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WILLS AND TRUSTS

by

Charles O. Galvin*

I. WILLS

Construction. In *Parker v. Blackmon*¹ a wife left her estate to her husband with the will proviso that, if he sold the homestead, the share of the proceeds to which she would have been entitled had she lived would go to her sons by a prior marriage. After the mother's death the two sons conveyed this contingent interest in their mother's estate to their stepfather. In a subsequent declaratory judgment action brought by the stepfather, the sons contended that they could not convey their interest in the home until it was sold. This contention was rejected by the Texas Supreme Court which held that the conveyance of the sons' contingent interest was valid and, therefore, the stepfather was entitled to the entire proceeds of the sale.²

*Bilek v. Tupa*³ concerned a will containing two conflicting dispositive clauses. Article IV devised all the husband's estate to the wife absolutely. Article VIII provided that all property "mentioned in Article IV" should pass in trust for the benefit of the wife for life with remainders over. Reading the will as a whole, the court concluded that the reference in article VIII to article IV was a limitation on the greater estate granted. Accordingly, the wife's interest was determined by the court to be a life estate in trust.⁴

In *Davis v. Wilson*⁵ the testatrix's will provided that if her niece (Davis) "would like to own my house . . . , then I give and devise such property to her in fee . . . upon the condition that she convey" her present home to one Wilson "in fee." Davis elected to take the house left to her, which was free of debt, and offered Wilson her own home encumbered by debt in excess of \$12,000. The court held that the words "fee" and "convey" meant that Davis was obligated to convey an unencumbered fee interest to Wilson. Accordingly, Davis was required to liquidate the \$12,000 indebtedness plus interest thereon.⁶

*McCauley v. Alexander*⁷ involved the construction of a simple will in which the second paragraph provided: "I give, devise and bequeath unto the Eden Home, in New Braunfels, Texas, being a home sponsored by the South Central Conference of the United Church of Christ, to have and to

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1. 553 S.W.2d 623 (Tex. 1977).

2. *Id.* at 624.

3. 549 S.W.2d 217 (Tex. Civ. App.—Corpus Christi 1977, no writ).

4. On another issue the wife's separate property had been so commingled with community property that the presumption of community prevailed. TEX. FAM. CODE ANN. § 5.02 (Vernon 1975).

5. 548 S.W.2d 483 (Tex. Civ. App.—Austin 1977, no writ).

6. *Id.* at 486.

7. 543 S.W.2d 699 (Tex. Civ. App.—Waco 1976, no writ).

hold in fee simple interest forever." The heirs challenged the will on the ground that the property to be devised was not designated. The third paragraph, however, provided for the appointment of an independent executor and contained the usual provision regarding the settlement of "said estate" by probating the will and returning the inventory of "said estate." Construing the will as a whole, the court interpreted the third paragraph as indicating that the testatrix had intended by the second paragraph to leave "said estate" to the Eden Home. Using both the rule of *Carr v. Roger*⁸ and extrinsic evidence, the court then defined "said estate" to be the testatrix's entire estate.⁹

In *In re Estate of O'Hara*¹⁰ a bequest to "The Foundation for the Arts (Dallas Museum of Fine Arts)" was challenged as incurably ambiguous, but was held by the court to be a bequest to the Foundation, not to the Museum. The court stated that parentheses are normally used to qualify or explain some other textual matter; thus, the parenthetical reference in question was used only to identify the Foundation as being in some way connected to the museum.¹¹ In *Rice v. Morris*¹² a mixed trust for charities and private individuals, challenged as ambiguous, was held valid because the terms of the trust gave the trustee discretion to distribute either to public or private beneficiaries. Moreover, with respect to the private beneficiaries, the twenty-year term of the trust did not violate the rule against perpetuities.

In *Moore v. Allen*¹³ the testatrix had bequeathed her home to a church, but in a third codicil to her will she recited: "I have willed my home to First Methodist Church, but I want them to let L.D. Moore buy it for \$10,000." The court of civil appeals held that when the will and the three codicils were construed together the word "want" was mandatory, not precatory. The court also held that the attorney general of Texas was a necessary party to the suit.¹⁴

Execution. The courts continue to insist on strict compliance with the statute regarding execution.¹⁵ In *In re Estate of McDougal*¹⁶ the witnesses testified that they had intended to sign as witnesses to a codicil but that they, in fact, had executed only the self-proving affidavit.¹⁷ Consequently, the codicil was inadmissible to probate.

