Washington University Law Review

Volume 6 | Issue 3

January 1921

The Clinch of the Dead Hand: Some Observations on Posthumous Control over Property

Virgil M. Harris

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SOME OBSERVATIONS ON POSTHUMOUS CONTROL OVER PROPERTY.

"A little gold that's sure each week,
That comes not from my living kind;
But from a dead man in his grave,
Who cannot change his mind."

The old Egyptians were wise beyond their day and generation. History relates that at their feasts it was their custom to bring in a skeleton as a reminder of the shortness and uncertainty of life. Did it make them unhappy? Not at all. On the contrary, the presence of skeletons at Egyptian banquets furnished incitement to greater merriment. The bones were pelted and the revelers called for more wine.

The "Jolly Testator," the man who wrote his own will, and who was a standing toast for the old English barristers as "the lawyers' best friend," has continued undismayed by the skeleton milestones in the history of wills from time immemorial. He has refused to profit by the experience of others. In fact, if we examine the court records and follow the train of disastrous consequences of poorly written, "home made" or "ready-made" wills, we find that new terrors have been added to death.

The fatal belief persists, in men who have otherwise in their business life shown keen perception and foresight, that the writing of a will calls for less erudition and care than the preparation of an ordinary business document. The average lawyer cannot specialize in will writing, for in general practice he will probably not be called on to write half a dozen wills a year.

Few testators have definite ideas as to the distribution of their property. Disposition is often made by the lawyer who

writes the will. It is obvious, therefore, that the adviser should be a man of sound judgment in worldly and legal affairs; that he should have a thorough understanding as to the family relations of the will maker.

Many estates have been wrecked by a lack of understanding of the laws of perpetuity and an inordinate desire for posthumous fame. Not long ago there died in Missouri one of its foremost citizens. He left an estate valued at several million dollars. His children were middle-aged, capable, and highly respected. By his will he created a trust of his whole estate, the principal to be divided between his descendants living at the end of the trust, which was to terminate twenty-one years after the death of the last of his grandchildren who were living at the time of his death. Assuming that any of his grandchildren should live as long as the grandfather, this trust would run for more than a hundred years. The wisdom of such testamentary trusts is controverted by experience.

All trusts of a general public, charitable character are excluded from the operation of the law of perpetuities, and are excluded from the purview of this article. One of the most frequent and dangerous propensities which the law has to check and guard against is testators in the desire for perpetuating the family name and the accumulation of large estates. Hence we have the so-called law against perpetuities.

We find that this law, early in its history, guarded against indefinite control of property and the perpetuation of fortunes. The old common law against the creation of a perpetuity has descended to us, but has been modified by the statutes of many of our states. This rule of English law, which held that the period within which an estate might be preserved, without vesting absolutely in some one, could not exceed a life or lives in being, plus twenty-one years and nine months, has been controlling in preventing abuse of property rights.

The celebrated Thellusson Will Case, decided in 1798 by the English courts, is an illustration of the operation of the com-

mon law as showing how far a testator could go in conserving his estate; it is the leading case on the subject, and the most extraordinary instance to be found in the law books on testamentary meanness and vanity.

The preservation and accumulation of property appeals to some of the dearest and most profound feeling of a man's nature. It gratifies pride and pomp, and unless we had some restraint it would be carried to extremes that would be dangerous to public welfare. It locks up and would withdraw from the channels of trade and enterprise a vast amount of property, dedicated to personal vanity rather than to the good of society. Consequently, every civilized country finds it necessary to define the extent of a man's control over his own property, how long his volition can regulate its use after death, and to what purpose it shall be employed.

Unlimited power to control property is entirely incompatible withour republican ideas and traditions, and offensive to the principle of equal rights of our citizens. But, even if the legal restraints should not suffice, there is an omniscient power which decrees that vain and ambitious visions of testators are often destined to disappointment. The history of property tenure and descent shows that such projections of property after death share the inevitable fate of nearly all great estates that fall into the gristmill of the courts and the lawyers and are subjected to taxation and the wear and tear of change and time.

