



January 1971

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Recommended Citation

Charles O. Galvin, *Wills and Trusts*, 25 SW L.J. 13 (1971)
<https://scholar.smu.edu/smulr/vol25/iss1/3>

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WILLS AND TRUSTS

by

Charles O. Galvin*

THE cases reviewed in the text and footnotes are collected under the following headings: Construction of Instruments; Statutory Construction; Procedural Matters; and Taxation.

I. CONSTRUCTION OF INSTRUMENTS

The construction of instruments—the intention of the grantor or testator, the meaning of words in their “ordinary sense,” the nature of property interests created—continues to provide the courts with grist for the mill.

Simultaneous Death Clause as Residuary Clause. In *Smith v. Williams* the joint will of husband and wife left specific property to a certain person and provided that in the event of simultaneous deaths, “all our property shall pass to and vest in [certain persons]”¹ The husband died and the will was probated. The wife subsequently remarried and died without changing her will. The second husband conceded that the specific property passed as directed under the will, but contended that all other property passed by intestacy. The parties named in the simultaneous death clause contended that it operated as a residuary clause. Finding no ambiguity, the court sustained the second husband’s contention that the wife had died partially testate and partially intestate. The presumption against partial intestacy is but one factor to consider in construction cases; it cannot override the plain meaning of words.²

Meaning of “Heirs.” In *Power v. Landram*³ the father in a 1944 will left his estate to his wife with power of disposition during her lifetime, any remainder at the wife’s death to pass to their children. In the event a child predeceased his mother, such child’s share was to pass to his heirs. One of the children died intestate, predeceasing his mother and survived by his wife and three children of a former marriage. The wife of the child contended that she was an heir, and the Texas supreme court agreed. Although the supreme court did not discuss the provision, section 3(o) of the Texas Probate Code,⁴ effective January 1, 1956, obviates any uncertainty in construction by including surviving wives in the definition of the word “heirs.”

Business Cash and Personal Cash. In *Dorough v. Thornton*⁵ the testator

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¹ 449 S.W.2d 359 (Tex. Civ. App.—Beaumont 1970), *error ref. n.r.e.*

² See *Huffman v. Huffman*, 161 Tex. 267, 339 S.W.2d 885 (1960).

³ 14 Tex. Sup. Ct. J. 152 (1971).

⁴ TEX. PROB. CODE ANN. § 3(o) (1956).

⁵ 450 S.W.2d 424 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

provided for the sale of his sole proprietorship to his employees. Excepted from the assets for sale was cash which was left by the residuary clause to his wife. The employees contended that the cash in the business should be offset against liabilities and the balance paid over to the wife.⁶ The wife contended that she was entitled to *all* the cash in the business, irrespective of offsetting liabilities. The court held that all the cash went to the wife. It is significant that the business owed approximately \$25,000 and the testator's will provided for a non-interest-bearing loan of up to \$25,000 to the purchasers.

Meaning of "Property." *Easter v. Legg*⁷ involved the construction of the word "property" under a will in which the husband left his entire estate to his wife subject to the condition that if she remarried, she was to make a settlement with each child. In directing the settlement, the will provided: "I require her to buy the one half of the property or sell the property—this includes residence, and all other real estate—and make a settlement with each child's—share [*sic*]. Each child to share and share alike—of my one half of property."⁸ The court rejected the wife's contention that "property" meant only real property, but rather construed the word to mean the husband's one half of all real and personal property given to the wife.

Meaning of "Wish" and "Desire and Will." In *Everett v. Adams*⁹ the husband left his property to his wife for life with full power of disposition, and provided that at her death a particular farm should pass to his foster son with the further provision that it was his "wish" that if oil were found, the proceeds were to be divided among named beneficiaries. The wife died in 1955, and her will reaffirmed the sharing of minerals with the words "I want." The foster son sold the farm, and the issue was whether or not his grantees acquired full title. The court construed the two wills as giving the named beneficiaries only a contingent interest, which was neither a violation of the Rule Against Perpetuities, nor a restraint on alienation. If oil had been found while the foster son held the property, the named beneficiaries would have had a vested interest in the minerals. But the sale prior to the finding of oil defeated any contingent interest the parties might have had. The property interests worked out in *Everett* reflect the court's interpretation of the parties' intent, as the language of the documents was assuredly imprecise.

The words "desire and will" were construed as mandatory in *Woods v. Wedgeworth*,¹⁰ as the court stated that the two words used together are much stronger than "desire" used alone. Moreover, the court noted that

⁶ The cash on hand in the business was \$33,263.16, and liabilities totaled \$25,699.71. The difference of \$7,563.45 was paid over to the wife by the former employees, leaving the balance of cash to apply against the liabilities.