In *Halamiczek v. Halamiczek*¹⁸ the decedent had executed a holographic will in 1963. He died in 1972, and the will was duly admitted to probate. In

8. 383 S.W.2d 383 (Tex. 1964). One who makes a will is presumed to intend to dispose of all his property.

9. 543 S.W.2d at 700.

10. 549 S.W.2d 233 (Tex. Civ. App.—Dallas 1977, no writ).

11. *Id.* at 238.

12. 541 S.W.2d 627 (Tex. Civ. App.—Corpus Christi 1976, no writ). *See also* Bode v. Loeffler, 540 S.W.2d 465 (Tex. Civ. App.—San Antonio 1976, no writ) (charitable trust held valid).

13. 544 S.W.2d 448 (Tex. Civ. App.—Waco 1976, no writ).

14. TEX. REV. CIV. STAT. ANN. art. 4412a (Vernon 1976). This article makes the attorney general a necessary party to an action construing any instrument affecting a charitable trust.

15. TEX. PROB. CODE ANN. § 88 (Vernon 1956 & Supp. 1978).

16. 552 S.W.2d 587 (Tex. Civ. App.—Tyler 1977, no writ).

17. TEX. PROB. CODE ANN. § 59 (Vernon 1956 & Supp. 1978).

18. 542 S.W.2d 246 (Tex. Civ. App.—Corpus Christi 1976, no writ).

1974 a suit was filed to set aside the holographic will on the grounds that a later holographic will revoked the 1963 will, although a later will was not produced. Judgment was entered in favor of the proponents of the later will upon a jury finding that the earlier will had been revoked.¹⁹ Despite testimony that the testator had spoken of a later writing, there was insufficient evidence that the later will existed, or, if it existed, that it had been executed with the requisite formalities. The court of appeals, therefore, reversed and rendered a decision that the earlier will remained in effect.²⁰ A similar problem was presented in *Barry v. Adams*.²¹ Adams died in 1973, and a 1968 will was offered and admitted to probate. Later, Barry sued to set aside the 1968 will on the ground that a 1972 will revoked the earlier document. Barry testified that the 1972 will was lost, but offered testimony that she and the deceased were in a lawyer's office where she saw the 1972 will signed and witnessed. The lower court excluded this testimony under the Dead Man's statute.²² The court of civil appeals held that Barry was not precluded by the dead man's statute from testifying based upon her own knowledge and that such testimony was not based upon a transaction with the deceased.²³ The judgment was reversed and the case was remanded so that the excluded testimony could be introduced.

In *In re Estate of Page*²⁴ an instrument was offered for probate as the last will of Page. The proponent proved that one of the witnesses to the execution of the will was dead and that the other could not be located in the county. Accordingly, the proponent offered testimony that the signatures of the testator and the deceased witness were genuine. The contestant argued that there was no evidence that the missing witness was dead,²⁵ in the Armed Forces,²⁶ or of proper age²⁷ at the time of witnessing. Moreover, there was no proof that either the deceased or the missing witness had subscribed in the presence of the decedent. The contestant argued, therefore, that proper execution of the will had not been proved. He argued further that the proponent of the will had failed to prove non-revocation as required by the Texas Probate Code.²⁸ The court of civil appeals held that the requirements

19. *Id.* at 248.

20. *Id.* at 250.

21. 551 S.W.2d 792 (Tex. Civ. App.—Waco 1977, no writ).

22. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926).

23. *Ragsdale v. Ragsdale*, 142 Tex. 476, 179 S.W.2d 291 (1944); *Whitis v. Whitis*, 549 S.W.2d 54 (Tex. Civ. App.—Waco 1977, no writ). See also *Fox v. Amarillo Nat'l Bank*, 552 S.W.2d 547 (Tex. Civ. App.—Amarillo 1977, no writ) (testimony otherwise excluded by the operation of the dead man's statute is admissible when received without objection at the proper time and for the proper reason).

