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STATE OF WASHINGTON

No. 86412-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In the Matter of the Estate of James W. Haviland.

DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA
CLAUSER,

Respondents,

v.

MARY HAVILAND,

Petitioner.

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MARY HAVILAND'S RESPONSE TO BRIEF OF *AMICUS CURIAE*
WASHINGTON ASSOCIATION OF PROFESSIONAL GUARDIANS

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ORIGINAL

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Mary Haviland, the petitioner in this Court and the respondent in the Court of Appeals (hereinafter “Petitioner”), files this brief in response to the Brief of Amicus Curiae Washington Association of Professional Guardians.

I. ARGUMENT

A. **Petitioner Does Not Assert the Existence of a “Constitutional Right to Continue Profiting from the Exploitation of a Vulnerable Adult.”**

In its zeal to protect the interests of those vulnerable adults whom its members serve, the Washington Association of Professional Guardians (“WAPG”) perhaps inadvertently mischaracterizes the issue in this case. The Petitioner does not, as the WAPG suggests, assert that she or anyone else has a constitutional right to “continue profiting from the vulnerability they exploited.” WAPG Br., at 4. Rather, Petitioner asserts (among other things) a constitutional right not be deprived of vested interests in property without due process, and a constitutional right to be free of ex post facto laws. The alleged financial exploitation, if it occurred, occurred prior to November 14, 2007, the date on which Dr. Haviland died. Under the law of this state, and under widely accepted probate law, the rights of heirs and beneficiaries of a decedent are fixed according to the law in existence as of the date of death. Twenty months after the date of death, the legislature of this state adopted the abuser amendments to the slayer statute. Those

abuser amendments, where they apply, drastically change the law. The amendments change the laws of intestate succession as to estates passing without a Will. They change the law of Wills with respect to decedents who died testate. They change the law regarding construction and enforceability of beneficiary designations in insurance policies, the law of trusts, and the law regarding ownership of bank accounts upon the death of a cotenant. *See* Supplemental Br. of Mary Haviland, at 7-8.

The constitutional rights that Mary Haviland seeks to preserve are the constitutional rights that protect every citizen of this state. Although Mary Haviland has had no hearing on any claim of financial exploitation, and no court has found her to be an exploiter, the WAPG attempts to paint an unflattering picture of Mary Haviland. *See e.g.*, WAPG Br., at 1 & n.3, 2, 4 n.5. Mary Haviland's character has no bearing on this case. *Every* citizen, no matter how virtuous or unvirtuous in the eyes of others, is entitled to the same protection of the constitution and laws of this state as every other citizen.

The WAPG argues that there is no constitutional right to avoid the legitimate consequences of wrongful conduct, quoting from *Reynolds v. United States*, 98 U.S. 145, 159, 25 L.Ed 244 (1879). WAPG Br., at 1, 7. While the quotation itself may be convenient for the WAPG, the facts of

that case bear no similarity to the facts here.¹ And in any event, the phrase “legitimate consequences” reserves the very question that is at issue in this case: whether the legislature may legitimately—may constitutionally—alter the laws of succession after the death of a decedent, in order to impose new consequences for alleged abuse occurring before death.

B. The WAPG Incorrectly Argues That Vested Rights Are Subject to Challenge.

In Section III.B of its brief, the WAPG argues that “even ‘vested’ rights are subject to challenge.” WAPG Br., at 7. The WAPG argues, for example, that rights that vest under a will may be divested if a will is successfully contested. It is certainly true that if a will is admitted to probate, and is then subsequently proven to be invalid, the persons who would have inherited under the challenged instrument will not be entitled to do so. It can scarcely be said, however, that persons who are named as devisees in an invalid will that was temporarily admitted to probate ever acquired any rights at all under the will. Certainly the determination of the invalidity of a will (under the law as it existed at the date of death, based on facts existing though perhaps not widely known at the date of death) is not comparable to changing the substantive law of intestate succession,

¹ The defendant in *Reynolds* procured the absence of an adverse witness, and then claimed he was denied his constitutional right to confront the witnesses against him when the trial court allowed the absent witness’s testimony, given in a former trial of the defendant for the same crimes, to be read to the jury. *Reynolds v. U.S.*, 98 U.S. at 158-60.

wills, trusts, beneficiary designations and joint accounts, and then applying the new laws to divest heirs and beneficiaries of inheritance rights in the estates of decedents who died before the law was enacted.

The WAPG cites *Estate of Graley*, 183 Wash. 268, 274 (1935) for the proposition that a decree of distribution may create title for the first time, and may shift title away from a person in whom it vested at death. The WAPG suggests that the Court in *Graley* described vesting of title in a decedent's estate in a "true heir" as only a "legal assumption." WAPG Br., at 8. The facts in *Graley* were, again, entirely different than the facts here.² Moreover, the *Graley* court in fact confirmed, in unambiguous language, the general principle of vesting of title in a decedent's estate:

This court has repeatedly stated the general principle that, upon the death of the ancestor, the title to his real estate vests immediately in his heirs, and in the case of *Kempf v. Michelbach*, 115 Wash. 193, 196 Pac. 661, it was said: 'Nor does a decree of distribution create a title in any event. It

² In *Graley*, a statute provided that in the event a decedent possessed of property died intestate and without heirs, "such property shall escheat to, and the title thereto immediately vest in the state of Washington, subject, however, to existing liens thereon, the payments of decedent's debts, and the expenses of administration." *Graley*, at 270. The statute also provided that if no heir appeared within 18 months following the issuance of letters of administration, the court was to enter a decree escheating the property to the state. The Court was asked to decide whether, during this 18 month period, the administrator was obligated to pay real estate taxes to the county as they became due. The Court answered the question in the affirmative, noting that it was not possible to know, until the end of the 18 month period, whether the property would escheat, and also noting the practical difficulty for the county treasurer of creating a sinking fund to reimburse estates for taxes paid when property of a decedent in fact escheated at the end of the 18 months. *Id.* at 276-77. There was no question in *Graley* of the impact on a decedent's estate of a new statute enacted after the date of death.

only declares who has acquired the title of the deceased. *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990; *In re Decker's Estate*, 105 Wash. 221, 177 Pac. 718.'

In the case of *Parr v. Davison*, 146 Wash. 354, 262 Pac. 959, we cited the *Kempf* case, and, referring to the question then under discussion, said: 'Nor did the decree of distribution in her estate create a title. . . . The function of a decree of distribution is to declare the title which accrues under the law of descents, or under the provisions of a will.'

These statements correctly define the purpose of a decree of distribution

Estate of Graley, 183 Wash. at 273. The Court then went on to describe a hypothetical situation in which a decree of distribution may grant title to a person other than the heir in whom it vested at death – when, in the hypothetical, the decedent's estate vests in a son who is living at the date of death but who is not found or chooses not to appear, thus leading ultimately to the entry of a decree of distribution in favor of a surviving brother, who would have taken nothing under the laws of intestate succession had the son appeared. *Id.* at 274. Again, this hypothetical divestment of the son's interest occurred as a consequence of facts and laws *existing at the date of death* – the fact that the decedent was survived by a brother, and the law making the brother the intestate heir if there were no issue.

Contrary to the WAPG's argument, the Court in *Graley* did *not* hold that the principle that the estate vests in the heirs and beneficiaries at the date of death is a "permutation of the equitable 'relation back' doctrine" WAPG Br. at 8. The Court first construed the escheat statute to provide that, because of the 18 month waiting period, the title of the state pursuant to an escheat would actually vest, not on the date of death, but at the end of the 18 months; and the Court then declined to apply the independent doctrine of relation back to relieve the estate of the obligation to pay real property taxes to the county. *Graley*, at 277. The doctrine of relation back has no bearing on this case.

The opinion in *Estate of Little*, 127 Wn. App. 915 (2005) does not illustrate the "illusory quality of 'vesting at death'" WAPG Br., at 10. Quite to the contrary, the case underscores the importance of the rights that heirs and beneficiaries acquire immediately upon death. In *Little*, the decedent's will left his estate to his friend Vannoy, and nominated Vannoy as his executor. On Vannoy's petition, the trial court admitted the will to probate and confirmed Vannoy's appointment as executor. Vannoy knew of at least one person, a nephew, who was decedent's heir, but failed to give the nephew (or any of several other

heirs³) notice of his appointment and of the pendency of the probate, as required by RCW 11.28.237(1). Vannoy eventually completed the nonintervention administration of the probate and distributed the assets of the estate to himself. When the heirs – all nieces and nephews of the decedent – subsequently discovered that their uncle had died, they petitioned to reopen the estate. The trial court granted the petition and the Court of Appeals affirmed, holding in essence that the final decree in favor of Vannoy was to be vacated in order to permit the heirs to protect whatever rights they had acquired when their uncle died.

The principle that title to the assets of a decedent's estate vest in his heirs and devisees as of the date of death, and that an estate passes according to the laws in existence at the date of death, has deep roots in American jurisprudence. *See, e.g.*, 23 Am. Jur. 2d, *Descent & Distribution* §§ 8, 14 (2002); 6 William J. Bowe & Douglas H. Parker, *Page on the Law of Wills* § 59.2, at 419 & n.10 (2005) (App. 1-14); *Estate of Schmidt*, 134 Wash. 525 (1925) (title to property in husband's estate vested immediately in surviving wife, and would pass to wife and then to her heir at law, even though wife died shortly after husband, and before admission of husband's will to probate); *Estate of Parker*, 195 Wash. 105,

³ As the Court points out, *Estate of Little*, at 917, heirs are defined by statute to be the persons "who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate." RCW 11.02.005(6).

