the paper writing was offered as the holographic will of Mrs. Rhodes. The contestant stated that it was not: (1) upon the grounds the paper writing was not in her handwriting; (2) that, she was mentally incompetent to make a will, and (3) that the will was the result of undue influence. Thereafter, the parties introduced evidence on these issues. Later, evidently in the course of reviewing the file in the case for the purpose of instructing the jury, it came to the attention of the trial judge that no declaration, alleging the paper writing to be the will of Mrs. Rhodes, had been filed. Nor, had there been any pleas filed by the contestant. This was brought to the attention of counsel, and after some discussion the court required that a declaration be filed alleging the due and proper execution of the will, and pleas be filed contesting the will on the issues first stated to the jury.

Also, in the course of the trial, and in instructing the jury, the trial judge declined to adopt the contention of the contestant that the facts and circumstances of the case were such as to cast suspicion upon its prima facie validity, so as to leave the burden of proof in regard to the validity of the will on the issues of sanity and undue influence on the proponent.

Although other errors were assigned the Court of Appeals narrowed the grounds for reversal down to the two propositions mentioned and held on authority of Bowman v. Helton, 7 Tenn.App. 325, that reversible error had not been committed by the trial judge in ordering a declaration and pleas to be filed; and that the bulk of suspicious circumstances relied on by contestant did not relate to the execution of the will, thereby concurring in the trial judge’s fact finding that there was not enough evidence of suspicious circumstances in connection with the execution of the will to sustain the position of the contestant.

Stated in brief the assignments of error in this Court are:

“1. Where suspicious circumstances are shown to exist at the time of the execution of a will or upon the death of the testator, does the burden of demonstrating the capacity of the testator rest upon the proponent of the will or does it rest upon the contestant?

“2. Is the same proof required for the admission of a will to probate in Circuit Court as in the Probate or County Court?

“3. Can a will contest be tried on the issue of devisavit vel non in the Circuit Court on the pleadings filed in the Probate or County Court?”

This Court is of opinion as stated, that the assignments of error are not good.

With respect to the last proposition the Court of Appeals held on authority of Bowman v. Helton, 7 Tenn.App. 325, there was no reversible error. We agree.
T.C.A. § 32–405 provides:

“Issues—When and how made up—When triable.— At the first term after the filing of the certificate aforesaid, and will, in the office of the clerk of the circuit court, an issue shall be made up, under the direction of the court, to try the validity of the same, and the issue or issues thus made up shall be triable at the first term following the filing of the will, certificate, and other necessary papers; provided, said papers are filed five (5) days before the term of the court.”

[3–5] It is apparent that the original statement of the issues to the jury and the subsequent filing of a declaration and written pleas reducing these issues to writing, is a sufficient compliance with T.C.A. § 32–402, which simply delineates the practice fixing no hard and fast rule that must be strictly conformed to at the risk of fatal error. The statute was not intended to supplant the general rule that by preceding to trial voluntarily, without objecting to the pleading by motion for judgment thereon, or by default, or for confessed judgment for lack of pleas, a party is deemed to have waived failure to raise, form, or join issue properly, or at all. This rule has been applied with respect to failure to raise, form or join issue, arising from the want of a declaration, plea, reply, replication or rejoinder. Moreover, where the parties have voluntarily and without objection tried the case as is certain matters were in issue, one party will not be permitted afterwards to object that such matters were not properly put in issue by the pleadings; the doctrine of waiver or estoppel being applied. 71 C.J.S. Pleading § 548 et seq.; Winn v. Fidelity Mutual Life Association, 100 Tenn. 360, 47 S.W. 93; Cherry v. Smith, 10 Heiskell, 389.

Finally, even without the benefit of these salutary rules of waiver and estoppel, this Court could not reverse on the basis of the asserted error, because of the express provision of T.C.A. § 27–117, that “no verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause * * * for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial.” Being of opinion it does not affirmatively appear that the error complained of did affect the results of the trial, we must overrule this assignment of error on the statute.

So, for all the reasons mentioned this particular proposition is decided against the contestant.

[6] The only question which this Court could consider under the second assignment, the questions in this Court being questions of law only, is whether as a matter of law proponent proved the will to be entirely in the handwriting of the testatrix as required by T.C.A. § 32–105, which provides: “No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator and his handwriting must be proved by two (2) witnesses.”

We find the will was proved to be entirely in the handwriting of the testatrix. Proof to this effect was made by an eminently qualified handwriting expert, Charles Appel.

[7] The proponent also offered as part of the proof in chief on this issue, the testimony given by Charles T. Rhodes on this same issue in the probate court. Rhodes’ testimony in the probate proceeding, in which he was cross-examined by contestant’s counsel, was that he knew his wife’s handwriting and that the will was entirely in her handwriting. This testimony was taken down by a court reporter and later transcribed. A transcript of the proceedings in the probate court was introduced in evidence without objection as Exhibit 1 to the testimony of this court reporter. Charles T. Rhodes being dead, his testimony under oath at a former trial on the identical issue, where he was cross-examined by counsel, was competent proof as to the handwriting in the will, as an accepted exception to the hearsay rule. This proposition is discussed in 29 Am.Jur. Evidence, § 738 where it is said on authority of a number of cases:

“The law recognizes, however, that it is sometimes impossible to produce a witness who has testified at a former trial, as where the witness dies, becomes insane before the later trial, is out of the jurisdiction, or is kept away from the trial by the opposite party. In such cases, where the second action is between the same parties or their privies and involves the same issues, and where the party against whom the evidence is offered had the opportunity to cross-examine the witness who gave the testimony, such testimony given at the former hearing or trial is, according to practically all decisions, admissible in the later one. Because such testimony has been delivered under the sanction of an oath and subject to the right of the adverse party to cross-examine the witness giving it, it is not open to the objections ordinarily urged against hearsay evidence.” 29 Am.Jur.2d § 738, p. 808

Finally, even if what we have said were not enough, and it is, this particular contention cannot
now be made, because there was no assignment of
error in the Court of Appeals directed to the proof of
handwriting, and the question was not made in the
motion for a new trial. Contestant’s own expert
witnesses, Marion Moore and Linton Godown, had
expressed the opinion the will was in the handwriting
of Elizabeth L. Rhodes; as did Burt Morelock, a
brother of Elizabeth L. Rhodes, a witness for the
contestant, so no question as to this was raised.

This brings us to the third and final proposition,
whether the case should be reversed by this Court
because the trial judge was of opinion the facts did
not require that the case be tried with the burden of
proof as to competency and undue influence being
the continuing burden of the proponent, a burden
that did not shift to the contestant.

The most scholarly discussion of what are
suspicious circumstances which can affect the burden
of proof as to sanity is to be found in Burrow v.
Lewis et al., 24 Tenn. App. 253, 142 S.W.2d 758
(1940), certiorari denied, in an opinion written by
now Court of Appeals Presiding Judge, McAmis. In
discussing this matter Judge McAmis said:

“...The court may finally determine the substantive issue of
the execution of the will upon conflicting evidence. We are unable to see how the court could exercise
such prerogative without violating the constitutional
right of trial by jury and such a contention is, we
think, unsound in principle. If the court passes
upon the legal execution of the will only upon a
prima facie showing of its due and legal execution
and the jury passes upon it not at all matter how
conflicting the evidence, the result is a no man’s
land where neither the court nor the jury may
exercise the prerogative of determining finally and
upon its merits this important issue.

“Assignments XIII, XVII and XIX all relate to the
question of the burden of proof and we think are
governed by the principles which we have
attempted to review and apply in disposing of other
assignments. As applied to the facts of this case, we
think, no error has been shown in the charge to the
jury upon this subject as it relates to the question of
the legal execution of the will.

“By assignments X and XV it is insisted the
court erred in imposing upon proponent the burden
of satisfying the jury by a preponderance of the
evidence that the testator was possessed of
‘testamentary capacity’ at the very time he executed
the paper offered for probate.

“After defining, at the outset of the charge, the
issues to be submitted to the jury upon contestant’s
pleas of insanity and undue influence, the court
charged the jury generally upon the subject of the
burden of proof as follows:

‘As in all other will cases, the burden of proof is
upon the executrix, or the proponent in this case, to
establish the due and formal execution of the will,
being the paper so as to amount to a will of the party
signing it, as above stated. If the due execution of the
will is proven by the proponent, and undue influence
and unsoundness of mind are charged by the
contestants, as in this case, then the burden of proof is
on the contestants to establish such charge or charges
subject to the variations hereinafter given you.’

“Considering the excerpts taken from the charge
and made the basis of assignments X and XV in the
light of the above charge upon the general subject
of the burden of proof and in connection with their
context, we think the court had in mind the burden
of proof upon the question of the due and legal
execution of the paper in charging the jury that the
burden rested upon proponent to show that at the
very time the will was executed testator was
possessed of ‘testamentary capacity.’

[10] The cases of Cox v. Cox, 4 Sneed 81, 36
Tenn. 81, Bartee v. Thompson, 8 Baxt. 508, 67
Tenn. 508 and cases of similar import, cited supra,
do not go so far as to place the burden of showing
testamentary capacity upon the proponent. They all
deal with cases where the testator is aged, sick and
infirm or unable to read and write by reason of
blindness or illiteracy. In such cases it is held that
proponent is onerated with the burden of showing
that the testator comprehended the fact that he was
about to execute his will and understood the
contents of the paper. None of them hold that the
burden of showing testamentary capacity rests upon
proponent at any time or under any circumstances.
Except when insanity is shown to have existed prior
to the execution of the will this burden rests
throughout the trial upon contestant. Smith v. Smith,
63 Tenn. (4 Baxt.), 293. For this reason we think the
charges complained of under these assignments are
technically erroneous, but we are unable to see
wherein proponent has suffered materially since,
derects appearing in the record without dispute,
the burden of proof rested upon him to show that
the testator comprehended the business in which he
was engaged and understood the contents of the
paper signed as his will. This implies necessarily a
showing of soundness of mind at the very time the
will was executed. The better practice is undoubtedly
to maintain a clear distinction between the burden
of proof upon the legal execution of the will in
cases where, by reason of the peculiar facts
appearing, the burden of showing a conscious execution of the will free from suspicious circumstances is placed upon proponent and the general burden of establishing insanity and undue influence which, as we have seen, continues throughout the trial to rest upon contestants.” 24 Tenn. 261–262, 142 S.W.2d 765.

On this question of mental capacity Phillips' Pritchard Law of Wills, § 105 says:

“The burden of proving the formal execution of the will is always on the proponent; but when this is done, the presumption of law is in favor of the sanity of the testator, and the will may be read to the jury. The burden of overcoming the legal presumption of capacity, and of showing of want of it by the preponderance of the evidence, is upon the party impeaching the will.”

In Smith v. Smith, 63 Tenn. 295, this Court said:

“Whatever may be the conflict of judicial ruling elsewhere upon this subject, the doctrine of this Court has always been uniform, that when a will is produced, and its formal execution established by proof, and the will is attacked for fraud of incapacity of the testator, the burden of proof is upon the assailing party to show the fraud, undue influence or want of testamentary capacity. 7 Hump., 92; 6 Cold., 25; Car.L.S., 789; 1 Swimb. 45; 1 Redf. 46; 2 Greenl.Ev., sec. 689; 1 Jarm., 74, 56 Verm., 38; Peters, C.C. 163; 4 Washb.C.C. 262; 10 N.H., 51, 54; Johns. 144; 4 Conn., 207; 7 Gray, 71. When, however, insanity is shown to have existed before the execution of the will, the burden of proving capacity at the time of the execution of the will, is shifted upon the plaintiff. Hailey v. Webster, 21 Maine, 461; Ford v. Ford, 7 Hump. 90 [92].” 63 Tenn. 295

[8] Of course, the burden of proof would not be shifted from proponent in an undue influence case where the relationship of the testator and the beneficiary is not such as to create a presumption of undue influence; such as between attorney and client, physician and patient, etc.; Rose v. Mynatt, 15 Tenn. 30; Rutland v. Gleaves, 31 Tenn. 198. Since neither of these two conditions, insanity prior to the execution of the will, or undue influence presumed from the character of relationship between the parties, was shown to exist in this case the burden of proof on these issues did not continue on proponent, but was on contestant.

There is much emphasis, and strong reliance, upon the fact that Mrs. Rhodes was an alcoholic. It is insisted that proof of this fact, coupled with opinion evidence by two expert witnesses called by contestant that she was under the influence of an intoxicant at the time she wrote the will was enough to keep the burden of proof on the proponent as to competency.

The rules on the effect of drunkenness on the capacity of a testator are well settled in Tennessee. The rule is correctly summarized in Phillips' Pritchard thusly:

“Drunkenness is of itself a species of insanity, self-imposed; and long continued habits of intemperance may, in some temperaments, gradually destroy the mind and impair the memory and other faculties, so as to produce permanent derangement. But the mere fact that the testator was under the influence of intoxicating drinks will not, of itself, render the testamentary act invalid. To have that effect, it must appear that the habit of indulging in strong drink has produced some fixed mental disease, or that his present state of intoxication is such as to render him not master of himself and therefore irresponsible for his acts.” § 114 (Emphasis supplied.)

The text continues:

“There is no presumption of the continuance of incapacity resulting from inebriety or disease. Proof of long continued habits of intemperance does not require proof of a lucid interval to give validity to the acts of the drunkard, as is required where general insanity is shown; unless it seems the indulgence has produced permanent derangement of mind. Where the testator's habits of intoxication are not such as to render him habitually incompetent, it is necessary for the party setting up his incapacity on the ground of intoxication to show its existence at the time of executing the will. After proof of excitement of delirium at the time of the act, the burden is upon the proponents of the will, to disprove its existence in such a degree as would vitiate the will.” § 116.

[9] There is no credible evidence that alcoholism had produced in Mrs. Rhodes any mental derangement, or as stated in Phillips' Pritchard had "produced some mental disease". The evidence of intoxication at the time Mrs. Rhodes wrote the will is not such as to cast doubt on its validity. On the day she wrote the will, she wrote five separate checks in payment of legal obligations, the checks varying in amount, with notations thereon as to the purpose of payment. Additionally, there are checks in the record written by Mrs. Rhodes some two, five and six days prior to the execution of the will, again varying in amounts, again to various persons for different purposes, with each check containing a notation of the purpose of the payment. Additionally, there are numerous other checks in the record drawn and paid within a period of six months before and after the making of the will which show a capacity for handling business affairs such as paying taxes, insurance premiums and other items, reflecting an awareness of her property and obligations. In truth, the practically uncontradicted evidence is that Mrs. Rhodes regularly and
competently attended to a reasonably large volume of business involving an estate estimated at between two and three hundred thousand dollars which consisted largely of rental property. Over and above this is the fact Mrs. Rhodes kept the will for nearly a year after she wrote it, during all of which time she could have destroyed it or written another, there being no adequate proof she was not competent to do either of these things.

Admitting that Mrs. Rhodes was an alcoholic and conceding for the sake of argument she had been drinking on the day she wrote her will, the sum total of all the facts we have with respect to Mrs. Rhodes’ mental capacity on that day, and before and after, leave it improbable she was not competent to make a will under the rules quoted above from Pritchard.

[10] Finally, there can be no reversal on this issue since the question of the presence or absence of suspicious circumstances was one of fact, decided against contestant by the trial judge, concurred in by the Court of Appeals. This concurrent finding of fact is binding on this Court. The rule in this regard is stated in Overbey v.

