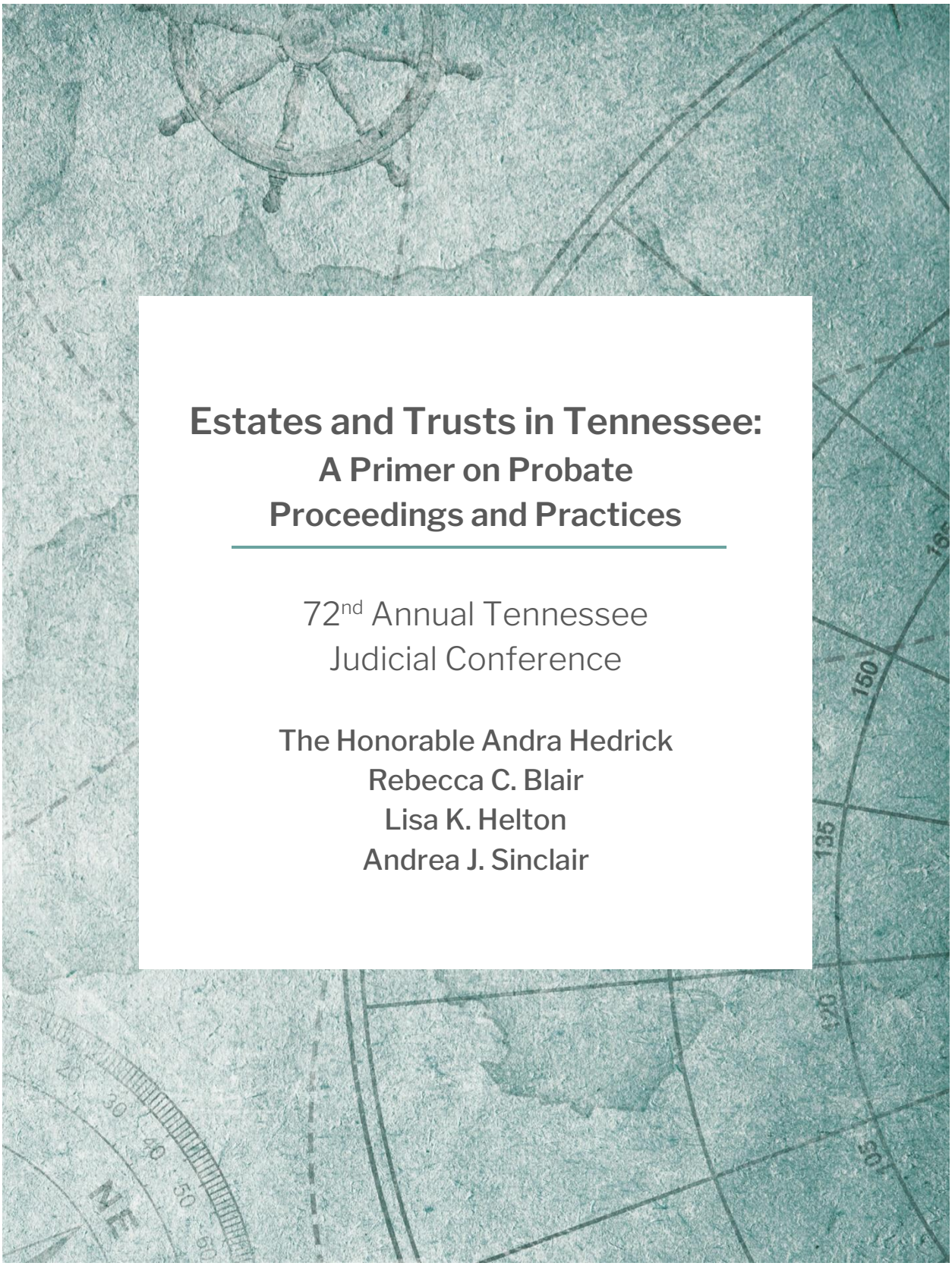

Estates and Trusts in Tennessee:
A Primer on Probate Proceedings and Practices

72nd Annual Tennessee Judicial Conference

The Honorable Andra Hedrick
Rebecca C. Blair
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Andrea J. Sinclair

Probate Proceedings in Tennessee

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Probate Proceedings in Tennessee

Helpful Resources

Probate Forms:

Davidson County: https://circuitclerk.nashville.gov/probate-forms/

Shelby County: https://www.shelbycountytn.gov/380/Probate-Forms

Hamilton County: https://www.hamiltontn.gov/ClerkMasterForms/default.htm

Fiduciary Instructions: https://circuitclerk.nashville.gov/forms-fiduciary-instructions/

Office of Conservatorship Management:
https://officeofconservatorshipmanagement.nashville.gov/

West's Tennessee Code Annotated
Title 32. Wills (Refs & Annos)
Chapter 1. Execution of Wills (Refs & Annos)
Part 1. Execution Generally

T. C. A. § 32-1-103

§ 32-1-103. Witnesses

Currentness

(a) Any person competent to be a witness generally in this state may act as attesting witness to a will.

(b) No will is invalidated because attested by an interested witness, but any interested witness shall, unless the will is also attested by two (2) disinterested witnesses, forfeit so much of the provisions therein made for the interested witness as in the aggregate exceeds in value, as of the date of the testator's death, what the interested witness would have received had the testator died intestate.

(c) No attesting witness is interested unless the will gives to the attesting witness some personal and beneficial interest.

Credits
1941 Pub.Acts, c. 125, § 3.

Formerly 1950 Code Supp., § 8098.3; § 32-103.

T. C. A. § 32-1-103, TN ST § 32-1-103
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 32. Wills (Refs & Annos)
Chapter 1. Execution of Wills (Refs & Annos)
Part 1. Execution Generally

T. C. A. § 32-1-104

§ 32-1-104. Manner of execution

Currentness

(a) The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator shall signify to the attesting witnesses that the instrument is the testator's will and either:

(A) The testator sign;

(B) Acknowledge the testator's signature already made; or

(C) At the testator's direction and in the testator's presence have someone else sign the testator's name; and

(D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses;

(2) The attesting witnesses must sign:

(A) In the presence of the testator; and

(B) In the presence of each other.

(b)(1) For wills executed prior to July 1, 2016, to the extent necessary for the will to be validly executed, witness signatures affixed to an affidavit meeting the requirements of § 32-2-110 shall be considered signatures to the will, provided that:

(A) The signatures are made at the same time as the testator signs the will and are made in accordance with subsection (a); and

(B) The affidavit contains language meeting all the requirements of subsection (a).

(2) If the witnesses signed the affidavit on the same day that the testator signed the will, it shall be presumed that the witnesses and the testator signed at the same time, unless rebutted by clear and convincing evidence. If, pursuant to this subsection (b),

witness signatures on the affidavit are treated as signatures on the will, the affidavit shall not also serve as a self-proving affidavit under § 32-2-110. Nothing in this subsection (b) shall affect, eliminate, or relax the requirement in subsection (a) that the testator sign the will.

Credits

1941 Pub.Acts, c. 125, § 4; 2016 Pub.Acts, c. 843, § 1, eff. April 19, 2016.

Formerly 1950 Code Supp., § 8098.4; § 32-104.

T. C. A. § 32-1-104, TN ST § 32-1-104

Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 30. Administration of Estates (Refs & Annos)
Chapter 1. Executors and Administrators
Part 1. General Provisions (Refs & Annos)

T. C. A. § 30-1-117

§ 30-1-117. Application for letters of administration or letters testamentary; verified petition, information

Currentness

(a) To apply for letters of administration or letters testamentary to administer the estate of a decedent, a verified petition containing the following information and documents shall be filed with the court:

(1) The identity of the petitioner;

(2) The decedent's name, age, if known, date and place of death, and residence at time of death;

(3) In case of intestacy, the name, age, if known, mailing address and relationship of each heir at law of the decedent;

(4) A statement that the decedent died intestate or the date of execution, if known, and the names of all attesting witnesses of the document or documents offered for probate;

(5) The document or documents offered for probate, or a copy thereof, as an exhibit to the petition;

(6) The names and relationships of the devisees and legatees and the city of residence of each if known, similar information for those who otherwise would be entitled to the decedent's property under the statutes of intestate succession, and the identification of any minor or other person under disability;

(7) An estimate of the fair market value of the estate to be administered, unless bond is waived by the document offered for probate or is waived as authorized by statute;

(8) If there is a document, whether the document offered for probate waives the filing of any inventory and accounting or whether such is not otherwise required by law;

(9) If there is a document, a statement that the petitioner is not aware of any instrument revoking the document being offered for probate, if that is the case, and that the petitioner believes that the document being offered for probate is the decedent's last will;

(10) The name, age, mailing address, relationship of the proposed personal representative to the decedent, a statement of any felony or misdemeanor convictions, and a statement of any sentence of imprisonment in a penitentiary; and

(11) A statement identifying if the decedent was the owner of or had a controlling interest in any ongoing business or economic enterprise that is or may be part of the estate to be administered, and, if so, the names and addresses of all such ongoing business or economic enterprises.

(b) No notice of the probate proceeding shall be required except for probate in solemn form, which shall require due notice in the manner provided by law to all persons interested.

Credits

1997 Pub.Acts, c. 426, § 1, eff. Jan. 1, 1998; 2019 Pub.Acts, c. 332, § 1, eff. May 10, 2019; 2022 Pub.Acts, c. 912, § 1, eff. July 1, 2022.

T. C. A. § 30-1-117, TN ST § 30-1-117

Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 31. Descent and Distribution (Refs & Annos)
Chapter 2. Intestate Succession

T. C. A. § 31-2-104

§ 31-2-104. Surviving spouse; heirs

Currentness

(a) The intestate share of the surviving spouse is:

(1) If there is no surviving issue of the decedent, the entire intestate estate; or

(2) If there are surviving issue of the decedent, either one-third (⅓) or a child's share of the entire intestate estate, whichever is greater.

(b) The part of the intestate estate not passing to the surviving spouse under subsection (a) or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) If there is no surviving issue, to the decedent's parent or parents equally;

(3) If there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother and sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take by representation; or

(4) If there is no surviving issue, parent, or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there is no surviving grandparent or issue of grandparent on either the paternal or maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

Credits
1976 Pub.Acts, c. 538, § 1; 1977 Pub.Acts, c. 25, § 4; 1978 Pub.Acts, c. 763, 2.

Formerly § 31-203; § 31-204.

T. C. A. § 31-2-104, TN ST § 31-2-104

Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 31. Descent and Distribution (Refs & Annos)
Chapter 2. Intestate Succession

T. C. A. § 31-2-106

§ 31-2-106. Per stirpes representation

Currentness

If representation is called for by this title, such representation shall be per stirpes.

Credits
1977 Pub.Acts, c. 25, § 2.

Formerly § 31-205.

T. C. A. § 31-2-106, TN ST § 31-2-106
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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68 Tenn. 386
Supreme Court of Tennessee.

JOHN BROWN and WIFE
v.
E. Z. C. HARRIS et al.

September Term, 1876.

***386** FROM MONROE.

****1** Appeal from the Circuit Court. E. T. HALL, Judge.

Attorneys and Law Firms

R. K. ROBINSON and C. W. HICKS for plaintiff.

MCCRASKY for defendant.

Opinion

MCFARLAND, J., delivered the opinion of the court.

The nuncupative will of Matilda Roy was admitted to probate in the county court of Monroe county, at the June term, 1875. Subsequently, at the September term, upon the petition of the next kin or some of them, the probate was set aside and the will and proceedings certified to the circuit court for an issue and contest in the usual form. In the circuit court, the administrator with the will annexed moved to dismiss the petition and annual the action of the county court setting aside the probate. This motion was ***387** sustained and the will was declared valid under the probate of the county court, and the matter remanded to that court to be proceeded with. The contestants have appealed.

