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WILLS AND TRUSTS

by

Charles O. Galvin*

I. WILLS

Construction. Several cases before the Texas courts during the survey period involved the nature of devised estates. In *Fawcett v. Ingram*¹ testatrix Addiebel died testate in 1970 survived by her two sons, Allen and Robert, and four grandchildren, each son having two children. The principal asset of her estate was a ranch, which she devised to Allen as trustee with instructions to hold the ranch intact for at least ten years. Thereafter he was given authority to sell at his discretion and distribute the proceeds equally among the six beneficiaries, two sons and four grandchildren. The will further provided that should a beneficiary be deceased, then his share would pass to his heirs or in accordance with his will. Within the ten-year period Allen as trustee sought and obtained a declaratory judgment authorizing the sale of the ranch.² While this litigation was pending, testatrix's other son Robert died leaving his two children surviving. Robert's will devised his interest in the ranch to his son Robert, Jr. and the residue of his estate to his children Ann and Robert, Jr. Ann contended that Addiebel's will created at most a power of appointment in the ranch property, and she further maintained that there was an equitable conversion of the ranch from an interest in realty to an interest in personalty. Thus, it was her position that she shared the ranch interest with her brother through the residuary clause in their father's will. The court rejected this contention and construed Addiebel's will as leaving the elder Robert a present vested equitable estate in realty. Therefore, when he died he specifically devised such equitable estate to Robert, Jr., and Ann acquired no interest therein.

In *Tindol v. McCoy*³ John executed a will in 1914 and amended it by codicil in 1917. He died in 1917. The will, among other things, left a life estate in certain property to a grandson, then an estate for twenty years to the children born to the body of such grandson with final vesting in such persons at the end of the twenty-year term. An adopted daughter of the grandson contended that under the Rule in Shelley's Case⁴ "children born to his body" were words of limitation which vested a fee simple title in her father. She contended further that as an adopted child she should be treated for all purposes as a natural child. The court rejected both contentions, holding on the first issue that the

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1. 535 S.W.2d 210 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

2. *Ingrum v. Ingram*, 520 S.W.2d 535 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

3. 535 S.W.2d 745 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

4. The supreme court in *Hancock v. Butler*, 21 Tex. 804, 808 (1858), stated the Texas definition of the rule as follows: "[W]hen a person takes an estate of freehold . . . and . . . there is a limitation . . . to his heirs, or heirs of his body, as a class of persons, to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate" The rule has been abrogated in Texas as to conveyances and wills taking effect after Jan. 1, 1964. TEX. REV. CIV. STAT. ANN. art. 1291a (Vernon Supp. 1976-77).

words "children born to his body" were words of purchase and, therefore, the grandson's estate was not a fee simple but a life estate. The court also held that under the circumstances existing when the testator wrote his will, an adopted child could not have been intended by him to be treated as a natural child.

*Hart v. Rogers*⁵ involved a devise of all the testatrix's residuary estate to her grandson Don in fee simple, provided that if Don "should precede me in death, or if he should die without issue leaving no blood descendants," then the residue of her estate was to vest in the children of her granddaughter Helen. Don died without issue following the testatrix's death. The heirs of Don contended that his death without issue had to occur *before* the testatrix's death in order for the gift over to be effective. The court rejected this contention, holding that Don's death *at any time* without issue caused the property to pass under the proviso to Helen's children. On another issue the court held that certain deeds executed before death, but which remained undelivered and in the testatrix's control at death, were ineffective to pass title to property.

*Stover v. Seitz*⁶ concerned a joint and mutual will which provided that all property of the first spouse to die passed to the survivor in fee simple and "that upon the death of such survivor any such estate then remaining" was to be divided between a son and daughter. The husband died leaving his wife and two children surviving. The son predeceased his mother, and the question at issue was whether or not he had received any estate from his parents which would then be subject to devise in his will. The court held that the son's interest in his parents' estates was contingent on his being alive at his mother's death; having predeceased her, he had no property interest to devise.

