South Carolina Law Review

Volume 19
Issue 1 *1966-1967 Survey Issue*

Article 17

1967

# Wills and Trusts

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Recommended Citation
Wynn, Robert L. III (1967) "Wills and Trusts," *South Carolina Law Review*: Vol. 19 : Iss. 1 , Article 17.
Available at: https://scholarcommons.sc.edu/sclr/vol19/iss1/17

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## WILLS AND TRUSTS

### I. Construction of Will

In *Sutcliffe v. Laney Bros., Inc.*[1] the court sought to ascertain the intentions of the testatrix with respect to the dividing line between two adjacent parcels of real estate. The phrase "approximately one acre"[2] was used in both of the two paragraphs of the will making the two gifts, but the land in question, slightly more than two acres, had for some time been divided by a fence into distinctly unequal parcels neither of which very closely approximated one acre.

The court decided that it could not be determined from the will precisely where the testatrix had intended the dividing line to be, and that the presence of this latent ambiguity made the admission of surrounding facts and circumstances known to the testatrix both proper and necessary in the attempt to determine her intention.[3] The court was of the opinion that the evidence presented in this case showed clearly that the testatrix thought of the two parcels on either side of the fence as two entirely distinct tracts of land and, as such, intended to devise the property as divided by the fence.

In deciding this case the court specifically referred to and relied on the principles of the factually similar case of *Shelley v. Shelley*.[4] In *Shelley* the court found, from the presence in the will of concurrent gifts of various buildings to the same beneficiaries, an intention on the part of the testator to give unequal shares to his two beneficiaries. It was apparent to the court that the dividing line was intended to be drawn in order to give the property containing certain buildings to one beneficiary and the property containing other specified buildings to the other beneficiary.[5]

1. 247 S.C. 417, 147 S.E.2d 689 (1966).

2. *Id.* at 417, 147 S.E.2d at 690.

3. For South Carolina cases where extrinsic evidence has been admitted to clarify a latent ambiguity in the instrument, see Note, *Admissibility of Testator's Declarations of Intention*, 17 S.C.L. Rev. 276, 278 & n.12 (1965).

4. 244 S.C. 598, 137 S.E.2d 851 (1964).

5. See Karesh, *Wills and Trusts, 1964-1965 Survey of South Carolina Law*, 18 S.C.L. Rev. 165, 185 (1965), and Note, 17 S.C.L. Rev. 283-84 (1965) for a full discussion of the principles enunciated in the *Shelley* case.

For a case in which the court found an intention to give precisely equal shares of property see Plummer v. Plummer, 226 S.C. 344, 85 S.E.2d 189 (1954).



Published by Scholar Commons, 1967

In *Morgan v. Merchants & Planters Nat'l Bank*,[6] perhaps the most interesting case in this area of the law during the period under survey, the testatrix left a will of which the following are the pertinent parts:

> Item II. I give and bequeath unto my beloved husband, B. B. Morgan, the sum of Six Thousand ($6000.00) Dollars per annum, payable to him in monthly installments of Five Hundred ($500.00) Dollars each . . . [and such installments] shall be paid to my husband by my Executor, hereinafter named, for and during the term of his natural life. And this annual income is to be paid to him from income derived from my income producing properties belonging to my estate.
>
> Item IV. After the above bequests are carried out in full, and only then, I give and bequeath Fifty Thousand ($50,000.00) Dollars of my estate for [certain specified charities]. . . . Should my estate be insufficient to pay all of the bequests mentioned in this paragraph or item in full, then the same shall be prorated by my Executor.
>
> Item V. All the rest and residue of my property . . . is hereby willed, devised and bequeathed unto my beloved husband, B. B. Morgan.
>
> Item VI. My Executor, hereinafter named, is requested to complete the administration of my estate as soon as practicable, bearing in mind the fact that he cannot make a full distribution to my beneficiaries named herein until after the death of my beloved husband, B. B. Morgan, who is to receive Five Hundred ($500.00) Dollars per month income derived from some of my income producing properties as long as he shall live as set forth in Item II of this Will.
>
> Item VII. I hereby nominate, constitute and appoint The Merchants and Planters National Bank of Gaffney, South Carolina, as my Executor to carry out the provisions of this my Last Will and Testament; and I do hereby give to my said Executor full power to collect all debts owing to me, and to receipt for same; to sell and convey any and all of my property, personal and mixed, and real estate, at public or private sale, at such times and upon such terms,

6. 247 S.C. 435, 147 S.E.2d 702 (1966).

