

WILLS, ESTATES, AND TRUSTS OUTLINE

I. Introduction

A. Generally speaking, there is no uniform law of estates (intestate succession) or wills (testate succession). Only one-third of U.S. jurisdictions have adopted the Uniform Probate Code (“UPC”), and about half those states still have the old version (1969) of the UPC. Tennessee is not a UPC jurisdiction, although it has adopted a few UPC provisions. Accordingly, for estates and wills this outline will focus on the key areas where Tennessee law is different than the generally accepted view (*i.e.*, the view tested on the UBE).

B. The law of trusts is different. Approximately two-thirds of U.S. jurisdictions (including Tennessee) have adopted the Uniform Trust Code (“UTC”). The law in non-UTC states is often quite similar to the UTC. Thus, the UTC is the generally accepted view. This outline will focus on the main differences between Tennessee trust law and the UTC.

II. Estates (*i.e.*, Intestate Succession)

A. Intestate Succession

1. Generally Accepted View: If a person dies intestate and is survived by a spouse and descendants, the spouse’s share of the estate ranges from one-third to all of the estate, depending on the jurisdiction.

2. Tennessee Law: In Tennessee, the spouse takes one-half of the estate if the decedent is survived by one child (or the issue of one child) and one-third of the estate if the decedent is survived by more than one child (or the issue of more than one child). Tenn. Code § 31-2-104. Alternatively, the surviving spouse could take an elective share under Tenn. Code Ann. §31-4-101

B. Adoption by Estoppel.

1. Generally Accepted View: In most states, a stepchild or foster child may be able to inherit from or through his or her stepparents or foster parents if the stepparents or foster parents gained custody of the child under an agreement with the natural parents to adopt such child but a legal adoption never took place. This is known as adoption by estoppel (also referred to as equitable adoption or virtual adoption).

2. Tennessee Law: Tennessee does not recognize adoption by estoppel. Bank of Maryville v. Topping, 393 S.W.2d 280 (Tenn. 1965).

C. Survivorship required.

1. Generally Accepted View: A person cannot take as an intestate heir, will beneficiary, or beneficiary of a non-probate transfer (*e.g.*, a payable-on-death bank account), unless he or she survives the decedent/testator.

a) To determine whether an heir or beneficiary survives, roughly half of U.S. states have adopted the Uniform Simultaneous Death Act (“USDA”).

b) Under the USDA, an heir or beneficiary is considered to have predeceased the decedent/testator unless there is “sufficient evidence” that the heir or beneficiary survived.

c) The other one-half of the U.S. states require that the heir or beneficiary survive the decedent/testator by 120 hours in order to inherit or take property (the “120-hour rule”).

2. Tennessee Law: Tennessee uses the 120-hour rule for intestate and testate succession. Tenn. Code § 31-3-120. However, for non-probate transfers, Tennessee uses the USDA. Tenn. Code §§ 31-3-104 and 31-3-105.

III. Wills (*i.e.*, Testate Succession)

A. Execution of Will

1. Generally Accepted View: To execute an attested will, all states require that the will be (1) in writing; and (2) signed by the testator (or a proxy) in the presence of at least two attesting witnesses.

2. Tennessee Law: In addition to the generally accepted requirements, Tennessee requires that the attesting witnesses sign in the presence of the testator and in the presence of each other and permits the testator to acknowledge the testator’s signature already made. Tenn. Code § 32-1-104. Tennessee also requires the testator to “publish” the will, but “[a]ny communication of the fact that the testator intends the instrument to be his

will, whether by word, sign, motions or conduct, is sufficient to constitute publication.” Lloyd v. Hensley, 1988 WL 98740, at *1 (Tenn. App.), quoting Pritchard on Wills and Administration of Estates § 205 (4th ed. 1983).

B. Self-Proving Affidavit

1. Generally Accepted View: In some states, if the testator and/or witnesses sign a self-proving affidavit affixed to the will but fail to sign the will itself, the signatures on the affidavit are sufficient for execution of the will.

2. Tennessee Law: Tennessee requires strict compliance with the will execution requirements. Hence, a testator’s signature on a self-proving affidavit does not satisfy the requirement that the testator sign the will. Estate of Chastain, 401 S.W.3d 612 (Tenn. 2012). However, for wills executed prior to July 1, 2016, witness signatures affixed to a self-proving affidavit are generally treated as witness signatures for the will. Tenn. Code § 32-1-104(b).