In *Eldridge v. Marshall National Bank*⁷ a reference in a will to a "Scholarship Trust—That is being arranged" was held to manifest an intention to create a present testamentary trust. The words "Scholarship Trust" stated a sufficiently defined charitable purpose. Moreover, failure to designate a trustee did not render the trust invalid because the court could appoint a trustee to carry out the settlor's intent.⁸

Finally, in *Ruby v. Green*⁹ there was a direction that if funds were insufficient to satisfy special bequests, such bequests should be proportionately reduced. On the basis of a review of the entire will the court construed the testatrix's intention to be that the term funds meant all properties, and not just cash or cash assets.

These construction cases make abundantly clear the importance of the draftsman's work. The description of interests in real and personal property, directions to the executor, and other aspects of the will should be examined carefully to be sure that the testator's intentions are clearly and sharply articulated.

5. 527 S.W.2d 230 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

6. 527 S.W.2d 829 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

7. 527 S.W.2d 222 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

8. See RESTATEMENT (SECOND) OF TRUSTS § 397 (1959).

9. 535 S.W.2d 385 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

Proof of Will. *Berry v. Griffin*¹⁰ reviews important legal rules with respect to a lost will. If a validly executed will is last seen in the possession of the decedent or in a place where the decedent had access to it and it cannot be found after the decedent's death, the presumption is that the will was destroyed with the intention of revoking it.¹¹ In the instant case there was testimony that an envelope was delivered to the testatrix and that she stated that it was her will. There was contrary testimony to the effect that the will was not in the testatrix's home. Other witnesses testified that she had not discussed revoking her will, and that she was amicable toward the principal beneficiary named in the will. The court held that the testimony that the will was not in the testatrix's home could only establish that the witness *had not seen* the will in the house, from which the first inference could be drawn that the will was not in the house. From that inference, however, it could not be further inferred that the testatrix did not have possession of the will nor ready access to it.¹² Thus, the presumption of revocation still stands absent clear and convincing proof of nonrevocation. In another revocation case, *Davis v. Hoskins*,¹³ the testimony was clear that the testatrix had destroyed her will, the only conflicting testimony being as to the date on which it was destroyed. Accordingly, a carbon copy of the destroyed will was denied probate.

Witnesses. Section 59 of the Texas Probate Code provides that the subscribing witnesses must sign in the presence of the testator. Should the subscribing witnesses be unwilling or unable to testify, the court may hear other evidence in order to assure that the proper solemnities were observed.¹⁴ In *Jones v. Whiteley*¹⁵ a deposition of an elderly subscribing witness stated that he had not signed in the presence of the testatrix. Contrary testimony of others was admissible to contradict that of the subscribing witness. Once the solemnities were established as to a valid execution of a will, there was a rebuttable presumption of nonrevocation and continuity.¹⁶ Accordingly, the will was admitted to probate. *McLeroy v. Douthit*¹⁷ involved another aspect of the formalities of execution. The testator signed the will, and then he and the two witnesses executed the self-proving affidavit. This execution was held insufficient because the witnesses had not subscribed their names to the will, but only to the separate self-proving affidavit.¹⁸ The will was, therefore,

10. 531 S.W.2d 394 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

11. See *Mingo v. Mingo*, 507 S.W.2d 310 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

12. For a discussion of problems of inference on inference see I C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 51 (2d ed. 1956).

13. 531 S.W.2d 424 (Tex. Civ. App.—Fort Worth 1975, no writ).

14. *Hopf v. State*, 72 Tex. 281, 10 S.W. 589 (1888).

15. 533 S.W.2d 881 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

16. *McElroy v. Phink*, 97 Tex. 147, 76 S.W. 753 (1903).

17. 535 S.W.2d 771 (Tex. Civ. App.—Fort Worth), writ ref'd, 539 S.W.2d 351 (Tex. 1976).

The contestants raised the issue of improper attestation for the first time on appeal. The Supreme Court of Texas in refusing the application for writ of error stated that the contestants did not have to plead improper attestation or file a motion for new trial. By their point of error the contestants properly preserved the issue before the court of civil appeals to consider whether or not the trial court had properly admitted the will to probate.