The argument in support of the action of the circuit court is, that the probate of a will had in solemn form cannot afterwards be set aside, and that under our laws the probate of a nuncupative will is a probate in solemn form by the express requirements of the statute. If the next of kin when notified to be present at the probate in the county court fail to contest and ask for an issue to be made, they cannot afterwards have the probate set aside. This, so far as we know, is a new question in this State. A probate in common form is the usual mode of proving wills in the county court; that is, wills other than nuncupative wills, may be set aside upon the petition of the parties in interest, and issue made for trial in the circuit court, even after the lapse of many years. But a probate in solemn form cannot be thus set aside. A probate in solemn form may be had in the county court by citing all who are interested to be present at the probation, an in their presence the will is offered for probate, and the witnesses all examined, and the judgment of the court thereon establishes or rejects the will.

Section 2166 of the Code, from the act of 1784, enacts, "that no nuncupative will shall be proved by the witnesses … till process has issued to call in the widow or next of kin, or both if conveniently to be found, to contest it." This in substance requires ***388** the probate of such a will to be in solemn form, and we do not see but what the same results would follow as to the right to have the probate set aside which attach to other wills proven in solemn form.

The record of the county court shows that the will of Matilda Roy was produced in open court at the May term, 1875, for probate, when it was ordered that the probate be continued until the June term, and that process issue as to all resident defendants, and publication be made as to all non-resident defendants next of kin, notifying them that the will would be offered for probate at the June term. The record shows that a number of persons, including all the petitioners except Mary E. Barr, (who was a niece of the testatrix) and her husband, by writing signed by attorney, waived service of process to appear at the June term, and at the June term the record recites that the next of kin were notified to appear on the day of the probate.

****2** The petition assumes that the probate of the will in the county court was in common form, but does not in terms aver a want of notice. Is the recital of the record that the next of kin were notified sufficient to show the fact? Should the record affirmatively show the service of the process? The requirement of the statute is, that "process" shall issue, etc. "Process" ordinarily would mean process issued by the clerk, which should constitute part of the record, but the mere absence of the process or notice from the record, where the fact of notice is recited, ought not to vitiate the probate, where want of notice is ***389** not averred. The probate of a will is a proceeding in rem; and while we think parties in interest who had no notice ought not to be denied their right to contest, yet when the record shows a case of probate in solemn form and no want of notice averred, that the probation ought not to be set aside merely because of the absence of the process or notice from the record.

Affirm the judgment.

9 Baxt. 386

All Citations

68 Tenn. 386, 1876 WL 5033, 9 Baxt. 386

West's Tennessee Code Annotated
Title 32. Wills (Refs & Annos)
Chapter 4. Contest (Refs & Annos)

T. C. A. § 32-4-108

§ 32-4-108. Limitation of actions

Currentness

All actions or proceedings to set aside the probate of any will, or petitions to certify a will for an issue of devisavit vel non, must be brought within two (2) years from entry of the order admitting the will to probate, or be forever barred, saving, however, to persons under the age of eighteen (18) years or adjudicated incompetent, at the time the cause of action accrues, the rights conferred by § 28-1-106.

Credits

1927 Pub.Acts, c. 3, § 1; impl. am. by 1971 Pub.Acts, c. 162, § 2; 1985 Pub.Acts, c. 228, § 1, 2; 1987 Pub.Acts, c. 322, § 15; 2011 Pub.Acts, c. 47, § 24, eff. July 1, 2011.

Formerly 1932 Code, § 8112; § 32-410.

T. C. A. § 32-4-108, TN ST § 32-4-108

Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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Proposed Legislation

West's Tennessee Code Annotated
Title 30. Administration of Estates (Refs & Annos)
Chapter 2. Management, Settlement and Distribution
Part 3. Inventory and Management

T. C. A. § 30-2-306

§ 30-2-306. Debtors and creditors; notice

Currentness

(a) Except as provided in subsection (e), it is the duty of the clerk of the court in which an estate is being administered, within thirty (30) days after the issuance of letters testamentary or of administration, to give, in the name of the personal representative of the estate, public notice of the personal representative's qualification as such by two (2) consecutive weekly notices published in some newspaper of the county in which letters testamentary or of administration are granted, or, if no newspaper is published in that county, by written notices posted in three (3) public places in the county, one (1) of which shall be posted at the usual place for posting notices at the courthouse.

(b) The notice shall be substantially in the following form:

NOTICE TO CREDITORS

Estate of _____ (name of deceased)

Notice is hereby given that on the _____ day of _____, 20___ letters testamentary (or of administration as the case may be) in respect of the estate of _____ (name of deceased) who died _____, 20_____ were issued to the undersigned by the _____ court of _____ County, Tennessee. All persons, resident and nonresident, having claims, matured or unmatured, against the estate are required to file the same with the clerk of the above named court on or before the earlier of the dates prescribed in (1) or (2), otherwise their claims will be forever barred:

(1)(A) Four (4) months from the date of the first publication (or posting, as the case may be) of this notice if the creditor received an actual copy of this notice to creditors at least sixty (60) days before the date that is four (4) months from the date of the first publication (or posting); or

(B) Sixty (60) days from the date the creditor received an actual copy of the notice to creditors if the creditor received the copy of the notice less than sixty (60) days prior to the date that is four (4) months from the date of first publication (or posting) as described in (1)(A); or

(2) Twelve (12) months from the decedent's date of death.

This _____ day of _____, 20___.

(Signed) _____

Personal Representative

Attorney for the Estate _____

Clerk _____

(c) An affidavit of the publisher of the newspaper, in case of publication by newspaper, showing the dates on which the notice was published, or of the personal representative, in case of posted notices, showing the date on which the notice was first posted, shall be prima facie evidence of the publication required by this section. The affidavit shall be filed with the clerk and be noted by the clerk on the docket of the cause.

(d) In addition, it shall be the duty of the personal representative to mail or deliver by other means a copy of the published or posted notice as described in subsection (b) to all creditors of the decedent of whom the personal representative has actual knowledge or who are reasonably ascertainable by the personal representative, at the creditors' last known addresses. This notice shall not be required where a creditor has already filed a claim against the estate, has been paid or has issued a release of all claims against the estate.

(e) The requirement of subsection (a) shall not apply if the letters testamentary or of administration are issued more than one (1) year from the decedent's date of death.

Credits

1939 Pub.Acts, c. 175, § 1; 1947 Pub.Acts, c. 137, § 1; 1949 Pub.Acts, c. 48, § 1; 1971 Pub.Acts, c. 229, § 1; 1989 Pub.Acts, c. 395, §§ 1, 2; 1991 Pub.Acts, c. 415, § 4; 1997 Pub.Acts, c. 426, § 5, eff. Jan. 1, 1998; 1999 Pub.Acts, c. 491, §§ 4, 5, eff. June 17, 1999; 2005 Pub.Acts, c. 429, § 5, eff. Jan. 1, 2006; 2008 Pub.Acts, c. 856, § 1; 2012 Pub.Acts, c. 886, § 4, eff. May 9, 2012.

T. C. A. § 30-2-306, TN ST § 30-2-306

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West's Tennessee Code Annotated
Title 32. Wills (Refs & Annos)
Chapter 5. Administration upon Foreign Wills (Refs & Annos)

T. C. A. § 32-5-101

§ 32-5-101. Records and recordation

Currentness

A will, duly proved, allowed and admitted to probate outside of this state, may be allowed and recorded in the proper court of any county in this state, in which the testator has left any estate.

Credits
1919 Pub.Acts, c. 77, § 1.

Formerly Shannon's Code Supp., § 3924a11; 1932 Code, § 8113; § 32-501.

T. C. A. § 32-5-101, TN ST § 32-5-101
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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17 Tenn.App. 673
Court of Appeals of Tennessee, Western Section.

In re DE FRANCESCHI'S ESTATE.

Dec. 22, 1933.
|
Certiorari Denied by Supreme Court March 24, 1934.

Synopsis

Appeal in Error from Probate Court, Shelby County; F. M. Guthrie, Judge.

Application by Pietro de Franceschi for the probate of the will of Antonio de Franceschi, deceased. Decree for proponent, and Flora de Franceschi appeals in error.

Affirmed.

Attorneys and Law Firms

***513** Randolph & Clifton, of Memphis, for plaintiff in error.

Goodman & Galella, L. E. Polk, and Wm. A. Percy, all of Memphis, for defendant in error.

Opinion

SENTER, Judge.

This is an appeal from a decree entered in the probate court of Shelby county, Tenn., on June 23, 1932, admitting to probate in solemn form a copy of the holographic will of Antonio de Franceschi, deceased, and the probate thereof in the courts of the kingdom of Italy.

It appears that Antonio de Franceschi, a resident of Shelby county, Tenn., died on the 17th day of November, 1931, while on a visit to the town of Lestans, in the kingdom of Italy, leaving surviving him a widow and nine children, six of whom were adults and three of whom were minors under the age of twenty-one years. It appears that, upon learning of the death of her husband, the widow, Bertha de Franceschi, applied for appointment in the probate court of Shelby county, Tenn., as administratrix of the estate of her deceased husband. This was upon the assumption that Antonio de Franceschi died while on a visit in Italy, intestate. Upon her petition she was duly appointed the administratrix of the estate, and letters of administration duly issued to her by the probate court of Shelby county, Tenn., on the 3d day of December, 1931. Subsequently, the family received information that Antonio de Franceschi did not die intestate, and that some proceedings with reference to a holographic will said to have been executed by him occurred in Lestans, in Italy. Investigation was made, and thereupon, on June 17, 1932, a petition was filed in the probate court of Shelby county, by Pietro de Franceschi, a son of the deceased, setting out that a holographic will had been found upon the body of Antonio de Franceschi, and that said holographic will had been probated in Spilimbergo, province of Udine, Italy, on March 1, 1932; an alleged certified copy with the alleged Italian probate with alleged proper authentication was filed with said petition. No executor having been named in the alleged will, the petitioner prayed that he be appointed the administrator cum testamento annexo, and that said certified copy of the probate from Italy be admitted to probate in the probate ***514** court of Shelby county, Tenn. All of the adult heirs, including the widow, joined in the petition; the widow specifically waiving her rights to administer in favor of said petitioner, Pietro de Franceschi. Process on said petition was duly issued and served on the minor defendants, and a guardian ad litem was duly appointed by the probate judge, who filed an answer in behalf of said minor heirs. On June 23, 1932, a decree admitting the certified and authenticated copy of said will and the alleged foreign probate thereof to probate in solemn form was entered upon said petition. The decree in the probate court limited the probate of the holographic will to the personal property of said estate, and by specific provision in the decree the probate of the holographic will was limited to, and made applicable only to. the personal estate, and specifically excluded the real estate owned by the deceased at his death. The alleged probate of the will in the probate court of Shelby county was in solemn form.

The deceased left a considerable estate, consisting of both real and personal property; the major portion of the estate was in stocks, bonds, money, and other securities, a considerable portion of which was in Shelby county, Tenn.

There was no appeal prayed or granted from the decree of the probate judge admitting said will to probate, but subsequently Flora de Franceschi, one of the adult heirs at law, and a daughter of Antonio de Franceschi, deceased, filed a petition for writ of error in this court, assigning errors, and the record is now before this court on said writ of error, and the questions made under the assignments of error.

The first assignment of error presents the question that the court erred in appointing Pietro de Franceschi administrator cum testamento annexo, and admitting said will to probate before first removing Bertha de Franceschi as the

administratrix previously appointed. It appears that Bertha de Franceschi joined in the petition requesting the appointment of her said son, Pietro, as the administrator with the will annexed, and in the petition for probating the alleged holographic will. Shortly thereafter she filed a petition setting forth the amount of the estate, and asked that the same be treated as her settlement, and that she and her sureties on the administrator's bond be discharged. This petition was granted, and the settlement approved, and she was accordingly discharged with her sureties. Since she joined in the petition for the appointment of her son, which petition set out all the facts, we are of the opinion that there was no error in the action of the probate court in so far as the element of time was concerned.