24. 544 S.W.2d 757 (Tex. Civ. App.—Corpus Christi 1976, no writ).

25. TEX. PROB. CODE ANN. § 84(b)(3) (Vernon 1956). This section provides that if none of the witnesses is living, or if all of the witnesses are in the military service, then the will may be proved by the testimony of two witnesses verifying the handwriting of one or both of the subscribing witnesses. Alternatively, if only one such witness can be found, then the will may be proved by the sworn statement, affidavit, or deposition of that witness.

26. *Id.*

27. *Id.* § 88(b)(3). This section provides that when a will is not self-proved the proponent of the will must prove "to the satisfaction of the court" either (1) that the testator, at the time of executing the will, was at least 18 years old or was or had been married, or (2) that the testator, at the time of executing the will, was in the armed forces and was of sound mind, and that the testator had executed the will with the formalities required by law and had not revoked the will.

28. *Id.*

of section 84 are not mandatory. Once the fact is established that the two witnesses are unavailable, then secondary evidence may be introduced to prove the validity of execution "to the satisfaction of the court."²⁹ The proponent's secondary evidence met this test and established a valid execution; thus, the production of direct evidence of non-revocation was unnecessary.

*In re Estate of Rosborough*³⁰ held that a plea of forgery in the execution of a will need not be verified by affidavit as required by the Texas Rules of Civil Procedure³¹ relating to written instruments, but may be urged by filing an "opposition . . . in writing" pursuant to the Texas Probate Code.³² Sufficient evidence of forgery was raised in the case for the court to deny probate.

*Chambers v. Chambers*³³ involved the validity of revocation by a later will. Testator executed a holographic will dated February 20, 1963, and later holographic wills dated May 8, 1964, December 20, 1964, March 26, 1968, and March 5, 1970. The 1963 will was admitted to probate in 1970. More than four years later the holographic wills of 1964, 1968, and 1970 were offered for the purpose of showing revocation of the 1963 will. Although these later wills could not be offered for probate because of the four-year limitation,³⁴ the court allowed them to be offered for the purpose of showing revocation of the 1963 will. The decedent, who had signed a will and three codicils, was held to have died intestate.³⁵

Undue Influence. The Supreme Court of Texas considered an undue influence case in *In re Estate of Woods*.³⁶ Citing *Rothermel v. Duncan*,³⁷ the court enunciated the elements necessary to prove undue influence: (1) the existence and exertion of influence; (2) the effective operation of such influence to subvert or overpower the mind of the testator; and (3) the execution of a testament which the maker would not have executed but for such influence.³⁸ The court added that such influence cannot be inferred from opportunity; there must be either direct or circumstantial evidence to show the presence of the influence and its effect on the making of the testament. As no such evidence was present in *Woods*, the court held for the proponents of the will.³⁹ Pursuant to the tests of *Rothermel* and *Woods* undue influence was not found in either *Ransom v. Iselt*⁴⁰ or *Texas A & M University v. Ward*.⁴¹

29. 544 S.W.2d at 759.

30. 542 S.W.2d 685 (Tex. Civ. App.—Texarkana 1976, no writ).

31. TEX. R. CIV. P. 93(h).

32. TEX. PROB. CODE ANN. § 10 (Vernon 1956).

33. 542 S.W.2d 901 (Tex. Civ. App.—Dallas 1976, no writ).

34. TEX. PROB. CODE ANN. § 73 (Vernon Supp. 1978) (no will shall be admitted to probate after the passage of four years following testator's death).

35. Other evidentiary issues of proper execution and testamentary capacity were decided in favor of the proponent of the revoking document.

36. 542 S.W.2d 845 (Tex. 1976).

37. 369 S.W.2d 917 (Tex. 1963).

38. 542 S.W.2d at 847.

39. *Id.* at 848-49.

40. 554 S.W.2d 42 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

41. 547 S.W.2d 328 (Tex. Civ. App.—Beaumont 1977, no writ).

