Trusts and Succession in Missouri

William F. Fratcher

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Recommended Citation
William F. Fratcher, Trusts and Succession in Missouri, 30 Mo. L. Rev. (1965)
Available at: https://scholarship.law.missouri.edu/mlr/vol30/iss1/11
TRUSTS AND SUCCESSION IN MISSOURI*

WILLIAM F. FRATCHER**

Probably the most interesting decisions of the period under review were two involving the jurisdiction of Missouri probate courts. The State Constitution establishes a probate court in each county,

with jurisdiction of all matters pertaining to probate business, to granting of letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by executors, administrators, curators and guardians, and of such other matters as are provided in this constitution.2

The Missouri Probate Code of 1955 contains a section declaring that probate courts have jurisdiction of the matters enumerated in the Constitution and “of the administration of testamentary trusts.”2 This section was amplified in 1961 by legislation empowering probate courts to require testamentary trustees to file bonds and accounts, declaring that probate court jurisdiction over testamentary trusts is co-extensive and concurrent with that of the circuit court, and providing for transfer of proceedings relative to such trusts from the probate to the circuit court.3 Other sections of the Missouri Probate Code permit proceedings in probate courts for the recovery of property wrongfully withheld from or by an executor or administrator4 and confer on each probate court “the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments and decrees in probate matters as the circuit court has in other matters.”5

In First Nat’l Bank v. Mercantile Bank & Trust Co.6 it was held

---

*This article contains a discussion of selected Missouri Court decisions reported in Volumes 370-380, South Western Reporter, Second Series.
**Professor of Law, University of Missouri; member of the Michigan and Missouri Bars.
5. § 472.030, RSMo 1959.
6. 376 S.W.2d 164 (Mo. En Banc 1964).

(82)
that a probate court had no jurisdiction to appoint a successor trustee of a testamentary trust because the statutes conferring jurisdiction over such trusts on probate courts are unconstitutional. The opinion suggests that the last clause of the provision of the Constitution quoted above manifests an intent to limit legislative extension of probate court jurisdiction to what is fairly and reasonably within the term "matters pertaining to probate business," which includes collection of assets, disposition of claims and distribution. It also suggests that the administration of testamentary trusts is not "probate business" because such a trust does not come into being until after the estate is distributed and closed. The latter suggestion is highly questionable, especially in view of the express provision of the Missouri Probate Code that both real and personal property pass at the moment of death directly to the devisees or heirs.\(^7\)

\textit{In re Myers' Estate,}\(^8\) decided on the same day, is difficult to reconcile with the First National Bank case. It held that a probate court has equitable jurisdiction, in a statutory proceeding to recover property wrongfully withheld by an executor or administrator, to trace trust funds held by the decedent into his personal bank account. This decision is warranted if the provisions of the Missouri Probate Code relative to such proceedings and the equitable powers of probate courts\(^9\) are constitutional. As the opinion suggests, the result is inconsistent, on the question of equitable jurisdiction, with at least two cases decided since the enactment of the Missouri Probate Code.\(^10\) The difficulty in reconciling the two 1964 decisions arises not so much from this aspect of the case as from the problem of whether judicial proceedings to recover property wrongfully withheld from or by an executor or administrator are "matters pertaining to probate business" within the rather narrow definition laid down by the opinion in the First National Bank case. Such proceedings were never within the jurisdiction of the English ecclesiastical courts or their successors, the Court of Probate and the Probate, Divorce and Ad-

\(7\) § 473.260, RSMo 1959. This abrogated the previous rule that title to personal property passed to the personal representative as of the date of death so that the title of legatees and other distributees arose only upon transfer to them by the personal representative. See 27 Mo. L. Rev. 93, 109-10 (1962).

\(8\) 376 S.W.2d 219 (Mo. En Banc 1964). Cf. Kalberloh v. Stewart, 378 S.W.2d 820, 823 (Spr. Mo. App. 1964), where it was observed that such a proceeding will not lie simply for the collection of a debt.

\(9\) Statutes cited notes 4 and 5 supra.

miralty Division of the High Court of Justice. The fact that the statutes have authorized such proceedings as to property withheld from executors and administrators since 1825 makes it highly unlikely that this type of proceeding to collect assets is not probate business within the meaning of the 1945 Constitution. Proceedings to recover property wrongfully withheld by executors and administrators were, however, first authorized by the 1955 Missouri Probate Code and the Myers case appears to be the first supreme court opinion in which the validity of the authorizing legislation was considered. In a case decided later in the year, the court held that title to cash and to bank accounts in the joint names of the deceased and the petitioner may be litigated under it.

