Volume 70
Issue 3 *Issues 3 & 4*

Article 27

June 1968

Wills--Contingent

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within the possession of the doctor.[51] Still another argument for the application of the doctrine is that plaintiff should not be barred from the doctrine merely because he is suing a doctor rather than a bottle or airplane manufacturer.[52] In this regard perhaps a statement that appeared in a 1934 article in the West Virginia Law Quarterly is both apropos and conclusive:

> As the practice of medicine in its various branches tends to become a business rather than a personal relation . . . when the medical profession laid aside as outmoded and unsanitary the shawl of the family doctor . . . and assume the efficient white jacket of specialization and commercialism, it likewise lost the armor of infallibility that the shawl concealed.[53]

Martin J. Glasser

Wills—Contingent

T died of natural causes. He left a holographic will while prefaced dispositive provisions with the clauses "In event that I get killed. . ." and "In case of accident. . ." The Chancery Court refused to admit the will to probate on the basis that the operation of the will was contingent upon *T's* being killed or dying in an accident. *Held,* affirmed and remanded. The language employed in the will was clearly conditional upon the death by accident or violent means, and death having occurred due to natural causes, the attempted testamentary disposition became inoperative and void, and was properly denied for probate. *In re Estate of Martin,* 199 So.2d 829 (Miss. 1967).

The principal case is one of a long line of cases in which the courts have been presented with the problem of determining whether the operation of a particular holographic will was contingent on the occurrence of a specified event or whether the will was absolute and intended to be operative in any event. The decision in the principal case appears to be a very sound and justifiable one. However, it appears to be rather difficult to reconcile this decision with West Virginia decisions dealing with the same issue. Thus, it is of value to

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[51] 60 MICH. L. REV. 1153, 1154 (1962).
[52] *Id.* at 1155.
[53] Posten, *The Law of Medical Malpractice in West Virginia,* 41 W. VA. L. Q. 35 (1934).

investigate this subject and to determine the manner in which the courts have dealt with the construction of holographic wills which are apparently contingent.

A contingent will is a will that is to become operative if, and only if, a particular event occurs.[1] Common cases concern wills which are contingent on the failure of the testator to return from a particular trip.[2] Wills are less often made contingent on the failure of the testator to survive a particular operation,[3] the failure of the testator to return from war,[4] the accidental or sudden death of the testator,[5] or on some other specified contingency.

Although the courts of various jurisdictions are in agreement regarding the elements of a contingent will, there is much disagreement in the construction of contingent wills.[6] The differences in the construction of these wills result primarily from (1) the dissimilar factual situation in each case and (2) the various manners in which the wills are worded.[7] In most cases the particular factual circumstances existing when the will was executed will play the major role in determining whether a will is construed to be contingent or absolute.[8] For this reason the principle that the construction of

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[1] Bagnall v. Bagnall, 148 Tex. 423, 425, 225 S.W.2d 401, 402 (1946).

[2] Eaton v. Brown, 193 U.S. 411 (1904); Tarver v. Tarver, 9 Pet. 174 (1835); Taylor's Estate, 119 Cal. App. 2d 574, 259 P.2d 1014 (1953); Barber v. Barber, 368 Ill. 215, 13 N.E.2d 257 (1938); *In re* will of Tinsley, 187 Ia. 23, 174 N.W. 4 (1919); Watkins v. Watkins Adm'r, 269 Ky. 246, 106 S.W.2d 975 (1937); Succession of Gurganus, 206 La. 1012, 20 So. 2d 296 (1944); Redhead v. Redhead, 83 Miss. 141, 35 So. 761 (1904); Estate of Coleman, 139 Mont. 58, 359 P.2d 502 (1961); *In re* Langer's Estate, 281 N.Y.S. 866 (1935).

[3] Estate of Del Val, 159 Cal. App. 2d 600, 323 P.2d 1011 (1958); McCray v. Long, 303 S.W.2d 296 (Ky. 1957); Walker v. Hibbard, 185 Ky. 795, 215 S.W. 800 (1919); Davis v. Davis, 107 Miss. 245, 65 So. 241 (1914).

[4] *In re* Stephenson's Estate, 45 Cal. Rptr. 121 (1965); Magee v. McNeil, 41 Miss. 17 (1866).

[5] Boyles v. Gresham, 153 Tex. 106, 263 S.W.2d 935 (1954); Shipwith v. Cabell, 60 Va. (19 Gratt.) 758 (1870); French v. French, 14 W. Va. 458 (1877).

[6] McMerriman v. Schiel, 108 O.S. 334, 338, 140 N.E. 600, 602 (1923).