108 (1938) (“the real property and the right to the rents, issues, and profits thereof vested in [the devisee], at the instant of the death of [the testator]”); *Estate of Henderson*, 46 Wn.2d 401, 403 (1955); *Blake v. Blake*, 31 P.2d 768, 771 (1934). It cannot be gainsaid that by application of the abuser amendments to the facts of this case, the effect would be to deprive an heir or beneficiary of her vested rights in the estate, and to retrospectively change the law of succession in multiple significant respects, as noted above.

C. The Concept of Honoring the Decedent’s Intent Does Not Permit the Retrospective Modification of the Laws of Succession.

Finally, the WAPG argues that no vesting rule may override the decedent’s intent, and quotes the Court in *Horton v. Bd. Of Educ. Of Methodist Protestant Church*, 32 Wn.2d 99, 110 (1948) for the proposition that while “the law favors the early vesting of estates,” this is “not a rule which would override the contrary intent of the testator.” WAPG Br., at 11. Once again, this partial quote appears on its face (as used in the WAPG Brief) to be a convenient one for the WAPG but is in fact entirely inapposite to the case currently pending before this Court. In *Horton* the Court was faced with the construction of provisions in a trust created under the last will of Dexter Horton, who died in 1904. In his will Horton created a trust for his granddaughter Ida Briggs, and provided that on her

death the balance if any in the trust was to be distributed to Kansas City University, which, at the time the will was executed (and at the time Dexter Horton died), ran a functioning school, owning land and buildings, in Kansas City. Dexter Horton provided alternatively that if, after the satisfaction of every bequest in the will, there remained undistributed residue, the residue should be distributed to certain of his then living issue. The Kansas City University subsequently transferred its interest in the school to another entity, and purported also to assign to that entity its rights to any bequests under any instruments. The assignee subsequently transferred the operations of the school itself (but not the right to receive bequests) to a third entity. The rights under the assignment of bequests were transferred to the Board of Education of the Methodist Protestant Church (the "Board"), which had no connection with the school. When Ida Briggs subsequently died, the Board contended that it was entitled to receive what remained of the trust fund that Dexter Horton had created for her; but Dexter Horton's then living issue contended that the Kansas City University, described as a remainder beneficiary of the trust, had ceased to exist, and that they, Dexter Horton's issue, should receive the residue. The question was thus one of construction of the testamentary trust instrument. The Board encouraged the Court to apply a canon of construction that the law favors early vesting of the interest of a

beneficiary in a trust, and on this basis argued that the interest of Kansas City University vested at the death of Dexter Horton, and thus could be assigned to an entity that no longer engaged in the charitable activity of running the Kansas City University. It was in this context that the *Horton* Court said:

It may be admitted, as stated in the cited case, that the law favors the early vesting of estates, but it is further stated in the opinion, citing *Dougherty v. Thompson*, 167 N.Y. 472, 60 N.E. 760, that this rule ‘. . . is not a rule which would override the contrary intention of the testator, and is resorted to only for the purpose of avoiding ‘perpetuities, intestacy, illegal suspension of the power of alienation, and to effect an intent which might otherwise be defeated.’ In other words, it is a rule to be invoked in aid of the intention of the testator to create a vested remainder.

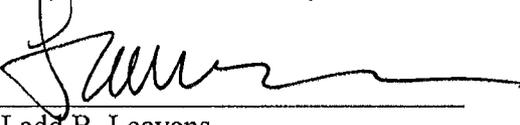
Horton, at 110. The Court was purely engaged in the construction of a trust instrument, which ultimately is a question of the decedent’s intent, and nothing else, guided only if necessary by canons of construction where the decedent did not make his or her intent plain in the instrument itself. There was no issue in the case regarding the application of *any* statute, let alone any statute that purported to change the law governing the succession of the estates of decedents who died before the statute was enacted.

II. CONCLUSION

For the foregoing reasons, and for reasons stated elsewhere in Petitioner's submissions in this matter, the Petitioner respectfully requests that the Order of the Superior Court be affirmed.

Respectfully submitted this 31st day of May, 2012.

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PROOF OF SERVICE

The undersigned hereby certifies and declares under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

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Lucy M. Collins

Revised Treatise
PAGE
ON THE
LAW OF WILLS

INCLUDING
PROBATE, WILL CONTESTS, EVIDENCE, TAXATION,
CONFLICTS, ESTATE PLANNING, FORMS,
AND STATUTES RELATING TO WILLS

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§ 59.2 Interest of beneficiary—in general

A devisee or legatee acquires no greater interest than the testator had,¹ except when the will is made in execution of a power.² If the property while in the hands of the testator was subject to a trust, such trust can be enforced against his devisee.³ The devisee is not entitled to and cause of action or defense in litigation involving the title to realty which the testator himself could have used.⁴ If the testator has divested himself of title to property by a

¹ **United States.** *McElroy v. Pegg*, 167 F(2d) 668; *United States v. 936.71 Acres of Land*, 418 F2d 551 (5th Cir 1969).

Alabama. *Leek v. Kahn*, 213 Ala 365, 105 So 185 (in equity of redemption).

Arkansas. *Hobbs v. Lenon*, 191 Ark 509, 87 SW(2d) 6; *Stewart v. Tucker*, 208 Ark 612, 188 SW(2d) 125; *Worthen Bank &c. Co. v. Green*, 237 Ark 785, 376 SW2d 275.

Illinois. *Brady v. Paine*, 391 Ill 596, 63 NE(2d) 721, 162 ALR 138 (partition; only part awarded to testator can pass by will).

Kansas. *Allbert v. Allbert*, 148 Kan 527, 83 P(2d) 795.

Massachusetts. *McCoy v. Natick*, 237 Mass 99, 129 NE 381 (in burial lot).

Nebraska. *Blum v. Poppenhagen*, 142 Neb 5, 5 NW(2d) 99 (testator held, subject to right of A to possession; devisee takes subject to same right); *Hahn v. Verret*, 143 Neb 820, 11 NW(2d) 551.

New Jersey. *Farmers Loan & Trust Co. v. Hewitt*, 94 NJEq 65, 118 Atl 267 (aff'd, *Farmers Loan & Trust Co. v. Hewitt*, 94 NJEq 187, 118 Atl 926) (in stock); *Hale v. Leeds*, 28 NJ 277, 146 A2d 216; *Metzdorf v. Borough of Rumson*, 67 NJSuper 121, 170 A2d 249 (devised realty subject to zoning ordinance).

New Mexico. *Arias v. Springer*, 42 NM 350, 78 P(2d) 153; *Conley v. Wikle*, 66 NM 366, 348 P2d 485.

New York. *In re Boerner*, 294 NYS2d 725 (specific bequest subject to storing charges or liens); *In re Cannavo*, 300 NYS2d 731.

Under New York law an agreement made by the testator to convey any property does not revoke a prior testamentary disposition of such property; instead such property passes under the will to the beneficiaries, subject to whatever rights were created by such agreement. NY Estates, Powers & Trusts Law § 3-4.2. See also IllRevStat ch.3, § 46a (Supp 1973-74); *In re Call*, 65 Misc2d 751, 317 NYS2d 867 (SurCt 1970) (specific legacy not adeemed to extent the contract to sell property was executory).

Ohio. *Maddox v. Reser*, 110 App 213, 13 OhioOps2d 8, 168 NE2d 923.

Oregon. *In re Wilson*, 85 Ore 604, 167 Pac 580 (in stock of corporation: part of capital having been distributed to testator and other stockholders); *In re Palmer*, 211 Ore 342, 315 P2d 164.

Pennsylvania. *Walters' Estate*, 8 Fiduciary 644 (Orph).

Rhode Island. *McCanna v. Hanan*, 49 RI 349, 142 Atl 609.

South Carolina. *First Presbyterian Church v. York Depository*, 203 SC 410, 27 SE(2d) 573 (subject to lease given by testator).

South Dakota. *Phillis v. Gross*, 32 SD 438, 143 NW 373; *Hicks v. Skie*, 67 SD 115, 289 NW 507.

Texas. *Klein v. First Nat. Bank (TexCiv App)*, 266 SW(2d) 448; *Logan v. Logan*, 138 Tex 40, 156 SW(2d) 507, rev'g 131 SW(2d) 1048; *Langehennig v. Hohmann*, 365 SW2d 203 (TexCivApp).

Virginia. *Stevenson v. Jones*, 142 Va 391, 128 SE 568.

Washington. *North Pacific Mortgage Co. v. Sieler*, 146 Wash 530, 264 Pac 4.

Wisconsin. *Zartner v. Holzhauer*, 204 Wis 18, 234 NW 508, 512.

See Chap. 16.

See, *Boyd v. Town of Hartford*, 112 Vt 503, 28 A(2d) 411. But compare *Kromer v. Koeppge*, 118 FSupp 571 (NDOhio) (legatees who received shares of stock were not bound by escrow agreement to which testator was a party).

² See Chap. 45.

³ *Allbert v. Allbert*, 148 Kan 527, 83 P(2d) 795.

Louisiana. *Succession of Abraham*, 136 S2d 471 (LaApp).

Missouri. *Bakewell v. Mercantile Trust Co.*, 319 SW2d 600.

New York. Compare, *Schrader v. Smith*, 169 NYS2d 797.

Texas. *Wurth v. Scher*, 327 SW2d 72 (Tex-CivApp).

⁴ *Arias v. Springer*, 42 NM 350, 78 P(2d) 153; *First Presbyterian Church v. York Depository*, 203 SC 410, 27 SE(2d) 573; *North Pacific Mortgage Co. v. Sieler*, 146 Wash 530, 264 Pac 4.

conveyance in his lifetime, it has been held that a devisee under his will takes no title to such property despite the fact that the conveyance might be voidable at the option of the testator if he were alive, unless the testator has performed some act indicating his repudiation of the contract as by making a later specific devise of the particular property involved.⁵

A devise or legacy, at least if it is not given for value, is a mere bounty, and gives the beneficiary no rights except those arising under the will itself.⁶ However, if a devise is made in accordance with an agreement which the devisee has fully performed, the devisee takes title free of any equities of which he had neither actual nor constructive notice.⁷

No interest passes under a will before the death of testator.⁸ This is involved in the idea of a will. If the instrument passed any sort of interest before the death of testator, it would not be a will.⁹ Upon the death of the testator and even before the probate of the will, the general rule is that title to realty vests in the devisee,¹⁰ subject to the power to sell for testator's debts.¹¹ The fact

See, *Logan v. Logan*, 138 Tex 40, 156 SW(2d) 507, rev'g 131 SW(2d) 1048.

