
Assignability and Descendibility of Will Contest Rights

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"Pleasure, comfort and welfare,"²⁵ "Comfort and pleasure,"²⁶ "Comfort and support,"²⁷ "Comfort and convenience,"²⁸ "Properly care for and maintain,"²⁹ "Need or desire,"³⁰ and "For the use and benefit as trustee in sole discretion deemed advisable."³¹

The most liberal ruling to date on power of invasion terminology was handed down on January 23, 1953, in the *Blodget* case. The will of a Massachusetts decedent left the residue of his estate in trust, the trustees "to pay over the net income therefrom to my said sister, . . . and also to pay from principal any amount in their discretion for her comfort and welfare," with a remainder to charity. The court in allowing the deductions said:

We think that court (Supreme Judicial Court of Massachusetts) on the basis of its prior decisions would hold that 'Comfort and Welfare' as used in the will we are considering meant the physical comfort and state of physical well being to which the life beneficiary had become accustomed, thus interpolating the 'standard . . . fixed in fact and capable of being stated in definite terms of money' set out in words in the will under consideration in the *Ithaca Trust Company* case.³²

In reviewing the contingent charitable remainder decisions, it would appear that whereas there is still much disagreement and hair splitting among the courts and the deduction is still denied in many cases where charity actually eventually receives the bequests; nevertheless the *Meierhof*, *Sternberger* and *Blodget* decisions offer encouragement to the taxpayers and tend to indicate that the judiciary may approve the avowed congressional policy of not benefiting the national revenue at the expense of charitable institutions.

ASSIGNABILITY AND DESCENDIBILITY OF WILL CONTEST RIGHTS

The right to contest a will is one ordained purely by statute. However, the statutes concerning the survival of the right and whether it is a personal or property right have been fraught with difficulties and misinterpretations. After surveying this probate problem through an investiga-

²⁵ *Henslee v. Union Planters Bank*, 335 U.S. 595 (1949).

²⁶ *Industrial Trust Co. v. Commissioner of Internal Revenue*, 151 F. 2d 592 (C.A. 1st, 1945).

²⁷ *Estate of Wiggin*, 3 T.C. 464 (1944).

²⁸ *Estate of Schumacher*, 2 T.C.M. 1018 (1943).

²⁹ *Estate of Holmes*, 5 T.C. 1289 (1946).

³⁰ *Gammóns v. Hassett*, 121 F. 2d 229 (C.A. 1st, 1941).

³¹ *Newton Trust Co. v. Commissioner of Internal Revenue*, 160 F. 2d 175 (C.A. 1st, 1947).

³² *Blodget v. Delaney*, Dec. 4677 (C.A. 1st, 1953).

tion of decisions and statutes, it seems that a majority rule has been established holding that the contest right is a property right and, is assignable and descendible.¹ However, there are a few jurisdictions which maintain that the right to contest is a personal one and dies with the contestant.²

Practically all pertinent statutes use the words "interested parties" as a qualification to bringing action.³ The decisions vary with the interpretation given this pivotal phrase by the courts of last resort, although there is a definite trend established to the effect that assignees, grantees, heirs and personal representatives of contestants are interested parties.⁴

The Supreme Court of Virginia has held that a grantee of an heir of the testator had such an interest as to allow him to contest the will which devised property to the grantor's children.⁵ Following this same principle, but using different reasoning, the West Virginia Supreme Court decided that an assignee of an heir of the testator could contest the will on proof of a bona fide claim.⁶ The court then ruled that an assignee did have a bona fide claim and thus was an "interested party." However, this criterion of proof of a bona fide claim seems to be peculiar to West Virginia. Continuing this trend of assignability, North Carolina like Virginia, held that the grantees of heirs of the testators were considered interested parties and were allowed to contest the testator's will.⁷

The Supreme Court of Wisconsin went so far as to hold that a purchaser at an execution sale of the interest of an heir, assumes the place of the heir so as to be heard in probate proceedings as to the authenticity of the testator's will.⁸ While this decision establishes the law as to assignees and grantees, the question of whether a personal representative or heir of a contestant gains the right to contest upon the death of the heir seems to remain open. This appears especially true in view of a recent Wisconsin survival statute which lists those actions which survive, other

¹ *In re Field's Estate*, 38 Cal. 2d. 151, 238 P. 2d. 578 (1951); *In re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919); *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364 (1918); *In re Baker's Estate*, 170 Calif. 578, 150 Pac. 989 (1915); *Ingersoll v. Gourley*, 78 Wash. 406, 139 Pac. 207 (1914); *Savage v. Bowen*, 103 Va. 540, 49 S.E. 668 (1905).