I. Marital Rights

Two sections of the Missouri Probate Code compel distribution of a decedent’s estate, in defiance of his wishes, in a manner which may be, in certain cases, grossly unfair. One of these, the exempt property section, entitles the surviving spouse or, if there is none, the unmarried minor children, to “the family bible and other books” and all household goods, whether or not there is an election to take against the will. If, as has been suggested, “family” modifies only “bible” and not “other books,” this would mean that the owner of a valuable specialized collection of books cannot bequeath them by will to an adult child or to a scholar or institution capable of using them; they must pass to the surviving spouse or unmarried minor children even though the surviving spouse is mentally incompetent or the minor children have no use for them whatever. Even if “family” does restrict the scope of “other books,” the section may operate to force distribution of books and other household goods which are family heirlooms to a surviving spouse who is not the parent of the decedent’s children and so take them permanently out of the family if the surviving spouse is mentally incompetent, hostile to the decedent’s children by a

11. Woerner, American Law of Administration § 140 (1899); Williams, Executors and Administrators 54-55 (14th ed. 1960); Atkinson, Brief History of English Testamentary Jurisdiction, 8 Mo. L. Rev. 107 (1943).
12. § 22, at 100, RSMo 1825; Mo. Laws 1841, at 4; Mo. Laws 1881, at 32; § 64, RSMo 1939; § 462.400, RSMo 1949.
15. § 474.250, RSMo 1959. See 24 Mo. L. Rev. 497, 499-501 (1959). Unlike the family and homestead allowance sections (474.260 and 474.290) this section has no limitation either as to the value of the property or the proportion of the estate which may pass under it. Hence it may cover books worth a million dollars.
prior spouse, fails to make a will returning them to the decedent’s family, or remarries and predeceases her new spouse, who then takes them by the marital right. The other section gives the surviving spouse a right to elect to take against the will a third of the estate if the decedent is survived by lineal descendants or half the estate if he is not. This may be an unduly large share in some cases, notably when the decedent’s children are needy and the surviving spouse is not their parent and has substantial other property or income, derived, it may be, from inter vivos transfers or life insurance made or effected by the decedent. Both sections are buttressed by a third which requires inter vivos transfers in fraud of marital rights to be treated as testamentary at the election of the surviving spouse.

In view of this potentially unfair scheme of distribution which cannot be defeated by inter vivos transfer or by will, it seems essential that parties to or contemplating a marriage be free to vary it, especially in cases where one or both has children by a prior spouse. Nevertheless, the provisions on the subject in the Probate Code, as originally enacted, were confusing and unsatisfactory. One section permits waiver of the right of election to take against the will by written instrument executed before or after marriage, after full disclosure of the facts and upon fair consideration. Another section, some of the language of which was derived from earlier legislation governing jointures to bar dower, permitted the barring of “rights of inheritance and other statutory rights in the estate of his spouse,” by ante-nuptial contract, provided the spouse whose rights were to be barred received “any estate either real or personal to take effect after the death of the spouse, or any other time, as a provision for his support during life.” The latter section was amended in 1963 to permit waiver of “inheritance or any other statutory rights by written contract before or after marriage, after full disclosure of the facts” if the thing or promise given to the waiving party is a fair consideration under all the circum-

17. § 474.150, RSMo 1959. 25 Mo. L. Rev. 417, 419-22 (1960); Lowe, Transfers in Fraud of Marital Rights, 26 Mo. L. Rev. 1 (1961). Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. En Banc 1964), was tried on a fraud on marital rights theory but eventually decided on other grounds. See text accompanying note 80 infra.
18. § 474.220, RSMo 1959.
19. § 474.120, RSMo 1959. Under the pre-1956 legislation it was held that a contract that neither spouse should have any interest in the estate of the other was ineffective because the statute required a transfer of property to effect the bar. Fariss v. Coleman, 103 Mo. 352, 15 S.W. 767 (1891). Moreover, this had to provide support during the whole life of the survivor; support during widowhood was not enough. Morgan v. Stewart, 173 Mo. 207, 73 S.W. 177 (1903).
stances.\textsuperscript{20} \textit{In re Adelman's Estate}\textsuperscript{21} held that a contract entered into by an elderly couple shortly before their marriage in 1960 that neither should have any right in property of the other owned at the time of the marriage but that subsequent earnings should be held jointly, was effective to bar the surviving husband's statutory rights to homestead, family allowance and election to take against the will. The wife died in 1961 so it was clear that the 1963 amendment did not govern the effect of the contract.

Under the Missouri statutes in force prior to 1956 the widow of a childless husband was entitled to renounce the provision made for her in his will and take in lieu thereof one-half of his estate, "subject to the payment of the husband's debts."\textsuperscript{22} As originally enacted, the Missouri Probate Code of 1955 provided that a surviving spouse who elected to take against the will should take by descent, as a modified share, in addition to exempt property and family allowance, "one half the estate" if there were no lineal descendants.\textsuperscript{23} It also provided that property passing by intestate descent did so subject to payment of claims and defined claims to include "all estate and inheritance taxes."\textsuperscript{24} Amendments which became effective June 12, 1957, inserted the words "subject to the payment of claims" after "one half the estate" and deleted the words "all estate and inheritance taxes" from the definition of "claims."\textsuperscript{25} It was held in 1961 that, under the pre-1956 law, the elective share of the surviving spouse should be computed without first deducting the federal estate tax, except to the extent that what she received added to the amount of that tax.\textsuperscript{26} In \textit{Jones v. Jones}\textsuperscript{27} is was held that the same method of computation should be used in the case of a decedent whose death occurred between January 1, 1956, and June 12, 1957, and the reasoning of the opinion makes it highly probable that this is also the rule under the 1957 amendments. Thus it would seem that, whatever the date of death, a surviving spouse electing to take against the will is entitled to the full benefit of the federal marital deduction of half the value of the adjusted gross estate.

