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Wills and Trusts

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I. WILLS

Construction. In *Rubio v. Valdez*¹ a devise was made to a son “upon his paying to my other children, over a period of no more than twelve (12) years, the total sum”² of $10,000 in specified amounts. The son died without making the payments, and the other children contended that the estate never vested in him because of his failure to fulfill the condition. The son’s heirs contended that he was vested with a fee simple estate, subject only to a charge on the land. In a case of first impression, the court of civil appeals sustained the latter construction, holding that the amount was secured by a preferential lien on the property.³

*Wilson v. Clay*⁴ involved a lapsed legacy. Ethel and Edith were sisters who executed identical wills and codicils. Each made specific devises of certain real property to their niece, Mary, subject to a life estate in the surviving testatrix. Mary predeceased the two testatrices so that the devises under the two wills lapsed pursuant to section 68 of the Texas Probate Code.⁵ Mary left surviving her an adopted daughter, Anne, who contended that the lapsed devises did not fall into the residue of the estate but passed by intestate succession. The residuary beneficiaries contended that the two testatrices meant all their property to be disposed of under their wills; therefore, the lapsed devises passed with the other properties under the residuary clauses of the two wills. The court of civil appeals stated that, absent a clear showing in the documents that the lapsed devises should be excluded from the residuary estates, the devises properly passed into the residue.⁶ The court held that in the instant case “the residuary clause is routinely plain and simple”⁷ and covered any property not other-

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¹. 603 S.W.2d 346 (Tex. Civ. App.—Eastland 1980, writ ref’d n.r.e.).
². Id.
³. Id. at 348.
⁴. 593 S.W.2d 725 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.).
⁵. TEX. PROB. CODE ANN. § 68 (Vernon 1980) provides:
   “Where a testator shall devise or bequeath an estate or interest of any kind by will to a child or other descendant of such testator, should such devisee or legatee, during the lifetime of such testator, die leaving children or descendants who shall survive such testator, such devise or legacy shall not lapse by reason of such death, but the estate so devised or bequeathed shall vest in the children or descendants of such legatee or devisee in the same manner as if he had survived the testator and died intestate.”
⁶. 593 S.W.2d at 728; cf. *Estate of Self*, 591 S.W.2d 338 (Tex. Civ. App.—Tyler 1979, no writ) (in the absence of a residuary clause, property goes to heirs at law).
⁷. 593 S.W.2d at 728.
wise disposed of under the will.8

*Jensen v. Cunningham*9 also involved reciprocal wills with identical clauses. The questioned provision stated: "One share to be divided equally *between* my daughter . . . *and* my following named grandchildren who are then surviving . . . ."10 In a suit brought by the bank as independent executor for construction of the above clause, the trial judge ordered that the daughter should be treated as a class entitled to one-half the corpus of a trust and the grandchildren should be treated as a class entitled to the other half of the trust.11 The court of civil appeals confirmed the trial court's construction of the disputed clause, holding that from a reading of the will as a whole the intention was clear that the testators, husband and wife, meant to provide for one another for the remaining life of the survivor, then to provide for their daughter, with the remainder over to surviving grandsons.12 The court found that the use of "between . . . and" meant an equal division between the daughter and the grandchildren as a group.13

*Toler v. Harbour*14 presented the question of the application of the Rule in Shelley's case to a direction that "my son . . . shall . . . have and hold a life-estate only . . . [and] at his death his heirs take the fee simple title."15 Although the rule was abolished effective January 1, 1964,16 the will in the instant case was probated before that date. The court of civil appeals stated that the former rule operated as a positive rule of law and not as a matter of construction dependent upon the testator's intent.17 Therefore, the court held that the devise to the son of a life estate with a remainder to his heirs operated automatically as a devise of the fee simple.18

*Johnson v. Stark*19 concerned the construction of a will in which a husband left properties to his wife for life with broad powers of control and sale.20 Upon her death the properties were designated to pass to particular remaindermen. For twenty-five years after the husband's death his wife dealt with her husband's estate as if she owned the property, making sales and conveyances of much of it. Upon her death the beneficiaries of the remainder interests under her husband's will sought a construction of the

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8. Id.
10. Id. at 267-68 (emphasis in original).
11. Id. at 268.
12. Id. at 270.
13. Id.
14. 589 S.W.2d 529 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).
15. Id. at 530.
17. 589 S.W.2d at 532 (citing Sybert v. Sybert, 152 Tex. 106, 254 S.W.2d 999 (1953)).
18. 589 S.W.2d at 532.
19. 585 S.W.2d 900 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).
20. Concerning the various properties bequeathed, the will stated: "and to be by her sold and conveyed, by fee simple title or otherwise, all in any manner, for any purposes, and on any terms and conditions, and for any considerations, which she may desire." *Id.* at 901-02.
husband's will. The probate court determined that the remainder interest beneficiaries were entitled to trace the proceeds of all sales made by the surviving wife. The court of civil appeals, in reversing and rendering judgment, construed the will as giving the wife complete discretion with respect to sales of property during her lifetime; only that property of the husband that remained undisposed of at the time of his wife's death would pass to the remainder beneficiaries under the husband's will. From a reading of the will as a whole, the court construed the language as giving the first taker, the wife, the largest estate possible.