² *Campbell v. St. Louis Union Trust Co.*, 346 Mo. 200, 139 S.W. 2d. 935 (1940); *Ligon v. Hawkes*, 110 Tenn. 514, 75 S.W. 1072 (1903).

³ Mo. Rev. Stat. (1949) § 468.580; Probate Code of Calif. (1951) c. 2, art. 1, § 370; Tex. Rev. Stat. (1948) art. 5534.

⁴ Authorities cited note 1 *supra*.

⁵ *Savage v. Bowen*, 103 Va. 540, 49 S.E. 668 (1905).

⁶ *Childers v. Milam*, 68 W. Va. 503, 70 S.E. 118 (1911).

⁷ *In re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919).

⁸ *Komorowski v. Jackowski*, 164 Wis. 254, 159 N.W. 912 (1916).

than those which survived at common law.⁹ It is to be noted that the right to contest a will is not listed. However, no decisions in point can be found construing such statute in relation to will contests; thus, on the basis of the above noted decision it would seem that Wisconsin still favors assignability and descendibility.

Those jurisdictions adhering to the minority rule generally hold that the interest must be a direct, pecuniary one, and they deprive assignees and heirs of the right to contest. However the Supreme Court of Ohio, in a unique decision, held that personal representatives and heirs of the contestant did possess such a direct pecuniary interest as to entitle them to the right of contest.¹⁰ In the respect that this decision follows the majority rule it is not outstanding. However, while most majority decision cases hold that the heirs or assignees are interested parties, they do not go so far as to decide that said parties have a "direct, pecuniary interest."

Although the weight of the decisions as noted above favor assignability, Missouri has persistently followed the minority rule. The Supreme Court of Missouri has held that the interest necessary to contest a will is neither assignable nor descendible and dies with the person.¹¹ The Court interpreted "interest" as meaning a direct, pecuniary one, and stated that it must exist at the time of the probate of the will. Following the identical reasoning, the same court in a recent decision, construing an amendment to the Missouri Statute of Wills,¹² held that an heir could not be substituted in a will contest as the right is one strictly personal and died with the contestant.¹³ Therefore, unless a statutory change is forthcoming, Missouri seems likely to remain one of the chief proponents of the minority view.

An early decision seems to establish that Tennessee is a follower of the minority rule.¹⁴ The court held that the father of a contestant, who was the son-in-law of the testatrix, was not an interested party as set out by statute and thus could not contest the will after the death of his daughter.

⁹ Wis. Rev. Stat. (1951) § 331.01. "In addition to the actions which survive at common law the following shall also survive": Lists fifteen types of actions excluding will contests.

¹⁰ *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364 (1918).

¹¹ *Campbell v. St. Louis Union Trust Co.*, 346 Mo. 200, 139 S.W. 2d 935 (1940).

¹² Mo. Rev. Stat. (1949) § 468.580. "If any person interested in the probate of any will shall appear within one year after the date of the probate or rejection thereof, and, by petition to the circuit court of the county, contest the validity of the will, or pray to have a will proved which has been rejected, an issue shall be made up whether the writing produced be the will of the testator or not . . ."

¹³ *Davis v. Davis*, 252 S.W. 2d. 521 (Mo., 1952).

¹⁴ *Ligon v. Hawkes*, 110 Tenn. 514, 75 S.W. 1072 (1903).

In view of the later cases,¹⁵ which favor more free assignability, it should be noted that Tennessee has held its ground with Missouri¹⁶ and still adheres to the minority view.

While the law of Tennessee and Missouri seems well established, the position of Texas remains open to dispute. A recent decision handed down by a Federal District Court in Texas indicates that the Texas courts may follow the minority view when a factual situation calling for its use arises.¹⁷ The decision points out that generally, unless a statute has a contrary provision, statutory claims, either penal or distinctly personal to certain individuals, will not survive to heirs or representatives of the decedent, and hence are not assignable. Although this decision may offer some illumination on the standing of Texas concerning the controversial point, the applicable Texas statute reiterates that any interested person may contest within four years.¹⁸ No Texas decision could be found interpreting the phrase "person interested."