[7] Walker v. Hibbard, 185 Ky. 795, 810, 215 S.W. 800, 806 (1919).

[8] Barber v. Barber, 368 Ill. 215, 222-23, 13 N.E.2d 257, 261 (1938). It has been suggested that the circumstances existing at the time the testator executes his will which may be considered by the court in determining whether the testator intended his will to be absolute or conditional include the following: circumstances surrounding the execution of the document and its delivery; the testator's state of health; his plans for the future; the preservation of the document, particularly after the contingency has failed; instructions upon delivery; subsequent declarations of the testator; lack of another subsequent will; lack of alternative disposition of the property and the amount of the estate disposed of by the instrument. Estate of Del Val, 159 Cal. App. 2d 600, 323 P.2d 1011 (1958).

one will is no certain guide to the construction of another is particularly applicable in determining whether a will is absolute or contingent.[9]

In construing a will that may possibly be contingent, the objective, as in the construction of all wills, is to determine whether the testator intended the will to be contingent or absolute. It is only when the language of the testator does not clearly indicate that he intended the will to be either contingent or absolute that a problem of construction arises. The court must then resort to well settled rules of construction. It is often said that the fact the testator leaves a will implies that he does not wish to die intestate.[10] This, of course, operates to influence the construction of a will as absolute. Although a contingent will can be created, the intention to do so must clearly appear in the will, either in express terms or by necessary implication,[11] and a condition will not be implied from indefinite language.[12] Thus, the courts follow the rule that a will will be construed to be absolute and not contingent unless an intention to the contrary clearly appears,[13] and, if a will is equally susceptible to a construction as either absolute or contingent, the will is entitled to probate as an absolute will.[14] If the event mentioned in the will indicates merely the inducement or reason for the execution of the will at the particular time and does not indicate that the event mentioned is to be a condition precedent to the operation of the will, then the will will be considered absolute.[15] Clearly the language of the will in the principal case is sufficient to create a condition precedent to the operation of the will and does not merely express the inducement for the execution of the will. It has been held that the use of the word "if" clearly implies a condition; it means "provided" or "in case that."[16] Under this construction both phrases in the principal case were properly considered conditional.

In contrast to those phrases in the principal case is the following language held to be non-contingent: "This will is written with the

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[9] Morrison's Will, 361 Pa. 419, 421-22, 65 A.2d 384, 386 (1949).

[10] Ferguson v. Ferguson, 121 Tex. 119, 122, 45 S.W.2d 1096, 1097 (1931).

[11] Ferguson v. Ferguson, 121 Tex. 119, 122, 45 S.W.2d 1096, 1099 (1931); French v. French, 14 W. Va. 458, 499 (1877).

[12] Taylor's Estate, 119 Cal. App. 2d 574, 581, 259 P.2d 1014, 1018 (1953).

[13] Ferguson v. Ferguson, 121 Tex. 119, 122, 45 S.W.2d 1096, 1097 (1931).

[14] *Id.*

[15] Barber v. Barber, 368 Ill. 215, 221, 13 N.E.2d 257, 261 (1938); Ferguson v. Ferguson, 121 Tex. 119, 122, 45 S.W.2d 1096, 1097 (1931).

[16] Bagnall v. Bagnall, 148 Tex. 423, 426, 225 S.W.2d 401, 402 (1946).

idea that something might happen to me that I would be wiped out suddenly. If this should happen my business would be in an awful shape. . ."[17] There the will was not contingent on the sudden death of the testator, but rather the language expressed the reason or inducement for making his will at the particular time, *i.e.,* the fact that his business would be in an "awful shape" if he should die suddenly. Absence of reference to a certain period or to a certain emergency during which the testator wishes his will to remain operative is evidence that he intended it to be an absolute unconditional will no matter what should occur in the future.[18]

The principal case, in contrast to other cases of the same nature, is somewhat unusual in one respect. The court did not find it necessary to rely heavily on the circumstances existing at the time the will was executed in determining whether the testator intended that his will be contingent or absolute. The words of the will were clearly conditional and expressed his intention that the will was to take effect only if he were killed or died in an accident. However, in most cases these facts are a major consideration in the court's decision. An early West Virginia case, *French v. French,*[19] illustrates this proposition very well. Testator was about to depart on a journey that would necessitate his crossing a river then at flood stage. He thus executed a will in the following terms: ". . . . *if I get drowned this morning,* March 7, 1872, I bequeath all my property, personal and real, to my beloved wife. . . ."[20] He returned from the trip and did not die until almost two years later. Using numerous assumptions the court concluded that his will was absolute and unconditional. The court first assumed that the testator was aware that had he died intestate on March 7, 1872, his wife would have taken all his property anyway under the then-existing statute of descent and distribution.[21] Secondly, the court assumed that he executed his will in contemplation of charges to be made in the statute of descent and distribution subsequent to March 7, 1872, which reduced the share the wife would take at his death. The court then was able to conclude that the will was an absolute will.[22] The court pointed out that to hold

