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Wills and Trusts

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WILLS AND TRUSTS

by

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I. WILLS

Construction. Several cases decided during the survey period illustrate the importance of describing clearly the estate intended to be left to a beneficiary. For instance, in *Roberdeau v. Jackson*[1] the testatrix's will provided that upon the death of her half-sister, "my nieces, . . . share and share alike, shall then be entitled to life estates in all of my property, and upon their deaths it is to then go to the child or children, share and share alike, of my said nieces."[2] Two nieces, Eugenia and Beatrice, survived the testatrix. Beatrice subsequently died survived by a daughter. Eugenia contended that the above language created a joint tenancy in a life estate with a right of survivorship in the surviving niece. The court noted that a joint estate with a right of survivorship must be created by express language,[3] and held that the "share and share alike" language of testatrix's will was insufficient to create a right of survivorship. Accordingly, the daughter of the deceased niece received a vested one-half remainder in fee.

Zint v. Crofton[4] involved the construction of a will that provided that the residue of testatrix's property was to pass to her son, "with personal instructions to him for my four grandchildren," and "instead of creating a trust herein for my four grandchildren, I have given instructions to my beloved son . . . as to the inheritance that my grandchildren are to receive."[5] The court held that the "personal instructions" did not operate to limit the devise of the residue of the estate to the son. The court relied on the "first taker" rule, which favors that construction of the will that vests the largest estate possible in the first taker. Under this rule the testator is presumed to have intended a full disposition of all his estate rather than to die partially intestate.[6]

The presumption of the "first taker" rule against partial intestacy was

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1. 565 S.W.2d 98 (Tex. Civ. App.—Austin 1978, no writ).

2. *Id.* at 99.

3. The court relied on Chandler v. Kountze, 130 S.W.2d 327 (Tex. Civ. App.—Galveston 1939, writ ref'd), which held that express language of a deed could create a joint tenancy with right of survivorship only when it is the clearly expressed intention of the grantor.

4. 563 S.W.2d 287 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

5. *Id.* at 288-89.

6. *See* Rogers v. Nixon, 275 S.W.2d 197 (Tex. Civ. App.—San Antonio 1955, writ ref'd); McDowell v. Harris, 107 S.W.2d 647 (Tex. Civ. App.—Dallas 1937, writ dism'd). *See also* Smith v. Bynum, 558 S.W.2d 99 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

rebutted in *Swearingen v. Giles*.[7] In *Swearingen* the court concluded that absent a clear and unambiguous direction to the contrary, the death of a residuary legatee prior to the testator caused that legatee's portion of the estate to pass to the testatrix's heirs-at-law rather than to the remaining residuary beneficiaries. Similarly, in *Najvar v. Vasek*[8] there was no clear direction that the children of the testator's brother should succeed to their father's share if he predeceased the testator; hence, the property passed to the testator's own children as his heirs-at-law.

Probate Code section 69 provides that all provisions relating to a divorced spouse shall be null and void.[9] In *Calloway v. Estate of Gasser*[10] the testatrix's will provided that her estate would pass to her husband if he survived her, but if he failed to survive her, to certain designated beneficiaries. The testatrix and her husband were divorced subsequent to the execution of the will. In construing the testatrix's will the court held that a divorced husband should be treated as a deceased husband for purposes of determining the interests of contingent beneficiaries who were entitled to succeed to the husband's interest if he predeceased the testatrix.

In *First United Methodist Church v. Allen*[11] the court construed the same will reported last year in *Moore v. Allen*.[12] The testatrix bequeathed her home to a church, but in a codicil recited: "I have willed my home to First Methodist Church, but I want them to let L.D. Moore buy it for $10,000.00."[13] Emphasizing the context of the will and codicil, the court determined that the word "want" was mandatory and not precatory in meaning.