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> and in such manner as my Executor may deem mete and proper; and to cancel mortgages, borrow money or lend money, sign proxies, transfer stocks and bonds, execute and deliver to purchasers of any personal or real property good and sufficient bills of sale, fee simple titles, and general warranty deeds; and to execute and deliver to the lender to secure any loan he may obtain in good and sufficient pledges of personal property, chattel mortgages or real estate mortgages.[7]

On the death of the testatrix the will was probated in common form, and on demand by the contestant grandniece of the testatrix, the will was proved in solemn form. The contestant then filed an appeal for a de novo hearing in the court of common pleas, but before the controversy reached trial, a court-approved settlement was reached. Under this agreement the contestant received 22,500 dollars, the husband of the testatrix received the use of the family home until his death, and the executor deposited 50,000 dollars in a savings and loan association account to be paid to the charities specified in the will at the death of the testatrix's husband.

The husband of the testatrix, B. B. Morgan, brought this action seeking a declaratory judgment that he is now the sole beneficiary under the will and, as such, may elect to take his gift in the residuary clause after rejecting the monthly income provision created for his benefit by Item II.

The principal issue raised by the case is the intention of the testatrix with respect to the creation of a spendthrift trust with her husband as beneficiary. If, as the plaintiff contended, no trust were created, then the plaintiff's interest in the annuity and the residuary estate merged and gave him the right to immediate possession of the remaining assets.[8] If an active trust were created, however, as the defendant contended, the plaintiff would not be entitled to possession of the residuary assets.

The South Carolina Supreme Court decided the case in favor of the plaintiff. In so doing the court said: "There can be no doubt that these provisions of the will placed the legal and equitable title to the entire estate in the husband, subject only to the payment of the charitable bequests."[9]

7. *Id.* at 438-39, 147 S.E.2d at 703-04.
8. McLarin v. Knox, 6 S.C. 23 (1874).
9. 247 S.C. 435, 441, 147 S.E.2d 702, 705 (1966).

It seems at least arguable, however, that there was room for doubt. The cases of the South Carolina Supreme Court contain numerous examples of the familiar principle that the duty of the court in interpreting a will is to attempt to determine the intention of the testator from the words used in the will.[10] From a consideration of the language of the various provisions of this will it seems quite possible that the intention of the testatrix was that her husband receive 500 dollars per month for the rest of his life, that the named charities receive 50,000 dollars if that much remained, and that her husband be allowed to dispose of any amount still remaining by his will.

Particularly salient is the language of the annuity provision of Item II: "And this annual income is to be paid to him *from income derived from my income producing properties belonging* to my estate"[11] and of the direction in Item VI:

> My Executor, hereinafter named, is requested to complete the administration of my estate as soon as practicable, *bearing in mind the fact that he cannot make a full distribution* to the beneficiaries named herein *until after the death of my beloved husband, B. B. Morgan*, who is to receive Five Hundred ($500.00) Dollars per month *income derived from some of my income producing properties as long as he shall live. . . .*[12]

Also important, as the defendant contended, were the powers conferred on the bank by the will. These seem to be particularly strong indications of the intention of the testatrix to vest legal title in the bank.

The court quickly disposed of this contention, however, by saying: "There is expressed in [Item VII] . . . no intent to affect the legal title to the remainder of the estate clearly devised to the husband in Item V."[13]

It seems, however, that the important thing is that these active powers are conferred. The gift in Item V and the absence of the express intention in Item VII "to affect the legal title to the remainder of the estate" seems to be rectified by the general manifestation of intention apparent from a closer adherance

10. *E.g.*, Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964); Montague v. South Carolina Tax Comm'n, 233 S.C. 110, 103 S.E.2d 769 (1958).
11. 247 S.C. 435, 147 S.E.2d 702, 703 (1966). (Emphasis added.)
12. *Id.* at 438, 147 S.E.2d at 704. (Emphasis added.)
13. *Id.* at 441, 147 S.E.2d at 705.