A surviving spouse who did not elect to take against the will did not

\begin{footnotes}
\item[20] Mo. Laws 1963, S.B. No. 34; § 474.120, RSMo 1963 Supp.
\item[21] 377 S.W.2d 549 (K.C. Mo. App. 1964).
\item[22] §§ 469.090, .110, .120, .150, RSMo 1949.
\item[23] Mo. Laws 1955, at 465, § 252(1) and (2).
\item[27] 376 S.W.2d 210 (Mo. En Banc 1964). Per curiam opinion. Eager, C.J., dissented.
\end{footnotes}
fare so well in *St. Louis Union Trust Co. v. Krueger.* In that case the will first directed payment of all debts and then devised half the estate to testatrix's husband, if living, otherwise to her nephew. Subsequent paragraphs contained legacies to a number of persons and a bequest of the residue to the nephew. The husband survived and the trial court ruled that his half should be computed after deducting the entire federal estate tax, claims and expenses of administration from the gross estate, which would give him $60,000 less than the method approved in *Jones v. Jones.* The trial court's decision was affirmed on the ground that a bequest of a share in an estate means, prima facie, a share in the net estate and that this prima facie meaning was buttressed in the instant case by the substitutionary gift of the husband's share to the nephew. It was held that the abatement statute, which prefers specific and general legacies to residuary legacies, if applicable at all to apportionment of an estate which is large enough to pay all legacies, does not, by its own terms, apply if the testator manifests a contrary intent. The moral for the draftsman is clear. If it is desired to give the surviving spouse the full benefit of the federal marital deduction, the will should make express provision to this effect.

II. Contracts to Make Wills

In *Jeffress v. Piatt* it was held that the heirs of one of two tenants in common had failed to establish by sufficiently clear, cogent and convincing evidence, that, on the death of their ancestor, the other co-tenant had agreed with them orally that, in consideration of exclusive occupation of the premises during her lifetime, she would devise the land to them. Similarly, it was held in *Butcher v. McClintock* that an alleged oral agreement between two sisters and a brother to make reciprocal wills was not clearly proved.

In *Tilton v. Woods* the plaintiff induced her nephew to accept a five-year lease of her farm and move onto it by executing a written contract by which the nephew and his wife agreed to operate the farm during her lifetime in consideration of the fact that she had previously executed a
will devising it to them and to the heirs of their bodies. The plaintiff, who had not actually executed such a will, later discovered that the contract had been recorded and that, because of this, she could not borrow money on a mortgage of the farm. At her insistent demand the nephew and his wife executed a quit-claim deed and release to her, each of which stated that it was made to enable the plaintiff to borrow money on the premises. At the same time the nephew took a new lease with an option for renewal which would make the eventual expiration date the same as that under the original five-year lease. The plaintiff then sued the nephew, his wife and the known and unknown heirs of their bodies for a determination that she was not bound to devise the farm to them. A judgment for her was affirmed. It was held that the mutual rescission was consideration for the quit-claim deed and release and that, in view of extrinsic evidence of the correspondence and conversations between the parties, these were intended to rescind the entire transaction, not merely to permit a mortgage. The court recognized that, in view of the Missouri fee tail statute, the heirs of the body would take an interest by purchase under the recited devise and so were third-party beneficiaries of the contract. The opinion reasons, however, that this interest was conditioned upon full performance by the nephew, which was made impossible by the mutual rescission. It is to be hoped that this indicates a trend against the exaggerated protection to contingent interests in unborn and unascertained heirs which the court was disposed to give a few years ago.

III. Will Substitutes

Jenkins v. Meyer was another in the long and confused series of Missouri cases dealing with efforts to use bank deposits as substitutes for wills. Decedent deposited funds in a building and loan association to the credit of herself or a neighbor or survivor; in a bank to the credit of herself or the neighbor; and in the bank to the credit of herself or the neighbor, “or either one of them, as joint tenants with right of survivorship and not as tenants in common.” She manifested an intention to retain complete control during her lifetime but that the neighbor should take beneficially

34. § 442.470, RSMo 1959.
36. 380 S.W.2d 315 (Mo. 1964).
37. Schrader, Bank Deposits as Will Substitutes in Missouri, 28 Mo. L. Rev. 482 (1963).
on her death. Subsequently decedent became mentally incompetent and her guardian withdrew the funds. It was held that the use of the word "survivor" in the first and last deposits raised a statutory presumption of joint tenancy but that this was rebutted by the evidence of intent, which was testamentary. Accordingly it was held that the neighbor was entitled to nothing because the deposits were not made with the formalities required for a will. Having reached a result on this theory the court declined to decide whether the guardian of an incompetent depositor may terminate a "joint" bank deposit when the funds are not needed to support his ward. The court, in effect, held that what was intended was a "payable on death" deposit, which some of the cases hold valid on a trust theory, and that such a deposit is a testamentary transaction. The court has previously held a very similar transaction valid on a contract theory. A writer has recently concluded that the law in this field is now in such a hopeless state of confusion that comprehensive legislation offers the only hope of clarification.