⁷ 448 S.W.2d 143 (Tex. Civ. App.—Tyler 1969).

⁸ *Id.* at 144.

⁹ 444 S.W.2d 789 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*

¹⁰ 453 S.W.2d 385 (Tex. Civ. App.—El Paso 1970).

had the words been construed as precatory, the testator would have died partially intestate. The court held that the testator died testate as to all his property, and thus protected the contingent named-beneficiaries who took under the "desire and will" clause. The court may have been influenced by the fact that the parties who contended that the words were precatory were not even named in the will.

*Codicils. Langston v. First National Bank*¹¹ demonstrates the importance of relating a codicil to the will. There, a will left certain bequests to named individuals and then left the residuary estate among the same people. A codicil left a bequest of \$1,000 to an individual and his wife, or the survivor, and provided for its deduction from one of the named legatees in the will. Because the husband and wife were named in the codicil but not in the will (other than the fact that their share was deducted from another legatee), they could not participate in the remainder. The effect of reading the will and codicil together was to include them among the legatees of special bequests, but not among the group sharing in the residue.

Class Gift. In Sanderson v. First National Bank the critical language used by the testatrix was that if the principal beneficiary predeceased her, "I want all my possessions . . . to be equally divided between my sisters after all my expenses are paid."¹² The testatrix had four sisters, only one of whom survived her. If the quoted language were a class gift, then the sole surviving sister would take everything. However, if the language constituted a gift to four individuals, then three of the shares would pass by intestacy to the testatrix's heirs-at-law. Since it was clear that the testatrix was close to her sisters, and since there is a presumption against partial intestacy, the court held that a class gift had been made.

Elections. If a testator attempts to dispose of property not part of his estate by putting his wife to an election, the applicable provisions must be clear and unmistakable. Moreover, there must be a benefit conferred in exchange for the election. In *Atkinson v. Peron* the use of words "all of the personal property belonging to me," "all of my real estate," "all of my personal property," "my real estate,"¹³ etc., referred only to the husband's estate and thus did not put the wife to an election.

By contrast, *Thomas v. Thomas*¹⁴ was a situation in which the husband and wife executed joint and mutual wills, and on the husband's death the wife accepted the benefits of his will. Disregarding the provisions of the will, the wife sought to dispose of her property. The court held that she was obligated to carry out the provisions of the joint and mutual will.

¹¹ 449 S.W.2d 855 (Tex. Civ. App.—Amarillo 1970).

¹² 446 S.W.2d 720, 722 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*

¹³ 447 S.W.2d 503, 506 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

¹⁴ 446 S.W.2d 590 (Tex. Civ. App.—Eastland 1969), *error ref. n.r.e.* See also *Holmes v. Holmes*, 447 S.W.2d 423 (Tex. Civ. App.—Waco 1969) (joint and mutual will); *Mitchell v. Lawson*, 444 S.W.2d 192 (Tex. Civ. App.—San Antonio 1969) (agreement to make a will supported by consideration).

Thus, she was estopped to deny the provisions of the will, and she could not act inconsistently with respect thereto.

In another election case, *Hunsucker v. Hunsucker*,¹⁵ the wife and one of three children died intestate prior to 1904. The husband remarried, and from this marriage there were six children. In 1922 the husband executed a will leaving two tracts of land acquired during his first marriage to the two surviving children of that marriage and specifically providing that this was in full settlement of their interest in their deceased mother's estate. Later, he conveyed the same two tracts to the children as a settlement of their inheritance. The two children each conveyed their respective tracts to others, and by mesne conveyances the tracts came back into the hands of the father. When he died in 1955, the children claimed the tracts under his will. The court held that the children were given an election in the will which they exercised by accepting the lifetime transfers from their father. The devises in the will were deemed by the *inter vivos* transfer.

Disclaimer. In *Bonham v. Gibbs*¹⁶ a disclaimer by a husband of any interest in the wife's estate in Texas did not bind the husband's heirs so as to preclude their claiming an interest in assets owned by the husband and wife in the Philippines.

Incorporation by Reference. In *Taylor v. Republic National Bank*¹⁷ the court construed the word "attached" as insufficient to incorporate into a one-page will fourteen pages of documents describing a hospital to be established with the residuary bequest of the will. The residuary clause provided that the hospital was to be owned by the Seventh Day Adventist Denomination General Conference. However, the bequest of the residue of the estate to charity was not permitted to fail. The court held that the residue passed to the use and benefit of the General Conference.