New York. Maisel v. Schwartzbaum, 210 NYS2d 910.

⁵ *Zartner v. Holzhauser*, 204 Wis 18, 234 NW 508, 512.

Arkansas. Worthen Bank & Trust Co. v. Green, 237 Ark 785, 376 SW2d 275.

⁶ *Smith v. Bradford*, 51 RI 289, 154 Atl 272; *Wachovia Bank & Co. v. Allen*, 232 NC 274, 60 SE(2d) 117; *Alexander v. Berkman* (TexCivApp), 3 SW(2d) 864; *Humble Oil & Refining Co. v. Blankenburg*, 149 Tex 498, 235 SW(2d) 891 (burden is on devisee to establish his rights under will).

Colorado. Robinson v. Tubbs, 140 Colo 471, 344 P2d 1080.

⁷ *Larkins v. Howard*, 252 Ala 9, 39 S(2d) 224, 7 ALR(2d) 541.

Virginia. Burruss v. Baldwin, 199 Va 883, 103 SE2d 249.

⁸ *Irving Trust Co. v. Day*, 314 US 556, 62 S Ct 398, 86 LEd 452, 137 ALR 1093, aff'g *Matter of McGlone*, 284 NY 527, 32 NE(2d) 539; *Lockett v. Thomas*, 179 Tenn 240, 165 SW(2d) 375; *In re Newton*, 35 Cal(2d) 830, 221 P(2d) 952, 19 ALR(2d) 1399, annotated, 39 CalifLRev 150 (exercise of power of appointment); *Awtry v. Commissioner*, 221 F(2d) 749 (8th Cir). *Comments*, 34 TexasLRev 1104, 44 GeoLJ 337, 69 HowLRev 1140, 41 IowaLRev 462, 40 MinnLRev 502 (mutual wills); *In re Cuff*, 118 NYS(2d) 619; *Justice v. Mitchell*, 238 NC 364, 78 SE(2d) 122; *Jones v. Shomaker*, 41 Fla 232, 26 So 191 (realty); *Burger v. Allen*, 211 Ky 742, 277 SW 1032 (realty, con-

veyed by testator before his death); *Hart v. West*, 16 TexCivApp 395, 41 SW 183 (personalty).

Arkansas. Rogoski v. McLaughlin, 228 Ark 1157, 312 SW2d 912.

Connecticut. Zaroni v. Hudon, 678 A.2d 12 (App. 1996).

Minnesota. Cich v. Cich, 428 NW2d 446 (App 1988).

New York. In re Giberson, 194 NYS2d 686.

Ohio. Third Nat. Bank & Trust Co. of Dayton v. Gardner, 53 OhioOps2d 261, 24 OhioMisc 223, 262 NE2d 430.

Texas. Zahn v. National Bank of Commerce, 328 SW2d 783, ref. n.r.e. (TexCivApp).

See § 39.8 et seq.

⁹ See § 6.2 et seq.

¹⁰ *United States. White v. Keller*, 68 Fed 796, 15 CCA 683; *Northrop v. Columbian Lumber Co.*, 186 Fed 770, 108 CCA 640 (also by statute); *Commissioner v. McKinney*, 87 F(2d) 811; *Weber v. Commissioner*, 111 F(2d) 766; *Kellar v. Kasper*, 138 FSupp 738 (SD) (immaterial that will provided that devise to wife should vest at time of distribution); *Baker v. Dale*, 123 FSupp 364 (WDMo) (devise to testamentary trustee); *Lawrence v. United States*, 265 FSupp 590 (NDTex 1967); *Pasadena Inv. Co. v. Weaver*, 376 F2d 175 (9th Cir 1967); *Horton v. C.L.R.*, 388 F2d 51 (2d Cir 1967); *In re Lonstein*, 950 F2d 77 (1st Cir 1991).

Alabama. Murphy v. Vaughan, 226 Ala 461, 147 So 404; *Whorton v. Snell*, 226 Ala 525, 147 So 602; *Larkins v. Howard*, 252 Ala 9, 39 S(2d) 224, 7 ALR(2d) 541.

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- Alaska.** In re McDougal, 10 Alaska 565.
- Arizona.** Matter of Estate of Johnson, 811 P2d 360, 168 Ariz 108 (App 1991).
- California.** Phelps v. Grady, 168 Cal 73, 141 Pac 926; Noble v. Beach, 21 Cal(2d) 91, 130 P(2d) 426, prior opinion (CalApp), 120 P(2d) 110; Estate of Platt, 21 Cal(2d) 343, 131 P(2d) 825, prior opinion (CalApp); 119 P(2d) 171; Carlson v. Lindauer, 119 CalApp(2d) 292, 259 P(2d) 925; Olson v. Toy, 46 CalApp 4th 818, 54 CalRptr2d 29 (1996) (title to property vests in heirs or devisees when testator dies).
- Colorado.** Miller v. Weston, 67 Colo 534, 189 Pac 610; McMillen v. Bliley, 115 Colo 575, 177 P(2d) 547; Collins v. Scott, 943 P.2d 20; 1996 Colo. App. LEXIS 273.
- Connecticut.** Greene v. King, 104 Conn 97, 132 Atl 411; Gallant v. Cavallaro, 50 ConnApp 132, 717 A2d 283 (1998).
- Delaware.** In re Harris, 28 DelCh 590, 44 A(2d) 18.
- Florida.** Simmons v. Spratt, 26 Fla 449, 9 LRA 343, 8 So 123.
- Georgia.** Bradley v. Bradley, 225 GaApp 530, 484 SE2d 280 (CtApp 1997) (the right of an heir or legatee or devisee to an interest in the estate is assignable).
- Illinois.** Havill v. Havill, 332 Ill 11, 163 NE 428; Peter v. Peter, 343 Ill 493, 175 NE 846; Sternberg v. St. Louis Union Trust Co., 394 Ill 452, 68 NE(2d) 892; Trustees v. Clippinger, 404 Ill 202, 88 NE(2d) 451; Meppen v. Meppen, 392 Ill 30, 63 NE(2d) 755, 164 ALR 712; In re Estate of Knight, 178 IllApp3d 777, 533 NE2d 949 (1989); In re Estate of Tobin, 531 NE2d 440 (App 1988); Tontz v. Heath, 20 Ill2d 286, 170 NE2d 153; In re White, 174 B.R. 779 (BkrctySDIll 1994); In re Estate of Lind, 314 Ill App3d 1055, 734 NE2d 47 (2000).
- Iowa.** Petty v. Hewlett, 225 Iowa 797, 281 NW 731; In re Smith, 240 Iowa 499, 36 NW(2d) 815.
- Kansas.** Bethany Hosp. Co. v. Philippi, 82 Kan 64, 30 LRA(NS) 194, 107 Pac 530.
- Kentucky.** Reid v. Bengel, 112 Ky 810, 99 Am-StRep 334, 66 SW 997 (sub nomine, Reid v. Bengel, 57 LRA 253); Bass v. Adkinson, 280 Ky 548, 133 SW(2d) 921; Stewart v. Morris, 313 Ky 424, 231 SW(2d) 70.
- Louisiana.** In re Succession of Jackson, 770 So2d 804 (Ct. App. 2000).
- Maine.** Bragdon v. Smith, 136 Me 474, 12 A(2d) 665.
- Maryland.** Fleming v. Brunner, 224 Md 97, 166 A2d 901.
- Massachusetts.** Daley v. Daley, 300 Mass 17, 14 NE(2d) 113.
- Michigan.** Stewart v. Hunt, 303 Mich 161, 5 NW(2d) 737 (foreign will: certified copy of will and record may be filed after partition suit has been begun); In re Cress, 335 Mich 551, 56 NW(2d) 380; People of Michigan, ex rel., Donker v. \$234,200 in United States Currency, 217 MichApp 320; 551 NW2d 444 (1996) (equitable title to decedent's property vests in decedent's heirs at time of death).
- Minnesota.** State Bank v. Dixon, 214 Minn 39, 7 NW(2d) 351; Bengtson v. Setterberg, 227 Minn 337, 35 NW(2d) 623.
- Mississippi.** Cooksey v. State, 175 Miss 82, 166 So 388; Beach v. State, 178 Miss 336, 173 So 429; In re Estate of McRight, 766 So2d 48 (2000).
- Missouri.** Snow v. Ferril, 320 Mo 543, 8 SW(2d) 1008; Trantz v. Lemp, 329 Mo 580, 46 SW(2d) 135; Loehr v. Glaser (Mo), 133 SW(2d) 394.
- Montana.** Rumney v. Skinner, 64 Mont 75, 208 Pac 895 (statute); In re Deschamps, 65 Mont 207, 212 Pac 512; In re McGovern, 77 Mont 182, 250 Pac 812; In re Clark, 105 Mont 401, 74 P(2d) 401; Montgomery v. First Nat. Bank, 114 Mont 395, 136 P(2d) 760; In re Armesworthey, 117 Mont 602, 160 P(2d) 472; In re Nossen, 118 Mont 40, 162 P(2d) 216; Henningsen v. Stromberg, 124 Mont 185, 221 P(2d) 438; In re Hofmann, 132 Mont 387, 318 P2d 230.
- Nebraska.** Krug v. Douglas County, 114 Neb 517, 208 NW 665; Hahn v. Verret, 143 Neb 820, 11 NW(2d) 551.
- New Hampshire.** Wentworth v. Wentworth, 75 NH 547, 78 Atl 646.
- New Jersey.** McTamney v. McTamney, 138 NJEq 28, 46 A(2d) 444; Craig v. Craig, 25 NJSuper 226, 95 A(2d) 767 (equitable interest of purchaser under contract to buy realty); Montclair Nat. Bank & Trust Co. v. Seton Hall College of Medicine and Dentistry, 96 NJSuper 428, 233 A2d 195.
- New Mexico.** Conley v. Winkle, 66 NM 366, 348 P2d 485.
- New York.** Irving v. Bruen, 186 NY 605, 79 NE 1107 (aff'g Irving v. Bruen, 97 NYS 180); Barber v. Terry, 224 NY 334, 120 NE 732; Waxson Realty Corp. v. Rothschild, 255 NY 332, 174 NE 700; Dessento v. Welcraft Marine Corp., 540 NYS2d 260 (AppDiv 1989).
- North Carolina.** Cannon v. Cannon, 225 NC 611, 36 SE(2d) 17 (valuation as of date of testator's death); Moore v. Jones, 226 NC 149, 36 SE(2d) 920; Paschal v. Autry, 256 NC 166, 123 SE2d 569; Darden v. Boyette, 247 NC 26, 100 SE2d 359.
- North Dakota.** Hoffman v. Hoffman, 73 ND 637, 17 NW(2d) 903.