Proof. Section 59 of the Texas Probate Code requires that a will written not wholly in the handwriting of the testator be attested to by two or more proper witnesses who shall subscribe their names in the presence of the testator. In *Morris v. Estate of West* the attestation clause recited that the subscribing witnesses signed their names in the presence of the testator; depositions of the witnesses and the attorney who prepared the will and supervised its execution showed, however, that the witnessing was not done in the presence of the testator. A summary judgment was entered denying probate. The court of civil appeals reversed and remanded, holding that the attestation clause makes a prima facie case that the witnessing was properly done. The court reasoned that the depositions taken merely contradicted the attestation clause and thus raised an issue of fact that should have been tried.

The statutory rules for the proving of lost wills were before the court in *Howard Hughes Medical Institute v. Lummis*. Hughes died on April 5, 1976, and on April 14, 1976, Hughes's aunt, Lummis, filed for letters of temporary administration, primarily to find Hughes's will. On February 19, 1977, the Howard Hughes Medical Institute made an appearance,

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21. *Id.* at 901.  
22. *Id.* at 904.  
23. *Id.* at 904-05. One other construction case is worthy of mention. In *El Paso Nat'l Bank v. Shriner's Hosp. for Crippled Children*, 588 S.W.2d 411 (Tex. Civ. App.—El Paso 1979, writ granted), the court held that in the absence of a statement of facts an appellate court must presume that sufficient evidence was introduced to support the findings of the trial court. *Id.* at 412 (citing *England Co. v. Kennedy*, 428 S.W.2d 806 (Tex. 1968)). After this Article went to print, the supreme court reversed the decision of the El Paso court of civil appeals, holding that the lower court erred in affirming the trial court judgment on the basis of the absence of a statement of facts. 24 Tex. Sup. Ct. J. 322, 323 (Apr. 4, 1981).]  
24. TEX. PROB. CODE ANN. § 59 (Vernon 1980) provides: Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two (2) or more credible witnesses above the age of fourteen (14) years who shall subscribe their names thereto in their own handwriting in the presence of the testator.

25. 602 S.W.2d 122 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).  
26. *Id.* at 123.  
27. *Id.* at 123-24; see *Nichols v. Rowan*, 422 S.W.2d 21 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).  
28. 602 S.W.2d at 124.  
29. 596 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).
claiming that Hughes executed a last will leaving his entire estate to the institute. Lummis sought a declaratory judgment that the will claimed by the institute was not a valid last will of Hughes, and on April 6, 1978, her motion for summary judgment in the declaratory judgment action was granted. The court of civil appeals stated that the Texas Probate Code provides for the proving and finding of lost wills and, in particular, provides for a four-year period from the decedent's death within which a will may be offered for probate. In this case the four-year period would have expired on April 5, 1980. The court, therefore, reversed the summary judgment because it invalidly shortened the statutory four-year period.

Testamentary Capacity; Undue Influence. In Estate of Wilson v. Wilson the will of Asie Wilson was denied probate on the ground that Leon Wilson had exercised undue influence on Asie Wilson at the time she made her will. As evidence of a relationship in which undue influence could have been exercised, the probate court admitted a judgment in a prior cause of action in which a deed from Asie Wilson to Leon Wilson was cancelled because of the undue influence Leon exercised on Asie. The court of civil appeals reversed and remanded, holding that the prior judgment was inadmissible because the subject matter of the two actions was not the same; the prior judgment concerned a deed, whereas the current suit concerned a will.

The Texas Supreme Court reversed the judgment of the court of civil appeals and remanded the case to that court. The supreme court noted that in the instant case Leon Wilson had himself offered into evidence the very deed that was the subject of the prior judgment. Thus, the court reasoned, Leon Wilson made the prior judgment relevant to the will contest and, pursuant to article 3731a, section 1 of the Texas Revised Civil Statutes, the prior judgment was admissible. On remand the court of civil appeals reviewed all the evidence and found that the decedent had testamentary capacity and that the jury's finding to the contrary was erroneous. The court found that while the evidence did establish an influence by Leon over Asie, it was insufficient to prove undue influence over

30. Id. at 173.
32. 596 S.W.2d at 173; see Tex. Prob. Code Ann. § 73 (Vernon 1980).
33. 596 S.W.2d at 173-74.
34. 587 S.W.2d 674 (Tex. 1979).
35. Id.
37. 587 S.W.2d at 675.
38. Id. at 674-75.
39. Tex. Rev. Civ. Stat. Ann. art. 3731a, § 1 (Vernon Supp. 1980-1981) provides: Any written instrument, certificate, [or] record . . . made by an officer of this State or of any governmental subdivision thereof, or by his deputy, or person or employee under his supervision, in the performance of the functions of his office and employment, shall be, so far as relevant, admitted in the courts of this State . . . .
40. 587 S.W.2d at 675.
her at the time she executed her will.\textsuperscript{42} The case was remanded for a new trial to determine the existence or nonexistence of undue influence at the time of the making of the will.\textsuperscript{43}

In \textit{Speck v. Speck}\textsuperscript{44} the probate court had allowed one counsel to ask a witness: "At the time she signed this instrument was she or was she not rational?"\textsuperscript{45} The court of civil appeals held that the question did not call for a conclusion by the witness as to testamentary capacity, but was merely a statement as to the witness’s view about the condition of the decedent’s mind.\textsuperscript{46} Accordingly, the court ruled that the probate court did not commit reversible error in overruling the objection to the question.\textsuperscript{47}