Testamentary Capacity. In *Dominguez v. Duran*⁴² the evidence was sufficient to establish that a testator who had suffered a stroke had acted strangely toward the natural objects of his bounty. A jury finding of lack of testamentary capacity was, therefore, sustained. Similarly, in *Reding v. Eaton*⁴³ a decedent who had executed a will a few months before his death was found to be ill and unable to know his property or the objects of his bounty.

Heirship. Texas Probate Code section 38(a)(4)⁴⁴ provides that, in the event there are no near heirs of a deceased person, his property shall be divided into two moieties, one to go to the paternal grandparents and their descendants, and the other to go to the maternal grandparents and their descendants. In *State v. Estate of Loomis*⁴⁵ thirty-two maternal descendants but no paternal descendants could be found. The State of Texas intervened, contending that the absence of paternal heirs required an escheat to the state of that portion of the estate allotted to such heirs. The court of civil appeals, construing legislative intent, held that the entirety of the decedent's estate passed to his heirs and that escheat will occur only when a decedent has no heirs.⁴⁶ The same Probate Code section was interpreted in *Allison v. Brashear*⁴⁷ to permit division of the moieties reserved for the paternal grandparents into two further moieties for the paternal greatgrandparents and their descendants if, after the division of the estate into the two moieties, there were no paternal grandparents nor descendants of the paternal grandparents.

Equitable Adoption. In *re Estate of Wood*⁴⁸ applied the principle that a person cannot claim to be an heir of the deceased by virtue of an equitable adoption without a showing of an agreement to adopt.⁴⁹ Although testimony was given concerning adoption papers and other circumstances relating to a purported adoption, the jury finding of no agreement to adopt was affirmed by the court of civil appeals.⁵⁰

Joint and Mutual Wills. In *Vickrey v. Gilmore*⁵¹ John and Belle had executed in 1952 an instrument designated a joint and mutual will in which each devised his or her property to the other with devises of specific tracts of land to their seven children. John died in 1971 and Belle executed a codicil in which she rearranged the division of the specific tracts because of changes in value. A child beneficiary brought suit, successfully contending

42. 540 S.W.2d 567 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

43. 551 S.W.2d 491 (Tex. Civ. App.—Austin 1977, no writ).

44. TEX. PROB. CODE ANN. § 38(a)(4) (Vernon 1956).

45. 553 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, writ ref'd).

46. *Id.* at 169.

47. 544 S.W.2d 492 (Tex. Civ. App.—El Paso 1976, no writ).

48. 543 S.W.2d 701 (Tex. Civ. App.—Beaumont 1976, no writ).

49. See *Cavanaugh v. Davis*, 149 Tex. 573, 235 S.W.2d 972 (1951).

50. 543 S.W.2d at 704.

51. 554 S.W.2d 36 (Tex. Civ. App.—Waco 1977, no writ). See also *Murphy v. Slaton*, 154 Tex. 35, 273 S.W.2d 588 (1954).

that the 1952 will was contractual and that, therefore, her mother could not change its terms. The court of civil appeals affirmed, holding that the joint and mutual will reflected a comprehensive plan of disposition and the parties' clear intention that the will be contractual.⁵²

Similarly, in *Knolle v. Hunt*⁵³ a will was held to be joint, mutual, and contractual because a comprehensive plan was evidenced to dispose of all property owned by either spouse at his or her death.⁵⁴ The court determined that the wife had violated the prior contractual provisions when she revoked the joint will and changed the disposition,⁵⁵ and that those taking under the surviving wife's will held the properties in trust for the benefit of the beneficiaries named in the earlier joint and mutual will.⁵⁶ The joint will, moreover, reached all the property owned by the surviving wife at her death, for such disposition was expressly provided for in the joint will and codicil thereto.⁵⁷ Despite this holding as to the substantive rights in the properties, a companion case held that the executrix appointed in the surviving wife's separate will was entitled to serve.⁵⁸