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to another familiar rule of wills construction—that the intention of the testator is to be determined from the language of the will considering the instrument as a whole.[14]

With respect to the possibility of finding the intention to create a trust, the well-established law is that no particular words or form is essential to the creation of a trust[15] and that the person intended to be the trustee may be designated in the will by other names such as "executor."[16]

The plaintiff in this case did not contend that the testatrix had been in any way precluded from or incapable of creating a trust. He contended only that she had not intended to do so.

But what had she intended to do? The plaintiff and the court said that the testatrix purposely worded her will as she had in order to guarantee the plaintiff a certain amount of money before any gifts were made to charity. But what had the testatrix tried to guarantee? Had she wished to insure that her husband receive property sufficient to provide him an annual income of 6,000 dollars, or had she wished to insure that he received the annual income itself? It seems plain that her intention was the latter. She had set up her priorities as follows:

(1) Annual income for her husband.

(2) Gifts to charity.

(3) Residuary estate to husband.

The way to insure her first priority was to recognize the intention that a trust be created.

## II. INTEREST ON LEGACY—TESTAMENTARY GUARDIAN

In *Jackson v. Walters*[17] the court followed "the clear weight of authority in this state"[18] in deciding that a legacy directed to be paid over to the plaintiff as the guardian of a minor bore interest computed from one year after the testatrix's death.

The language in the codicil creating the legacy read as follows: ". . . and direct that it be used for [the minor beneficiary's]

14. *E.g.*, Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964); MacDonald v. Fagan, 118 S.C. 510, 111 S.E. 793 (1922).

15. *E.g.*, Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943).

16. *E.g.*, Angus v. Nobel, 73 Conn. 56, 46 Atl. 278 (1900) (trustee designated "executor").

17. 246 S.C. 486, 144 S.E.2d 422 (1965).

18. *Id.* at 494, 144 S.E.2d 425.

. . . education."[19] The circuit court had interpreted this phrase to mean "college education" and had decided that the legacy would not bear interest until such time as the beneficiary should reach college age.[20]

## III. Wills—Inconsistent Contract to Devise

In *Footman v. Sweat*[21] the South Carolina Supreme Court affirmed a decree of specific performance[22] in favor of one having an oral contract to devise with a decedent whose will, executed prior to the making of the contract, was inconsistent with the contract. In so deciding the court relied on the circuit court opinion which cited the South Carolina case of *McLauchlin v. Gressette*[23] for the proposition that the existence of the will may be considered "as bearing on the improbability of the existence of a contract inconsistent with its terms."

Actually, however, in *McLauchlin* the alleged contract to devise was entered into prior to the execution of the will.[24]

In the *Footman* fact situation, where the will was executed prior to formation of the alleged contract to devise, there seems to be even more reason for reducing the effect of an inconsistent will. This seems to be particularly true in a case such as this where the testatrix made her will four years prior to the alleged execution of the contract and died only seven months after the alleged execution.

## IV. Trustees—Estoppel

*Dunn v. Miller*[25] is an application of well settled equitable principles to a unique and interesting factual situation.

Several members of the Laws Chapel Church, a member of the Toe River Association of Free Will Baptist Churches, exe-

19. *Id.* at 489, 144 S.E.2d 423.

20. The question in this case arose as part of a mortgage controversy between the plaintiff, acting as both executrix and testamentary guardian, and the defendant, mother of the minor legatee. See Survey of Property in this issue.

21. 247 S.C. 172, 146 S.E.2d 624 (1966).

22. See Survey of Contracts in this issue.

23. 224 S.C. 296, 79 S.E.2d 149 (1953).

24. For another case where the will was executed subsequent to the entrance into an inconsistent contract to devise, see Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916).

Apparently *Footman v. Sweat* is the first South Carolina case where the issue of a prior executed will is raised.

25. 247 S.C. 567, 148 S.E.2d 676 (1966).

cuted a deed to a lot owned by and across the street from the Laws Chapel Church.

The deed was executed to a Reverend Snow, an ordained Missionary Baptist minister, who had been conducting services at Laws Chapel in the absence of a regular Free Will Baptist minister. The grantors of the deed purported to be the trustees of Laws Chapel Church.

After the construction of a building on the lot, the plaintiffs, members and trustees of Laws Chapel, learned that the property no longer belonged to Laws Chapel Church, and that the building was to be used to house a Missionary Baptist Church called the Marietta Second Baptist Church.