In *Warren v. Hartnett*[14] an obviously illiterate testatrix executed a holographic will reciting two events yet to occur: having her teeth pulled and a plane trip to San Antonio. Contestants contended that the will was contingent upon her death occurring as a result of either of the two events, and that because neither event resulted in the testatrix's death, the will was ineffective. The court noted that leaving a will implies an intent not to die intestate and that if two constructions are possible, the one preventing intestacy should be applied.[15] Accordingly, the recitals were construed as reasons for making the will, but not conditions determining its effectiveness.[16]

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7. 565 S.W.2d 574 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).
8. 564 S.W.2d 202 (Tex. Civ. App.—Corpus Christi 1978, no writ).
9. TEX. PROB. CODE ANN. § 69 (Vernon 1956).
10. 558 S.W.2d 571 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *cf.* McFarlen v. McFarlen, 536 S.W.2d 590 (Tex. Civ. App.—Eastland 1976, no writ) (divorced wife is not treated as deceased, thus estate descended to heirs); Volkmer v. Chase, 354 S.W.2d 611 (Tex. Civ. App.—Houston [1st Dist.] 1962, writ ref'd n.r.e.) (divorced wife is not treated as deceased).
11. 557 S.W.2d 175 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).
12. 544 S.W.2d 448 (Tex. Civ. App.—Waco 1976, no writ); *see* Galvin, *Wills and Trusts, Annual Survey of Texas Law*, 32 SW. L.J. 15, 16 (1978).
13. 557 S.W.2d at 177.
14. 561 S.W.2d 860 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).
15. Ferguson v. Ferguson, 121 Tex. 119, 45 S.W.2d 1096 (1932).
16. An issue of testamentary capacity was raised by opponents of the will. It was re-

Testamentary Capacity. McIntyre v. Milliorn[17] held that the state of the decedent's mind must be determined as of the date of the execution of the instrument offered for probate and not on some other date.[18] Testimony concerning the decedent's testamentary capacity on a date other than that on which the will was executed, therefore, was properly excluded by the probate court. In *Wysick v. Estate of Wysick*[19] the trial court's instructions on the elements of testamentary capacity were held sufficient despite its failure to provide a definition of the words "next of kin and the natural objects of her bounty."[20] The court reasoned that the instructions were substantially the same as had been previously approved by courts in Texas.

Execution and Proof. In will contests the Dead Man's Statute[21] may prevent the introduction of testimony concerning an instrument offered for probate as the last will of a deceased person. In *Adams v. Barry*[22] the Supreme Court of Texas considered whether testimony offered in support of the probate of an alleged lost will was excluded by the statute. The testator died in 1973, and a will executed by him in 1968 was admitted to probate. Thereafter, one Barry sued to set aside the 1968 will. She contended that there was a lost will executed in 1972 that named her as the sole beneficiary. The only evidence offered was Barry's testimony that she and the testator executed reciprocal wills simultaneously. This testimony was excluded. The court of civil appeals reversed and remanded, reasoning that the excluded testimony did not involve a transaction with the deceased and hence was not prohibited by the Dead Man's Statute.[23] The Texas Supreme Court reversed the court of civil appeals, stating that the "term 'transaction' involves mutuality or concert of action" and that "whatever knowledge Miss Barry possessed with respect to the alleged lost will of George Adams was inseparably connected with the transaction between them."[24] Thus, the court held that Miss Barry's testimony to the effect that there was a will that she saw and that was signed by Adams was testimony regarding a transaction with the deceased barred by the Dead Man's Statute.

In *Mossler v. Johnson*[25] two adopted children of Candace Mossler sought to probate an instrument purported to be their mother's last will.

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solved, however, in favor of the proponents when the court refused to allow testimony of contestant's handwriting expert regarding decedent's mental condition.

17. 566 S.W.2d 675 (Tex. Civ. App.—Fort Worth 1978, no writ).
18. *Id.* at 676. The court relied on Lee v. Lee, 424 S.W.2d 609 (Tex. 1968).
19. 562 S.W.2d 903 (Tex. Civ. App.—Tyler 1978, no writ).
20. *Id.* at 904.
21. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926).
22. 560 S.W.2d 935 (Tex. 1978).
23. Barry v. Adams, 551 S.W.2d 792 (Tex. Civ. App.—Waco 1977, writ granted). The court of civil appeals stated: "Article 3716 does not disqualify a witness from testifying to facts that such witness may know of her own knowledge. . . . In the case at bar, Mrs. Barry's testimony in question was based on her own knowledge, received from her reading of the will of George H. Adams . . . ." *Id.* at 793-94.
24. 560 S.W.2d at 938.
25. 565 S.W.2d 952 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

They were opposed by two natural children, Rita and Norman. Rita testified that a conformed copy of a will executed in 1968 was delivered to Candace Mossler in the hospital. The testatrix struck the name of the executor and asked Rita to substitute the names of the two natural children. The attending physician witnessed the changes made in the instrument. The fatal flaw was that Rita filled in her name as an executrix and not as a witness, leaving the doctor as the only witness. The will, therefore, was not executed pursuant to Texas Probate Code section 59 and could not be admitted to probate.