Election. In *Stutts v. Stovall*⁵⁹ the husband bequeathed a substantial portion of his estate to his wife and the balance to nieces and nephews. His widow took under the will and, in addition, was awarded a widow's allowance. She sued for reimbursement for funds which had been removed from her portion of the community estate and used to purchase certain properties. The court of civil appeals held that she was entitled to keep the widow's allowance but that her claims for reimbursement were inconsistent with her election to take valuable benefits under her husband's will.⁶⁰

Procedure. In *Boyd v. Ratliff*⁶¹ an independent executrix filed suit in the district court in Dallas County for construction of a will admitted to probate in Denton County. The defendant was a resident of Dallas County and, therefore, the case included issues of jurisdiction and venue. Texas Probate Code section 5(c),⁶² enacted in 1973, states that matters regarding administration shall be filed in the probate court. Section 5(d),⁶³ added in 1975, refers to all courts exercising original probate jurisdiction. In 1973 the voters adopted an amendment to article V, section 8 of the Texas Constitution⁶⁴ adding potential probate jurisdiction to the original jurisdiction of district courts. The court of civil appeals held that the long standing jurisdiction of

52. 554 S.W.2d at 38.

53. 551 S.W.2d 755 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

54. *Id.* at 760.

55. *Id.* at 761-62.

56. *Id.* at 762-63.

57. On another issue the court held that the words "will and desire" should be construed as mandatory, not precatory. *Id.* at 760-61.

58. *Hunt v. Knolle*, 551 S.W.2d 764 (Tex. Civ. App.—Tyler 1977, no writ).

59. 544 S.W.2d 938 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

60. *Id.* at 942.

61. 541 S.W.2d 223 (Tex. Civ. App.—Dallas 1976, writ dismissed).

62. TEX. PROB. CODE ANN. § 5(c) (Vernon Supp. 1978).

63. *Id.* § 5(d).

64. TEX. CONST. art. V, § 8.

district courts to construe wills was not limited by either section 5(c) or section 5(d) of the Probate Code.

With respect to the venue question, article 1995(4)⁶⁵ places venue in the county of the residence of one of the defendants, but Texas Probate Code section 8⁶⁶ provides generally for venue in the county where application for probate is made. The court in *Boyd* held that section 8, read in conjunction with sections 6⁶⁷ and 7⁶⁸ of the Probate Code relating to venue for specific purposes, was inapplicable to the present suit for a declaratory judgment. Therefore, article 1995(4) applied and the suit was properly brought in Dallas County.

In *Townsend v. Phillips*⁶⁹ the decedent died on September 9, 1971, and on December 2, 1971, Phillips filed an application for administration accompanied by a statement that a determination whether or not a will existed was necessary. On December 16, 1971, Phillips filed a motion to require Townsend, the administrator, to deliver into court the will of the decedent; the will was delivered. On November 4, 1975, Phillips moved to dismiss the proceedings, but on November 21, 1975, Townsend filed an application to probate the will as a muniment of title. The court of civil appeals held that the application of November 21, 1975, related back to the original proceeding so that a timely filing was effected within four years of death as required by the Probate Code.⁷⁰

In other procedure cases Texas courts held that: executors of an estate were not permitted to sell to themselves, notwithstanding the fact that they had been granted broad powers under the will;⁷¹ the fact that a decedent's will had been admitted in Arkansas did not preclude his son from offering another will for probate in Texas;⁷² while living, a client may assert that his will is a privileged communication with his attorney,⁷³ and such privilege must be waived before the communication may be introduced as evidence;⁷⁴ plea in abatement is proper if all beneficial interests are not represented;⁷⁵ want of due process required reversal and remand for trial;⁷⁶ a temporary administrator was properly appointed while a will contest was in progress;⁷⁷ an independent executor may incur expenses reasonably necessary to pre-

65. TEX. REV. CIV. STAT. ANN. art. 1995(4) (Vernon 1964).

66. TEX. PROB. CODE ANN. § 8 (Vernon 1956).

67. *Id.* § 6.

68. *Id.* § 7 (Vernon Supp. 1978).

69. 545 S.W.2d 898 (Tex. Civ. App.—Texarkana 1977, no writ).

