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PROBATE AND ESTATE LAW

Things have a terrible permanence when people die.—ALINE KILMER, *Things*.

STATUTORY CHANGES IN ILLINOIS PROBATE LAW— 1950–1960

MARSHALL T. ISMOND

THE DECADE OF the 1950's produced many statutory changes in Illinois in the probate field, both in substantive rights and in practices and procedures. Well over fifty changes were made in five general legislative sessions—the majority in the Probate Act itself. This article undertakes to cover only the more significant principles of the major new provisions.

HISTORY OF THE CHANGES—A “DISTILLING PROCESS”

It is appropriate to describe, briefly, the circumstances under which the changes were accomplished. They originated largely in probate committees of the Chicago and Illinois State Bar Associations, where they were first proposed, extensively studied, and drafted into bills for presentation to the Legislature. Frequently proposals were reviewed by several other committees in the associations. In almost all instances both associations collaborated. All bills originating elsewhere, but touching this field, were scrutinized by the appropriate committees of the two associations. It was a sort of distilling process whereby the experiences of practicing lawyers were translated into new concepts and procedures, albeit slowly.

Footnotes herein as to the various statutory amendments and new sections do not contain references to the ILLINOIS REVISED STATUTES, but are limited to the appropriate Senate or House bill numbers and the year of passage. This will permit the bills to be examined in their entirety by those interested in doing so. The latter method of citation makes for simplicity and accuracy, particularly as to those bills which cover numerous sections. Those who would like to inquire further will

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find helpful discussions in the 1960 pocket parts of *JAMES, ILLINOIS PROBATE LAW AND PRACTICE*, currently edited by Mr. Austin Fleming, under notes keyed to the numbers of the sections discussed herein.

A TEN-YEAR REVIEW OF PROBATE AND ESTATE LAW AMENDMENTS

For many years lawyers occasionally found themselves unable to distribute in intestate estates where the heirs had to be traced through grandparents or more remote ancestors under rule Sixth of the Rules of Descent (section 11 of the Probate Act). The rule, prior to the 1959 amendment, made it necessary to ascertain all of the "nearest kindred" through both the paternal and maternal sides. Frequently a portion or all of the heirs on one side were unknown, although those on the other were fully known. It sometimes was impossible to determine the number of persons of equal degree as to both sides or, where little or nothing was known about one side of a family, whether that side would produce an heir of higher degree than those established on the other. In such cases any distribution was impossible.

The 1959 amendment to section 11 of the Probate Act,¹ effective as to persons dying on or after July 8, 1959, inserts two new rules Sixth and Seventh to correct the difficulty mentioned in the preceding paragraph. Where the heirship must be traced through grandparents, the new rule Sixth provides that half the estate passes to the maternal grandparents in equal parts, or to the survivor of them, and if neither is living, to their descendants, per stirpes. The other half passes to the paternal grandparents, or to their descendants, in like manner. If there is no one to take on one side, then the other side takes all. Where heirship must be traced through great-grandparents, the new rule Seventh provides for the same type of division. Thus, the amendment attempts to reduce the number of instances in which distribution will be completely frustrated. However, whether this will be accomplished, and whether other distribution complications will result, remains to be seen.

Under the new rules, experience may prove that it will be necessary to establish the identity of remote kindred more frequently than in the past. This increase in the number of heirs is bound to raise some new problems. Only time will tell whether frustrated distributions will

¹S.B. 75 (1959). As noted in the third paragraph of this article, the reference to the statutory change in this footnote and in succeeding footnotes is to the bill introduced in the appropriate house (Senate or House of Representatives) and the year of passage by the Illinois Legislature.

occur more frequently under the new rules than under the old. While there may be fewer situations where total failure of distribution occurs, there may be more undistributable half portions of estates which would have gone to nearest kindred on the other side of the family under the old rule.

