1-1-1947

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SOME PROPOSED CHANGES IN THE LAW OF WILLS IN PENNSYLVANIA

by

A. J. WHITE HUTTON

The Wills Act of June 7, 1917 provides as follows:

"Every person of sound mind and of the age of 21 years or upwards, whether married or single, may dispose by will of his or her real estate, whether such estate is held in fee simple or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate."

The Commission of 1915 codifying the subject of Wills as presented to the General Assembly of 1917, which enacted the same, explained the above quotation thus:

"Note.—This is Section 1 of the Act of April 8, 1833, P.L. 249, 4 Purd. 5109-18, amended by inserting the words, 'of the age of twenty-one years or upwards, whether married or single.' This obviates the necessity for a separate section as to minors, thus supplying Section 3 of the Act of 1833, 4 Purd. 5120. It also supplies Section 7 of the Act of April 11, 1848, P. L. 537, 4 Purd. 5119 (which supplied Section 2 of the Act of 1833) providing that a married woman might dispose of her separate property by will executed in the presence of two or more witnesses, neither of whom should be her husband. It likewise supplies Section 5 of the Act of June 8, 1893, P. L. 345, 4 Purd. 5119, empowering married women to make wills as if unmarried, which act repealed the married persons' property act of June 3, 1887, P. L. 332.

"The provision in Section 1 of the Act of 1833 as to estates held for the lives of others was copied from the Statute of 29 Charles II, Chapter 3, Section 12; and the provision as to joint tenancy followed the Act of March 31, 1812, 5 Sm. L. 395, 2 Purd. 2031, which provides that if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and be considered to every intent and purpose in the same manner as if such deceased joint tenants had been tenants in common.

"Apropos of a suggestion that the testamentary age be reduced to eighteen years, it may be noted that in the draft submitted by the Com-

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1P. L. 403, Section 1, 20 PS 181.
missioners in 1832, it was provided that wills of personal estate alone might be made by persons of the age of eighteen years or upwards, but this was not approved by the legislature."

**ROMAN AND ENGLISH LAW**

In Rood on Wills\(^3\) it is said:

"The rule of the civil law, adopted by the ecclesiastical courts in England, was, that males of fourteen and females of twelve might make wills without the consent of their guardians, and could not at any earlier age, even with their guardians' consent. The age required to make a valid devise, of lands devisable by virtue of statute, was raised to twenty-one for both sexes, by the statute 34 and 35 Henry VIII, c. 5, section 14, A.D. 1543-3; and for wills of personality as well, for both sexes, by the Statute of Wills, 1 Vic. c. 26, section 7, A.D. 1837; and such is the law in England today."

By another authority\(^4\) it has been said:

"The power of an infant to dispose of personalty by will was recognized at an early date and is a common law right, and it is generally held both in England and in the United States in the absence of statutes to the contrary, that a male infant over fourteen years of age has the power to dispose of personal property by will . . . also by the common law a female over twelve years of age was competent to make a will disposing of personal property."

**AMERICAN STATUTORY LAW**

In Rood on Wills, supra\(^5\) there is a collation of information relative to the statutes of many American jurisdictions pertaining to wills, and the author notes that in Georgia the age limit is the lowest, where it is held, in construing the statute applicable, that all persons of the age of fourteen have the capacity to dispose of realty or personalty by will. In California, Connecticut, Hawaii, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota and Utah, both males and females may dispose of all their realty and personalty by will at the age of eighteen years. In Illinois, Maryland, District of Columbia and Missouri the privilege of disposing of both realty and personalty at eighteen is accorded only to females and in Wisconsin to married females of the age of eighteen. In Alabama, Arkansas, Oregon, Rhode Island, Virginia and West Virginia, while no one can dispose of realty by will till twenty-one years of age either sex may dispose of any personalty by will at eighteen. In New York to dispose of realty either sex must be of the age of twenty-one years and this applies likewise to personalty as regards males with an exception as to females in the case of personalty, allow-

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\(^{4}\)Ann. Cas. 1912 A. note. See also Atkinson, Law of Wills (Hornbook Series, 1937) 183; Henninger Est. 30 D. R. 413 (1921); Smith's Est., 308 Pa. 265, 162 A. 214 (1932).