Technical rules have rendered many a noble scheme abortive, and have also frustrated the benevolent and reformatory plans of many a well-meaning testator. It is said that in no part of the world is the making of a will so delicate an operation as in the state of New York, where the rule of the common law on the subject of remoteness has been abrogated. This must be true, if litigation on the subject be a fair test.

The Hacker will is one of many examples in which the testator provided that the estate should not be "given or sold in the name of the Hacker family, and must remain the

Hacker estate forever." The courts hold this will invalid, because it violated the law against the creating of perpetuity. Likewise the law of primogeniture, which designs the descent of an estate to oldest sons to the exclusion of other members of the family, is inimical to American law and tradition.

The preservation of property through instruments of trust, or to carry out cherished plans, provides wise and commendable avenues for the protection of those left behind, for deserving and for benevolent ends. But too frequently we meet extraordinary instances of calculating and impelling pride and vanity in testators. They often disregard the ease and comfort of immediate descendants for the questionable satisfaction of enjoying in anticipation the wealth and aggrandizement of distant posterity. Such iron-hearted schemes of settlement, by withdrawing property for a long period from all the uses and purposes of social and economic life, are intolerable and opposed to the welfare of the nation.

One can readily see the necessity for the creation of a trust of limited duration for those who are dependent or who are incapacitated. It does not follow, however, that a general declaration of trust for those who are competent to take care of themselves is of any advantage. In truth, it may be a serious detriment from many points of view. We need not search the files of history, but find numerous instances in our our own daily life and contacts, which show that very often dependents are ungrateful, that long trusts destroy initiative and self-reliance in the younger generation, and offer an ever-present temptation for litigation and will breaking.

The Eighteenth and Nineteenth Amendments both tend to lessen the necessity for long trusts. The last enactment presents an entirely new field of conjecture as to the future apportionment and handing down of estates. In olden times, the wife was practically a slave, so far as her property interests were concerned, and no picture in English or American history is more disgraceful than this treatment of married women.

So soon as a woman married, her property became absolutely that of her husband; and it is no small wonder that the father of marriageable daughters took pains to see that the property rights of his daughters were secured through the medium of trusts; but women are now free with reference to their property rights, and with experience, and the right to vote, will become quite as capable as men in the management of their own affairs.

A son who goes out into the world with a spendthrift trust over him bears a brand which fetters and humiliates. Few men trust their future sons-in-law, and very often are unwilling to trust their sons and daughters with the management of property. The fact remains, however, that the younger generation is showing an aptitude for business, and an ability to care for itself, and with the numerous agencies for sound advice now existing, all women may have ample protection; already in a political way, under the new order of things, the members of the masculine sex have begun to "run to and fro," and to realize that "knowledge shall be increased."

It is not given to us to peer very far into the future. We can span the Niagara river, but not the Atlantic Ocean. The brain of man is flexible and adaptable, but brick and mortar are not. "Dogs and dogmas have their day," and many of the reasons, if any substantial reasons ever existed, for long trusts, have disappeared. To bring about certain disappointment, to buy censure where one aimed to silence it, to carve a family name on a gold brick, is not efficient giving. To create a perpetual fund for teaching German in our own schools, to add a wing to a hospital where none is needed and cannot be maintained, to outline the policies of a church for all time, are donations the wisdom of which may be seriously controverted.

There can be no just reason to permit a testator to accumulate property after his death; such a course casts a moral and economical blight upon his descendants, and is a distinct injury to the community.

The years roll on, but human nature does not change. Desire for posthumous fame plays an important part in long trusts; the "ruling passion strong in death" is ever present. Pope was not only a poet, but a philosopher, and he says:

> "But thousands die without, or with, this or that—
> Die, and endow a college or a cat.
> Who builds a church to God and not to fame,
> Will never mark the marble with his name."

VIRGIL M. HARRIS.