Adopted children were raised more completely to the status of natural children for purposes of receiving property by inheritance, will, and otherwise by amendments to section 14, in 1953 and 1955. The 1953 amendment² made such a child a descendant of the adopting parent capable of inheriting both from the adopting parent and from the lineal and collateral kindred of the adopting parent. It also gave the adopting parent the status of a natural parent for the purposes of inheritance, except that the natural family will take from the child such property as the child has taken from the natural family. For the purpose of determining property rights under any instrument executed after January 1, 1954, an adopted child is deemed a natural child unless the contrary intention appears in the instrument. Technical improvements were provided by the 1955 changes.³

The inheritance problems which arise out of an adoption situation can be very complex where the child is not a stranger to both of the adopting parents. In many instances, divorce and remarriage have preceded the adoption, with one, or both, of the new spouses adopting the children of the other. In other cases, the death of parents or other misfortune frequently results in a child being adopted by an aunt, uncle, or other relative. In such cases, shall an adopted child lose his right to inherit from or through a natural parent because of the divorce or other misfortune which destroyed the innocent child's family? (For a detailed discussion of these changes and problems, reference is made to JAMES (mentioned in the early portion of this article)).

The 1959 Legislature adopted a new act⁴ relating to adoptions which has probate implications. As of January 1, 1960, an adult person in this State may be adopted, provided the conditions prescribed by the act are met.

A new section, 16a, was added to the Probate Act in 1955,⁵ providing that upon a renunciation of a will by a surviving spouse, a future interest which is to take effect upon the termination of the interest given the spouse shall accelerate and take effect as though the surviv-

² S.B. 132 (1953).

⁴ S.B. 737 (1959).

³ S.B. 155, S.B. 156 (1955).

⁵ H.B. 23 (1955).

ing spouse has predeceased the testator. The marital deduction has resulted in an increased number of renunciations and consequential difficulties. This much-needed new section fills a serious void in Illinois statutory and case law.

One of the most important tools of modern estate planning was given a statutory foundation in 1955 by the addition of section 43a to the Probate Act.⁶ The tool is the so called "pour-over" will, which gives property to an inter vivos revocable trust. Although for some years this device had become more and more frequently employed, in the absence of an appropriate statute its legality was insecure under the decisions. This new section, which took effect July 1, 1955, provides that "a testator may devise and bequeath real and personal estate to a trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the trust is subject to amendment, modification, revocation, or termination." An excellent discussion of the problems related to the substance of this new section is contained in JAMES.

Limitations on the qualifications of witnesses to wills were realistically liberalized by an amendment to section 44 of the Probate Act in 1957,⁷ effective as to wills of decedents dying after July 1, 1957. It provides:

No individual or corporation is disqualified to act or to receive compensation for acting in any fiduciary capacity with respect to a will of a decedent by reason of the fact that any employee or partner of such individual or any employee or shareholder of such corporation attests the execution of the will or testifies thereto. No attorney or partnership of attorneys is disqualified to act or to receive compensation for acting as attorney for any fiduciary by reason of the fact that such attorney or any employee or partner of such attorney or partnership attests the execution of the will or testifies thereto.

Probably the majority of wills are executed in the offices of the testator's attorneys, who frequently are the only conveniently available or practicable witnesses. Certain decisions, particularly *In re Georges Estate*,⁸ cast serious doubt upon the qualification of such attorneys to be compensated for services rendered in the administration of such a will, even though the testator expressed in his will the desire that such attorney act. This amendment is a substantial clarification of the law in this particular.

Two particularly important changes were effected by the 1957 amendment to section 46 of the Probate Act⁹ effective July 1, 1957,

⁶ H.B. 100 (1955).

⁷ H.B. 145 (1957).

⁸ 11 Ill. App.2d 359, 137 N.E.2d 555 (1956).