By the second assignment of error it is contended that the court erred in admitting the said will of the deceased to probate as a holographic will, because the proof necessary to establish the same as a holographic will as required by section 8090 of the 1932 Code of Tennessee was not introduced; that there was not sufficient evidence introduced to show, (a) that said will, after the death of deceased, had been found among his valuable papers or lodged in the hands of another for safe-keeping; nor (b) that the handwriting of the deceased was generally known by his acquaintances; nor (c) was it proven by three creditable witnesses that they verily believed the writing, and every part of it, was in the hand of the deceased.

The third assignment of error presents the most important question to be considered on the appeal. By this assignment it is urged that the court erred in admitting the alleged will of deceased to probate because it was not entitled to probate as a duly probated will under section 8115 of the 1932 Code of Tennessee. In this connection it is contended that the authenticated record of the proceedings had on said alleged will in Italy, and which record was presented to the court with the said petition, failed to show that said alleged will had been fully proved, allowed, and admitted to probate in the kingdom of Italy, according to the laws of Italy. And, further, that said authenticated record nor any other proof offered in support of said petition does not show that said alleged will was executed according to the law of the place in which the same was made, the said paper on its face showing that it was made in Washington, D. C.; nor did it show that it was executed according to the law of the place in which the testator, at the time, was domiciled, said paper on its face showing that the domicile of the deceased was then in Memphis, Tenn.; nor that it was executed in conformity with the laws of the state of Tennessee.

By the fourth assignment it is said that said will should not have been admitted to probate by the probate court of Shelby county, Tenn., because on the proof introduced it was not entitled to probate as an unprobated foreign will under section 8116 of the 1932 Code.

***515** By the fifth assignment the contention is made that the court erred in admitting said will to probate as a will of personal property only, because the proof necessary to warrant the probate of such a will was not produced on the hearing of said petition; that the factum of said will was not established by two witnesses, nor by evidence equivalent to that of two witnesses present at its execution.

Having disposed of the first assignment, we will consider and dispose of all other assignments collectively.

There is a preliminary question, however, made at the hearing of the cause in this court, and that is whether this court has jurisdiction to review the matters and questions presented, in the state of the record, or whether the jurisdiction under section 10 of chapter 100 of the Public Acts of 1925 (Code 1932, § 10618) is vested in the Supreme Court. This question was suggested by the court at the hearing, and counsel for the respective parties were requested to submit briefs on that subject. The conclusion we reach is that the jurisdiction is in this court and not the Supreme Court. There is no stipulation as to facts. In order to pass upon the question as to whether the alleged will is subject to probate as a will having been probated in another state or country, necessitated the trial judge considering the facts set forth in the certified transcript of the proceedings had in Italy, and to consider the facts as disclosed by the certified transcript. It was therefore a mixed question of law and fact. And, while there is no dispute as to what the record of the proceedings in Italy shows, the facts are not stipulated, and it is clear that the lower court had to take into consideration the facts disclosed by the certified transcript in determining whether or not the will was subject to re-probate in Shelby county, under section 8115 of the Code of 1932, which is one of the sections contained in the Uniform Wills Act, Foreign Probated, adopted by this state. We think the jurisdiction on appeal would be in this court for the reasons above stated, and independent of the question as to whether proof aliunde the record from Italy would be competent to supplement the record from Italy. Section 10 of chapter 100 of the Acts of 1925 is brought up into the 1932 Code as section 10618, and has been construed in several cases by the Supreme Court. Gormany v. Ryan, 154 Tenn. 432, 289 S. W. 497; Creasy v. Coal Co., 154 Tenn. 372, 289 S. W. 524; Cockrill v. Bank, 155 Tenn. 342, 293 S. W. 996;

Johnson v. Stuart, 155 Tenn. 618, 299 S. W. 779; Cumberland Trust Co. v. Bart, 163 Tenn. 272, 43 S.W.(2d) 379; King v. King, 164 Tenn. 666, 51 S.W.(2d) 488.

We think it is necessary to set out the record from Italy upon which the petition for probate in Shelby county was based, in order to a proper consideration and determination of the questions presented under assignments 2, 3, 4, and 5. Tennessee has adopted the Uniform Act on the subject of foreign probated wills, and the provisions of the Uniform Act are brought into the Code of 1932 under sections 8113 to 8115, inclusive, on the subject of foreign probated wills, and section 8116 deals with authenticated copy of an unprobated will from a state or country not requiring probate. We do not find that this Uniform Act has been construed by either of the five states that have adopted the Uniform Act, especially with reference to the questions presented under these assignments of error, and for this reason, especially, we deem it expedient to set out the transcript of the proceedings had in Italy with reference to the alleged will in question.

Translation of Record from Spilimbergo, Province of Udine, Kingdom of Italy Filed June 17, 1932.

Translation

N. 5319 not. rep

No. 3360 File
Victor Emanuel III

By the Grace of God and by the Will of the Nation.

King of Italy.

The twenty-seventh day of February One Thousand Nine Hundred Thirty Two X year E. F. at two and thirty o'clock P. M.

In Spilimbergo, in my notarial office in Viale Vittorio Emanuele II.

Before me, Del Bianco Giacomo, Notary in Spilimbergo, College of Udine, in the presence of the Illustrious Vice Praetor of this District Mr. Gerometta avv. Gieo. Maria, and of the following known and idoneous witnesses:

1st. Fabrici Daniele of the late Luigi, notary, born at Clauzetto and residing here;

2nd. Margaritta Giovanni of the late Antonio, proprietor, born and domiciled in Travesio,

Has Appeared:

Mr. Bettoli Albino of the late Evaristo, merchant, born at Binningen, (Switzerland) here domiciled, of whose personal identity I am certain, and who requests me of the Publication of the olographic testament of De ***516** Franceschi Antonio of the late Pietro, deceased, in Lestans di Sequals, on November seventeen, nineteen thirty one, as it appears from the abstract of the certificate of death of the same, released that officer of the Vital Statistics, and which is here annexed, after being read, as Exhibit A:

The affiants hands me an open envelope on which is written in printing in English the words "After five days return to..... Memphis, Tennessee," and then follow other words written by hand in English on three lines with the signature of the testator.—Said envelope, after the authentication according to law, is here annexed as exhibit B.

I therefore pull out from said envelope the olographic testament of the same written by hand in the English language, on a half sheet of ruled paper, starting with the words: "Washington" and ending with number "nineteen twenty seven" on the first page, while on the second are written, also in English, crosswise, six lines. In the translation made by the sworn expert, Dr. Corgnali Geio. Battista, said envelope and said testament are translated as follows:

1st. Envelope: "After five days return to .....Memphis, Tennessee.

> "Testament of A. De Franceschi, this should not be open but after my death. Antonio De Franceschi."

2nd. Testament: "Washington, D. C., April 25, 1927, Testament of Antonio De Franceschi of Memphis, Tenn. Instructions.

"After my death all my property, money, bonds, etc. belonging to me, should remain intact as it is at the present time; an Administrator should be selected by the Court and when my

youngest child should reach the age of twenty one years, then all should be devided in equal parts, among my living children.

To Berta Liedtken De Franceschi, my wife, she should receive one dollar ($1.00). Signed by me, A. De Franceschi, April 25, 1927.

Also my accident policy should go to the children in equal parts. A. De Franceschi, April 25, 1927. Washington, D. C."

I attach as exhibit C the above olographic testament, after authentication as per law, and as exhibit C the above olographic testament, after authentication as per law, and as exhibit D the translation made by the above expert, Corgnali Dector Gio. Batta.

The affiant states that a property T' of the total amount of ten thousand lire exists in Italy.

This instrument written by me occupies one sheet, and has been read by me to the requesting affiant, together with the enclosures, in the presence of the Vice Praetor and of the witnesses, and is signed at three o'clock p. m. Signed: Bettoli Albino of the late Evaristo.
"avv. GM. Gerometta, Vice Praetor.

"Fabrici Daniele, witness, signed: Margaritta Giovanni, witness.

"Del Bianco Giacomo, notary.

Exhibit A—attached to File N. 3360.

Town Hall of Sequals—Office of the Vital Statistics

Abstract from the records of deaths for the year nineteen thirty one—part 1st. No. 26.—The year nineteen thirty one X—the eighteenth day of November, at eleven o'clock a. m., in the Townhall. Before me Pellarin Cav. Pietro, Prefect Commissary, Officer of the Vital Statistics of the Commune of Sequals—have appeared Xalle Vittorio, aged sixty one, shoemaker, domiciled in Sequals, and Cesaratto Angelo, aged fifty two, baker, domiciled in Sequals, who have declared to me that at one o'clock p. m. of yesterday in the house located in Lestans at number one hundred fifty five, has died De Franceschi Antonio, aged fifty six, contractor, residing in Lestans, son of the late Pietro, also contract, whose domicile was Lestans, and of the late Del Eabbro Regina, house wife, whose domicile was Lestans, husband of Liedtken Berta.

To this instrument have witnessed Crovato Mattia, aged thirty eight, municipal messenger, and Odorico Annibale, aged fifty one, clerk, both residing in this Commune. Read the present instrument to all present, it has been by these and by me subscribed. Signed: Xalle Vittorio—Cesaratto Angelo—Crovato Mattina—Annibale Odorico—P. Pellarin.

This copy is in conformity with the original.

Sequals, February 27, 1932—X.

The Officer of the Vital Statistics.

Signed: P. Pellarin.

Exhibit B—attached to File N. 3360.

After five days return to ..... Memphis, Tennessee. Testament of A. De Franceschi. This should not be open until after my Death. Antonio De Franceschi.
Signed: Berroli Albino.

"Vice Praetor avv. GM Germoetta.

"Fabrici Daniele, witness.

"Margaritta Giovanni, witness.

"Del Bianco Giacomo, notary.

Exhibit C—attached to File N. 3360 Washington, D. C., April 25, 1927.

***517** Testament of Antonio De Franceschi of Memphis, Tenn.

Instructions, After my death all my property, money, bonds, etc., belonging to me, should remain intact as it is at the present time, an Administrator should be selected by some Court, and when my youngest child should reach the age of 21 years, then all should be devided in equal parts among my living children.

To Bertha Liedtken De Franceschi, my wife, she should receive one dollar ($1.00), signed by me A. De Franceschi, April 25th, 1927. Also my Accident Policy should go to the children in equal parts.

A. De Franceschi.

April 25th, 1927, Washington, D. C.
Signed: Bettoli Albino.

"Avv GM Germetta V. Praetor.

"Fabrici Daniele, witness.

"Margaritta Giovanni, witness.

"Del Bianco Giacomo, notary.

Translation from the English

(On the envelope) After five days return to ..... Memphis, Tennessee. Testament of A. De Franceschi. This should not be open until after my death. Antonio De Franceschi.

(On the sheet of letter paper): Washington, D. C., April 25, 1927. Testament of Antonio De Franceschi of Memphis, Tenn.

Instructions. After my death all my property, money, bonds, etc., belonging to me, should remain intact as it is at present time; an Administrator should be selected by the Court, and when my youngest child should reach the age of 21 years, then all should be devided in equal parts among my living children.

To Berta Liedtken De Franceschi, my wife, she should receive one dollar ($1.00). Signed by me A. De Franceschi, April 25, 1927. (On the reverse side of the sheet). Also my Accident Policy should go to the children in equal parts. A De Franceschi. April 25, 1927. Washington, D. C.

The undersigned expert declares that at the request of Bertoli Albino of the late Evaristo he has made the correct and true translation of the testament of Mr. Antonio De Franceschi, written in the English language on a sheet of letter paper with the relative envelope on the upper part of which are written printed seven words.

In attestation it is subscribed in the presence of the notary.

Signed: Dr. Gio. Battista Corgnali—N. 5314—notarial repertory.

Udine, February 26, nineteen thirty two X.E.F.

I, De Bianco Giacomo, notary in Spilimbergo, College of Udine, certify as to the authenticity of the above signature of Doctor Corgnali Gio. Battista of the late Luigi, Librarian, expert translator, born and domiciled in Udine, of whose personal identity I am certain, because it has been appended in my presence and in the presence of the known and idoneous witnesses.

