

# TENNESSEE BAR JOURNAL

JANUARY/FEBRUARY 2024

VOLUME 60, NO. 1

## The 'Big 3' of Intellectual Property Law

SCOTUS' 2023 Term  
Provides Clarity in  
Trademark, Copyright  
and Patent Decisions

### ALSO:

Eminent Domain Law, Landowners  
and Blue Oval City

Does Tennessee Have an Exception  
to the Employment-at-Will Doctrine?

Spotlight on the Tennessee State High  
School Mock Trial Competition





# Death & Taxes, Part 2

## More Trusts and Estates Developments



“Making a sequel to anything is just a cheap carny trick.”  
—Steven Spielberg<sup>1</sup>

**I**n the September/October 2023 issue of the *Journal*, this column discussed various developments relevant to trusts and estates (T&E) practice.<sup>2</sup> Understanding that the sequel is rarely as good as the original, let’s look at additional T&E developments that lawyers should know as they counsel clients.

### FEDERAL ESTATE AND GIFT TAXES

The gift tax annual exclusion has increased from \$17,000 to \$18,000 for 2024.<sup>3</sup> The cumulative gift tax (during life) and estate tax (at death) exemption amount in 2024 has increased from \$12.92 million to \$13.61 million per person (\$27.22 million

per married couple). The exemption is adjusted annually for inflation but scheduled to be cut in half on Jan. 1, 2026. Because of the scheduled 2026 halving, plus the fact that the “generation-skipping transfer” (GST) tax exemption is not “portable” between spouses, individuals and couples with estates exceeding \$7-8 million should consider transfer tax planning.

### CORPORATE TRANSPARENCY ACT<sup>4</sup>

The Financial Crimes Enforcement Network (FinCEN) issued a final rule on Nov. 29, 2023, extending to 90 days the deadline for an entity created in 2024

to file its initial beneficial ownership information reports, which is still a short deadline.<sup>5</sup> Reporting companies created or registered before 2024 will continue to have until Jan. 1, 2025 to file their initial reports.

## TENNESSEE CASES

Several additional 2023 Tennessee cases are relevant to T&E practice:

### **The Testator Must Sign the Will and the Self-Proving Affidavit is Not the Will: *In re Estate of Dariel Blackledge Washington***<sup>6</sup>

Decedent's siblings alleged a document to be decedent's last will and testament. The decedent did not sign in the place provided at the end of the will's dispositive provisions, but two witnesses did. The decedent and witnesses signed a later page titled "Affidavit." The Tennessee Court of Appeals noted that the Tennessee Supreme Court in *In re Estate of Chastain*<sup>7</sup> ruled that Tennessee law requires strict compliance with the Tennessee General Assembly's statutory will execution requirements and that the testator's signature on the self-proving affidavit, a separate legal document, is not the testator's signature on the will. Even though the "affidavit" referred to "this instrument" as the testator's will, the court concluded that the will was ineffective due to the lack of the decedent's signature because 1) the page with the witnesses' first signatures referred to "the above instrument" as the will and 2) the "affidavit," even though signed by the testator, was a self-proving affidavit (not part of the will). This case is consistent with the principles in several cases and one statutory change since at least 2008 regarding witness signatures on the self-proving affidavit rather than the will.<sup>8</sup>

---

EDDY SMITH practices with Kennerly Montgomery in Knoxville. He focuses on planning, administration, and litigation related to trusts, estates, businesses and non-profits. Smith is a fellow of The American College of Trust and Estate Counsel and served as chair of the TBA Estate Planning and Probate Section.

### **Will Residuary Clause Invalidated Because the Product of Undue Influence: *In re Estate of Chaney***<sup>9</sup>

Decedent's will left the residue of his estate to his daughter, to the exclusion of his son, which represented a change to the residuary provision from a prior will. Son contested the will, alleging undue influence by the daughter.

Among the rules reviewed by the Tennessee Court of Appeals: a confidential relationship is any relationship that gives one person the ability to exercise dominion and control over another; the burden of showing confidential relationship is on the contestant; if a confidential relationship exists, the contestant must also show "suspicious circumstances" in the procurement or execution of the will, including the dominant party obtaining a benefit from the other party; if the contestant proves a confidential relationship and suspicious circumstances, then the burden shifts to the proponent to rebut a presumption of undue influence by clear and convincing evidence that the will was the product of the decedent's independent judgment.

Applying these principles, the court noted decedent's declining physical health, decedent's resulting dependency on the daughter, daughter's control over decedent's financial affairs, daughter's involvement in procuring the new will and the residuary clause being inconsistent with decedent's previous pattern of dealing with the property. The court ruled that a confidential relationship existed between daughter and decedent and daughter failed to overcome the presumption of undue influence.