\(^{6}\)Page 82, Sec. 107.
ing such wills to be made at the age of sixteen. In South Carolina all persons devising real estate must be of the age of twenty-one years, but as to personally the age adopted is that for both sexes prevailing at common law.

Other states not mentioned have a requirement that both sexes must attain the age of twenty-one years before being competent to make a will either of personally or realty in accord with the present law of Pennsylvania.6

It has been held in Pennsylvania that the designation of a beneficiary by a member of the benefit society is an act testamentary in character and that such designation was subject to the requirement of the Wills Act of 1833. Willard J., explained:

"The designation of a beneficiary by a member of a benefit society is an act testamentary in its character, and the same rules of construction apply as in the case of other testamentary writings: Continental Life Insurance Company v. Palmer, 42 Conn. 64; Union Mutual Aid Association v. Montgomery, 70 Mich. 587.

"This writing being testamentary in its character, to make it valid and binding required a person to execute it of full and lawful age, otherwise it was voidable. John K. Weisenborn being admittedly but seventeen or eighteen years of age at the time he designated his uncle as beneficiary, such designation was voidable; we must therefore treat this case as though no designation had been made, and while it appears from the rules of the society that Adam Weisenborn, the father, would be entitled to receive this fund, we are only called upon to decide whether George Burst, the appellant, is entitled to the fund. And having decided that the designation as beneficiary, under which he claims, was null and void when made, or at least voidable, it follows that he is not entitled to the fund in question."7

However, it has been stated by the Supreme Court in numerous opinions that it takes less capacity to make a will than to conduct the general affairs of life or ordinary business.8

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6The rules in the various states are also collated in Bordwell, Statute Law of Wills, 14 Ia. LR 177-79; Powell, 1 Cases on Trusts and Estates 251, 252, n.; see Atkinson on Wills, page 184 n.
7Burst v. Weisenborn, 1 Pa. Super. 276 (1896). But see Insurance Code of May 17, 1921, P. L. 682, Art. IV, Sec. 420a, added June 22, 1931, P. L. 625, Sec. 1, as amended April 22, 1943, P. L. 72, Sec. 1, 40 PS 572 supplement, authorizing generally minors of the age of eighteen years and upwards to enter into insurance and annuity contracts.
Section 5 of the Wills Act of June 7, 1917, P. L. 403, 20 PS 194, provides as follows:

"Notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages, and personal estate as he might have done before the making of the act."

The Commission has explained the above quotation thus:

"Note.—This is Section 8 of the Act of 1833, 4 Purd. 5128, which was copied from Section 7 of the Act of 1705, 1 Sm. L. 33. There were omitted, however, in the Act of 1833, the words, 'or they' after 'as he.' The Commissioners of 1830 remarked, in reference to the change thus made: 'By extending the provisions to all' other persons at sea it is conceived that there would be some danger of those evils in respect to the disposition of property by verbal wills against which it was the object of a previous section to guard.'

"Under the present law and the decisions of the courts, mariners at sea and soldiers in actual military service have the same privileges in the making of wills that they would have enjoyed if the English Statute of Frauds and our Acts of 1705 and 1833 had never been passed, as all of these statutes have expressly excluded such wills; the wills, though oral, must, however, be proved by two witnesses: Smith's Will, 6 Phila. 104; Drummond vs. Parish, 3 Curteis Ecc. 522.

"While the Commissioners are aware of the dangers attending oral wills, they have concluded to recommend the exception here made in favor of mariners and soldiers, as a class of persons who have always been regarded with peculiar indulgence by the law of England as well as by the Roman law, in which this exception originated.

"Nuncupative wills in general have been so safeguarded by the requirements of the preceding sections, that the Commissioners do not believe that any serious consequences will ensue from their retention. Such wills seldom occur in practice, and yet their total abolition might produce inconvenience in cases proper for them."