⁹ S.B. 54 (1957).

relating to the revocation of wills. The first change relates to the effectiveness of the revocation of a will by a later will declaring the revocation. In *Stetson v. Stetson*,¹⁰ the Supreme Court declared that where a testator executed a later will expressly declaring that all prior wills be revoked, such prior wills would be revived upon the destruction of such revoking will. This rule, of course, did not apply to prior wills which were physically destroyed. The section now provides: "No will which is in any manner revoked shall be revived otherwise than by the re-execution thereof, or by an instrument in writing declaring the revival and signed and attested in the manner prescribed by this Article for the signing and attestation of a will."

The other change made by the amendment to section 46 relates to the effect of divorce upon a will. Prior to such amendment, divorce or annulment resulted in no revocation. Now, "unless the will expressly provides to the contrary: (1) . . . ; and (2) the divorce or annulment of the marriage of the testator revokes every beneficial devise, legacy or interest given to the testator's former spouse in a will executed before the entry of the decree of divorce or annulment, and the will shall take effect in the same manner as if the former spouse died before the testator."

Extremely important changes were made in 1955 and 1957 in section 49 of the Probate Act, which deals with the disposition of devises or legacies to deceased devisees or legatees. The changes eliminate many intestate situations which frequently did violence to the testator's intentions. The 1955 amendment,¹¹ which retained the former provision to the effect that the descendants of a legatee or devisee shall take, per stirpes, his share where he predeceases the testator, providing he (the devisee or legatee) was a descendant of the testator and the will made no provision for such contingency, is as follows:

[W]hen a devise or legacy lapses by reason of the death of the devisee or legatee before the testator, and there is no provision in the will for that contingency, the estate so devised or bequeathed shall be included in and pass as part of the residue under the will, and if the devise or legacy is or becomes part of the residue, the estate so devised or bequeathed shall pass to and be taken by the legatees or devisees, or those remaining, if any, of the residue in proportions and upon estates corresponding to their respective interests in the residue.

The 1957 amendment to section 49¹² provides:

¹⁰ 200 Ill. 601, 66 N.E. 262 (1903), Annot., 61 L.R.A. 258 (1903).

¹¹ H.B. 71 (1955).

¹² S.B. 242 (1957).

When a devise or legacy is to a class and any member of the class dies before the testator and there is no provision in the will for that contingency, the members of the class who survive the testator take the share or shares which the deceased member would have taken had he survived the testator, except that if the deceased member of the class is a descendant of the testator, the descendants of the deceased member take per stirpes the share or shares which the deceased member would have taken had he survived the testator.

The exception, of course, retains the principle regarding descendants which was part of the prior law. An excellent commentary on the details of these changes is to be found in JAMES.

A new tool for probate practitioners and testators was created in 1957 by the addition of section 89b to the Probate Act.¹³ It permits a non-resident decedent to provide "in his will that the testamentary disposition of tangible or intangible personal estate, having a situs within . . . [Illinois] as defined in Section 55, shall be construed and regulated by the laws of this State, [and that] the validity and effect of such dispositions shall be determined by such laws. In respect of such testamentary dispositions of tangible or intangible personal estate the probate court, in its discretion, may direct and, in the case of a decedent who was at the time of his death a resident of a foreign country, shall direct the executor or administrator appointed in this State to make distribution directly to those designated by the decedent's will as beneficiaries of such tangible or intangible personal estate."

It is rare that a change in anything as technical as the Probate Act is a matter of public interest, but in 1959, after approximately forty years of effort in many legislative sessions during that period, and under the pressure of great publicity, section 96¹⁴ was amended to permit a non-resident heir to nominate a resident administrator of a decedent's estate. Formerly, when an Illinois resident died intestate, or without naming a qualified executor, and there were no resident heirs, only the Public Administrator was permitted to administer the estate. Non-residents, regardless of their personal interest or qualifications, were not permitted to select, or even advise in the selection of, an administrator. The plucking of this political plum was lamented only in certain centers of self-interest which shall be nameless. This amendment becomes effective December 4, 1961, so that, as to persons dying thereafter, a non-resident heir may select and nominate an Illinois administrator of his choice.