### **Transfers Shortly Before Death Were Intended to Defeat the Spousal Elective Share: *In re Estate of Quinn***<sup>10</sup>

Within three days of his death, a decedent transferred three properties to his ex-wife (with whom he was living) and children for no consideration. His surviving spouse sought to set aside the transfers or to have the value of the transferred property included in the decedent's net estate under *Tenn. Code Ann.* § 31-1-105, which applies

when a decedent transferred property "with an intent to defeat the surviving spouse's elective or distributive share."

The Tennessee Court of Appeals reviewed the facts and circumstances surrounding the transfer, plus seven non-exhaustive factors to be considered in determining intent: 1) whether the transfer was made with or without consideration, 2) the size of the transfer in relation to the decedent's total estate, 3) the time between the transfer and the decedent's death, 4) relations that existed between the spouses at the time of the transfer, 5) the source from which the property came, 6) whether the transfer was illusory, and 7) whether the surviving spouse was adequately provided for in the will. The court found that the decedent was attempting to disinherit his wife by quitclaiming the property just prior to his death. The decedent was in the process of divorcing his wife. One of the deeds was executed by the decedent and the other two deeds were executed by the decedent's attorney-in-fact, his daughter. The court found it significant that the decedent gave the property to his children (with a life estate to his ex-wife) through his will, but then decided to quitclaim the same property just prior to his death. The court held that all three properties were conveyed with the intent to defeat the wife's elective share, which was to be recalculated based on a net estate that included the properties.

### **Suing the Trustee for Breach of Trust is Not a Trust "Contest": *In re Lieselotte H. Rogoish Revocable Living Trust***<sup>11</sup>

A trust beneficiary filed suit seeking an accounting and removal of the trustee for breach of trust. The trustee asserted the affirmative defense that by filing the lawsuit, the beneficiary violated the trust's no-contest clause. Under *Tenn. Code Ann.* § 35-15-1014, a no-contest provision is enforceable according to its express terms, unless probable cause exists for various factors speaking to the validity of the provision. However, *Tenn. Code Ann.* § 35-14-1014(c) lists actions that do not

CONTINUED ON PAGE 40 >

violate a no-contest provision, including “[a]ny action brought solely to challenge the acts of the trustee . . . to the extent that the trustee . . . has committed a breach of fiduciary duties or breach of trust.”<sup>12</sup> The Tennessee Court of Appeals held that the beneficiary did not violate the express terms of the no contest provision because she was challenging the actions of the trustee in administering the trust, not the validity of the trust itself.

**File the Lawsuit Against the Trustee, Not the Beneficiary’s Estate: *In re Estate of Richadean Greer Wilson***<sup>13</sup>

Husband’s will created a trust with wife as income beneficiary for her life. Wife did not possess any power of appointment over the trust and the trust did not name her or her estate as a remainder beneficiary upon her death. After wife’s death, some of the trust remainder beneficiaries filed suit in wife’s estate, alleging that improper

invasion of the trust corpus reduced their distributive share as the remainder beneficiaries of the trust and inflated the estate. The Tennessee Court of Appeals ruled that the probate court in wife’s estate did not have subject matter jurisdiction over the actions of the trustee of a trust created in husband’s estate, noting that plaintiffs could have filed to reopen husband’s estate or filed a separate action against the trustee.

**Being Named in an Earlier Will or Codicil Provides Standing to Contest a Later Will, Even Before the Earlier Testamentary Document is Judged Valid: *In re Estate of Seeber***<sup>14</sup>

Various family members contested decedent’s will and produced copies of earlier wills and codicils in which they were named beneficiaries. The will proponent argued that contestants did not have standing until they overcame the

presumption of revocation of the earlier documents by destruction. The Tennessee Court of Appeals ruled that contestants pled facts sufficient to survive a motion to dismiss for lack of standing. A party establishes standing to bring a will contest if the party was named as a beneficiary under an earlier will or codicil or would be an intestate heir of the decedent if the will were invalidated.<sup>15</sup> The contestants were named as beneficiaries in prior wills. Even though the contestants had not produced the originals of the prior wills and had not initiated lost will proceedings, in order to find standing, the court could rely on copies of earlier documents to establish the substance or contents of the originals:

[T]his court reaches no conclusion as to which of the testamentary documents at issue . . . should be certified to the circuit court. Instead, this court concludes only that contestants have stated facts sufficient to withstand a motion to dismiss with regard to their standing.<sup>16</sup>

The court also ruled that the attorney-client privilege did not attach to the previous wills and codicils. *Tenn. Code Ann.* § 32-1-113 required decedent’s attorney to send to the court clerk any document (even photocopies of documents) purporting to be a last will or codicil.

