Anna Nicole Smith's will

What hath her lawyer wrought?

By Dan W. Holbrook

Anna Nicole Smith died on Feb. 8, 2007, her brief 39 years a testament to the hazards of fast living. One would expect that someone whose wealth derived from inheritance would carefully fashion her own estate plan, and that any lawyer representing a major celebrity would showcase the art of quality will craftsmanship. Wrong. Smith's will is beyond ambiguous; it's virtually incapable of rational construction. Ultimately the courts will construe it, and then only as a best guess of her intent.

Let's consider this situation as if it were a Tennessee bar exam question,[1] and apply Tennessee law.

FACTS: Mom, unmarried, died testate domiciled in Tennessee, survived by minor child named Daughter and by Mom's mother named Granny. When she wrote the Will, Mom had only one child named Son, by Ex-husband [Will says "I have one child SON"], but Son predeceased Mom without issue. Will leaves entire estate to Trustee, in trust "for my child … such that my children are distributed sufficient sums for their health, education, and support … until age 35; and at 35 are given all of the principal." Neither the Will nor the Trust created under the Will contains any other remainder or contingent beneficiary. Will contains a clause labeled "Disinheritance" that reads as follows: "Except as otherwise provided in this Will and in the Trust, I have intentionally omitted to provide for my spouse and any of my heirs, including future spouses and children and other descendants now living and those hereafter born or adopted." Who gets Mom's estate and why?[2]

Here are the potential claimants and their respective legal arguments.[3]

1. Ex-husband. The Will uses the term "child" to refer only to Son, thus defining the term "child" to mean only Son. The Trust is solely for benefit of "child," i.e., Son. The residuary bequest to the Trust for Son contains no explicit condition regarding Son's survival and none should be implied. A maxim of will construction is that a testator intends to dispose of his entire estate, and the Trust is the sole beneficiary under the Will, so it should be respected. The Trust also contains no contingent reversion if Son dies during the term of the Trust. If Son had survived and died after Mom, the Trust remainder would likely have been construed to pass to Son's heirs under the intestacy provisions of *Tenn. Code Ann.* §31-2-104(b), namely Son's issue, if any, or in the absence of issue to Son's "parent or parents equally." The result should be no different merely because Son predeceased Mom. Since Mom has deceased, her one-half circles back into her estate, but the other one-half of the estate passes to Son's other parent, namely Ex-husband. This does not violate the disinheritance clause since Ex-husband is heir of Son, not of Mom. The half coming back into Mom's estate passes again one-half to Ex-husband, and after infinite regressions all of Mom's estate passes to Ex-husband.

2. Daughter Outright.

(a) First Argument: The Will uses the term "child" to refer only to Son, thus defining the term "child" to mean only Son. The Trust is solely for benefit of "child," i.e., Son. There is an implied condition of Son's survival, so residuary bequest to Trust lapses. Under *Tenn. Code Ann.* §31-2-101, "Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs." Under *Tenn. Code Ann.* §31-2-104(b)(1), Mom's sole heir is her Daughter. The disinheritance clause does not disinherit Daughter for two possible reasons. (1) In Tennessee as well as in the majority of states, a testator cannot disinherit his heirs or next of kin (i.e., create a "negative will") unless his will also disposes of the entire estate, and property not passing by such a "negative will" passes by intestacy despite the attempt to disinherit heirs.[4] In effect, the disinheritance clause was intended to apply only if Son actually survived, which he did not, so the Tennessee rule applies to reinstate the share of the intestate heirs. (2) In the alternative, the disinheritance clause, read literally, does not actually disinherit; rather, despite the label given to it, it is merely descriptive of the estate plan leaving everything to a Trust for Son, and the Will never affirmatively states that all heirs are never to receive anything under any circumstance.

(b) Second Argument: Under *Tenn.*

Code Ann. §32-3-103, "A child born after the making of a will … not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if the testator had died intestate." Regardless of any other provision of the will or any other statute, Daughter is entitled to the share of a pretermitted heir. Since she is the sole surviving child, she would receive the entire estate. The disinheritance clause does not disinherit Daughter for the two reasons given above, but even if it might, Daughter does not take by being an "heir" under the intestacy statute but by a separate statutory provision applying only to pretermitted children, and so she is not in the category of persons to whom the disinheritance clause applies.



3. Daughter in Trust. The entire residue passes to Trust "for my child … such that my children are" provided for. Other than one singular reference to child, all remaining dispositive provisions of the Trust are plural, referencing "my children," the plural verb "are," and the plural adjective "their." Maxims of will construction create presumptions in favor of testacy over intestacy; in favor of the natural objects of a testator's bounty; and in favor of a disposition that is just, natural and reasonable. Therefore, Mom's intent must have been for the Trust to provide for all of her children, including those born after the making of the Will. The disinheritance clause does not apply for the two reasons described above. Furthermore, the disinheritance clause explicitly begins by saying "Except as otherwise provided in this Will and in the Trust …" Since the Trust does in fact provide otherwise, it overrides any general disinheritance.

4. Granny. The Will uses the term "child" to refer only to Son, thus apparently defining the term "child" to mean only Son. The Trust is solely for benefit of "child," i.e., Son. There is an implied condition of Son's survival, so residuary bequest to Trust lapses, and entire estate passes by intestacy. Under *Tenn. Code Ann.* §31-2-104(b)(1), Mom's sole heir would normally be Daughter, and Tennessee law would normally not recognize a "negative will." However, the Will was not a "negative will" when drawn, and the disinheritance clause should remain effective insofar as it is excludes specific individuals rather than all heirs. The disinheritance clause is explicit that the Will disinherits Daughter ("future … children … hereafter born"). So under *Tenn. Code Ann.* §31-2-104(b)(2) the next "heir" in priority is Mom's parent, namely Granny, who is not explicitly disinherited.

