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Probate Law

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for personal property tax purposes under *W.Va. Code,* 11-6-7(e) [1986].[1581]

XXIV. PROBATE LAW

A. *Construction of Will*

Justice McHugh relied upon the decision in *Couch v. Eastham*[1582] in deciding the case of *Keller v. Keller.*[1583] The court in *Keller* held that

> [w]hen the will affords no satisfactory clue to the real intentions of the testator, the court must from necessity resort to legal presumptions and rules of construction. But such rules yield to the intention of the testator apparent in the will, and have no application when the intention thus appears.[1584]

B. *Codicil to Will*

Justice McHugh determined the effect of a codicil to a will in *Bank of Raleigh v. Thompson.*[1585] The opinion held that

> [a]lthough a testatrix provided in a will for the bequest of the corpus of the trust to the Kansas City College of Osteopathy, now the University of Health Sciences, upon the death of the life estate beneficiaries, language used by the testatrix in a codicil to that will, "Money that was to be given as stated in the will to the Kansas City College . . . shall be given to West Virginia Osteopath shall be the amount of $1,500.00 . . . each year to the college to be used in a scholarship for a worthy student[,]" and subsequent use of the language, "Money is to be willed to my sister Macie Teter Williams . . ." evidences the testatrix's intent to alter the initial bequest in her will by bequeathing a sum sufficient to generate $1500 annually to the West Virginia School of Osteopathic Medicine for scholarship purposes while providing a residuary bequest of the corpus of the trust to the named beneficiary, Macie Teter Williams.[1586]

1581 *Id.* at Syl. Pt. 5 (alterations in original).

1582 3 S.E. 23 (W. Va. 1987).

1583 287 S.E.2d 508 (W. Va. 1982).

1584 *Id.* at Syl.

1585 351 S.E.2d 75 (W. Va. 1986).

1586 *Id.* at Syl. Pt. 2 (alterations in original).

C. Joint Will

Justice McHugh addressed several issues involving a joint will in the case of *Black v. Black*.[1587] The court initially addressed the status of real property left to beneficiaries of the joint will. Justice McHugh wrote that

> [w]here in a joint will dated August 11, 1969, three testators left all their property, both real and personal, to the two surviving testators and then to the last surviving testator, and the will further provided that upon the death of the last surviving testator the property "then remaining" would become the property "in fee" of certain named nieces and nephews, the last surviving testator received under the will a life estate in the property, and the named nieces and nephews received a remainder in fee simple.[1588]

The next issue in *Black* involved the effect of a provision in the joint will on property previously disposed of under a written agreement. Justice McHugh held that

> [a] written agreement dated January 3, 1950, whereby three parties expressed an intent that certain real and personal property owned by them be held jointly with survivorship, was superseded by a joint will of the parties dated August 11, 1969, where two of the parties died and the joint will was probated as to them and the last surviving party accepted benefits under the joint will and where the disposition of property under the joint will was inconsistent with the 1950 agreement of the parties concerning the property in question.[1589]

Justice McHugh determined the rights of a survivor to a joint will in *Seifert v. Sanders*.[1590] The court held that

> [w]here in a joint and mutual will persons devised all their real and personal property to the survivor of them to take and hold as his or her sole and entire property and vested in the survivor the power to dispose of the same and the will further provided that at the death of the survivor, the property "which shall not have been disposed of" would become, in equal shares, the property of certain named children and grandchildren, the survivor received a fee simple estate in the property and the power to dispose

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1587 298 S.E.2d 843 (W. Va. 1982).

1588 *Id.* at Syl. Pt. 1.

1589 *Id.* at Syl. Pt. 2.

1590 358 S.E.2d 775 (W. Va. 1987).

absolutely of such property.[1591]

D. Drafting Will

Justice McHugh held in *Brammer v. Taylor*[1592] that "[d]rafting a will for another person, advising another person how to draft a will or supervising its execution are activities which constitute the practice of law."[1593]

E. Matters Disposable by Will

In *Seifert v. Sanders*,[1594] Justice McHugh held that "[d]epending upon the language used in an instrument by a grantor of a power to dispose of real and personal property, that power may be executed not only by a conveyance inter vivos, but that power may also be executed by will."[1595]