Poteat, 206 Tenn. 146, 149, 332 S.W.2d 197, as follows:

“(1) It may be well at this point to recall that findings of the ultimate facts, whether based on conflicting evidence, or on uncontroverted evidence, if concurred in by the trial court and the Court of Appeals, and if supported by any material evidence, are not subject to review in the Supreme Court; conclusions of law based on those findings of fact are, however, open for review in this Court. Ins. Co. of North America v. East Tenn. V. & G. Ry. Co., 97 Tenn. 326, 37 S.W. 225; Martin v. McCrary, 115 Tenn. 316, 89 S.W. 324, 1 L.R.A., N.S., 530; Moore v. Cincinnati, N. O. & T. P. Ry. Co., 148 Tenn. 561, 256 S.W. 876 (W.C. Case); King v. Buckeye Cotton Oil Co., 155 Tenn. 491, 296 S.W. 3, 53 A.L.R. 1086 (W.C. case).” 206 Tenn. 149, 332 S.W. 2d 199.

Since there was much material evidence, the question is foreclosed in this Court.

The assignments of error are overruled and the judgment of the Court of Appeals affirming the judgment of the Circuit Court is affirmed.

BURNETT, C. J., and Dyer, CHATTIN and CRESON, JJ., concur.
CHAPTER 6

PREPARATION TO DRAFT A WILL: CHECKLISTS AND THE CONFERENCE WITH THE CLIENT

SECTION ONE

Review Activities

1. Assume you have been a working paralegal in a general practice firm for over two years. Your supervising attorney handles criminal law matters and estate planning matters. You have a will client, Bob, who wants to use a good friend, Ted, to be the executor of his will. Bob trusts Ted, and they have been friends for over twenty years. Bob is unaware that Ted is a client of your firm also. Ted is being investigated for embezzlement at his job. Should Bob be advised about Ted’s situation? Bob clearly expressed his desire to have Ted serve. Should Bob select another executor? How would you resolve this matter?

2. Discuss the advantages of sending to a client a rough draft of his will. Why should it be done? How can you ensure the fact that the client will still come in for a proper execution?

3. Witness to a will should be chosen with care. Your office practice is to use two legal secretaries in the firm. The secretaries used most often are single. Assume that one of the secretaries recognizes a will client as a former high school classmate, and she gladly agrees to act as a witness for his will. The client and secretary renew their friendship and marry a year after the client’s will execution. What effect does this marriage have on the will? Is there anything your office could have done to prevent this negative impact on the client’s will?

4. Access the will of Richard Nixon at www.courttv.com. Select Famous people, then Wills. Read his will. Did it contain a residuary clause? Was simple language used in the will?

5. Assume a client wants to make a few minor changes to a will she had prepared three years ago. In her will she left $10,000 to each of her five grandchildren. Now she wants to change that to $20,000, and one of her grandchildren has died. She wants to know if she can hand write in her will these changes. What will be your response?

SECTION TWO

Vocabulary Review

Fill in the Blank

1. An _____ is money or property given by a parent to a child in anticipation of the share the child will inherit from the parent’s estate.

2. A _____ is one who spends money unwisely and wastefully.

3. A _____ is the family home and the adjoining land where the head of the family lives.

4. A condition _____ is one in which a specified event must occur before the estate or interest vests.

5. A condition _____ is one in which an estate that is already vested in a named devisee will not continue to be vested unless a specified event occurs.
CHAPTER 7

FINAL DRAFT AND EXECUTION OF A VALID WILL

SECTION ONE

Review Activities

1. Access the wills of famous people at willsandformsonline.com or at www.courttv. Find the will of John F. Kennedy Jr. Who was his executor? Find the will of Linda McCartney. Who was her executor? When was her will executed? Find the will of former U.S. Supreme Court Chief Justice Warren Burger. List five suggestions that could have improved his will.

2. Access some online form services to prepare your simple will. Try willsandformsonline.com or lawsmart.lawinfo.com/documents/living. Which site do you like better and why? Find a wills form service online. Prepare your own will.

3. Locate a real will that has been probated. Label the exordium clause, residue clause, simultaneous death clause, and testimonium clause. If the will contains any trusts, circle and label them, also.

4. Using the information from the text and the information you can find at www.money.com regarding powers of attorney and medical directives, prepare a brochure about these important nontestamentary documents that could be given to an estate client. Keep the brochure easy to read.

5. A will client of your firm for some unknown reason prepared his own codicil and had it executed in another state. Now that codicil is being contested because of the way it was executed. Does the law of your state apply? Or does the law of the state where the codicil was executed apply? See In Re Estate of Zelikovitz, 923 P.2d 740 (Wyo. 1996).

SECTION TWO

Vocabulary Review

1. Some common used clauses in a will are self-explanatory. Some are not. Prepare the written explanation you would give to a new paralegal you are training who has had little will-drafting experience for the following clauses:
   a. exordium clause
   b. revocation clause
   c. residuary clause
   d. simultaneous death clause
   e. testimonium clause
   f. attestation clause

2. You have done such a great job training your new assistant, that you have been asked to perform an in-house training session for all support staff regarding the importance of living wills, medical powers of attorney, durable powers of attorney for health care, and health care proxies and durable powers of attorney. Prepare a one-page handout that you will use for your training materials.
In the Matter of the ESTATE OF Joseph ZELIKOVITZ, Deceased.

No. 95–265.

Supreme Court of Wyoming.

Sept. 12, 1996.

Petition to revoke probate of second codicil was granted by the District Court, Teton County, D. Terry Rogers, J. Appeal was taken, alleging valid execution of codicil. The Supreme Court, Thomas, J., held that: (1) Wyoming law applied when determining whether codicil signed in another state was validly executed, and (2) notary public who notarized testator's signature could also serve as witness to execution.

Reversed and remanded.

1. Wills 70

   Wyoming law applies when determining whether disputed codicil, which was signed in Oklahoma, was validly executed. W.S.1977, § 2–2–102(a)(i).

2. Wills 70

   Only if execution of codicil signed in another state does not conform to requirements of Wyoming law does court turn to law of place where codicil was signed to determine validity of execution. W.S.1977, § 2–2–102(a)(i).

3. Wills 116

   Notary public could validly both notarize testator's signature and serve as witness to execution of disputed codicil, satisfying requirements of will execution statute. W.S.1977, § 2–6–112.

4. Statutes 226

   California precedent will no longer be treated as having additional persuasive authority when interpreting Wyoming probate statutes, even though Wyoming Probate Code was derived from California Probate Code.

   * * * * *

   Henry C. Phibbs, II of Phibbs Law Office P.C., Jackson, for Appellant Melba Zelikovitz.

   Floyd R. King of King & King, Jackson, for Appellees Susan Zelikovitz, Elaine Stein, and Steven Zelikovitz.

   Before TAYLOR, C.J., and THOMAS, MACY, GOLDEN* and LEHMAN, JJ.

*Chief Justice at time of oral argument.

THOMAS, Justice.

The issue is what law governs the execution of the codicil of Joseph Zelikovitz (Zelikovitz), a Wyoming resident, who executed the codicil in Oklahoma, and who died in Teton County. We hold, contrary to the decision of the trial court, that the critical codicil was executed according to the law of Wyoming, and it should be admitted to probate. We reverse the Order Granting Petition to Revoke Probate of Second Codicil, and we remand the case to the probate court for further proceedings in accordance with this opinion.

In the Brief of Appellant Melba Zelikovitz (Melba), these are the asserted issues:

1. Whether the district court was in error in its ruling that since the adoption of the new Wyoming Probate Code in 1980, California law is neither controlling or persuasive authority in the determination of questions of first impression involving provisions of the Probate Code.

2. Whether under California precedent the district court was in error in ruling that a notary public who observed a decedent sign a codicil, knowing that it was a codicil, and signed the document as notary, should be considered to be a witness to the execution of the codicil under W.S. § 2–6–112.

3. Whether the district court erred in its choice of law when it ruled that Oklahoma law was controlling, as the Oklahoma precedent was based on different statutory language from Wyoming, and the use of such law resulted in the defeat of a testator's clear intention on the basis of a technicality not present in the Wyoming Probate Code.

The Brief of Appellees Susan Zelikovitz, Elaine Zelikovitz Stein and Steven Zelikovitz (Zelikovitz children) states the issues in this way:

There is one principal issue presented for review which the appellees would state as follows:

Was the attempted second codicil of the decedent, Joseph Zelikovitz, properly executed according to law and therefore entitled to be admitted to probate in the state of Wyoming?

The two sub-issues involve the choice of law and the statutory requirements in the State of Oklahoma where the codicil was prepared and executed. The appellees believe those issues should be stated as follows:

1. The probate court was correct in determining that since the adoption of the Wyoming Probate Code the California precedents have not been controlling or
extremely persuasive and that the court would look to Oklahoma law to determine the codicil’s validity.

II. The probate court was correct in determining that under Oklahoma law the codicil was invalid as not having been properly executed and was not entitled to be admitted to probate in the state of Wyoming.

Zelikovitz executed his Last Will and Testament (Will) on June 6, 1990, in which he bequeathed $25,000 to Steven Zelikovitz stating, “he has already benefited from my estate during his lifetime.” The residue of the estate, except for certain described limited and specific bequests, was bequeathed to Susan Zelikovitz and Elaine Zelikovitz. The Will named Steven Zelikovitz, Elliot Levitan, and David Ross as executors and trustees. About six months later, Zelikovitz executed a first codicil in which he revoked the appointment of Levitan and Ross as executors and trustees and appointed Susan and Elaine in their stead.

By November 7, 1994, a document entitled “Joseph’s Last Will & Testament” (second codicil) had been prepared, which actually was in the handwriting of Zelikovitz’ wife, Melba. That document is the focus of this case. The second codicil removed Steven Zelikovitz and David Ross as executors and trustees, removed Susan and Elaine as executors and trustees named in the first codicil, and appointed Jerry Owen and Bernie Greenblott as new executors and trustees. The second codicil, including interlineation, provided:

Joseph’s Last Will & Testament

Last Will & Testament

Residuary Estate—I ca revoke all of this paragraph and in its place all my the residue of my estate shall go to my wife, Melba Zelikovitz, for her sole benefit.

Add all my personal papers, patents, patent pendings and all my development work, lab models plus all my personal property and effects, art, glass sculptures, etc. will become the sole undisputed property of my beloved wife, Melba Zelikovitz.

On November 7, 1994, Zelikovitz and Melba went to the Grove Tag Agency (Agency) in Grove, Oklahoma. Activity at the Agency was tumultuous because it was open for the first day at a new location, was short the services of two employees, and was experiencing computer problems and a heavy volume of business transactions when the Zelikovitz couple arrived. Zelikovitz and Melba sought out Dee Lawson (Lawson), an acquaintance who was employed at the Agency. Zelikovitz explained to Lawson he was making some changes to his Will, and he asked that a notary public and two people witness the execution of the second codicil and a document addressed to his attorney in Jackson, Wyoming.

Lawson asked the owner of the Agency, Susie Nichols (Nichols), to serve as the notary public. Both Lawson and Nichols understood the document represented changes to Zelikovitz’ Will, and they saw him sign the second codicil. After observing Zelikovitz sign the second codicil, Nichols wrote: “Signed before me this 7th day of Nov 1994 Susie Nichols 11-08-97 [expiration date of notary commission]” before Lawson or any other witness signed the document. Apparently Nichols then resumed her duties, and she did not observe anyone else sign the second codicil as a witness. At some point in time, the words “Witnessed by” were added at the bottom of the second codicil, to the left of Zelikovitz’ signature, and Lawson signed her name below that, out of the presence of any other witness. Lawson asked Lisa Humble (Humble), another employee of the Agency, to be the second witness. Humble then signed her name below that of Lawson and under the words “Witnessed by.”

The execution at the end of the document reads:

Witnessed by:

Lisa Humble /s/

Signed before me this 7th day of Nov 1994
Susie Nichols 11-08-97 /s/

Zelikovitz and Melba then returned to Jackson, Wyoming, where Zelikovitz died on December 3, 1994. All parties are in accord that Zelikovitz was a resident of Teton County at the time of his death, and there appears to be no dispute he was a resident of Teton County at the time the second codicil was executed.

On January 3, 1995, the personal representatives named in the second codicil filed a petition to admit the Will and the two codicils to probate in Teton County. An order was entered admitting the Will and the two codicils to probate and appointing the personal representatives named in the second codicil. Some three days following that order, the Zelikovitz children filed their petition for probate of the 1990 Will and 1991 codicil without referring to the second codicil. After that petition for probate was presented, the court revoked its order of January 6, 1995 and, on February 1, 1995, the court

---

1. The Grove Tag Agency, on behalf of the State of Oklahoma, issued car, boat, and motor vehicle registration as well as driver licenses.
entered another order admitting the Zelikovitz Will and both codicils to probate. That order also appointed the personal representatives whom Zelikovitz had named in the second codicil, but expressly provided Letters Testamentary should not issue, and did not require the posting of any bond until the court could rule on any action to set aside the Will or any portion of it.

After that last order, the Zelikovitz children filed a Petition to Revoke the Probate of Second Codicil, on which a hearing was held April 20, 1995. The court received testimony from Lawson and Nichols. Humble, both by a deposition and an affidavit, admitted she did not see Zelikovitz, Lawson, or Nichols sign the second codicil, and she had not been informed the document was a codicil or a will. The testimony by Humble established Lawson’s signature was already on the document at the time Humble signed it, and Lawson, not Zelikovitz, had asked her to sign the document.

After the hearing, the court entered an Order Granting Petition to Revoke Probate of Second Codicil, stating the execution of the second codicil was governed by Oklahoma law. The court ruled the second codicil was not valid because it did not contain the signature of two subscribing witnesses and found, under Oklahoma law, the notary public would not qualify as a witness. After the court denied her motion to reconsider, Melba appealed from that order.

[1,2] The parties vigorously debate the choice of foreign law, which they contend ought to be applied in this case. We have no reason to resolve that debate. The Will is to be proved in Teton County pursuant to WYO. STAT.§ 2–2–102(a)(i) (1980). We hold we need to look only to the law of our state to determine the validity of the execution of the second codicil, unless the execution did not conform to the requirements of our statute. Only in that event would we be justified in turning to the law of the place where it was executed.

[3] Under our statutes, “[w]ill’ includes the words ‘testament’ and ‘codicil.’ ” WYO. STAT. § 8–1–102(a)(viii) (1993). The validity of the execution of a will is governed by WYO. STAT. § 2–6–116 (1980), which states:

A written will is valid if executed in compliance with W.S. 2–6–112 or 2–6–113 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national. (Emphasis added.)

The statute refers to WYO. STAT. § 2–6–112 (1980), which provides, in pertinent part:

Except as provided in the next section [§ 2–6–113], all wills to be valid shall be in writing, or typewritten, witnessed by two (2) competent witnesses and signed by the testator or by some person in his presence and by his express direction.

Our application of Wyoming law is supported by WYO. STAT. § 2–6–104 (1980), which offers this guidance concerning the choice of law as to the meaning and effect of wills:

The meaning and legal effect of a disposition in a will is determined by the law of the state in which the will was executed, unless the will otherwise provides or unless the application of that law is contrary to the public policy of this state otherwise applicable to the disposition.

This provision addresses the substantive effect of the language of the will. See Matter of Reed’s Estate, 768 P.2d 566 (Wyo. 1989). Had the legislature intended to apply the law of the place of execution to the requirements for a valid execution, that direction would have been included in WYO. STAT. § 2–6–104. We would not have WYO. STAT. § 2–6–116 as a part of our statutory scheme.