18. See 1955 Tex. Gen. Laws ch. 55, at 88 (Vernon). In the instant case the self-proving affidavit was dated Nov. 18, 1955, although such affidavit was not provided for in the statutes until Jan. 1, 1956.

not properly admitted to probate. In another case, *Perritte v. Birdwell*,¹⁹ two documents, one dated in 1967 and the other in 1974, were offered for probate as the last will of the deceased. With respect to the later will there was no credible evidence that the subscribing witnesses signed in the presence of the testator, and such will was, therefore, invalid.

Holographic Wills. *Watkins v. Boykin*²⁰ concerned a document, partially handwritten and partially typewritten, which was not clearly designated as a will. Considering all the facts, the court found that the document as a whole reflected a testamentary disposition, and that the portion which was wholly in the testator's handwriting was sufficiently complete within itself to be admitted for probate. In contrast, however, is *In re Estate of Wilson*²¹ in which the proponent of a will offered a letter from the deceased in which he expressed an intent to leave his property to her. The decedent and the proponent had been married and divorced, then remarried and the marriage annulled. In the past the decedent had always given the name of the proponent as the person to be notified in the event of his death or disability. The court held that the letter was at most an expression of an intent to make a will and, therefore, lacked the necessary requisites of present testamentary intent.

Effect of Divorce. In *McFarlen v. McFarlen*²² William and Velma were married in 1932 and divorced in 1968. In June 1972 while William was single he executed a will leaving his estate to Velma and nominating her as independent executrix. A daughter was made beneficiary in the event Velma predeceased William. In October 1972 Velma and William remarried but in 1974 that marriage also ended in divorce. William later married Ruth and shortly thereafter died. The court applied section 69 of the Texas Probate Code, which provides that if a testator is divorced after making a will, all provisions in favor of the divorced spouse are null and void. In the instant case the court sustained the will as valid, but held that Velma could not take under the will nor could she qualify as executrix. The daughter's interest in the estate was also negated since she was only a contingent beneficiary. The result of the holding was to permit the designated successor executor, a bank, to qualify and administer the estate for William's heirs at law.

Conditional Will or Conditional Bequest. *Johnson v. Hewitt*²³ dealt with the effect of a clause in a 1966 will in which the testatrix left all her estate to her friend, provided that she take care of the testatrix and not place her in an old folks home. The probate court admitted the will to probate, but the district court reversed, holding that the will was conditional, that the condition had not been fulfilled, and that an earlier 1964 will should have been admitted to probate. The court of civil appeals in reversing the district court held that the 1966 will was not conditional but only the *devise* to the friend was conditional. Therefore, the later will should have been admitted to probate, and the

19. 539 S.W.2d 95 (Tex. Civ. App.—Tyler 1976, no writ).

20. 536 S.W.2d 400 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

21. 539 S.W.2d 99 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

22. 536 S.W.2d 590 (Tex. Civ. App.—Eastland 1976, no writ).

23. 539 S.W.2d 239 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

question of whether or not the devisee fulfilled the conditions to receive under the will could be raised in a subsequent action in the probate court.

Testamentary Capacity. The rule of *Carr v. Radkey*²⁴ is that a witness may not make conclusionary statements about the testator's mental capacity to make a will, but may testify as to whether or not the testator had the capacity to know the objects of his bounty, the nature of the transaction in which he was engaged, the extent of his estate, and similar matters. *Pearce v. Cross*²⁵ stated that undue influence consists of the following two elements: (1) the external, the words or acts that bring pressure to bear on the testator; and (2) the internal, the collapse of the testator's own volition produced by such conduct. Recent cases involving testamentary capacity should be viewed with these two cases in mind.

In *In re Estate of Woods*²⁶ the Supreme Court of Texas held that there was no evidence to support a jury finding of undue influence at the time the testator executed his will and also no evidence of unsound mind when the testator executed a codicil. In *Stephen v. Coleman*²⁷ a testator suffering from brain cancer was found to have testamentary capacity to execute a will on December 27, 1974, although he died January 5, 1975. In *Soto v. Ledezma*²⁸ the court determined that a testatrix dying of cancer did not have the capacity to execute a will five months before her death. In *Burk v. Mata*²⁹ the court affirmed the admission of a will to probate, even though the testimony as to testamentary capacity was sharply conflicting, because there was sufficient evidence on the basis of which the trier of facts could find that the testatrix possessed the requisite capacity. But in *Bradshaw v. Naumann*³⁰ a husband and wife executed a deed which conveyed all their land to their son to the exclusion of their daughter and reserved a life estate in themselves. A jury found that the husband was acting under undue influence and that the wife did not have the mental capacity to execute the deed. The court of civil appeals reversed, holding that there was no evidence of probative force on the undue influence issue and, although there was evidence of the peculiar conduct of the wife, there was nothing that supported a finding of lack of mental capacity.

