Probate and Estate Law Decisions - 1950-1960

Nat M. Kahn

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol10/iss2/21

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
PROBATE AND ESTATE LAW DECISIONS--
1950--1960

NAT M. KAHN

Since probate law encompasses all fields of human conduct, this article will discuss decisions of Illinois courts of review during the past decade relating not only to the Probate Act, but also to the fields of evidence, wrongful death actions, corporations, joint tenancies, trusts, divorces, subrogation, adoptions, and other categories.

There were a number of unusual decisions by Illinois courts of review during the last decade. Whether they were sound can be the subject of heated discussions which would involve philosophical, social and other subjective factors. An analysis of these decisions emphasizes the oft-repeated statement that the law is not a science, nor do legal principles remain static.

JURISDICTIONAL QUESTIONS

Since the Probate Court handles a vast amount of claims against the estate of a decedent, the misconception persists that it has exclusive jurisdiction in these matters. This fallacy gained new strength with several recent Appellate Court decisions.

Under section 12 of article 6 of the Constitution of Illinois, Circuit Courts, being courts of general jurisdiction, have original jurisdiction of all causes in law and equity. This was emphasized by the Supreme Court in Howard v. Swift. Notwithstanding the many suits that have been filed over a hundred years in Circuit Courts against administrators and executors on claims arising out of contracts, this erroneous idea that the Probate Court has exclusive jurisdiction in these contractual claims continues to blossom. This error was strengthened by the case

1 356 Ill. 80, 190 N.E. 102 (1934).

Mr. Kahn, a member of the Illinois Bar, has also been admitted to practice before the Supreme Court of the United States. He attended the University of Chicago, the University of Michigan, and Chicago-Kent College of Law, and is a past member of the Board of Governors of the Illinois State Bar Association and a former Chairman of its Section on Probate and Trust Law; he also was a member of the Board of Managers of the Chicago Bar Association and the Chairman of the Committee on Probate and Trust Law of that association. Mr. Kahn is presently engaged in private practice in Chicago.
of Bosnak v. Murphy,\(^2\) decided as recently as November 21, 1960, and the holding by the Appellate Court in Abrams v. Schlar,\(^3\) decided by the same court on October 3, 1960, and the abstract decision of that court in Curran v. Harris Trust & Sav. Bank,\(^4\) decided May 21, 1957. These three cases contain language indicating that the Probate Court has exclusive jurisdiction in contractual claims against a decedent's estate. The Curran decision does not make this holding as dictum, but flatly states that "the Superior Court has no original jurisdiction to allow a claim against a decedent's estate. Such claim will have to be filed and determined in the Probate Court. (Ill. Rev. Stat. 1955, ch. 3, sec. 344.)"\(^5\) These holdings flaunt not only the Constitution of Illinois, but also section 207 of the Probate Act, which provides:

The provisions of this Article relating to the jurisdiction of the Probate Court that claims against estates, shall not be construed to exclude the jurisdiction of other courts.\(^6\)

It would be refreshing to have a Supreme Court decision to clear the dust raised by these Appellate Court decisions on what should be regarded as a basic, simple, well settled proposition.

In Voegel v. Central Nat'l Bank of Mattoon,\(^7\) it was held that the Probate Court, being of limited jurisdiction under the Illinois Constitution and not having the general powers of a court in chancery, is without jurisdiction to declare an antenuptial agreement void. It would appear that where an estate consists entirely of personalty, the question of whether or not an antenuptial agreement is valid comes within the constitutional power of the Probate Court as to "settlement of estates of deceased persons." If title to real estate is involved, the Probate Court might be without jurisdiction in such an action. However, the Supreme Court held in Kerner v. Peterson,\(^8\) that where personalty is involved, the Probate Court has jurisdiction to construe a will. Certainly construing a will is analogous to the power to pass on the validity of an antenuptial agreement.

In In re Estate of Baughman,\(^9\) the Supreme Court held for the first time that where two persons (usually husband and wife), execute a

---


\(^3\) 27 Ill. App.2d 237, 169 N.E.2d 583 (1960).

\(^4\) 13 Ill. App.2d 430, 142 N.E.2d 183 (1957) (abstract opinion).

\(^5\) Ibid.


\(^7\) 27 Ill. App.2d 400, 169 N.E.2d 675 (1960).

\(^8\) 368 Ill. 59, 12 N.E.2d 884 (1937).

\(^9\) 20 Ill.2d 593, 170 N.E.2d 557 (1960).
joint and mutual will pursuant to a contract, the surviving testator has
the power to revoke the will and the survivor's later will must be ad-
mitted to probate by the Probate Court. The beneficiaries under the
joint and mutual will, whose rights are based on a contract of the testa-
tors to execute a joint and mutual will, must enforce their rights in an
action in chancery in the Circuit Court, a court of general jurisdiction.