Wheeler v. Rines applied the established Missouri rule that a deed which states that it is not to take effect until the death of the grantor is a testamentary instrument unless there is other language indicating that the grantor intended to retain only a life estate. It would seem that in most other states such a deed, despite its language, is not deemed to be a testamentary instrument but a present conveyance of a springing use to become effective in possession on the death of the grantor.

IV. Revocation of Wills

Under the law in force in Missouri prior to 1956 divorce, whether or not accompanied by a property settlement, did not revoke a spouse's will as a whole or the provision made in it for the other spouse. The Missouri

38. §§ 362.470, 369.150, RSMo 1959.
41. Schrader supra note 37, at 505-06.
42. 375 S.W.2d 48 (Mo. 1964).
43. Goodale v. Evans, 263 Mo. 219, 172 S.W. 370 (1914); Terry v. Glover, 235 Mo. 544, 139 S.W. 337 (1911). Cf. Cook v. Daniels, 306 S.W.2d 573 (Mo. 1957), cited at 23 Mo. L. Rev. 467-70 (1958); Wimpey v. Ledford, 177 S.W. 302 (Mo. 1915).
44. ATKINSON, WILLS 187 (2d ed. 1953).
45. Robertson v. Jones, 345 Mo. 828, 136 S.W.2d 278 (1940). The majority view, in the absence of statute, is that divorce plus a property settlement, but not without one, revokes testamentary provisions in favor of the divorced spouse. ATKINSON, WILLS 431 (2d ed. 1953).
Probate Code, which became effective January 1, 1956, provides: "If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked. . . ."46 In Rookstool v. Neaf47 a husband and wife executed separate wills in 1938 by which each left all his property to the other. In 1952 they executed a property settlement under which the husband paid the wife $12,000 and she released her interest in entireties land in full and complete settlement of all claims against each other arising out of the marriage, "including all claims for dower and other statutory allowances of every kind and description." There was convincing evidence that, in a subsequent conversation held just prior to their 1952 divorce, the husband admitted that he had made an inadequate settlement on the wife and each promised to keep his existing will in force. The wills were then deposited by them with the wife's father. There was also evidence that the husband reminded his ex-father-in-law of this agreement on the day before his death in 1957. The husband's will was admitted to probate and the ex-wife sought the benefit of its provisions. It was held that, although the divorce did not revoke the provisions of the will in 1952, the statute did so on January 1, 1956, and that the ex-wife's refraining from revoking her own will was not sufficient part performance to take the oral contract not to revoke out of the statute of frauds. It seems very doubtful that the statute was intended to give an effect to divorces granted before its enactment which they did not have when they were decreed.

V. WILL CONTESTS

The decision in Cole v. Smith48 manifests the same tendency to apply the time requirements of the Missouri Probate Code strictly as does the series of decisions under the nonclaim sections. The provisions relating to will contests require them to be commenced within nine months after probate and require their dismissal if service of process on all defendants is not completed within sixty days "in the absence of a showing by the plaintiff of good cause for failure to secure and complete service."49 In this case the contest was commenced on time, personal service on nine of the eleven legatees was effected within sixty days, and service by publication on the other two legatees was commenced prior to the expiration of the

46. § 474.420, RSMo 1959.
47. 377 S.W.2d 402 (Mo. 1964).
48. 370 S.W.2d 307 (Mo. 1963).
49. § 473.083 (1), (4), RSMo 1959.
sixty days but not completed until seventy-one days after the commencement of the contest. An order dismissing the contest, entered on motion of the legatees served by publication, was affirmed on the ground that they could have been served personally within the sixty days if the contestant had used due diligence to ascertain their whereabouts, their addresses having been listed correctly in the application for probate.

*Sturm v. Routh* was a contest, on the grounds of incapacity and undue influence, of a will executed on April 1, 1959, and a codicil executed on November 6, 1959, by an eighty-year-old testator who suffered from senility, delusions, failing memory, arteriosclerosis of the brain and mental depression and whose condition was steadily deteriorating. The will, after making provision for the widow and an invalid daughter, devised the residue in equal shares to the testator's other two daughters and their families. The codicil disinherited one of these daughters and her family. There was some evidence that it was executed while the testator was under the influence of drugs and a mistaken belief that the husband of the disinherited daughter had embezzled money from him. The jury rendered a verdict in favor of the will and against the codicil. The trial court entered judgment in favor of the codicil notwithstanding the verdict on the ground that the latter was not supported by substantial evidence. The judgment as to the codicil was reversed in an opinion finding that the contestant had adduced substantial evidence of incapacity.

On the basis of the evidence summarized in the opinion it would seem that the result reached was sound. The opinion tends, however, to raise doubt as to the locus of the burden of proof in will contests by stating:

The sole question presented on this appeal is whether there was sufficient evidence adduced from which the jury reasonably could have found that the codicil was invalid. In considering that question we are mindful of the rule that in the situation before us we must disregard the evidence offered by defendants unless it aids plaintiffs' case, accept plaintiffs' evidence as true, and give them the benefit of every inference which may legitimately be drawn from it.