70. TEX. PROB. CODE ANN. § 73 (Vernon Supp. 1978).

71. *Furr v. Hall*, 553 S.W.2d 666 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

72. *In re Estate of Bills*, 542 S.W.2d 943 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

73. *Suddarth v. Poor*, 546 S.W.2d 138 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

74. *Id.* at 141.

75. *Pampell v. Pampell*, 554 S.W.2d 20 (Tex. Civ. App.—Austin 1977, no writ). *See also Brooks v. Mahfouz*, 554 S.W.2d 292 (Tex. Civ. App.—Waco 1977, no writ); *Turcotte v. Trevino*, 544 S.W.2d 463 (Tex. Civ. App.—Corpus Christi 1976, writ granted).

76. *Read v. Gee*, 551 S.W.2d 496 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). Plaintiffs had been given insufficient notice of a proceeding to determine disposition of an estate. *See also Armstrong v. Manzo*, 380 U.S. 545 (1965).

77. *Blackburn v. Faulkinbury*, 554 S.W.2d 7 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

serve the estate;⁷⁸ and the sole eligible heir of a murdered deceased had a justifiable interest in a suit to impose a constructive trust on the deceased's assets.⁷⁹

II. TRUSTS

Construction. In *Frost National Bank v. Newton*⁸⁰ the supreme court reversed the judgment of the court of civil appeals which had held that a testamentary trust terminated when the primary beneficiaries had received benefits in accordance with the trust and the contingent beneficiaries had waived their interests and consented to the trust's termination.⁸¹ The supreme court determined that a trust which by its own terms terminated on the happening of certain events could not be judicially terminated. Moreover, one purpose of the trust, the payment of excess income to named beneficiaries, had not yet been fulfilled.

*Corpus Christi National Bank v. Gerdes*⁸² upheld an exculpatory clause in a testamentary trust's provisions which relieved the trustee bank from liability for negligent conduct. The court held that such clauses are not void as against public policy;⁸³ the court distinguished an important earlier case, *Langford v. Shamburger*,⁸⁴ which had held that an exculpatory clause authorizing self-dealing was against public policy.

The court in *City of Mesquite v. Malouf*⁸⁵ held that a declaration of trust was unambiguous and created a present trust despite the trustor's testimony that he did not intend to vest a present beneficial interest in certain land. As equitable owners, the trust beneficiaries were entitled to the benefit of lower tax assessments upon land designated for agricultural use, as such use was their occupation and source of income.⁸⁶

Constructive Trust. When a person has acquired properties with funds wrongfully taken from another, a constructive trust may be imposed on the properties for the benefit of the rightful owner of the funds. In *Baxter v. Williams*⁸⁷ an airplane was the subject of a constructive trust in favor of a wife, the rightful owner, whose former husband sold the plane to a vendee who had knowledge of the wife's interest. In *McCray v. Peoples National Bank*⁸⁸ the plaintiff sought an assignment of a one-sixteenth interest in certain oil and gas leases which he claimed to have acquired for the decedent and decedent's estate. Although the evidence showed some kind of oral contract of employment between plaintiff and the decedent and his estate,

78. *Gonzalez v. Gonzalez*, 552 S.W.2d 175 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

79. *Gordy v. Alexander*, 550 S.W.2d 146 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.). For another case involving a murdered deceased see *Bounds v. Caudle*, 549 S.W.2d 438 (Tex. Civ. App.—Corpus Christi 1977, writ granted).

80. 554 S.W.2d 149 (Tex. 1977).

81. 543 S.W.2d 196 (Tex. Civ. App.—Waco 1976).

82. 551 S.W.2d 521 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

83. *Id.* at 524.

