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# REAL ESTATE LAW IN PROBATE PRACTICE: TALES OF WOE, WARNING, & WISDOM

FRANK J. HARRISON\*

The attorney who practices in the field of probate law, whether he concentrates in that area, or only occasionally has probate work to do, is likely to feel that expertise in probate work depends on mastery of a substantial body of tax law, regulations, forms, and procedures. From the filing of Forms 56 and SS-4 to notify the Internal Revenue Service that an estate has been opened and an employer identification number is needed, to the filing of another Form 56 with the closing of the estate as a notice of termination, the attorney cannot forget that tax law impinges on probate law. He needs to consider: the likely or possible duration of the estate and the appropriate tax periods, the timing of distributions, the allocation of deductions in the event an estate tax return is required, and the selection of qualified appraisers to fix values for tax returns. In addition, the attorney should also consider gift tax returns which were filed or should have been filed, taxes on prior transfers, deduction of estate tax on income in respect of a decedent, excess distributions on termination, newly conceived or revised forms such as those relating to alternative minimum tax or passive income, and other tax-related concerns, depending on the facts and figures in the particular estate.

Yet the importance of a probate lawyer's understanding of the tax law, including the rules governing the income taxation of estates, Federal estate and gift taxes, and state death taxes, should not be allowed to obscure the importance of land law in the probate process. The drafting of a will may require knowledge of future interests generally, the rule against perpetuities in its present form, and trusts, including the Illinois land trust. The inventory of assets will sometimes require examination of abstracts, as well as title policies, and that in turn requires the ability not only to identify title flaws but to know which can properly be waived. The preparation of the inventory and death tax returns, if needed, may call for a familiarity

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with land descriptions, and other title problems may arise in the final distribution and closing of the estate.

## I. THE LAYPERSON'S WILL

### A. *Lack of Legality*

A situation illustrating the extent to which real estate and probate law may become entwined is shown in an article which appeared in the January 1955 issue of the Chicago Bar Record, entitled "Mr. Blaustein's Will, or the Lawyer's Best Friend," written by attorney Benjamin Wham. Originally an address delivered at the Chicago Literary Club in October of 1954, it was a delightful story about a successful businessman who undertook to draft his own will, the problems which arose upon his demise, and the litigation that followed. In Mr. Wham's description of the oral argument on appeal, this appears:

He then launched into a technical discussion of various rules and presumptions of law. He discussed fee simple, qualified, defeasible or conditional fees, estate tails, life estates, shifting and springing uses, words of limitation, remainders, cross-remainders, precatory words, limited and unlimited powers of disposition, executory devises, vested and contingent estates, conditions precedent and subsequent, patent and latent ambiguities, and cestui que trusts.

He then discussed at length the rule in Shelley's case. This rule, according to Mr. Rose, was of great antiquity and was entitled to the respect usually accorded to old age. He argued that it had been honored by Coke and Blackstone as an ancient dogma and pillar of English jurisprudence, and had been preserved in its primordial rigor and brought to this country . . . .

The Chief Justice in a fatherly tone said to Mr. Rose, "Don't you know, Mr. Counsellor, that at the last session our State legislature abolished the rule in Shelley's case in this State?"

Mr. Rose turned a pea green, clutched his coat over his heart, staggered and sat down heavily, apparently muttering in distress over the demise of his old friend, the rule in Shelley's case.

The story was interspersed with verses of a song with which the late Mr. Blaustein was toasted by his attorneys, "The Jolly Testator Who Makes His Own Will." The first stanza ran as follows:

Ye lawyers who live upon litigants' fees,  
And who need a good many to live at your ease;  
Grave or gay, wise or witty, whate'er your degree,  
Plain stuff or State's Counsel, take counsel of me:  
When a festive occasion your spirit unbends,  
You should never forget the profession's best friend:  
So we'll send round the wine, and a light bumper fill  
To the jolly testator who makes his own will.

In Benjamin Wham's story the real estate law problems raised by the Blaustein will were wide-ranging. Sometimes such problems are not numerous, but are difficult to resolve nonetheless.

*B. "Who Are the Heirs"*

Many years ago a man named William W. Bean decided, like Blaustein, to draft his own will. He died in 1935, and later that year his will was admitted to probate. Mr. Bean's will left his home to his son, W.R. Bean, and the son's wife, Pearl, for life. The will then stated: "After their death the property to pass to the Bean heirs — grandchildren etc. then living." In subsequent provisions of the will he gave stock to his daughter, Lulu, and property in New York to "Jennie Gokey, one of the Bean heirs," a distant cousin of the decedent. In 1954, when both life tenants had died, it became necessary to determine who the "Bean heirs" were to whom remainder interests in the home had been given, and in what proportions they were to share.