Ricci Renato of the late Guiseppe, Clerk, born and domiciled in Udine, and Avon Angelo of the late Michel, clerk, born in Tramonti di Sotto, here domiciled.
Signed: Ricci Renato of the late Guiseppe

"Angelo Avon Fu Michele

"Del Bianco Giacomo, notary.

T' add "available" postil approved.

Registered in Spilimbergo on March 1st, 1932-X. in N. 707, publ. with L. 55.05.

The Procurator, signed: Giannone.

Spilimbergo, March 3, 1932. X.

Copy in conformity with the original by me, duly registered as above, released to the heirs.

Signed: Del Bianco Giacomo, notary.

Spilimbergo, March 3, 1932. X.

Royal Praetura of Spilimbergo—Seen for the legalization of the signature of Mr. Del Bianco Dr. Giacomo, notary of Spilimbergo.

The Vice Praetor: (Avv. GM Gerometta)
Signed: Avv. GM. Gerometta.

Seen for the legalization of the signature of the Vice Praetor of Spilimbergo, GM. Gerometta. Trieste, March 4, 1932. X.

The First President of the Court of Appeals (Signature illegible).

This is to certify that the foregoing is a correct translation in the English language of the annexed document written in the Italian language.
Washington, D. C., April 29, 1932. X.

Vincenzo di Girolamo

Chancellor R. Italian Embassy.

No. 2331

United States of America

Department of State
To All to Whom These Presents Shall Come, Greeting:

I certify that Vincenzo di Girolamo, whose ***518** name is subscribed to the document hereunto annexed, was at the time of signing Chancellor of the Royal Italian Embassy.

In Testimony Whereof, I William R. Castle, Jr. acting secretary of State have hereunto caused the seal of Department of State to be affixed and by name subscribed by the Chief Clerk of the said Department at the City of Washington, in the District of Columbia, this thirtieth day of April, 1932.
William R. Castle, Jr.

Acting Secretary of State

By C. E. MacEachran.

Admitted to Probate and ordered recorded June 17, 1932.
F. M. Guthrie, Judge.
Recorded June 17, 1932.

Ed B. Crenshaw, Clerk.

By Frances Lincoln, D. C.

The foregoing is an English translation of the Italian record of Probate from Spilimbergo, Province of Udine, Kingdom of Italy, a duly certified and authenticated copy of which was probated in the Probate Court of Shelby County, Tennessee, on June 23rd, 1932, which appears in Will Book 43, pages 370-376, of the Records of Wills of the Probate Court of Shelby County, Tennessee, and to which are attached the following certificates of authentication in accordance with the Acts of Congress for the authentication of foreign instruments, to-wit:

Consulate of the United States of America, Trieste, Italy.

I, the undersigned Vice Consul of the United States of America at Trieste, Italy, do hereby certify that Mr. Barzelatto who has signed and sealed with the official seal of his office the annexed instrument, was at the time of so doing, the duly authorized to sign for the first president of the Court of Appeals, in this consular district, that his signature thereunto as such is true and genuine, and is entitled to full faith and credit.

In witness whereof I have hereunto set my hand and affixed my official seal this Fourth day of March, 1932.
Bernard C. Connelly

Vice Consul of the United States of America.
[Seal]

No. 2153

United States of America

Department of State

To All to Whom These Presents Shall Come, Greeting:

I certify that Bernard C. Connelly whose name is subscribed to the paper hereto annexed, was at the time of subscribing the same, Vice Consul of the United States of Trieste, Italy, duly commissioned; and that full faith and confidence are due to his acts as such.

In testimony whereof, I, William R. Castle, Jr., Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed

by the Chief Clerk of the said Department, at the City of Washington, this 23rd day of April, 1932.
William R. Castle, Jr.

Secretary of State.

By G. E. MacEachran, Chief Clerk.
[Seal]

On the said Italian record, there appears:
"Admit to Probate,

F. M. Guthrie, Judge.

6-23-32."

By sections 8113, 8114, and 8115 of the Code of 1932, the same being sections 1, 2, and 3 of chapter 77 of the Public Acts of 1919 (Uniform Act), it is provided:
"8113. *Foreign Probated Wills*.—A will, duly proved, allowed and admitted to probate outside of this state, may be allowed and recorded in the proper court of any county in this state, in which the testator shall have left any estate.

8114. *Copy of Authenticated Probated Will Presented with Petition for Probate Must be Filed; Hearing; Notice*.—When a copy of the will and the probate thereof, duly authenticated, shall be presented by the executor or by any other person interested in the will, with a petition for probate, the same must be filed and a time must be appointed for a hearing thereon and said notice must be given, as required by law on a petition for the original probate of a domestic will.

8115. *Such Will Must be Admitted to Probate, When; Effect of Such Probate*.—If upon the hearing, it appears to the satisfaction of the court that the will has been duly proved, allowed and admitted to probate outside of the state, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, which probate shall have the same ***519** force and effect as the original probate of a domestic will."

It is the contention of appellee that the probate of the will in question in the probate court of Shelby county was under the provisions of the Uniform Act above set forth, and especially section 8115. It will be observed that the above-quoted sections apply to wills probated in another state or country where probate is required. Section 8116 applies only to the probate of a will in this state on a duly authenticated copy of an unprobated will from a state or country not requiring probate. Section 8116 has no application to the proceeding had in the probate court of Shelby county with reference to the will in question. It is conceded by appellee that the proceeding in the probate court was under sections 8113, 8114, and 8115 of the 1932 Code.
Among other questions made by appellant in the brief is that section 1 of the act being section 8113, 1932 Code, states that the foreign will "may be allowed and recorded" in this state, and that this language makes it discretionary with the probate judge as to whether such will may be admitted to probate in this state, and points out that this language distinguishes the act referred to as Uniform Wills Acts, Foreign Probated, from the Uniform Wills Acts, Foreign Executed, where the provision is mandatory.

We think this distinction is properly made, but, where the transcript of the record from the foreign state or country fully meets the requirements of the statute, then it is mandatory upon the probate court that it be admitted to probate under section 8115, of the Code of 1932. Under the provisions of the statute in question, it is the duty of the probate court to examine the certified copy of the alleged holographic will, and the transcript of the proceedings had in the foreign state or country, and to determine if it meets the requirements of the statute. To this extent the probate court exercises judicial discretion or judgment.
It appears from the decree of the probate court that at the hearing the court heard the evidence of Pietro de Franceschi in addition to the transcript of the record of probate from Italy. The decree recites on this subject as follows:

> "And it further appearing that petitioner, Pietro de Franceschi, was present in Italy at the time of the probate of said will, that he saw the original thereof, and testified in this court that the said holographic will was in the handwriting of his father, Antonio de Franceschi, deceased."

An examination of the transcript as hereinbefore set out in full does not contain any record of the evidence heard by the Italian authorities with reference to the alleged will being in the handwriting of the deceased. The death of the deceased is proved and the manner of producing the will is shown by the transcript with elaborate detail, and we think it clear from the transcript that it was probated in the proper tribunal and before the proper authority in Italy, and carries the certification of all the officials. By the decree of the court, the probate of the will in Shelby county was limited to a disposal of personal property only, since the record from Italy did not show that the testator's handwriting was generally known by his acquaintances and proved by at least three creditable witnesses, as required by section 8090 of the 1932 Code.

It would therefore appear that the probate judge of Shelby county, in admitting the will to probate in Shelby county, proceeded on the assumption that the alleged will was not entitled to probate so as to dispose of real estate under the transcript of the record, but that the evidence of Pietro de Franceschi with the accompanying circumstances was sufficient to entitle it to probate as the holographic will of the deceased, with the probate limited to a disposal of the personal property.

Appellant earnestly contends that extraneous evidence cannot be heard to supplement the record coming from a foreign country, and that the probate court of Shelby county could only look to the transcript of the alleged probate in Italy, and, if it was insufficient in itself to entitle it to probate under the laws of Tennessee, its probate must be refused. Appellant contends that there is not anything in the statute, as brought into the 1932 Code, under sections 8113-8115, that contemplates that extraneous evidence may be heard.

We are not prepared to agree to this contention. We do not find that this act has been fully construed by the courts of last resort of either of the five states that have adopted the Uniform Act. However, in the case of Terry v. Webb, 159 Tenn. 642, 21 S.W.(2d) 622, 623, it would appear that extraneous evidence was heard. In that case, the testator was a resident of Florida, and his will was presented for probate in that state, and was admitted to probate upon proof ***520** of its due execution by witnesses other than the subscribing witnesses. A copy of the Florida proceeding, with copy of the will and codicil probated in Florida and duly authenticated, were presented to the county court of Knox county upon the petition of the executor, and the will was there admitted to probate upon the record, under the provisions of chapter 77 of the Acts of 1919, and especially the section of the act brought into the 1932 Code as sections 8113-8115.

The subscribing witnesses did not testify on the probate proceeding in Florida because they were not available, and the Florida court admitted the evidence of other witnesses by whom the will was proved. The court, in the course of the opinion, stated as follows:

> "The confusion in complainant's mind seems to have been brought about through a cautionary measure of the executor, who, in addition to presenting the Florida record and resorting to it as the basis for the proceeding in the Tennessee court, called the subscribing witnesses who were available in Tennessee and had them examine the certified copy of the will and thereupon testify to the due execution of the original. It was said in Jacobs v. Willis' Heirs, 147 Tenn. 539, 249 S. W. 815, that this might be done under section 3916 of Shannon's Code. No discussion of this last proposition is necessary, because the probate of the will upon the authenticated record is conclusive against the collateral attack brought against it by the complainant."

While the court in that case did not, in express terms, hold that extraneous evidence could be heard in the Tennessee proceeding, the Jacobs Case is referred to with apparent approval, even though the Jacobs Case was decided prior to the passage of the Uniform Act of 1919, and was a proceeding under section 3916 of Shannon's Code.

While the Uniform Act does not provide for the hearing of evidence in connection with the transcript coming from a foreign state or country, there is nothing in the act that would preclude that practice. We can see that it is necessary in many instances that such evidence be heard and considered in connection with the transcript of the record coming from a foreign country, as in the present case. Different countries have different probate procedure and probate laws, and, where a will is probated in a foreign country, it may be that the laws of that country entitling the will to probate would differ

materially from laws of other states or countries, and the record would not disclose all pertinent facts and incidents to entitle the will to be reprobated simply on the transcript of the record from such foreign countries. As, for instance, it is a recognized rule in this state that a holographic will may be sufficient to dispose of personal property where the fact that it was written wholly in the handwriting of the testator, etc., is proved by only one witness, and other circumstances. Pritchard on Wills, § 9. This is the rule in England, and has been recognized as controlling in this state. Pritchard, § 9; Suggett v. Kitchell, 6 Yerg. 425; Moore v. Steele, 10 Humph. 562; Jones v. Arterburn, 11 Humph. 97; Davis v. Baugh, 1 Sneed, 477; Cox v. Cox, 4 Sneed, 81; Johnson v. Fry, 1 Cold. 101.

We are of the opinion that, where the record of the probate coming from Italy is sufficient on its face to show that the will was duly probated in Italy, and according to the forms of law and procedure in that country, but failed to show that witnesses were called to testify to the fact that the will was in the handwriting of the deceased, we think it proper to hear evidence by a witness or witnesses who have seen the original will on file in Italy and who testify that it is wholly in the handwriting of the testator, and that the certified copy contained in the transcript from Italy is a copy of the probated will seen by the witness or witnesses in Italy. By admitting this evidence, the will probated in Italy, and the original of which cannot be produced because it is a part of the permanent court files of that country, is thereby sufficiently proved to conform to the requirements of the laws of this state on the subject.
Of course, the full faith and credit clause of the Federal Constitution, art. 4, § 1, only applies to states and territories of the United States of America, and not to foreign countries. However, the Uniform Wills Act, Foreign Probated, chapter 77 of the Public Acts of 1919, as brought into the 1932 Code, contemplates that a will duly probated in a foreign country may be probated in this state, the state of the domicile of the testator, and where the deceased left property, and such probate in a foreign country, when the proceeding with reference thereto is duly authenticated, will be given effect, if it appears to the probate court of this state that the will has been duly proved, and that it complies with the requirements of the laws of this state.