¹³ H.B. 103 (1955).

¹⁴ H.B. 18 (1959).

A new office, "Conservator to Collect," was created by the addition, in 1957, of section 113a to the Probate Act.¹⁵ The position is similar to the office of Administrator to Collect, and is intended to serve substantially the same purpose. It has been found that there are occasions where, pending the hearing on a petition for appointment of a conservator, there is a need for the interim protection or management of the respondent's business, farm, or other assets. Heretofore, such has not been possible. This addition will serve to correct the deficiency.

During this ten-year period, many beneficial changes were made regarding the management of estates. Broad new powers were granted conservators and guardians for leasing oil, gas, coal and other minerals in a new section 222a to the Probate Act which was added in 1955.¹⁶ An amendment to section 246 of the Probate Act in 1955¹⁷ clarified the power of an executor to sell or mortgage real estate under a power in the will, regardless of whether the will subsequently was set aside. Modernized investment powers added by the 1955¹⁸ and 1957¹⁹ amendments to section 259 had perhaps the most important impact on the affairs of incompetents and minors. Prior thereto, such persons had little or no opportunity to enjoy economic growth or protection against the ravages of inflation. These amendments permit a portion of the ward's assets to be invested in equities, subject to the strict and rather complex limitations prescribed in the section. It is recommended that the extensive commentary in JAMES covering these amendments be read carefully.

To lawyers, perhaps the most controversial change made in the Probate Act relates to the amendments affecting appeals from the Probate Court. In the past, except in specified instances, all appeals have been from the Probate Court to the Circuit Court, where the matters would be tried de novo. As a consequence, trials in the Probate Court frequently were little more than harassing or preliminary investigations which resulted in a multiplicity of hearings.

Many lawyers feel that all appeals should be direct to the Appellate Court and that all trials de novo in the Circuit Court should be abolished. Another large group of lawyers believes, just as strongly, that the Probate Court is essentially an administrative court in a large part

¹⁵ S.B. 69 (1957).

¹⁶ S.B. 516 (1955).

¹⁷ H.B. 1092 (1955).

¹⁸ S.B. 20 (1955).

¹⁹ H.B. 6 (1957).

of its function, and that the old procedures permitted the disposition of many small matters more or less informally.

The appeals sections of the Probate Act were amended in 1959,²⁰ without the sponsorship of the bar associations, as a result of which, appeals were divided into two categories: Appeals from orders admitting or refusing to admit wills to probate, proceedings in the sale of real estate, and orders where the amount in controversy was \$3,000.00 or more, would be taken to the Appellate or Supreme Court; all other appeals would be taken to the Circuit Court, where the matter would be tried *de novo*. Unfortunately, the 1959 amendment is considered to be vague and uncertain as to what constitutes an amount in controversy of \$3,000.00. Both associations are officially agreed that the 1959 amendment must be clarified in this respect, and a new amendment has been drafted, and will be sponsored for passage in 1961.

The 1959 amendment²¹ to section 25 of the Inheritance Tax Act, provides that in cases of contingent testamentary dispositions, the tax will be assessed upon the happening of the most probable of the contingencies. Formerly, the tax was required to be assessed and paid on that contingency which would produce the greatest tax, regardless of how improbable such contingency might be; and whenever, and as often as, an event occurred which would produce a lower tax, the party entitled thereto could apply to the county court for a reassessment of the tax and to the state treasurer for a refund of the overpayment. With luck the state treasurer had sufficient funds on hand to repay. Frequently there were no funds on hand for the purpose, and then it would be necessary to await an appropriation by the next session of the Legislature. No interest was paid on the money so refundable. In 1945, attempt was made to alleviate the losses resulting from such excess tax payments through a tentative tax device which provided for a deposit of government bonds with the state treasurer. This method, however, proved to be cumbersome and generally unsatisfactory. The 1959 change will prove to be a truly helpful amendment.