C. Noncupative Wills

1. Generally Accepted View: Most states do not recognize oral (*i.e.*, noncupative) wills.

2. Tennessee Law: Tennessee recognizes noncupative wills in very limited circumstances. Specifically, a nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, and is valid only if the testator died as a result of the impending peril, and must be:

a) declared to be the testator's will by the testator before two disinterested witnesses;

b) reduced to writing by or under the direction of one of the witnesses within 30 days after such declaration;

c) submitted for probate within six months after the death of the testator; and

d) cannot:

(1) revoke or modify an existing will;

(2) affect real property; or

(3) dispose of personal property exceeding \$1000.

(4) Tenn. Code Ann. § 32-1-106.

Moreover, a nuncupative will may dispose only of personal property having an aggregate value not exceeding \$1,000, except that in the case of persons in active military service in time of war the aggregate amount may be \$10,000. In addition, a nuncupative will may not revoke or modify an existing written will.

D. UPC § 513: Disposal of Property by Memorandum

1. Generally Accepted View: Many states have adopted UPC § 513, which authorizes a testator to dispose of tangible personal property by a signed memorandum prepared and/or altered by the testator after execution of the will.

2. Tennessee Law: Tennessee has not adopted UPC § 513. In Tennessee, a will may refer to a written statement or list to dispose of items of tangible personal property (not money, intangible property, or property used in a trade or business) not otherwise specifically disposed of by the will. The writing must:

- a) be either in the handwriting of the testator or signed by the testator;
- b) be dated; and
- c) describe the items and devisees with reasonable certainty.

The writing may be prepared before *or after* the execution of the will, and it may be altered by the testator after its initial preparation, provided that the testator signs and dates the alteration. If more than one otherwise effective writing exists or a single writing contains properly signed and dated alterations, the provisions of the most recent writing or alteration revoke any inconsistent provisions of all prior writings. Tenn. Code Ann. § 32-3-115.

E. Marriage Following Execution of Will

1. Generally Accepted View: In most states, marriage following execution of a will has no effect on the earlier will, although the spouse may be entitled to an intestate share as an “omitted spouse.”

2. Tennessee Law: In Tennessee, a will is revoked by both the subsequent marriage and the birth of a child of the testator. Tenn. Code § 32-1-201.

F. Anti-Lapse Statute

1. Generally Accepted View: At common law, if a beneficiary of a will predeceased the testator, a bequest to that beneficiary lapsed (*i.e.*, failed). Today, almost all jurisdictions have anti-lapse statutes that save a lapsed

bequest if the deceased beneficiary was in a specified relationship to the testator and left issue who survive the testator. In most jurisdictions, the deceased beneficiary must be a descendant of the testator or a descendant of the testator's grandparent for the anti-lapse statute to apply. Additionally, most anti-lapse statutes apply only to wills and not to trusts or other non-probate transfers.

2. Tennessee Law: Tennessee has a very broad anti-lapse statute. It applies to all predeceased beneficiaries who leave issue that survive the testator. In other words, Tennessee's anti-lapse statute has no "relationship" requirement. Tenn. Code § 32-3-105(a). Furthermore, Tennessee's anti-lapse statute applies to wills and revocable trusts that became irrevocable upon the death of the settlor. Tenn. Code § 32-3-105(b).

G. Bequest of Common Stock

1. Generally Accepted View: At common law, a specific bequest of common stock included additional shares obtained by stock splits, but not additional shares obtained by stock dividends. Today, most jurisdictions treat additional shares obtained by stock splits and stock dividends the same; that is, both types of additional shares are added to a specific bequest of stock.

2. Tennessee Law: Tennessee follows the majority view on stock splits, but may follow the common law view on stock dividends. Davis v. Price, 226 S.W.2d 290, 293 (Tenn. 1949).

H. Extrinsic Evidence

1. Generally Accepted View: In many states, extrinsic evidence is admissible to cure both latent and patent ambiguities in a will. A latent ambiguity is generally found to exist where the words of a written instrument are plain and intelligible, yet are susceptible to multiple meanings given extraneous facts. A patent ambiguity occurs when the meaning of the language is, on its face, uncertain, doubtful, or obscure. Perdue v. Estate of Jackson, 2013 WL 2644670 (Tenn. App.).

2. Tennessee Law: In Tennessee, extrinsic evidence is admissible to cure a latent ambiguity, but not a patent ambiguity. Ward v. Berry & Assoc., Inc., 614 S.W.2d 372, 374 (Tenn. App. 1981).

I. Exoneration.

1. Generally Accepted View: In most states, a specific bequest of property passes subject to any mortgages, liens, or security interests on such property, unless the will contains a specific direction to pay such debts. In other words, specifically devised property is not exonerated.

2. Tennessee Law: Tennessee still follows the common law doctrine of exoneration. Hence, a beneficiary of a specific bequest is entitled to have a mortgage, lien, or security interest exonerated (*i.e.*, paid out of the residue), unless the will directs otherwise. Estate of Vincent, 98 S.W.3d 146 (Tenn. 2003). However, Tennessee does not apply exoneration to property passing by right of survivorship.