Community or Separate. *Pritchard v. Estate of Tuttle*³¹ applied the familiar rule that properties acquired during marriage are presumed community unless they can be shown to be separate.³² In *Estate of Tuttle* the heirs of Tuttle brought suit to recover their father's interest in the community estate existing at his death. The only amount the surviving wife could trace was \$30,000

24. 393 S.W.2d 806 (Tex. 1965). See also *Lee v. Lee*, 424 S.W. 2d 609 (Tex. 1968).

25. 414 S.W.2d 457 (Tex. 1966).

26. 542 S.W.2d 845 (Tex. 1976).

27. 533 S.W.2d 444 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

28. 529 S.W.2d 847 (Tex. Civ. App.—Corpus Christi 1975, no writ).

29. 529 S.W.2d 591 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

30. 528 S.W.2d 869 (Tex. Civ. App.—Austin 1975, no writ). But see *Graham v. Darnell*, 538 S.W.2d 690 (Tex. Civ. App.—Fort Worth 1976, no writ), in which it was found that the requisite testamentary capacity was lacking because of insane delusions.

31. 534 S.W.2d 946 (Tex. Civ. App.—Amarillo 1976, no writ).

32. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

which she brought into the marriage in 1956, and with respect to this amount the court refused to make any adjustment to bring the value of such 1956 dollars to a present value level. The court also refused to consider a divorce proceeding pending at the decedent's death in which the wife could have sought an unequal partition of the community favoring her. *Pritchard v. Snow*³³ was a simultaneous death case which held that the husband's estate was entitled to the entire proceeds of life insurance because the policies had their inception before marriage. The community's right to reimbursement for premiums paid with community funds was fully discharged by deducting from the proceeds of the policy a debt representing funds that had gone into the community. *Anderson v. Anderson*³⁴ held that the community property of husband and wife placed in a son's name continued to be community property. Subsequent to her husband's death the wife had invested the funds with the son in a bank account under a survivorship agreement. Since the funds remained community property, her investment could only affect her interest and, therefore, the husband's interest was held to belong to his heirs.

Foreign Wills and Administration. In *Eikel v. Burton*³⁵ the court relied on the established rule that a foreign administrator under appointment in another state cannot bring suit in Texas without a Texas appointment. This rule was applied despite an attempted waiver by the parties as to the administrator's lack of capacity to bring suit. The court reasoned that the parties could not confer jurisdiction over the estate by agreement when no person was authorized to represent the estate in such agreement.³⁶

Will Contest—Attorneys' Fees. In *Muse, Currie & Kohen v. Drake*³⁷ the supreme court held that an administratrix of an estate had no right to appeal a will contest because in her representative capacity she was not an interested party as required by Texas Probate Code sections 93 and 100.³⁸ Therefore, fees and expenses of the law firm could not be allowed against the estate. In *El Paso National Bank v. Leeper*,³⁹ however, a fee was allowed to an attorney for services rendered for a temporary administrator in a case in which the temporary administrator had not rendered its final account and had not been discharged in transferring the estate to an independent executor.

33. 530 S.W.2d 889 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

34. 535 S.W.2d 943 (Tex. Civ. App.—Waco 1976, no writ). See also *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.) (case remanded to determine if deceased husband's transfer of community property was in fraud of the wife and whether a daughter's interest in certain funds was by right of survivorship or as a third party beneficiary).

35. 530 S.W.2d 907 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). See also *Eikel v. Bristow Corp.*, 529 S.W.2d 795 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

36. 530 S.W.2d at 909.