We have said, “[i]t is the duty of the courts when construing legislation to attempt to effectuate the purposes and intent of the legislature.” State ex rel. Albany County Weed and Pest Dist. v. Bd. of County Com’rs of Albany County, 592 P.2d 1154, 1158 (Wyo. 1979). In this instance, the legislature was solid with respect to its intent. It provided, in WYO. STAT. § 2–1–102 (1980), with respect to the issue before us:

(a) This code shall be liberally construed and applied, to promote the following purposes and policies to:

* * * *

(ii) Discover and make effective the intent of a decedent in distribution of his property; * * *.

All the parties agree Humble would not qualify as a witness under WYO. STAT. § 2–6–112. The findings of the probate court confirm this by stating, “[t]he parties agree that Lisa Humble, the second attesting witness to the decedent’s second codicil was not qualified as a witness because she did not actually witness the decedent sign the codicil.” We accept that as a proper construction of WYO. STAT. § 2–6–112, but the focus of the issue then becomes whether Nichols, who intended to and did act as a notary public,
qualifies as a witness to the second codicil under Wyoming law.

We hold the requirements of Wyo. Stat. § 2–6–112 are met. The probate court, in its findings, described the second codicil as a “handwritten will,” thus, the requirement that “all wills to be valid shall be in writing, or typewritten” was satisfied. The probate court also found Zelikovitz signed the codicil, and the requirement that it be “signed by the testator” was met. Finally, the probate court, in its findings, states, “Susie Nichols notarized Joseph Zelikovitz’ signature and witnessed Zelikovitz sign the document.” That is confirmed by another finding stating, “Joseph Zelikovitz signed the second codicil at the end thereof, * * *. He also signed it in the presence of the notary public, Susie Nichols.”

There is no provision in the Wyoming statutes, nor any ruling in our cases, that would inhibit the notary public from serving as a witness, even if she intended to and did sign the document as a notary public. The second codicil was “witnessed by two (2) competent witnesses,” in accordance with the statute. Nichols satisfied the construction given to Wyo. Stat. § 2–6–112 by observing Zelikovitz sign the codicil and then signing herself. There is no requirement in our statutes that the witnesses sign in the presence of one another, although that does foreclose the prospect of having a self-proving will pursuant to Wyo. Stat. § 2–6–114 (1980).

We hold, under our law, Nichols qualified as the second witness, and the requirements of our statute for the execution of a valid will were satisfied. In In re Estate of Carey, 504 P.2d 793, 801 (Wyo. 1972), we repeated the proposition:

“It was signed by the testator and witnessed by two witnesses at his request. That was sufficient.” In re Stringer's Estate, 80 Wyo. 389, 394, 433 P.2d 508, 522, rehearing denied and modified on other grounds 80 Wyo. 389, 345 P.2d 786 (1959).

The second codicil should have been admitted to probate.

[4] Melba vigorously contends resolution of this case should be controlled by reference to California decisions. We readily acknowledge we have historically relied upon California decisions on the theory that our probate code was derived from the California Probate Code, and the decisions of the California courts construing parallel provisions were highly persuasive. Dainton v. Watson, 658 P.2d 79 (Wyo.1983); Matter of Kimball’s Estate, 583 P.2d 1274 (Wyo.1978); Matter of Reed’s Estate; In re Randall’s Estate, 506 P.2d 432 (Wyo.1973); Gaunt v. Kansas University Endowment Ass’n of Lawrence, Kansas, 379 P.2d 825 (Wyo.1963); Wilson v. Martinez, 76 Wyo. 196, 301 P.2d 785 (1956); and Edelman v. Edelman, 65 Wyo. 271, 199 P.2d 840 (Wyo.1948). While this approach has been taken in the history of our probate law, we have recognized, in this instance, there is no need to turn to California law. We conclude adjustments in the probate code of our state and that of California cause us to no longer treat California precedent as having additional persuasive authority with respect to Wyoming probate statutes. California cases will hereafter be afforded the same persuasive weight as those of any other sister jurisdiction.

The Zelikovitz children, as they did in the probate court, rely heavily upon the application of Oklahoma law. For the reasons already articulated, we see no need to turn to the law of Oklahoma to resolve this case. Consequently, we do not do so.

Because the second codicil to the Will was executed in accordance with the appropriate laws of the State of Wyoming, we hold it should have been admitted to probate in Teton County. The Order Granting Petition to Revoke Probate of Second Codicil is reversed, and this case is remanded to the probate court in Teton County for further proceedings in the administration of the estate.
CHAPTER 8

INTRODUCTION TO TRUSTS

SECTION ONE

Review Activities

1. Your supervising attorney wants you to create a brochure that discusses the differences between a will and a trust. He is finding that many clients have been confusing information about the two documents. Accessing the website of AARP would be helpful. That site is www.aarp.org/getans/wills.html.

2. Mr. Greene, a wealthy retired businessman, is very interested in creating an educational trust for the benefit of his five grandchildren. His children would not be a wise choice for trustee. Mr. Greene has always been nice to you, and you have much respect for him. What would your response be when he asks for your personal opinion as to who he select for trustee?

3. Discuss the advantages of creating a trust.

4. Using www.findlaw.com, locate an attorney who prepares trusts in the following locations:
   a. Dallas, Texas
   b. Wilmington, Delaware
   c. Reno, Nevada
   d. Boise, Idaho

5. Contact three local banks. Collect information regarding the services they provide and the fees charged for serving as a trustee.


SECTION TWO

Vocabulary Review

1. Define trust. Use the website at www.aaaattorneys.com/willsglossary.htm. Find another website that defines trust and compare the two definitions. Which definition do you prefer and why?

2. Using the information found at AARP’s website, www.aarp.org/confacts/money/wills-trusts.html, explain the difference between revocable and irrevocable trusts.

3. Go to www.nolo.com and define living trust, trustee, trustor, and beneficiary.

Case Study

258 Ga. 679
MUNFORD, Guardian,
v.
MACLELLAN, Trustee, et al.

No. 46059.
Supreme Court of Georgia.

Child’s guardian sued trustees of trust established for child’s benefit to remove them as trustees. The Fulton County Court, William W. Daniel, J., granted partial summary judgment in favor of the trustees, and guardian appealed. The Supreme Court, Hunt, J., held that nonresident of Georgia was entitled to serve as trustee.

Affirmed.

Weltner, J., dissented and filed opinion.

See also 682 F.Supp. 521.

A nonresident of Georgia was entitled to serve as trustee of a trust created in and to be administered in Georgia and concerning property located in Georgia.

Moreton Rolleston, Jr., Atlanta, for M. Aubrey Munford, guardian.
C.B. Rogers, Rogers & Hardin, Louis Levenson, Mark A. Thompson, Atlanta, for Kathrina H. Maclellan, trustee, et al.

HUNT, Justice.

The main question presented by this appeal is whether a nonresident of Georgia may serve as trustee of a trust created in and to be administered in Georgia and concerning property located in Georgia.

* * * * *

Contrary to Ms. Munford’s argument, this section does not bar Ms. Maclellan from serving as the trustee. “[This section] applies where a trustee has died or removed beyond the jurisdiction of the courts of this state, resigns, or otherwise becomes disqualified, the superior courts of the several counties shall have full power and authority, in a summary manner, upon the petition of two or more of the parties interested in the trust or upon the petition of the sole party at interest and on such notice as the court shall direct, to appoint a new trustee or trustees in the place of the deceased, nonresident, resigned, or disqualified trustee or trustees.

Contrary to Ms. Munford’s argument, this section does not bar Ms. Maclellan from serving as the trustee.

1. We note that under common law, it is not necessary that a trustee be a resident of the jurisdiction in which the trust is created and that the Restatement of the Law 2d, Trusts, § 94, specifically provides: “A natural person who does not reside in the State in which a trust is created and is to be administered and in which the trust property is situated can be a trustee.” See also Comment to Restatement of the Law 2d, Trusts, § 94.

1. We note that under common law, it is not necessary that a trustee be a resident of the jurisdiction in which the trust is created and that the Restatement of the Law 2d, Trusts, § 94, specifically provides: “A natural person who does not reside in the State in which a trust is created and is to be administered and in which the trust property is situated can be a trustee.” See also Comment to Restatement of the Law 2d, Trusts, § 94.

The status of a trustee, nonresident at the time of appointment, is distinguishable from that of a trustee who is a resident at the time of appointment but who subsequently moves out of state. The fact that a trustee is close at hand may be a factor in naming a resident as trustee. Thus, the trustee’s later removal from the state may be sufficient reason for disqualification. On the other hand, residency is not a consideration if one names as trustee a person who is a nonresident at the time of appointment.
We find no authority for disqualifying Ms. Macellion from serving as the trustee merely because she is a nonresident. The legislative protections for beneficiaries cited by the dissent severely limiting nonresident fiduciaries apply to executors and administrators of estates. There is good reason to distinguish the functions of executors and administrators from those of trustees. The duties of the former can be characterized as “closing-out” an estate, assuring the distribution of assets, etc., in an expeditious fashion. The duties of a trustee, however, may be, and often are, long-lasting. In many cases, a trustee is named because he has a personal concern for the beneficiary and a motivation to diligently carry out the management of a trust over the time required. In many cases, a nonresident is the only individual with such an interest and motivation. In general, a testator will name as trustee an individual or institution he desires to so serve, and in whom he has confidence, regardless of the residency of that individual or institution. The legislature has not restricted a trustee’s ability to make that choice in the instance of a nonresident, and we find no compelling reason to do so.

2. We find no merit to Ms. Munford’s contentions that the trial court abused its discretion by appointing a guardian ad litem for the child in this litigation, OCGA § 29–4–7, or by vacating the default by the bank. OCGA § 9–11–55(b).

JUDGMENT AFFIRMED.

All the Justices concur, except WELTNER, J., who dissents.

WELTNER, Justice, dissenting.

I respectfully dissent to Division 1 of the majority opinion because I believe that the statutory scheme requiring the accountability of fiduciaries prohibits or severely restricts the appointment as trustee of persons who are not immediately and directly subject to the judicial processes of this state.

1. I agree with the majority in several aspects, as follows:

(a) that OCGA § 53–13–8 is not applicable to this case, as it works the disqualification of a trustee who has “removed beyond the jurisdiction of the courts of this state . . .,” removal being, of course, a matter distinct from the initial appointment of a non-resident as trustee;

(b) that Caldwell v. Hill, 179 Ga. 417, 426(2), 176 S.E. 381 (1934), does not resolve the issue in this case, as it holds only that the above code section was inapplicable to the appointment of a non-resident trustee; and

(c) that the common law did not prohibit the appointment of non-resident trustees, and the Restatement of the Law would authorize it. (Opinion, p. 369.)

2. But we do not deal here with a common law situation. The General Assembly, over many years, has created protection for beneficiaries that prohibit or severely limit non-resident fiduciaries. Examples are:

(a) A non-resident may not be appointed executor or co-executor without posting a bond in double the amount of the estate, with the added requirement that the sureties on the bond be residents of Georgia. OCGA § 53–6–22(a).

(b) A non-resident appointed as executor may not qualify, even though relieved by the will of posting bond, without the express approval of the probate judge, and “within his discretion.” OCGA § 53–6–22(b).

(c) A non-resident may not be appointed administrator unless such person has “equal or greater interest than resident heirs, or of sole interest of any estate . . .” and unless the non-resident shall post a bond (with sureties who are residents of Georgia) in double the amount of the estate. OCGA § 53–6–23.

(d) A trustee who has “removed beyond the jurisdiction of the courts of this state” is disqualified. OCGA § 53–13–8.

3. A theme of great importance—immediate accountability of fiduciaries—underlies each of these statutory restraints. Consider:

1. The majority aptly notes the distinction between appointing a trustee known to the settlor to be a non-resident, and the removal of a resident trustee beyond the jurisdiction of the Georgia courts. (Opinion, p. 369.) But note that the same knowledge exists on the part of the testator naming a non-resident executor—which may only be accomplished within these statutory constraints.

2. Again, the heirs may agree upon and request the appointment of a non-resident administrator, knowing their choice to be a non-resident. Yet the law will not permit it, except in these narrow circumstances.
(a) Fiduciaries of trusts or estates created in Georgia and supervised by the courts of Georgia state must be fully amenable to the judicial processes and criminal sanctions of Georgia.

(b) Beneficiaries of trusts and estates in Georgia must be able to enforce their rights through the courts of Georgia.

(c) Courts of Georgia that appoint (or approve the appointment of) fiduciaries of estates in Georgia must be empowered to enforce their orders through the judicial and executive powers of the State of Georgia.

4. In the light of this recurring statutory theme of accountability, we should not sanction the appointment of a trustee who is beyond the reach of the courts of Georgia. The results of such a sanction would include:

(a) consigning the rights of beneficiaries to the courts of other states, whose laws and practices may be foreign to our own;

(b) requiring beneficiaries of Georgia estates to invoke the powers of at least two court systems—that of Georgia and of the domicile of the foreign trustee—with the possibility of removal, on grounds of diversity of citizenship, to the federal system; and

(c) according to foreign trustees the right to select a forum other than the courts of Georgia.

5. We have here the opportunity to strengthen the protection that the law casts about beneficiaries. That is consistent with centuries of legal history, commencing with the earliest chancellors, who “became keeper of the king’s conscience. . . . the general guardian of all infants . . . and [had] the general superintendence of all charitable uses in the kingdom.” 3 W. Blackstone, Commentaries, *47–8 (Jones, ed. 1915). We have, also, the authority to do so.

There are compelling reasons to eliminate the manifold perils of non-resident trustees. For the contrary proposition, I know of no good reason.

3. I do not struggle here with whether or not a non-resident trustee might be subject to *in personam* jurisdiction under the Georgia Long Arm Statute, OCGA § 9–10–91 et seq. At the very least, that is yet another barrier to be overcome in enforcing the rights of beneficiaries. Further, if it is possible to ground jurisdiction upon a *situs* of property in Georgia, that ground easily may be eliminated by transfer of realty and removal of the *res*.

4. It is an elementary rule of statutory construction that a statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes “in pari materia,” are construed together, and harmonized wherever possible, so as to ascertain the legislative intendment and give effect thereto. It is simply the duty of this court in interpreting the statutes now under consideration to look diligently for the intention of the legislature, keeping in view at all times the old law, the evil, and the remedy. [OCGA § 1–3–1(a)]. *Ryan v. Commissioners of Chatham County*, 203 Ga. 730, 731–2, 48 S.E.2d 86 (1948).
CHAPTER 9

CLASSIFICATION OF TRUSTS, THE LIVING TRUST, AND OTHER SPECIAL TRUSTS

SECTION ONE

Review Activities

1. Your supervising attorney is very interested in promoting living trusts with his estate planning clients. Create a brochure that discusses the advantages of living trusts. Also, your supervising attorney is interested in making that information available on the firm’s web page. Would you include the same information as that contained in the brochure? Would there be any differences? Discuss.

2. You are interviewing an estate planning client. This client has one child and three grandchildren. The client’s husband died three years ago leaving her over $2 million in assets. The client mentions several times during the interview that she is worried her child will foolishly spend all her inheritance and therefore leave nothing for the grandchildren. The child has a gambling addiction the client reveals during the interview. What kinds of trusts may be appropriate for this client?

3. Thurston Powell, a wealthy client of your firm, wants to create the following trusts. Would these trusts be ruled valid in your state? (A) A trust to care for his pet cocker spaniel; (B) a trust to fund and build a gym at his college if the men’s basketball team wins the NCAA tournament before the year 2020; (C) a trust for his granddaughter if she travels to China.

4. Access www.violinlaw.com. Prepare a summary of the article regarding the potential problems of living trusts. Do you have suggestions to avoid these problems?

5. Your supervising attorney wants you to prepare a letter that will be sent to a client who has called and asked if she needs a will since she has a living trust. Prepare a draft of that letter.