It became evident that "Bean heirs," in the paragraph devising the home, might have meant heirs at law under the statute of descent, who in 1954 were the decedent's daughter Lulu and the two children of his son W.R.; or it might have meant the decedent's grandchildren and more remote descendants; or, all of his descendants, including his daughter Lulu; or, all of his relatives, lineal and collateral, including Jennie Gokey. Title insurance on the home was requested, to solve the multiple-choice problem, but was refused until an order of court could be provided construing "the Bean heirs — grandchildren etc. then living." Thus the end result of William W. Bean's drafting efforts was that his will, which was admitted to probate in 1935, had to be brought before the court again, twenty years later, in 1955.

For the purpose of obtaining a judicial determination of title to the Bean home, a complaint for partition was prepared and filed, and the amount required as advance court costs was paid. Service of process was obtained on some of the defendants, sheriffs of three different counties being employed for this purpose. An affidavit as to unknown persons and an affidavit for publication were prepared and filed, and the other defendants were then given notice by publication. Guardians ad litem were appointed for parties who were minors and for any unknown owners who might have been under disability, and an attorney was appointed to represent any persons in military service. Notice of hearing was given, a hearing took place, and a decree (now judgment) for partition was entered. The court found that William W. Bean, by using the expression "the Bean heirs — grandchildren, etc., then living" in his will, intended to des-

ignate and describe all of his descendants who might be living at the time of the death of the survivor of his son and his son's wife, all of them sharing equally, per capita, as tenants in common.

With the meaning of the probated will elucidated, the court ordered a partition of the premises and appointed three commissioners to make a physical division if possible or an appraisal if not. Subsequently an oath of commissioners was filed; a report of commissioners was filed; the report was approved and a sale was ordered; a notice of sale was published; a public sale was conducted by a master in chancery; the master in chancery's report of sale was filed; his report was approved and the sale confirmed; a master's deed was prepared and delivered by the master in chancery to the buyers at the sale; a petition to fix fees was filed; notice was given, a hearing was held, and fees were fixed by the court for the guardians ad litem and the attorneys; a petition for distribution was filed; notice was given, a hearing held, and an order for distribution of the proceeds of sale was entered; distribution was made by the master in chancery; and the master's report of final distribution was filed and approved.

In the petition for distribution all the costs and expenses of the partition proceedings were listed. They included court costs, recording charges, publication charges, the costs of title insurance and revenue stamps, and the fees of the sheriffs, master in chancery, guardians ad litem, and attorneys. The figures listed for the Bean litigation bring to mind the chorus of the song in Benjamin Wham's story about Mr. Blaustein:

You had better pay toll when you take to the road,  
Than attempt by a by-way to reach your abode;  
You had better employ a conveyancer's hand,  
Than encounter the risk that your will shouldn't stand.  
From the broad beaten track when the traveler strays,  
He may land in bog, or be lost in a maze;  
And the law, when defied, will avenge itself still,  
On the man and the woman who make their own will.

## II. OUTDATED WILLS BY LAWYERS

But wills crafted by their testators, like those of Blaustein and Bean, do not appear to be numerous despite the availability of instruction manuals for laymen. Most wills are still prepared by lawyers, and accordingly it is usually a will prepared by a lawyer, but perhaps never taken back to him for review, that turns out not to be suitable to a factual situation that may have changed substantially since the will's execution. A testator's feelings towards persons he has named or has not named as beneficiaries may have changed; his assets or his tax situation may require different administrative pro-

visions; or events may have occurred which were not anticipated by anyone concerned. A will which has not been reviewed may turn out to be a misfortune to the family, may give rise to unnecessary expenses and taxes, and may create litigation, just as in the case of the testator who makes his own will. That litigation illustrates, again, the nexus between probate and real estate law.

#### *A. Failure of the Family Tree—The Garvin Estate*

An example of unanticipated events may be seen where a will creates life estates and the remaindermen never come into being. A long time ago, in 1921, such a will was made, which caused complex real estate problems to emerge almost sixty years later. Michael Garvin, a farmer, executed a will dated June 20, 1921, by which he disposed of his four tracts of farmland, two of them situated in Illinois and two in Iowa. Tracing the title after the death of all the life tenants brought the will into litigation in both of those states.