\textit{Gillispie v. Reinhardt}\textsuperscript{48} concerned a question of testamentary capacity in the execution of a holographic will. The court of civil appeals affirmed the trial court’s judgment that a valid will existed.\textsuperscript{49} The court concluded that once the handwriting of the testatrix was proved and the will was found in all respects to be valid, a prima facie case was made out.\textsuperscript{50} Because the contestants failed to overcome that prima facie case in their attempt to show that the decedent lacked testamentary capacity at the time she made the will, the court upheld its validity.\textsuperscript{51}

In \textit{In re Estate of Willenbrook}\textsuperscript{52} the parties stipulated that the testatrix had testamentary capacity; the only issue was whether the attorney for the testatrix unduly influenced her. The jury determined that the attorney did unduly influence the testatrix to include him in her will. The trial court disregarded the jury finding and admitted the will to probate.\textsuperscript{53} On appeal the court of civil appeals affirmed, stating that the contestants showed by the testimony of their witnesses only that the attorney had the opportunity to influence the testatrix, not that he had done so.\textsuperscript{54} The court stated that the fact that the attorney was in a fiduciary relationship with the testatrix would not, standing alone, be sufficient to raise the issue of undue influence.\textsuperscript{55}

In \textit{Folsom v. Folsom}\textsuperscript{56} the probate court found the proponent of the will, Edgar, to have unduly influenced his brother, William, to leave his entire estate to him to the exclusion of William’s children.\textsuperscript{57} Moreover, the alter-

\begin{footnotes}
\footnote{42. \textit{Id}.}
\footnote{43. \textit{Id}.}
\footnote{44. 588 S.W.2d 853 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).}
\footnote{45. \textit{Id}. at 854.}
\footnote{46. \textit{Id}.}
\footnote{47. \textit{Id}.}
\footnote{48. 596 S.W.2d 558 (Tex. Civ. App.—Beaumont 1980, writ ref’d n.r.e.).}
\footnote{49. \textit{Id}. at 560.}
\footnote{50. \textit{Id}. at 561; see \textit{Farr v. Bell}, 460 S.W.2d 431 (Tex. Civ. App.—Dallas 1970, writ ref’d n.r.e.).}
\footnote{51. 596 S.W.2d at 560-61.}
\footnote{52. 603 S.W.2d 348 (Tex. Civ. App.—Eastland 1980, writ ref’d n.r.e.).}
\footnote{53. \textit{Id}. at 349.}
\footnote{54. \textit{Id}. at 350-51.}
\footnote{55. \textit{Id}. at 351; see \textit{Boyer v. Pool}, 154 Tex. 586, 280 S.W.2d 564 (1955); \textit{Lipper v. Wescow}, 369 S.W.2d 698 (Tex. Civ. App.—Waco 1963, writ ref’d n.r.e.).}
\footnote{56. 601 S.W.2d 79 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.).}
\footnote{57. \textit{Id}. at 81.}
\end{footnotes}
nate beneficiary was Edgar's son, not the children of William. The court of civil appeals affirmed. The evidence showed that the testator was an alcoholic, that he was weak from cancer therapy on the day he executed the will, that the will was prepared by his brother's attorney, that his mother and father had just died, and that he died just five weeks after he executed the will. The evidence showed that he loved his children and that there was some question whether he even liked the brother's son, who was named alternate beneficiary. Based on all the facts, the court concluded that the evidence clearly supported a finding of undue influence.

The question whether the opportunity to exercise undue influence was in fact an effective exercise was raised in Henderson v. Sims. The children of the first marriage contended that the wife and children of the second marriage unduly influenced the testator. The jury found that undue influence had been exercised, but the trial judge entered a judgment notwithstanding the verdict. The court of civil appeals affirmed, holding on review of all the evidence that an issue of undue influence had not been raised for submission to the jury. The court stated that facts that only show an opportunity to exercise influence will not suffice to set aside a will.

Nuncupative Will. In Dabney v. Thomas the court of civil appeals applied the rules for proof of an oral or nuncupative will. The court stated that proof must be of the clearest and most convincing character, that the testimony of three witnesses must be in substantial agreement, and that

58. Id.
59. Id. See also In re Estate of Hensarling, 590 S.W.2d 639 (Tex. Civ. App.—Tyler 1979, no writ) (daughter's undue influence over her father).

Another undue influence case, Sebesta v. Stavinoha, 590 S.W.2d 714 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), dealt with the issues of testamentary capacity and undue influence. Testamentary capacity requires that the testator have some idea of the nature and extent of his property and recognize those who would be the natural objects of his bounty. See Rothermel v. Duncan, 369 S.W.2d 917 (Tex. 1963). Undue influence is the exertion of such influence that subverts or overpowers the testator's mind so that he executes a will that he would not have executed but for such influence. Id. at 922. In either situation, testamentary incapacity or undue influence, the condition must exist on the date the will was executed. Id. at 923. Testimony of events at other times has probative force that merely demonstrates that the condition persists and has probability of existence when the will was executed. See Lee v. Lee, 424 S.W.2d 609 (Tex. 1968). In Sebesta the court of civil appeals, on reviewing the evidence, held that there was sufficient evidence of probative force, albeit contradicted, to support a jury finding that the testatrix did not have testamentary capacity. 590 S.W.2d at 718. See also Spruance v. Northway, 601 S.W.2d 153, 156-57 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (testamentary capacity may be affected if the person is laboring under an insane delusion such that the person made a disposition different from that which the person otherwise would make).
60. 591 S.W.2d 593 (Tex. Civ. App.—Tyler 1979, no writ).
61. Id. at 594.
62. Id. at 597.
63. Id.; see Rothermel v. Duncan, 369 S.W.2d 917, 923 (Tex. 1963).
64. 596 S.W.2d 561 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).
65. Id. at 563-64; see Comment, The Nuncupative Will, 18 BAYLOR L. REV. 77 (1966).
67. 596 S.W.2d at 563; see TEX. PROB. CODE ANN. § 86(c) (Vernon 1980).
the transaction must be in a setting in which the decedent is "in extremis." In the instant case the three witnesses were not in agreement as to what the deceased had said. Furthermore, the decedent lived twenty-seven days after making the alleged will, and there was no evidence that he was in a critical state when the oral statement was given. Accordingly, the court of civil appeals affirmed the trial court's judgment that no valid nuncupative will existed.