In actions to enforce contracts to make a will, it is well settled that
specific performance, that is to say, compelling the transfer or con-
vveyance of property in kind, is not granted as a matter of right. In those
claims involving less than the entire estate of the promisor, unless the
property promised is unique or irreplaceable because of its intrinsic
nature or value, adequate relief is possible by recovering a monetary
judgment for damages arising out of a breach of the contract. Accord-
ingly, *Linder v. Potier* waves a red flag of warning against a pro-
cedural pitfall in these claims. In effect, it warns the claimant as a pre-
cautionary measure, to file a monetary claim against the decedent's
estate. In earlier decisions of the Supreme Court in *Downing v. Harris
Trust & Sav. Bank*, and in *In re Estate of Johnson*, the measure of
damages in a claim of this character is the value of the property
promised to be bequeathed or devised.

In *In re Estate of Niehaus*, even though the decedent owned real
estate as well as personal property, the claimant filed her claim in the
Probate Court to enforce her oral contract with the decedent to leave
property to the claimant by his will and she was allowed a claim equal
in dollars to the value of the net estate.

Since the Circuit Court under the Illinois Constitution is a court of
general jurisdiction, the wisest course in a claim of this kind is to file in
the same complaint a separate count for specific performance, and in
the alternative, a separate count for a money judgment in the form of
a claim to be allowed against decedent's estate. The complaint must be
filed within the nine month period for filing claims.

Frequently the assertion is made that the Probate Court has no juris-

---

10 409 Ill. 407, 100 N.E.2d 602 (1951).
11 318 Ill. 323, 149 N.E. 256 (1925).
12 389 Ill. 425, 59 N.E.2d 825 (1945).
13 341 Ill. App. 454, 94 N.E.2d 525 (1950), petition for leave to appeal denied, 351
14 There is a full discussion of the jurisdiction of the Probate Court in actions to en-
force contracts to make a will in Kahn, *Probate Court Jurisdiction in Actions to En-
diction over trusts. The more accurate rule is that the Probate Court, being a court of limited jurisdiction, does not have jurisdiction to create, establish or administer trusts.\textsuperscript{15}

In \textit{Guttman v. Estate of Guttman},\textsuperscript{16} the jurisdiction of the Probate Court was sustained to pass on a fifth class preferred claim against a decedent's estate for trust funds commingled by the trustee with his own funds during his lifetime, where the trust funds could not be identified or traced.

In citations for the recovery of personal property by an estate, the Probate Court, under section 185 of the Probate Act, now has complete jurisdiction to "determine all questions of title, claims of adverse title, and the right of property. \ldots"\textsuperscript{17} It is well settled that in citation proceedings the Probate Court can pass on equitable rights as well as legal rights to the property involved.\textsuperscript{18} In \textit{Coffey v. Coffey},\textsuperscript{19} the question at issue was whether the decedent had sufficient mental capacity to make a valid gift in trust of personal property during his lifetime. The court held that the proceeding was an equitable one and discussed the facts in detail concerning the decedent's mental condition, and affirmed the holding of the trial court that the decedent did have sufficient mental capacity to have made a valid gift in trust of the property.

Consequently, if an alleged gift of personal property is made to a trustee, it must follow from these last cited cases that the validity of the gift in trust can be questioned in a recovery citation in the Probate Court as the court is fully empowered now, under section 185 of the Probate Act\textsuperscript{20} to settle all controversies as to title to personalty.

If the judicial article is adopted, useless litigation questioning the jurisdiction of various courts will become a thing of the past. This would be a refreshing and welcome change.

\textbf{CASES OF THE DECADE}

Top honors are easily awarded to the Supreme Court decision in \textit{Collins v. Collins},\textsuperscript{21} decided by that court in 1958. The divorce decree

\begin{footnotes}
\item[16] 28 Ill. App.2d 85, 40 N.E.2d 170 (1960).
\item[19] 74 Ill. App. 241 (1897).
\item[21] 14 Ill.2d 178, 151 N.E.2d 813 (1958).
\end{footnotes}
granted to a wife in this case was void on its face. The pleadings and the
decree showed that at the time the wife filed her complaint for divorce
on grounds of habitual drunkenness of her husband, the parties had
been married only eighteen months. Habitual drunkenness under the
Divorce Act is a cause for divorce if it has existed for a minimum con-
tinuous period of two years. The wife accepted a property settlement
and then entered into another marriage. The divorced husband died,
leaving a substantial estate. The second husband then procured an an-
nulment of his marriage. The wife, notwithstanding her acceptance and
retention of the fruits of the property settlement, within the statutory
period of two years, filed a petition under section 72 of the Civil Prac-
tice Act to vacate the divorce decree. The Supreme Court reversed
the Appellate Court and affirmed the decree of the Circuit Court that
granted this relief and set aside and vacated the divorce decree in ques-
tion. The decision held that the defense of estoppel by the wife in
accepting the property settlement could not be raised for the first time
on appeal by the deceased husband’s heirs, who were substituted as
parties defendant after his death. If it had been raised in the lower court,
it still would not bar the relief as the State is an interested or third party
in all divorce cases. Notwithstanding the inequitable results of this de-
cision, it appears that logic and consistency required the holding that
the divorce decree was void as not being based on a statutory cause.

