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# The Danger of Retaining A Will: A Virginia View

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## The Danger of Retaining A Will: A Virginia View

*Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always been heretofore accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff. For a limitations statute, by its inherent nature, bars a cause of action solely because suit was not brought to assert it during a period when the suit, if begun in that period, could have been successfully maintained; the plaintiff, in such a case, loses for the sole reason that he delayed—beyond the time fixed by the statute—commencing his suit which, but for the delay, he would have won.<sup>1</sup>*

NOTWITHSTANDING the general acceptance of the above-described axiom, the majority of American jurisdictions still continue the original common law concept of a statute of limitations that begins to run immediately upon the commission of a wrong, as contrasted with the more modern rule that a statute of limitations will not begin until such time as the injured party actually discovers the injury or, in the exercise of due diligence, should have discovered the injury.<sup>2</sup> Those jurisdictions adopting the modern approach disregard what they refer to as the "technical" approach of the common law rule in order to focus on more fundamental concepts of justice instead. The issue, as stated by this emerging modern view, is whether a remedy shall be actually (vs. theoretically) available to an injured party for a reasonable period of time. It is recognized that in many instances the existence of an injury will not be

discovered until long after the negligent act in question has been committed. This is particularly true where the injury in question arises out of the negligent drafting of a will or other estate planning document which isn't designed to become operative until some time in the future. Therefore it is argued that to start the statute of limitations running upon the commission of the wrong, as opposed to the time of discovery, is to effectively deny a remedy in the typical case of negligent draftsmanship in a will.

The case of *Hawks v. Dehart*,<sup>3</sup> alleging medical malpractice in connection with leaving a surgical needle in a patient's throat, has been interpreted by some attorneys as rejecting the discovery rule in all matters of professional malpractice. It has been suggested, however, that the *Hawks* case is not only out of step with the developing law in Virginia's neighboring states but that it is also capable of being distinguished on its facts.<sup>4</sup>

Regardless of what the Virginia rule might be in matters of legal malpractice, generally speaking, it would appear that when an injured beneficiary brings an action against the draftsman of a negligently drawn will the equitable principle announced in the case of *Caudill v. Wise Rambler, Inc.*<sup>5</sup> would require a different result. In this case, involving products liability in connection with the sale of an automobile, the Court stated:

Obviously, since the plaintiff had not been injured at the time she purchased the car, she

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could not then maintain an action for her injuries. To say, then, that her right of action accrued before her injuries were received is to say that she was without remedy to recover damages for her alleged injuries. Such an unjust and inequitable result is not the purpose of statutes of limitation. They are designed to compel the prompt assertion of an accrued cause of action; not to bar such a right before it has accrued.<sup>6</sup>

The philosophy embodied in this quotation would seem to eliminate any possibility that the statute of limitations could begin to run against a beneficiary under a negligently drafted will until the death of the testator—it is only then that the beneficiary would have a cause of action.

#### Another Basis For Extending the Liability

In addition to the foregoing, there is another basis for suspending the operation of the statute of limitations if the attorney who drafted the will is also serving as custodian of the will for his client. This additional basis is referred to as the “continuing relationship” or “continuous relationship” theory. Under this theory it is held that when there is an undertaking between two contracting parties which requires a continuation of services over a period of time, the statute of limitations does not begin to run on the breach of a particular term thereof until the termination of the relationship out of which the breach arose. The continuing relationship theory is not a novel idea and it is expected that this theory will be regularly advanced in future cases of attorney malpractice because, as stated by the Supreme Court, in *McCormick v. Romans and Gunn*,<sup>7</sup> “it is particularly appropriate to an attorney-client agreement in view of the trust and confidence inherent in that relationship.” Under this continuing relationship theory, then, the statute of limitations will not begin in a legal malpractice case until the relationship between the attorney and his client, out of which the alleged wrong arose, has terminated.

Although *McCormick* did not involve legal malpractice in connection with a will, it is quite easy to see how the continuing relationship theory can be aptly argued in all of those cases where the attorney is also serving as the custodian of his client’s will. Even though all of the “legal” work has been completed, the will has been executed, the fee has been paid, and the file has been placed among the inactive, it can be argued that there is still a continuing relationship that exists between the attorney and his client because the attorney is serving as custodian for his client. Thus,



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even if Virginia is a “general rule” jurisdiction (which follows the common law practice of starting the statute of limitations upon the date of the wrong) the statute of limitations will not begin to run on a negligent error contained in a will so long as the attorney retains the will in his custody. Only when the attorney-client relationship comes to an end, typically at the client’s death, will the statutory period begin to run. Thus the attorney who also serves as custodian of his client’s will may truly have what some have referred to as “liability for life.”