The conclusion we reach is that the transcript of the record of probate in Italy, supplemented by the evidence heard by the probate court of Shelby county, fully meets the requirements of the laws of this state so as to ***521** entitle the will to probate in this state. Many questions are made by the assignments of error that have not been separately considered and disposed of. Numerous authorities have been cited by the respective parties, both from this state and other jurisdictions, in support of the respective contentions made. The authorities cited and relied upon by the respective parties are cases construing and adjudicating rights under former enactments, and have very little, if any, application to the probate of wills under the sections of the Code now in force in Tennessee. The only other state among the five which have adopted the Uniform Wills Act, Foreign Probated, that has construed the Uniform Act in question, so far as we have been able to find, is the state of Illinois, where the question there made was confined to the importance of giving notice to all parties of the probate, and the fixing of the time for hearing of the petition for probate. Pratt v. Hawley, 297 Ill. 244, 130 N. E. 793; Uniform Laws Ann., Vol. 9, pages 295, 296 [revised edition, pages 425, 426]. We do not have that question here involved, since it is conceded that section 8113, requiring notice to all parties, was fully complied with, and all parties at interest were before the court; the Tennessee case of Terry v. Webb, supra, being the only other case to which our attention has been called involving the construction of the act in question, or any portion thereof.

It results that we find no error, and the decree of the probate court is accordingly affirmed. Appellant and sureties on the appeal bond will pay the cost of this appeal.

ANDERSON and KETCHUM, JJ., concur.

All Citations

17 Tenn.App. 673, 70 S.W.2d 513

West's Tennessee Code Annotated
Title 32. Wills (Refs & Annos)
Chapter 5. Administration upon Foreign Wills (Refs & Annos)

T. C. A. § 32-5-103

§ 32-5-103. Petitions; hearings; notice; contest

Currentness

When a copy of a will of another state, district, or territory and the probate of the will, duly authenticated, is presented by the executor or by any other person interested in the will, with a petition for probate of the will, the will must be filed and probate may be had either in common or in solemn form, and if the latter, then a time must be appointed for a hearing and notice must be given as is required by law on a petition for the original probate of a domestic will in solemn form; provided, however, that a contest of a will of another state, district, or territory upon the issue devisavit vel non shall be allowed as to a devise of realty lying in this state, but as to devises of personalty, the foreign probate of such will shall be conclusive.

Credits
1919 Pub.Acts, c. 77, § 2; 1941 Pub.Acts, c. 63, § 1; 1959 Pub.Acts, c. 112, § 1.

Formerly Shannon's Code Supp., § 3924a12; 1932 Code, § 8114; 1950 Code Supp., § 8114; § 32-502.

T. C. A. § 32-5-103, TN ST § 32-5-103
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

End of Document

West's Tennessee Code Annotated
Title 32. Wills (Refs & Annos)
Chapter 2. Probate of Wills (Refs & Annos)

T. C. A. § 32-2-111

§ 32-2-111. Admission of will to probate for establishing a muniment of title to real estate

Currentness

Regardless of the date of the person's death and any limitation on the time for admitting a will for probate, any will when duly proven, whether of a resident or nonresident decedent, may be admitted to probate for the limited purpose of establishing a muniment of title to real estate and personal property, without the necessity of granting letters testamentary or otherwise proceeding with administration.

Credits

1997 Pub.Acts, c. 426, § 19, eff. Jan. 1, 1998; 2002 Pub.Acts, c. 735, § 7, eff. May 8, 2002; 2007 Pub.Acts, c. 8, § 3, eff. March 28, 2007.

T. C. A. § 32-2-111, TN ST § 32-2-111

Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 30. Administration of Estates (Refs & Annos)
Chapter 4. The Small Estate Probate Act (Refs & Annos)

T. C. A. § 30-4-102

§ 30-4-102. Definitions

Currentness

As used in this chapter, unless the context clearly requires otherwise:

(1) “Court” means the court then exercising probate jurisdiction in the county in which the decedent had legal residence on the date of death;

(2) “Decedent” means a person who is deceased;

(3) “Limited letters” means the limited letters of administration of a small estate and limited letters testamentary of a small estate, as appropriate;

(4) “Limited letters of administration of a small estate” means limited letters of administration for the decedent's property that restrict the person to whom the limited letters of administration are issued to the property itemized and identified in the petition for the limited letters, which must be attached to and made a part of the limited letters;

(5) “Limited letters testamentary of a small estate” means limited letters testamentary for the decedent's property that restrict the person to whom the limited letters testamentary are issued to the property itemized and identified in the petition for the limited letters which must be attached to and made a part of the limited letters;

(6) “Person” means an individual, partnership, firm, business trust, corporation, or other legal entity, and includes both the singular and plural, and the masculine and feminine, as appropriate;

(7) “Personal representative” means the person to whom limited letters of administration of a small estate or limited letters testamentary of a small estate are issued;

(8) “Property” means only personal property, or any interest in personal property, owned by the decedent on the date of death that would be subject to probate, other than personal property held as tenants by the entirety or jointly with right of survivorship, or personal property payable to a beneficiary other than the decedent's estate; and

(9) “Small estate” means the probate estate of a decedent in which the value of the probate property does not exceed fifty thousand dollars ($50,000).

Credits
2023 Pub.Acts, c. 297, § 1, eff. April 28, 2023.

Formerly § 30-2002.

T. C. A. § 30-4-102, TN ST § 30-4-102
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 30. Administration of Estates (Refs & Annos)
Chapter 4. The Small Estate Probate Act (Refs & Annos)

T. C. A. § 30-4-103

§ 30-4-103. Administration of small estates

Currentness

Whenever a decedent leaves a small estate, it may be administered in the following manner:

(1) After the expiration of forty-five (45) days from the date of the decedent's death, as evidenced by a copy of the decedent's death certificate, provided that no petition for the appointment of a personal representative of the decedent's estate has been filed in that period of time for the decedent's estate, either:

(A) One (1) or more of the decedent's competent adult heirs shall file a petition for the issuance of limited letters of administration of a small estate; or

(B) If the decedent died testate and it is determined that distribution of the small estate pursuant to the decedent's will is different than distribution by intestate distribution, and it is desired that the small estate be distributed according to the decedent's will, the person named as the personal representative in the decedent's will shall either:

(i) File a petition for the probate of the decedent's will as a muniment of title to the property of the decedent pursuant to § 32-2-111 and for the issuance of limited letters testamentary of a small estate; or

(ii) File the original of the decedent's will together with affidavits of the attesting witnesses or the affidavits of the two (2) disinterested persons attesting to the decedent's handwriting, if the decedent's will is holographic, with the clerk who shall record the will and affidavits. The recording of the decedent's will and accompanying affidavits is deemed sufficient to probate the decedent's will for the purposes of this chapter;

(2) To apply for limited letters of administration of a small estate or for limited letters testamentary of a small estate, the person seeking the limited letters shall file a sworn petition with the court containing the information set forth in § 30-1-117(a)(1)-(10). The petition must include an itemized list of the property of the decedent to which the limited letters are to apply, the value of each item of property, the identity of each creditor of the decedent, and the amount owing to each identified creditor;

(3) Regardless of the language of the decedent's will waiving bond, the petitioner for the limited letters shall make the bond payable to the clerk of the court for the benefit of those entitled with a corporate surety. The amount of the bond must be equal to the value of the decedent's property to be administered under this chapter. However, bond is not required of the petitioner if:

(A) The petitioner or petitioners are the sole heirs of the intestate decedent;

(B) The petitioner or petitioners are the sole beneficiaries of the testate decedent; or

(C) All the adult heirs and beneficiaries consent in writing;

(4) The clerk shall charge and receive such fees for processing a petition for the issuance of limited letters of administration of a small estate or limited letters testamentary of a small estate as provided in § 8-21-401;

(5) Upon posting the required bond, unless waived as set forth in subdivision (3), the clerk shall issue limited letters of administration of a small estate or limited letters testamentary of a small estate, as appropriate, on the form in subdivision (9);

(6) A notice to creditors must not be published, and a creditor is not permitted to file a claim in a small estate probate;

(7) The personal representative and the surety on the personal representative's bond may be discharged from liability under the bond as follows:

(A) The court may enter an order discharging the personal representative and the surety on the personal representative's bond after the personal representative files, for a decedent dying before January 1, 2016, either the tax receipt issued pursuant to § 67-8-420, or the certificate or assessment issued pursuant to § 67-8-409(f); or

(B) The personal representative and the surety on the personal representative's bond may wait until the first anniversary of the issuance of the limited letters when the court shall automatically discharge them from liability. The limited letters must remain open and active until the first anniversary of the issuance of the limited letters;

(8) Upon good cause shown, the court may waive the requirement to wait forty-five (45) days before filing a petition for limited letters; and

(9) The form for issuance of limited letters of administration of a small estate or limited letters testamentary of a small estate must be as follows:

Limited Letters of Administration/Limited Letters Testamentary of a Small Estate

Pursuant to T.C.A. § 30-4-101, et seq.

In the Matter of the Estate of: _____

Whereas, it appearing that the above-named deceased person left property and debts subject to administration pursuant to the above-referenced statutory provisions, and _____ is hereby authorized to serve in the limited role of Personal Representative.

As such, Limited Letters of Administration/Letters Testamentary of a Small Estate are hereby issued to the above-named individual being now therefore empowered to collect and preserve all assets of the estate, remove any personal property from

a property leased by the decedent, and cancel any insurance policies no longer applicable due to decedent's death. Said assets are limited to those itemized in the Petition, a copy of which is attached hereto. The total value of decedent's property shall not exceed $50,000.00.

There is no real property at issue in this matter, and this limited letter in no way gives any authority to the personal representative to handle any real estate matters of the decedent.

In witness whereof, I have issued these Limited Letters of Administration/Limited Letters Testamentary.

Date: _____Clerk: _____

I swear that all statements in the Small Estate documents I have executed and provided are true and accurate. I do solemnly swear or affirm that I will faithfully and honestly discharge the duties imposed upon me and as required by law.

Date: _____Personal Representative: _____

I, as Clerk, certify that these Letters are in full force and effect as of this date of issuance.

Date: _____Clerk: _____

Credits
2023 Pub.Acts, c. 297, § 1, eff. April 28, 2023.

Formerly § 30-2003.

T. C. A. § 30-4-103, TN ST § 30-4-103
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 30. Administration of Estates (Refs & Annos)
Chapter 4. The Small Estate Probate Act (Refs & Annos)

T. C. A. § 30-4-104

§ 30-4-104. Payment, transfers, or delivery of property; discharge of liability; actions and proceedings; conversion into probate

Currentness

(a) Each person indebted to the decedent's estate, having possession of any property belonging to the estate, or acting as registrar or transfer agent of any shares of stocks, bonds, notes, or other evidence of ownership, indebtedness, or right belonging to the decedent's estate must be furnished with a copy of the limited letters of administration of a small estate or limited letters testamentary of a small estate by the personal representative, duly certified by the clerk of the court. Upon receipt of a copy of the limited letters of administration of a small estate or limited letters testamentary of a small estate and demand by the personal representative, each person furnished a copy of the limited letters under this subsection (a) shall pay, transfer, and deliver to the personal representative:

(1) All indebtedness owing by the recipient; and

(2) Other property in possession of, or subject to, registration or transfer by the recipient.

(b) A person making payment, transfer, or delivery of property belonging to a decedent's estate to the personal representative pursuant to this chapter is released and discharged from all further liability to the estate and its creditors to the same extent as if the payment, transfer, or delivery were made to the duly appointed, qualified, and acting personal representative of the decedent. The person making the payment, transfer, or delivery shall not be required to see to its application.

