CHAPTER 9: WILLS, TRUSTS, AND PROBATE

**TRANSPARENCY MASTERS**

The Will

Wills (some vocabulary)

Preparation of a Will

Changing the Will

What Is a Trust?

How to Create a Trust

Express Trusts

Implied Trusts

What Is Probate?

**PURPOSE AND SUBSTANTIVE CONTENT**

This chapter is intended to give the student an introduction to and overview of the law of wills, trusts, and probate.

**CHAPTER OUTLINE**

Technology Corner

Case File

9-1 Introduction

9-2 Wills

9-3 Preparation of the Will

The Opening Clauses

The Body of the Will

The Fiduciary Clause

The Closing Clauses

Changing the Will

Where There Is no Will

9-4 Trusts

What Is a Trust?

How to Create a Trust

Express Trusts

Implied Trusts

9-5 Probate

9-6 Case Law Examples

Featured Website

Chapter Summary

Terms to Remember

Questions for Review

Questions for Analysis

Assignments and Projects

**SKILL BUILDING**

The examples, assignments, case questions and projects provide the opportunity for students to build the following skills:

Critical Thinking

Legal Analysis

Writing

Computer



**CASE SUMMARIES, CASE QUESTIONS, AND SUGGESTED ANSWERS**

***Hicks v. Casablanca Records***, **464 F. Supp. 426 (S.D.N.Y. 1978**) (Pg. 188)

This is an action brought by the heirs of Agatha Christie against a movie company and book publisher who want to distribute a movie and book, entitled *Agatha*, that gives a fictionalized account of a true incident in the life of Agatha Christie. At one point in her life, Ms. Christie disappeared for 11 days. No one knows why, although the movie and the book suggest that she did this because she was emotionally unstable and was plotting to kill her husband’s mistress. The petitioners requested a preliminary injunction while the respondents moved to dismiss the case.

The issues in this case involve the right of heirs to assert the right of publicity value of the name or likeness of the decedent and whether that right exists at all in connection with movies or books rather than with the sale of merchandise. As to the first issue, the court stated that heirs have the basis to assert the right of publicity if the public figure exploited his or her name during their lifetime and these rights were duly transferred to the heirs. In this case, both facts were present. Ms. Christie’s name was obviously exploited and she made a valid testamentary disposition of her rights. As to the second issue, the court could find no direct law and therefore analogized to the state law regarding invasion of privacy. Appropriating one’s likeness for commercial purposes constitutes an invasion of privacy unless the publication is a biography or comes under the “fair comment” exception. Since *Agatha* was clearly intended to be a fictionalized account, it could not be considered a biography, nor was it fair comment. However, the court also found that where books and movies were concerned, First Amendment rights had to be considered. After reviewing other authorities, the court found that absent deliberate falsifications, or an attempt to present disputed events as true, the First Amendment protection usually accorded novels and movies outweighs the publicity rights plaintiffs may possess.

1. What is a “right to publicity”?

**Suggested Answer:**

The right to publicity is the interest in the publicity value of one’s name or likeness and is a valid property right, which is transferable and capable of surviving the death of the owner.

1. Why does the court cite (discuss) so many cases in the *Hicks v. Casablanca Records* decision?

**Suggested Answer:**

The court cites so many cases because it is discussing a novel area of law. That is there is no one case that is directly on point. The court, therefore, wanted to present all cases that dealt with similar issues. In this way, the court could analogize and distinguish the facts and appropriate law.

***Froch v. Grosset & Dunlap, Inc.,* 75 A.2d 768, 427 N.Y.S.2d 828 (1980**) (Pg. 191)

The executor of the estate of Marilyn Monroe brought this action against various defendants as a result of the Norman Mailer book, *Marilyn*. The book purported to be a biography, although plaintiff disputed this characterization. The trial court granted summary judgment. The court of appeals affirmed, saying that it did not matter whether the book was truly a biography or not. The right of publicity applies to commercial advertisements for the sale of goods or services. It does not apply to any literary works.

1. Explain plaintiff’s argument.

**Suggested Answer:**

Plaintiff is arguing that the Mailer book is a fictionalized biography and as such constitutes an attempt to make a profit based on the publicity value of the Monroe name. As the executor of the estate, plaintiff has the right to assert this.