#### A Basis For Expanding The Liability

Moreover, the attorney who engages in the practice of serving as custodian of his client’s will, whether he be motivated by the highest ideals of service to his client or by concern for an estate fee in the future, may thereby expose himself to a legal malpractice action even though the original document is error free. This possible further exposure arises out of FORMAL

OPINION No. 210 of the American Bar Association's Committee on Professional Ethics which insulates an attorney from a charge of solicitation when he initiates contract with a former will's client by writing to advise the client of a change in the law or facts which might defeat his client's testamentary plan. This opinion, in relevant part, reads as follows:

Many events transpire between the date of making the will and the death of the testator. The legal significance of such occurrences are often of serious consequence, of which the testator may not be aware, and so the importance of calling the attention of the testator thereto is manifest.

It is our opinion that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but *it might even be his duty* (emphasis added) to advise his client of any change of fact of law which might defeat the client's testamentary purpose as expressed in the will.<sup>8</sup>

The further problem foreseen for the attorney/custodian in connection with this opinion is that the client's estate or a beneficiary under client's will will be in a strong position to "boot-strap" a theory of liability from the existence of the continuing relationship between the testator and the attorney/custodian. The plaintiff would first argue that because of the custodianship involved there was a "continuing relationship" during the period of the custodianship. And then, because of this continuing attorney-client relationship, the attorney had a *duty* (see emphasized portion of OPINION 210, above) to keep the client advised concerning major changes in the law that might affect his estate plan.<sup>9</sup> Query—If there is such a duty, will the sending out of a simple form letter, with no follow-up, be regarded as satisfaction of that duty vis-a-vis the Tax Reform Act of 1976?<sup>10</sup> Or perhaps the question should be posed a bit differently—Will the sending out of a simple form letter, with no follow-up, be regarded *by a jury* as a satisfaction of that duty vis-a-vis the major changes brought about by TRA '76 or the further changes brought about in the Revenue Act of 1978?

While it is not suggested that the foregoing analysis of the problems inherent in the attorney serving as custodian is necessarily correct, it is suggested that these arguments will be advanced against the attorney/custodian. Thus, prudence suggests (1) that an attorney give careful consideration to all of the circumstances of a particular case before he agrees to serve as custodian and, (2) that in all cases where the

attorney is not going to so serve, he should send a termination letter to the client immediately after the execution of the will (a) confirming that the will has been delivered to the client, and (b) confirming that the client has assumed the responsibility for initiating any future review of the estate plan in the light of changes in the law or in the client's personal position. The following form letter was developed by a Virginia law firm to respond to several of the concerns described in this article as well as provide tax advice to the client in connection with the attorney fees involved.

### FORM

Mr. and Mrs. John A. Smith  
1000 Willortrust Road  
Richmond, Virginia 23219

Dear John and Mary:

I am enclosing an invoice for our services in connection with preparation of your wills and a separate invoice for our services in connection with estate planning and tax advice.

We are invoicing separately for estate planning and tax advice because the charge for this type of service is tax deductible on your federal income tax return, and you should make an appropriate notation to include the bill for this service with your tax information for the year in which payment is made. The cost of preparing the will is not tax deductible.

We appreciate very much your confidence in having us do this work for you. The plan reflected by the wills is, in our opinion, sound and in the best interest of your respective estates at this time. However, as I explained to you when you signed and received your wills, you should have these wills reviewed whenever there has been a material change in the value of your estate, a change in the beneficiaries, executors or trustees under your wills, or a major change in the tax laws, and they should be reviewed periodically even though you are unaware of any changes in the law or your situation. We regret that we are unable to automatically review your wills and the other wills drafted by our office either on a periodic basis or with every change in the tax laws. I am sure you can understand the burden that would be placed on us if we undertook to do this. However, we will be more than happy to meet with you, review your wills, answer your questions, and take whatever action is necessary whenever you call upon us to do so.

Cordially,

I. M. Counselor

IMC/abc

### FOOTNOTES

1. *Dincher v. Marlin Firearms Co.*, 198 F. 2d 821, at 823, dissenting opinion of Judge Frank (2nd Cir. 1952).