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Ohio. *Kincaid v. Dawson*, 87 OhioApp 299, 43 OhioOp 16, 93 NE(2d) 731; *Burroughs v. Raymond*, 50 OhioOp 169, 112 NE(2d) 82 (OhioProb); *In re Gamble*, 36 OhioOps2d 388, 8 OhioMisc 314, 220 NE2d 621.

Oklahoma. *Armstrong v. Letty*, 85 Okla 205, 209 Pac 168; *Parks v. Lefebvre*, 162 Okla 265, 20 P(2d) 179, 163 Okla 6, 20 P(2d) 184; *Russell v. Davison*, 184 Okla 606, 121 ALR 1063, 89 P(2d) 352 (by statute); *DeWitt v. Cavender*, 878 P2d 1077 (1994) (if decedent dies intestate, title to his property vests immediately in his heirs).

Oregon. *Blake v. Blake*, 147 Ore 43, 31 P(2d) 768 (dower of wife of devisee accrued at testator's death although she was later remarried); *D'Arcy v. Snell*, 162 Ore 351, 122 ALR 928, 91 P(2d) 537; *In re Moore*, 190 Ore 63, 223 P(2d) 393, annotated, 30 OreLRev 271.

Rhode Island. *Lucy C. Ayers Home v. Fales*, 77 RI 37, 73 A(2d) 104 (under California law).

South Carolina. *First Nat. Bank v. Bennett*, 206 SC 402, 34 SE(2d) 678.

South Dakota. *Hicks v. Skie*, 67 SD 115, 289 NW 507.

Tennessee. *Lockett v. Thomas*, 179 Tenn 240, 165 SW(2d) 375; *Wallace v. McPherson*, 187 Tenn 333, 214 SW(2d) 50; *Gray v. Boyle Inv. Co.*, 803 SW2d 678 (App 1990) (title to real estate vests in beneficiary absent specific testamentary provision granting interest to executor or providing for sale by executor); *Gentry v. Gentry*, 924 SW2d 678 (1996) (title to real property owned by decedent vests in beneficiaries on date of death).

Texas. *Frame v. Whitaker*, 120 Tex 53, 36 SW(2d) 149; *Bruni v. Vidaurri*, 140 Tex 138, 166 SW(2d) 81, aff'g in part and rev'g in part *Vidaurri v. Bruni* (TexCivApp), 154 SW(2d) 498; *Rowe v. Palmer* (TexCivApp), 277 SW(2d) 781; *Apel v. Gallagher* (Tex CivApp), 278 SW(2d) 527; *Buckner Orphans Home v. Berry*, 332 SW2d 771 (Tex-CivApp); *Johnson v. McLaughlin*, 840 SW2d 668 (CtApp 1992) (title vests in devisee at testator's death unless will indicated unambiguous intent to delay vesting of title).

Vermont. *In re Callahan*, 115 Vt 128, 52 A(2d) 880; ; *Lysak v. Grull*, 812 A.2d 840 (2002) (appeal by holder of quitclaim deed because probate court found that two claimants owning land adjoining disputed property had established adverse possession).

Washington. *In re Schmidt*, 134 Wash 525, 236 Pac 274; *In re Patrick*, 195 Wash 105, 79 P(2d) 969; *In re Henderson*, 46 Wash(2d) 401, 281 P(2d) 857.

West Virginia. *Green v. Mullins*, 146 WV 958, 124 SE2d 244.

Wisconsin. *Triba v. Lass*, 146 Wis 202, 131 NW 357; *In re Borchardt*, 184 Wis 561, 200 NW 461; *Caldwell & Gates Co. v. Mennes*, 190 Wis 551, 209 NW 588; *Qualley v. Zimmerman*, 231 Wis 341, 285 NW 735; *Will of Marshall*, 236 Wis 132, 294 NW 527; *In re Riemann*, 272 Wis 378, 75 NW(2d) 564.

But see *Clemmons v. Clemmons*, 198 Ark 430, 128 SW(2d) 994, where it is said: "An estate does not belong to the heirs or an intestate person, nor to the devisees of a testator, till its debts are paid."

See, also, *Gamble v. Burney*, 169 Ga 830, 152 SE 73, where it was held that residuary devisees had not alleged title in themselves in a suit involving realty without alleging that debts and specific legacies were paid.

See *Omission of realty in probate administration*, by R. G. Patton, 42 KyLJ 666. Compare *Assents by personal representatives in their own favour*, 105 LJ 647; *Duties of the district registrar with respect to transfers of land under the Real Property Act by executors and administrators*, by C. L. St. John, 27 ManitobaBarNews 48.

11 **United States.** *Bohan v. U.S.*, 326 FSupp 1356 (DCMo 1971).

Alabama. *Whorton v. Snell*, 226 Ala 525, 147 So 602.

California. *Carlson v. Lindauer*, 119 CalApp(2d) 292, 259 P(2d) 925.

Connecticut. *Zanoni v. Hudon*, 678 A.2d 12 (App. 1996); *Villano v. Polimeni*, 54 Conn.App. 744, 737 A.2d 950 (1999).

Delaware. *In re Harris*, 28 DelCh 590, 44 A(2d) 18.

Illinois. *In re White*, 174 B.R. 779 (BkrtcySDIll 1994).

Indiana. *Campbell v. Union Trust Co.*, 227 Ind 692, 88 NE(2d) 560.

Maine. *Bragdon v. Smith*, 136 Me 474, 12 A(2d) 665.

Massachusetts. *Jenks v. Liverpool, London & Ins. Co.*, 206 Mass 591, 92 NE 998.

Mississippi. *In re Estate of McRight*, 766 So2d 48 (2000).

Montana. *In re McGovern*, 77 Mont 182, 250 Pac 812; *Montgomery v. First Nat. Bank*, 114 Mont 395, 136 P(2d) 760; *In re Armesworthey*, 117 Mont 602, 160 P(2d) 472 (devisee A alive when testator died; dead when decree of distribution entered; an irregularity but not jurisdictional).

New Hampshire. *Wentworth v. Wentworth*, 75 NH 547, 78 Atl 646.

New Jersey. *McTamney v. McTamney*, 138 NJEq 28, 46 A(2d) 444 (citing this section).

that the devisee is also the executor,¹² or that the realty is subject to testator's contract to convey,¹³ does not prevent the operation of the rule. Title passes to the devisee at once upon testator's death even though the will in terms gives the property at the termination of the administration or the like, if no other interest is created by the will for the interim.¹⁴ If all of testator's property is exhausted in order to pay his debts, such situation does not create an intervening estate, but merely results in divesting the title which vested in the devisee at the testator's death.¹⁵ Title to land and personalty may vest in the devisees and legatees only upon the assent of the executor if a statute so provides.¹⁶

In Connecticut, legal title to real property immediately passes to the decedent's heirs subject to the right of the executor to administer the estate upon the death of the owner of that property. But statute provides that the fiduciary of the decedent's estate shall, during settlement, have possession, care and control of the decedent's real property unless the property has been specifically devised or directions have been given by the decedent's will which are inconsistent with statute, but the court may order surrender of the

New York. In re Frank, 123 NYS(2d) 452; Dessento v. Welcraft Marine Corp., 540 NYS2d 260 (AppDiv 1989); In re Rich, 211 NYS2d 68.

North Dakota. Hoffman v. Hoffman, 73 ND 637, 17 NW(2d) 903.

Ohio. Burroughs v. Raymond, 50 OhioOp 169, 112 NE(2d) 82 (PC).

Oklahoma. Russell v. Davison, 184 Okla 606, 121 ALR 1063, 89 P(2d) 352.

Oregon. Blake v. Blake, 147 Ore 43, 31 P(2d) 768; D'Arcy v. Snell, 162 Ore 351, 122 ALR 928, 91 P(2d) 537.

Pennsylvania. In re Estate of Peterson, 649 A2d 1007 (CommwCt 1994) (devisee acquires legal title to specifically devised real property upon the death of the testator, subject to powers of personal representatives and to all orders of the court until distribution is made).

South Dakota. Hicks v. Skie, 67 SD 115, 289 NW 507.

Wyoming. Park County ex rel Park County Welfare Dept. v. Blackburn, 394 P2d 793.

See, also, § 59.1.