F. Quarantine

The issue of quarantine was addressed by Justice McHugh in *Cutone v. Cutone*.[1596] Quarantine is the right of a surviving spouse to occupy and enjoy his or her former marital residence, or mansion house, until such time as dower is formally assigned. The court in *Cutone* held that

> [a]bandonment of the legal right of quarantine should be deemed to occur only where: (1) A person entitled to the right of quarantine has actually abandoned possession of the property subject to the right; (2) Prior to, or at the time of, abandoning the possession of the property the person knew of the existence of his right of quarantine; (3) After abandoning possession of the property the person entitled to quarantine has demonstrated a lack of intention to repossess it; and (4) The person entitled to quarantine has demonstrated an apparent indifference to what would become of the property.[1597]

1591 *Id.* at Syl. Pt. 1.

1592 338 S.E.2d 207 (W. Va. 1985).

1593 *Id.* at Syl. Pt. 1.

1594 358 S.E.2d 775 (W. Va. 1987).

1595 *Id.* at Syl. Pt. 2.

1596 285 S.E.2d 905 (W. Va. 1982).

1597 *Id.* at Syl. Pt. 2.

G. Heirs

Relying in part on *Wheeling Dollar Savings & Trust Co. v. Singer*,[1598] Justice McHugh held in *First Nat. Bank in Fairmont v. Phillips*[1599] that

> [t]he doctrine of equitable adoption is hereby incorporated into the law of West Virginia, but a litigant seeking to avail himself of the doctrine in a dispute among private parties concerning trusts or the descent of property at death must prove by clear, cogent, and convincing evidence that he has stood from an age of tender years in a position exactly equivalent to that of a formally adopted or natural child[.][1600]

The court also said in *Phillips* that

> [i]f an equitable adoption is established by clear, cogent and convincing evidence, the equitably adopted child would inherit from another child of the adoptive parent under *W.Va. Code*, 48-4-11(b) [1984], which provides that an adopted child inherits "from . . . the lineal . . . kindred of such adopting parent or parents in the same manner and to the same extent as though said adopted child were a natural child of such adopting parent or parents."[1601]

H. Fees and Commissions

The decision in *Black v. Black*[1602] required Justice McHugh to examine the propriety of an attorney recovering legal fees and a commission as executor or administrator of a decedent's estate. Justice McHugh said:

> In the case of a decedent's estate, this Court does not look with favor upon the charging of compensation for legal services in addition to a commission by an attorney who is the executor or administrator of that estate. Where the executor or administrator of a decedent's estate is an attorney, compensation for legal services in addition to a commission may only be allowed within carefully circumscribed bounds and upon exceptional circumstances. The burden is upon the attorney to establish those

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1598 250 S.E.2d 369 (W. Va. 1978).

1599 344 S.E.2d 201 (W. Va. 1985).

1600 *Id.* at Syl. Pt. 1 (alteration in original).

1601 *Id.* at Syl. Pt. 2 (alterations in original).

1602 298 S.E.2d 843 (W. Va. 1982).

exceptional circumstances by clear and convincing evidence.[1603]

I. Inheritance Tax

Justice McHugh stated in *First National Bank of Morgantown v. McGill*[1604] that "[t]he former West Virginia inheritance tax is ultimately the responsibility of the recipient of the specific property, unless the testator or testatrix clearly and specifically expresses otherwise in the will."[1605] The opinion also indicated:

> A clause in a will which contains a general direction to the personal representative to pay debts, expenses and taxes, or similar "stock" language, is not sufficient by itself to shift the liability for the former West Virginia inheritance tax from the specific devisees or legatees to the residuary estate.[1606]

J. Gift Causa Mortis

Justice McHugh addressed an issue involving a gift causa mortis in the case of *Lutz v. Orinick*.[1607] The court held:

> A party seeking to prove fraud, mistake or other equally serious fault must do so by clear and convincing evidence and if such fraud, mistake or other equally serious fault is not so proven, then the surviving joint tenant may rely on the conclusive presumption created by *W.Va. Code,* 31A-4-33, as amended, that the donor depositor of a joint and survivorship account intended a causa mortis gift of the proceeds remaining in the account after his death to the surviving joint tenant to establish such gift.[1608]

K. Notifying Beneficiaries of Will

Justice McHugh discussed the role of the county clerk to notify beneficiaries of a will in the case of *Cary v. Riss*.[1609] Justice McHugh held:

> Upon delivery of any will to the county clerk, the county clerk is required under the provisions of *W.Va. Code,* °41-5-2 [1931] to

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1603 *Id.* at Syl. Pt. 3.