IV. Trusts

A. Declaration of Trust: Intent

1. Generally Accepted View: For a declaration of trust to be valid, a manifestation of intent by the settlor to hold certain items of his or her property in trust for one or more beneficiaries is sufficient for the property to be in the trust. No further document transferring title to the property is required.

2. Tennessee Law: Tenn. Code Ann. §35-15-401 requires some transfer of a property interest for an inter vivos for the trust to be valid, though the property interest can be minimal and can occur long after execution, and, indeed, after the settlor's death, such as where a pour over will is involved. Assets can only be validly transferred to an inter vivos trust:

a) to the extent they have been transferred to the trust by deed or registration in the name of the trustee, or

b) for assets not capable of registration, by a recital of assignment particularly describing the asset.

For purposes of this rule, assets capable of registration, such as real estate, stocks, bonds, and bank accounts, are transferred to the trust through the recording of a deed or the completion of registration of the asset in the name of the trust or trustee. Assets that are capable of registration are not transferred to the trust merely by a recital of assignment in the trust instrument. Assets not capable of registration are transferred to the trust through a recital of assignment describing the asset with particularity in the trust instrument. Tenn. Code § 35-15-402(d).

B. Real Estate in Inter Vivos Trust

1. Generally Accepted View: In a majority of states, an inter vivos trust in which all or part of the trust property is real estate must be evidenced by a writing.
2. Tennessee Law: The Tennessee Statute of Frauds does not require a writing for an inter vivos trust of land, but an oral trust of land must be proved by evidence that is clear, cogent, and convincing. Sanderson v. Milligan, 585 S.W.2d 573 (Tenn. 1979).

C. Perpetuities

1. Generally Accepted View: At common law, for a beneficial interest in a trust to be valid, it must vest no later than 21 years after some life in being at the creation of the interest.
2. Tennessee Law: As to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust must require that all beneficial interests in the trust vest or terminate within 360 years. Tenn. Code § 66-1-202(f). Thus, for all practical purposes, perpetual trusts are valid in Tennessee.

D. Doctrine of Cy Pres

1. Generally Accepted View: According to UTC § 413, a court may modify a charitable trust under the doctrine of cy pres if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or *wasteful*.
2. Tennessee Law: Under Tennessee law, a court may modify a charitable trust under the doctrine of cy pres if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, *obsolete, or ineffective*. Tenn. Code § 35-15-413. The Tennessee statute omitted the word “wasteful” because it was considered too vague and overbroad.

E. Spendthrift Trust

1. Generally Accepted View: Under UTC § 505, a settlor may not create a spendthrift trust to avoid his or her own creditors. Thus, the entire corpus of a revocable trust is subject to claims of the settlor's creditors. Moreover, the corpus of an irrevocable trust is subject to the claims of the settlor's creditors to

the extent that the trust property may be distributed to or for the settlor's benefit.

2. Tennessee Law: Tennessee law is generally consistent with UTC § 505, but Tennessee also recognizes Asset Protection Trusts (“APT”). An APT is a self-settled spendthrift trust that is not subject to the claims of the settlor’s own creditors so long as the initial transfer to the trust does not violate Uniform Fraudulent Transfer Act. Tenn. Code § 35-16-101, *et seq.* An APT is subject, however, to alimony and support claims of the settlor’s children, spouse, or former spouse. Tenn. Code § 35-16-104.

F. Support or Maintenance from a Spendthrift Trust

1. Generally Accepted View: Under UTC § 503, a spendthrift provision is unenforceable against a beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.

2. Tennessee Law: Tennessee’s version of § 503 contains no such provision. Tenn. Code § 35-15-503.

G. Support or Maintenance from a Discretionary Trust

1. Generally Accepted View: Under UTC § 504, the court may order a distribution from a discretionary trust to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child, spouse, or former spouse.

2. Tennessee Law: Tennessee’s version of § 504 contains no such provision. Tenn. Code § 35-15-504.

H. Creditors of a Beneficiary of Discretionary Trust

1. Generally Accepted View: Under UTC § 504, the creditors of a beneficiary of a discretionary trust may not compel the trustee to make a distribution, but they may prevent the trustee from making any payments to the beneficiary until the creditors’ claims are satisfied.

2. Tennessee Law: Under Tennessee’s version of § 504, a creditor may not force or otherwise reach a distribution with regard to a discretionary interest. Moreover, a trustee of a discretionary trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. Tenn. Code § 35-15-504.

I. Exercise of Discretionary Power by Trustee

1. Generally Accepted View: Under UTC § 814(a), the trustee must exercise discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. It is unclear whether UTC § 814(a) applies a “reasonableness” standard to discretionary powers. Tenn. Code § 35-15-103 cmt.