¹² Murphy v. Vaughan, 226 Ala 461, 147 So 404.

Rights of a Wisconsin personal representative in the real estate of his decedent by B. J. MacDonald (1960 WisLRev 363).

¹³ Bauermeister v. McDonald, 124 Neb 142, 245 NW 403 (modified on rehearing, 124 Neb 147, 247 NW 424); Waxson Realty Corp. v. Rothschild, 255 NY 332, 174 NE 700.

¹⁴ Donnelly v. Montgomery County Welfare Bd., 200 Md 534, 92 A(2d) 354, 34 ALR(2d) 996; Trautz v. Lemp, 329 Mo 580, 46 SW(2d) 135; Loehr v. Glaser (Mo), 133 SW(2d) 394; Rosencrans v. Fry, 12 NJ 88, 95 A(2d) 905 (testamentary trust); Voss v. Voss, 57 OhioOp 246, 129 NE(2d) 322 (CP) (equitable interest under trust).

United States. Matter of Simpson, 36 F3d 450 (5th Cir 1994) (under Texas law, a beneficiary's disclaimer of devise or bequest relates back to the time of death of the testator, such that the beneficiary never gains possession of the disclaimed property).

California. In re Harabedian, 220 CalApp2d 1, 34 CalRptr 668.

Illinois. Scott v. Scott, 179 IllApp3d 489, 534 NE2d 174 (1989).

¹⁵ Caldwell & Gates Co. v. Mennes, 190 Wis 551, 209 NW 588 (creditors of devisee were entitled to mechanic's lien for improvements placed on realty at his direction).

¹⁶ Thornton v. Hardin, 205 Ga 215, 52 SE(2d) 841.

Georgia. Oliver v. Irvin, 219 Ga 647, 135 SE2d 376.

Illinois. In re Marriage of Epstein, 791 N.E.2d 175 (App. 2003) (filing of claim against estate within statutory period is a grant of jurisdiction, not general statute of limitations, and no exception to filing period may be granted by judicial decision; court has no power or jurisdiction to entertain petition against estate after statutory period has passed).

possession and control of the property to the heirs or devisees, or may, during settlement, order distribution of the property.^{16a}

A somewhat different rule is stated in a few cases, to the effect that title to realty vests in the heirs of the decedent until a will is proved, but that title vests in the devisees when the will is allowed and relates back to the testator's death.¹⁷

Most jurisdictions regard a decree or judgment in probate proceedings as merely an adjudication of existing facts and not as creating a new title.¹⁸ Even in jurisdictions following the theory that the probate of the will, or the decree of distribution, vests the title in the devisee, much the same result is reached by holding that the probate or decree relates back to the testator's death so as to intercept the descent of the realty to the heirs.¹⁹ Under either theory, the adjudication of title is as of the testator's death.²⁰

If a devisee is given an option to take at a certain value, title vests when the option is exercised.²¹ Such option must be exercised within the time

^{16a} Connecticut. *LaFlamme v. Dallessio*, 251 Conn. 247, 802 A.2d 63 (2002) (negligence action against executor where the dispositive issue was whether the executor had any right to possession and control of the property).

¹⁷ *Allen v. Markham*, 156 F(2d) 653; *Gray v. Hutchins*, 150 Me 89, 104 A(2d) 423; *Brown v. Webster*, 87 Neb 788, 128 NW 635.

United States. *United States v. 936.71 Acres of Land*, 418 F2d 551 (5th Cir 1969); *In re Lonstein*, 950 F2d 77 (1st Cir 1991).

Illinois. *Matter of Estate of Stokes*, 225 IllApp 3d 834, 587 NE2d 564 (1992).

¹⁸ *Commissioner v. McKinney*, 87 F(2d) 811; *Ashmore v. Newman*, 350 Ill 64, 183 NE 1; *In re Deschamps*, 65 Mont 207, 212 Pac 512; *In re McGovern*, 77 Mont 182, 250 Pac 812; *Qualley v. Zimmerman*, 231 Wis 341, 285 NW 735; *Allwood v. Cahill*, 382 Ill 511, 47 NE(2d) 698; *Old v. Heibel*, 352 Mo 511, 178 SW(2d) 351; *In re Baird*, 135 CalApp(2d) 333, 287 P(2d) 365. Comment, 7 *HastingsLJ* 336.

Iowa. *In re Oppelt*, 203 NW2d 213, 65 ALR3d 444 (1972).

Ohio. *In re Witteman*, 21 OhioSt2d 3, 50 OhioOps2d 2, 254 NE2d 345 (subsequent death of purchasing spouse will not nullify right to purchase on terms of judgement in her favor).

Texas. *Padgett v. Padgett*, 309 SW2d 262 (Tex-CivApp).

Effect of doubtful construction of will devising property upon marketability of title, 65 ALR3d 450 (1975).

Compare § 26.113.

¹⁹ *Murphree v. Griffis*, 215 Ala 98, 48 ALR 1032, 109 So 746; *Union Trust Co. v. Neilen*, 283 Mass 144, 186 NE 66; *Gray v. Hutchins*, 150 Me 89, 104 A(2d) 423; *Matthews v. Fuller*, 209 Md 42, 120 A(2d) 356; *Hill v. Grand Lodge, I. O. O. F.*, 157 Kan 34, 138 P(2d) 438 (even if the will is contested, if unsuccessfully); *Old v. Heibel*, 352 Mo 511, 178 SW(2d) 351; *Sternberg v. St. Louis Union Trust Co.*, 394 Ill 452, 68 NE(2d) 892, 169 ALR 545.

United States. *Bohan v. U.S.*, 326 FSupp 1356 (DCMo 1971).

Louisiana. *Succession of Paillet*, 602 So2d 152 (CtApp 1992).

Minnesota. *Hanson v. State Farm Ins. Co.*, 661 N.W.2d 659 (App. 2003) (the relation back doctrine applies to the authority of a personal representative, such that the power to perform acts which benefit the estate would relate back to the time of the decedent's death; because a trustee in a wrongful death suit is essentially a personal representative, the authority of the trustee also relates back to the date of decedent's death).

New York. *In re El-Khoury*, 195 NYS2d 312.

²⁰ *Peter v. Peter*, 343 Ill 493, 175 NE 846; *Olds v. Morse*, 98 OhioApp 382, 57 OhioOp 419, 129 NE(2d) 644; *Will of Marshall*, 236 Wis 132, 294 NW 527; *Pownall v. Cearfoss*, 129 WV 487, 40 SE(2d) 886.

Delaware. *Stayton v. Delaware Trust Co.*, 206 A2d 509.

New York. *In re Tisnowe*, 244 NYS2d 169.

See note in 48 ALR 1035.

²¹ United States. *Valleskey v. Nelson*, 168 FSupp 636 (DCWis).

limited.²² Those to whom the proceeds of the sale of land, after deducting certain expenses, are given, have no interest in such land but their rights are those of legatees of money.²³ If a mere discretionary power of sale is given to the executors it does not prevent the title to realty from vesting in the devisees at the death of the testator, subject to being divested by exercise of the power.²⁴

After the will is admitted to probate, the devisee is the owner of the realty devised to him, in accordance with the provisions of the will.²⁵ Whether or

California. *In re Estate of Hilton*, 199 CalApp3d 1145, 245 CalRptr 491 (1988) (option vested at time of testator's death; residuary beneficiary was barred from making anticipatory assignment or otherwise alienating property and had to keep intact property subject to option during period provided for its exercise).

Illinois. *Daly v. Daly*, 299 Ill 268, 132 NE 495; *Stern v. Stern*, 410 Ill 377, 102 NE(2d) 104, annotated, 1952 UMLF 303; *In re Moring*, 38 IllApp2d 197, 186 NE2d 549; *In re Link*, 271 NE2d 393.

Iowa. *In re Zach*, 131 NW2d 484.

Kentucky. *Miller v. Farmers Bank*, 312 Ky 321, 227 SW(2d) 429 (option to be exercised in reasonable time after death of first life tenant).

Missouri. *Hirlinger v. Hirlinger*, (Mo App), 267 SW(2d) 46, 44 ALR(2d) 1207 (upon exercise of option beneficiary is entitled to fee free of encumbrances; executor must pay mortgage from assets of estate).

Nebraska. *Watson v. Riley*, 101 Neb 511, 164 NW 81.

New Jersey. *Rosenerans v. Fry*, 21 NJ Super 289, 91 A(2d) 162.

Ohio. *Walters v. Wannemacher*, 35 OhioOps2d 385, 6 OhioApp2d 226, 217 NE2d 695 (appraisal value subject to approval of probate court where devisee is executor).

Pennsylvania. *Ludwick's Estate*, 269 Pa 365, 112 Atl 543; *In re Siegel*, 178 PaSuper 532, 115 A(2d) 843 (devisee exercised option to buy land of which a portion had been leased by testator to third person who was also given an option to buy this portion; devisee entitled to payment by third person who exercised option); *Horn Estate*, 351 Pa 131, 40 A(2d) 471.

Wisconsin. *Estate of Bosse*, 246 Wis 252, 16 NW(2d) 832 (income of property before option is exercised does not pass).

See, *France Estate*, 352 Pa 522, 43 A(2d) 139.

Option held personal to legatee; after his death, his assignee may not exercise it. *Skelton v. Younghouse*, [1942] AC 571, [1942] AllEngR 650, anno-

tated 58 LQRev 292, 18 NZLJ 241; aff'g [1941] Ch 1, [1940] 4 AllEngR 122, which affirmed [1940] Ch 490 [1940] 2 AllEngR 492 (option to buy stock at par).

²² *In re Avard*, [Eng 1948], Ch 43.

Iowa. *In re Beaver*, 206 NW2d 692, 82 ALR3d 778 (1973).