1. According to the court in this case, does a right of publicity survive the death of Marilyn Monroe? Explain.

**Suggested Answer:**

This court does not deny that a right of publicity can survive the death of Monroe. It does say, however, that the publication of the book, *Marilyn*, does not involve a violation of that right.

***Groucho Marx Production, Inc., v. Day and Night Company***, **523 F. Supp 485 (S.D.N.Y. 1981)** (Pg. 192)

Plaintiffs in this case are the heirs and assignees of three Marx brothers, Groucho, Chico, and Harpo. They brought this action alleging that defendants appropriated the right of publicity in their names, by producing a musical play. The court discusses two main issues in this case. First, does the right to publicity exist under New York law? Second, after establishing that the right to publicity did in fact exist, did it descend to the heirs and assignees of the Marx brothers in this case?

In discussing the first issue, the court mentions that this right does not exist under any New York statute and must therefore be based on common law. In examining case law, the court noted that while several federal courts (interpreting New York State law) found such a right exists, no state court had done so. This court decided that such a right does exist.

In discussing the second issue, the court mentions that in order for the right to publicity to descend to heirs, the public figure must have asserted the right during his or her lifetime. In this case, defendants argued that the Marx brothers never used their likeness to sell products and had therefore not exploited their rights. The court disagreed, pointing out that each of the brothers had created special, recognizable characters that had a public value. The fact that they never endorsed products was not important.

1. How did each plaintiff acquire rights of publicity?

**Suggested Answer:**

Plaintiff, Susan Marx, was trustee of the residuary trust under the last will and testament of Harpo Marx. Plaintiff Marx Productions acquired rights through contractual assignments. Groucho Marx assigned to plaintiff all right, title, and interest in the name, likeness, and style of the character Groucho. The estate of Chico Marx, through his widow, Mary Marx, entered a similar agreement with Marx Productions. Mary Marx claimed her rights as the residual beneficiary under the will of Chico Marx.

1. How did Julius Marx demonstrate an intent to capitalize on the value of the name and likeness of the character of Groucho?

**Suggested Answer:**

This was done in two ways. First, he obviously created a well-known character. Second, more importantly, he made an intervivos transfer of his rights and also included a testamentary disposition of his rights in his will.

***State ex rel, The Elvis Presley International Memorial Foundation v. Crowell,*** **733 S.W.2d 89 (Tenn. App. 1987)** (Pg. 195)

This case involves a dispute between two non-profit corporations concerning their respective rights to use Elvis Presley’s name as part of their corporate name. Plaintiff was known as the Elvis Presley International Memorial foundation and defendant was known as the Elvis Presley Memorial Foundation. After the death of Elvis Presley, his estate incorporated Elvis Presley Enterprises, Inc. This corporation monitors and sells the right to the name and likeness of Elvis Presley. In 1981 a group of Presley fans incorporated the Elvis Presley International Memorial Foundation, a non-profit corporation supporting a trauma center that was part of the Memphis and Shelby County hospital system. Although they had approached the Presley estate for permission to use the Presley name, permission was denied. They incorporated anyway. A few years later, the Presley estate incorporated a different non-profit corporation called the Elvis Presley Memorial Foundation. Plaintiff sued to dissolve this corporation, claiming that it constituted unfair competition. Defendant corporation claimed that it had the right to use the Presley name under agreement with the Presley estate. Plaintiff claimed, that upon his death the name of Elvis Presley entered the public domain and that no descendible property right existed. They were therefore free to use the name. The trial court entered summary judgment in favor of defendant.

The court spent considerable time discussing whether or not a right of property descends to one’s heirs. It points out several public policy reasons why such a right of property does descend in the state of Tennessee. The Tennessee courts have long recognized that a person’s business, a corporate name, a trade name, and the good will of a business are types of intangible personal property. Furthermore a celebrity’s right of publicity has value. Recognizing the right of publicity as descendible is consistent with the recognition that an individual’s right of testamentary distribution is an essential right. If a right of publicity is treated as an intangible property right in life, it is no less a right at death. It also recognizes one of the basic principles of jurisprudence that “one may not reap where another has sown.” It is consistent with a celebrity’s expectation that he is creating a valuable capital asset that would benefit his heirs and assigns after death. Failure to recognize the value of the contract rights of persons who have acquired the rights to use a celebrity’s name and likeness would greatly diminish the value of those rights. Recognizing that the right of publicity can be descendible will further the public’s interest in being free from deception regarding endorsement. Finally, recognizing the right of publicity is descendible is consistent with the policy against unfair competition. Thus, the court concluded that the right to use the Presley name was a property right that was descendible. (However, the court did reverse the summary judgment on the grounds that the Presley estate may have been guilty of laches in not asserting the right at an earlier time.)