In *Pelton v. Dawley*[26] a holographic will, admittedly in the handwriting of deceased, was denied probate because it could not be read. The court held that when words are so illegible as to allow only speculative deciphering by the court the writing fails as a testamentary instrument.

Joint and Mutual Wills. Two individuals executing the same document as their joint will do not necessarily bind one another to the terms of the instrument unless they have contractually agreed to do so. The Texas Probate Code permits the survivor to revoke the prior will, but he or she does so under peril of an action for breach of contract arising out of the earlier instrument. *Jones v. Chamberlain*[27] is illustrative of this problem. In 1962 R.L. and his wife, Pearl, executed a joint will. R.L. died in 1969, and on application of Pearl the 1962 will was admitted to probate. In 1975 Pearl executed a new will, revoking the joint will. Pearl died in 1975, and a contest arose between the beneficiaries under the 1962 will and those under the 1975 will. The district court found that the 1962 will was joint and contractual and refused to admit the 1975 will to probate. On appeal, the court of civil appeals reversed the judgment of the district court and admitted the 1975 will to probate. The court reasoned that the 1975 will was valid in all respects as a revocation of the 1962 will and, therefore, should be admitted to probate. Further, the beneficiaries under the 1962 will were without prejudice to file suit for breach of contract arising out of the 1962 will.[28] This case presents an anomalous result in that the proponents of the 1975 will were successful in having that instrument admitted to probate, yet the beneficiaries under the 1962 will may in the final analysis take the properties in the estate in satisfaction of their contractual claims.

Stearn v. Reass[29] presented a similar situation. The testator and testatrix executed a joint will disposing of all of their property. The will included an agreement that the joint will would remain unrevoked after the death of the first to die. The court upheld the joint will and imposed a constructive

26. 556 S.W.2d 398 (Tex. Civ. App.—Waco 1977, no writ).

27. 563 S.W.2d 885 (Tex. Civ. App.—Texarkana 1978, no writ).

28. *See* Tips v. Yancey, 431 S.W.2d 763 (Tex. 1968); Nesbett v. Nesbett, 428 S.W.2d 663 (Tex. 1968).

29. 559 S.W.2d 898 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.); *see* Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621 (1957); Murphy v. Slaton, 154 Tex. 35, 273 S.W.2d 588 (1954).

trust on the properties in the hands of the surviving husband for the beneficiaries under the will.

Family Settlement Agreement. In *Womack v. Worthington*[30] a father left his estate to one of three daughters. Another daughter sued to establish that the three sisters had entered an oral agreement to divide the estate equally. The agreement was allegedly entered into thirteen years before the father's death. The court held that such an agreement was included within the Statute of Frauds[31] and, if it existed, was unenforceable.

Procedure. A series of cases dealt with procedural matters. *Williams v. Hollingsworth*[32] held that to abandon a will contest action all parties involved in the dispute had to consent to a settlement. In *Garrison v. Texas Commerce Bank*[33] the court held that an order that granted a divorce but that retained jurisdiction to divide community property was interlocutory. In *Garrison* the testatrix died prior to a final judgment in her divorce action. The surviving spouse of the testatrix brought an action contesting the probate of his wife's will. The court found that the wife's death before final judgment rendered the divorce action moot. The husband, therefore, became an "interested person" in his spouse's estate and was entitled to be a contestant of the probate of the will.

The independent executor in *Sumaruk v. Todd*[34] brought suit to recover $30,000 from the former nurse of the deceased, alleging that a stipend from the deceased was a loan and not a gift. The district court ruled in favor of the executor on a motion for summary judgment. The defendant appealed, contending that under section 5 of the Probate Code[35] the statutory probate court of Dallas County had exclusive jurisdiction of the matter. The court of appeals disagreed, construing section 5 as permitting concur-

30. 561 S.W.2d 564 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

31. TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1968).

32. 568 S.W.2d 130 (Tex. 1978), *rev'g and remanding* 559 S.W.2d 111 (Tex. Civ. App.—Texarkana 1977).