Joint and Mutual Wills. A joint will may be one that is not contractual, so that after the death of one of the testators, the survivor may revoke the will and do as he wishes with his estate. If the joint will is contractual, however, and the survivor revokes, a constructive trust may be placed on some or all of the property by the beneficiaries under the original will. In Novak v. Stevens the Texas Supreme Court addressed the subject of what constitutes the indicia of contract in such a will. Because the joint will in Novak spoke of "the purpose of making the best deposition of our worldly affairs," "our last will and testament," and "all of our estate . . . after both our deaths," the court held that the will was contractual on its face. Thus, the court ruled that because the survivor revoked the will and made a later will, a constructive trust for the beneficiaries under the first will was properly imposed on the estate.

In Fisher v. Capp the husband and wife executed a joint and mutual will leaving their estates one to the other with remainders over. After the husband's death, his will was duly probated. Subsequently, the wife revoked the will and executed a new will disposing of the estate in a manner different from the joint will. A residuary beneficiary under the joint will established in the trial court that the joint will was contractual and that the beneficiaries thereunder were entitled to the protection of their respective shares under the joint will. The court of civil appeals affirmed, stating that the will indicated that each spouse left his or her estate to the survivor and then jointly planned the disposition of whatever the survivor had at his or her death. By so doing, the court ruled that each spouse bound himself or herself to the other to carry out the joint plan; this promise was the contract that became enforceable against the survivor after the first spouse died.

Contract Not to Make a Will. In McFarland v. Haby a mother agreed

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68. 596 S.W.2d 564; see McClain v. Adams, 135 Tex. 627, 629, 146 S.W.2d 373, 374-75 (1941).
69. 596 S.W.2d at 564.
70. See Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 62 (1957).
71. 596 S.W.2d 848 (Tex. 1980).
72. Id. at 851-52 (emphasis by the court).
73. Id. at 852-53.
74. Id. at 853.
75. 597 S.W.2d 393 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).
76. Id. at 399.
77. Id.
78. 589 S.W.2d 521 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).
not to make a will and stipulated how her children would share in her estate. Upon her death, however, she left a will and codicil that were admitted to probate. A son who was excluded under the will sought to enforce the contract not to make a will and impose a trust on the property for the share he would take as an heir. The district court sustained the son's action to enforce the contract.79 The court of civil appeals reversed, holding the contract void.80 The court adopted the rule adhered to by other states that a person may contract for a consideration not to make a will in order to permit his estate to descend by the laws of intestacy.81 When, as here, however, the contract was not to invoke the laws of intestacy, but to change such statutory rules by contract, the court held that such contract was void and unenforceable.82

Injunctive Relief. In Lucik v. Taylor83 the Texas Supreme Court dealt with the important question of whether the probate court can give injunctive relief. Lucik died, leaving his surviving widow as the principal beneficiary under a 1977 will, which she filed for probate. A 1978 will was filed for probate by Taylor, who was the named principal beneficiary in that will. Both applications for probate were consolidated in the same proceeding. On August 22, 1978, Hartnett was appointed temporary administrator of the estate. Prior to the appointment of the temporary administrator the surviving widow filed an application to enjoin Taylor and her representative from dealing in any way with the estate. The probate court issued a temporary restraining order in broad terms.84 The court of civil appeals reversed on the ground that the probate court lacked jurisdiction to give injunctive relief because the matter involved the personal interests of the widow and was not for the benefit of the estate.85 The supreme court held that the matter concerned the protection of the assets of the estate; accordingly, pursuant to the Probate Code in effect at that time86 the probate court of Dallas County had the power to issue the injunction.87

Gentry v. Marburger88 also involved the power to grant injunctive relief.

79. Id. at 522.
80. Id. at 525.
81. Id. at 523.
82. Id. at 524.
83. 596 S.W.2d 514 (Tex. 1980); see Galvin, Wills and Trusts, Annual Survey of Texas Law, 34 Sw. L.J. 21, 31 (1980).
84. 596 S.W.2d at 515.
85. Id. at 514.
86. 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 provides:
   All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate, including but not limited to, all claims by or against an estate, all actions for trial of title to land incident to an estate and for the enforcement of liens thereon incident to an estate, all actions for trial of the right of property incident to an estate, and actions to construe wills. When a surety is called on to perform in place of an administrator or guardian, all courts exercising original probate jurisdiction may award judgment against the personal representative in favor of his surety in the same suit.
87. 596 S.W.2d at 516.
88. 596 S.W.2d 201 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
The probate court considered an estate consisting of the wife's one-half community interest in a house. An injunction involving the entire interest in the house was granted in the district court. The heirs of a prior wife's estate who sought to overturn the injunction urged that the district court was without power to grant the injunction while the matter was pending in the probate court. The court of civil appeals held, however, that although the probate court was without power to deal with property not before it in administration, and at the time of the granting of the injunctive relief the husband's half of the community was not in administration in the probate court, the district court was the proper court for granting the injunction.

