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AN ECCLESIASTICAL ROLE FOR THE LAWYER IN A SECULAR SOCIETY

BY THOMPSON G. MARSH

Dr. Marsh adds his comments to the growing inquiry regarding the nature of the lawyer's role in our worldly society. He examines the common law pitfalls into which the "reasonably prudent layman" may stumble when he bypasses the lawyer in planning his estate. His analysis reveals the enigmatic role required of today's lawyer — that of incorporating the secular with the divine in his own earthly existence in order to mitigate the disenchantment of these dead souls.

TODAY'S secularism imposes upon the lawyer a new role. He must do what he can to alleviate the mental agonies of the dead. It is a matter of common knowledge that when the reasonably prudent decedent learns that he has died owning more property than he thought he had, he is aghast.

After a brave life spent in defense of his property against the tax gatherers, they now dig up an unsuspected addition to his taxable estate but they don't dig him up to defend it. To make matters worse, any of this newly discovered property that is left after taxes is liable to wind up in the hands of the very person to whom the decedent would not have given it if he had known that he had it. The resulting frustration is so great that many godly souls develop persecution complexes and believe that they are in hell. Allen, Brock, Craig, and Dixon are typical, pitiful victims of this fate.

Allen, a widower, owned a farm. His only child, Jane, and her worthless husband, Jim, moved in on him. Allen wanted to make sure that the farm would stay in the family and that Jim would never get any part of it. He also wanted to avoid estate taxes. So, in 1920 he deeded the farm "to my daughter Jane for her life, and then to her children in fee simple." The deed was delivered to Jane, who recorded it. She thereafter managed the farm and paid the taxes.

Allen died in 1921. Jane's only children, twins, were born in 1923. In 1945 Jane died intestate, survived by her husband Jim and the twenty-two year old twins. Since the statute of descent and distribution was similar to the one in Colorado,[1] worthless Jim got half the farm.

This is just what Allen had tried to prevent. He could not believe it when he heard that the judge had said that, in spite of his

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[1] COLO. REV. STAT. § 153-2-1 (1963).

deed, Allen had died owning the farm in fee simple. However, the estate tax collectors believed it, and took their share.

It is perhaps unfortunate that Allen was a godly soul, because where he is there are no lawyers, and he will never have the mystery explained to him. When his deed was delivered to Jane she had no children and so of course the estate in fee simple did not pass to them at that time. The attempted conveyance to them merely created a contingent remainder. Jane got her life estate in possession, but Allen still retained his estate in fee simple in reversion, subject to divestment upon the birth of a child to Jane.

No child was born to Jane during Allen's lifetime. Therefore, his reversion descended to Jane, his only heir, and was a part of his taxable estate.

The life estate which Jane had acquired by the deed merged into the fee simple which she inherited and was thereby ended. Since the contingent remainder had not yet vested it was destroyed, and would not thereafter be restored by the subsequent birth of the twins. Consequently, Jane died owning the farm in fee simple absolute. All of this is a matter of orthodox common law.[2] The fact that Jim inherited one half of her farm is a matter of statute.[3]

Brock, who had known of Allen's plans, was astonished at the outcome; but he was told that Allen could have accomplished his purpose if he had conveyed his farm in trust for Jane and her children, because the rule of destructibility of contingent remainders does not apply to trusts.

Brock acted upon this suggestion, and in 1946, deeded his farm to the Trust Company, to manage and pay over the net income quarterly, as follows: "to me for my life, and after my death to my wife Victoria for her life, and after Victoria and I are both dead, to my son Paul for his life, and after Victoria and Paul and I are dead, to convey the farm to my heirs."

Brock still had a few old books and pictures left, and in his will he gave "all the rest and residue of my property to the University of Pennsylvania." Victoria and Paul died in 1947, and Brock died in 1948, leaving his brother and his sister as his only heirs.

Brock rested peacefully because he loved his brother and sister and knew that they would take good care of the old farm. However, a Philadelphia lawyer persuaded a court to order the Trust Company to convey the farm to the University of Pennsylvania.