5. The State of Tennessee. The Will uses the term "child" to refer only to Son, thus apparently defining the term "child" to mean only Son. The Trust is solely for benefit of "child," i.e., Son. There is an implied condition of Son's survival, so the residuary bequest to Trust lapses, and entire estate passes by intestacy. The Will disinherits all heirs. Although Tennessee law does not normally recognize a "negative will," this Will was not a "negative will" when drawn, and should remain effective to carry out the intent of the testator that none of the individuals listed should take. Under *Tenn. Code Ann.* §31-2-110, "If there is no taker under the provisions of [the intestacy statute], the intestate estate shall escheat to the state of Tennessee." The testator must be presumed to have known that the effect of leaving for benefit of Son but to no other heirs would pass it to the state of Tennessee, for which the state is most grateful.[5]

So what lessons can we learn for our will drafting, aside from the obvious that even prominent testators can hire incompetent lawyers? First and foremost, draft for contingencies. Ask the "What if" questions until your clients tire of the process and every reasonable contingency is considered and provided for, even if remote. Second, if your client wants to disinherit, state so actively and specifically, rather than possibly being

(Continued on page 32)

Anna Nicole's will

(Continued from page 31)

only descriptive of what other parts of the Will have done. Third, don't disinherit everyone; leave a default somewhere. Fourth, proofread your documents carefully, for example, not mixing plural with singular in a way that confuses. Finally, in an age of instant fame and Google, assume someday every word written will invite public scrutiny, so you won't be instantly infamous.

Notes

1. The facts of this "bar exam question" are admittedly oversimplified compared to the full range of facts involved in Smith's actual will construction, including such issues as admission of evidence to resolve patent ambiguities, possible "scrivener's errors," or parentage of the minor daughter.

2. In all these scenarios, the U.S. Treasury may claim the largest share, through the federal estate taxes. But see footnote 5.

3. The Will also contains an "in terrorem" clause, threatening to deny any interest if any "heir … or any other person … contests or attacks this will or the Trust or any of the provisions …" A will construction suit might be treated as an attack on a provision, and each interested claimant might assert the in terrorem clause against other claimants, with uncertain result.

4. 1 Tenn. Juris., Wills §114, citing *Waller v. Sproles*, 160 Tenn. 11, 22 S.W.2d 4 (1929), and *Nichols v. Todd*, 20 Tenn. App. 564, 101 S.W.2d 486 (1936). Uniform Probate Code §2-201, not adopted in Tennessee, authorizes so-called "negative wills" that merely disinherit without necessarily disposing of the rest of the estate.

5. If the estate escheats to the State of Tennessee, it is not clear whether or not any federal estate taxes would be owed, because the State in effect acts only as a custodian of the escheated property, not necessarily receiving absolute fee title. Normally, assets passing to a State qualify for a federal estate tax charitable deduction under Internal Revenue Code §2055(a)(1). However, under Regulations §20.2055-2(b)(1), "If … a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible." Under Tennessee's escheat statute, *Tenn. Code Ann.* §31-6-101 et seq., property escheating to the estate is delivered to the state treasurer. Under *Tenn. Code Ann.* §31-6-119, "Any person claiming to be entitled to the property of any decedent may file a claim thereto with the treasurer in accordance with [*Tenn. Code Ann.* §66-29-101 et seq., the Tennessee Uniform Disposition of Unclaimed Property Act (UDUPA)]." *Tenn. Code Ann.* §66-29-123 provides that any person claiming an interest in any property under the UDUPA may file a claim thereto. Therefore if the possibility that any individual might file a claim for the property is not "so remote as to be negligible," the charitable deduction is disallowed and the U. S. Treasury can claim its share of federal estate tax. Of course, since the State's legal argument is predicated on the fact that the Will disinherits all heirs, then the State would argue that by definition there can be no claimants, making the contingency not only remote but non-existent.

PAINE ON PROCEDURE

Admissions 'against interest'

By Donald F. Paine

How much longer must I preach this sermon? There ain't no such thing as admissions "against interest." The true principle supporting the opposing party admissions exception to the hearsay exclusionary rule is this: Anything the opposing party said or wrote out of court is admissible in court against that party. Whether the statement was disserving or self-serving when made is immaterial.

You computer literati out there need to program your equipment to delete the words "against interest" anytime you type them after the word "admission." And that goes for some of you judges (you know to whom I refer).

The best example of the lunacy underlying "against interest" arises in a divorce trial between rich folks. A spouse claims poverty during trial proof. But last year that same litigant submitted a financial statement to a bank claiming assets worth over $1 million. Was that statement self-serving when made? Probably. Is it disserving at trial? You bet. Is it admissible? Sure.

Sometimes an extrajudicial statement is made, not by the opposing party, but by the opposing party's agent or employee. Take a look at Tennessee Rule of Evidence 803(1.2)(D). If you want to offer an agent's statement against the principal, the agent must have been speaking or writing against his or her own interest. The federal version does not contain this requirement.

Admissions form an important and frequently used hearsay exception. Let's learn to use it right.

Donald F. Paine is a past president of the Tennessee Bar Association and is of counsel to the Knoxville firm of Paine, Tarwater, Bickers, and Tillman LLP. He lectures for the Tennessee Law Institute, BAR/BRI Bar Review, Tennessee Judicial Conference, and University of Tennessee College of Law. He is reporter to the Supreme Court Advisory Commission on Rules of Practice and Procedure.