**Jurisdiction.** In *Novak v. Stevens* two proponents of different wills made applications in separate proceedings before the county court for the probate of the wills. Both contested applications were transferred to the district court in which the two causes were consolidated for trial. On motions for summary judgment by both proponents the district court granted judgment in favor of one applicant and denied the motion of the other. On appeal the court of civil appeals held that the district court lacked jurisdiction to consider the will contests and to construe the 1968 will to determine whether it was contractual. The supreme court reversed, holding that pursuant to the 1973 amendment to article V, section 8 of the Texas Constitution and the enabling legislation a will contest and a suit for construction could properly be heard in the same proceeding in the district court. Similarly, in *English v. Cobb* the Texas Supreme Court held that in accordance with the 1973 Texas constitutional amendment and the enabling legislation, county courts sitting in probate have the "power to hear all matters incident to an estate." Thus the court ruled that the county court at law sitting in probate was not subject to a jurisdictional limit of $10,000.

In a trespass to try title action brought against a foreign administrator the court in *Minga v. Perales* construed article 1982 as mandatorily

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89. Id. at 202.
90. Id. at 202-03.
91. 596 S.W.2d 848 (Tex. 1980).
92. Id.
95. TEX. PROB. CODE ANN. § 5 (Vernon 1980). Section 5 authorizes the transfer of probate matters to district courts in counties in which no statutory probate court or other statutory court exercising probate jurisdiction exists.
96. 596 S.W.2d at 851.
97. 593 S.W.2d 674 (Tex. 1979).
98. Id. at 657-76 (quoting TEX. PROB. CODE ANN. § 5(d) (Vernon 1980) (emphasis by the court); TEX. REV. CIV. STAT. ANN. art. 1970—355, § 1(b) (Vernon Pam. Supp. 1965-1980).
99. 593 S.W.2d at 675.
100. 603 S.W.2d 240 (Tex. Civ. App.—Corpus Christi 1980, no writ).
requiring the joinder of the heirs of the deceased.\textsuperscript{102} Moreover, because the foreign administrator was appointed by the courts of Tennessee and had not qualified in any way to represent the decedent’s estate with respect to assets in Texas, the court ruled that he could not sue or be sued in Texas.\textsuperscript{103} A similar result was reached in \textit{K.L. Cattle Co. v. Bunker,}\textsuperscript{104} in which the federal district court held that a foreign executrix could be sued only in her home state of Colorado because no ancillary administration had been taken out in Texas.\textsuperscript{105} The suit had originally begun against an individual who subsequently died. Had he continued to live, suit against him in Texas probably would have been proper under the Texas long-arm statute,\textsuperscript{106} but the \textit{Bunker} court held that the statute does not extend to nonresident personal representatives.\textsuperscript{107}

\textbf{Venue.} In \textit{Moody v. Lewis}\textsuperscript{108} the court of civil appeals held that a suit by a guardian to recover funds in a savings and loan association was properly filed in the county in which the association was located.\textsuperscript{109} In \textit{McCarty v. Loftice}\textsuperscript{110} the surviving children of the decedent brought suit against the surviving spouse for conversion of the assets of the deceased. The court held that, based on the allegations of the plaintiff’s petition, the suit was one for conversion and not for revision of the probate proceedings; therefore, venue was proper in Collin County, the county of the surviving spouse’s residence, rather than in Dallas County, the county in which the decedent’s will had been probated.\textsuperscript{111} In \textit{Carter v. Carter}\textsuperscript{112} the county court of Bexar County sitting in probate entered an order overruling the defendant’s motion to transfer the case to Dallas County, her county of residence.\textsuperscript{113} The court of civil appeals held that the appeal was from an interlocutory order rather than from a final judgment, and that no authority existed in the Probate Code for such an appeal.\textsuperscript{114}

\textbf{Bill of Review.} In \textit{Carson v. Estate of Carson}\textsuperscript{115} an administratrix obtained approval from the probate court for the sale of certain real property to pay debts, claims, and taxes.\textsuperscript{116} Carson, an interested party, was present at the

\begin{itemize}
\item 102. 603 S.W.2d at 241.
\item 103. \textit{Id.} at 242.
\item 104. 491 F. Supp. 1314 (S.D. Tex. 1980).
\item 105. \textit{Id.} at 1316.
\item 107. 491 F. Supp. at 1316.
\item 108. 596 S.W.2d 319 (Tex. Civ. App.—Waco 1980, no writ).
\item 109. \textit{Id.} at 320.
\item 110. 587 S.W.2d 547 (Tex. Civ. App.—Dallas 1979, no writ).
\item 111. \textit{Id.} at 548-49. The applicable venue provision states: “Suits to revise proceedings of the county court in matters of probate must be brought in the district court of the county in which such proceedings were had.” \textit{Tex. Rev. Civ. Stat. Ann.} art. 1995(18) (Vernon 1964).
\item 112. 594 S.W.2d 464 (Tex. Civ. App.—San Antonio 1979, writ ref’d n.r.e.).
\item 113. \textit{Id.} at 465.
\item 114. \textit{Id.} at 466.
\item 115. 601 S.W.2d 171 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.).
\item 116. See \textit{id.} at 173.
\end{itemize}
hearing and agreed to the sale; he later sought a bill of review to set aside the sale because of certain irregularities. On appeal he provided only a transcript of the record without a statement of facts. The court of civil appeals stated that every reasonable presumption consistent with the record would be indulged in favor of the correctness of the order. The court noted that although the irregularities complained of might render the order voidable, they did not render it void. The court concluded that Carson failed to sustain the burden of showing fundamental error in the order of sale.