84. 417 S.W.2d 438 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

85. 553 S.W.2d 639 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

86. TEX. CONST. art. VIII, § 1-d.

87. 544 S.W.2d 192 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

88. 541 S.W.2d 253 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

such evidence fell short of demonstrating a confidential or fiduciary relationship upon which a constructive trust on the estate assets could be based. In *Sheldon Petroleum Co. v. Peirce*⁸⁹ an investor sought to impose a constructive trust on money she had furnished the defendants to purchase oil properties. No constructive trust was raised, however, since there was insufficient evidence tracing plaintiff's funds into property held by a particular defendant who was a resident of Dallas County. Moreover, absent a cause of action against such defendant, a plea of privilege to have the suit tried in Lubbock County should have been sustained. In *Rankin v. Naftalis*⁹⁰ the parties were engaged in an oil and gas joint venture. The supreme court held that the fiduciary relationship existing between joint venturers extends only to the development of the particular lease, and therefore, no breach of a fiduciary relationship occurs requiring imposition of a constructive trust when one venturer breaches an oral promise to purchase a second lease for the benefit of all.⁹¹

Procedure. In *Weatherly v. Byrd*⁹² a settlor had created a revocable trust. When she thereafter became incompetent, her guardian sought revocation of the trust, and a revocation order was subsequently entered from which the trustee appealed. Prior to submission of the appeal the ward died, and the trustee contended that the action was moot. The court of civil appeals held that the case was not moot because the settlor was alive at the time judgment was entered and the guardian required the funds to make her final account. Moreover, the guardian had the power to exercise the settlor's contractual right to revoke without a court order and did not have to demonstrate that the revocation was in the ward's best interest. In *Cogdell v. Fort Worth National Bank*⁹³ the court found that a trustee with broad powers was entitled to settle claims against executors of the estate and that such actions bound the trust beneficiaries.

In *Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*⁹⁴ a church vestry established a separate endowment fund in a non-profit corporation managed by a board of five trustees. The vestry needed funds for parish operations and requested that the trustees distribute portions of the trust income. The trustees refused the request, and the vestry went into debt. The vestry then sought to change the corporate bylaws and elect more sympathetic successor trustees, but the corporate trustees resisted the change, and the vestry sued. Gray, a parishioner and successor trustee, intervened on the side of the plaintiffs. The original plaintiffs and defendants then settled their dispute, but Gray refused to assent to the settlement. The court of civil appeals held that Gray had standing to intervene on his own behalf and on behalf of other parishioners.⁹⁵

89. 546 S.W.2d 954 (Tex. Civ. App.—Dallas 1977, no writ).

90. 557 S.W.2d 940 (Tex. 1977).

91. *Id.*

92. 552 S.W.2d 573 (Tex. Civ. App.—Fort Worth 1977, writ granted).

93. 544 S.W.2d 825 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.). *See also In re Estate of Cogdell*, 544 S.W.2d 830 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.) (dismissing suit for accounting because accounting had been in issue in prior suit).

94. 544 S.W.2d 488 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

95. *Id.* at 491.

Estate Taxes. In *First National Bank v. United States*⁹⁶ the decedent, John, had been married twice. His first wife, who died in 1948, was survived by John and their four children. The first wife's will created a trust for the children with John as trustee. Although at the time of her death she and John owned six life insurance policies, no settlement was made with her estate regarding these insurance policies. Later, two of the policies were cashed in by John who retained all of the proceeds. John, who subsequently remarried in 1956, died in 1966 but was survived by his second wife. After John's death the executor of his estate, a bank, paid a share of the insurance policy proceeds to the trust created by the first wife and claimed a deduction therefor. The representatives of John's estate contended that the first wife's trust had a property right in the insurance policies and was, therefore, entitled to a portion of the proceeds. The Government contended that the first wife's estate had only a claim for reimbursement for the premiums advanced by the first wife's trust after her death. The district court applied the law as it had been in 1948 and held that the first wife's interest in the policies was inchoate only. Her estate was entitled to share in the cash surrender value of those policies cashed in prior to her death, but was not entitled to the proceeds of policies which had matured at John's death. The first wife's estate was also entitled to reimbursement for premiums advanced. These amounts, therefore, constituted the deduction to which the husband's estate was entitled.⁹⁷

Legislation. Texas Probate Code section 145⁹⁸ now provides for a new type of fiduciary, an independent administrator. Independent administration may be obtained when the estate does not exceed \$200,000 if the will fails to provide for independent administration or fails to name an executor, if the named executor fails to act, or if the decedent dies intestate. The appointment is made by the distributees. New section 154A⁹⁹ provides for the appointment of a successor independent executor by the distributees if the will fails to do so.