Most important amendments²² to sections 10 to 14, inclusive, of the Statute of Frauds and Perjuries were made in 1955, effective July 1, 1955, respecting the situation where the personal estate of the decedent is insufficient for the payment of his debts. Formerly in such a situa-

²⁰ H.B. 534 (1959).

²¹ S.B. 88 (1959).

²² S.B. 126, S.B. 127 (1955).

tion, apparently the only limitation upon the creditor's right to maintain an action against lands taken by an heir or devisee was the running of the general statute of limitations against the obligation of the decedent sought to be enforced. The courts have held that failure to file a claim against the decedent's estate within the statutory period allowed for the filing of claims did not preclude the creditor from maintaining an action against the heir or devisees under the Statute of Frauds and Perjuries. Before the statutory changes, a note, for example, could have been enforced against the decedent's heir or devisee until the running of the ten-year statute had barred an action on the note. Now, under this amendment, where the personal estate of a decedent is insufficient for the payment of debts, a creditor must proceed against the heirs or devisees within seven years from the date of the decedent's death unless Letters Testamentary or of Administration are applied for within such seven-year period; in the latter event, the creditor must file his claim within the period for filing claims under the Probate Act, normally nine months from the date of issuance of letters.

In the aforesaid amendments to sections 10 to 14 there is also found a new specific limitation on suits to enforce a contract to make a will. Formerly, the only limitations applicable to such suits have been the general statutes of limitation relating to actions on contracts. Now such actions shall be commenced within two years after the date of death, unless Letters Testamentary or of Administration are applied for within two years of such date, in which event such actions shall be commenced within and not after the time for presenting claims against estates of deceased persons in accordance with the Probate Act.

A 1955 amendment²³ to sections 5 and 14 of the Principal and Income Act, has an important bearing on the treatment of income during the administration of the estate of a testator. It provides for the distribution of income earned or accrued during the period of administration, and not payable to others; such amounts are to be distributed as income among the trustees of any pecuniary legacies in trust or trustees of any trusts in proportion to their respective interests computed in the manner specified. The amendment also includes a definition of what is "income" for purposes of distribution, supplying a much needed standard.

The Uniform Gifts to Minors Act²⁴ became law in Illinois on July

²³ H.B. 37 (1959).

²⁴ H.B. 233 (1959).

2, 1959. This is a new and as yet a relatively untried device which seeks to simplify the making of gifts to children without the use of a trust or legal guardianship. The act permits a donor to give property to a custodian to hold pursuant to the provisions of the act for the benefit of the minor, and to deliver the property to the minor upon the latter's attaining age twenty-one. The tax implications are largely unknown. Many members of the Bar strongly opposed this legislation on the grounds that it may create more problems than it can solve, including among their objections the uncertainties as to tax consequences, the consequences of reckless or ill-informed use of the statute, and also the probability of excessive tax-saving motivation, which too frequently produces undesirable results.

In 1951, the sections relating to dower were amended.²⁵ Prior to these amendments, a surviving spouse first became vested with a dower interest which would be lost (resulting in a fee being taken in lieu thereof) through the failure to file an election to take (perfect) dower. Under the amendments, the surviving spouse now takes a fee interest which is divested by electing to take dower in the manner prescribed by the act. The new amendments also provide that dower is lost unless elected, even in the case of real estate which was conveyed by the deceased spouse during the marriage without a release of dower by the surviving spouse at the time of conveyance.

To mention a few other changes: Small estates limitations have been raised; the Rule in Shelley's Case²⁶ and the Worthier Title Doctrine²⁷ have been abolished; and the rights of personal representatives to join in the execution of joint income tax returns of decedents and wards have been made practical by the elimination of personal responsibility for the tax, absent fraud on the part of the representative.

As readily can be seen, the past decade truly has produced many advancements in the area of statutory probate law.

²⁵ H.B. 975 (1951).

²⁶ H.B. 402 (1953).

²⁷ H.B. 69 (1955).