**Fees.** In *Rodeheaver v. Alridge* the court of civil appeals held that under the provisions of article 2072 an administratrix was exempt from the payment of the county clerk’s fee of $25 for an action begun by her in the probate court as well as from the constable’s fee of $10 for service of the citation.

**Administration.** Two cases that clarify certain matters relating to administration were decided by the Texas Supreme Court during the survey period. In *Drake v. Trinity Universal Insurance Co.* Holt was appointed administratrix for the estate of Duncan in Texas, while Drake was appointed executor of the estate pursuant to a will filed for probate in New Hampshire. Drake sought to have the New Hampshire will admitted to probate in Texas and to have Holt removed as administratrix. Holt employed Currie as counsel to resist the application to probate the New Hampshire will. Drake prevailed and Holt was removed. Before the removal, Currie filed a claim for legal services in the amount of $12,000 plus certain advances, which Holt allowed and which were approved by the probate court. On appeal the court of civil appeals reversed and remanded on the grounds that Holt was acting in her individual capacity when she employed Currie. On remand the probate court ordered that Holt and Currie reimburse the estate in full. On appeal from that order the court of civil appeals reversed and remanded for a hearing concerning any offsets that might be made to the amount owed the estate. On this second remand the probate court determined that Currie was entitled to offset $5,000 for legal services properly chargeable to the estate and that

117. *Id.*
118. *Id.* at 174.
119. *Id.*
120. 601 S.W.2d 51 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.).
122. 601 S.W.2d at 54.
123. 600 S.W.2d 768 (Tex. 1980).
125. 600 S.W.2d at 770.
127. 600 S.W.2d at 770.
the balance owed the estate was a joint and several liability of Holt, Currie, and Trinity Universal, as surety for Holt. On appeal the court of civil appeals determined that Holt was primarily liable for $12,000, that Trinity Universal was secondarily liable for $12,000, and that Currie was not liable to the estate and was entitled to $5,000 for services rendered the estate. The supreme court reversed, holding both Currie and Holt primarily liable and Trinity Universal secondarily liable. The court stated that even though Currie earned the money, and the amount was paid pursuant to the order of the probate court, the reversal of that order placed upon both Currie and Holt the obligation to return the money to the estate. The court added that failing such restitution, Trinity Universal would be liable. The litigation in this case was protracted and probably more costly to all the parties than the amount in issue. One might well counsel the parties in the case of a contested appointment to identify meticulously those services that are personal to the representative and those that relate to the conservation and administration of the estate.

In Texas Bank & Trust Co. v. Moore a nephew attending an elderly aunt obtained control of certain properties that the bank as administrator sought to recover. The Texas Supreme Court ruled that, as a matter of law, the evidence established a fiduciary relationship and that once the relationship was established a presumption of unfairness and invalidity attached to the transfers made to the nephew. The court found that the nephew did not rebut this presumption. Chief Justice Greenhill dissented, pointing out that the presumption of unfairness, coupled with the dead man's statute, places an onerous burden on one who undertakes to assist an elderly person.

Independent Administration—Power of Sale. In Harper v. Swoveland the decedent devised certain property to his children. His wife as independent executrix, acting pursuant to an express power to sell any and all of the

129. 600 S.W.2d at 770.
131. 600 S.W.2d at 773.
132. Id. at 771-72.
133. Id. at 772. See also Gulf Ins. Co. v. Blair, 589 S.W.2d 786, 787 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (temporary administrator who failed to file return and his surety were liable to estate for losses).
134. 595 S.W.2d 502 (Tex. 1980).
135. Id. at 507. But see Alexander v. Bowers, 595 S.W.2d 176 (Tex. Civ. App.—Tyler 1980, no writ) (different result occurs when substantial evidence exists that decedent intended to make a gift).
136. 595 S.W.2d at 507.
137. TEX. REV. CIV. STAT. ANN. art. 3716 (1926).
138. 595 S.W.2d at 512. According to Chief Justice Greenhill, the presumption of unfairness places upon the assister the burden of explaining his transactions with the deceased, but the dead man's statute prevents such testimony, "[s]o he must, as a matter of law, explain; but he cannot explain." Id.
139. 591 S.W.2d 629 (Tex. Civ. App.—Dallas 1979, no writ).
decedent’s property for “any reason,” sold the property. The court held that the executrix could properly exercise that power, as against the claims of the specific devisees that the sale was invalid.\textsuperscript{140}

\textit{Independent Administration—Fees.} In \textit{Estate of Roots}\textsuperscript{141} the court of civil appeals held that a bank could not be disqualified from acting as independent executor solely by reason of the fees that it proposed to charge.\textsuperscript{142} Section 149A of the Probate Code\textsuperscript{143} provides that under appropriate circumstances an independent executor may be required to make an accounting, including the justification of its fees, but the court stated that such rules relate to the executor’s services and not to the executor’s qualification.\textsuperscript{144}