It appears that Illinois was a leader in establishing the minority view that will contest rights were not assignable or descendible. Thus it was held in an early Illinois decision that a person not pecuniarily interested in the estate of a deceased person at the time of the probate of the will was not entitled to file a bill in chancery to contest the will; a purchaser, after probate of the will, was not such an interested party.¹⁹ Here the court was only dealing with a grantee of an interest and not a personal representative or heir. While this decision opened the gates, a period of ten years had passed before the Illinois position was made clear, when the Supreme Court of Illinois handed down a decision, ruling that the right of a person interested to contest a will within a year after probate was not assignable or descendible.²⁰

This decision was followed consistently in Illinois and has been cited on many occasions by the courts of other jurisdictions, which has resulted in the confusion now surrounding the Illinois view. Subsequently, the Illinois Supreme Court reiterated that a will contest right is not assignable and that the rights of heirs and devisees to succeed to the estate are fixed and vested beyond the power of the legislature to change at the moment of the testator's death.²¹ Since this case deals specifically with

¹⁵ Authorities cited notes 5, 6, 7, 8, 10 supra.

¹⁶ Authorities cited notes 11, 13 supra.

¹⁷ *Strickland v. Sellers*, 78 F. Supp. 274 (F.W.D. Tex., 1948).

¹⁸ Tex. Rev. Stat. (1948) art. 5534. "Any person interested in any will which shall have been probated under the laws of this state may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward."

¹⁹ *McDonald v. White*, 130 Ill. 493, 22 N.E. 599 (1889).

²⁰ *Selden v. Ill. Trust and Savings Bank*, 239 Ill. 67, 87 N.E. 860 (1909).

²¹ *Havill v. Havill*, 332 Ill. 11, 163 N.E. 428 (1928).

contest rights, it seems clear that the court was hinting that even an amendment to the Statute of Wills could not rectify the situation and render the interest assignable and descendible.

Although the Illinois judiciary seemed little in favor of an amendment, the Illinois legislature in 1929, amended the Statute of Wills by providing that any interested person could file a complaint in the Circuit Court of the county in which the will was admitted to probate, to contest the validity of the will; it was further provided that the right to institute or continue such a suit descended to the heir, legatee, devisee, executor, administrator, grantee, or assignee of the person entitled to institute the suit.²² As a result of the statute, it appeared that Illinois, one of the promulgators and founders of the minority doctrine, had reversed itself and now could be aligned with those adhering to the majority rule that the right to contest a will is assignable and descendible. Furthermore, it seemed that the statute alleviated all difficulties as it was broad in its scope, and thus included heirs and personal representatives as well as assignees and grantees.

Although the statute appears to be quite clear on its face, the first case construing it presented an interesting problem with an even more interesting decision; one which has troubled the highest courts of other jurisdictions. Thus, in 1930 the Illinois Supreme Court decided the case of *Glos v. Glos*,²³ wherein the testator died leaving his estate to his wife; a brother contested the will in the County Court. Upon the will being allowed to probate, the contestant appealed to the Circuit Court of Du Page County. He succeeded in perfecting his appeal, but died before it had been heard. The decedent's son then filed a motion asking to be substituted for his father, which motion was denied. The case reached the Illinois Supreme Court on certiorari and the trial court was sustained. In reaching its decision the court ruled that there was an all important distinction in procedure which was the ultimate factor in its ruling. The court held that Article 7 of the Probate Act, which is the amendment making the right of contest assignable, could be used only in an action at Circuit Court level, independent of any decree rendered by a County or Probate Court.²⁴ If, as in this case, an appeal from an order of the Probate or County Court allowing the will to probate was taken to the

²² Ill. Rev. Stat. (1951) c. 3, § 242. "Within nine months after the admission to probate of a domestic or foreign will in the probate court of any county of this State, any interested person may file a complaint in the Circuit Court of the county in which the will was admitted to probate to contest the validity of the will. The right to institute or continue a suit to contest the validity of a will survives and descends to the heir, legatee, devisee, executor, administrator, grantee, or assignee of the person entitled to institute the suit."

²³ 341 Ill. 447, 173 N.E. 604 (1930).

²⁴ Stat. cited note 22 supra.

Circuit Court, the procedure was that ordained by Article 14 of the Act and not Article 7.²⁵ Article 14 in no way provided for the assignability or descendibility of the right of contest. Article 14, which provided for the appeal of an order allowing probate, only mentioned interested parties and did not specifically list assignees or heirs.

After this judicial interpretation of the amendment, Illinois law remained that the amendment related only to an independent action in equity filed after a will has been admitted to probate and not to an appeal taken from the County or Probate Court to a higher court to contest the order of the lower court.