2. For a discussion of these theories, see 18 ALR 3rd 978—  
(continued on page 25)

subjects, or if they can reflect the uniqueness of state laws, particularly in areas such as evidence and real property. Secondly, if the raising of lawyer competency levels is to be done by the sharpening and testing of fundamental skills—skills such as analyses and written communications, and if the bar examination is to be an academic backup to legal education—a second test of substantive knowledge and fundamental skills—it is difficult to believe that a multiple choice examination will accomplish that purpose in subject areas that are the very core of the law school curriculum.

The fourth and remaining chance for quality control is after the lawyer has been graduated, has passed the bar examination and is practicing. This is when the lawyer will either practice competently or, by not doing so, contribute to a negative public perception of a legal profession that today is suffering slings and arrows from a consumer oriented society. What is there other than the market place and growing malpractice suits to expose lawyer incompetency?

Since repeal of Prohibition, the greatest form of mass hypocrisy could be the perpetuated myth that the practicing bar regulates itself to weed out incompetent lawyers. The Code of Professional Responsibility mandates this but it is a mandate that goes unheeded. Each year, when representatives of the Virginia State Bar, charged with implementing requirements of the Virginia Code of Professional Responsibility, visit our law school, I ask if they know of any instance where a Virginia lawyer has reported another for incompetence. Thus far, I have heard of no such instance.

Perhaps human nature is such that the drafters of the present Code expected too much.

I have been reading preliminary drafts of the forthcoming report of the Kutak Commission, charged with drawing new rules of professional responsibility. Their approach to self regulation appears less hypocritical. The Commission's early drafts, by silence about self regulation of competency, could lead one to conclude that much responsibility for dealing with incompetency will rest with the judiciary; that hope for most improvement will depend upon future developments such as expanded continuing legal education programs, peer review, special examination for practice before certain courts and examinations for specialists.

We *do* live in a consumer oriented society. These are times when confidence in the legal profession and our system of justice is waning. Lawyer incompetency is a source of exacerbations along with trial delays, high costs and inadequate delivery of legal services. Lack of competence by practicing attorneys reflects upon the law schools, but also upon the practicing bar and judiciary. To assure the public that more lawyers will be more competent will require the best efforts of all charged with responsibility for legal education and the administration of justice. For organizations such as the National Center for State Courts, the problems facing the legal profession today represent an opportunity for service. For those of the practicing bar such problems require continuing self appraisal. For those in the judiciary, public concerns about our legal system present an opportunity for leadership.

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## The Danger of Retaining A Will: A Virginia View

(continued from page 6)

"When Statute of Limitations Begins To Run Upon Action Against Attorney for Malpractice."

3. 206 Va. 810 (1966).

4. Lahy, "Perpetuities, Privity and Professional Liability," 2 U. Rich. Law Notes 203 (1966).

5. 210 Va. 11 (1969).

6. *Id.* at 12.

7. 214 Va. 144, at 149 (1973).

8. In INFORMAL OPINION No. 661, July 12, 1963, the Committee had occasion to refer back to this ruling and stated "We adhere to this ruling, which we consider applicable to estate plans in general."

9. Should this theory of liability seem far-fetched to the reader, he is referred to Keydel, "Explaining the Tax Reform Act of 1976 to Clients," *The Practical Lawyer*, Vol. 23, No. 2 (March 1977), 11, at page 12, where the author notes that "(u)nless it has been made

quite clear to a client through past written communications that he bears the responsibility for returning to the attorney for any review of his plan, whether necessitated by changes in the law or otherwise, the failure to notify a client of vital changes in the tax laws affecting his plan would appear to be not only a breach of the attorney's ethical responsibilities, but also possible grounds for a malpractice lawsuit." *A fortiori*, if there is a "continuing relationship" between the attorney and the client for whom he drafted the will in question, the liabilities foreseen by Keydel are of much greater likelihood.

Note also the language of Surrogate Regan in *Estate of Buettner* (Surrogate's Court, Erie County, Buffalo, N.Y., 11/6/78) CCH Par. 13,300, a case raising the question whether the new "mini-max" marital deduction of TRA '76 would be obtained under a pre TRA will providing for the "maximum" marital deduction where the testator died prior to 1/1/79—. . . it would do well for attorneys to notify such clients as have drafted pre-1977 wills containing marital deduction formula clauses as to the Tax Reform Act changes to determine if the clients want to take advantage of the new \$250,000 minimum in these cases where the 50% deduction would be less than \$250,000.

10. For the suggested form that an appropriate letter might take, see Keydel, *op. cit.*, note 9.