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[17] Boyles v. Gresham, 153 Tex. 106, 108, 263 S.W.2d 935, 936 (1954).
[18] Watkins v. Watkins Adm'r, 269 Ky. 246, 249, 106 S.W.2d 975, 977 (1937); *In re* Langer's Estate, 28 N.Y.S. 866, 868 (1935).
[19] 14 W. Va. 458 (1877).
[20] *Id.* at 462 (emphasis added).
[21] *Id.* at 489.
[22] *Id.* at 503.

otherwise would attribute to the testator the doing of an idle act.[23] An application of the normal rules of construction indicates, however, that this will was conditional and not absolute. In express terms the testator makes clear his intention that the will is to be contingent. Certainly, the testator by specifying a particular date and a certain event intended his will to be conditional, operative only on that date and until that event had passed. Yet the court proceeding contrary to the accepted rules of construction, and disregarding what would seem to be a clearly expressed intention, determined that the testator mentioned the specific period and event only as an indication of the inducement for the execution of the will and not a condition precedent to its operation. Although the decision was limited to its facts,[24] it appears that the broad facts surrounding the execution of the will were allowed to override the testator's expressed conditional intent in this particular case.

In a more recent West Virginia case, *Bank v. Wehrle,*[25] the court again found it necessary to determine whether a will was absolute or contingent. The ambiguous clause there stated: "If anything happens to us on this trip that we shouldn't return, I want all my property and all my interest in the property to be devised. . . . This is my will and wishes."[26] Obviously, whether this will was absolute or contingent presented a much closer question than that of the *French* case. The terms are more general: "anything" replaces "drowning," and "this trip" replaces "this morning." It is easy to perceive the two interpretations in this case. Wills which involved very similar language have been held to be both absolute and contingent, the decision often turning on the peculiar facts of the particular case.[27] In fact, the court recognized that the language of the *Bank* case was

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[23] *Id.* at 500-01.
[24] *Id.* at 502.
[25] 124 W. Va. 268, 20 S.E.2d 112 (1942).
[26] *Id.* at 274, 20 S.E.2d at 115.
[27] *See In re* Moore's Estate, 15 R.I. 245, 2 A.2d 761 (1938), where the will provided as follows: "I am writeing my will if anything Hapins to me Before I come Home I will ten thousand to . . . ." ". . . this is my Will I write and Sign." Testatrix died twenty years after returning from the trip. The court held the will to be absolute theorizing that the failure of the testatrix to revoke the will expressly indicated that she did not intend to die intestate. In Bagnall v. Bagnall, 148 Tex. 423, 225 S.W.2d 401 (1946), the will provided as follows: "If anything happens to me. While gone. All my belongs and estate to goes to . . . ." This will was held to be contingent. The court gave some weight to the fact that the testator executed the will immediately prior to leaving on a hunting trip thus indicating it was to be operative only for the duration of the trip.

much less restrictive and specific than that of the *French* case. This fact, together with the disfavor with which the law views intestacy, led the court to conclude that the will was an absolute will.[26]

In dealing with wills that may possibly be contingent the courts have demonstrated a strong desire to interpret these wills as absolute and thus preclude the possibility that a "testator" might die intestate. The *French* case exemplifies this desire. The process of construction of these wills usually proceeds on three bases: first, a comparison of the language of the will in question with other similiar wills; second, an application of rules of construction to the will in question; and third, a consideration of the peculiar facts and circumstances surrounding the execution of the will in question. The technique of basing a decision primarily on a comparison of the terms of the will in issue with the terms of other similar wills would appear to have only limited value in close cases such as the *Bank* case. *Bank* was an appropriate case for the application of established rules of construction and for a full analysis of the peculiar facts surrounding the testator at the time the will was executed. This approach was not used however, and it appears most difficult to understand how the *French* case could be authority for the proposition that the will in issue in the *Bank* case was or was intended to be absolute.

Also, when wills are expressly contingent, the court should, as in the principal case, give effect to the testators wishes, and should not as seems to have been done in the *French* case, allow a desire to construe a will as absolute, coupled with an over-emphasis on the facts of the case, override the testator's clearly expressed intention.

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[26] Bank v. Wehrle, 124 W. Va. 268, 274, 20 S.E.2d 112, 115 (1942).