In view of this decision, it certainly seemed that it could no longer be intimated that Illinois still held with the minority view that the right of contest is a personal right. However, in a recent California Supreme Court decision, the *Glos* case was cited as precedent for Illinois holding the minority view.²⁶ The court cited the *Glos* case and even mentioned the amendment to the Illinois Statute of Wills, but still concluded that in Illinois the right to contest a will does not survive the contestant.

While this interpretation would seem to be correct if the court had made the distinction between those cases on appeal from the Probate Court and those contests which are begun in the Circuit Court, the court makes no such distinction and bluntly cites Illinois as being with the minority.

In 1939 the statute dealing with appeals of contests to the Circuit Court was modified and changed in that "any person who considers himself aggrieved" may take an appeal to the Circuit Court.²⁷ Formerly, under the 1929 statute, only an "interested party" could so appeal. There have been no decisions interpreting this modification and there now may be room for argument that an assignee or heir of a contestant could appeal from the Probate Court to the Circuit Court. However, the better view is that this modification even adds strength to the contention that on

²⁵ Ill. Rev. Stat. (1939) c. 148, § 14. "Appeals may be taken from the order of the county court, allowing or disallowing any will to probate, to the circuit court of the same county, by any person interested in such will, in the same time and manner as appeals may be taken from justices of the peace, except that the appeal bond and security may be approved by the clerk of the county court; and the trials of such appeals shall be de novo."

²⁶ *In re Field's Estate*, 38 Cal. 2d. 151, 238 P. 2d. 578 (1951).

²⁷ Ill. Rev. Stat. (1951) c. 3, § 484. "An appeal from any other order, judgment, or decree of the probate court may be taken by any person who considers himself aggrieved to the circuit court by the filing in, and the approval by, the probate court of an appeal bond and the payment of the costs and fees of the appeal. The bond shall be filed and approved and the fees and costs paid within twenty days after the entry of the order, judgment, or decree appealed from or within such further time, not to exceed sixty days after the entry of the order, judgment, or decree appealed from, as the probate court may allow on application made within the twenty days."

appeal the right is not assignable or descendible. An Appellate Court decision rendered in 1949 indicates that the Illinois courts still are not prone to free assignability unless clearly and concisely set out by statute, as the right to contest is not a vested one and no right existed in favor of an heir to contest independently of statute.²⁸

As seen from the above discussion, while there still remains a diversity of opinion as to the assignability and descendibility of will contest rights, it must be concluded that both the courts and legislatures are turning towards a greater liberality in allowing assignability and descendibility of such rights.

DOUBLE JEOPARDY AND THE IDENTITY OF OFFENSES

“. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .”¹

This clause, which is embodied in our Federal Constitution, bestows upon us one of our most jealously guarded civil rights. It is well settled that this clause applies only to proceedings in federal courts;² however, most state constitutions have similar provisions.³ This right to be free from multiple prosecutions for the same offense did not originate in the Constitution. It was well known in the ancient common law, being embodied in the Magna Charta.⁴

The protection which this right affords is invoked by what is commonly known as a plea of “double jeopardy” or “former jeopardy.” The right is founded on the theory that repeated prosecutions for the same offense results in persecution; it is such resulting persecution which is sought to be eliminated.

All courts agree that two prosecutions for the same offense are prohibited by the constitutional clauses, but there is an enormous diversity of opinion as to the interpretation of the phrase, “same offense.” The reason attributable to this enormous diversity of opinion is that the courts do not use the same criteria or tests in determining when offenses are the same.

The test which is most widely accepted by American courts is well illustrated in the recent Illinois decision of *People v. Harrison*.⁵ The de-

²⁸ *Kessler v. Martinson*, 339 Ill. App. 207, 89 N.E. 2d. 735 (1949).

¹ U.S. Const. Amend. 5.

² *United States v. Lanza*, 260 U.S. 377 (1922); *Phillips v. McCauley*, 92 F. 2d 790 (C.A. 9th, 1937).

³ Ill. Const. Art. II, § 10 (1870) reads as follows: “. . . or be twice put in jeopardy for the same offense.”

⁴ *Ex Parte Lange*, 18 Wall. 163 (U.S., 1873).

⁵ 395 Ill. 463, 70 N. E. 2d 596 (1947). For other Illinois decisions applying this test see: *People v. Flaherty*, 396 Ill. 304, 71 N.E. 2d 779 (1947); *People v. Allen*, 368 Ill.