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WILLS—RENUNCIATION IN BEHALF OF INCOMPETENT WIDOW

Testator made provisions for his physically helpless and hopelessly insane widow which in retrospect seem shockingly inadequate. The widow's guardian filed bill in equity for renunciation of the will. The trial court accepted, in lieu of renunciation, a plan proposed by four legatees setting up a special trust for the widow. On appeal by the guardian, *held*: first, that renunciation must be by the court and not by the guardian; and second, that under the Virginia statutes a court of equity has no authority "to accept or enter into a business arrangement or contract which neither renounces the provisions of the will, nor allows them to operate as drawn by the testator," and that therefore, on the facts of the case, renunciation must be decreed. *First Nat. Exchange Bank of Roanoke v. Hughson et al.* 74 S.E.2d 797 (1953).

On both points the decision is one of first impression in Virginia. The first point, that renunciation must be by the court and not by the guardian, assumes, properly, that there can be renunciation in behalf of the incompetent widow. There is no reason to criticise the holding that under the Virginia Code¹ such fundamental action should be taken by the court rather than by the guardian.

In reaching the decision on the second point, that such a plan can not be adopted, the opinion of the majority of the court makes use of what Professor Walter Wheeler Cook stigmatized as "reasoning by imaginary horrors" to present a singularly weak and erroneous argument:

"If the interested legatees be allowed to propose a plan for the court to accept, then there is no good reason why others who would probably be the heirs and distributees of the *hopelessly* insane widow, should not propose a plan."

The opinion continues:

"That character of barter and trading on or with the estate left by the testator, the bequests and devises left to the incompetent and other parties, and the statutory rights of the widow, to say nothing of the potential interests of

1. Va. Code Ann. § 64-13 (1950).

the incompetent's prospective distributees, is not contemplated by sections 64-13, 64-16, and 64-27."²

The objection to the majority holding is forcefully set forth in the concurring opinion of Mr. Justice Buchanan, in which he was joined by Mr. Chief Justice Hudgins:

"Cases may well arise in which there would not be the slightest doubt that it would be to the interests of the incompetent to accept an arrangement offered by other beneficiaries of the will rather than to renounce the will."³

No legalistic interpretation of the Virginia statutes can justify attributing to courts of equity incapacity to further the interests of the incompetent through the adoption of such a plan. The majority holding goes contra to the entire history of courts of equity, and to the historic doctrine, which may be said to be the entire basis of courts of equity, that equity will fashion whatever relief is necessary for the attainment of complete justice, taking all factors into consideration, and creating whatever exceptions are necessary to strict rules of law, whether or not set forth in statutes. Equity does what legislators would have done if they had had the specific problems in mind. Where would the doctrine of part performance, for example, be if courts of equity had felt themselves helpless in the presence of a statute?

It is true that if courts of equity consider such plans they will be confronted with the very difficult question to what extent consideration should be given to the interests of those who will take through the widow if the will is renounced. The correct solution would seem to be to hold that the interests of the widow are paramount, but that, insofar as there is no conflict, the interests of those who will take from her are to be considered. They should be permitted to propose counter-plans, the very "imaginary horrible" conjured up by the majority opinion. There would still be difficult decisions to make in working this out, but they should not be beyond the capacity of courts of equity.

This unfortunate decision, indicating that a state of sterility has descended upon equity in Virginia, may have the beneficial by-product that it will help to hasten the end of the energy-wasting anachronistic maintenance of separate courts of law and equity.

Donald A. Lawrence

2. *First Nat. Exchange Bank of Roanoke v. Hughson* 74 S.E.2d 797, 807 (1953).
3. *Id.* at 809.