In re Estate of Ilg\textsuperscript{23} is another shocker. That case upheld a provision
in a partnership agreement whereby the surviving partner became the
sole owner of the entire partnership assets upon the death of the other
partner, without requiring the survivor to pay any compensation to the
estate of the deceased partner. This same principle was followed by the
Court of Appeals for the Seventh Circuit during 1955 in Jones v. Schel-
lenberger.\textsuperscript{24} The insidious part of the \textit{Ilg} decision is that it is an abstract
decision and can be easily overlooked. However, the effect of its hold-
ing can be devastating.

It is not uncommon for two brothers or two friends to become part-
ners in a small enterprise which can mushroom into a large and profit-
able firm. At the time the partners commence doing business and sign
a partnership agreement, containing this survivorship gamble clause,

\textsuperscript{22} \textit{Ill. Rev. Stat.} ch. 110, § 72 (1959).


\textsuperscript{24} 225 F.2d 784 (7th cir. 1955), cert. denied, 350 U.S. 989 (1955).
let us assume that both of the partners are unmarried. Later each of them marries and acquires dependents and forgets the survivorship provision in their contract. Under this hypothetical and not uncommon situation where the wealth of the partners is all invested in their firm, it is conceivable that the dependents of the deceased partner can be pauperized overnight. Certainly this dangerous situation calls for corrective legislation.

The third shocker is another buried abstract decision of the Appellate Court for the First District in *Mimmack v. McNulty*. A bachelor's will gave his entire estate to a friend. It was admitted to probate. Shortly thereafter, a brother of the decedent filed a complaint in the Superior Court of Cook County for specific performance to enforce the terms of a joint and reciprocal will dated about two months later than the earlier will that was admitted to probate. Witnesses testified to an oral agreement of the decedent and his brother to execute a joint and reciprocal will, whereby upon the death of either of them the survivor was to receive the deceased brother's estate. The original document was not produced and the scrivener testified he remembered drawing the will. Oral testimony was introduced of the contents of the will and its due execution. Under the oral contract of the two brothers the will would be irrevocable. After the will was signed and witnessed by the two testators, it was delivered to the decedent and it could not be found after his death. The surviving brother was awarded the entire estate of the deceased brother without producing a scrap of paper to prove his claim. It was established entirely on oral testimony.

*Holmes v. Birtman Elec. Co.* posed the dilemma of a stock transfer agent caught in a court fight of two hostile sisters, each of whom claimed ownership to the same shares of corporate stock. One sister claimed title as the surviving joint tenant with her father. The other sister charged in her verified complaint that the joint tenancy was void in its inception because of undue influence and lack of mental capacity of the father, who originally was the owner of the stock. The transfer agent was made a party to the suit and served with process. It refused the demand of the surviving joint tenant to transfer the stock to her during the pendency of the suit. She later won the suit on the merits. Meanwhile, the stock declined in value. The transfer agent, a neutral

---


26 18 Ill.2d 554, 165 N.E.2d 261 (1960).
stakeholder was surcharged with a substantial amount because of the depreciation in value of the stock during the pendency of the litigation. This decision also calls for corrective legislation.

*Thorne v. Continental Ill. Nat'l Bank & Trust Co.*\(^{27}\) introduced into Illinois law an entirely new and convenient principle to "break" a testamentary trust. The bitter litigation in the affairs of Montgomery Ward Thorne, deceased, are in public domain. As a means of ending the seemingly endless litigation between the parties, the Appellate Court based its decision on the "emotional emergency" suffered by the decedent's mother, the life beneficiary. The opinion said it "could be far more devastating than a financial 'emergency.'"\(^{28}\)

**JOINT TENANCIES**

*In re Estate of Schneider*\(^{29}\) was a landmark decision of the Supreme Court. It overruled the earlier Appellate Court decision of the First District decided in 1948, *Culini v. Northern Trust Co.*\(^{30}\) The Supreme Court in the *Schneider* case held that parol evidence is admissible to prove that a survivor of a joint bank account was not intended to own the funds of the deceased testator. When the opinion is analyzed, there is nothing revolutionary about it. In 1947, the Supreme Court of Illinois, in *Kane v. Johnson,*\(^{31}\) gave the green light to the introduction of parol evidence to impress a resulting trust against a joint tenancy in real estate in favor of the party that advanced the entire purchase price where the relationship between the parties did not raise a presumption of a gift to the survivor. It has been possible for a long time to introduce parol evidence to prove that a deed absolute on its face is in fact a mortgage.