In *Henninger's Estate* a soldier, nineteen years of age, was mortally wounded in a battle in World War I and died three or four days following his wound. While being carried to the rear on a stretcher the soldier said to the sergeant that he wanted a certain person to have everything he owned, in these words: "She can have everything I own and my stuff." It was held that this language constituted a good nuncupation and that furthermore it was validly made as the wills of mariners at sea and soldiers in actual military service are

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10D. R. 413 (1921), per Guest, J. See also Smith's Will, 6 Phila. 104 (1865). Other cases of interest are McNelis' Estate, 22 D. & C. 486 (1935), discussing rights of a soldier as testamentary; In Re Gromaczuski's Estate, 19 Erie 498, 51 York 186 (1938); and In Re Buehrer's Estate, 349 Pa. 353 37 A. 2d 587 (1944).
expressly excepted from the general operation of the Wills Act and are governed by the common law under which a will of personalty by word of mouth by a minor over fourteen years of age was valid.

Although the provisions in the law pertaining to mariners and soldiers making wills have generally been referred to as instances of nuncupation, nevertheless there are cases falling under these provisions where the mariners or soldiers left certain writings and the questions determined were as to the validity of these particular writings. Therefore it is apparently the law that a mariner or soldier under the circumstances explained by the cases may make a will either oral or in writing and in both cases the common law requirement of age would be applied.

**NUNCUPATION**

Nuncupation is defined as "an oral will declared by a testator in extremis before witnesses, and afterwards reduced to writing." On this subject the Wills Act of June 7, 1917, P. L. 403, Section 4, 20 PS 193, provides as follows:

"Personal estate may be bequeathed by a nuncupative will, under the following restrictions:—"

"(a) Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more next before the making of such will, except where such person shall be surprised by sickness, being from his own house.

"(b) Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and, in all cases, the foregoing requisites shall be proved by two or more witnesses who were present at the making of such will.

"(c) No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the alleged testamentary words, unless the said testimony, or the substance thereof, were committed to writing within six days after the making of said will."

These provisions enable one to make an oral will under the strict requirements as specified, but the age as required is twenty-one years.

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11 See cases in note 10.
13 For explanatory notes see Report of the Commission, page 60.
14 Megary's Estate, 25 Pa. Super. 243 (1904); In re McClellan's Estate, 325 Pa. 257, 189 A. 315 (1937); In re Hunter's Estate, 328 Pa. 484, 196 A. 35 (1938); Reynolds vs. Maust, 142 Pa. Super. 109, 15 A. 2d. 863 (1940); In re Buehrer's Estate, 349 Pa. 353, 37 A. 2d. 587 (1944); O'Neil's Estate, 48 Montg. 94 (1932); Needham's Estate, 81 Pitts. 51 (1933).
DICKINSON LAW REVIEW

PROPOSED CHANGES

In the Report of the Committee on Law of Decedents Estates and Trusts of the Pennsylvania Bar Association for the year 1942 there were fifteen recommendations made concerning changes in the present Wills Act and of these Recommendations No. 1 is as follows:

"Recommendation No. 1. Any minor who (a) is of the age of eighteen years or upwards and is either married or without parents or (b) who is of the age of fourteen years or upwards whose property would, in the case of intestacy, escheat to the Commonwealth may dispose by will of his real and personal estate."

The Report further observed in support of the Recommendation:

"Persons under twenty-one, whether single or married, have no power under section 1 of the Wills Act to make a testamentary disposition. As pointed out by the Supreme Court it takes less capacity to make a will than to conduct the continuing affairs of life or to conduct ordinary business. Minors are authorized to conduct ordinary affairs or to conduct business, subject to their right to avoid certain contracts when they become of age. Yet, under section one of the Wills Act a minor must let his estate go to a distant relative even though he is making his home with a family which he wants to receive his estate.

"It has been held in a learned and exhaustive opinion by the late Judge Gesty that the Wills Act does not bar testamentary dispositions by soldiers and mariners under the age of twenty-one.

"A comparative survey of the law of the jurisdictions throughout the United States reveals that in fifteen other jurisdictions, minors do not have the power to make testamentary dispositions. Of the remaining jurisdictions twelve fix the age of eighteen, four additional fix a lower age, six additional fix the reduced age of eighteen only for females, four additional fix the reduced age of eighteen only for dispositions of personalty and seven additional empower married persons to make wills even though under twenty-one."

At the Annual Meeting of the Pennsylvania Bar Association in 1941 there was adopted the recommendation of the Committee on Law of Decedents Estates and Trusts that a legislative commission be appointed to re-examine and recodify the Law of Decedents Estates and Trusts in the light of experience since the general codification of 1917.