The accepted rule has been that the proponent of a will has the burden of proving the testator’s mental capacity but when the proponent has adduced

50. 373 S.W.2d 922 (Mo. 1964).

51. Id. at 923, citing McGrail v. Schmitt, 357 S.W.2d 111 (Mo. 1962), 27 Mo. L. Rev. 594, 599 (1962), in which similar language was used but the opinion recognized that the contestant's burden was only that of going forward with the evidence.
evidence of capacity the contestant has the burden of going forward with the evidence of incapacity. If the contestant does offer evidence of incapacity, the burden of proof remains on the proponent. It is improbable that the court intended to change this rule but the language of the opinion could be understood to place the burden of proof of incapacity on the contestant.

VI. MISTAKES IN WILLS

_In re Garrison's Estate_ was an appeal from a circuit court judgment affirming a probate court decree that the appellant was entitled to only a dollar of her father's estate. The father's will devised described tracts of land to his son and his younger daughter and the residue to the daughter. It bequeathed only a dollar to appellant, the testator's elder daughter, in a clause which recited that this was done not because he did not love her but because she would take, at his death, eighty acres under the will of her grandfather. In fact, the grandfather's will gave appellant only twenty acres on the death of her father and another twenty acres on the death of her uncle and devised forty acres to the father in fee simple. The decisions of the probate and circuit courts that this forty acres passed under the residuary clause to the younger daughter were affirmed. Although wills will not be reformed for mistake in the inducement, relief is sometimes given when, as here, the mistaken fact is recited in the will, at least if it is inferable from the language used what the testator would have done if the mistake had not been made. It is arguable that these stringent conditions of relief were met here and that, accordingly, the appellant should have been allowed to take the forty acres which the testator apparently did not devise specifically because he mistakenly thought that he held only a life estate with remainder to her.

Complete relief against a mistake in the description of land in a will

---

52. Morton _v._ Simms, 263 S.W.2d 435 (Mo. 1954); Wipfler _v._ Bader, 250 S.W.2d 982 (Mo. 1952).
53. Fields _v._ Luck, 335 Mo. 765, 74 S.W.2d 35 (1934).
54. The principal case was decided by Division No. 1. An opinion of Division No. 2 handed down on the same day recognized the rule. Switzer _v._ Switzer, 373 S.W.2d 930 (Mo. 1964). In this case a judgment against the will on the ground of undue influence was reversed because of improper instructions permitting the jury to consider undue influence exercised by persons not charged therewith in the petition and to infer undue influence from the mere existence of benefit to persons in a confidential relationship.
55. 374 S.W.2d 92 (Mo. 1964).
was given in *Stuesse v. Stuesse.* The will devised to the widow a life estate in "my home farm" in Sections 8, 9, 16 and 17 and, subject thereto, "that portion of my home farm" in Sections 8, 9, 16 and 17 north and west of a surveyor's line to a son and "the remaining part of my home farm" in Sections 8, 9, 16 and 17 to a grandson. The residue was devised to two daughters who were also given substantial specific bequests. It appeared that, in fact, testator's home farm consisted of 565 acres, 47 of which were in Section 18 and none of which were in Section 9. The daughters contended that the 47 acres in Section 18 fell into the residue. A judgment that the entire 565 acres passed to the son and grandson was affirmed. It was held that extrinsic evidence was admissible to show the mistake in section numbers and resolve the latent ambiguity. This is the normal and sound approach to this kind of mistake problem. The opinion frankly recognizes that although it is standard doctrine that a will may not be reformed for mistake the same result is accomplished under the guise of "construction."

VII. Construction of Wills

*Walters v. Sisleri* involved the construction of a clause of the will of a testator who died in 1913 by which he devised a sixth of his estate to his wife for life "with remainder to my children and heirs hereinafter named." The five clauses which followed devised a sixth of the estate to the testator's son in fee simple and a sixth to each of his four daughters for life, with remainder to the heirs of her body. One of the daughters and her only child, a son, joined in a conveyance to the defendants. The son of the daughter predeceased her leaving children, the plaintiffs, who sought partition of the lands in which the testator's widow had had a life estate on the theory that their grandmother took only a life estate in these lands, with a remainder to the heirs of her body which remained contingent until her death. A judgment for the plaintiffs was reversed, the court holding that, in view of the fact that, under the law in force in 1913, the testator's five children were his only heirs, the phrase "my children and heirs" meant the same thing as "my children." The opinion concludes, accordingly, that the testator intended to give his daughters fee simple interests in the sixth devised to their mother for life even though he only gave them life estates in the other sixths. The court points out that even if this intent were not manifest the auxiliary rule of construction favoring early vesting would re-

57. 377 S.W.2d 389 (Mo. 1964).
58. The leading case is Patch v. White, 117 U.S. 210 (1886).
60. 371 S.W.2d 187 (Mo. 1963).
quire, in the absence of a clear contrary indication, that the testator’s heirs be ascertained as of the date of his death.