(c) The decedent's property must be distributed either to the decedent's heirs as provided by law or, if there is a will, in accordance with the terms of the decedent's will admitted to probate as a muniment of title or filed with the clerk as provided in § 30-4-103(1)(B)(ii). The person to whom payment, transfer, or delivery of any property of the decedent is made by the personal representative shall be liable and remain liable up to one (1) year from the date of payment, transfer, or delivery, to the extent of the value of the property received, to unpaid creditors of the decedent, to anyone who had a prior right to the decedent's property, or to any personal representative of the decedent thereafter appointed. If distribution is made prior to payment of all medical assistance owed to TennCare under § 71-5-116, then both the personal representative and the person to whom payment, transfer, or delivery is made by the personal representative shall be liable to TennCare and remain liable, to the extent of the value of the property received.

(d) If a person having possession of any of the decedent's property, upon receipt of a copy of the limited letters issued by the clerk, refuses to pay, transfer, or deliver the property to, or at the direction of, the personal representative, then:

(1) The property may be recovered; or

(2)(A) Transfer and delivery of the property may be compelled in an action brought in a court of competent jurisdiction for that purpose upon proof of the facts required to be stated in the petition; and

(B) Costs of the proceeding must be adjudged against the person wrongfully refusing to pay, transfer, or deliver the property.

(e) If, during the administration of the small estate pursuant to the limited letters, the personal representative or a creditor of the decedent discovers additional assets that exceed the statutory small estate limitation, then the court may allow the small estate administration to be converted into probate administration by application of a verified petition to the court pursuant to § 30-1-117 by the personal representative of the small estate or a creditor of the decedent. The personal representative of the small estate, if the property of the decedent has not been paid, transferred, or delivered, or the person or persons to whom the property of the decedent has been paid, transferred, or delivered, is liable for the assets that have been paid, transferred, or delivered prior to the conversion.

Credits
2023 Pub.Acts, c. 297, § 1, eff. April 28, 2023.

Formerly § 30-2004.

T. C. A. § 30-4-104, TN ST § 30-4-104
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 20. Civil Procedure
Chapter 5. Abatement and Survival of Actions (Refs & Annos)

T. C. A. § 20-5-102

§ 20-5-102. Survival of actions; death of party

Currentness

No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another, except actions for wrongs affecting the character, be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described in § 20-5-106.

Credits
1835-1836 Acts, c. 77, § 1; 1967 Pub.Acts, c. 121, § 1.

Formerly 1858 Code, § 2846; Shannon's Code, § 4569; 1932 Code, § 8694; § 20-602.

T. C. A. § 20-5-102, TN ST § 20-5-102
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 20. Civil Procedure
Chapter 5. Abatement and Survival of Actions (Refs & Annos)

T. C. A. § 20-5-103

§ 20-5-103. Survival of actions; tort-feasors; death

Currentness

(a) In all cases where a person commits a tortious or wrongful act causing injury or death to another, or property damage, and the person committing the wrongful act dies before suit is instituted to recover damages, the death of that person shall not abate any cause of action that the plaintiff would have otherwise had, but the cause of action shall survive and may be prosecuted against the personal representative of the tort-feasor or wrongdoer.

(b) The common law rule abating such actions upon the death of the wrongdoer and before suit is commenced is abrogated.

(c) This section shall not apply to actions for wrongs affecting the character of the plaintiff.

Credits
1935 Pub.Acts, c. 104, § 1.

Formerly mod. 1950 Code Supp., § 8243.1; § 20-603.

T. C. A. § 20-5-103, TN ST § 20-5-103
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 20. Civil Procedure
Chapter 5. Abatement and Survival of Actions (Refs & Annos)

T. C. A. § 20-5-104

§ 20-5-104. Revival; heirs

Currentness

If no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent.

Credits
1809 (Sept.) Acts, c. 121, § 3.

Formerly 1858 Code, § 2849; Shannon's Code, § 4571; 1932 Code, § 8696; § 20-605.

T. C. A. § 20-5-104, TN ST § 20-5-104
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 20. Civil Procedure
Chapter 5. Abatement and Survival of Actions (Refs & Annos)

T. C. A. § 20-5-105

§ 20-5-105. Revival; successors in interest

Currentness

If the decedent has parted with the decedent's interest pending the suit, it may be revived by or against the successor in interest instead of the representative or heir.

Credits
1794 Acts, c. 1, § 64.

Formerly 1858 Code, § 2850; Shannon's Code, § 4572; 1932 Code, § 8697; § 20-606.

T. C. A. § 20-5-105, TN ST § 20-5-105
Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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Proposed Legislation

West's Tennessee Code Annotated
Title 20. Civil Procedure
Chapter 5. Abatement and Survival of Actions (Refs & Annos)

T. C. A. § 20-5-106

§ 20-5-106. Wrongful death; beneficiaries

Currentness

(a) The right of action that a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; to the person's personal representative, for the benefit of the person's surviving spouse or next of kin; to the person's natural parents or parent or next of kin if at the time of death decedent was in the custody of the natural parents or parent and had not been legally surrendered or abandoned by them pursuant to any court order removing such person from the custody of such parents or parent; or otherwise to the person's legally adoptive parents or parent, or to the administrator for the use and benefit of the adoptive parents or parent; the funds recovered in either case to be free from the claims of creditors.

(b) In any case involving a beneficiary who is a minor or who is legally incompetent, if the court finds it is in the best interest of the beneficiary, the court in its discretion may authorize all or any portion of the funds recovered for the beneficiary to be added to any trust or trusts established for the benefit of the beneficiary, wherever situated, whether the trust was created by the person whose death was caused by the wrongful action or omission or by any other person. The funds recovered shall be for the benefit of the beneficiary and shall be free from the claims of creditors.

(c)(1) Notwithstanding any other law to the contrary, the right to institute and the right to collect any proceeds from a wrongful death action granted by this section to a surviving spouse shall be waived, if the children or next of kin establish the surviving spouse has abandoned the deceased spouse as described in § 36-4-101(a)(13) or otherwise willfully withdrawn for a period of two (2) years.

(2) If the period of two (2) years has passed since the time of abandonment or willful withdrawal, then there is created a rebuttable presumption that the surviving spouse abandoned the deceased spouse for purposes of this section.

(3) In an action under this section, the child or next of kin shall serve the surviving spouse with process as provided in the rules of civil procedure or by constructive service as may otherwise be provided by law.

(d) As used in this section, the word “person” includes an unborn child at any stage of gestation in utero.

Credits

1849-1850 Acts, c. 58, § 1; 1851-1852 Acts, c. 17; 1871 Acts, c. 78, § 1; 1945 Pub.Acts, c. 58, § 1; 1953 Pub.Acts, c. 210, § 1; 1959 Pub.Acts, c. 240, § 1; 1975 Pub.Acts, c. 284, § 1; 1978 Pub.Acts, c. 742, § 1; 1991 Pub.Acts, c. 196, § 1; 1998 Pub.Acts, c. 866, § 1, eff. May 1, 1998; 2011 Pub.Acts, c. 366, § 1, eff. May 30, 2011; 2021 Pub.Acts, c. 379, § 2, eff. May 11, 2021.

Formerly 1858 Code, § 2291; Shannon's Code, § 4025; 1932 Code, § 8236; mod. 1950 Code Supp., § 8236; § 20-607.

T. C. A. § 20-5-106, TN ST § 20-5-106

Current with effective legislation through Chapter 234 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
State Rules of Court
Tennessee Rules of Civil Procedure
Rule 25. Substitution of Parties

Rules Civ.Proc., Rule 25.01

Rule 25.01. Death

Currentness

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

<Research Note>

<See Rules of Civil Procedure Annotated, 4th (Tennessee Practice, volumes 3 and 4), for a comprehensive treatment of practice and procedure under these Rules. Procedural forms for use in civil cases are set forth in Civil Procedure Forms, 3rd (Tennessee Practice, volumes 5 and 6). >

Rules Civ. Proc., Rule 25.01, TN R RCP Rule 25.01
State court rules are current with amendments received through April 15, 2025. Some rules may be more current; see credits for details.

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2012 WL 3986328
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Ezra WILLIAMS
v.
Stephen Leon WILLIAMS, et al.

No. E2012–00162–COA–R3–CV.
|
Aug. 27, 2012 Session.
|
Sept. 12, 2012.

Appeal from the Chancery Court for Sullivan, County No. K0037464(C); E.G. Moody, Chancellor.

Attorneys and Law Firms

Arthur G. Seymour, Jr. and Matthew A. Grossman, Knoxville, Tennessee, for the appellant, Regions Bank.

Rob Starnes, Kingsport, Tennessee, for the appellee, Ezra Williams, Deceased.

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

OPINION

D. MICHAEL SWINEY, J.

***1** In January of 2011, Ezra Williams ("Plaintiff") sued Stephen Leon Williams and Regions Bank [1]. Plaintiff died in May of 2011. Regions Bank filed a Suggestion of Death. No motion for substitution of proper party was made within ninety days after Plaintiff's death was suggested upon the record. In July of 2011, the attorney who had represented Plaintiff prior to Plaintiff's death filed a Motion for Voluntary Dismissal. In October of 2011, Regions Bank filed a Motion for Summary Judgment. The Trial Court granted the Motion for Voluntary Dismissal without prejudice. Regions Bank appeals to this Court. We hold that the Trial Court should have dismissed the case pursuant to Tenn. R. Civ. P. 25.01 for failure to timely move for substitution of proper party. We, therefore, vacate the Trial Court's judgment and dismiss this case pursuant to Tenn. R. Civ. P. 25.01.

Background

In January of 2011, Plaintiff sued Stephen Leon Williams and Regions Bank alleging, among other things, fraud, embezzlement, and negligence in connection with a Quitclaim Deed and Deed of Trust on a parcel of real property in Sullivan County. Plaintiff died in early May of 2011. On May 11, 2011, Regions Bank filed a Suggestion of Death suggesting the death of Plaintiff on the record. No motion for substitution of proper party pursuant to Tenn. R. Civ. P. 25.01 ever was filed.

On July 7, 2011, the attorney who had represented Plaintiff prior to Plaintiff's death filed a Motion for Voluntary Dismissal. On October 20, 2011, Regions Bank filed a Motion for Summary Judgment based upon there having been no motion for substitution of proper party filed. After a hearing on the Motion for Voluntary Dismissal and the Motion for Summary Judgment, the Trial Court entered its Final Order on January 3, 2012 granting the Motion for Voluntary Dismissal without prejudice and certifying the order as final pursuant to Tenn. R. Civ. P. 54.02. Regions Bank appeals to this Court.

Discussion

Although not stated exactly as such, Regions Bank raises one issue on appeal: whether the Trial Court erred in granting Plaintiff's Motion for Voluntary Dismissal rather than Regions Bank's Motion for Summary Judgment. Plaintiff raises an issue regarding whether the Suggestion of Death was valid when no notice of hearing was filed or served. Because the facts involved in this appeal are undisputed and the issue presents a question of law, we review the Trial Court's decision *de novo* without a presumption of correctness. E.g., *Sowell v. Estate of Davis,* No. W2009–00571–COA–R3–CV, 2009 Tenn.App. LEXIS 860, at *7, 2009 WL 4929402 (Tenn.Ct.App. Dec.21, 2009), *no appl. perm. appeal filed.*

We first will address Plaintiff's issue regarding whether the Suggestion of Death was valid absent a notice of hearing. As pertinent to this appeal, Tenn. R. Civ. P. 25 provides:

> **25.01. Death.**—(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

***2** Tenn. R. Civ. P. 25.01.

Plaintiff argues in his brief on appeal that because Regions Bank failed to file and serve a notice of hearing with its Suggestion of Death, that the Suggestion of Death was invalid. Plaintiff has misread Rule 25.01 and is mistaken. Rule 25.01 neither requires nor even provides for a hearing on the Suggestion of Death. Rule 25.01 clearly provides that a notice of hearing shall be served on the parties with regard to a *motion for substitution of proper party.* Rule 25.01 contains no requirement that a notice of hearing be filed and served with regard to a Suggestion of Death. This distinction makes sense. A motion for substitution asks a trial court to take action and, thus, requires a court hearing of which all involved parties deserve notice and an opportunity to be heard. Conversely, a suggestion of death requires no hearing by the trial court. The purpose of the filing of a suggestion of death is to trigger the running of the 90 day period within which a motion for substitution of proper party may be filed. As a suggestion of death without either a motion for substitution of proper party being filed or the 90 day period running asks nothing of the trial court, there is no need to file a notice of hearing. It is Rule 25.01 itself that requires action by a trial court if a motion for substitution of proper party is not filed timely. Plaintiff's argument is without merit. The record on appeal reveals that the Suggestion of Death filed by Regions Bank was properly served upon the parties and constitutes a valid suggestion of death which triggered the running of the 90 days within which to file a motion for substitution of proper party.