Missouri. *Estate of Schler v. Benson*, 947 SW2d 495 (CtApp 1997) (notice by a devisee of his intention to exercise an option bequeathed to him was valid even though the devisee gave notice prior to the time specified in the will).

Nebraska. Time in which to exercise option was extended where will contests were ongoing and personal representative refused to tender deed. *In re Michels*, 389 NW2d 285 (1986).

Time in which option created by will to purchase real estate is to be exercised, 82 ALR3d 790 (1978).

Illinois. *Kubian v. Alexian Bros. Medical Center*, 272 IllApp3d 246, 651 NE2d 231 (AppCt 1995) (however, fact that estate administrator was hostile to and would not represent the interest of surviving wife did not permit appointment of wife as special administrator for purposes of pursuing wrongful death claim).

²³ *Anglin v. Hooper*, 153 Ga 734, 113 SE 195; *Hoffman v. Hoffman*, 61 OhioApp 371, 15 OhioOp 255, 22 NE(2d) 652.

See notes, this section; and Chap. 46.

²⁴ *Weber v. Commissioner*, 111 F(2d) 766. See, *Beck v. Megli*, 153 Kan 721, 135 ALR 1124, 114 P(2d) 305.

²⁵ *Wilson v. Kirkland*, 172 Ala 72, 55 So 174 (devisee may bring ejectment); *Beckwith v. Cowles*, 85 Conn 567, 83 Atl 1113 (devisee may sue to set aside conveyance by testator, if sufficient other property to pay debts and expenses of administration); *Hewitt v. Sanborn*, 102 Conn 352, 130 Atl 472 (right to immediate possession); *Willin v. Wright*, 25 Del (2 Boyce) 197 (sub nomine, *Willin v. Roe*, 78 Atl 773) (devisee may bring ejectment); *Newberry v. Chicago Lumbering Co.*, 154 Mich 84, 117 NW 592 (devisee only person who can maintain

not a devisee may maintain an action based upon his ownership of the realty devised, before distribution, is a question upon which there is a division of authority, due in part to differences in local practice and legislation,²⁶ and depends partly upon whether the kind of action brought is one which can be sustained by mere proof of title, or whether the right to possession is also necessary.²⁷ It has been held that an action may be brought by the devisee without consent by the executor where the latter has refused to act.²⁸ An action against a devisee or legatee to hold him as trustee cannot be brought before the will is admitted to probate.²⁹ Whether devisees may take possession or bring actions for possession before the inheritance tax is adjusted depends upon the provisions of the tax law.³⁰

It has been said that an indefeasible title to realty does not pass to the devisees until the decree of distribution,³¹ but a devisee's title will be sustained even though no final decree of settlement was entered,³² or even though such decree was defective,³³ where there are no superior substantive rights involved, particularly if a considerable period of time has elapsed before the title is attacked.

action for unlawfully cutting timber on land devised, after death of testator); *In re Purdy* (Fla), 54 S(2d) 112 (beneficiary under unprobated will has no vested legal nor equitable interest in testator's estate, therefore beneficiary may object to probating of will without renouncing his rights under it).

²⁶ That such action may be maintained before probate: *Northrop v. Columbian Lumber Co.*, 186 Fed 770, 108 CCA 640 (Georgia); *Bethany Hosp. Co. v. Philippi*, 82 Kan 64, 30 LRA(NS) 194, 107 Pac 530 (action brought before probate; supplemental petition filed after probate); *Kcirsey v. Hirsch*, 58 NM 18, 265 P(2d) 346 (revivor statute); *Koch v. Chicago Nat. Life Ins. Co.*, 59 SD 596, 241 NW 617 (suit to quiet title); *Reed v. Hayward*, 23 Cal(2d) 336, 144 P(2d) 561.

That such action cannot be brought until after probate: *Bilger v. Nunan*, 199 Fed 549, 118 CCA 23 (aff'g *Bilger v. Nunan*, 186 Fed 665) (Oregon); *Gamble v. Burney*, 169 Ga 830, 152 SE 73 (residuary devisees held not entitled to maintain ejectment suit unless they proved debts of testator and specific legacies paid); *Moody v. McHan*, 184 Ga 740, 193 SE 240; *Stull v. Veatch*, 236 Ill 207, 86 NE 227; *White v. White*, 142 Tex 499, 179 SW(2d) 503.

²⁷ *Moody v. McHan*, 184 Ga 740, 193 SE 240.

²⁸ *McLarty v. Abercrombie*, 168 Ga 742, 149 SE 30; *Holt v. Holt*, 232 NC 497, 61 SE(2d) 448 (action by legatees to set aside transfer of personal property

induced by fraud prior to testator's death).

²⁹ *Brown v. Webster*, 87 Neb 788, 128 NW 635.

New York. Oysterman's Bank & Trust Co. v. Weeks, 313 NYS2d 535.

Texas. Dukes v. Miguera, 758 SW2d 831 (App 1988).

³⁰ That the devisee is entitled to possession, see *Weller v. Wheelock*, 155 Mich 698, 118 NW 609; that he is not entitled to possession: *Succession of Hagan*, 150 La 934, 91 So 303.

United States. Old Kent Bank & Trust Co. v. United States, 232 FSupp 970 (Mich).

³¹ *Greene v. King*, 104 Conn 97, 132 Atl 411; *In re Hickman*, 41 Wash(2d) 519, 250 P(2d) 524 (life beneficiary required to pay rental value of realty from time of entering possession to decree of distribution). See *Proof of succession to land under the new Missouri Probate Code*, by P. E. Basye, 25 UKanCityLRev 67.

United States. Jenkins v. United States, 428 F2d 538 (5th Cir 1970; *Bohan v. United States*, 326 FSupp 1356 (DCMo 1971).

³² *In re Yorba*, 176 Cal 166, 167 Pac 854.

Some developments in the law of independent administrations, by M. K. Woodward (37 TexasL-Rev 828); *Succession duty and the devolution of an interest in an unadministered estate: a recent decision*, by J. D. Feltham (35 AustLJ 10).

³³ *In re Ross*, 181 Wis 125, 194 NW 151.

Title to gifts of personalty is said, in some cases, to vest at the death of the testator³⁴ subject to the possibility that the personalty may be taken for the debts of the testator. Some courts make a distinction between general and specific bequests in this respect, stating that title to the latter vests in the legatee at testator's death.³⁵ It is generally held, however, that legal title passes to the executor or administrator on the death of the testator; and that it passes to the legatee only with the assent of the executor and acceptance by the legatee.³⁶ Even though the executor and legatee are the same person, the

³⁴ **United States.** *Brewster v. Gage*, 280 US 327, 50 S Ct 115 (aff'g 30 F[2d] 604, which rev'd 25 F[2d] 915); *Fairchild v. Lohrnan*, 13 F(2d) 252; *Hibernia Nat. Bank v. Donnelly*, 121 FSupp 179 (BD La); *Kellar v. Kasper*, 138 FSupp 738 (SD) (immaterial that will provided that gifts to wife should take effect at time of distribution); *Kinney-Lindstrom Foundation, Inc. v. United States*, 186 FSupp 133 (DC Iowa).

Alabama. *Jennings v. Jennings*, 250 Ala 130, 33 S(2d) 251.

Arizona. *Matter of Estate of Johnson*, 168 Ariz 108, 811 P2d 360 (ArizApp 1991) (court presumed estate vested in beneficiary at death of testator unless testator's intention to the contrary was clearly stated in the will).

California. *Klokke Inv. Co. v. Lissner*, 186 Cal 731, 200 Pac 590; In re *Bixby*, 140 CalApp(2d) 326, 295 P(2d) 68 (specific bequest of stock); In re *Baird*, 135 Cal App(2d) 333, 287 P(2d) 365; *Noble v. Beach*, 21 Cal(2d) 91, 130 P(2d) 426, prior opinion (CalApp), 120 P(2d) 110.

Idaho. *Estate of Zimmer*, 47 Idaho 364, 276 Pac 302 (bequest to one who died before probate of the will passes under the will of the latter).

Michigan. In re *Kurd*, 303 Mich 504, 6 NW(2d) 758, annotated 41 MichLRev 953.

Mississippi. *Cooksey v. State*, 175 Miss 82, 166 So 388.

Montana. In re *Nossen*, 118 Mont 40, 162 P(2d) 216; *Henningsen v. Stromberg*, 124 Mont 185, 221 P(2d) 438; In re *Spoya*, 129 Mont 83, 282 P(2d) 452.

Nebraska. *Krug v. Douglas County*, 114 Neb 517, 208 NW 665 (legacy to wife of testator passed under her will although she died before probate of the will by which the legacy was given to her).

New Hampshire. *Carter v. Whitcomb*, 74 NH 482, 17 LRA(NS) 733, 69 AH 779 (obiter) (tax law in effect at testator's death, and not the one in effect at time of distribution, is applicable to gifts taken by legatees); *Munro v. Mullen*, 100 NH 128, 121 A(2d) 312 (specific bequest).

New York. In re *Grabfelder (Misc)*, 108 NYS(2d)

529; In re *Chertow (Misc)* 109 NYS(2d) 567; In re *Schwartz*, 149 NYS(2d) 638 (specific bequest); In re *Beaudry*, 206 Misc 749, 134 NYS(2d) 893 (specific bequest); In re *Bradley*, 130 NYS(2d) 652; In re *Kania*, 126 NYS(2d) 395; In re *Dunham*, 320 NYS2d 951.

Ohio. *Braun v. Central Trust Co.*, 92 OhioApp 110, 49 OhioOp 249, 109 NE(2d) 476.

Oklahoma. *Parks v. Lefeber*, 162 Okla 265, 20 P(2d) 179; 163 Okla 6, 20 P(2d) 184.

Pennsylvania. *Beatty v. Hottenstein*, 380 Pa 607, 112 A(2d) 397 (employee to whom testator willed testator's business was entitled to all profits of business after testator's death).