_Farkas v. Calamia_\(^61\) also involved a question of whether a devise should be construed to pass a fee simple or only an estate for life. The clause in question devised the residue to testatrix’s three named children,

...to be divided between them equally share and share alike. However, the portion of ... [plaintiff] shall be paid to her in monthly installments of $20.00 until exhausted, in the event that she shall die before her share is used up, then any balance thereof shall revert to my above named two sons to be divided between them equally. For the purpose of ... [plaintiff’s] share, I name my son, ... [C—], to act as trustee, in the event he cannot act as such, then I name ... [D—], my son, to act as such.

Plaintiff contended that she was entitled to a third of the residue in fee simple, either because language creating a fee cannot be cut down by subsequent language or because the trust was executed by the Statute of Uses in the absence of active duties imposed on the trustee. The court properly rejected both contentions, applying the usual rules that language sufficient to create a fee simple may be modified by later language which clearly reduces the quantum of estate granted and that the implied duties to preserve the corpus, pay over the income and preserve contingent remainders are active duties which prevent execution of a trust by the Statute of Uses. It would seem that execution by the Statute of Uses would not enlarge the plaintiff’s beneficial interest in any event; it would merely change it from an equitable to a legal estate.

In _Buschmeyer v. Biermann_\(^62\) the will, after bequeathing a dollar to each of testator’s children, provided,

All the residue of my property of whatever kind it may consist, I give, devise and bequeath unto my beloved wife, ... the same shall be her property as long as she remain a single person and shall also have the income of the same and use such income as she may see fit. In the event that my wife should remarry, then it is my will to give, devise and bequeath unto my said wife that part of this residue as is provided by law and the remainder to be divided equally share and share alike among my seven children.

The widow, who did not remarry, conveyed a farm which constituted part of the residue to a son, reserving a life estate, and later died. A determina-
tion that the widow took only an estate for her life, determinable upon re-marriage, not a fee simple, was affirmed despite the failure of the will to dispose expressly of the remainder in the event that the widow did not re-marry. The opinion recognized that there is substantial authority in other states for the proposition that such failure indicates an intent to create a fee but rejected this construction because previous Missouri decisions have laid down a rule that such language creates a life estate with a re-mainder by implication to the persons who would take if the widow re-married.

Mercantile Trust Co. v. Muckerman is an interesting and carefully considered case involving construction of the terms of a testamentary trust. Testatrix bequeathed the residue of her estate to trustees to pay the income to her four children in equal shares. On the death of any child of testatrix the income from that child’s share was to be paid to his “descendants” until the youngest of them reached twenty-one, when the corpus of that share was to be distributed to such descendants. The will provided that the “term ‘descendants’ as used herein shall be deemed to refer to and include only the children of a deceased child of mine.” A son of the testatrix died, survived by an adult son and the minor children of a daughter who had predeceased him. The successor trustee sought a declaratory judgment as to whether the adult grandson of the testatrix was entitled to the whole of his father’s share or whether the minor great-grandchildren of the testatrix were entitled to half of that share. A determination that, in view of the explicit definition of “descendants,” these included only grandchildren and not great-grandchildren of the testatrix and awarding the whole share, accordingly, to the adult grandson, was affirmed. The court recognized that the term “descendants” normally includes grandchildren and more remote descendants but thought that it was restricted here by the explicit definition. It also recognized that the word “children,” which was used in the definition, can sometimes include grandchildren but thought that the testatrix intended to confine it to its usual and narrower meaning. Counsel for the trustee and for the great-grandchildren who were cut off by the decision were awarded substantial fees to be paid from the trust fund.

Busch v. Dozier involved the problem of whether testamentary powers

---

64. 377 S.W.2d 355 (Mo. 1964). St. Louis Union Trust Co. v. Grove, 370 S.W.2d 375 (Mo. 1963), involved construction of the terms of an inter vivos trust. See text accompanying note 85 infra.
65. 375 S.W.2d 27 (Mo. 1964). Opinion by Hyde, J.

https://scholarship.law.missouri.edu/mlr/vol30/iss1/11
of appointment were effectively exercised. The terms of inter vivos trusts of stock in a corporation empowered the settlor’s daughter-in-law to appoint remainders thereunder by will “to or for the benefit of . . . , and subject to such further trusts if any,” the descendants of settlor’s son and the descendants of the donee of the power by a prior husband. The terms limited the remainders in default of appointment and provided that both appointees and takers in default should take subject to the requirement that the shares remain in voting trusts created thereby. The will of the donee of the powers did not mention them but bequeathed the residue of her estate, “including all property and interest in property in respect to which I may have at the time of my death the power from any sources to appoint the disposal of by my will” to trustees who were to hold for the primary benefit of descendants of the settlor’s son and of the donee by her prior husband. The residuary clause empowered the testamentary trustees to vote and sell corporate stock and provided for contingent remainders to the heirs of primary beneficiaries who died under age and to the heirs of the donee if there were no descendants of the primary beneficiaries. A determination that the powers were not effectively exercised was reversed in an admirably lucid, careful and well-reasoned opinion of the supreme court. In this opinion it was held that the residuary clause was intended to exercise the powers, that reference in it to the voting trust restrictions was unnecessary, and that the ineffectiveness as to the appointed assets of the voting and sale powers of the testamentary trustees and the ultimate remainders to heirs who might not be permissible appointees did not impair the effectiveness of the appointment so far as the permissible appointees were concerned. The opinion provides a valuable precedent as to exercise of powers of appointment and its reasoning could well be adopted if the court sees fit to reform the extreme “infectious invalidity” doctrine which some older Missouri cases laid down in applying the Rule Against Perpetuities.66