In some states, notably New York and California,\(^{32}\) the survivor becomes the absolute owner of the bank account and his title can be attacked only on the ground of fraud, undue influence, or lack of mental capacity of the original owner of the funds. Certain language in the *Schneider* Supreme Court decision relating to "donative intent" of the original depositor and sole owner of the funds, precipitated a flock of actions by heirs of the decedent or beneficiaries under his will attacking these joint bank accounts and demanding that the survivor


\(^{28}\) Id. at 181, 151 N.E.2d at 404.

\(^{29}\) 6 Ill.2d 180, 127 N.E.2d 445 (1955).

\(^{30}\) 335 Ill. App. 86, 80 N.E.2d 275 (1948).

\(^{31}\) 397 Ill. 112, 73 N.E.2d 321 (1947).

\(^{32}\) N.Y. BANKING LAW § 134; CAL. BANKING CODE § 852.
prove, in the first instance, the "donative intent" of the depositor and owner of the funds. This position was a distortion of the holding of the Supreme Court in the Schneider case. This erroneous notion was given encouragement by the decision of the Appellate Court for the First District in In re Deskovic, where the opinion mentioned that the survivors "met the burden the law placed upon them."

The Supreme Court decision in the Schneider case clearly indicated that the survivor establishes a prima facie case of ownership by merely introducing the bank signature card spelling out the joint account. Moreover, the abstract decision of the Appellate Court for the First District in In re Estate of Ida Sneider, and the recent opinion handed down by that court in Estate of Fitterer, are decisive and consistent with the Supreme Court opinion in the Schneider case that the burden is on those attacking the title of the survivor to overcome the presumption of the survivor's ownership to the funds.

Public Aid Comm'n v. Stille involved a citation for the recovery of assets. It was held in that case that the survivorship attribute of real estate owned by a husband and wife in joint tenancy does not follow the cash proceeds of a sale of the real estate made by them even where the proceeds are preserved intact and immediately and directly placed in a safety deposit box previously rented by them under a lease which provided for "joint tenancy with right of survivorship" as to the contents of the box. The joint tenancy ceased with the completion of the sale of the real estate. The holding in that case was predicated on the earlier Supreme Court case of In re Wilson, where joint tenancies in the contents of a safety deposit vault box have been practically outlawed.

UNITED STATES BONDS SURVIVORSHIP RIGHTS

It is unusual that within a period of several months the Appellate Court for the First District decided three cases involving rights of surviving co-owners or death beneficiaries in United States Savings

34 Id. at 214, 157 N.E.2d at 772.
37 There is a full discussion of this question in Kahn, Joint Bank Accounts, 48 Ill. B.J. 138 (1959); Kahn, Parol Evidence in Joint Bank Accounts, 44 Ill. B.J. 54 (1955).
38 14 Ill.2d 344, 153 N.E.2d 59 (1958).
39 404 Ill. 207, 88 N.E.2d 662 (1949).
Bonds. In *In re Estate of Hirsh*, a decedent during her lifetime with her own funds purchased a number of United States Savings Bonds, Series E, which were made payable to her or a specified friend of the buyer. The buyer retained possession of the bonds. She was declared incompetent and a conservator was appointed for her estate. The bonds matured after the conservator was appointed. Without notice to the co-owners, the conservator cashed the bonds. The proceeds were not necessary nor were they used for the support of the incompetent ward. Upon their purchase the co-owner acquired a present interest in the bonds, and the respective surviving co-owners were entitled to have a claim allowed against the estate of the decedent for the respective amounts of the bonds that were cashed by the conservator. This decision followed the earlier abstract decision of the Appellate Court for the Second District in *In re Estate of Johnson*.

In *Levites v. Levites*, a husband and wife each had children by prior marriages. The husband became seriously ill. They sold a parcel of real estate they owned together, divided the proceeds equally, and apparently separated. The husband died three months later. With his sole funds the husband meanwhile had purchased a number of United States Savings Bonds, Series E. He had the bonds issued in his name or the names, respectively, of various of his children, grandchildren, and great-grandchildren as co-owners. He retained possession of the bonds until his death. They represented his entire assets. Upon his death the court held that his widow, by reason of her mere status as surviving spouse, did not have any interest in the bonds or their proceeds. A significant holding in that case was that as soon as the bonds were issued, the co-owners acquired a "present interest" in the bonds.