JOINT STATE GOVERNMENT COMMISSION

The Joint State Government Commission created by the Act of July 1, 1937, P.L. 2460, Section 1, and amended by the Act of June 26, 1939, P.L. 1084, Section 1, 46 PS 65, and as further amended by the Act of March 8, 1943, P.L. 13,

46 PS 65 Supplement, is a continuing agency of the General Assembly to undertake studies and develop facts, information and data on all phases of government for the use of the General Assembly and Departments and agencies of the State Government. In accordance with the recommendation of the Pennsylvania Bar Association, the Senate of Pennsylvania on March 13, 1945 adopted the following resolution:

"Whereas, No revision of the decedents' estate laws of the Commonwealth has been made since 1917, but numberless amendments have been made and laws on subjects related thereto have been enacted, which render the true status of these laws uncertain and difficult of administration; therefore, be it

"Resolved, That the Joint State Government Commission is hereby requested, during the interim between the present session of the General Assembly and the regular biennial session of 1947, to study, revise and prepare for reenactment the Orphans' Court Partition Act, the Orphans' Court Act, the Revised Price Act, the Wills Act, the Register of Wills Act, the Intestate Act and the Fiduciaries Act, together with all of their supplements and amendments and all separate laws that should properly be incorporated therein, and to present them for the consideration of the General Assembly at its next session." 17

Pursuant to the said resolution the Commission established a special "Committee on Decedents' Estates Laws" to carry out the request contained in the said Resolution. The Committee in turn created an Advisory Committee consisting of judges and attorneys to aid in the work, and as a result of the study made the Commission has published as a part of their report to be submitted to the General Assembly of 1947 the following:


The Proposed Wills Act of 1947 provides, inter alia, as follows:

"Section 1. Who May Make a Will. (a) Persons Twenty-one or Older. Any person of sound mind twenty-one years of age or older may by will dispose of all his real and personal estate subject to payment of debts and charges.

"(b) Additional Persons During Wartime. During any war in which the United States is engaged, a person of sound mind eighteen years of age or older and being in the military service in the Armed Forces of the United States in active service at home or abroad, or being a mariner on land or at sea, may by will dispose of all his real and personal estate subject to payment of debts and charges."

17History of Senate Bills and Resolutions, Session of 1945, Being the 136th Regular Session of the General Assembly, 163.
As pointed out in the Comment to the Proposed Act,\(^1\) Section 1 as proposed takes the place of Sections 1, 5 and 7 of the 1917 Act which read:

"Section 1. Every person of sound mind of the age of twenty-one years or upwards, whether married or single, may dispose by will of his or her real estate, whether such state is held in fee simple or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate.

"Section 5. Notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his moveables, wages, and personal estate as he may have done before the making of this act.

"Section 7. The emblements, or crops, growing on lands held by a widow in dower, or by any other tenant for life, may be disposed of by will as other personal estate. Rents and other periodical payments accruing to any tenant for life, or to any other person entitled under the laws of this Commonwealth regulating the descent and partition of real estate, may, so far as the same may have accrued on the day of death of such tenant for life or other person, be disposed of by will in like manner."

The Commission states that Subsection (b) is a change in existing law in the following respects:\(^2\)

"1. It permits a person in military service or a mariner, in time of war, to dispose of real as well as personal estate if he is eighteen years of age or older.

"2. It prevents the making of wills by all persons who have not attained eighteen years of age.

"3. It makes all persons comply with the safeguards of the Wills Act . . . For further discussion see comments to the introductory clause of Section 2.

"4. It permits mariners and soldiers between eighteen and twenty-one years of age to have their wills written at home without requiring them to be in 'actual military service'."

**Proposed Nuncupation**

On the subject of nuncupation the Proposed Wills Act of 1947 provides, inter alia, as follows:

"Section 2. Form and Execution of a Will. Every will, including wills of mariners and persons in the military service in the Armed Forces of the United States, shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:

\(^{19}\)Proposed Wills Act of 1947, page 2.
"(d) Nuncupative Wills. (1) When Permissible. A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the peril, and must be declared to be his will by the testator before two disinterested witnesses, reduced to writing by or under the direction of both of the witnesses within ten days after such declaration, and submitted for probate within three months of the death of the testator.