South Carolina. *First Nat. Bank v. Bennett*, 206 SC 402, 34 SE(2d) 678.

Texas. *Edwards v. State*, 162 TexCrApp 390, 286 SW(2d) 157.

Virginia. *Wellford v. Powell*, 197 Va 685, 90 SE(2d) 791 (gift of future interest to charitable corporation which voluntarily surrendered its charter prior to termination of particular estate).

Wisconsin. *Caldwell v. Mennes*, 190 Wis 551, 209 NW 588.

Comment, 7 *HastingsLJ* 336.

³⁵ *Griffith v. Adams*, 106 Conn 19, 137 Atl 20; *Sykes v. Hughes*, 182 Md 396, 35 A(2d) 132, 150 ALR 87.

Pennsylvania. In re *Mearkle*, 11 *Fiduciary* 317 (Orph).

³⁶ **England.** *Mead v. Orrery*, 3 Atk 235. **United States.** *Chase Nat. Bank v. Sayles*, 11 F(2d) 948, 48 ALR 207; annotated, 27 *ColumLRev* 86 [rev'g 6 F(2d) 403; certiorari denied, *Sayles v. Chase Nat. Bank*, 273 US 708, 71 LEd 851, 47 S Ct 99]; *Mather v. Commissioner*, 149 F(2d) 393.

Alabama. *Cook v. Parker*, 248 Ala 393, 27 S(2d) 779.

California. *Klopstock v. Superior Court*, 17 Cal(2d) 13, 135 ALR 318, 108 P(2d) 906.

Georgia. *Clay v. Clay*, 149 Ga 725, 101 SE 793.

Illinois. *Oulvey v. Converse*, 326 Ill 226, 157 NE 245.

Iowa. *Bosserman v. Watson (Iowa)*, 287 NW 845.

executor holds title in his official and not in his personal capacity until requirements of probate proceedings relating to testator's debts have been met.³⁷ The title in the executor, however, is a mere legal title for purposes of administration, and the beneficiary has an inchoate or equitable interest.³⁸ It is said that the legatee's rights vest at the death of the testator although possession and legal title are postponed and although he may never receive legal title and possession due to intervening rights of creditors or other beneficiaries.³⁹ In any event, the final vesting of complete title and possession

Kentucky. *Oldham v. Boston Ins. Co.*, 189 Ky 844, 226 SW 106 (fire insurance); *Burchett v. Burchett*, 226 Ky 5, 10 SW(2d) 460; *Fowler v. Rothrock*, 261 Ky 664, 88 SW(2d) 667; *Moore v. Brookins*, 263 Ky 519, 92 SW(2d) 813; *Shoenberg v. Lodenkemper*, 314 Ky 105, 234 SW(2d) 501.

Maryland. *Scliafer v. Spear*, 148 Md 620, 129 Atl 898; *Home for Incurables v. Bruff*, 160 Md 156, 153 Atl 403; *Sykes v. Hughes*, 182 Md 396, 35 A(2d) 132, 150 ALR 87.

Massachusetts. *S. S. Pierce Co. v. Fiske*, 237 Mass 39, 129 NE 609.

Nebraska. *Hahn v. Verret*, 143 Neb 820, 11 NW(2d) 551.

New Jersey. *Craig v. Craig*, 25 NJSuper 226, 95 A(2d) 767 (interest of vendor under contract to sell realty); *Montclair Nat. Bank & Trust Co. v. Seton Hall College of Medicine and Dentistry*, 96 NJSuper 428, 233 A2d 195.

New York. *Blood v. Kane*, 130 NY 514, 15 LRA 490, 29 NE 994. In re *Parsons (Misc)*, 115 NYS(2d) 460 (beneficiary had right to possession upon entry of decree in its favor because of its prior acceptance).

North Carolina. *Moore v. Jones*, 226 NC 149, 36 SE(2d) 920.

North Dakota. In re *Murphy*, 48 ND 1267, 189 NW 497.

Ohio. *Eastwood v. Capel (OhioApp)*, 126 NE(2d) 343.

Virginia. *Strader v. Metropolitan Life Ins. Co.*, 128 Va 238, 105 SE 74.

Compare Steuer v. Hector, 1 AppDiv(2d) 1003, 151 NYS(2d) 830 (on widow's election to take against will and her consent to receive shares of stock, widow does not receive legal or equitable title to stock).

On the execution of assents, by B. A. Bicknell (117 NewLJ 1258); Problems on assents, by E. H. Bodkin (33 Convey 245).

³⁷ *Zoller v. State Board of Tax Appeals*, 124 NJL 376, 11 A(2d) 833.

South Carolina. *Myers v. Sinkler*, 235 SC 162, 110 SE2d 241.

Texas. *Humphrey v. Dougherty*, 420 SW2d 450.

Wisconsin. *Larson v. Smith*, 18 Wis2d 366, 118 NW2d 890.

³⁸ **United States.** *Chase Nat. Bank v. Sayles*, 11 F(2d) 948, 48 ALR 207; annotated 27 ColumLRev 86 [rev'g 6 F(2d) 403] (certiorari denied, *Sayles v. Chase Nat Bank*, 273 US 708, 71 LEd 851, 47 SCt 99); *Connelly v. Federal National Mortgage Assoc.*, 251 F. Supp. 2d 1071 (D.C. Conn. 2003) (under Connecticut law, an administrator or executor of a decedent's estate does not have title to the decedent's real property and cannot sell the decedent's real property in derogation of the rights of the heirs or devisees; rather, the executor's rights extend only to temporary possession, care and control of the property).

Indiana. *Matter of Robak*, 654 NE2d 731 (1995) (executor is duty-bound to manage and protect those assets of which he has possession for both creditors and distributees by employing reasonable precautions against loss).

Iowa. *Bossenman v. Watson (Iowa)*, 287 NW 845; In re *Cooper*, 229 Iowa 921, 295 NW 448.

Maryland. *Home for Incurables v. Bruff*, 160 Md 156, 153 Atl 403.

New Hampshire. In New Hampshire the personal representative must obtain permission of the court to operate the decedent's business and make an annual accounting to inform heirs if business was operating at a profit or loss. *Deschenes v. Deschenes' Estate*, 109 NH 389, 254 A2d 278 (1969).

Oklahoma. *Cook v. Redfield*, 103 Okla 77, 229 Pac 588.

Vermont. *Bacon v. Barber*, 110 Vt 280, 123 ALR 253, 6 A(2d) 9.

³⁹ In re *Lefranc*, 38 Cal(2d) 617, 239 P(2d) 617, annotated, 27 NotreDameLaw 422 (interests of contingent remaindermen vested at testator's death); *Sykes v. Hughes*, 182 Md 396, 35 A(2d) 132, 150 ALR 87; In re *Clark*, 105 Mont 401, 74 P(2d) 401; *Wachovia Bank &c. Co. v. Grubb*, 233 NC 22, 62 SE(2d) 719, annotated, 26 Notre DameLaw 579 (gift of residue); *Bacon v. Barber*, 110 Vt 280, 123 ALR 253, 6 A(2d) 9.

in the beneficiary by transfer from the executor or by final decree of distribution is said to relate back to the death of the testator, so that for practical purposes many of the same results follow as would obtain under the theory that the legatee had legal title from that time.⁴⁰ Under such rule it is held that the interest of a legatee in bank stock given him by will is subject to a stockholders' assessment made after testator's death but before probate, or during administration.⁴¹ The same is true with respect to taxes.⁴²

Where the legatees are the only beneficiaries under the will and the rights of creditors are not affected, the interest held by the legatees is such as to enable them to agree to a different disposition than that provided by will,⁴³

New York. In re Dunham, 320 NYS2d 951.

Pennsylvania. Maier v. Henning, 578 A2d 1279 (1990) (statutory priority given to asset distribution to specific devisees unless will provides otherwise when decedent's estate insufficient to pay all claimants and distributees in full).

⁴⁰ **United States.** Matteson v. Dent, 176 US 521, 44 LEd 571, 20 SCt 419 (aff'g Dent v. Matteson, 73 Minn 170, 75 NW 1041; Neustadter v. United States, 90 F(2d) 34; Helvering v. Reynolds, 313 US 428, 61 SCt 971, 86 LEd 1438, annotated 27 CornellLQ 127, 36 IllLRev 459, 19 NYULQ Rev 88 (contingent interest; question of income taxation); Sylvania Industrial Corp. v. Lilienfeld, 132 F(2d) 887.

California. Western Pac. R. Co. v. Godfrey, 166 Cal 346, AnnCas 1915B, 825, 136 Pac 284; In re Lefranc, 38 Cal(2d) 617, 239 P(2d) 617, annotated, 27 NotreDame Law 422 (legal title vests in trustee at death of testator); Kenny v. Citizens Nat. Trust & Co. Bank (CalApp), 269 P(2d) 641.

Illinois. Mortimer v. Potter, 213 Ill 178, 72 NE 817; Aslimore v. Newman, 350 Ill 64, 183 NE 1.

Maine. Fortin v. Fortin, 140 Me 25, 33 A(2d) 163 (note which belonged to testator is transferred to wrong legatee; maker of note cannot deny his title).

Massachusetts. Union Trust Co. v. Nelen, 283 Mass 144, 186 NE 66.

Michigan. Glass v. Grossman, 289 Mich 130, 286 NW 184.

South Dakota. In re Smith, 76 SD 11, 71 NW(2d) 577.

Vermont. Bacon v. Barber, 110 Vt 280, 123 ALR 253, 6 A(2d) 9.

Virginia. Borum v. National Val. Bank, 195 Va 899, 80 SE(2d) 594 (immaterial that executrix failed to transfer to herself individually personalty bequeathed to her as an individual).