Paragraph Second of Michael Garvin's will devised a 130-acre tract of farmland in Illinois to his wife Dora Garvin for life; thereafter to his daughters Beatrice Garvin and Dorcas Garvin for their joint lives and for the life of the survivor of them; thereafter to the children (not then in being) of those two daughters who should survive them (they ultimately died without having had any children); or, if they should leave no children surviving, then to the children of his grandson Willard Steinhart (who died without having had any children).

Paragraph Third of his will devised a 30-acre tract of Illinois farmland to his daughter Mary Steinhart for life; thereafter to her son Willard for life; thereafter to Willard's children (there were none): or, if he should leave no children surviving, then to the children of Beatrice and Dorcas (none).

Paragraph Fourth of the will devised an 80-acre tract of farmland in Iowa to daughter Beatrice for life; thereafter to her children who should survive her (none); or, if she should leave no children surviving, then to the children of daughter Dorcas then living (none).

Paragraph Fifth of the will devised another 80-acre tract of Iowa farmland to daughter Dorcas for life; thereafter to her children who should survive her (none); or, if she should leave no children surviving, then to the children of daughter Beatrice then living (none).

Paragraph Twenty-second of the will gave the residue of Michael Garvin's estate to the three daughters; Mary, Beatrice, and Dorcas.

After the commencement of proceedings to administer the estates of Dorcas Garvin, who died in 1978, and Beatrice Garvin, who died in 1980, it became evident that there were complicated title and tax problems in the two estates. Questions were coming from Iowa, Colorado, and California regarding ownership of the land following the death of life tenants Dorcas and Beatrice. Additional counsel was employed to help the attorney who had opened those estates and who shortly afterward retired from the practice of law.

The estates of Beatrice and Dorcas had initially been thought to own no interests in real property, the life estates having terminated, and inventories having been filed listing no real estate. A memorandum was now prepared directing attention to the devolution of the reversionary interests created by the Michael Garvin will, which had to be traced upon failure of the contingent remainders to vest, and which established the need to file supplemental inventories in the estates of Beatrice and Dorcas, as well as estate tax returns for those estates.

The memorandum dealt with the nature, descent, and taxation of the interests in real estate created by the Michael Garvin will. The memorandum pointed out that the interests in the 130-acre tract of Illinois land were as follows: a life estate in wife Dora, life estates in daughters Beatrice and Dorcas, a contingent remainder in any children those two daughters might have, a contingent remainder in any children Willard might have (the two contingent remainders together constituting a contingent remainder with a double aspect), and a reversion in all three of Michael Garvin's daughters. Since neither Beatrice, nor Dorcas, nor Willard ever had any children, none of the contingent remainders ever became vested. There being no vested remainder, a reversion was left. Reversions are transferable though defeasible, and under a residuary clause in a will. Including a residuary clause in the Garvin will in which the particular estate is created, meant the reversion in the 130-acre tract passed to the three daughters; Mary, Beatrice, and Dorcas, and their successors.

In tracing the descent of the reversion, consideration had to be given to the effective date of any pertinent legislation. The Illinois anti-lapse statute was amended in 1969 and the new version was not applicable to wills of decedents dying before 1970, so it did not apply to the will of Michael Garvin. Accordingly, when Michael Garvin's daughter Mary Steinhart died in Denver in 1957, her share of the reversion passed to the trustee of the trust created by her will, rather than passing under the statute to Mary's daughter. The one-third interest in the reversion which belonged to Dorcas Garvin, who died intestate, passed to her two heirs, one-sixth going to Genevieve Crow, Mary Steinhart's daughter, and one-sixth to Beatrice Garvin.

The one-half interest in the reversion thereafter owned by Beatrice passed to the beneficiaries named in the residuary clause of Beatrice's will.

The interests created in the 30-acre tract of Illinois land under Michael Garvin's will were also life estates, contingent remainders which failed to vest, and a reversion in the three daughters. Ownership of the reversion did not pass in the same manner, however, because of transactions, affecting Mary Steinhart's interest. In 1956 she conveyed her one-third interest in this tract to her attorney in Denver, but later obtained a judgment requiring reconveyance on the basis that the deed had been obtained by fraud, which was affirmed by the Colorado Supreme Court. Mary then amended her will to give the property on her death to Beatrice and Dorcas; then she died and her property was reconveyed by the attorney to her executor, the First National Bank of Denver. There was no conveyance from the executor to Beatrice and Dorcas, but the Illinois Statute of Uses executes passive trusts, so her interest passed to her two sisters as intended, and later to the heirs of Dorcas and the beneficiaries named in the will of Beatrice.