"(2) Property Disposable. A nuncupative will attempting to dispose of personal property of an aggregate value in excess of five hundred dollars, or of real estate in any amount, shall be wholly void.

"(3) Effect on Prior Will. A nuncupative will shall neither revoke nor change an existing written will.

"(e) Witnesses. No will shall be valid unless proved by the oaths or affirmations of two competent witnesses."

These provisions are to take the place of Section 4 of the Wills Act of 1917 as follows:

"Section 4. Personal estate may be bequeathed by a nuncupative will, under the following restrictions:

"(a) Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more next before the making of such will, except where such person shall be surprised by sickness, being from his own house.

"(b) Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and, in all cases, the foregoing requisites shall be proved by two or more witnesses who were present at the making of such will.

"(c) No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the alleged testamentary words, unless the said testimony, or the substance thereof, were committed to writing within six days after the making of said will."

A review of the salient features of the present law pertaining to Sections 4 and 5 of the Will's Act of 1917 may aid in giving further evidence of the extent of the proposed changes.

As to the law concerning the provisions of Section 5 already cited and partially discussed, Rood on Wills states the general laws as follows:

"Section 238. 'Any Soldier Being in Actual Military Service or any Mariner or Seaman Being at Sea.' Soldiers in service and seamen at sea might dispose of their personal property to any amount under

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the statute of 29 Car. II c. 3 without observing the forms required of
of other persons, and the same privilege is allowed them now by the
statutes of Alabama, Arizona, Arkansas, District of Columbia, Maine,
Michigan, Missouri, Mississippi, Nebraska, New Jersey, New Hampshire,
Pennsylvania, South Carolina, Texas, Vermont, Washington, and Wis-
consin. In Indiana and Iowa these must observe the requirements but
are not limited as others are in the amount they may thus dispose of.
In Kentucky and Oregon no others can make such wills, and these only
on conditions named. No conditions are imposed, but no others can
make oral wills, in Maryland, Massachusetts, Minnesota, New York
Rhode Island, Virginia and West Virginia. These can make wills
orally only when in fear and peril of death in California, Montana, and
the Dakotas. All persons in military service before the enemy are
privileged as soldiers, for example, a surgeon attending a regiment in
the service of the East India Company. A soldier is not privileged when
mustered into the service; nor yet while quartered at the barracks not
in the face of the enemy, whether in his own country or in a colony;
nor while at home on a furlough. He is privileged while on a military
expedition, whether in battle, march, camp, or hospital.

"Section 239. The Privilege as a Seaman belongs to the whole
service, from the cook to the commander-in-chief, in the government
service or on a merchant boat. The seaman is 'at sea' within the mean-
ing of the statute from the time he goes on board for the voyage,
though still fast to the dock, in a river and above tide water. The
privilege continues while at anchor in a port on the way, even while the
sailor is temporarily on shore; or while stationed at a port in the coast
defense; but the commander of a fleet was held not to be privileged
while stationed at a foreign port, and living in a house on shore. A
navy surgeon going home, by ship, on sick leave, as a passenger, was
held to be a seaman at sea, but a captain on passage to take charge of
his boat was held not to be."

Summary

By the proposed changes above outlined there is a general adherence to the
21-year age requirement in the Wills Acts of 1833 and 1917 with a concession,
however, to those of the age of 18 "being in military service in the Armed Forces
of the United States in active service at home or abroad or being a mariner on land
or at sea."

On the contrary the law as indicated in Henninger's Estate would be
changed as to soldiers and mariners less than 18 years of age.

22See also note on Wills of Soldiers or Seamen, Ann. Cases 1916 A, 483-487.
23See note 10, supra.
As indicative of the attitude of the Legislature relative to the legal capacity, competency and responsibility of these below the age of 21 years in various activities, a study of the numerous acts on this subject is interesting as it appears in the Digested Statutory Law of Pennsylvania.

As to nuncupation the changes, as will be noted in comparing the present law and that proposed, are quite marked but follow the similar terms of Section 6 of the Model Execution of Wills Act. It will be noted that the limitation on nuncupation as proposed, referring to personal property and excluding real estate, is the sum of $500.00.

December 14, 1946