Poor godly Brock. Where he is, he is not even permitted to curse the court, but he has plenty of company. For centuries the

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[2] See Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931).

[3] COLO. REV. STAT. § 153-2-1 (1963).

courts of the common law have held that no one, by trust or otherwise, can convey his own property to his own heirs by using the word "heirs."[4] The attempt to do so is a nullity. Therefore, Brock still owned the farm in fee simple when he died, and it passed under the residuary clause of his will.

Craig was told that if Brock had used descriptive words such as "children," "brothers," "sisters" or "nephews," rather than the technical term "heirs," his trust would have been completely effective.

Craig was very much interested in this explanation, but he preferred the university to his dead-beat brother and sister, and he liked the idea of a tax-free gift to charity.

In 1949, he deeded his farm to the Trust Company, to manage and pay over the net income as follows: "to me for my life, and after my death to my widow for her life, and after her death to my son for his life, and after I and my widow and my son are dead, then to convey the farm to such of my grandchildren as are then living, and if there be no such grandchildren, to the University of Pennsylvania."

In 1950, Craig's wife and son died and there were no surviving grandchildren. In 1952, Craig died leaving his unloved brother and sister as his only heirs. They got the farm.

In a similar case, speaking of such a testator, Lord Dunedin said, "He has used the words . . . and I am afraid he must take the consequences."[5] What had Craig done? He had violated the Rule Against Perpetuities. Craig might have remarried; his widow might have been someone who was not in existence when the deed was delivered to the Trust Company. The contingent gift to such grandchildren as might be living at the death of the widow is void for remoteness, and so is the alternative contingent gift to the university.[6] Craig had died owning the farm in fee simple. It was a part of his taxable estate. The government took the estate tax, the brother and sister took the farm — Craig took the consequences.

Dixon, having heard about Adams, Brock, and Craig, decided not to run the risk of such a posthumously distressing distribution. He would make sure that he didn't own anything when he died. When he bought a farm in 1951, he saw to it that the land was not conveyed to him in fee simple, but only for his life, so that when he died there would be nothing in his estate. The deed to the farm was in these words, "to Dixon for his life only, and then to his wife Mary for her life only, and then to the heirs of Dixon."

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[4] *In re* Brolasky's Estate, 302 Pa. 439, 153 Atl. 739 (1931).

[5] Ward v. Van Der Loeff, [1924] A.C. 653, 667.

[6] See Perkins v. Iglehart, 183 Md. 520, 39 A.2d. 672 (1944).

Mary died in 1954. Dixon in the meantime had accumulated a few stocks and bonds. His only child was John, and the farm would be more than enough for him. So as a gesture of loyalty in 1955, he willed "all of my property to the University of Pennsylvania."

In 1956, Dixon died. The University of Pennsylvania got the farm and son John went on relief. There is no relief for Dixon nor for any of the thousands of souls who, during their time on earth, have brought themselves within the reach of the Rule in Shelley's Case.

In spite of the plain meaning of the deed, its effect was to give Dixon a life estate, Mary a life estate, and Dixon himself, not his heirs, the remainder in fee simple absolute.[7] He owned it when he died. It was a part of his taxable estate, and it passed under his will to the university.

Prudent laymen like Adams, Brock, Craig, and Dixon know so much law that they will continue to follow the well-worn paths of those many generations of property owners who have by-passed all lawyers on their way to heaven. No doubt this is a sin of omission, but should it be punished by eternal bewilderment? If only these godly souls could talk to a lawyer. There would be plenty of time for everything to be explained — over and over again — a sort of posthumous psychotherapy.

It is therefore the responsibility of the legal profession and of the individual lawyer to do whatever can be done to diminish the discomforture of those deserving decedents who had determined to die destitute. The challenge of this new role is perplexing. Lawyers must become psychiatrists; they must live such pure lives that they will go to heaven and there commune with the godly Allens, Brocks, Craigs, and Dixons throughout eternity; and yet withal they must be lawyers.

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[7] See Seymour v. Heubaum, 65 Ill. App. 2d 89, 211 N.E.2d 897 (1965).