**CONCLUSION**

2023 was a busy year for T&E-related developments and it can be hard to keep up. With a significant percentage of the U.S. population becoming elderly and dying, expect 2024 and following to be just as busy. III

**NOTES**

1. Quoted in Nashawaty, “Jaws Is an Undisputed Masterpiece. So How Did It Produce One of the Worst Sequels Ever Made?”, *Esquire*, available at <https://www.esquire.com/entertainment/movies/a33338461/why-jaws-sequel-4-the-revenge-is-so-bad-anniversary-essay/>, published July 17, 2020. (Spielberg reportedly said this when asked to make a sequel to *Jaws*. He later met Indiana Jones.)
2. Eddy Smith, “Death and Taxes: Select

Capture time for calls, texts and emails automatically.

TIMEMINERAPP.COM

Trusts and Estates Developments,” *Tennessee Bar Journal*, September/October 2023, Vol. 59, No. 5, available at [www.tba.org/Smith\\_DeathTaxes1](http://www.tba.org/Smith_DeathTaxes1).

3. See “IRS provides tax inflation adjustments for tax year 2024,” available at [www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2024](http://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2024).

4. See column cited *supra*, note 1, for introduction.

5. Available at [www.fincen.gov/news/news-releases/fincen-extends-deadline-companies-created-or-registered-2024-file-beneficial](http://www.fincen.gov/news/news-releases/fincen-extends-deadline-companies-created-or-registered-2024-file-beneficial).

6. *In re Estate of Dariel Blackledge Washington*, No. M2022-01326-COA-R3-CV (Tenn. Ct. App. Aug. 1, 2023).

7. *In re Estate of Chastain*, 401 S.W.3d 612 (Tenn. 2012).

8. See *In re Estate of Stringfield*, 283 S.W.3d 832 (Tenn. Ct. App. 2008); *In re Estate of Morris*, No. M2014-00874-COA-R3-CV, 2015 WL 557970 (Tenn. Ct. App. 2015), perm. app. denied (Tenn. 2015); *Tenn. Code Ann.* § 32-1-104(b); *In re*

*Estate of Morris*, No. M2016-02557-COA-R3-CV (Tenn. Ct. App. 2017), perm. app. denied (Tenn. 2018); Eddy Smith, “Strictly Speaking, When Is a Will Not a Will?” *Tennessee Bar Journal*, August 2015, available at [www.tba.org/Smith\\_WhenWillNotWill](http://www.tba.org/Smith_WhenWillNotWill).

9. *In re Estate of Chaney*, No. E2022-01051-COA-R3-CV, (Tenn. Ct. App. Sept. 28, 2023).

10. *In re Estate of Quinn*, No. M2022-00532-COA-R3-CV, 2023 WL 5013257 (Tenn. Ct. App. Aug. 7, 2023).

11. *In re Lieselotte H. Rogoish Revocable Living Trust*, No. M2022-01464-COA-R3-CV, (Tenn. Ct. App. Oct. 16, 2023).

12. *Tenn. Code Ann.* § 35-14-1014(c)(1).

13. *In re Estate of Richadean Greer Wilson*, No. W2021-00862-COA-R3-CV (Tenn. Ct. App. Feb. 10, 2023).

14. *In re Estate of Seeber*, No. E2022-01476-COA-R3-CV (Tenn. Ct. App. Sept. 27, 2023).

15. *Id.* at 9, citing *Estate of Brock*, 536 S.W.3d 409, 414 (Tenn. 2017).

16. *Id.* at 14.

## The Vowell Law Firm

APPELLATE COUNSEL IN THE  
TENNESSEE AND FEDERAL  
COURTS OF APPEAL

Certified Civil Trial  
Specialist Since 1997

Summary Judgment  
Consultant

### Record on Appeal Since 2019

— 9 wins, 1 loss

- 3 reversals of the trial court (Tennessee Court of Appeals)
- 1 reversal of the trial court (Tennessee Supreme Court Workers Compensation Panel)
- 3 reversals of the United States District Court (Sixth Circuit Court of Appeals)
- 2 preservations of the trial court decision (Tennessee Court of Appeals)



**Donald K. Vowell**

865-292-0000  
865-292-0002 (fax)  
[don@vowell-law.com](mailto:don@vowell-law.com)  
[www.vowell-law.com](http://www.vowell-law.com)

## Dealing with Anxious Heirs?



### ProbateCash is the Fix.

ProbateCash provides upfront cash to heirs waiting for inheritance money tied up in probate court. To learn more and/or ask about litigation funding, call...

**(844) 867-0204**

To Learn More Scan Here



SCAN ME

ProbateCash.com and NewProbateTool.com are trade names of Novation Inheritance, LLC.  
1641 Worthington Rd #280, West Palm Beach, FL 33409