We turn now to Regions Bank's issue regarding whether the Trial Court erred in granting Plaintiff's Motion for Voluntary Dismissal rather than Regions Bank's Motion for Summary Judgment. Importantly, Tenn. R. Civ. P. 25.01 also must be taken into account with regard to this issue. As this Court stated in *Sowell v. Estate of Davis,* "the plain language in Rule 25.01 mandates a dismissal for failure to comply with the Rule's requirement that a proper party be timely substituted for a deceased party." *Sowell,* 2009 Tenn.App. LEXIS 860, at *8, 2009 WL 4929402.

The record on appeal reveals that Regions Bank filed the Suggestion of Death on May 11, 2011. This filing triggered the ninety day period within which to file a motion for substitution pursuant to Tenn. R. Civ. P. 25.01. Thus, the parties or "the successors or representatives of [Plaintiff] ..." had until August 9, 2011 to file a motion for substitution of proper party. No motion for substitution of proper party was filed. The Trial Court held its hearing on the Motion for Voluntary Dismissal and the Motion for Summary Judgment on December 22, 2011, more than ninety days after the filing of the Suggestion of Death.

Pursuant to Tenn. R. Civ. P. 25.01:

> Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action *shall be dismissed as to the deceased party.*

***3** Tenn. R. Civ. P. 25.01 (emphasis added). Given the mandatory language of Rule 25.01, the Trial Court should have dismissed Plaintiff's action pursuant to Tenn. R. Civ. P. 25.01, rather than granting either Plaintiff's Motion for Voluntary Dismissal or Regions Bank's Motion for Summary Judgment. We, therefore, vacate the Trial Court's judgment and dismiss this case pursuant to Tenn. R. Civ. P. 25.01.

Conclusion

The judgment of the Trial Court is vacated and this action is dismissed pursuant to Tenn. R. Civ. P. 25.01. This cause

is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the appellant, Regions Bank, and its surety.

All Citations

Not Reported in S.W.3d, 2012 WL 3986328

Footnotes

1 Plaintiff later was granted leave to amend his complaint to add Heritage Title & Closing Services, LLC and Melissa A. Tootle as defendants to the suit. Stephen Leon Williams, Heritage Title & Closing Services, LLC, and Melissa A. Tootle are not involved in this appeal.

Trust Basics

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West's Tennessee Code Annotated
Title 35. Fiduciaries and Trust Estates
Chapter 15. Tennessee Uniform Trust Code (Refs & Annos)
Part 4. Creation, Validity, Modification, and Termination of Trust (Refs & Annos)

T. C. A. § 35-15-411

§ 35-15-411. Modification or termination of noncharitable irrevocable trust by consent or agreement

Currentness

(a) During the settlor's lifetime, a noncharitable irrevocable trust may be modified or terminated by the trustee upon consent of all qualified beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust if the settlor does not object to the proposed modification or termination. The trustee shall notify the settlor of the proposed modification or termination not less than sixty (60) days before initiating the modification or termination. The notice of modification or termination must include:

(1) An explanation of the reasons for the proposed modification or termination;

(2) The date on which the proposed modification or termination is anticipated to occur; and

(3) The date, not less than sixty (60) days after the giving of the notice, by which the settlor must notify the trustee of an objection to the proposed modification or termination.

(b) Following the settlor's death, a noncharitable irrevocable trust may be terminated upon the unanimous agreement of the trustee and all qualified beneficiaries if such termination does not violate a material purpose of the trust. Additionally, following the settlor's death, a noncharitable irrevocable trust may be terminated upon consent of all of the qualified beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

(c) Following the settlor's death, a noncharitable irrevocable trust may be modified or terminated upon the unanimous agreement of the trustee and all qualified beneficiaries if such modification or termination does not violate a material purpose of the trust. Additionally, a noncharitable irrevocable trust may be modified or terminated upon consent of all of the qualified beneficiaries if the court concludes that modification or termination is not inconsistent with a material purpose of the trust.

(d) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(e) An agreement to modify a trust as authorized by this section is binding on a beneficiary whose interest is represented by another person under part 3 of this chapter.

(f) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the qualified beneficiaries.

(g) If not all of the qualified beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b), or (c), as applicable, the modification or termination may be approved by the court if the court is satisfied that:

(1) If all of the qualified beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) The interests of a qualified beneficiary who does not consent will be adequately protected.

(h) As used in this section, "noncharitable irrevocable trust" refers to a trust that is not revocable by the settlor with respect to which:

(1) No federal or state income, gift, estate, or inheritance tax charitable deduction was allowed upon transfers to the trust; and

(2) The value of all interests in the trust owned by charitable organizations does not exceed five percent (5%) of the value of the trust.

(i) Notwithstanding subsection (a), (b), or (c), the trustee may seek court approval of a modification or termination.

Credits

2004 Pub.Acts, c. 537, § 33, eff. July 1, 2004; 2007 Pub.Acts, c. 24, §§ 15 to 19, eff. April 12, 2007; 2019 Pub.Acts, c. 340, § 14, eff. May 10, 2019; 2021 Pub.Acts, c. 420, § 8, eff. July 1, 2021; 2023 Pub.Acts, c. 166, § 8, eff. April 17, 2023.

T. C. A. § 35-15-411, TN ST § 35-15-411
Current with effective legislation through Chapter 155 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

End of Document

West's Tennessee Code Annotated
Title 35. Fiduciaries and Trust Estates
Chapter 15. Tennessee Uniform Trust Code (Refs & Annos)
Part 1. General Provisions and Definitions (Refs & Annos)

T. C. A. § 35-15-111

§ 35-15-111. Nonjudicial settlement agreements

Currentness

(a) Except as otherwise provided in subsection (b), the trustee and the qualified beneficiaries may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(b) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.

(c) Matters that may be resolved by a nonjudicial settlement agreement include, but are not limited to:

(1) The interpretation or construction of the terms of the trust;

(2) The approval of a trustee's report or accounting;

(3) Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(5) Transfer of a trust's principal place of administration;

(6) Liability of a trustee for an action relating to the trust;

(7) The extent or waiver of bond of a trustee;

(8) The governing law of the trust;

(9) The criteria for distribution to a beneficiary where the trustee is given discretion;

(10) The resignation, appointment, and establishment of the powers and duties of trust protectors or trust advisors; and

(11) The approval of an investment decision, delegation, policy, plan, or program.

(d) Any qualified beneficiary or trustee may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in part 3 of this chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

Credits

2004 Pub.Acts, c. 537, § 12, eff. July 1, 2004; 2007 Pub.Acts, c. 24, §§ 7 to 9, eff. April 12, 2007; 2021 Pub.Acts, c. 420, § 6, eff. July 1, 2021.

T. C. A. § 35-15-111, TN ST § 35-15-111
Current with effective legislation through Chapter 155 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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T. C. A. § 35-15-1001

§ 35-15-1001. Remedies for breach of trust

Currentness

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) Compel the trustee to perform the trustee's duties;

(2) Enjoin the trustee from committing a breach of trust;

(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) Order a trustee to account;

(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) Suspend the trustee;

(7) Remove the trustee as provided in § 35-15-706;

(8) Reduce or deny compensation to the trustee;

(9) Subject to § 35-15-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) Order any other appropriate relief whether provided elsewhere in this chapter, available at common law or under equity principles.

Credits

2004 Pub.Acts, c. 537, § 77, eff. July 1, 2004.

T. C. A. § 35-15-1001, TN ST § 35-15-1001
Current with effective legislation through Chapter 155 of the 2025 First Regular Session of the 114th Tennessee General Assembly. Some sections may be more current; see credits for details. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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< Back

Fiduciary Duties and Standards for Individual Trustees in Tennessee

September 3, 2024 | Lisa Helton

Being asked to serve as an individual trustee is an honor. Trustees step into a leadership role in a family's life, controlling assets and making important decisions that impact the trust beneficiaries. Individuals serving as trustee for the first time may have questions about their roles and duties and generally wonder where to start. The following discussion sets forth some initial considerations for individual trustees in Tennessee as they embark on their fiduciary journeys.

Trustees should spend time familiarizing themselves with the trust's beneficiaries and developing a relationship with those individuals. For effective and harmonious trust administration, trustees must understand the beneficiaries' circumstances, needs, plans, and goals. Trustees should plan to connect with the beneficiaries regularly, with the goals of establishing mutual-trust and open communication.

From a legal perspective, it is important for trustees to understand the terms of the trust, including the trustee's enumerated powers and the standards set forth in the trust for distributions and other trust-related decisions. New trustees should view the trust document as their instruction manual and must spend time familiarizing themselves with its terms.

It is equally important for trustees to understand the laws that control their conduct in Tennessee. For example, the Tennessee Uniform Trust Code (Tenn. Code Ann. §§ 35-15-101 to -1301) (the "Trust Code") is an important body of law for Tennessee trustees. Of particular note, the Trust Code establishes various fiduciary duties that Tennessee trustees must fulfill in their administration. These duties include but are not limited to: loyalty, impartiality, prudent administration, and control and protection of trust property. The Trust Code addresses many additional topics, such as the trustee's powers, record keeping, and judicial proceedings.

Beyond the Trust Code, there are additional statutes in Tennessee that may be relevant to the trustee's position, depending upon the circumstances. These include the Tennessee Uniform Prudent Investor Act (Tenn. Code Ann. §§ 35-14-101 to -114) and the Tennessee Uniform Principal and Income Act (Tenn. Code Ann. §§ 35-6-101 to -602). Again, new trustees should familiarize themselves with all relevant statutes when embarking on their new role.

When the trust includes a discretionary component for making distributions, the trustee position presents challenges of fairness, balance, and long-term vision for the best interests of the beneficiaries. Typically, for discretionary distributions, the trust instrument will list specific circumstances when a distribution may be made, such as for the beneficiary's health, education, maintenance, and support (often referred to as a HEMS standard). When considering a beneficiary's request for a discretionary distribution, the trustee must consider whether the request fits within the standards established by the trust and is consistent with other considerations under Tennessee law.

It is vital to note that in Tennessee, non-residents may not serve as trustees until they have properly registered with the Tennessee Secretary of State. More information may be found here: https://sos.tn.gov/node/482.

Serving as trustee involves an honored position of trust and responsibility. As outlined above, understanding the beneficiaries, following the terms of the trust document, and complying with Tennessee law are foundations to a productive and enjoyable trusteeship.

Lisa Helton focuses her practice on estate and trust litigation, appellate practice, general and commercial litigation, landlord/tenant law, representation of homeowners associations, homeowners association disputes, and IRS tax litigation and controversy. She was recognized by *Best Lawyers*® as the 2025 "Lawyer of the Year" in Nashville for Trust and Estate Litigation and as the 2023 "Lawyer of the Year" in Nashville for both Trust and Estate Litigation and Tax Litigation and Controversy.