In re Howe’s Estate67 involved a will which bequeathed half the residue to trustees to pay the income to the testator’s wife Jessie, for life, and then to distribute the corpus to such persons as she should by will appoint. Should she fail to appoint, the trustees were directed to distribute the corpus to two of testator’s children. Jessie died and testator married Louise, who sur-

66. E.g. Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1891). It may be that the supreme court has already reformed this much criticized doctrine by its decision in Mercantile Trust Co. v. Hammerstein, 380 S.W.2d 287 (Mo. 1964), a will construction case which is being discussed in detail by Professor Eckhardt.
67. 379 S.W.2d 134 (St. L. Mo. App. 1964).
vived him and elected to take against the will. It was held that the two named children took half the residue as donees in default of appointment. The court rejected arguments that this half of the residue should pass by intestacy either because, Jessie's power of appointment having lapsed, she did not fail to exercise it or because the widow's election to take against the will destroyed the entire testamentary scheme of disposition. The result seems sound.68

Smith v. Dardenne Presbyterian Church69 involved a devise of a third of the residue of an estate to the appellant church with a proviso that appellant should take "only if within nine months after my death it shall have a full-time pastor and be holding church services regularly." The church had no pastor when the will was executed. Subsequently Presbytery took control of it, which operated to make the Chairman of Presbytery's Committee on Church Extension ex-officio pastor in addition to his other duties. He conducted one service during the nine months following testatrix's death. Three other services were conducted during this period, one by another minister and two by laymen. On the last day of the period arrangements were made to hold monthly services in the future. A decision that appellant had not complied with the conditions of the proviso was affirmed.

VIII. Administration of Estates

Stark v. Cole70 raised the very important question of the extent to which probate decrees of final distribution are conclusive. The plaintiff alleged that her father died in 1954, when she was thirteen years old, that his widow was appointed administratrix with one of the defendants as surety, and that the administratrix appropriated $3,000 of estate assets to her own use. She further alleged that the surety paid $2,988 to an administrator de bonis non who later paid $2,300 of this, being all that was left after payment of claims and expenses of administration, back to the surety, without authorization by the probate court. Plaintiff sought to compel the former administratrix, the administrator de bonis non and the surety to account to her for her share in the estate. The administrator de bonis non filed a motion to dismiss the petition on the ground that it did not state a cause of action. The surety filed a motion to dismiss on the ground, inter alia, that the payment to it was made pursuant to a probate decree of final distribution from which there had been no appeal. A

69. 378 S.W.2d 465 (Mo. 1964).
70. 373 S.W.2d 473 (K.C. Mo. App. 1963).
judgment granting both motions was reversed with directions to allow the plaintiff to amend her petition so as to alleged that the decree of distribution was procured by fraud. The opinion first states that the fraud for which a probate court judgment will be set aside is of the same character as that required to set aside any other final judgment of a court of competent jurisdiction but later suggests that probate court judgments are peculiarly vulnerable to attack because these courts are easily deceived and often negligent. In view of the importance which the finality of probate decrees of distribution has under the Missouri Probate Code in ensuring the security of land titles, the outcome of this litigation is of great interest.

In St. Louis Housing Authority v. Barnes the plaintiff sued to condemn land of one Fein, paid the commissioners’ award into the registry of the court took possession of the land, and filed timely exceptions to the award, requesting a new appraisement by a jury. Fein died and plaintiffs did not file notice of the revival of the suit against his administrators in the probate court within nine months after the first publication of notice of the issuance of letters of administration. The Missouri Probate Code provides that if notice of revival of a pending action is not so filed no recovery may be had on the judgment therein against assets being administered in the probate court. The condemnation jury made an award which was lower than that of the commissioners. It was held that the failure to file notice in the probate court did not bar the plaintiff from recovering the difference between the jury’s and commissioners’ awards from the fund in court because the order directing refund was not a judgment and the fund in court was not an asset being administered in the probate court. This decision evinces less tendency than some previous cases to give a broad and comprehensive effect to the nonclaim provisions of the Probate Code.

In Embry v. Martz’ Estate a jury awarded the plaintiff $25,000 in her action on a quantum meruit theory for housekeeping services rendered to the deceased over a period of some fifteen years. The trial court then

71. Id. at 477.
73. 375 S.W.2d 144 (Mo. 1964).
74. § 523.040, RSMo 1959.
75. § 523.050, RSMo 1959.
76. §§ 473.360(2), .363, RSMo 1959.
78. 377 S.W.2d 367 (Mo. 1964).
granted a new trial on the grounds that it had erred in instructing the jury that, in the absence of a family relationship, the rendition of such services implies a promise of payment therefor, and in admitting testimony of plaintiff's husband. The order for a new trial was reversed over the contention of the defendant administrator that the issue of the existence of a family relationship should have been submitted to the jury. The evidence showed that plaintiff was the wife of a tenant on the decedent's farm and that she did the work in question only because the decedent promised to see that she was paid for it. It was held that the admission of testimony of plaintiff's husband, who was not a party to the agreement with the deceased, was not barred by the "dead-man" statute.\textsuperscript{79}