\textit{Necessity of Administration.} In \textit{Banks v. Hereford}\textsuperscript{145} Alice Hereford died intestate, and her husband filed an affidavit of heirship as sole heir. Banks, mother of the deceased, was appointed administratrix of the estate because of her allegation of necessity of administration to pay debts. Hereford moved to dismiss Banks on the ground that no necessity existed for administration. Banks relied on the existence of an adopted child and separate property of the deceased as warranting administration. The court of civil appeals affirmed the trial court’s removal of Banks, holding that the mere existence of two heirs instead of one and the existence of separate property were not determinative of the issue of necessity of administration, but were only collateral to it.\textsuperscript{146}

\textit{Conflict of Interest.} In \textit{Hitt v. Dumitrov}\textsuperscript{147} Lon Coker, his wife Catherine, and their two children were killed in a private airplane crash. Hitt, a brother-in-law of Lon Coker, qualified as administrator of both spouses’ estates and took the position that certain insurance proceeds passed to Lon’s mother. Dumitrov, Catherine’s mother, sought to remove Hitt as administrator of Catherine’s estate on the ground that a conflict of interest existed. Section 47(b) of the Probate Code provides that in the case of simultaneous deaths the proceeds of community insurance shall be divided equally between the estates.\textsuperscript{148} Accordingly, Dumitrov contended that Catherine’s estate was entitled to have an administrator who would assume an advocate’s role as against the contentions made by those representing Lon’s estate. The court of civil appeals affirmed the removal of Hitt and the appointment of Dumitrov to represent Catherine’s estate.

\textsuperscript{140} \textit{Id.} at 631.
\textsuperscript{141} 596 S.W.2d 240 (Tex. Civ. App.—Amarillo 1980, no writ).
\textsuperscript{142} \textit{Id.} at 244; see, e.g., Walling v. Hubbard, 389 S.W.2d 581, 590 (Tex. Civ. App.—Houston 1965, writ dism’d) (in an action for accounting, executor may have to justify his compensation).
\textsuperscript{143} \textsc{Tex. Prob. Code Ann.} \textsection{} 149A (Vernon 1980).
\textsuperscript{144} 596 S.W.2d at 244.
\textsuperscript{145} 601 S.W.2d 108 (Tex. Civ. App.—Dallas 1980, no writ).
\textsuperscript{146} \textit{Id.} at 109-10.
\textsuperscript{147} 598 S.W.2d 355 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).
\textsuperscript{148} \textsc{Tex. Prob. Code Ann.} \textsection{} 47(b) (Vernon 1980).
finding sufficient evidence of a conflict of interest on the part of Hitt as the administrator of Catherine's estate.\(^{149}\)

**Heirship—Contest.** In *Brown v. Crockett*\(^{150}\) a party claiming to be an heir filed a petition to declare heirship in the probate court of Dallas County. Another party filed an application to declare heirship and a motion to remove the cause to the district court of Bastrop County. The later motion was granted.\(^{151}\) The question on appeal was whether the dispute was a "contested" probate matter within the meaning of section 5(b) of the Probate Code\(^{152}\) so that it could be transferred to the district court. Construing the language of section 5(b) "as to give a reasonable and practical effect to the statute,"\(^{153}\) the court of civil appeals stated that for purposes of section 5(b), a probate matter is contested "when a pleading is filed which sets out sufficient facts to show some reasonable grounds for the belief that there are two or more parties or claimants to assets of an estate and that there is a *bona fide* controversy between them concerning those assets."\(^{154}\) The court of civil appeals held that the conflicting heirship claims were a contested probate matter.\(^{155}\)

**II. Trusts**

*Trustee Powers.* In *Corpus Christi Bank & Trust v. Roberts*\(^{156}\) Colvin created a trust in 1949 in which twenty-eight residential units were conveyed to Jones as trustee with directions to rent or lease the properties. Jones employed a realty company to handle the properties. The question was whether the fees paid to the realty company were expenses of Jones or the trust estate. Construing article 7425b—25H(1) of the Texas Trust Act,\(^{157}\) the Texas Supreme Court held that the employment of the realty company was a proper expense of the trust.\(^{158}\)

In *Transamerican Leasing Co. v. Three Bears, Inc.*\(^{159}\) a trust owned fifty percent of the stock in a lessee corporation. The lessee operated a restaurant business that would accrue to the benefit of the trust. The trust instrument conferred upon the trustees the power to invest in leases. The Texas

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149. 598 S.W.2d at 356. In another action Hitt was denied reimbursement for attorneys' fees incurred in the removal action because he was acting in his own personal interest. *Dumitrov v. Hitt*, 601 S.W.2d 472, 474-75 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).
151. *Id* at 189.
152. TEX. PROB. CODE ANN. § 5(b) (Vernon 1980).
153. 601 S.W.2d at 190.
154. *Id*.
155. *Id*.
156. 597 S.W.2d 752 (Tex. 1980).
158. 597 S.W.2d at 754. Jones died shortly after the suit was filed, and his independent executor, Corpus Christi Bank & Trust, was substituted as defendant. *Id* at 753. The supreme court affirmed the judgments against the trustee's estate for his failure to distribute the proper amounts to the beneficiaries of the trust.- *Id* at 755.
159. 586 S.W.2d 472 (Tex. 1979).
Supreme Court construed that provision to include a guarantee of a lease.\textsuperscript{160} Accordingly, the court held that the trustees' action in guaranteeing payment under a lease of restaurant equipment was within their powers under the trust instrument.\textsuperscript{161}