2. Tennessee Law: Under Tennessee law, a court may review a trustee's discretionary power only if the trustee acts dishonestly, acts with an improper motive, or fails to act if under a duty to do so. Tenn. Code § 35-15-814. Unlike the UTC, Tennessee’s version of § 814 makes clear that a reasonableness standard should not be applied to the exercise of discretion by the trustee.

J. Proceeding Against Trustee by Beneficiary

1. Generally Accepted View: Under UTC § 504, a beneficiary of a discretionary trust may maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard of distribution.

2. Tennessee Law: Under Tennessee law, a discretionary interest in a trust is neither a property interest nor an enforceable right; it is a mere expectancy. Tenn. Code § 35-15-504.

K. Mandatory Distribution Directly to Creditor

1. Generally Accepted View: Under UTC § 506, a creditor of a beneficiary with a mandatory income interest may compel the trustee to make past due payments of income directly to the creditor.

2. Tennessee Law: While a court may order a trustee to distribute past due mandatory distributions to a beneficiary, a court may not order a trustee to distribute such past due mandatory distributions directly to a creditor. Tenn. Code § 35-15-506(b).

L. Honorary Trusts

1. Generally Accepted View: Under the UTC, honorary trusts are generally enforceable for a maximum of 21 years.

2. Tennessee Law: Under Tennessee law, honorary trusts are generally enforceable for a maximum of 90 years. Tenn. Code §§ 35-15-408 and 35-15-409.

V. NON-PROBATE MATTERS

A. Tennessee law allows for a variety of non-probate transfers. These include:

1. Tenancy by the entirety between spouses: “A venerable principle of Tennessee common law has been that property held in a tenancy by the entirety passes immediately to the surviving spouse upon the death of the other spouse.” *Heirs of Ellis v. Estate of Ellis*, 71 S.W.3d 705, 712 (Tenn. 2002).
2. Joint tenancy with right of survivorship
 - a) This could include a bank account
 - b) See Tenn. Code Ann. §45-2-703(f)(1), which provides: “ (1) Joint tenants with right of survivorship. This designation means that the deposit account or certificate of deposit shall become the property of each owner as joint tenants, and that the survivor is entitled to all moneys in the account or represented by the certificate even if the first person to die had a will specifically directing disposition to someone else. ...”
3. Pay-on-death (POD) designations or transfer-on-death (TOD) designations
 - a) Many bank or brokerage accounts have POD beneficiary designations.
 - b) These designations with proper beneficiaries generally trump language in a will.
4. Beneficiary designations in life insurance, IRAs, and annuities
5. Remember that if a beneficiary is not named, the asset is payable to the decedent’s estate and must pass through probate.

B. **Practice Tip:** Tennessee practitioners should remember that it is best to name all beneficiaries – primary and contingent – and to double-check those designations after a marital dissolution agreement and divorce.

VI. SIMPLIFIED PROBATE PROCEDURES

A. Small Estates

1. Tennessee offers a simplified probate process for estates which contain only personal property, the value of which does not exceed fifty thousand dollars (\$50,000.00). Tenn. Code Ann. §30-4-102, et seq.
2. The personal representative of the estate files a written request in the form of an affidavit with the local probate court in accordance with the procedure set out in

Tenn. Code Ann. §30-4-103.

B. Muniment of Title: Tennessee offers another option for beneficiaries who need to transfer ownership of real property and personal when the decedent left a will without the necessity of granting letters testamentary or otherwise proceeding with administration. Tenn. Code Ann. §32-2-111.

C. Practice Tips:

1. The interest of a surviving spouse in a decedent's estate is protected under Tennessee law. The surviving spouse has:
 - a) the right to an elective share of the estate, Tenn. Code Ann. §31-4-101 and accompanying table,
 - b) the right to a year's support, Tenn. Code Ann. §30-2-102,
 - c) certain exempt personal property, Tenn. Code Ann. §30-2-101, and
 - d) a homestead exemption, Tenn. Code Ann. §30-2-201 et. seq.
2. The Tennessee estate tax was repealed in 2016. There is no longer a requirement to file estate tax returns for anyone who died after 12/31/15.
3. TennCare (Medicaid), a program which provides benefits for long term care services, is entitled to a lien against the real property of any recipient who was fifty-five years old or older at the time he or she received the benefits. That lien must be released before any probate estate can be closed. Tenn. Code Ann. §71-5-116. Neglecting to file probate will not protect real property from a TennCare lien. TennCare liens are not subject to the one year statute of limitations for filing claims. Estate of Tanner, 295 SW3d 610 (Tenn 2009).