33. 560 S.W.2d 451 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). For a similar situation, see Bourne v. Bourne, 559 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (Divorce decree determined that wife should have an interest in a ring that husband inherited from his grandmother. Held: divorce court had authority to determine ownership in ring although grandmother's estate was being administered in probate court. This was without prejudice to grandmother's heirs to assert any interest that they might have.).

34. 560 S.W.2d 141 (Tex. Civ. App.—Tyler 1977, no writ).

35. TEX. PROB. CODE ANN. § 5 (Vernon Supp. 1978-79). For additional recent cases construing § 5, see Estate of Rosborough v. Daniels, 567 S.W.2d 823 (Tex. Civ. App.—Texarkana 1978, no writ) (contested claim against an estate is a probate matter and contesting party is a party to the proceedings who may have matter transferred to district court); Nolan v. Bettis, 562 S.W.2d 520 (Tex. Civ. App.—Austin 1978, no writ) (jurisdiction of suit for fraud and cancellation of deed was not exclusively vested in probate court, and district court could entertain suit); Bell v. Hinkle, 562 S.W.2d 35 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (suits to determine heirship are within the exclusive jurisdiction of probate court; if administration not pending, district court has jurisdiction of trespass to try title action); Estate of Maxey v. Sparks, 559 S.W.2d 458 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) (where county court proceeded first on heirship matter, its findings were res judicata in district court).

rent jurisdiction of the district and county courts in matters incident to an estate. The court noted that section 5 was intended to give the probate court exclusive jurisdiction only over matters in which the controlling issue was the settlement, partition, or distribution of an estate.[36] Here, no administration was pending, and, therefore, the district court was properly carrying out its historic general jurisdiction.

In *Bergeron v. Sessions*[37] a receiver was appointed to marshal the assets of a missing person until he was declared dead. Prior to the termination and final accounting of the receivership, the district court awarded final fees to the receiver and his accountant. On appeal it was held that the award of final fees to the receiver before he finished his work was error, that a receiver's fee was subject to the court's, but not the jury's, determination, and that it was error not to separate the value of legal services performed by the receiver from his other services.

Kilgore v. Estate of Kilgore[38] presents the not unusual situation in which the independent executor of an estate becomes incapacitated and unable to perform his duties. In *Kilgore* the independent executor was adjudged non compos mentis, and a temporary administrator was appointed by the court. The court of civil appeals reversed the action of the lower court. It reasoned that Probate Code section 222,[39] which authorizes the removal of a personal representative when he becomes an incompetent, does not apply to independent executors.[40] The result of this case may be avoided by providing specifically for successor executors in the event of disability of the person appointed. Certainly, there is need for a clarifying amendment by the Texas Legislature.

The lengthy litigation involving the estate of Sarita K. East was again before the Supreme Court of Texas in *Trevino v. Turcotte*.[41] In this will contest action the contestants' father was both an independent executor of the estate and a beneficiary under the contested will who had received and accepted substantial benefits before his death. All of the contestants contended that they were "interested persons" because they were the sole heirs of their father who had a substantial interest in the East estate. Further, two of the contestants claimed to be interested persons by virtue of assign-

36. *See* Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372 (1976).

37. 561 S.W.2d 551 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). For a related case, see Bergeron v. Sessions, 554 S.W.2d 771 (Tex. Civ. App.—Dallas 1977, no writ).

38. 568 S.W.2d 182 (Tex. Civ. App.—San Antonio 1978, no writ).

39. TEX. PROB. CODE ANN. § 222 (Vernon Supp. 1978-79).

40. The court relied on Bell v. Still, 389 S.W.2d 605 (Tex. Civ. App.—Waco 1965), *adopted*, 403 S.W.2d 353 (Tex. 1966), in which the court held that the Probate Code did not alter the previously existing rule that a probate court did not have the power to remove an independent executor unless he failed to post a bond when required to do so. In the instant case Chief Justice Cadena filed a vigorous and well-reasoned dissent, arguing that removal of an independent executor for legal incapacity to perform does not involve intrusion by the probate court into the manner in which the independent executor is discharging his responsibilities. Thus, such removal violates neither the letter nor the spirit of the Texas Supreme Court's holding in *Bell*. 568 S.W.2d at 151.