37. 532 S.W.2d 369 (Tex. Civ. App.—Dallas 1975), writ ref'd, 535 S.W.2d 343 (Tex. 1976). But see *Blackmon v. Nelson*, 535 S.W.2d 439 (Tex. Civ. App.—Texarkana 1976, no writ), in which the court remanded for trial the issue of whether or not the executrix under an annulled will had acted in good faith in defending its probate for which she would be entitled to reimbursement for expenses and attorneys' fees. See also *Estate of Tartt v. Harpold*, 531 S.W.2d 696 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (allowing the fees of an attorney who represented unknown heirs to be paid out of estate); *Humane Soc'y v. Austin Nat'l Bank*, 531 S.W.2d 574 (Tex. 1975), cert. denied, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976) (attorneys' fees allowed for will construction suit).

38. "Interested persons" is defined in TEX. PROB. CODE ANN. § 3(r) (Vernon 1956).

39. 538 S.W.2d 803 (Tex. Civ. App.—El Paso 1976, no writ).

Determination of Heirship. In *Wickware v. Session*⁴⁰ the court applied full faith and credit to a California proceeding which determined that the illegitimate children of an intestate father were entitled under California law to inherit his property. The effect of the California decision was to legitimate the children for purposes of inheritance in Texas. In *Reilly v. Jacobs*⁴¹ the court of civil appeals approved the trial court's finding that a common law marriage existed where the parties lived together as husband and wife and held each other out to the public as such. Thus, the surviving wife of such common law marriage was a proper heir of her deceased husband.

Removal of Administratrix. In *Pipes v. Christenson*⁴² an administratrix failed to file a proper inventory and to give a new bond and in addition paid out large sums of money discharging alleged debts. The county court refused to remove her as administratrix. The court of civil appeals reversed the lower court, pointing out that such gross deficiencies in the performance of her duties in a representative capacity required her removal.

Procedure. *Eisenhauer v. Williams*⁴³ held that a plea in abatement was properly sustained against an executor who filed suit for construction of a will while the estate was pending in the county court. *In re Estate of Bateman*⁴⁴ held that the county court was without jurisdiction to require an amended inventory from an independent executor upon complaint of a remainderman under the will as to alleged omissions from the original inventory.

In *Stutts v. Stovall*⁴⁵ the San Antonio court of civil appeals considered the recently amended section 5(e) of the Probate Code which provides that final orders of any court exercising original probate jurisdiction shall be appealable to the courts of civil appeals. In *Stutts* a dispute arose as to whether the widow of the deceased had been put to an election to take under her husband's will, and if so, whether she had made an election. On motion for summary judgment the probate court held that the widow was put to an election but that there was a fact issue as to whether she had exercised such election. The widow appealed and the court of civil appeals dismissed, holding that the order was not a *final* order from which an appeal could be taken since a fact issue remained as to one of the issues considered at the summary judgment hearing.

Antenuptial Agreement. In *Frey v. Estate of Sargent*⁴⁶ George Sargent, an eighty-year-old single man, and Ruby Frey entered into an antenuptial

40. 538 S.W.2d 466 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

41. 536 S.W.2d 406 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). A review of common law marriage appears in *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913).

42. 530 S.W.2d 860 (Tex. Civ. App.—Beaumont 1975, no writ).

43. 537 S.W.2d 336 (Tex. Civ. App.—San Antonio 1976, no writ); see *Thomas v. Price*, 534 S.W.2d 730 (Tex. Civ. App.—Waco 1976, no writ) (domicile of the decedent, for the purpose of establishing venue to probate his will, was county in which he was adjudged insane, and county court could take judicial notice of insanity proceedings).

44. 528 S.W.2d 86 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

45. 531 S.W.2d 690 (Tex. Civ. App.—San Antonio 1975, no writ).

46. 533 S.W.2d 142 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). The agreement was made in Oklahoma to be performed in Texas; therefore, Texas law governed.

agreement pursuant to which George would bequeath \$30,000 cash to Ruby if she would take care of him. Two-and-a-half years later, after Ruby's death, George changed his will omitting the bequest. Thereafter, George died and Ruby's lineal descendants sought to enforce the bequest. The court held that the bequest required Ruby's personal performance. Accordingly, after her death there was nothing to which her estate was entitled that could descend to her heirs.