6. If a client wants to fund a trust with stock, should the dividends be classified as income or added to the principal? The need for careful drafting is apparent when reading Estate of Tyler, 377 A.2d 157 (pa. 1977).

SECTION TWO

Vocabulary Review

1. What is a necessary? List at least five things that would be deemed a necessary.

2. Years ago, when Thurston Powell, a wealthy businessman and client of a law firm, wrote his will, he created a testamentary trust for the benefit of building a library in his hometown. A flood hit his hometown in 1999, and every house and building was condemned. The federal government has purchased all the land in the town, preventing anyone or any organization from rebuilding in the area. Mr. Powell died before he was able to change his will. What will happen to the testamentary trust? Should the cy-pres doctrine be applied? Explain cy-pres and answer the question.

3. According to www.aol.smartmoney.com, what is a living trust and how can one be used to save taxes?

4. What is a marital bypass trust and a Q-tip trust according to www.aol.smartmoney.com?

5. Define express trust, implied trust, active trust, and passive trust. Using these terms, classify the following: John created a testamentary trust for the benefit of his wife Yvonne, wherein the trustee Paul would release monies to Yvonne monthly for necessaries. The trust was funded with $555,000.
At issue in this appeal is the proper distribution as between income and principal of certain small stock dividends received during the period May 3, 1945 through September 30, 1963 by the trustee of an inter-vivos trust created by Sidney F. Tyler in 1919. The Court of Common Pleas of Philadelphia County, Orphans’ Court Division, followed our decision in Tyler Trusts, 447 Pa. 40, 289 A.2d 441 (1972), and held such small stock dividends to be allocable to principal.1

The executor of the estate of a deceased income beneficiary has appealed, relying on this Court’s decision in Pew Trust, 411 Pa. 96, 191 A.2d 399 (1963).2 We thus have before us the relationship between our decisions in Tyler Trusts, supra, and in Pew Trust, supra.

I.

Much, perhaps too much, has already been written of the historical events which gave rise to the controversy typified by this appeal.3 No more than a brief summary is therefore in order:

Prior to May 3, 1945, allocation of trust receipts in the form of stock dividends as between principal and income was accomplished through application of what was known as the “Pennsylvania Rule.” Where the trust received an “extraordinary” stock dividend, it was incumbent upon the trustee to determine what portion of that dividend represented a distribution of current earnings of the issuing corporation (and hence was allocable to income) and what portion represented a distribution or dilution of the capital of the corporation (and hence should be allocated to principal to avoid diminution of the trust corpus.)4 While this task of allocation involved no little difficulty, given the increasing complexity of corporate economics and structure in the first half of this century, the Pennsylvania apportionment rule was never applied to stock dividends which constituted less than 6% of the number of shares outstanding of the class of stock being distributed. Such stock dividends were deemed “ordinary” and, absent a contrary direction of the trust settlor,5 were always classified as income distributable to the income beneficiary.

In 1945 the Legislature enacted the Uniform Principal and Income Act6 which, among other things, legislatively decreed that these “ordinary” stock dividends of less than 6% be classified as principal, but which at the same time recognized a

2. This appeal comes directly to this Court under Section 202(3) of the Appellate Court Jurisdiction Act of 1970, P.L. 673, No. 223, art. II, 17 P.S. § 211.202(3) (Supp. 1977–78).
5. Prior to the enactment of the Uniform Principal and Income Act of 1945, any attempt by the settlor to direct that small stock dividends (6% or under) be accumulated as principal after the death of the settlor was violative of the Act of April 18, 1853, P.L. 503, § 9. See Maris’ Estate, 301 Pa. 20, 151 A. 577 (1930).

Because the Act of 1945 was in effect from May 3, 1945 until July 3, 1947 and the Act of 1947, substantially the same Act, was in effect thereafter, the starting date for the question presented by this appeal is May 3, 1945.

power in the settlor to “himself direct the manner of ascertainment of income and principal. . . .” This statute was initially held to be unconstitutional insofar as it purported to apply to trusts created prior to its effective date, May 3, 1945, a position which we reversed in 1961.9

There then arose the question presented here: what should be done with the “ordinary” stock dividends received by trusts created prior to 1945 to which the Principal and Income Act now constitutionally applied and which under that Act were legislatively declared to be principal, absent a direction by the settlor that they be classified as income?

When this Court first addressed that question in Pew Trust, 411 Pa. 96, 191 A.2d 399 (1963), the majority summarized its holding as follows:

“We hold (1) that as to wills of persons dying before and inter vivos trusts created prior to the effective date of the Principal and Income Act of 1945, a gift of income or net income included small stock dividends of 6% or less, unless the testator or settlor clearly expressed a contrary intent; and (2) it is especially clear that in the light of the facts and circumstances which surrounded Mrs. Pew at the time she created the trust, she gave and intended to give to her grandson Arthur E. Pew, Jr., the life tenant of this trust, the small stock dividends of 6% or less, as well as the cash dividends which were paid annually, or as often as possible, to the owners of the common stock of the Sun Oil Company.” (Emphasis supplied.) 411 Pa. at 109–110, 191 A.2d at 406.

The first part of this holding in Pew Trust, not surprisingly, drew dissents in this Court10 and was a cause of some confusion among trial judges and members of the bar: if the Uniform Principal and Income Act was, as this Court held in 1961, constitutional if applied to trusts created prior to 1945 and if that Act declared, as it did, that small stock dividends were principal absent a contrary direction by the settlor himself, how then could this Court hold in Pew Trust that such dividends were income absent a “clearly expressed . . . contrary intent” by the settlor?

Nearly ten years later the question of the proper treatment of small dividends in pre-1945 trusts was again presented to us in Tyler Trusts, 447 Pa. 40, 289 A.2d 441 (1972). In a plurality opinion (two members of the Court concurring in the result, two not participating) the holding of Pew Trust was limited as follows:

“[W]e shall set things straight by simply limiting hereafter the force of Pew as a precedent to its alternative holding as summarized in the second-from-last paragraph of the opinion of the Court. . . .

Thus, up until September 30, 1963, the law should have been, and is now, that . . . after 1945, both ordinary and extraordinary stock dividends are allocated to principal in the absence of a contrary direction by the settlor.” (Footnote omitted; citations omitted.) 447 Pa. at 50, 51, 289 A.2d at 448.11

[I] The appellant income beneficiary argues that the above-language from Tyler Trusts is dictum; he points out correctly that the trusts before this Court in that case contained explicit provisions in which the settlor12 had directed that ordinary stock dividends be classified as principal and that there was therefore no need in Tyler Trust to deal with the question of how ordinary stock dividends should be classified absent such specific direction. The appellee guardian and trustee ad litem for the remainderman makes a cogent argument in reply that the above language was not dictum. We need not, however, resolve this dispute, for in the case at bar the point is clearly decisional, and we elect to and do follow the above-quoted language of Tyler Trusts, and declare that the first holding of Pew Trust is overruled. We do not, however, disapprove the second holding of Pew Trust that where it is especially clear that in the light of the facts and circumstances which surrounded [a settlor] at the

---

7. Section 2 of the Uniform Principal and Income Act of 1945, formerly 20 P.S. § 3472.
10. The opinion in Pew Trust was written by then Chief Justice Bell, who had dissented from that part of the decision in Catherwood Trust which held that the Principal and Income Act could constitutionally be applied to pre-1945 settled trusts. Mr. Justice (later Chief Justice) Benjamin R. Jones, the author of Catherwood, and Mr. Justice Cohen filed dissenting opinions in Pew Trust.
12. The settlor in this case, Sidney F. Tyler, was also the settlor of the trusts involved in Tyler Trusts, 447 Pa. 40, 289 A.2d 441 (1972).
time [he or she] created a trust” that the settlor intended that small stock dividends be classified as income rather than principal, then such stock dividends will be regarded as income. The Uniform Principal and Income Act has always recognized a power in the settlor to classify as he will, and the second holding of Pew Trust simply does the same thing.

II.

[2] We come to the facts of this case. All agree that the trust of Sidney F. Tyler created October 7, 1919 does not contain a direction to the trustee to classify ordinary stock dividends (less than 6%) as income rather than as principal. The instrument is entirely silent on that point. Nor are we able to find any language in the trust itself which might indicate such an intention on the part of the settlor.

Appellant offered into evidence in the lower court certain other trust instruments created by Sidney F. Tyler13 in which a specific direction is made to classify all stock dividends (ordinary and extraordinary) as principal. Appellant’s argument is that the insertion of such explicit provisions in two other instruments proves that Mr. Tyler, by not inserting such a provision in the instrument now before us, intended that small stock dividends be classified as income. The auditing judge at first sustained an objection to the introduction of these other trust instruments but then in his adjudication considered their evidentiary value and declared that the inference he was asked to draw therefrom was “pure conjecture.” A five-judge court en banc agreed with this conclusion.

It is not necessary to view as pure conjecture appellant’s argument based on the directions contained in these other trusts relative to small stock dividends in order to conclude that the evidentiary value of the other documents is not so strong as to justify our disregarding what amounts to a factual finding by the court below. This case is unlike Pew Trust where, according to the majority opinion, the corpus of the trust was funded with common stock on which there was regularly paid an ordinary stock dividend of less than 6%. If it were not the intention of the settlor of the Pew trust to give these small stock dividends to the income beneficiary, then the benefits afforded by the trust to that beneficiary would have been entirely illusory. Here, however, the trust was funded originally with 2,500 shares of preferred stock with respect to which no small stock dividends were ever paid. While appellant’s argument based on the other trusts created by Sidney F. Tyler is a reasonable one, it falls short of making it “especially clear” (see the alternate holding in Pew Trust, supra) that the settlor intended a different treatment of the ordinary dividends in the trust now before us than that ordained by the Act.

The decree is affirmed; each party to bear own costs.

EAGEN, C. J., and ROBERTS, J., concur in the result.

JONES, former C. J., did not participate in the consideration or decision of this case.

13. One of the trusts was created in 1917, two years before the instant trust; the other was created in 1933.
CHAPTER 10

ESTATE PLANNING AND LONG-TERM CARE

SECTION ONE

Review Activities

1. Your supervising attorney wants you to create an estate planning brochure. In particular he wants you to
highlight what is involved in estate planning and the basic documents. Several internet sites are available
to assist you—try www.thelaw.com, article regarding tips of estate planning. Also, if this type of informa-
tion were to be added to your firm's website, what would you change?

2. Summarize the information found in the article about government assistance with nursing home costs at
with estate planning clients?

3. Assume your office has a client who is a grandparent who wants to pass assets to his grandchildren but not
by giving the children cash outright. What estate planning tips can you think of that will assist this client?
Can he pay their college tuition? Buy each one a car? His five grandchildren range in age from 15 to 21. Ac-

4. Discuss the types of life insurance available to someone your age. If you were to purchase a plan, what
would it be and why? Submit your answer to your instructor.

5. Several clients have been discussing long-term care insurance. You are curious about this product and
wonder if it is a product your parents need. Contact a local agent and gather some quotes about the costs.

6. You have become somewhat of an expert in estate planning. You have worked closely with your supervising
attorney, and you have learned so much. Your supervising attorney is out sick today, and he has not had the
chance to create a proposed estate plan for Emily Farthing, a new client who came in two days ago seeking
advice about her estate. The file contains the following information: Miss Farthing is 70 years old, never mar-
nied, has one sister, Jennifer, and one brother, Clayton. Jennifer, age 68, has two grown children, Mike and
James. Clayton, age 75, has no children. Emily owns a home valued at $225,000. She owns over $500,000 in
antiques and art, and her stock portfolio is valued over $1.5 million. Emily is a graduate of a small, private,
liberal arts college, and she would like to leave part of her estate to that college. She wants the remainder of her estate to go to her nephews.
She is in good health. Take the initiative to prepare a draft of an estate plan for this client. List the major doc-
uments she needs. Plan on sharing this information with your supervising attorney when he returns to work.

7. Special Assignment

The Taxpayer Relief Act of 1997 made changes in the existing traditional IRA and created the new Roth
IRA as an alternative for taxpayers. The unique features and differences between a traditional IRA and a
Roth IRA follow.

Traditional IRA

a. A qualified single person (taxpayer) can contribute up to $2,000 per year; a qualified married couple
filing a joint return can contribute up to $4,000 per year.

b. Contributions can be tax-deductible or nondeductible for qualified taxpayers. The act raised the
adjusted gross income (AGI) limits for taxpayers, making a deductible contribution for the years 2001
through 2007 as follows:
Tax Year | Single Taxpayer | Married Taxpayers
---|---|---
2001 | $33,000 | $53,000
2002 | 34,000 | 54,000
2003 | 40,000 | 60,000
2004 | 45,000 | 65,000
2005 | 50,000 | 70,000
2006 | 50,000 | 75,000
2007 | 50,000 | 80,000
c. A married taxpayer, not participating in an employer-sponsored retirement plan, with adjusted gross income (AGI) of $150,000 or less (computed jointly) can take the maximum deduction for his or her IRA contribution even if his or her spouse participated in an employer sponsored plan (see IRC sec.219 [g][7]).
d. Direct rollovers from qualified employer-sponsored plans can be made to traditional IRAs.
e. Withdrawals are taxable to the taxpayer and nonqualified withdrawals prior to age 59 1/2 may be subject to a 10 percent penalty.
f. Withdrawals can be made without penalty in certain circumstances including first-time homebuyer expenses (not to exceed a $10,000 lifetime limit).
g. The taxpayer is required to take minimum withdrawals by April 1 of the year following the year the taxpayer reaches age 70 1/2.

**Roth IRA**
a. A qualified single person (taxpayer) can contribute up to $2,000 per year; a qualified married couple filing a joint return can contribute up to $4,000 per year.
b. All contributions are nondeductible, i.e., the taxpayer is not allowed a tax deduction (see IRC sec.408A [c][1]).
c. Single taxpayers can make the maximum contribution per year if their adjusted gross income (AGI) does not exceed $95,000, phased out at $110,000; married taxpayers filing jointly qualify if their AGI does not exceed $150,000, phased out at $160,000.
d. Direct rollovers from qualified employer-sponsored plans cannot be made to Roth IRAs.
e. Earnings accumulate tax free and withdrawals are tax free if they meet the requirements of a qualified distribution, as discussed in f. below.
f. The requirements for a qualified distribution are:

   An account must be in place for five years beginning with the first contribution to the Roth IRA and one of the following conditions applies: (i) the distribution is made on or after the taxpayer is age 59 1/2; or (ii) the distribution is made to a beneficiary on or after the taxpayer’s death; or (iii) the distribution is made to the taxpayer who is permanently disabled; or (iv) the distribution is to pay for qualified first-time homebuyer expenses (not to exceed a $10,000 lifetime limit).
g. The Roth IRA permits contributions indefinitely at any age as long as the taxpayer works; does not require the taxpayer to take minimum withdrawals; and has no mandatory age to start withdrawals.

Although the contributions are limited to $2,000 per year, taxpayers who start an investment program in Roth IRAs while young can provide an income tax-free retirement fund for themselves while living and/or an income tax-free transfer (gift) at death to their heirs. State income tax laws vary and must be checked for state consequences for IRA contributions.