In \textit{DeJulio v. Lawler}\textsuperscript{162} William Robert Lawler, Sr. created the Lawler Family Trusts in 1968 and Roger Lawler was empowered to remove trustees and appoint successor trustees. In 1972 Nicoladze was sole trustee and Roger Lawler acted as manager of the trust. Both entered into real estate transactions in which each profited individually by causing certain land to be conveyed to the Lawler Family Trusts for a note in the amount of $950,000. The court of civil appeals affirmed the trial court's judgment that the trustee and manager had not acted in the interest of the trusts and that, consequently, the note should be cancelled and the trust restored as nearly as possible to its former status.\textsuperscript{163}

\textbf{Spendthrift Trust.} In \textit{Myrick v. Moody National Bank}\textsuperscript{164} a trust had been created pursuant to a divorce decree that was to provide for the education of the spouses' children. The husband-father agreed that disbursements to him from certain other trusts of which the Moody Bank was trustee would be pledged for the creation of the educational trust. Upon his failure to fund the educational trust, the former wife sued for the amounts due the trust and instituted garnishment proceedings against the trustee bank. The bank defended on the grounds that the trusts were spendthrift trusts and could not be garnished. The trial court held that the trust proceeds were garnishable for the husband's child support obligations, but not for his obligation to fund the education trust.\textsuperscript{165} The judgment was not appealed and became final. In this subsequent action Myrick and the bank attempted to relitigate the issue, and the court of civil appeals held that the garnishability issues were barred by res judicata.\textsuperscript{166} It did, however, remand for findings as to the priority of the application of the garnished funds to the educational trust, child support, attorneys' fees, and other items.\textsuperscript{167}

\textbf{Charitable Trust.} In \textit{City of Wichita Falls v. Kemp Public Library Board of Trustees}\textsuperscript{168} Kemp had donated money to the city to build a public library. Kemp had conditioned the gift on the requirements that an independent board of trustees would be established to manage the library and that the city could continue to provide the library with continued financial support. A dispute arose years later, and the library board sought a determination

\begin{itemize}
  \item \textsuperscript{160} \textit{Id.} at 475.
  \item \textsuperscript{161} \textit{Id.}
  \item \textsuperscript{162} 593 S.W.2d 837 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
  \item \textsuperscript{163} \textit{Id.} at 842-43.
  \item \textsuperscript{164} 590 S.W.2d 766 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).
  \item \textsuperscript{165} \textit{Id.} at 768.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} \textit{Id.} at 769.
  \item \textsuperscript{168} 593 S.W.2d 834 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
\end{itemize}
of the charitable trust relationship between the board and the city. The
district court found that the library constituted a charitable trust.\textsuperscript{169} The
court of civil appeals reversed, holding that no charitable trust existed be-
cause no intent could be found on the part of Kemp to create an express
trust.\textsuperscript{170} The court stated that an intent to create a trust could not be im-
puted on the mere basis of conditioning a gift on continued financial sup-
port.\textsuperscript{171}

\textit{Constructive Trust.} In Batmanis v. Batmanis\textsuperscript{172} suit was brought to deter-
mine the property interests of the decedent's daughter by a first marriage and
the surviving wife of his second marriage. The evidence showed that the
husband collected rents and dividends from the properties that were his
first wife's community half interest. These sums were invested and the
court held that they could be traced into other accounts where they should
be deemed as held in trust for the daughter of the first marriage.\textsuperscript{173} The
case was remanded for further findings as to the proper tracing of funds
from the first marriage and the community funds of the second mar-
riage.\textsuperscript{174}

\section*{III. Federal Estate Tax}

\textit{Power of Appointment.} In Patterson v. United States\textsuperscript{175} the husband left his
estate to his wife for life with remainders to his children. The wife was
given the "right . . . to sell, convey or encumber any or all of said prop-
erty, and to receive, use and appropriate the proceeds thereof."\textsuperscript{176} Another
clause required that the surviving wife, as co-executrix, could exercise her
powers in that capacity only with the consent of her son as co-executor.
The federal district court held that the widow in her individual capacity
had a taxable general power of appointment; only her exercise of those
powers in her representative capacity required the consent of her son.\textsuperscript{177}

\textit{Attorneys' Fees—Deductibility.} Malone v. United States\textsuperscript{178} concerned the
deductibility of attorneys' fees as administration expenses under Texas
law. The attorneys had entered into a fifty percent contingent fee contract
for recovery of estate taxes previously paid, and the estate sought to deduct
the fees as expenses of the estate in calculating the estate tax payable. The
federal district court allowed the deduction only up to one-third of the
recovery.\textsuperscript{179} The court reasoned that section 233 of the Probate Code\textsuperscript{180}

\begin{itemize}
\item 169. Id. at 835.
\item 170. Id. at 836.
\item 171. Id.
\item 172. 600 S.W.2d 887 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).
\item 173. Id. at 889.
\item 174. Id. at 891.
\item 175. 499 F. Supp. 492 (N.D. Tex. 1979).
\item 176. Id. at 492 n.3.
\item 177. Id. at 494.
\item 179. Id. at 529.
\item 180. TEX. PROB. CODE ANN. § 233 (Vernon 1980).
\end{itemize}
provides for as much as a one-third contingent fee in recovery actions, and section 242\textsuperscript{181} provides for the allowance of fees and expenses.\textsuperscript{182} The court concluded that the statutes, when read together, indicated that a one-third contingent fee was the reasonable fee under Texas law and thus was the upper limit of deductibility for federal estate tax purposes.\textsuperscript{183}

\begin{footnotesize}
\begin{enumerate}
\item Id. § 242.
\item 493 F. Supp. at 529.
\item Id.
\end{enumerate}
\end{footnotesize}