Recent News

ESTATES AND TRUSTS IN TENNESSEE: SPEAKER FOR THE DEAD

Application of the Dead Man's Statute, Hearsay, and Other Evidentiary Exceptions in Probate

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72nd Annual Tennessee Judicial Conference

I. Evidentiary Issues in Probate Related Matters

A. Dead Man's Statute

Tennessee's Dead Man's Statute – T.C.A. 24-1-203:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

- In order to exclude evidence pursuant to the Dead Man's Statute:
  - The case must be brought by or against an executor, administrator, or guardian;
  - The case must seek a judgment that would increase or decrease the decedent's estate;
  - The proposed witness must be a party to the suit such that judgment may be rendered for or against the proposed witness;
  - The subject matter of the proposed witness's testimony must concern a transaction with, or statement by, the decedent that would increase or decrease the decedent's estate.

- The statute's purpose "is to protect estates from spurious claims and prevent interested parties from giving self-serving testimony regarding conversations or transactions with the deceased when the testimony involves transactions or statements that would either increase or decrease the deceased's estate." *Mitchell v. Johnson*, 646 S.W.3d 754, 765 (Tenn. Ct. App. 2021) (citing *In re Est. of Marks*, 187 S.W.3d 21, 28 n.2 (Tenn. Ct. App. 2005)).

- The Dead Man's Statute is strictly construed. Section 24-1-203 is "an exception to the presumption of competence that exists under [Tennessee Rule of Evidence 601], which states that '[e]very person is presumed competent to be a witness except as otherwise provided in these rules or by statute.' " *Mitchell v. Johnson*, 646 S.W.3d 754, 765 (Tenn. Ct. App. 2021) at n.12. As such, the statute "must be strictly construed against the exclusion of testimony and in favor of its admission." *Id.* (citing *Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 230–31 (Tenn. Ct. App. 1976)). "

The Dead Man's statute can be waived by the opposing party.

- Some sources suggest that it is the witness, not the evidence, which is made incompetent by the Dead Man's statute. "Therefore, if the objecting party calls the witness to testify, even about matters not prohibited by the statute, the statutory prohibition is waived, and the witness may be questioned concerning his or her transactions with the deceased." *Trial Handbook for Tennessee Lawyers Section 14.1* (*citing Burchett v. Stephens*, 794 S.W.2d 745 (Tenn. Ct. App. 1990)); see also *Cotton v. Roberts' Estate*, 47 Tenn. App. 277, 337

S.W.2d 776 (1960) (statutory disqualification can be waived by calling the witness to testify about the excludable transaction and the witness may then testify as to the entire transaction).

- Waiver may also occur by failure to object to the testimony of a witness who is otherwise incompetent under the statute. *War Finance Corp. v. Ready*, 2 Tenn. App. 61, 1925 WL 1932 (1925).

Does the Dead Man's Statute apply to a will contest proceeding?

- No, because a will contest is an action in rem. *In re Estate of Eden*, 1995, 99 S.W.3d 82.

Does the Dead Man's Statute preclude testimony in a hearing to establish year's support, exempt property, and elective share?

- Yes, because a widow's demand for a year's support, exempt property and/or a demand for her elective share, has the effect of decreasing the estate to be distributed. See *Cantrell v. Estate of Cantrell*, 19 S.W.3d 842 (Tenn. Ct. App. 1999).

Does the Dead Man's Statute apply to actions by a beneficiary to recover life insurance proceeds?

- No, as long as the beneficiary is seeking to recover the proceeds in the beneficiary's individual capacity. For example, In *Newark Ins. Co. v. Seyfert*, 392 S.W.2d 336 (Tenn. 1964), the Court held that statements by a widow were permissible under the statute because the life insurance proceeds at issue would go directly to the decedent's widow, as opposed to the widow as executrix of the deceased's estate.

Does the Dead Man's statute preclude testimony in an action to reform a Testamentary Trust?

No, because an action to reform a testamentary trust is not an action by or against an executor or administrator. Nor is it an action seeking a "judgment" that would increase or decrease the decedent's estate. An action to reform the document addresses an issue of how it should be distributed and is not an action for a monetary judgment.

Caselaw Examples of Application of the Dead Man's statute

Holliman v. McGrew, 343 S.W.3d 68 (Tenn. App. 2009)

- The Dead Man's statute did not preclude admission of testimony from notes of conversations with the decedent in a wrongful death action because the testimony was taken by the opposing party.

- The Court seemed to think it is possible that the Dead Man's statute could preclude the admission of testimony in another wrongful death case.

Mitchell v. Johnson, 646 S.W.3d 754 (Tenn App. 2021)

- The Court found the Dead Man's statute excluded testimony by the decedent's attorneys in fact in an action filed by the Administrator against the decedent's attorneys in fact for breach of fiduciary duty and undue influence because the testimony involved transactions with the decedent that would increase or decrease the estate.

Chumbler v. McClure, 505 F.2d 489, 490–91 (6th Cir. 1974)

- The Sixth Circuit applied Tennessee's Dead Man's statute in a medical malpractice action and held the trial court did not err in excluding all testimony on the alleged lack of informed consent by the plaintiff-appellant concerning his drug treatment where such testimony would inevitably relate to conversations with the deceased doctor or to transactions involving the doctor.

Estate of Haire v. Webster, 2024 WL 733248 (Tenn. App. Feb. 22, 2024)

- Decedent's son, individually and as personal representative, filed a lawsuit asserting the bank breached its duties to the decedent by disbursing funds from decedent's accounts following her death. The bank filed a motion for summary judgment and attached affidavits of its employees that addressed their interactions with the decedent. Decedent's son moved to strike the affidavits under the Dead Man's statute.

- The Court held that the Dead Man's statute did not apply because the lawsuit involved non-probate bank accounts and did not increase or decrease the decedent's estate.

B. Common Hearsay Exceptions Used in Probate Related Matters

T.R.E. 803:

(2) Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis and Treatment

Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

(6) Records of Regularly Conducted Activity

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

(8) Public Records and Reports

Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

(9) Records of Vital Statistics

Records or data compilations in any form of births, fetal deaths, deaths, marriages, or divorces, if the report was made to a public office pursuant to requirements of law.

(12) Marriage, Baptismal, and Similar Certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament made by a member of the clergy, a public official, or another person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, engravings on rings, inscriptions on family portraits, engravings on burial urns, crypts, tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property as proof of the contents of the original recorded document and its execution and delivery by each person by whom

it purports to have been executed if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(16) Statements in Ancient Documents Affecting an Interest in Property

Statements in a document in existence thirty years or more purporting to establish or affect an interest in property, the authenticity of which is established.

(19) Reputation Concerning Personal or Family History

Reputation among members of a person's family by blood, adoption, or marriage or among associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation Concerning Ancient Boundaries

Reputation in a community, arising before the controversy and existing thirty years, as to the boundaries of or customs affecting lands in the community.

(23) Judgment as to Personal or Family History or Boundaries

Judgments as proof of matters of personal or family history or boundaries, which matters were essential to the judgment.

T.R.E. 804 Hearsay Exceptions; Declarant Unavailable

(a) **Definition of Unavailability.** “Unavailability of a witness” includes situations in which the declarant:

4) is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity;

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

(4) *Statement of Personal or Family History.* A statement made before the controversy arose (A) concerning the declarant's own birth, adoption, marriage, divorce, or legitimacy; relationship by blood, adoption, or marriage; ancestry; or other similar fact of personal or family history; even though the declarant had no means of acquiring personal knowledge of the matter asserted; or (B) concerning the foregoing matters, and death also, of another person if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

C. Evidence Establishing Paternity

A child born out of wedlock may inherit through the father, if either "[t]he natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or . . . [t]he paternity is established by adjudication before the death of the father or is established thereafter by clear and convincing proof . . . ." Tenn. Code Ann. § 31-2-105.

"The "clear and convincing" standard falls somewhere between the "preponderance of the evidence" in civil cases and the "beyond a reasonable doubt" standard in criminal proceedings. To be "clear and convincing," the evidence must "produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Hobson v. Eaton,* 19 Ohio Misc. 29, 399 F.2d 781, 784 n. 2 (6th Cir.1968), *cert. denied,* 394 U.S. 928, 89 S.Ct. 1189, 22 L.Ed.2d 459 (1969). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hodges v. S.C. Toof & Co.,* 833 S.W.2d 896, 901 n. 3 (Tenn.1992). *See e.g. In re Estate of Armstrong,* 859 S.W.2d 323, 328 (Tenn.App.1993). *Fruge v. Doe,* 952 S.W.2d 408, 412 n. 2 (Tenn.1997)." Walton v. Young, 950 S.W.2d 956, 958-960 (Tenn. 1997).

The cases interpreting this standard contain a wide range of proof.

In Robinson v. Tabb, Tenn.1978, 568 S.W.2d 835, the Supreme Court held that paternity was established by clear and convincing evidence where the mother and alleged father lived together as husband and wife, the alleged father acknowledged the children as his, and the alleged father supported the mother and children.

In Muse v. Sluder, Tenn.App.1980, 600 S.W.2d 237, the Court of Appeals found clear and convincing evidence of paternity based on testimony from "reputable witnesses."

In Morrow v. Thompson, Tenn.App.1981, 626 S.W.2d 706, the Court of Appeals found clear and convincing evidence of paternity and sustained the claim of the child where the evidence demonstrated that the decedent acknowledged the claimant as his child, gave her items, and was kind to her.

In Majors v. Smith, 776 S.W.2d 538, 540–41 (Tenn. Ct. App. 1989), the Court of Appeals found that "the mother's testimony that plaintiff was decedent's child and that he acknowledged and supported the child, and the testimony of others that he acknowledged parenthood raise a strong inference of parenthood" was clear and convincing evidence of paternity and found that the fact that other individuals were not told of the child was very weak circumstantial evidence since a child born out of wedlock is often a private affair.

In Kelani v. Bowen, 684 F. Supp. 490, 497 (M.D. Tenn. 1988), relying on Tennessee law, the court found that "testimony by disinterested witnesses may establish clear and convincing proof of paternity" and concluded that "the testimony of [several] disinterested witnesses well satisfies the standard of clear and convincing proof . . . " of paternity. The court noted that the witnesses had nothing to gain by the paternity and their testimony was consistent with the exception of one individual whose testimony was based on inaccurate information received by the individual.

However, in Walton v. Young, 950 S.W.2d 956, 958-960 (Tenn. 1997), the Tennessee Supreme Court found that the claimant's evidence did not meet the standard of clear and convincing evidence where the proof showed that the mother's husband was not the biological father of the child (even though mother had at times claimed he was) but did not show that the decedent was the father of the child where the evidence was conflicting as to whether the decedent acknowledged the child as his own and where all other evidence submitted was based on the testimony of the mother, who the court found was not credible.

Although Tennessee case law does not appear to require DNA testing to meet the clear and convincing burden of proof, DNA testing is often used to make such a determination by Tennessee courts. See In re Est. of Bennett, No. E2004-02007-COA-R3CV, 2005 WL 2333597, at *1 (Tenn. Ct. App. Sept. 23, 2005) (finding clear and convincing evidence established child as decedent's biological daughter where DNA test results showed a 99.34% probability that the decedent's sister was the child's biological aunt).

Tenn. Code Ann. § 24-7-112(2) provides that during any civil or criminal proceeding "in which the question of parentage arises, upon the motion of either party or on the court's own motion, the court shall at such time as it deems equitable order all necessary parties to submit to any tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage."

While it has been noted that the overall purpose of Tenn. Code Ann. § 24-7-112 is to require a biological father to support his child (Shell v. Law, 1996, 935 S.W.2d 402), this statute has been used when asking a court to order DNA testing in order to determine whether an individual was the child of a decedent in connection with determining who had priority to bring a wrongful death lawsuit. There, the probate court ordered DNA testing at one time upon motion of one of the parties, but in light of a motion for reconsideration based on a paternity determination by a court in Mississippi decided to recognize the Mississippi judgment as a determination of paternity and did not ultimately require a DNA test. Hussey v. Woods, No. W201401235COAR3CV, 2015 WL 5601777, at *3–4 (Tenn. Ct. App. Sept. 23, 2015), rev'd on other grounds, 538 S.W.3d 476 (Tenn. 2017).