The third of these series of cases involving United States Savings Bonds is *Alexander v. Mermel*. The holding in that case was that in Illinois a trust in personal property need not be in writing and

---

40 27 Ill. App. 2d 228, 169 N.E. 2d 591 (1960).
43 There are a number of comprehensive annotations on this question relative to the unconditional title of the survivor, and they are collected in Annot., 37 A.L.R. 2d 1221 (1954); Annot., 161 A.L.R. 304 (1954); Annot., 158 A.L.R. 1473 (1949); Annot., 157 A.L.R. 1461 (1949); Annot., 154 A.L.R. 1466 (1945); Annot., 151 A.L.R. 1467 (1944); Annot., 149 A.L.R. 1471 (1944).
may be proved by parol. Although under Illinois law, proceeds of United States Savings Bonds can properly be paid to the surviving co-owner upon the death of the other co-owner who furnished the money for their purchase, a resulting trust may be impressed upon the proceeds of the bonds.

A bachelor purchased United States Savings Bonds, Series E, which were issued in his name or his sister's name. Later he married. The original purchaser, his wife and his sister entered into an oral agreement, whereby the sister agreed to give up her rights in the originally purchased bonds in exchange for the sole ownership of a certain bank account and other savings bonds. The Appellate Court in this decision reversed a judgment on pleadings by the trial court, which dismissed the action, and the Appellate Court remanded the case for trial.

The federal regulations provide that United States Savings Bonds, Series E, cannot be assigned or pledged. The ultimate holding by the Appellate Court in the instant case was that after the bonds were paid by the Government, the federal regulations no longer could control the ownership of the proceeds, and that in a proper case on the facts, a resulting trust can be impressed on the proceeds. In the instant case the decision seems to be fair because the parties got together and entered into a trade or exchange of property which, if proven, should be enforced. By reason of these three recent cases involving the survivorship rights of United States Savings Bonds, estate planners now have a new device and tool to use in their work.

EVIDENCE

The most important decision in this field is Pink v. Dempsey. In that case it was held that the taking of a discovery deposition of a party who is disqualified to testify in his own behalf because of the Dead Man's Statute, does not waive his disability to testify at the trial. This holding is contrary to the majority rule.

In the instant case the claimant under an oral contract to leave a will was examined exhaustively by the administrator in a discovery deposition. The actual trial was a year later. Meanwhile, the admin-

---


46 See Annot., 33 A.L.R.2d 1440 (1954); Annot., 159 A.L.R. 411 (1945); Annot., 107 A.L.R. 482 (1937); Annot., 64 A.L.R. 1148 (1930).
istrator had ample time to develop a defense to the claim based on the information extracted from the claimant during the deposition hearing. At the trial the claimant was still disqualified from testifying. This results in the Dead Man's Statute being used as a sword and not as a shield. When the estate extracts this information and develops a defense to the claim at the trial, the parties are no longer on an equal basis if the claimant is still disqualified from testifying.

The majority rule, followed outside of Illinois, holds that the taking of a deposition is a waiver of the Dead Man's Statute to the extent of and within the scope of the examination. The claimant's proof in the Pink case was very weak. It is probable that when a claimant presents a case that is strong on the facts, our Illinois courts of review may in time follow the majority rule of a partial waiver of the Dead Man's Statute.

This confusing statute—The Dead Man's Statute—permeates practically every recovery citation in the Probate Court. Under section 185 of the Probate Act, "at the hearing the court may examine the respondent on oath. . . ."47 Whether the respondent will be permitted to testify in his own behalf is purely discretionary with the trial court. In the earlier case of Storr v. Storr,48 the respondent was permitted to testify. In contrast to this, in the case of Johnson v. Mueller,49 the respondent in a citation proceeding was not permitted to testify. Where is the standard that can be applied to guide the trial court in its discretion? There is none. It depends on the pure whim of the judge. A legal wag described this situation recently as: "You pays your money and you gets the trial court's cherce."

**JOINT AND MUTUAL WILLS**

Joint and mutual wills are a constant source of litigation. They are used frequently by husband and wife who have been married previously to other spouses and each of whom has children by the prior marriage. To prevent the blood relatives of the husband or wife from obtaining the combined property of the testators under a will of the surviving testator, the husband and wife will draw a single document, described as a joint and mutual will, with reciprocal provisions, or, at the same time, they will draw two separate documents with identical mutual and reciprocal provisions, whereby the survivor will acquire

all the property of the other spouse who dies first, and at the survivor's
death the property will be given to the person or persons designated
by the testators. Frequently these arrangements follow an oral agree-
ment between the testators. The Supreme Court held in In re Estate
of Edwards that a joint will of a husband and wife with reciprocal
provisions is presumed to be executed pursuant to a contract, because
of the intimate relationship between them.

In Tontz v. Heath, a husband and wife owned most of their prop-
erty in joint tenancy. The husband and wife executed a joint and
mutual will whereby the survivor was given a life estate in the prop-
erty they owned together. Upon the death of the survivor, the de-
scendants of the husband by his previous marriage would share equally
in the survivor's estate with the two children, the daughters born to
both of the testators during their marriage. There was no direct evi-
dence that the testators had entered into an express contract to make
this joint and mutual will. However, the Supreme Court held that a
contract existed because of the terms of the will, the circumstances of
the testators, and their clear purpose to treat the children of the hus-
band by his prior marriage on an equal basis with the two children
of the testators. The joint will disposed of "all" of the property that
the testators "'now own or shall hereafter acquire'" to the survivor
for a "'term of his or her natural life.'"