New article 4590h,¹⁰⁰ entitled the Natural Death Act, states that a person may provide in advance for the withdrawal or the withholding of extraordinary life support measures when such person has a terminal illness.

Probate Code section 37A¹⁰¹ has been amended to permit representatives of incompetent, deceased, or minor persons to execute disclaimers or renunciations with prior court approval. Independent executors may do so without court approval. The written memorandum must be filed in the probate court or with the county clerk.

Venue in negligence suits against executors may now lie in the county

96. 418 F. Supp. 955 (N.D. Tex. 1976); see TEX. REV. CIV. STAT. ANN. art. 23, § 1 (Vernon 1969) which was enacted in 1957 and defines insurance as property.

97. 418 F. Supp. at 961.

98. TEX. PROB. CODE ANN. § 145 (Vernon Supp. 1978).

99. *Id.* § 154A.

100. TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1978).

101. TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1978).

where the negligent act or omission occurred pursuant to amended subdivisions 6 and 9a of article 1995.¹⁰²

New Probate Code section 107A¹⁰³ provides a method by which a foreign executor or administrator may recover debts due a deceased non-resident. The foreign representative may file his letters testamentary or of administration and submit personally to the jurisdiction of the court for an amount equal to the judgment sought. Suit may not be maintained if a Texas executor or administrator has qualified.

Other legislative changes affecting the law of wills and trusts include the following: Probate Code section 320¹⁰⁴ allows \$2,000 instead of \$1,000 for funeral expenses and expenses of the last illness if the claim is presented within sixty days from the grant of letters testamentary; otherwise, the claim is postponed until the allowance for the widow and children is paid. An amendment to Probate Code section 389A¹⁰⁵ has deleted the word "corporate" so that any guardian may apply for authority to invest in properties in which a trustee may invest. Internal Revenue Code sections 2039(d) and (e)¹⁰⁶ exempt the community property interest in qualified employee annuities and individual retirement accounts of a non-employee spouse from inheritance taxes. Probate Code section 5(d)¹⁰⁷ has been amended to consolidate actions involving sureties with suits by their personal representatives; section 236(b)¹⁰⁸ provides for approval of prior expenditures by a guardian; and section 245¹⁰⁹ provides for the assessment of costs against a personal representative for neglect of duty. New section 130A¹¹⁰ allows a limited guardianship for incompetent persons, and a new article 5547—300,¹¹¹ known as the Mentally Retarded Persons Act of 1977, has been adopted to provide for mentally retarded persons. The Probate Code limitation for small estates has been raised from \$5,000 to \$10,000,¹¹² new section 113A¹¹³ provides for the appointment of an attorney ad litem for a person who is not a minor; new section 127A¹¹⁴ deals with the guardianship of missing persons; and section 42¹¹⁵ has been amended to clarify the fact that an illegitimate child inherits from his maternal kindred. If the father marries the mother, then the child acquires full inheritance rights. In the case of legitimation by voluntary proceeding, the child inherits from his father but not from his paternal kindred. Finally, a new section 404B¹¹⁶ permits the determination of heirship in guardianship proceedings; and section 110¹¹⁷ no longer requires that a guardian read and write the English language.

102. TEX. REV. CIV. STAT. ANN. art. 1995(6), (9a) (Vernon Supp. 1978).

103. TEX. PROB. CODE ANN. § 107A (Vernon Supp. 1978).

104. *Id.* § 320.

105. *Id.* § 389A.

106. I.R.C. §§ 2039(d)-(e).

107. TEX. PROB. CODE ANN. § 5(d) (Vernon Supp. 1978).

108. *Id.* § 236(b).

109. *Id.* § 245.

110. *Id.* § 130A.

111. TEX. REV. CIV. STAT. ANN. art. 5547—300 (Vernon Supp. 1978).

112. TEX. PROB. CODE ANN. § 137 (Vernon Supp. 1978).

113. *Id.* § 113A.

114. *Id.* § 127A.

115. *Id.* § 42.

116. *Id.* § 404B.

117. *Id.* § 110.