**So, Who Wants to Be a Millionaire?**

Brianna is Malik’s 16-year-old daughter. During the summer she begins her first job working full time at McDonald’s and part time the rest of the year while attending high school. Brianna earns over $2,000 and spends all the money on wonderful teenage “necessities.” She continues to work at the job for her remaining high school years and is employed at other higher paying jobs while completing a four-year college degree. Throughout his daughter's high school and college years, Malik annually contributes $2,000 to a Roth IRA for Brianna. After she graduates, Brianna, as an employee and later a self-employed person, continues to contribute $2,000 annually to her Roth IRA until she reaches age 65. This financial plan, carried out over a fifty-year time period,
would make Brianna a millionaire, and remember distributions from a Roth IRA are not taxable. If you follow this advice, you have a realistic opportunity to be a millionaire.

Explain how you qualify and the reasons for your choice of a traditional versus Roth IRA based on your age, income, marital status, size of your family, other investments, and long-term financial goals.

Caveat:
As the fifth edition of this textbook goes into print, the following increases in the limits on contributions to either a traditional or Roth IRA and the increases in the limits of annual contributions to 401(k) programs are shown in the following charts. For additional information these retirement accounts, access http://www.irs.gov.

**IRA provisions**
Raises limits for traditional and Roth IRAs and creates a new category for individuals age 50 and older

<table>
<thead>
<tr>
<th>Year</th>
<th>Regular contributions</th>
<th>Age 50 and older contributions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>$2,000</td>
<td>$2,000</td>
</tr>
<tr>
<td>2002</td>
<td>3,000</td>
<td>3,500</td>
</tr>
<tr>
<td>2003</td>
<td>3,000</td>
<td>3,500</td>
</tr>
<tr>
<td>2004</td>
<td>3,000</td>
<td>3,500</td>
</tr>
<tr>
<td>2005</td>
<td>4,000</td>
<td>4,500</td>
</tr>
<tr>
<td>2006</td>
<td>4,000</td>
<td>5,000</td>
</tr>
<tr>
<td>2007</td>
<td>4,000</td>
<td>5,000</td>
</tr>
<tr>
<td>2008</td>
<td>5,000</td>
<td>6,000</td>
</tr>
<tr>
<td>2009</td>
<td>5,000*</td>
<td>6,000*</td>
</tr>
</tbody>
</table>

*Plus indexing

**401(k) provisions**
Raises maximum annual tax-deferred contributions from $10,500 in 2001 to $11,000 in 2002, $12,000 in 2003, $13,000 in 2004, $14,000 in 2005, and $15,000 in 2006. For individuals age 50 and older, an additional $5,000 in contributions would be permitted beginning in 2002.

8. Assuming an attorney in your firm, Max Perry, spoke with a Jack Rooney about estate planning. Mr Rooney wanted a will and several trusts drafted. Several pages of notes were taken during the consultation, but he never retained the firm or Mr. Perry to prepare the documents. Now Vivian Rooney has contacted your supervising attorney regarding the handling of her divorce from Jack Rooney. Can your office represent Vivian Rooney? See Mathias v. Mathias, 188 Wis.2d 280, 525 N.W.2d 81 (1994).

**SECTION TWO**

**Vocabulary Review**

**Internet Assignment**

Access www.bospicefoundation.org/ and define five words from the vocabulary listing.
SECTION THREE
Case Study

188 Wis.2d 280
In re the Marriage of John Lester
MATHIAS, Petitioner–
Appellant,

v.

Mary Evelyn MATHIAS, Respondent–
Respondent.

No. 94–1082.

Court of Appeals of Wisconsin.


SUNDBY, Judge.

John L. Mathias appeals from an order entered April 20, 1994, denying his motion to disqualify his wife’s counsel, Kinney & Urban, from representing her in this divorce action. We granted his petition for leave to appeal from that order, held oral argument, and gave the parties an opportunity to file and simultaneously exchange briefs. John filed a timely brief but his wife, Mary, did not. We therefore decide this appeal on the parties’ submissions on John’s petition, the oral argument, and John’s brief. We conclude that Kinney & Urban’s representation of Mary in this divorce action is substantially related to its representation of John in preparing his estate plan and therefore violates SCR 20:1.9(a). We reverse the order and instruct the trial court to grant John’s motion.

The trial court held an evidentiary hearing on John’s motion. It concluded that this case is controlled by SCR 20:1.9(a). The court further concluded that Mary’s counsel did not have a conflict of interest because counsel’s previous representation of John did not involve “a substantially related matter in which that person’s [Mary’s] interests are materially adverse to the interests of the former client [John]. . . .” Id.

At oral argument and in his brief, John claimed for the first time that Mary’s counsel still represented him and that SCR 20:1.7 controls. That Rule provides: “A lawyer shall not represent a client if the representation of that client will be directly adverse to another client. . . .”

[1] We will not consider John’s belated argument for several reasons. First, we granted his petition for leave to appeal on his representation that Mary’s attorneys were his “former counsel.” (Emphasis added.) Second, John did not present evidence at the hearing to support this claim. The trial court did not, and could not, make findings on this question. We cannot find facts, Wurtz v. Fleischman, 97 Wis.2d 100, 107 n. 3, 293 N.W.2d 155, 159 n. 3 (1980), and without trial court findings as to this question, we have nothing to review.

We conclude that the trial court incorrectly applied the “substantial relationship” test announced in Burkes v. Hales, 165 Wis.2d 585, 591, 478 N.W.2d 37, 40 (Ct.App.1991):

We apply the “substantial relationship” test to determine whether an attorney should be disqualified from representing a client because of “inconsistent or adverse representations.” It is a two-part test. In order to prevail on a motion to disqualify an attorney, the moving party must establish: (1) that an attorney-client relationship existed between the attorney and the former client; and (2) that there is a substantial relationship between the two representations.

The parties agree that Kinney & Urban formerly represented John in estate planning matters. The first part of the “substantial-relationship” test is therefore satisfied. Whether there is a “substantial relationship” between that representation and the representation of Mary in this divorce action is a mixed question of fact and law. We must accept the trial court’s findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. However, whether the facts fulfill a legal standard is a question of law. See Advance Concrete Form, Inc. v. Accuform, Inc., 158 Wis.2d 334, 339–40, 462 N.W.2d 271, 273–74 (Ct.App.1990). We decide questions of law without deferring to the trial court.

At oral argument and in his brief, John claimed for the first time that Mary’s counsel still represented

1. Supreme Court Rule 20:1.9(a) reads as follows:
A lawyer who has formerly represented a client in a matter shall not:
(a) represent another person in the same or a substantially related matter in which that person’s interests

are materially adverse to the interests of the former client unless the former client consents in writing after consultation. . . .

63
If there is a substantial relationship between two representations, it is irrelevant whether the client actually imparted confidential information to the attorney in the former representation. Tamara L.P. v. County of Dane, 177 Wis.2d 770, 782, 503 N.W.2d 333, 337 (Ct.App.1993); Burkes, 165 Wis.2d at 597, 478 N.W.2d at 42. The court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer’s duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.


Therefore, to determine whether there is a substantial relationship between the two representations, we inquire only into the legal services. Mary seeks from Kinney & Urban in this action and the legal services John sought from the firm in its previous representation. It is undisputed that on April 22, 1991, John consulted Stuart Urban of the firm of Kinney & Urban to obtain advice as to planning his estate. The notes Urban made of that consultation show that Urban collected facts he would need to advise John but also show that at that time he did not give John legal advice. The notes further show that John told Urban he wished to create a trust for his minor children, create another trust for three grandchildren, make cash bequests to certain persons, make a cash bequest to Mary, create a trust for her benefit, and give the residue of his estate to his minor children. Unresolved was the disposition of the proceeds of John’s life insurance. John informed Urban that he was considering moving to Florida.

On October 8, 1993, John called Urban to make an appointment, which he subsequently cancelled. Urban’s notes of that call show that John wished to consult Urban with a view to establishing a trust funded with stock.

This evidence is sufficient to show that John consulted Kinney & Urban for the purpose of preparing his estate plan. Whether John discussed his marital problems with Urban is irrelevant; confidential communication is presumed.

In the fall of 1993, Mary consulted Attorney Jack Kussmaul of the Kinney & Urban firm about estate planning or a living trust “or things like that.” John made the appointment for her. At that time, Mary and John were separated. Mary testified that she saw Attorney Kussmaul because she wished to talk to someone other than the attorney John had talked to. She informed Kussmaul of her marital problems but never got beyond generalities in discussing her situation.

The trial court concluded that “[t]he action for divorce and the consultation concerning [John’s] estate planning are not, on their face, either adverse or related to one another.” The trial court believed that the only way the two actions could be “substantially related” would be if John gave information to Urban which could be used against him in this divorce action. The trial court found as facts that John did not give any specific financial information to Urban and did not discuss his marital problems with him. The trial court applied the wrong test. An error of law is an erroneous exercise of the trial court’s discretion which requires reversal, unless the error does not affect the party’s substantial rights. State v. Leis, 134 Wis.2d 441, 444, 397 N.W.2d 498, 500 (Ct.App.1986).

We must assume that John imparted to Urban whatever confidences were necessary to permit him to prepare an estate plan tailored to John’s circumstances. The trial court’s finding that John did not discuss his marital problems with Urban is irrelevant to the question whether estate planning is substantially related to divorce. We conclude as a matter of law that estate planning which is reasonably contemporaneous with initiation of divorce proceedings is substantially related to issues which may arise in those proceedings. Divorce involves division of the marital estate and a possible award of non-marital property to the spouse who may suffer hardship. Section 767.255, Stats. The division of property in divorce proceedings may be greatly affected by the estate plan of either spouse or the spouses. Also, an estate plan may affect an award of custody or maintenance. “Lawyers who have assisted the spouses in estate planning, tax matters and the like may be precluded from representing either spouse in a marital dispute.” 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 22.6 (3d ed. 1989).

We do not hold that there may not be a case where the client’s contacts with an attorney are so casual or ill-formed that a conflict under SCR 20:1.9 does not arise. In such a case, the motion to disqualify an attorney will founder at the first step—existence of a client-lawyer relationship—of the “substantial relationship” test. Once an attorney-client relationship is established, the focus shifts to
the nature of the representations; if there is a substantial relationship between the subject matter of the representations, the attorney may not undertake the conflicting representation.

We hold that there is in this case a substantial relationship between Kinney & Urban's representation of John for estate planning and representation of John's wife in a divorce proceeding. Mary's interests in this divorce action are materially adverse to John's interests. Supreme Court Rule 20:1.9(a) does not permit Kinney & Urban to represent Mary in this action; John's interests may be substantially and adversely affected if the firm continues to represent Mary.

Order reversed and cause remanded with directions.
CHAPTER 11

PERSONAL REPRESENTATIVES: TYPES, PRE-PROBATE DUTIES, AND APPOINTMENT

Review Activities

1. Assume you have the responsibility of training a new paralegal who has been hired by your firm to assist with estate matters. Prepare an outline of the information you would share with this new employee as to how your office assists and provides services to a personal representative. Include in your materials the brochure you designed detailing the duties of a personal representative and a copy of a tickler form you created listing the major probate events and deadlines/due dates.

2. You are working on an estate where the administrator must post bond. Assume the estate has $200,000 in real property and $200,000 in personal property. What will be the fee for bond? Contact some bond/surety businesses and obtain quotes.


4. Access your state statutes. Could the following persons serve as a personal representative in your state? Convicted felon, who was released five years ago? Resident alien? Twenty-year-old college student who is attending college out of state? Surviving spouse, 85 years old?

5. Contact the proper probate court personnel and ask what the court does when there is no family member or close friend suitable or available to serve as a personal representative.

6. Contact the proper probate court personnel and ask to obtain a copy of any information that the court provides to personal representatives who are going through the process of probate without the assistance of an attorney.

7. Your office is handling an estate where the named executor is now an out-of-state resident. Can that person serve? Check your state statutes and read Munford v. Maclellan, 373 S.E.2d 368 (Ga. 1988). Do you think the court would rule differently if the executor was an out-of-state bank that was licensed to do business in your state? Read In Re Emery, 59 Ohio App.2d 7, 391 N.E.2d 746 (1978).

SECTION TWO

Vocabulary Review

True/False

1. T F An administratrix is the female named in the will to carry out the wishes of the testator.

2. T F An administrator CTA is only appointed to carry on the business dealings of the deceased.

3. T F The court will appoint an administrator DBN when the original personal representative cannot serve due to illness.

4. T F The court will appoint an administrator CTA when the original personal representative cannot serve due to incapacity.
5. T F An executor cannot be paid for his services.
6. T F A personal representative can be paid for his services.
7. T F A tickler system is a helpful calendar system that will list probate filings and due dates.
8. T F A personal representative is a fiduciary.
9. T F A testator cannot list two persons to serve as co-executors.
10. T F A personal representative's duties end with the burial of the deceased.

SECTION THREE
Case Study

59 Ohio App.2d 7
In re EMERY.*

Court of Appeals of Ohio,
Hamilton County.

The Probate Court, Hamilton County, refused to appoint a nonresident trust company as executor though it was named as executor in a will. On appeal by the trust company, the Court of Appeals, Castle, J., held that: (1) foreign corporation licensed to do business in state was not to be considered as resident qualified as such to act as executor; (2) those parts of statute chapter referring to companies acting as executor or executing estate are not nullified, but are still applicable to domestic trust companies, though probate statute has eliminated nonresident corporations from eligibility to serve as executors; (3) statutory exclusion of nonresidents from acting as an executor did not violate state constitutional provision against retroactive legislation, nor did it violate Fourteenth Amendment equal protection or due process; and (4) nonresident trust company having been disqualified by statute from serving as executor, appointment of coadministrates did not affect its substantial rights and it was not aggrieved party having standing to appeal from such appointment.

Affirmed.

1. Executors and Administrators 15

It is clear import of two statutes that trial court’s discretion in appointment of nonresident executor is limited to those persons who are surviving spouses or next of kin, and legislature has eliminated other nonresidents from consideration for appointment. R.C. §§ 1.51, 2109.21, 2113.05.

* A motion to certify the record was overruled by the Supreme Court of Ohio, October 6, 1978.

2. Executors and Administrators 15

Foreign corporation licensed to do business in state was not to be considered as resident qualified to act as executor of testator’s estate. R.C. §§ 1109.08, 2109.21, 2113.05.

3. Executors and Administrators 15

Those parts of statute chapter referring to companies acting as executor or executing estate are not nullified, but are still applicable to domestic trust companies, though probate statute has eliminated nonresident corporations from eligibility to serve as executors. R.C. §§ 1101.05, 1109.08, 2109.21, 2113.05.

4. Constitutional Law 190

Rights protected by State Constitution as against retroactive application of legislation must be vested rights, and right is not regarded as vested unless it amounts to something more than mere expectation or interest based upon anticipated continuance of existing law. Const. art. 2, § 28.

5. Constitutional Law 190

Right which is not absolute but dependent for its existence upon action or inaction of another is not basic or vested so as to be protected by state constitutional provision against retroactive legislation. Const. art. 2, § 28.

6. Wills 78

Will is ambulatory and takes effect only upon death of testator.

7. Constitutional Law 190

Nonresident corporation named as executor in will had no vested right, prior to death of testator, which would be protected by state constitutional provision against retroactive legislation. Const. art. 2, § 28; R.C. § 2109.21.
Retrospective law prohibited by state constitutional provision is one which attaches new disability in respect to transactions or considerations already past. Const. art. 2, § 28.

Nonresident corporation was presumed to have notice, at time it renewed its license at increased fee, of statute under which it was disabled from acting as executor in local probate proceeding, and thus statute was not unconstitutional as retroactive in application. Const. art. 2, § 28; R.C. §§ 2109.21, 2113.05.

Generally, liberty guaranteed by Fourteenth Amendment against deprivation other than by due process of law is that of natural, not artificial persons, and foreign corporation is not person who may invoke due process clause. U.S.C.A. Const. Amend. 14.