1604 377 S.E.2d 464 (W. Va. 1988).

1605 *Id.* at Syl. Pt. 1.

1606 *Id.* at Syl. Pt. 2.

1607 401 S.E.2d 464 (W. Va. 1990).

1608 *Id.* at Syl. Pt. 2.

1609 433 S.E.2d 546 (W. Va. 1993).

> notify by mail or otherwise the beneficiaries named under the will. Notification "by mail or otherwise" shall be construed as certain to ensure actual notice. Upon receiving such actual notice, constitutional due process requirements are satisfied because beneficiaries have notice that the testator has died and that probate proceedings will be instituted. Neither due process nor any statutory provision requires that the beneficiaries must also be given actual notice of the county commission's refusal to probate the will under *W.Va. Code,* 41-5-10 [1923].[1610]

L. Effects of Divorce on Will

The case of *Foy v. County Commission of Berkeley County*[1611] involved interpretation of two statutes addressing the effects of a divorce on a will. Justice McHugh held initially that

> *W.Va. Code,* 41-1-6 [1975], provided, in part that, "[e]very will made by a man or woman shall be revoked by his or her marriage, annulment or divorce, except a will which makes provision therein for such contingency[.]" The amendments to *W.Va. Code,* 41-1-6 [Supp.1992], effective after June 5, 1992, provide that, "[i]f after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, . . ., unless the will expressly provides otherwise." The primary difference between the 1975 version of the statute and the 1992 version of the statute is that the former, with certain exceptions, essentially revokes the entire will by marriage, divorce or annulment. The amended version only revokes the disposition of the property made by the will to the former spouse upon divorce or annulment. Marriage no longer revokes a will.[1612]

The opinion concluded:

> When a decedent executed a will in 1986, married in 1990, and died in 1992, the will was revoked pursuant to *W.Va. Code,* 41-1-6 [1975], which provides that a subsequent marriage revokes a will. The will was not revived because it was not re-executed pursuant to *W.Va. Code,* 41-1-8 [1923], which requires that a will

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1610 *Id.* at Syl.

1611 442 S.E.2d 726 (W. Va. 1994).

1612 *Id.* at Syl. Pt. 2 (alterations in original).

be re-executed in order for it to be revived.[1613]

M. Effects of Marriage on Premarital Will

Justice McHugh stated in *Mongold v. Mayle*,[1614] that "[e]ven though a testator executed a premarital will, as provided by *W.Va. Code*, 42-3-7 [1992], a surviving spouse of that testator is not precluded from taking an elective share of the decedent spouse's estate pursuant to *W.Va. Code*, 42-3-1 [1992]."[1615]

XXV. BUSINESS LAW

A. Shareholders

Relying in part on *Southern Electrical Supply Co. v. Raleigh County National Bank*,[1616] Justice McHugh held in *Laya v. Erin Homes, Inc.*[1617] that "[t]he law presumes . . . that corporations are separate from their shareholders."[1618]

B. Partnership

In *Transamerica Commercial Finance Corp. v. Blueville Bank of Grafton*,[1619] Justice McHugh addressed several matters pertaining to partnerships. The court initially stated:

> *W.Va. Code*, 47-8-2 [1986], which provides that no general partnership may carry on business in this state under any assumed name other than the names of the individuals owning the business unless those persons file in the office of the clerk of the county commission certain information, is to be construed in pari materia with *W.Va. Code*, 46-9-402(7) [1974], which specifies that it is sufficient to put the individual, partnership, or corporate names of the debtors on a financing statement whether or not it adds other trade names of the parties.[1620]

The court next held:

1613 *Id.* at Syl. Pt. 3.

1614 452 S.E.2d 444 (W. Va. 1994).

1615 *Id.* at Syl. Pt. 1.

1616 320 S.E.2d 515 (W. Va. 1984).

1617 352 S.E.2d 93 (W. Va. 1986).

1618 *Id.* at Syl. Pt. 1.

1619 (W. Va. 1993).

1620 *Id.* at Syl. Pt. 2.