In the instant case, the Supreme Court confirmed the trial court's
decree and followed Bonczkowski v. Kucharski, which held that
land held in joint tenancy may be the subject of a contract embraced
in a joint and mutual will. All of these factors established in the instant
case that the testators had entered into a contract which was binding
on the surviving testator, and the rights of the beneficiaries under the
agreement between the husband and wife were protected by the
decision.

Earlier reference was made to the landmark decision of the Supreme
Court in In re Estate of Baughman, where the Supreme Court held
for the first time that even though a surviving testator under a mutual
will commits a breach of the contract with the other testator and
makes a later and different will after his spouse dies, the later will
must be admitted to probate if it was duly executed. The beneficiaries

50 3 Ill.2d 116, 120 N.E.2d 10 (1954).
51 20 Ill.2d 286, 170 N.E.2d 153 (1960).
52 Id. at 292, 170 N.E.2d at 157.
53 13 Ill.2d 443, 150 N.E.2d 144 (1958).
54 20 Ill.2d 593, 170 N.E.2d 557 (1960).
under the contract between the two testators must resort for relief in a court in chancery, as the Probate Court does not have jurisdiction to enforce the contractual rights of the beneficiaries.

It is not the use of a joint and mutual will by husband and wife or two persons that instigates litigation, but the welshing by the survivor.

WILL CONTESTS

No attempt will be made to mention or discuss the dozens of decisions involving will contests on the usual grounds of lack of testamentary capacity of the decedent, and undue influence. Old and established rules in this field were applied consistently in these cases. A wise observation by Justice Walter V. Schaefer of the Supreme Court in *Heideman v. Kelsey*\(^5\) deserves mention. He said:

“This court recognizes the tendency of juries to look for an excuse to hold invalid a will making an unequal division of the testator’s property among his children. . . .” [Citations omitted.]

In *Belfield v. Coop*,\(^5\) the Supreme Court announced a new principle that a presumption of undue influence cannot arise unless the beneficiary abuses the fiduciary relationship he bears to the decedent and the beneficiary prepares, or procures the preparation, or participates in the preparation of the will. The court overruled all language in previous decisions that a presumption of undue influence arises if the beneficiary is not in a fiduciary relationship to the decedent, but nevertheless prepares or participates in the preparation of the will. The existence of a fiduciary relationship by the beneficiary is now essential.

In *Sterling v. Kramer*,\(^8\) a reviewing court in Illinois held squarely for the first time that undue influence includes false representations made to the testator by a beneficiary concerning an heir-at-law of the decedent that induce the testator to disinherit the heir, even in the absence of any overt physical act by the beneficiary to procure the execution of the will. The court also held that prior wills of the decedent dividing her estate equally between her two heirs (the plaintiff and defendant), executed within a year of the later disputed will disinherit- ing the plaintiff, were admissible in evidence because of the charge of fraudulent conduct by the sole beneficiary.

\(^5\) 19 Ill.2d 258, 166 N.E.2d 596 (1960).

\(^6\) Id. at 267, 166 N.E.2d at 600 (quoting from *De Marco v. McGill*, 402 Ill. 46, 51, 83 N.E.2d 313, 316 (1949)).

\(^7\) 8 Ill.2d 293, 134 N.E.2d 249 (1956).

In *Sterling v. Dubin*, the court held that mental ability of a decedent to transact ordinary business affairs of life is not conclusive as to testamentary capacity, if at the same time the decedent has insane delusions as to natural objects of his bounty.

There was an amusing holding as to insane delusions in *Quellmalz v. First Nat'l Bank*. In that case the testator was an elderly lady of odd habits whose home was next to a fire station. The contestants charged that she had delusions that firemen frequently peeped into the windows of her home. Because of its proximity to the fire station her complaints were not proven to have been baseless or figments of her imagination, and therefore not delusions. Accordingly, it must be remembered that in every case where an insane delusion of a testator is charged, the contestants have the burden of proving the fallacy or falsity of the delusion.

**ADOPTION**

In *Monahan v. Monahan*, the Supreme Court held for the first time that an oral contract to adopt, as any other fact, may be proved by circumstantial evidence. However, the evidence must be clear and convincing and the court will weigh the evidence scrupulously and with caution.

The Supreme Court emphasized in *In re Estate of Leichtenberg*, that the right to inherit is statutory and may be given or taken away at the discretion of the legislature. While an adopted child may inherit from his natural parents and also from his adoptive parents, if the child is readopted by his natural parents, the statute makes no provision for inheriting from his former adoptive parents.