1. Is there a descendible right of publicity in Tennessee?

**Suggested Answer:**

For all of the public policy reasons stated, the court concluded that there is a descendible right of publicity in Tennessee.

1. Summarize each of the three issues in *State ex rel. The Elvis Presley International Memorial Foundation v. Crowell*.

**Suggested Answer:**

The first issue deals with the exploitation of the Presley name during his lifetime. The court describes the unique and unparalleled nature of the Presley career and points out how his name was commercially exploited during his life and how commercial exploitations continue after his death. Presley entered into numerous contracts during his lifetime and this practice continued through his estate after his death.

The second issue deals with whether the right of publicity descended to the heirs of Elvis Presley. In discussing this, the court discusses whether the right of publicity is descendible or whether a public figure’s name and likeness enter the public domain upon the figure’s death. The Tennessee State court decided that in Tennessee the right to publicity is a recognizable property right and, for several public policy reasons, is descendible.

The third issue deals with the appropriateness of a summary judgment in the case. Although the reasons are not fully explained, the court decided that a summary judgment was not appropriate.

**QUESTIONS FOR ANALYSIS**

1. State the issues presented to the Court *in Groucho Marx Publications, Inc. v. Day and Night Company*.

**Suggested Answer:**

a. Does New York recognize a non-statutory right of publicity?

b. Does a right of publicity descend to heirs and assignees?

2. How is the right of publicity different from the right of privacy? (*See* the Elvis Presley case in this chapter.)

**Suggested Answer:**

The right of privacy concerns the media’s intrusion into the affairs of private citizens whereas the right of publicity involves the right of celebrities to use their names and likenesses for commercial purposes.

Chapter 9: Wills, Trusts, and Probate

True/False

1. A will is a document in which an individual provides for the distribution of his or her property upon his or her death.
2. Wills fall into two broad categories: holographic and formal.
3. A common element of a will is the fiduciary clause.
4. The attestation clause is used to open the will.
5. A will may not be changed.
6. A trust is a document in which a person makes provisions for the disposition of all real property.
7. Technically a trust is a situation where the title to property is divided into two parts: legal title and equitable title.
8. Probate is the court-supervised process that takes places after a person dies.
9. Paralegals may draft initial wills.
10. Paralegals may draft guardianship documents.

Multiple Choice

1. Which of the following may a person not distribute in a will?
2. real property
3. personal property
4. money
5. property owned by another
6. car
7. Which of the following is not common to most wills?
8. the opening clauses
9. promises not to leave anything to a disfavored child
10. the fiduciary clause
11. the closing clause
12. the body of the will
13. Changes to a will may be published in:
14. an addendum
15. a codicil
16. an attestation clause
17. a testimonium clause
18. the closing clause
19. Which of the following is not an element of a trust?
20. a trustee
21. a beneficiary
22. a settlor
23. a gift
24. trust property
25. A living trust becomes effective
26. during the life of the settlor
27. upon death of the settlor
28. upon death of the beneficiary
29. when an express trust is created
30. during the probate process
31. Which of the following tasks may not be performed by a paralegal?
32. assist with inventories
33. assist with tax returns
34. advise the client on the benefits of a trust over a will
35. draft conservatorship documents
36. arrange for appraisals
37. Which of the following tasks may be performed by a paralegal?
38. collection of documents
39. draft initial wills and trusts
40. review creditors’ claims against an estate
41. assist the attorney at initial client interview
42. all of the above
43. A specific bequest is:
44. money
45. real property
46. a specific devise
47. a gift of specific property
48. demonstrative legacy
49. A fiduciary owes a duty of trust to:
50. the estate
51. the guardian
52. the trustee
53. the executor
54. the heirs
55. Which of the following is a reason to change a will?
56. the testator changes his or her mind
57. circumstances change
58. assets are acquired
59. heirs are born and die
60. all of the above

Answer Key

1. True 2. False 3. True 4. False 5. False 6. False

7. True 8. True 9. True 10. True

1.d 2.b 3.b 4.d 5.a 6.c

7.e 8.d 9.a 10.e