Constitution commits to states power to control administration of their citizen's estates, and exclusion of nonresident trust companies from acting as executors did not deny them of due process of law. R.C. §§ 2109.21, 2113.05; U.S.C.A.Const. Amend. 14.

It is within inherent power of probate court to determine that nonresident is improper person to appoint as executor. R.C. §§ 2109.21, 2113.05.

Legislature confers power to dispose of property by will, and Legislature may also restrain such power, confine it to particular classes of persons or abolish it altogether, so far as persons who die after enactment of such statutes are concerned. Const. art. 2, § 28; U.S.C.A.Const. Amend. 14; R.C. § 2109.21.

It is within inherent power of probate court to determine that nonresident is improper person to appoint as executor. R.C. §§ 2109.21, 2113.05.

Where nonresident trust company was disqualified by statute from serving as executor, appointment of coadministratrices did not affect its substantial rights and it was not aggrieved party having standing to appeal from such appointment. R.C. §§ 2109.21, 2113.05.

A Probate Court is under no duty to appoint a nonresident corporation, licensed to do business in Ohio, as executor of the estate of a resident testator who designated such corporation to act in that capacity.

Syllabus by the Court

A Probate Court is under no duty to appoint a nonresident corporation, licensed to do business in Ohio, as executor of the estate of a resident testator who designated such corporation to act in that capacity.

* * * *

Strauss, Troy & Ruehlmann, Cincinnati, for appellant.
Frost & Jacobs, and R. R. Klausmeyer, Cincinnati, for appellee.

CASTLE, Judge.

This case presents a question to us which, to our knowledge, has never before been considered by the Supreme Court or the Courts of Appeal of Ohio: whether a Probate Court errs if it fails to appoint a nonresident corporation licensed to do business in this state as executor of a resident testator's estate where the testator has named that corporation as executor in his will.

The testator in this case, John J. Emery, designated the appellant, Girard Trust Bank, a Pennsylvania banking corporation, and his wife, Irene Emery, as co-executors of his estate in his last will and testament dated November 25, 1968. Irene Emery predeceased the testator, who died on September 24, 1976. The testator's will was submitted for probate on October 18, 1976,
accompanied by an application from Girard Trust to be appointed executor. The will was admitted to probate and record on December 17, 1976, on the same date that the Probate Court denied Girard Trust’s application to be appointed executor for the reason that Girard Trust, being a nonresident corporation, was not qualified by statute.

The statutory authority by which the Probate Court denied Girard Trust’s application is found in R.C. 2109.21 and R.C. 2113.05. These sections, which deal with the residence qualifications of executors, were amended in 1975 and became effective January 1, 1976. Prior to the amendments, R.C. 2109.21 left the appointment of a nonresident executor to the discretion of the Probate Court. The amendment deleted this discretionary provision from the statute. R.C. 2109.21 now reads, in pertinent part:

“Any fiduciary, except an executor appointed pursuant to section 2113.05 of the Revised Code, whose residence qualifications are not defined in this section shall be a resident of the state, and shall be removed on proof that he is no longer a resident of the state.”

R.C. 2113.05, the statute pursuant to which executors are appointed, provides:

“When a will is approved and allowed, the probate court shall issue letters testamentary to the executor named in the will, if he is suitable, competent, accepts the trust, and gives bond if that is required. The court may issue letters testamentary to a surviving spouse or one of the next of kin, even though a nonresident of the county or of this state.”

[1] It is our finding that the clear import of these two statutes is that the trial court’s discretion in the appointment of a nonresident executor has been limited to those persons who are surviving spouses or next of kin. Under the old maxim of statutory interpretation expressio unius est exclusio alterius the legislature has eliminated other nonresidents from consideration for appointment.

If we were to read the first sentence of R.C. 2113.05 as a directive that a Probate Court must appoint the executor named in the will so long as he is “suitable, competent, accepts the trust, and gives bond if this is required,” as appellant urges, we would be eliminating the discretion of the Probate Court in the appointment of a nonresident spouse or next of kin which the second sentence of the statute clearly confers on it. Such an interpretation would render the second sentence not only superfluous but meaningless. Rather, we give effect to all of the language of R.C. 2113.05 by determining that the exception from residency requirements for executors stated in R.C. 2109.21 refers only to those who are surviving spouses or next of kin. Thus, we find that this language excludes appellant, as a nonresident corporation, from acting as the executor of the testator’s estate.

[2] We do not find that appellant should be exempted from this application of the statutes on the basis that, as a foreign corporation licensed to do business in this state, it should be considered as a resident. Paragraph 1 of the syllabus of B. F. Goodrich Co. v. Peck (1954), 161 Ohio St. 202, 118 N.E.2d 525, states:

“In the absence of the expression of a contrary legislative intention, a corporation incorporated under the laws of a foreign state will generally be included by the use in a statute of the word ‘nonresident.’ ”

There is no expressed legislative intention that indicates that a foreign trust company doing business in this state should be treated as a resident for any particular or general function that it performs. We distinguish the case of In re Lawrence’s Estate (1938), 53 Ariz. 1, 85 P.2d 45, on the basis that Ohio has no statute, as Arizona does, which gives a foreign corporation once licensed to do business in the state the same rights and privileges as held by a domestic corporation.

[3] Nor do we find that it is necessary to create an exemption for appellant by deeming it a resident to avoid nullification of those provisions of R.C. chapter 1109 which refer to trust companies performing the duties of executors. R.C. 1109.08, which provides that a trust company may accept and execute trusts committed to it and act as executor, became effective January 1, 1968. R.C. 2113.05 became effective January 1, 1976, and took away the right of a nonresident, but not a domestic, trust company to be considered for appointment as executor. As chapter 1109 specifies the trust business which can be performed by both domestic and foreign trust companies who are qualified, those parts of chapter 1109 which refer to companies acting as executors or executing an estate are not nullified but are still applicable to domestic trust companies. This explanation allows effect to be given to all parts of chapter 1109 as well as all of the provisions of R.C. 2113.05, in compliance with R.C. 1.51.

If there were a conflict, we would have to find that R.C. 2113.05 is a special provision limiting the discretion of the Probate Court in its
appointment of nonresident executors, which controls over the general grants of authority given to domestic and foreign trust companies by chapter 1109. We do not find that R.C. 1101.05, which provides that a foreign bank or trust company may transact the business of a trust company in Ohio as provided in R.C. chapter 1109 and the provisions of R.C. chapter 1109, basically conditions with which domestic and foreign trust companies must comply and the acts which they may perform, can be said to mandate the appointment by the Probate Court of a nonresident trust company as executor of an Ohio decedent's estate in light of the specific provision of R.C. 2113.05 which disqualifies them from acting in that particular area.

Likewise, we find no merit in appellant's contention that the legislature could not have intended to exclude foreign trust companies from acting as executors, because it substantially increased their annual license fee. There are still substantial areas of the trust business a nonresident trust company may perform in Ohio if it chooses. We find it equally logical that the fee increase was designed to discourage foreign trust companies from doing business in Ohio, thus protecting domestic companies. The overall economy and revenues of this state are just as easily benefitted by such protection as by the receipt of the relatively insignificant fees charged to foreign trust companies for the privilege of doing business here.

Having determined that appellant does not qualify under Ohio law to be appointed as executor of the testator's estate, we come to the question of whether, by excluding it, the Ohio statutes so doing violate the Constitution of Ohio and of the United States.

[4, 5] Appellant asserts first that its exclusion from acting as an executor violates Section 28, Article II, of the Ohio Constitution. The rights protected by the Ohio Constitution in this regard are vested rights. State ex rel. Ogelvee v. Cappeller (1883), 39 Ohio St. 207. A right is not regarded as vested in the constitutional sense unless it amounts to something more than a mere expectation or interest based upon an anticipated continuance of existing law. Moore v. Bureau of Unemployment Compensation (1943), 73 Ohio App. 362, 56 N.E.2d 520. A right, not absolute but dependent for its existence upon the action or inaction of another, is not basic or vested. Hatch v. Tipton (1936), 131 Ohio St. 364, 2 N.E.2d 875.

[6, 7] On the other hand, a will is ambulatory and takes effect only upon the death of the testator. Patton v. Patton (1883), 39 Ohio St. 590. It is not until that time that an executor named in the will can have even an expectation of administering an estate. In fact, an executor derives his powers only when letters are issued to him by the Probate Court, and under previous Ohio law a nonresident executor's receipt of such letters was dependent on the discretion of the Probate Court. Thus, it cannot be said that a change in the law preventing a nonresident corporation from acting as an Ohio executor, which is effective prior to the death of the testator in whose will the corporation is named as executor, deprives it of more than a mere expectation. And such expectation is not protected by Section 28, Article II, of the Ohio Constitution.

[8] But besides being one which takes away or impairs vested rights, a retrospective law that is prohibited by Section 28, Article II, is also one which attaches a new disability in respect to transactions or considerations already past. State ex rel. Michaels v. Morse (1956), 75 Ohio Law Abs. 536, affirmed in 165 Ohio St. 599, 138 N.E.2d 660. While appellant may be under a new disability in that it may no longer be considered by the Probate Court as eligible to act as an executor, such disability cannot be said to be in respect to transactions or considerations already past.

[9] As we noted, the statute eliminating appellant from consideration as executor by the Probate Court was effective prior to the testator's death and the submission of his will for probate. Moreover, Girard Trust renewed its license to do business in this state annually, and its present license was issued more than eight months after the statutes excluded it from acting in the capacity of executor of the testator's estate. Since appellant was presumed to have notice of the statute at the time it renewed its license, and since the testator was not deceased at the time of the statute's effective date, any disability which the statute placed on appellant was prospective only. Therefore, we do not find the statute, as applied to appellant, violates Section 28, Article II, of the Ohio Constitution.

Likewise, we do not find that the exclusion of a nonresident trust company licensed to do business in Ohio from acting as executor of an Ohio resident's estate violates either the Due Process Clause or the Equal Protection Clause of the Constitution of the United States.

[10–12] As a rule, a foreign corporation is not a person who may invoke the provision of the Due Process Clause that protects against deprivation of liberty, as the liberty guaranteed by the Fourteenth Amendment against deprivation other than by due process of law is that of natural, not artificial
persons. *Nutting v. Massachusetts* (1902), 183 U.S. 553, 22 S.Ct. 238, 46 L.Ed. 324. And, as previously discussed, appellant has no vested property right to be taken by due process or otherwise. Moreover, the Due Process Clause no longer offers a substantive bar to the state regulation of a business subject to state control. *North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.* (1973), 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379. Since the Constitution commits to the states the power to control the administration of their citizen’s estates, *Labine v. Vincent* (1971), 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288, we do not find that the exclusion by this state of nonresident trust companies from acting as executors deprives them of due process of law. *American Trust Co., Inc. v. South Carolina State Board of Bank Control* (D.C.1974), 381 F.Supp. 313.

[13–15] In fact, because the Constitution has committed to the state the power to make rules to regulate the disposition of property left in this state by a man dying here, the Equal Protection Clause also will not operate to prevent the state from excluding nonresident executors from administering an Ohio decedent’s property. It is for the legislature of this state to make laws for the distribution of property within this state, and the vague generalities of the Equal Protection Clause will not interfere so long as no specific constitutional guarantee is violated. *Labine v. Vincent, supra.* The exclusion of nonresident corporations or nonresident persons who are not surviving spouses or next of kin does not involve suspect classification as did the case of *Reed v. Reed* (1971), 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225.

[16] This state has a strong interest in the administration of its citizens’ estates. It has always been considered that the legislature which created the right to dispose of property by will in this state must be held to have unlimited authority to regulate the exercise of that right, including the course of administration the testator’s property shall take when he dies testate. *Hane v. Kintner* (1924), 111 Ohio St. 297, 145 N.E.2d 326, *In re Pickards* (1898), 5 N.P. 493. As the legislature confers the power so it may restrain its operation, confine it to particular classes of persons, or abolish it altogether, so far as persons who die after the enactment of such statutes are concerned. *In re Loue* (1963), 119 Ohio App 303, 191 N.E.2d 196.

[17] It has long been within the inherent power of the Probate Court to determine that a nonresident of the state is an improper person to appoint as executor. *In re Evans* (1938), 27 Ohio Law Abs. 550. The fact that the legislature has seen fit to exclude certain classes of nonresidents who do not fall within a suspect classification is not, in our opinion, a violation of the Equal Protection Clause of the United States Constitution, in view of the commitment to the state of the power to control the distribution of and its strong interest in the administration of its decedents’ estates.

Appellant’s first assignment of error is overruled.

Appellant’s second assignment of error is made in support of appellant’s appeal from the Probate Court’s appointment of two of the testator’s daughters as co-administratrices with the will annexed, which appeal was consolidated with appellant’s appeal of the Probate Court’s denial of its application to be appointed executor. Appellant asserts that the Probate Court erred in the appointment of the co-administratrices and in the overruling of appellant's motion to set that appointment aside.

[18] We have found, in our disposition of appellant’s first assignment of error, that the trial court correctly refused to appoint appellant as executor, because, as a nonresident corporation, appellant is statutorily disqualified from holding that position. Being statutorily disqualified, appellant is not in a position to have been appointed executor if the judgment below had not been given. Therefore, the Probate Court’s appointment of the co-administratrices does not affect appellant’s substantial rights. It is fundamental that an appeal lies only on behalf of a party aggrieved whose substantial rights have been affected, and appellant has not demonstrated that it is an aggrieved party. *Ohio Contract Carriers Assn. v. Public Utilities Comm.* (1942), 140 Ohio St. 160, 42 N.E.2d 758.

Having considered the merits of the second assignment of error and for the reasons set out above, the same is hereby overruled.

The judgments of the Court of Common Pleas, Probate Division, are affirmed.

Judgment affirmed.

SHANNON, P. J., and KEEFE, J., concur.
CHAPTER 12

PROBATE AND ESTATE ADMINISTRATION

SECTION ONE

Review Activities

1. Access your state statutes at www.findlaw.com. What amount is used to classify an estate as small? Outline the probate procedure for small estates.

2. Contact your local estate administration court personnel and ask what percentage of estates in your jurisdiction qualify for small estate administration procedures. Also ask if small estates are quicker to resolve.

3. Contact your local estate administration court personnel and obtain a copy of the most commonly used forms, i.e., application for probate, initial inventory and closing inventory forms. Are these forms obtainable off the internet?

4. Obtain a copy of a notice to creditors. Does your state require a public notice?

5. Assume you have just received a telephone call from a client, Hillary Bonner. Ms. Bonner was the administratrix for her deceased father’s estate, which was closed about six months ago. Hillary has just discovered that her father had a $50,000 life insurance policy with the named beneficiary being the estate. What should be done? Assume Hillary shared her father’s estate with her two brothers. They all received one-third of the estate. Can Hillary just divide the insurance money into thirds? Does the court need to be notified?

6. A sister, Janet Brady, of the deceased, Marti Brady, comes to your office with a copy of her dead sister’s will. She is upset because her brother, Robby Brady, has been named administrator. What is the likely outcome in a situation like this? Read what happened in a similar case, Davis v. Hoskins, 531 S.W.2d 424 (Texas 1975).

SECTION TWO

Vocabulary Review

1. What is your state’s definition of a small estate?

2. What is listed on an inventory in your state? Real property? Personal property? Jointly owned assets? Assets owned in severalty?


4. Who is an affiant?

5. Explain the difference between the different types of probate: formal, informal, solemn, common, and collection by affidavit.
SECTION THREE

Case Study

Mildred Von Simmons DAVIS, Appellant,
v.
Jeff HOSKINS, Administrator of Estate
of Ida Belle Simmons,
Deceased, Appellee.