Joint and Mutual Wills. A joint and mutual will may be executed by two or more parties and becomes the will of each on their respective deaths. The will as to each may be revoked like any other will unless the will is contractual. That is, if the parties have each executed the document in consideration of the other's execution, then upon the death of the first, the other is bound by his contract to permit the devolution of property to occur as agreed. Should the survivor disregard the obligation and revoke the will, those who would have taken under the joint will may impress a trust for their benefit.

Absent a clear intention to the contrary, the properties subject to the joint will are usually those properties which the parties owned at the death of the first. Properties later acquired by the survivor are covered only if there is a clear expression to this effect.⁴⁷ This problem was recently considered in *Wallace v. Turriff*.⁴⁸ In *Wallace* a husband and wife executed a joint will reciting "that the survivor of us . . . shall have all of the estate of every character . . . which either or both may own . . . at the time of the death of the one of us dying first . . ." The will further provided that "for the consideration and benefits herein derived by the survivor, we . . . agree that at the death of the survivor . . . all the property . . . that the survivor may die seized and possessed of, will go to" the heirs of the husband. After the husband's death the wife executed a holographic will limiting the bequest of the husband's heirs to the value of the estate at the death of the husband. The husband's heirs brought suit contending that the terms of the joint will entitled them to the entire estate of the wife measured at the time of her death. The court of civil appeals accepted this contention and held that a trust was imposed on "all" assets of the estate in favor of the beneficiaries under the joint will. The dissent rejected the contention of the husband's heirs pointing out that the joint will controlled only as to "the property" and that the reference to "the property" was limited to property as it existed at the time of the husband's death.

Although an attempt to change the devolution of property under a joint will was held ineffective in *Wallace*, the changes may become effective if the applicable statute of limitations has run. On motion for rehearing in *Morris v. Texas Elks Crippled Children's Hospital, Inc.*⁴⁹ the El Paso court of civil

47. *Murphy v. Slaton*, 154 Tex. 35, 273 S.W.2d 588 (1954). See also *Tips v. Yancey*, 431 S.W.2d 763 (Tex. 1968); *Nye v. Bradford*, 144 Tex. 618, 193 S.W.2d 165 (1946).

48. 531 S.W.2d 692 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); see *Glover v. Landes*, 530 S.W.2d 910 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (joint will left husband's estate to wife; while husband's will was pending, wife died leaving another will; held: beneficiaries under wife's will were not indispensable parties in contest of husband's will).

49. 525 S.W.2d 874, 884 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

appeals withdrew its earlier opinion⁵⁰ and held that property which devolved under an ineffective modified joint will, as in *Wallace*, would become effective after passage of the applicable statute of limitations. In *Morris* Mr. and Mrs. Denny executed a joint will in 1941 leaving all their properties to each other with remainders to relatives. Mrs. Denny died in 1950 and the joint will was filed for probate. In 1961 Mr. Denny executed a new will leaving his ranch in Terrell County to the hospital. After his death the executor of his estate conveyed the ranch to the hospital in 1962 and 1963. The relatives named in the 1941 joint will learned of the 1961 will of Mr. Denny in 1972 and claimed that the hospital held the ranch in trust for their benefit. The hospital brought an action in trespass to try title and the trial court found for the hospital.

The court of civil appeals initially reversed the trial court, holding that the joint will was contractual and that Mr. Denny's attempt to change the order of devolution of property resulted in a trust for the benefit of the relatives under the 1941 will. On rehearing the court emphasized that the hospital accepted the deeds to the land in 1962 and 1963, entered into possession, paid taxes, and asserted its ownership for a period of ten years prior to suit. The court further pointed out that the hospital was not put on notice as to the relatives' claims because the 1941 will was never made of record in Terrell County. Accordingly, the court reversed its initial decision, and held that the hospital's title was perfected by adverse possession under the five and ten-year statutes of limitations.