Similar interests were created in the two tracts of Iowa land, but ownership of the reversion did not pass in the same way because Iowa law governed the devolution of title to the Iowa property, and its provisions for descent were quite different. The real estate Dorcas owned, both her parents being deceased and she having died intestate, appeared to have passed under Iowa law as follows: half to the surviving descendants of her father (Beatrice Garvin and Genevieve Crow) and half to the surviving descendants of her mother (Beatrice Garvin). However, after ancillary proceedings were begun in Iowa to administer the two estates, a petition in equity was filed in which the contention was made that under Iowa law the reversions passed by intestacy to Michael Garvin's heirs living at the death of the life tenants, rather than passing under the residuary clause in his will. The litigation over this issue did not come to an end until the case had been appealed to the Iowa Supreme Court, when a settlement was finally reached.

Tracing residuary interests into the estates created problems of valuation. A reversionary interest in property is includible in a decedent's estate if it has some ascertainable value. Therefore it was necessary to determine when the reversionary interests in the four tracts acquired substantial value, and what value those tracts had at the death of Dorcas in 1978 and Beatrice in 1980. The contingent remainders given to the unborn children of Beatrice and Dorcas did not disappear until the death of Beatrice and Dorcas, because of the presumption of fertility in real estate law. However, this presumption has in a number of cases been overlooked where questions of

taxation have been involved. Accordingly, Beatrice having been born in 1894 and Dorcas in 1898, their reversionary interests acquired value for tax purposes long before their death, and that value might be considered equal to the full value of the fee, less the actuarial value of the life estates, less a discount for diminished marketability of fractional interests, the ownership of the reversion being divided, and less an additional discount for the possibility that one of the life tenants might substantially outlive her expectancy, or might have a child at a time in life when such an event was statistically improbable.

Federal estate tax returns filed for the Dorcas and Beatrice estates listed the reversionary interests received from Michael Garvin. The return filed for the estate of Dorcas was late, and payment of tax was late. It was explained, however, in a statement filed with the return, that both Beatrice and Dorcas had thought they owned just life estates; that they probably had been told this by one or both of the Garvin family attorneys, both of whom were by this time deceased; that the reversionary interests had not been noticed when the Illinois inheritance return filed for the estate of Dorcas was approved; that the Colorado Supreme Court had commented, after Dorcas's sister Mary had died, that Mary's interest in one of the Illinois tracts was a life estate only; and that a commitment for title insurance had been issued without a title-finding. The property law complications were sufficient to excuse the assessment of penalties for late filing and late payment.

A supplemental Illinois inheritance return was filed for the estate of Dorcas, and an Illinois inheritance tax return for the estate of Beatrice. The returns were approved, orders entered, and countersigned receipts obtained from the State Treasurer as was then necessary. In Iowa, the devolution of title continued to give rise to different opinions. A letter from the Administrator of the Iowa Department of Revenue to the attorney for the Administrator of the two Iowa estates read as follows: "I have reviewed the above two captioned estates in light of the Estate of Michael Garvin, who died in 1921. These estates have caused no end of trouble, but my conclusion is that the remainders created in the Michael Garvin will, under paragraphs four and five, lapsed for failure to vest (no one present to take upon the death of the life tenant and therefore falls to the residuary estate under paragraph twenty-two of the will)." He then outlined his conclusions as to the fractional interests of the various owners, and ended his letter as follows: "Frankly, the whole matter still leaves me a little confused."

**FINAL THOUGHTS**

From the foregoing it should be evident that the real estate problems which will sometimes arise in connection with the administration of a decedent's estate can be quite complicated, and may occasionally leave the probate practitioner "a little confused." Perhaps it is the inevitable involvement of real estate law and probate law with each other that has led the American Bar Association to have just one "Section of Real Property, Probate and Trust Law," rather than separate sections. The attorney involved in probate work who has developed some amount of expertise in property law, future interests included, will be better able to resolve the difficult title problems that sometimes appear. He can also feel more confident that the wills that cause such problems will not be his.