In this decision the court held that the plaintiffs were not estopped to deny the validity of the purported deed by their silence during the construction of the building, when it was shown that they had believed the new building was going to be larger quarters for the crowded Laws Chapel congregation and had no knowledge of the purposes or the actions of the defendants.

### V. LEGISLATION—EFFECT OF DIVORCE ON PRIOR DRAWN WILLS AND CERTAIN FILINGS REQUIRED BY PERSONAL REPRESENTATIVES

The treatment of wills made prior to divorce was dealt with by the South Carolina General Assembly in Act No. 896[26] which provides:

> Any will offered for and admitted to probate, subsequent to the effective date of this act, made by husband or wife who have been divorced, *a vinculo matrimonii*, from each other subsequent to the date of the will shall be made null and void by means of the divorce insofar as the will affects the surviving divorced spouse as beneficiary, trustee, executor or any other capacity, unless the will shall have been made in contemplation of such divorce expressed on its face.[27]

In passing this legislation, South Carolina joined an increasing number of states which have enacted similar statutes.[28] The

26. S.C. Acts & J. Res. 1966, p. 2248, adding § 19-223 to S.C. CODE ANN. (1962).

27. *Ibid.*

28. See Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 885 (1960), for a discussion of similar statutes in other states.

South Carolina act, however, is different from most in two respects. First, our statute covers provisions in the will affecting the surviving divorced spouse as "trustee, executor or any other capacity" as well as provisions affecting such spouse as beneficiary. Second, the South Carolina statute allows an express statement on the face of the will that it was "made in contemplation of such divorce" to prevent the nullification.

Act No. 1038[29] requires the filing of certain documents by the personal representative of the decedent in the probate courts of all counties wherein the decedent owned real estate. With respect to a testate estate, the act amends section 19-264.1 of the code[30] so as to require such a filing of not only a certified copy of the will but also a certified copy of the final discharge of the personal representative.

In the case of an intestate estate the act requires that:

> There shall be filed with the judge of probate of every county of the State wherein the intestate owned real estate, a certified copy of (a) the petition for letters of administration, (b) the order appointing the administrator, and (c) the final discharge of administrator.[31]

## VI. New Statute Regarding Pecuniary Formula Clauses and Other Pecuniary Bequests[32]

No estate planning problem has received more attention in recent years than the problem of meeting the requirements of Revenue Procedure 64-19[33] to qualify the estate for the estate tax marital deduction.[34] The problem arises where the draftsman utilizes the following provisions in spelling out the share of the estate to be used to fund the wife's qualifying share: (1) a pecuniary bequest or transfer in trust for the wife's share; (2) a provision that the executor may satisfy bequests by payment in kind as well as in cash; and (3) a provision that the executor may use values as finally determined for estate tax purposes in satisfaction of such bequests. It is important to note

29. S.C. Acts & J. Res. 1966, p. 2657.
30. S.C. Code Ann. § 19-264.1 (1962).
31. S.C. Acts & J. Res. 1966, p. 2657.
32. This section is written by Charles H. Randall, Jr., Professor of Law, University of South Carolina.
33. 1964-1 Cum. Bull. 682.
34. Int. Rev. Code of 1954, § 2056.

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that the Revenue Procedure has no application to fractional share formula clauses. However, it is probably true that the majority of wills drafted in this state which use the formula clause marital deduction employ the pecuniary formula clause.[35] The Revenue Procedure expressed, concern that the fiduciary in satisfying the bequest might not be required either by the express or implied provisions of the instrument or by state law to distribute assets equal in amount to the full marital deduction, or alternatively to fairly apportion any appreciation or depreciation in the assets between the wife's bequest and other bequests. The question seldom provokes litigation in state courts, so that it is difficult to find authority requiring an executor to so apportion where the instrument is silent. To settle the question, the legislature enacted this year a statute which purports to be declaratory of present law and which requires that "unless the governing instrument provides otherwise," the fiduciary must distribute assets "fairly representative of appreciation or depreciation in the value of all property thus available for distribution."[36] The purpose of this comment is only to call the new statute to the attention of the bar; the problem is too complex for brief discussion in this survey.[37]

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35. Bruton, *Some Marital Deduction Problems For The South Carolina Lawyer*, 16 S.C.L. REV. 462, 474 (1964).

36. S.C. Acts & J. Res. 1966, p. 2265.

37. See generally CASNER, ESTATE PLANNING 543-49 (Supp. 1966).