II. TRUSTS

Bank as Trustee. In *Burnett v. First National Bank*⁵¹ an adult beneficiary assented to and ratified loans by the trustee bank to entities in which the beneficiary had an interest. Accordingly, the court held that the beneficiary could not allege that the bank by making the loans had failed to discharge its duties as trustee.

*Shannon v. Frost National Bank*⁵² involved a situation where the trustee-bank invested the funds of the trustor-beneficiary in a common trust fund. According to the applicable regulations governing funds in a common trust, a request for withdrawal of funds must be submitted prior to the quarterly valuation date of the common trust in order to withdraw funds from that trust during the quarter. The trustee-bank invested the funds in such a trust despite knowledge that it was the trustor-beneficiary's intention to withdraw funds to meet emergencies. When the trustor-beneficiary made demand for distributions to meet emergency situations the bank advised her that it would be more economical to borrow money from the bank at a lower interest rate than to draw money out of the trust which was earning at a higher interest rate. Two years after the money was placed in the trust the trustor-beneficiary sought

50. 525 S.W.2d 874 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.), *discussed in Galvin, Wills and Trusts, Annual Survey of Texas Law*, 30 Sw. L.J. 13, 17 (1976).

51. 536 S.W.2d 600 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.).

52. 533 S.W.2d 389 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). Compare the self-dealing aspects of *Shannon* with *Harvey v. Casebeer*, 531 S.W.2d 206 (Tex. Civ. App.—Tyler 1975, no writ).

immediate withdrawal of all funds in the trust. The bank denied immediate withdrawal because of the regulation requiring prior notice. Trustor-beneficiary brought suit against the bank alleging self-dealing regarding the loan transactions and breach of the bank's fiduciary duty. The trial court granted an instructed verdict in favor of the bank.

On appeal the court of civil appeals first pointed out that review of an instructed verdict requires the appellate court to view the evidence in the light most favorable to the plaintiff. The court went on to reject plaintiff's contention that the bank automatically breached its fiduciary duty by investing the funds in a common trust where the trust between bank and trustor-beneficiary was revocable at will. The plaintiff had argued that she had the right to withdraw funds at any time in a revocable trust, and, therefore, by placing the funds in a common trust, the bank incapacitated itself from complying with the terms of a revocable trust. The court of civil appeals, however, reversed the trial court and remanded to determine if the trustee-bank had disclosed sufficient information to put the trustor-beneficiary on notice that the funds had been invested in a common trust with the resultant limitations. The court felt that failure adequately to disclose would be a breach of the bank's fiduciary duty. This decision could have a significant effect on what would generally be the accepted practice of corporate fiduciaries.

In *Linder v. Citizens State Bank*⁵³ the question of a fiduciary relationship arose between a home builder and the bank which was financing the home. In *Linder* an owner of land arranged interim financing with the bank to build a house. The project fell into difficulty and the owner sued the bank contending that it failed to supervise advances of money. A judgment was rendered in the trial court for the bank notwithstanding a jury verdict for the owner. Taking the evidence most favorable to the owner the court could not find that the bank had failed to keep its commitment: to advance the funds up to the point when the work was terminated. The court of civil appeals in affirming the trial court judgment pointed out that a fiduciary relationship between the bank and plaintiff could not arise in this context unless the parties had previously dealt with each other. Because the parties had had no previous dealings, the court ruled that there was no fiduciary relationship and accordingly rejected the plaintiff's contention that a constructive trust arose with respect to funds advanced by the bank.

*Cogdell v. Fort Worth National Bank*⁵⁴ determined that a bank had the authority to continue beyond the termination date of the trust to do whatever was necessary, including proceeding with litigation, to effect an orderly winding up of the trust. Venue for the suit was the principal place of business of the bank trustee.

53. 528 S.W.2d 90 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

54. 537 S.W.2d 304 (Tex. Civ. App.—Fort Worth 1976, writ dismissed). See also *Cogdell v. Cogdell*, 537 S.W.2d 111 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.) (suit dismissed as involving same parties in previous litigation).