No. 17671.

Court of Civil Appeals of Texas,
Fort Worth.
Dec. 12, 1975.

OPINION

BREWSTER, Justice.

This is an appeal by Mildred Von Simmons Davis from an order entered in a probate proceeding by the County Court of Denton County which order denied her application to probate an instrument that she contended was the last will of Ida Belle Simmons, deceased, and granted letters of administration on that estate to Jeff Hoskins, a brother of the deceased. The original of the instrument that was claimed to be the will of Ida Belle Simmons was not produced in court. A carbon copy of the claimed will was produced. The trial was non-jury and the trial court found that the proponent of the instrument sought to be probated as the last will of Ida Belle Simmons, deceased, failed to prove that the instrument was a valid will in that she failed to prove that it had been properly executed and witnessed in the manner required by law. The trial court further found that such instrument had been revoked by the deceased during her lifetime by an act of physical destruction (tearing) and that the deceased died intestate.

We affirm.

[1] Appellant's second point of error is that the trial court erred in finding that the deceased, Ida Belle Simmons was not produced in court. A carbon copy of the claimed will was produced. The trial was non-jury and the trial court found that the proponent of the instrument sought to be probated as the last will of Ida Belle Simmons, deceased, failed to prove that the instrument was a valid will in that she failed to prove that it had been properly executed and witnessed in the manner required by law. The trial court further found that such instrument had been revoked by the deceased during her lifetime by an act of physical destruction (tearing) and that the deceased died intestate.

We affirm.

[2] Appellant's first point of error is that the trial court erred in finding that the proponent of the will testified that in the presence of Myrtle and Jeff Hoskins and Shirley Yielding and a Mrs. Bassinger, who is now senile, Ida Belle Simmons tore the will up and threw the pieces of it in the wastebasket. She testified that this occurred on October 10, 1974. She first thought this occurred on another date but later produced a diary she kept and said it occurred October 10, 1974. The maid that cleans up the rooms threw the contents of the wastebasket containing the pieces of the will into the garbage.

The witness, Shirley Yielding, testified that she worked at the nursing home; that she was in the presence of the deceased, Ida Belle Simmons, on one occasion when she saw Mrs. Simmons tear up an instrument that the others present told this witness was Mrs. Simmons' will. The said Myrtle and Jeff Hoskins were also present and saw Mrs. Simmons tear the will up. The witness said she did not read the instrument to see if it was a will, as the others said it was. She thought this occurred in December, 1974.

The witness, A. D. Petty, testified that he was a good friend to Ida Belle Simmons and he visited her each week in the nursing home. On one visit, on about December 1, 1974, while he was sitting on her bed talking to her, the deceased told him that she had previously made a will but that she had thereafter torn it up. She told this witness that in the presence of Jeff and Myrtle Hoskins.

There is no evidence that tends to indicate that the instrument the deceased tore up on the occasion in question was not the will that is sought to be probated.

The original of the will sought to be probated was not produced in court.

The evidence referred to is certainly sufficient to support the court's finding to the effect that Ida Belle Simmons revoked the will by tearing it up and that this occurred on October 10, 1974. The finding is not against the overwhelming weight of the evidence.

The fact that there was conflicting evidence as to the date the will was torn up does not change the situation. It was the trial judge's function to determine the facts and there was sufficient evidence to support his finding that it was torn up and revoked on October 10, 1974.

We overrule the point.

On this issue the witness, Myrtle Hoskins, testified that at the request of Ida Belle Simmons she went with Jeff Hoskins, the witness' husband, to the bank and removed Ida Belle Simmons' will from her lock box at the bank and took it to the deceased who was then a resident in a nursing home. Mrs. Hoskins
had failed to prove that the will offered for probate
had been properly executed and witnessed.

We overrule that point.

The outcome of the appeal is determined and
controlled by the ruling that we have hereinabove
made on appellant’s point of error No. 2. Because
of that ruling appellant’s first point of error has
become immaterial.

Even if we sustained the appellant’s first point
of error and held that the trial court erred in finding
that the appellant had failed to prove that the will
offered for probate had been properly executed and
witnessed in the manner provided by law, this
would not entitle the appellant to have a reversal of
the trial court’s decision. This is so because even if
the will sought to be probated was a valid will, the
trial court decided on sufficient evidence that prior
to her death the testatrix had revoked it. Under
those circumstances the trial court’s decision
denying the application to probate the will and
granting letters of administration to Jeff Hoskins was
proper. See on this Palmer v. Logan, 189 S.W. 761
(Austin, Tex.Civ.App., 1916, no writ hist.), wherein
the court held that no matter how well the
execution and witnessing of a will by the testator
may have been established by the evidence it is the
duty of the court to not admit such will to probate if
it is also established that such will had been
revoked by the testator prior to his death.

[3] The testatrix could revoke a valid will that
she had theretofore executed and which had been
witnessed in the manner required by law by
destroying said will. Sec. 63, Probate Code, V.A.C.S.
It is settled that a will that has been revoked cannot
be admitted to probate. Shawver v. Parks, 239 S.W.2d
188 (Eastland, Tex.Civ. App., 1951, writ ref.).

In appellant’s third point of error she contends
that the trial court erred in appointing an
administrator for the Estate of Ida Belle Simmons for
the reason that she had previously executed a valid
will. She contends that under those circumstances
the court lacked jurisdiction to appoint an
administrator.

We overrule that point.

[4] A will that has been revoked by the testatrix
is not her last will and for that reason cannot be
admitted to probate. Even if the will had been
executed by the testatrix and witnessed in the
manner required by law, it ceased to be her last will
when she thereafter revoked it. When the testatrix
died after revoking such will, without after such
revocation having made another will, she died
intestate. Ellsworth v. Aldrich, 295 S.W. 206
(Texarkana, Tex. Civ.App., 1927, writ ref.).

In this case, since the trial court found on
sufficient evidence that the will sought to be
probated by appellant had been revoked by the
testatrix prior to her death, she died intestate. The
appointment of the administrator was therefore
proper.

Affirmed.
SECTION ONE

Review Activities

1. Access your state statutes. Assume a grandchild, age 25, of a deceased has contacted your office. This grandchild wants to serve as the personal representative for his grandfather’s estate. Another grandchild, age 20, and two brothers also survived the deceased, ages 60 and 66. The brothers were business partners with the deceased. Who has the priority to serve as personal representative?

2. Assume a personal representative has been presented with a gambling debt of $400 owed by the deceased. Must that debt be paid? What about an unpaid florist bill of $50? Unpaid credit card bill of $200?

3. Does your state probate law give a family allowance to surviving spouses? What is that amount? Does your state probate law give that family allowance to “significant others”? Does your state probate law give any family allowance to minor children of the deceased? Who receives the minor’s money? What if the deceased had a minor child with someone other than the surviving spouse?

4. Find your state’s notice requirements for informal probate. Prepare a notice for Daniel Dixon, who passed away on July 1 of the current year. Where and for how long does this notice need to run?

SECTION TWO

Vocabulary Review

What is a closing statement and what is contained on one? Obtain a copy from your local court.
CHAPTER 14

TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATES

SECTION ONE

Review Activities

1. Does your state require the filing of a state estate tax return? Or a state inheritance tax return?
2. How would you respond when a client asks if having a will reduces taxes? Or does having a living trust reduce taxes?
3. Prepare a chart that will be used in all estate files in your office, listing all possible tax returns that may need to be filed in an estate, with due dates for returns listed as well.
4. What is the current status of federal estate taxes? Have they been abolished?
5. Assume the wife of a dying man has contacted your office. The man is in his last stages of cancer, and he would like to give away as much property as he can while he is still alive. It has been determined to a medical certainty that he will not live another month. What is going to be your supervising attorney’s response to this wife? Can this dying man avoid tax consequences by giving everything away? His current spouse and three adult children (by his first wife) survive him. His first wife is deceased.
6. Who pays the income tax on the money a trust makes? The settlor or the beneficiary? See IRC sections 652 and 662.
7. Your firm has a wealthy client who is interested in lowering his taxable income and estate. This client wants to create a trust and name his wife as the beneficiary. The trust will only last for a few years, and the trust res will revert back to the grantor. The client also wants to serve as trustee because he “doesn’t trust anyone else with his money.” Will this trust result in a tax savings for this client? Read Helvering v. Clifford, 309 U.S.331 (1940), and see what the U.S. Supreme Court held.
8. Your law firm has a client who wants to gift some valuable antiques. The client or her parents purchased many of the items 60 to 80 years ago. In determining if a gift tax will be due, what value should be placed on the gifts? The value when purchased or when gifted?

SECTION TWO

Vocabulary Review

3. Who are the following: successor; transferor; transferee; and skip person?
4. What is a Clifford trust?
**SECTION THREE**

**Case Study**

*GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,*

v.

GEORGE B. CLIFFORD, Jr.

(309 US 331–343.)

[No. 383.]

Argued February 5, 1940. Decided February 26, 1940.

On WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment reversing a decision of the United States Board of Tax Appeals as to the taxability to the settlor, of income of a short-term trust. Reversed.

See same case below, 105 F(2d) 586, reversing 38 BTA 1532.

Special Assistant to the Attorney General Warner W. Gardner, of Washington, D.C., argued the cause, and, with Solicitor General Jackson, Assistant Attorney General Samuel O. Clark, Jr., Special Assistants to the Attorney General Sewall Key and L. W. Post, and Mr. Richard H. Demuth, all of Washington, D.C., filed a brief for petitioner:

Respondent was in substance the owner of the trust property and the trust income was therefore property taxable to him under § 22 (a) of the Revenue Act of 1934, 26 USCA 1940 ed. § 22 (a).


The trust income was properly taxable to the respondent under § 166 of the Revenue Act of 1934, 26 USCA 1940 ed. § 166.

Mr. Thomas P. Helmezy, of Minneapolis, Minnesota, argued the cause, and, with Mr. F. H. Stinchfield, also of Minneapolis, Minnesota, filed a brief for respondent:

Respondent is not taxable on trust income. He was not in substance the owner of the trust property.

Du Pont v. Commissioner of Internal Revenue, 289 US 685, 77 L ed 1447, 53 S Ct 766; Poe v.

The trust is not revocable.

United States v. First Nat. Bank (CCA 5th) 74 F (2d) 360; Wood v. Commissioner of Internal Revenue, 37 BTA (F) 1065, 1068; Langley v. Commissioner of Internal Revenue (CCA 2d) 61 F (2d) 796; Lewis v. White (DC) 56 F (2d) 390; Ashforth v. Commissioner of Internal Revenue, 26 BTA (F) 1188; Faber v. United States, 76 Ct Cl 526, 1 F Supp 859.

Mr. Justice Douglas delivered the opinion of the Court:

In 1934 respondent declared himself trustee of certain securities which he owned. All net income from the trust was to be held for the “exclusive benefit” of respondent’s wife. The trust was for a term of five years, except that it would terminate earlier on the death of either respondent or his wife. On termination of the trust the entire corpus was to go to respondent, while all “accrued or undistributed net income” and “any proceeds from the investment of such net income” was to be treated as property owned absolutely by the wife. During the continuance of the trust respondent was to pay over to his wife the whole or such part of the net income as he in his “absolute discretion” might determine. And during that period he had full power (a) to exercise all voting powers incident to the trusteed shares of stock; (b) to “sell, exchange, mortgage, or pledge” any of the securities under the declaration of trust “whether as part of the corpus or principal thereof or as investments or proceeds and any income therefrom, upon such terms and for such consideration” as respondent in his “absolute discretion may deem fitting;” (c) to invest “any cash or money in the trust estate or any income therefrom” by loans, secured or unsecured, by deposits in banks, or by purchase of securities or other personal property “without restriction” because of their “speculative character” or “rate of return” or any “laws pertaining to the investment of trust funds”; (d) to collect all income; (e) to compromise, etc., any claims held by him as trustee; (f) to hold any property in the trust estate in the names of “other persons or in my own name as an individual” except as otherwise provided. Extraordinary cash dividends, stock dividends, proceeds from the sale of unexercised subscription rights, or any enhancement, realized or not, in the value of the securities were to be treated as principal, not income. An exculpatory clause purported to protect him from all losses except those occasioned by his “own wilful and deliberate” breach of duties as trustee. And finally it was provided that neither the principal nor any future or accrued income should be liable for the debts of the wife; and that the wife could not transfer, encumber, or anticipate any interest in the trust or any income therefrom prior to actual payment thereof to her.

It was stipulated that while the “tax effects” of this trust were considered by respondent they were not the “sole consideration” involved in his decision to set it up, as by this and other gifts he intended to give “security and economic independence” to his wife and children. It was also stipulated that respondent’s wife had substantial income of her own from other sources; that there was no restriction on her use of the trust income, all of which income was placed in her personal checking account, intermingled with her other funds, and expended by her on herself, her children and relatives; that the trust was not designed to relieve respondent from liability for family or household expenses and that after execution of the trust he paid large sums from his personal funds for such purposes.

Respondent paid a federal gift tax on this transfer. During the year 1934 all income from the trust was [334]
distributed *to the wife who included it in her individual return for that year. The Commissioner, however, determined a deficiency in respondent’s return for that year on the theory that income from the trust was taxable to him. The Board of Tax Appeals sustained that redetermination (38 BTA (F) 1532). The Circuit Court of Appeals reversed (105 F (2d) 586). We granted certiorari [308 US 542, ante, 457, 60 S Ct 139] because of the importance of the revenue to the use of such short term trusts in the reduction of surtaxes.

Sec. 22(a) of the Revenue Act of [May 10] 1934 (48 Stat. at L. 680, chap. 277, Internal Revenue Code (1939 ed.) § 22(a)) includes among “gross income” all “gains, profits, and income derived . . . from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or
profit, or gains or profits and income derived from any source whatever.” The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories. Cf. Helvering v. Midland Mut. L. Ins. Co. 300 US 216, 81 L ed 612, 57 S Ct 423, 108 ALR 436. Hence our construction of the statute should be consonant with that purpose. Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue. That issue is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus. See Blair v. Commissioner of Internal Revenue, 300 US 5, 12, 81 L ed 465, 470, 57 S Ct 330. In absence of more precise standards or guides supplied by statute or appropriate regulations,1 the answer to that question must depend on an analysis of the terms of the trust and all the circumstances attendant on its creation and operation. And where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary lest what is in reality but one economic unit be multiplied into two or more2 by devices which, though valid under state law, are not conclusive so far as § 22(a) is concerned.

In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. Rather, the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a).

So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position. It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had. To exclude from the aggregate those indirect benefits would be to deprive § 22(a) of considerable vitality and to treat as immaterial what may be highly relevant considerations in the creation of such family trusts. For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the family group. In those circumstances the all-important factor might be retention by him of control over the principal. With that control in his hands he would keep direct command over all that he needed to remain in substantially the same financial situation as before. Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22(a). To hold otherwise would be to treat the wife as a complete stranger; to

1We have not considered here Art. 166-1 of Treasury Regulations 86 promulgated under § 166 of the 1934 Act and in 1936 amended (T. D. 4629) so as to rest on § 22(a) also, since the tax in question arose prior to that amendment.

let mere formalism obscure "the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements.

The bundle of rights which he retained was so substantial that respondent cannot be heard to complain that he is the "victim of despotic power when for the purpose of taxation he is treated as owner altogether." See DuPont v. Commissioner of Internal Revenue, 289 US 685, 689, 77 L ed 1447, 1449, 53 S Ct 766.