IX. CREATION OF TRUSTS

In \textit{Edgar v. Fitzpatrick}\textsuperscript{80} a husband signed an instrument reciting that he had purchased or declared his intention of purchasing certificates of participation in a named investment fund and declaring that they "are to be in trust," he as trustee to have full powers of management, to pay the income to himself for life. The instrument provided that the trust should terminate on the settlor's death and the trust assets should then be distributed to his three children by his first wife or the survivors or survivor of them. It also provided that if all the children predeceased him, the trust would terminate and the assets would belong to him. Power to change beneficiaries and to revoke was reserved. When the instrument was signed the settlor owned some shares in the named investment fund. He subsequently had some of these transferred to his name as trustee and purchased others, apparently taking some in his name as trustee and some in his own name as an individual. After this the husband made a will which bequeathed to his wife all property falling within a description which corresponded to exempt property as defined by the Missouri Probate Code,\textsuperscript{81} a support allowance for a year, and one-third of the balance of his estate.\textsuperscript{82} The residue was devised to the three children. In a declaratory judgment suit brought by the executor the trial court held that the full value of the investment fund shares should be considered in computing the widow's testamentary share and, apparently, that the trust was in fraud of marital rights. A court of appeals reversed on the ground that, in view of the

\textsuperscript{79} § 491.010, RSMo 1959.
\textsuperscript{80} 377 S.W.2d 314 (Mo. En Banc 1964).
\textsuperscript{81} § 474.250, RSMo 1959.
\textsuperscript{82} This was what the widow could have elected to take against the will. §§ 474.260, .160, RSMo 1959.
fact that the investment fund shares constituted only about a third of the
testator's gross estate, the creation of the trust was not a fraud on marital
dependents. The supreme court reversed the judgment of the court of appeals
and reinstated that of the trial court in an opinion which did not decide
the question of fraud on marital rights but held that there never was a
valid trust because there was no definite trust property when the purported
self-declaration of trust was signed and no subsequent declaration of trust
was made after property conforming to the description was acquired. It
is difficult to accept this conclusion insofar as it applies to shares issued to
the testator as trustee.

X. TRUST ADMINISTRATION

St. Louis Union Trust Co. v. Grove involved the construction of an
inter vivos trust instrument executed in 1927. The terms required pay-
ment of the income to the settlor for life and thereafter the payment of
stipulated annual sums to annuitants and the balance of income to settlor's
son until he reached fifty or died. When that occurred the trustee was
directed to divide the trust into two parts, one sufficient to complete the
annuities and the other consisting of the balance of the corpus. The second
part was to be distributed to the son at that time, if he was alive. If he
was not, it was to be held in trust and the income paid to three named
grandchildren until January 31, 1941, and then distributed to these grand-
children or the issue of any who had died. The son died in 1934 under fifty.
The trustee did not divide the trust at that time because the entire trust
property was subject to possible claims against the estate of the settlor's de-
ceased husband, which claims were not finally settled until 1940. In January,
1941, the three grandchildren authorized the trustee to defer division until
their further direction. In 1957 they demanded division and distribution to
them of the second part. The trustee sought instructions and was directed
by the trial court to refuse to divide on the ground that its inaction in
1934 was an allocation of the entire trust property to the first part which

83. Edgar v. Fitzpatrick, 369 S.W.2d 592 (Spr. Mo. App. 1963), 28 Mo. L.
Rev. 588, 597-98, 631-32 (1963). See Lowe, Transfers in Fraud of Marital Rights,
84. The opinion suggests that the trust might be illusory because of the
settlor's retention of an undue amount of control. Edgar v. Fitzpatrick, supra note
80 at 316-17. Cf. RESTATEMENT (SECOND), TRUSTS § 57 and comment h (1959).
85. 370 S.W.2d 375 (Mo. 1963). Busch v. Dozier, supra note 65, also involved
construction of the terms of an inter vivos trust. Mercantile Trust Co. v. Muck-
eman, supra note 64, and Mercantile Trust Co. v. Hammerstein, supra note 66 in-
volved construction of testamentary trust terms.
exhausted the power to divide. This judgment was reversed and the trustee directed to effect the division and distribution. The opinion reflects the sound view which, unfortunately, has not always been remembered in Missouri judicial decisions,86 that trust property belongs, in equity, to the beneficiaries, not to the settlor or the trustee.

XI. Resulting Trusts

In Hovey v. Hovey,87 the usual rule, that when a husband pays the purchase price for land conveyed to his wife a gift is presumed and a resulting trust may be established only if the presumption is rebutted by convincing evidence that such a trust was intended at the time of the purchase, was applied.88 A determination that the presumption had not been rebutted by the evidence presented by the husband was affirmed.

86. E.g. Thomson v. Union Nat'l Bank, 291 S.W.2d 178 (Mo. 1956), criticized, 32 N.Y.U.L. Rev. 419, 430 (1957); 22 Mo. L. Rev. 390-95 (1957).
87. 379 S.W.2d 621 (Mo. 1964).