Spendthrift Trust. In *First Bank & Trust v. Goss*⁵⁵ a judgment creditor sought to garnish the accumulated income of a spendthrift trust created by the beneficiary's grandmother. The court of civil appeals denied the judgment creditor's action, reasoning that the spendthrift trust protected the principal as well as the accumulated income. The court recognized that protection would not be available where the settlor creates the trust and makes himself the beneficiary, but refused to accept that a beneficiary became a settlor for purposes of that exception by merely failing to draw on the accumulated income.

Profit-Sharing Retirement Trust. *Fox v. Smith*⁵⁶ held that an employees' profit-sharing retirement trust is owned by the former spouses as tenants in common after divorce. A share left by the husband to his sister was, therefore, owned half by the sister and half by the former wife; each beneficiary's share was subject to an equal charge for the expenses and trustees' attorneys' fees.

Oral Trust. In *Armstrong v. Armstrong*⁵⁷ the husband made his wife beneficiary of insurance policies after she agreed to pay the proceeds in accordance with his desires. According to the agreement the proceeds were to be paid to his sons, the estate of Avis Armstrong, and his wife. The sons brought suit against the surviving widow on the theory of an oral trust. The court of civil appeals reversed and remanded for failure to join the estate of Avis Armstrong as a party. The court held that all beneficiaries having a joint interest would be indispensable parties.

III. TAXATION

Federal Taxes—Gift Tax. Section 2503(c) of the Internal Revenue Code of 1954⁵⁸ provides that gifts to minors will qualify for the annual \$3,000 exclusion if the property and income may be expended for the benefit of the minor and, to the extent not so expended, will pass to the donee at age twenty-one, or if he dies before attaining twenty-one then such property and income must be payable to the donee's estate or to those whom he may appoint under a general power of appointment.

In *Gall v. United States*⁵⁹ the settlors created trusts for two children with provisions that the trust property would be distributed to whomever the beneficiary appointed by will. If the beneficiary failed to make such appointment, then the property would be distributed to the surviving issue of the settlors, or in the absence of such issue, to the beneficiary's estate. The beneficiary could not exercise the power of appointment until he or she attained nineteen years of age. The court held that the restrictions in the trust instrument disqualified the trust under section 2503(c) because it was possible that the property would not pass to the beneficiary's estate if he died before

55. 533 S.W.2d 93 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

56. 531 S.W.2d 654 (Tex. Civ. App.—Waco 1975, no writ).

57. 532 S.W.2d 406 (Tex. Civ. App.—Eastland 1976, no writ).

58. I.R.C. § 2503(c).

59. 521 F.2d 878 (5th Cir. 1975).

attaining age twenty-one. The annual exclusions were accordingly disallowed.

Federal Taxes—Income Tax. In *Lamkin v. United States*⁶⁰ a will provided that certain income producing real property would become part of a testamentary trust. Before the trust was established the executor distributed income to the beneficiaries of the prospective trust. Under section 167(h) of the Internal Revenue Code of 1954⁶¹ it was held proper to allocate depreciation to the beneficiaries on the basis of the income received by each.

Federal Taxes—Estate Tax Lien. *Kleine v. United States*⁶² held that the federal estate tax lien follows the property in an independent administration of a will as provided in the Texas Probate Code⁶³ unless the lien is divested pursuant to section 6324(a)(1) of the Internal Revenue Code of 1954⁶⁴ which requires that the proceeds of a sale be used to pay charges against the estate and expenses of its administration as may be "allowed by any court having jurisdiction thereof." The issue raised was whether this statute impinged upon and interfered with the Texas practice of independent administration. The court held that court approval under the circumstances did not intrude into the Texas probate system.

It should be noted that section 6325(c)⁶⁵ authorizes the Internal Revenue Service to issue administrative releases. This practice, which is often used in Texas, permits the independent executor to sell property and escrow the proceeds or apply the proceeds to tax liability, debts, claims, and expenses so that the property passes free of federal tax liens. When utilizing this process no intervention of the court is necessary.

60. 533 F.2d 303 (5th Cir. 1976).

61. I.R.C. § 167(h).

62. 539 F.2d 427 (5th Cir. 1976).

63. TEX. PROB. CODE ANN. §§ 145-146 (Vernon Supp. 1976-77).

64. I.R.C. § 6324(a)(1).

65. *Id.* § 6325(c).