41. 564 S.W.2d 682 (Tex. 1978).

ments acquired from heirs of the testatrix. Addressing the arguments of the contestants, the Texas Supreme Court affirmed the judgments of the lower courts that the contestants, as devisees or legatees of their father, were estopped to challenge the validity of the will by their father's acceptance of benefits under the will. In addition, the court extended the rule of estoppel to the contestants asserting claims under the minute interests acquired from heirs of the testatrix. The court concluded that it would be inequitable, unjust, and against public policy to permit standing under such circumstances.

Slayton v. Slayton[42] involved a plea of privilege. A widow in her individual capacity and as representative of her husband's estate sued her deceased husband's son by a former marriage on the grounds that the son had defrauded her as to the value of the estate. The defendant filed a plea of privilege to be sued in Harris County, the county of his residence. The court held that the suit was properly brought by the widow in Jefferson County, where it was alleged the fraudulent statements were made.

Equitable Conversion. In *Fuqua v. Fuqua*[43] the deceased, prior to her death, sold real property to a third party. The death of the deceased occurred prior to the passage of legal title. The court of appeals sustained the proposition that the interest passing is treated as personalty because the proceeds are "related back" to the date the deed from the vendor was placed in escrow.

II. TRUSTS

Construction. In *Bradford v. Rain*[44] a debtor, joined by a principal mortgagee, conveyed certain oil producing properties to a trustee under an agreement that the trustee collect all income from the producing properties and distribute the net collections on a pro rata basis among the creditors of the debtor other than the mortgagee. Under the agreement the trustee was not authorized to convey the properties to third parties as long as $25,000 per month was made available for distribution among creditors. If, however, such sum was not available, the trustee could sell the properties and distribute the proceeds among the creditors. If the creditors were satisfied out of the income from the properties, then the trustee was to assign the properties to the mortgagee. The trust agreement, however, was silent as to what disposition the trustee should make if the proceeds of a sale exceeded the creditors' claims. The mortgagee brought a declaratory judgment action, contending that it was the equitable owner of the property under the trust agreement. The court of appeals agreed, construing the

42. 557 S.W.2d 538 (Tex. Civ. App.—Beaumont 1977, no writ). *See also* Aleman v. Laborers Nat'l Pension Fund, 558 S.W.2d 106 (Tex. Civ. App.—Waco 1977, no writ) (venue of suit to recover death benefits from a pension plan trust was proper in county where the principal office of trust is maintained under TEX. REV. CIV. STAT. ANN. art. 7425b—24(B) (Vernon 1960)).

43. 559 S.W.2d 440 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd).

44. 562 S.W.2d 514 (Tex. Civ. App.—Texarkana 1978, no writ).

instrument as vesting a remainder in the mortgagee subject to divestment if the trustee exercised his power of sale under the provisions of the trust instrument.

In *Brelsford v. Scheltz*[45] a conveyance of land was made to "Michael Scheltz, Trustee" in 1972 without a designation of trust powers or terms. Michael wrote to his brother, Allan, stating that he held an undivided one-half interest in the land as trustee for Allan. Allan subsequently conveyed eight percent of his interest to a third party, and the third party sought a partition. Reviewing the refusal of the trial court to partition, the court of civil appeals held that a deed to one as trustee without terms or powers fails to create an express trust.[46] Therefore, neither Allan nor his assignees had an equitable title that could be the basis for partition.

Burnett v. First National Bank[47] involved two trusts established by a husband and wife, one revocable and the other irrevocable. Both trust agreements gave the trustee bank broad discretion over the trust and provided that the trustee would not be liable for an honest mistake in judgment. The bank as trustee of the irrevocable trust purchased certain notes from itself as trustee of the revocable trust. Beneficiaries of the irrevocable trust brought suit against the trustee alleging improper self-dealing and mismanagement. On the finding that there was no evidence of negligence or bad faith, the court of civil appeals held that no material issue of fact existed as to whether the trustee was guilty of improper self-dealing or mismanagement because the trust agreement specifically allowed broad self-dealing powers and exculpated the fiduciary for mistakes in judgment.[48]

In *Pierson v. Palestine Contractors, Inc.*[49] Palestine created a retirement trust for its employees. The retirement trust purchased annuities for three employees who terminated their employment. The annuities were issued in the name of the trust. Subsequently, the employees brought suit to have the trust transfer ownership of the policies to them. Although the trust agreement contemplated that ownership of such annuities could be in others than the trust, the question before the court was whether the non-transferability provision precluded the trust from transferring ownership of the annuity to the former employees. On review of the entire instrument, the court held that the trust was not required to transfer ownership of the annuities.