**WRONGFUL DEATH ACTIONS**

In the recent case of *Dini v. Naiditch*, the Supreme Court overruled earlier decisions and held that a wrongful death action will lie for a municipal fireman’s death due to negligence in the maintenance of property.

In *Amann v. Faidy*, the Supreme Court overruled earlier cases and held, for the first time in Illinois, that an action lies for the wrongful death of a child who suffered pre-natal injuries as a result of the negli-
gence of another person, and after his birth, died as a result of his injuries.

In Bradley v. Fox,65 the Supreme Court overruled the earlier case of Welsh v. James,66 and held that where one joint tenant murders the other, the right of survivorship is destroyed. The murderer still retained his original undivided interest in the property but on grounds of public policy was prevented from profiting by his crime and acquiring the interest of the other joint tenant.

In Welch v. Davis,67 the Supreme Court held, for the first time in Illinois, that the administrator of a deceased wife's estate has a right of action against her husband or her husband's estate for wrongful death.

In Saunders v. Schultz,68 the Supreme Court held, here too, for the first time in this State, that since a wife under the Illinois Family Expense Act is personally and primarily liable for medical and funeral expenses of her husband who died of injuries inflicted by a negligent tort-feasor, the wife has a cause of action to recover these expenses from the negligent tort-feasor. This action is independent of the separate right of action of the legal representative of the deceased husband's estate under the Wrongful Death Act. There is a similar holding in Staken v. Shanle.69 This is a new rule under the Illinois law, and it appears sound in principle.

ATTORNEY'S FEES

It was held in In re Estate of Yoon70 that the attorney for a dishonest administrator is entitled to an allowance of fees if he, the attorney, acts in good faith without any knowledge of his client's dishonesty and the attorney's services are beneficial to the administration of the estate. Section 337 of the Probate Act now permits an attorney to apply directly to the Probate Court for an allowance of fees for his services to the estate.71 Previous to the adoption of the Probate Act the attorney would be paid his fees presumably by the administrator or the executor personally and the latter would seek reimbursement for his advances when he would file a current or final account in the estate. The present procedure not only is more direct but avoids the

66 408 Ill. 18, 95 N.E.2d 872 (1950).
67 410 Ill. 130, 101 N.E.2d 547 (1951).
68 20 Ill.2d 301, 170 N.E.2d 163 (1960).
forfeiture of fees of an attorney who renders beneficial services in good faith in the administration of the estate. Under the old system it would seem that the attorney would be deprived of his fees, as the dishonesty of his principal, the administrator, or executor, would prevent the attorney from being compensated for his services.

In a reverse action—*i.e.*, one to disallow attorney’s fees—the Appellate Court held, in *Klappa v. Johnson*," that the Probate Court, under section 337 of the Probate Act, has the power and jurisdiction to disallow fees to the attorney for an administrator or an executor when the attorney’s services have not been beneficial but instead have been injurious to the estate.

**UNUSUAL CLAIMS AGAINST A DECEDENT’S ESTATE**

In *In re Estate of Herr*, the decedent-maker’s signature to a note was concededly genuine. The administrator, as permitted by section 35 (2) of the Civil Practice Act," on information and belief, denied delivery of the note. The payee-claimant was disqualified by the Dead Man’s Statute to testify to the delivery of the note, and he was also prohibited from testifying that he had possession of the note after the death of the maker, and his claim was disallowed. This is a harsh decision, and again highlights the injustice of the Dead Man’s Statute.

The decision of the Appellate Court in *In re Estate of Kuchenbecker* highlights the oft-neglected doctrine that alimony may be a charge against a deceased divorced husband’s estate based on an express or implied contract. In drafting alimony or property settlement contracts and decrees based thereon, care must be taken to avoid the payment of alimony after the divorced husband’s death. There have been a number of decisions where by implication alimony continued to be a charge against the husband’s estate. A typical example is a provision whereby the divorced husband was to pay his divorced wife a periodical sum for the remainder of her life.

*In re Estate of Cohen* is another landmark decision. There, the

---

"14 ILL. REV. STAT. ch. 110, § 35 (2) (1959).
"16 There is a full discussion of this unusual question in Kahn, *Probate and Trust Questions: Alimony May Be a Charge Against a Deceased Divorced Husband's Estate If Based on an Expressed or Implied Agreement*, 44 Ill. B.J. 680 (1956).
"17 23 Ill. App.2d 411, 163 N.E.2d 533 (1960), petition for leave to appeal denied by Illinois Supreme Court.
Appellate Court held that the beneficiary of a life insurance policy of a decedent who pledges the policy as security for a bank loan cannot recover the amount of the loan deducted from the policy by way of subrogation on a claim against the decedent's estate.