A decree of distribution and the like is necessary. In re Bradford, 128 NJEq 372, 16 A(2d) 268.

Relation back of letters testamentary or of admin-

istration as validating prior sales of decedent's property, 2 ALR3d 1105. Lamkin v. Vierra, 198 CalApp2d 123, 17 CalRptr 805.

⁴¹ **United States.** Hardesty v. Corrothers, 31 FSupp 365; Matteson v. Dent, 176 US 521, 44 LEd 571, 20 SCt 419 (aff'g Dent v. Matteson, 73 Minn 170, 75 NW 1041).

California. Western Pac R. Co. v. Godfrey, 166 Cal 346, AnnCas 1915B, 825, 136 Pac 284.

Illinois. Mortimer v. Potter, 213 Ill 178, 72 NE 817.

Michigan. Glass v. Grossman, 289 Mich 130, 286 NW 184.

Vermont. Bacon v. Barber, 110 Vt 280, 123 ALR 253, 6 A(2d) 9.

See, Moss v. Brown, 253 Ala 380, 44 S(2d) 561 (new certificates of stock for beneficiaries; not all beneficiaries take certificates; officers of corporation cannot lawfully be ordered to withhold certificates).

⁴² **Chandler v. Field.** 63 F(2d) 13; annotated, 3 IdahoLJ 267, aff'g 58 F(2d) 370.

California. In re Hendrick, 89 CalRptr 748, 11 CA3d 204.

Kentucky. Gratz v. Hamilton, 309 SW2d 181.

Louisiana. Succession of Jones, 172 S2d 312 (App).

South Carolina. Myers v. Sinkler, 235 SC 162, 110 SE2d 241.

⁴³ **Mesmer v. White,** 121 CalApp(2d) 665, 264 P(2d) 60; **Bank of Commerce v. Carter (Ky),** 247 SW(2d) 533 (remainderman may consent to use of corpus for support of life beneficiary); In re Jensen, 135 Neb 602, 283 NW 196; **Conger v. Gruening,** 117 Vt 559, 96 A(2d) 821.

Georgia. Morrow v. Vineville United Methodist Church, 227 GaApp 313, 489 SE2d 310 (Ct. App. 1997) (enforcing a settlement agreement between trust beneficiaries and will beneficiaries).

Indiana. Yates-Cobb v. Hays, 681 NE2d 729 (CtApp 1997).

Louisiana. Succession of Ramp, 305 S2d 86.

or, in jurisdictions permitting such an agreement, to renounce the will entirely and agree to permit the estate to pass by the laws of descent,⁴⁴

The legatee cannot recover from a debtor of the estate in his own name, without administration.⁴⁵ However, one who owes a debt to testator may convey property to devisees and legatees in satisfaction of such debt, with the consent of all parties in interest.⁴⁶

A valid settlement agreement must receive approval from all decedent's heirs.^{46a}

While administration is pending, a legatee cannot as a general rule bring an action as owner of the property unless it has been transferred to him by the executor,⁴⁷ although he may sue in equity for the benefit of the estate if the executor refuses to act,⁴⁸ or is interested adversely to the estate.⁴⁹ Under the law of Louisiana if testator is not survived by any forced heirs, his universal legatees may bring an action for an accounting against a person who has assets of testator's estate.⁵⁰ If administration is not completed, but all debts are paid, a legatee may bring an action as owner of the property given to him under exceptional circumstances.⁵¹

New York. In re Payne, 179 NYS2d 594.

Ohio. Taylor v. Connell, 271 NE2d 305, 26 OhioApp2d 253.

Texas. Manning v. Sammons, 418 SW2d 362 (agreement between executor and third persons who would have received property if will had been executed not binding against executor).

See § 25.1 et seq.

See § 59.19, n. 50; § 25.4, n. 4.

⁴⁴ Davenport v. Sandeman, 204 Iowa 927, 216 NW 55.

Nebraska. In re Coryell, 174 Neb 603, 118 NW2d 1002.

⁴⁵ Kentucky. Burchett v. Burchett, 226 Ky 5, 10 SW(2d) 460.

Massachusetts. S. S. Pierce Co. v. Fiske, 237 Mass 39, 129 NE 609.

Michigan. In re Svitojus, 296 Mich 19, 295 NW 543.

North Carolina. Nicholson v. County Commissioners, 119 NC 20, 25 SE 719.

Virginia. Strader v. Metropolitan Life Ins. Co., 128 Va 238, 105 SE 74.

Sec, Klopstock v. Superior Court, 17 Cal (2d) 13, 135 ALR 318, 108 P(2d) 906,

⁴⁶ Cross v. O'Cavanagh, 198 Miss 137, 21 S(2d) 473.

^{46a} Kansas. In re Estate of Harrison, 967 P2d 1091 (ClApp 1998).

⁴⁷ Williams v. O'Connor, 208 Ga 39, 64 SE(2d)

890; Oulvey v. Converse, 326 Ill 226, 157 NE 245; Fowler v. Rothrock, 261 Ky 664, 88 SW(2d) 667; Moore v. Brookins, 263 Ky 519, 92 SW(2d) 813; Franklin v. Sullivan, 176 Term 107, 138 SW(2d) 435; Jeffries v. Antonsanti, 142 Va 218, 128 SE 510.

Alabama. Douglass v. Jones, 628 S2d 940 (1993).

But compare: Gregory v. Hardwick, 218 La 346, 49 S(2d) 423 (action by universal legatees against testatrix's husband for an accounting). See Institutional debtors, small estates and minors, by P. P. Fallen, 1956 InsLJ 156.

⁴⁸ Moore v. Brookins, 263 Ky 519, 92 SW(2d) 813; Niemaseck v. Bennett Holding Co., 125 NJEq 284, 4 A(2d) 794.

Compare, Tribull v. Tribull, 208 Md 490, 119 A(2d) 399 (legatee may invoke equity jurisdiction if powers of Orphans' Court are insufficient).

⁴⁹ Rogers v. Taintor, 90 SE(2d) 629, appeal transferred, 211 Ga 805, 89 SE(2d) 165; Niemaseck v. Bennett Holding Co., 125 NJEq 284, 4 A(2d) 794.

⁵⁰ Gregory v. Hardwick, 218 La 346, 49 S(2d) 423.

Louisiana. Succession of Christensen, 248 So2d 45.

⁵¹ Tribull v. Tribull, 208 Md 490, 119 A(2d) 399; Cook v. Redfield, 103 Okla 77, 229 Pac 588 (legatee also executor); Hatten v. Howard Braiding Co., 47 RI 47, 129 Atl 805 (executor estopped from action); Borum v. National Val. Bank, 195 Va 899, 80 SE(2d) 594.

Once the estate has been closed, beneficiaries may bring an action as an owner of the property, but only on his or her own behalf, not that of the estate.^{51a}

The persons who are entitled to the proceeds of a promissory note which is discovered after all testator's debts have been paid and the estate has been closed, may sue the maker of the note to recover the principal and interest due.⁵² It has been held that the benefits of an automobile insurance policy are not available to the person to whom the automobile has been bequeathed until completion of probate proceedings.⁵³

Where debts have been paid and personalty specifically bequeathed has been turned over to the legatee by the executor, it has been held that a final decree of distribution is unnecessary to perfect the legatee's title.⁵⁴ It has been said that with respect to legatees as well as devisees the final decree is not a transfer of title but merely a determination of existing rights.⁵⁵

§ 59.3 Nature of property or medium in which legacies are paid

A specific legacy can, by its nature, be satisfied only by delivery of the article or articles designated.¹ A general pecuniary legacy is ordinarily payable in such currency of the country where the will was made as passes for legal tender at the time of testator's death, unless a contrary intent is shown by the will.² A general pecuniary legacy is said to be payable in currency which is recognized when the payment is due.³

Where a gift is made in terms of a monetary unit other than the legal currency of the country in which the will is made, if such unit has fluctuated in value since the execution of the will, or if there is more than coin or both coin and paper money circulating under such term, the value of the legacy may vary greatly, depending upon the construction placed on the gift. Whether such a legacy is to be regarded as a gift of a commodity, or as a pecuniary gift to be measured in value by the value of the currency specified, and as of what date the value is to be determined, are questions to be decided in such a case. The testator's intent governs if it can be ascertained, and surrounding circumstances will be considered for that purpose, such as the

^{51a} Iowa. Estate of Dyer v. Krug, 533 NW2d 221 (1995).

⁵² Cheney v. Garibaldi, 345 IllApp 509, 104 NE(2d) 114 (under Missouri law).

⁵³ Collins v. Northwest Gas. Co., 180 Wash 347, 97 ALR 1235, 39 P(2d) 986.

⁵⁴ Crean v. McMahon, 106 Md 507, 14 LRA(NS) 798, 68 Atl 265.

⁵⁵ Latsch v. Bethke, 222 Wis 485, 269 NW 243.

¹ Smith v. McKitterich, 51 Iowa 548, 2 NW 390; Tomlinson v. Bury, 145 Mass 346, 1 AmStRep 464,

14 NE 137.

Estate distributions in kind, by J. J. Freeland (23 TaxLRev 59).

See, also, § 48.3 et seq.

² Phipps v. The Earl of Anglesia, [Eng] 1 Wms 696; Wallis v. Brightwell, [Eng] 2 Wins 88; Pierson v. Garnet, [Ent] 2 BroCh 38; Matter of Lendle, 250 NY 502, 63 ALR 521, 166 NE 182; annotated, 15 Cornell LQ 140.

³ Rogers v. English, 130 Conn 332, 33 A(2d) 540, 147 ALR 812.

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The attached Mary Haviland's Response to Brief of Amicus Curiae Washington Association of Professional Guardians is filed on behalf of Ladd Leavens, counsel for Respondent Mary Haviland.

Thank you for your attention to this matter.

Lucy Collins

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