We should add that liability under § 22(a) is not foreclosed by reason of the fact that Congress made specific provision in § 166 for revocable trusts, but failed to adopt the Treasury recommendation in 1934, Helvering v. Wood, 309 US 344, post, 796, 60 S Ct 551, that similar specific treatment should be accorded income from short term trusts. Such choice, while relevant to the scope of § 166, Helvering v. Wood, supra, cannot be said to have subtracted from § 22(a) what was already there. Rather, on this evidence it must be assumed that the choice was between a generalized treatment under § 22(a) or specific treatment under a separate provision3 (such as was accorded revocable trusts under § 166, Internal Revenue Code (1939 ed.) § 166); not between taxing or not taxing grantors of short term trusts. In view of the broad and sweeping language of § 22(a), a specific provision covering short term trusts might well do no more than to carve out of § 22(a) a defined group of cases to which a rule of thumb "would be applied. The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of § 22(a).

In view of this result we need not examine the contention that the trust device falls within the rule of Lucas v. Earl, 281 US 111, 74 L ed 731, 50 S Ct 241 and Burnet v. Leininger, 285 US 136, 76 L ed 665, 52 S Ct 345, relating to the assignment of future income; or that respondent is liable under § 166, taxing grantors on the income of revocable trusts.

The judgment of the Circuit Court of Appeals is reversed and that of the Board of Tax Appeals is affirmed.

Reversed.

3As to the disadvantage of a specific statutory formula over more generalized treatment, see Vol. I, Report, Income Tax Codification Committee (1936), a committee appointed by the Chancellor of the Exchequer in 1927. In discussing revocable sentiments the Committee state, p. 298:

"This and the three following clauses reproduce § 20 of the Finance Act, 1922, an enactment which has been the subject of much litigation, is unsatisfactory in many respects, and is plainly inadequate to fulfil the apparent intention to prevent avoidance of liability to tax by revocable dispositions of income or other devices. We think the matter one which is worthy of the attention of Parliament."
CHAPTER 15

ETHICAL PRINCIPLES RELEVANT TO PRACTICING LEGAL ASSISTANTS

SECTION ONE

Review Activities

1. Your parents are so proud of you. You have graduated from college and have been working for a well-respected law firm for over two years. Your parents want you to prepare their wills for them. What is your response? What if your spouse wanted you to prepare his/her will? What would be your response?

2. Since you have become somewhat of an expert in the area of estate planning, you are considering preparing wills for profit out of your home. You will certainly recognize when an attorney is needed and you will refer those clients with a more complicated estate situation to an attorney and only prepare simple wills out of your home. Are there any ethical concerns with your plan?

3. Your supervising attorney wants you to transfer $2,000 from an estate account into the firm’s general account to cover payroll. It is likely that next week the estate will close and the court will approve $2,000 as your firm’s fee. Should you make that transfer?

4. Your supervising attorney wants your opinion on whether the firm should suggest to clients that they can leave their original wills in the office. What do you think? If you will be responsible for the safekeeping of those documents, what would be your safekeeping plan?

5. While in the courthouse doing some estate work, you overhear the family member of a client talking with court personnel about the client’s passing and how the client died without a will. You know for a fact that the client died testate because you assisted in the preparation of the client’s will. What do you do?

6. A client of your firm has just completed having several estate planning documents prepared. You worked closely with this client, and she has sent you a $50 gift certificate to the nicest steakhouse in town. Can you keep it?

7. You have so much knowledge about estate planning that your supervising attorney suggests you make some presentations about estate planning in the local retirement communities. You are a little uncomfortable with that suggestion. What will be your response? Read Doe v. Condon, 341 S.C. 22, 532 S.E.2d 879 (2000).

SECTION TWO

Vocabulary Review

1. What is the difference between an ethical consideration and a disciplinary rule?

2. Do the codes of ethics from the ABA, NFPA, and NALA differ? How?

3. What does NFPA stand for? NALA? How, if in any way, do these organizations differ?

4. Define UPL and list four areas in estate planning that you think would pose a UPL problem.

5. As a paralegal are you governed by the attorney-client privilege? How?
341 S.C. 22
John DOE, Alias, Petitioner.
v.
Charles M. CONDON, Attorney General
for the State of South Carolina,
Respondent.
No. 25138.
Supreme Court of South Carolina.
PER CURIAM:
Petitioner sought to have the Court accept this
matter in its original jurisdiction to determine
whether certain tasks performed by a non-attorney
employee in a law firm constitute the unauthorized
practice of law. Specifically, petitioner asks
(1) whether it is the unauthorized practice of law for
a paralegal employed by an attorney to conduct
informational seminars for the general public on
wills and trusts without the attorney being present;
(2) whether it is the unauthorized practice of law for
a paralegal employed by an attorney to meet with
clients privately at the attorney's office, answer
general questions about wills and trusts, and gather
basic information from clients; and (3) whether a
paralegal can receive compensation from the
paralegal's law firm/employer through a profit-
sharing arrangement based upon the volume and
type of cases the paralegal handles. The Office of
the Attorney General filed a return opposing the
petition for original jurisdiction.
The Court invoked its original jurisdiction to
determine whether the paralegal's activities
constituted the unauthorized practice of law, and,
W. Kittredge was appointed as referee to make
findings of fact and conclusions of law concerning
this matter. A hearing was held and the referee
issued proposed findings and recommendations.
[1,2] We adopt the referee's findings and
recommendations attached to this opinion and hold
that a non-lawyer employee conducting
unsupervised legal presentations for the public and
answering legal questions for the public or for
clients of the attorney/employer engages in the
unauthorized practice of law. See State v. Despain,
319 S.C. 317, 460 S.E.2d 576 (1995). We further hold
that a proposed fee arrangement which
compensates non-lawyer employees based upon the
number and volume of cases the non-lawyer
employee handles for an attorney violates the
ethical rules against fee-splitting with non-lawyer
employees. Rule 5.4 of the Rules of Professional
Conduct, Rule 407, SCACR.

APPENDIX
THE STATE OF SOUTH CAROLINA
In the Supreme Court
IN THE ORIGINAL JURISDICTION
Of the Supreme Court
John Doe, Alias,
Petitioner,
v.
Charles M. Condon, Attorney General
for the State of South Carolina,
Respondent.
PROPOSED FINDINGS AND
RECOMMENDATIONS OF
THE REFEREE

This is a declaratory judgment action in the
Supreme Court's original jurisdiction. The Court
referred this matter to me as Referee. Petitioner, a
paralegal, has submitted a generalized list of tasks
he wishes to perform and has inquired whether
performing them constitutes the unauthorized
practice of law. Petitioner also seeks a
determination of the propriety of his proposed fee
splitting arrangement with his attorney-employer.
Despite my repeated offers for an evidentiary
hearing, neither party requested a hearing. The
record before me is sufficient to address and resolve
whether the activities in question constitute the
unauthorized practice of law.

I find that a paralegal conducting unsupervised
legal presentations for the public and answering
legal questions from the audience engages in the unauthorized practice of law. Further, I find that a paralegal meeting individually with clients to answer estate planning questions engages in the unauthorized practice of law. Finally, I find the proposed fee arrangement is improper and violates the ethical prohibition against fee splitting.

**BACKGROUND**

Petitioner submitted the following questions to the Court:

(1) Is it the unauthorized practice of law for a paralegal employed by an attorney to conduct educational seminars for the general public, to disseminate general information about wills and trusts, including specifically a fair and balanced emphasis on living trusts, including answering general questions, without the attorney being present at the seminar as long as the seminar is sponsored by the attorney’s law firm and the attorney has reviewed and approved the format, materials and presentation to be made for content, truthfulness and fairness?

(2) Is it the unauthorized practice of law for a paralegal employed by an attorney to meet with clients privately in the law office for the purpose of answering general questions about wills, trusts, including specifically living trusts, and estate planning in general, and to gather basic information from said clients for such purposes as long as it is done under the attorney’s direction, and the clients have a follow-up interview and meeting with the attorney who would have primary responsibility for legal decisions?

(3) Can a paralegal receive compensation from the law firm he is employed by, through a profit-sharing arrangement, which would be based upon the volume and type of cases the paralegal handled?

**Discussion**

To protect the public from unsound legal advice and incompetent representation, South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys. *S.C.Code Ann.* § 40-5-310 (1976). While case law provides general guidelines as to what constitutes the practice of law, courts are hesitant to define its exact boundaries. Thus, the analysis in ‘practice of law’ cases is necessarily fact-driven. The Supreme Court has specifically avoided addressing hypothetical situations, preferring instead to determine what constitutes the unauthorized practice of law on a case by case basis. *In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar;* 309 S.C. 304, 422 S.E.2d 123 (S.C.1992). I find that Petitioner’s proposed actions constitute the unauthorized practice of law and that the proposed fee agreement violates the ethical prohibition against fee splitting.

Our Supreme Court has set forth a succinct standard of the proper role of paralegals:

The activities of a paralegal do not constitute the practice of law as long as they are limited to work of a preparatory nature, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort. *Matter of Easler,* 275 S.C. 400, 272 S.E.2d 32, 33 (S.C.1980).

While the important support function of paralegals has increased through the years, the *Easler* guidelines stand the test of time. As envisioned in *Easler,* the paralegal plays a supporting role to the supervising attorney. Here, the roles are reversed. The attorney would support the paralegal. Petitioner would play the lead role, with no meaningful attorney supervision and the attorney’s presence and involvement only surfaces on the back end. Meaningful attorney supervision must be present throughout the process. The line between what is and what is not permissible conduct by a non-attorney is oftentimes “unclear” and is a potential trap for the unsuspecting client. *State v. Buyers Service Co., Inc.,* 292 S.C. 426, 357 S.E.2d 15, 17 (S.C. 1987). The conduct of the paralegal contemplated here clearly crosses the line into the unauthorized practice of law. It is well settled that a paralegal may not give legal advice, consult, offer legal explanations, or make legal recommendations. *State v. Despain,* 319 S.C. 317, 460 S.E.2d 576 (S.C. 1995).

**A. Educational Seminars**

Petitioner intends to conduct unsupervised “wills and trusts” seminars for the public, “emphasizing” living trusts during the course of his presentation. Petitioner also plans to answer estate planning questions from the audience. I find Petitioner’s proposed conduct constitutes the unauthorized practice of law.

I find, as other courts have, that the very structure of such “educational” legal seminars suggests that the presenter will actually be giving legal advice on legal matters. See, *In Re Mid–America Living Trust Assoc. Inc.,* 927 S.W.2d 855 (Mo.banc 1996); *People v. Volk,* 805 P.2d 1116 (Colo.1991); *Oregon State Bar v. John H. Miller & Col,* 235 Or. 341] 385 P.2d 181 (Or.1963). At the very least. Petitioner will implicitly advise participants that they require estate planning services. Whether a will or trust is appropriate in any given situation is a function of legal judgment. To be sure, advising a potential client on his or her need for a living trust (or other particular estate
planning instrument or device) fits squarely within the practice of law. These matters cry out for the exercise of professional judgment by a licensed attorney. Thus, in conducting these informational seminars, Petitioner would engage in the unauthorized practice of law as a non-attorney offering legal advice.

Petitioner plans to answer "general" questions during his presentation. I have reviewed the Estate Planning Summary submitted by Petitioner and his attorney-employer. This summary sets forth the subject matter to be covered by the paralegal. Petitioner would present information on, among other things, revocable trusts, irrevocable living trusts, credit shelter trusts, qualified terminable interest property trusts, charitable remainder trusts, qualified personal residence trusts, grantor retained annuity trusts, grantor retained unitrusts and charitable lead trusts. It is difficult to imagine such specific estate planning devices eliciting "general" questions or a scenario in which the exercise of legal judgment would not be involved. It is, after all, a legal seminar, apparently for the purpose of soliciting business.1 To suggest that some "plan" would anticipate all possible questions with predetermined nonlegal responses is specious. And so complex is this area of law that many states, including South Carolina, have established stringent standards for an attorney to receive the designation of "specialist" in Estate Planning and Probate Law.

I fully recognize the prevailing popularity of 'financial planners' and others "jumping on the estate planning bandwagon." (Estate Planning Summary submitted by Petitioner's attorney-employer, p. 1). This trend in no way affects the decision before the Court. This paralegal would not be presenting the estate planning seminar as a financial planner. This seminar would be conspicuously sponsored by the paralegal's attorney-employer. The attorney's law firm is prominently displayed in the brochure submitted, e.g., name, address, telephone number and "Firm Profile." In promoting the law firm and representing to the public the 'legal' nature of the seminar, neither the paralegal nor his attorney-employer can escape the prohibition against the unauthorized practice of law.

B. Initial Client Interview

Petitioner intends to gather client information and answer general estate planning questions during his proposed "initial client interviews." While Petitioner may properly compile client information, Petitioner may not answer estate planning questions. See Matter of Easler, supra. Petitioner's answering legal questions would constitute the unauthorized practice of law for the reasons stated above. While the law firm in which Petitioner is employed plans to direct clients to an attorney for "follow-up" consultations, a paralegal may not give legal advice in any event. Moreover, permissible preparatory tasks must be performed while under the attorney's supervision. The proposed after the fact attorney review comes too late.

C. Compensation

Petitioner's law firm intends to compensate him based upon the volume and types of cases he "handles." A paralegal, of course, may not "handle" any case.2 This fee arrangement directly violates Rule 5.4 of the Rules of Professional conduct, SCACR 407.3 This limitation serves to "discourage the unauthorized practice of law by lay persons and to prevent a non-lawyer from acquiring a vested pecuniary interest in an attorney's disposition of a case that could possibly take preeminence over a client's best interest." Matter of Anonymous Member of the S.C. Bar, 295 S.C. 25, 26, 367 S.E.2d 17, 18 (S.C. 1998 [1988]). This compensation proposal arrangement coupled with Petitioner's desire to market the law firm's services via the educational possibilities poses possible ethical concerns for his sponsoring attorney. Petitioner's involvement clearly constitutes the unauthorized practice of law.

1. While this marketing method may raise ethical implications for the attorney involved, the issue before me is whether the activities of the paralegal constitute the unauthorized practice of law. See Rule 7.3, Rules of Professional Conduct, 407 SCACR; Matter of Morris, 270 S.C. 308, 241 S.E.2d 911 (1978) (lawyer improperly solicited employment); Matter of Craven, 267 S.C. 33, 225 S.E.2d 861 (1976) (an attorney's knowledge that his employee is engaged in solicitation of professional employment for attorney constitutes professional misconduct); Matter of Crosby, 256 S.C. 325, 182 S.E.2d 289 (1971) (attorney improperly solicited business). Thus, not only does Petitioner's solicitation of legal clients raise

2. The suggestion that Petitioner and the law firm intend for him to "handle" cases speaks volumes about the anticipated role of Petitioner, far beyond the permissible tasks performed by paralegals.

3. Nonlawyer employees may certainly participate "in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement." Rule 5.4(a)(3), Rules of Professional Conduct, SCACR 407.
seminars and meet individually with clients creates a situation ripe for abuse. Indeed, the proposal by Petitioner presents the very evil Rule 5.4 was designed to avoid. Accordingly, I find Petitioner’s proposed compensation plan violates both the letter and the spirit of Rule 5.4 prohibiting fee splitting with non-attorneys.

RECOMMENDATIONS

1. Offering legal presentations for the general public constitutes the practice of law.
2. Answering estate planning questions in the context of legal seminars or in private client interviews constitutes the practice of law.
3. Fee sharing arrangements with non-attorneys based on volume and cases “handled” by a paralegal violates Rule 5.4, Rules of Professional Conduct, SCACR 407.

RESPECTFULLY SUBMITTED.

/s/ John W. Kittredge
Referee
April 7, 2000
Greenville, SC