A diametrically opposite result, allowing subrogation on a claim of this kind in favor of the life insurance beneficiary, was announced by the United States District Court for the Northern District of Illinois, Eastern Division, in Chaplin v. Merchants' Nat'l Bank. This District Court opinion follows the majority rule. Since the creditor—the bank—could ignore the collateral—the life insurance policy—file a claim against the decedent's estate on the debt, and then have it allowed in its entirety, it would appear that the beneficiary of the life insurance should be placed in the same position.

OTHER LANDMARK HOLDINGS

In Farkas v. Williams, the Supreme Court laid the pattern in upholding the validity of revocable trust agreements, notwithstanding the retention of the broadest and widest forms of management and control of the trust property by the settlor, coupled with his reservation of a life interest in the trust property.

Under People v. Schallerer, refund annuity contracts are now subject to Illinois inheritance tax. This follows the rule in other states.

Lawless v. Lawless follows the common-law doctrine of exoneration of real estate so that the personal property in a decedent's estate remains primarily liable for the payment of his debts and federal estate taxes.

In MacDonald v. LaSalle Nat'l Bank, the Supreme Court held that a person may be declared incompetent and a conservator appointed for his property because of physical disability alone that renders him incapable of managing his estate.

In Eckland v. Jankowski, a will of the decedent was discovered after his estate was closed as an intestate estate. Meanwhile, bona fide purchasers, relying on the heirship record of the estate proceedings, purchased the property from the heirs. It was held that the bona fide

80 5 Ill.2d 417, 125 N.E.2d 600 (1955).
81 12 Ill.2d 240, 145 N.E.2d 585 (1957).
83 11 Ill.2d 122, 142 N.E.2d 58 (1957).
84 407 Ill. 263, 95 N.E.2d 342 (1950).
purchasers who relied on the public records as to the heirship, acquired
good title from the heirs, superior to that of the devisees of the later
discovered will of the decedent.

In Rathbun v. Rimmerman,86 the Appellate Court held that a rel-
avtive is preferred in the appointment of a conservator of an incom-
petent’s estate.

It was held in Sternberg Dredging Co. v. Estate of Sternberg,86 that
the estate of a deceased partner is liable for the entire amount of a
partnership debt. The estate, in turn, is entitled to contribution from
the other partners.

In re Estate of Donovan87 contains the unusual but sound holding
that a surviving spouse who is appointed executor of her husband’s
will may renounce the will and continue to act as executor.

The right of illegitimates to inherit was restricted by the holding in Spencer v. Burns88 that an illegitimate child, or his descendants,
can only inherit through the mother of the illegitimate child or his
mother’s ascendants.

In In re Estate of Greenberg, the testator’s will provided that “if
at any time three persons shall be acting as co-executors . . . hereunder,
the determination of the majority . . . shall control.”89 One of three
executors, because of the objections of the other two executors, was
denied the right to employ, at the expense of the estate, independent
counsel of his own choosing to advise him.

In Allen v. National Bank,90 a bequest of a specific number of shares
of corporate stock owned by a testator when he made his will was
held to include additional shares of the stock acquired subsequently
by the testator by stock splits unless a contrary intention appears in
the will.

By the decision in Molner v. United States,91 the surviving spouse’s

86 10 Ill. 2d 328, 140 N.E.2d 125 (1957).
87 409 Ill. 195, 98 N.E.2d 757 (1951).
88 413 Ill. 240, 108 N.E.2d 413 (1952).
89 15 Ill. App.2d 414, 415, 146 N.E.2d 404 (1958), petition for leave to appeal denied,
90 19 Ill. App.2d 149, 153 N.E.2d 260 (1958), petition for leave to appeal denied, 20
award is a vested interest under the Probate Act and qualifies for the marital deduction in computing the federal estate tax.

In *People ex rel. Kagy v. Seidel*, there was a race between two sets of litigants to appoint a conservator for the estate of a person who was mentally ill. A proceeding for the appointment of a conservator was instituted in one county. The other litigant filed a similar proceeding in another county. The later proceeding went to immediate hearing and the court in that case appointed a conservator for the estate of the incompetent. No appeal was taken from that order. Even though it was erroneous, because of the prior and earlier pending proceeding, the order could not be attacked collaterally. In the absence of an appeal from the order appointing the conservator, the earlier proceeding lost jurisdiction of the case. This strange and harsh result also calls for corrective legislation.

**CONCLUSION**

There were literally hundreds of decisions by Illinois courts of review in the field of Probate and Estate Law during the last decade. The foregoing discussion is an attempt to evaluate the significant and unusual decisions in that area. Illinois now has one of the best probate codes in the nation. Notwithstanding the care and skill of its draftsmen, it is not a rigid and unyielding system of statutes. It is under constant study by devoted members of the Bar throughout the state who never cease in their efforts to improve the Probate Act so that it will serve the public efficiently and justly.

"22 Ill. App.2d 316, 160 N.E.2d 681 (1959)."