Revocation. In *Weatherly v. Byrd*[50] the settlor of a revocable trust became

45. 564 S.W.2d 404 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

46. A trust requires a settlor, a corpus, and a beneficiary. Unthank v. Reppstein, 386 S.W.2d 134 (Tex. 1964).

47. 567 S.W.2d 873 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *see* Adam v. Harris, 564 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

48. The draftsman is well advised to include an exculpatory clause holding the trustee liable only for negligence or bad faith.

49. 559 S.W.2d 908 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

50. 566 S.W.2d 292 (Tex. 1978). The ward had died at the time of the appeal. The guardian, therefore, contended that the action was moot. The court of civil appeals held that the action was not moot because the settlor was alive when the trial court entered judgment and the guardian required funds to make a final account. Weatherly v. Byrd, 552 S.W.2d

incompetent. Her guardian filed a petition in the probate court to revoke the trust. The Supreme Court of Texas held that the power of revocation is a personal right. The guardian, therefore, could not revoke for her ward.[51]

Constructive Trust. In *Roberts v. Roberts*[52] a divorce decree provided that the children of the divorced couple were to be the beneficiaries of policies on their father's life. At the death of the father, however, the former wife was designated a beneficiary of the policy. The insurance company filed an interpleader to determine who should receive the proceeds of the policy. The court held that it was proper to impose a constructive trust on the proceeds for the children's benefit.

In *Rankin v. Naftalis*[53] the plaintiffs sought to impose a constructive trust on an oil and gas lease that defendant took in his own name. The defendant had a joint venture arrangement with the plaintiffs for the development of a particular lease. The defendant subsequently acquired an unrelated lease. The plaintiffs brought suit, contending that the defendant was in a fiduciary relationship with them and, therefore, they were entitled to share in the second lease. The court held that the fiduciary relationship covered only the first lease, and any oral commitments that the defendant made concerning the second lease were unenforceable under the Statute of Frauds, Statute of Conveyances, and the Texas Trust Act. As a result, the court refused to impose a constructive trust on the second lease for the benefit of the plaintiffs.

Deeds of Trust. In *Bozeman v. Folliott*[54] the decedent died testate in 1972 with a note in default to the National Bank of Commerce of Brownsville secured by a deed of trust. His will was filed for probate in December 1973 and his wife was appointed independent executrix. The land subject to the deed of trust was sold at a trustee sale in June 1973. In an action to cancel the trustee's deed the court of civil appeals applied the rule that a trustee's deed is valid if a decedent mortgagor dies testate, appointing an independent executor. If the estate had not been an independent administration, the power of sale would have been suspended during administration.[55]

573 (Tex. Civ. App.—Fort Worth 1977, writ granted). Although one reason for the decision was in the interest of judicial efficiency, the guardian must now presumably start over in the district court.

51. The court further held that the district court, not the probate court, had jurisdiction to resolve the controversy.

52. 560 S.W.2d 438 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

53. 557 S.W.2d 940 (Tex. 1977). Other constructive trust cases decided during the survey period were Gutierrez v. Madero, 564 S.W.2d 185 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); Rogers v. Butler, 563 S.W.2d 840 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); Johnson v. Brown, 560 S.W.2d 763 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); Williams v. Williams, 559 S.W.2d 888 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); Austin Lake Estates, Inc. v. Meyer, 557 S.W.2d 380 (Tex. Civ. App.—Austin 1977, no writ); First Nat'l Bank v. Sassine, 556 S.W.2d 116 (Tex. Civ. App.—[no city] 1977, no writ).

54. 556 S.W.2d 608 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *see* Hammonds v. Holmes, 559 S.W.2d 345 (Tex. 1977).

55. Pearce v. Stokes, 155 Tex. 564, 291 S.W.2d 309 (1956).