Trusts. In *Aberg v. First National Bank*¹⁸ T. W. and Lela Vardell, husband and wife, executed two trusts in 1931, designating their daughter Lela as primary beneficiary and their daughter Elizabeth as secondary beneficiary. If Lela died without issue, the trust provided that Elizabeth would be the beneficiary for life with continuing beneficial interests in her descendants until the termination of the trust. Lela died in 1968 without children, and Elizabeth executed a renunciation of her interest. Elizabeth's children thereupon contended that their interests accelerated, and that they were entitled to be vested with their interests outright. The trust instrument provided that in order to be vested with a share of the trust, the remaindermen had to be living twenty-one years after the birth of Elizabeth's last child or at her death, whichever was later. Because Eliza-

¹⁵ 455 S.W.2d 780 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

¹⁶ 443 S.W.2d 267 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

¹⁷ 452 S.W.2d 560 (Tex. Civ. App.—Dallas 1970), *error ref. n.r.e.*

¹⁸ 450 S.W.2d 403 (Tex. Civ. App.—Dallas 1970), *error ref. n.r.e.*

both was living, the identity of the remaindermen could not be determined and the remainders could not be accelerated. Moreover, the spendthrift clauses in the trusts clearly indicated the settlors' intent that the trusts should run their full term for the protection of the beneficiaries.

II. STATUTORY CONSTRUCTION

Anti-Lapse Statute. Section 68 of the Texas Probate Code¹⁹ provides that a devise or bequest shall not lapse in the case of a child or descendant who predeceases a testator, but shall pass to the children or descendants of such legatee or devisee. *Rossi v. Rossi* construed this anti-lapse provision as not applicable in a situation in which the testator specifically provided for the gift to pass to others in the event his son died "before he has come into the whole of the bequest."²⁰

Descent and Distribution. *Rogers v. First National Bank*²¹ involved construction of sections 38(a)4 and 41(b) of the Texas Probate Code.²² There, the decedent left no spouse, children, descendants, or near kin. In such a case, section 38(a)4 provides for the division of the estate into two equal moieties, one to go to the paternal and the other to go to the maternal kindred, starting with the grandfather and grandmother and passing through their descendants. Section 41(b) describes the shares of collateral kindred of the half blood and whole blood. In *Rogers* the decedent's paternal grandfather and grandmother had each been married previously and each had children prior to their marriage to each other. The court held that all the descendants of both grandfather and grandmother should be included, and that the whole-blood heirs should take twice that of the half-blood heirs.

In a related case, *Lewis v. First National Bank*,²³ the court held that once the surviving descendants' grandparents are found, the search ends. The statutory language "and so on without end"²⁴ in section 38(a) does not mean that the search must continue to the descendants of the great-grandparents.

III. PROCEDURE

Assets in the Probate Estate. In *Foreband v. Light*²⁵ the Texas supreme court held that a certificate of deposit issued to a mother or daughter with no mention of right of survivorship did not vest the daughter with the right to the proceeds on the mother's death. The term "survivor" or "payable on death to" is indispensable to the creation of a right of survivorship; otherwise, the proceeds pass into the decedent's estate.

¹⁹ TEX. PROB. CODE ANN. § 68 (1956).

²⁰ 448 S.W.2d 162, 163 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

²¹ 448 S.W.2d 149 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*

²² TEX. PROB. CODE ANN. §§ 38(a)4, 41(b) (1956).

²³ 445 S.W.2d 629 (Tex. Civ. App.—El Paso 1969).

²⁴ TEX. PROB. CODE ANN. § 38(a) (1956) provides in part: "If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants."

²⁵ 452 S.W.2d 709 (Tex. 1970).

In *Estate of Reynolds v. Reynolds*,²⁶ however, a savings account opened by a mother and daughter as joint tenants properly belonged to the daughter on her mother's death, absent a showing of fraud, undue influence, mistake, or other infirmity. The contention of the sons that their mother opened the account only for her convenience was rejected.

Creditors' Claims. In *Montague v. Brassell*²⁷ a divorced wife received as part of a property settlement a note from her husband in the amount of \$10,000, secured by a deed of trust on producing royalties. The husband died in June 1963, the independent executor was appointed in July 1963, the former wife filed a claim on the note in September 1963, and the deed of trust was foreclosed in April 1965. She then sought to recover for the diminution in value of mortgaged property allegedly caused by the executor's failure to pay to her amounts earned by the royalty interest from September 1963 to April 1965. The plaintiff had three courses of action available to her at the time of her former husband's death. She could have caused the trustee under the deed of trust to sell the property at a trustee's sale; she could have proceeded with a judicial foreclosure and asked for a garnishment or receivership to impound or collect the royalties; or she could proceed, as she did, under section 306(a)(2) of the Texas Probate Code, which provides for the allowance of a preferred claim against specific property.²⁸ Under this last alternative, section 306(c) provides that "no further claim shall be made against other assets . . ."²⁹ The court held that, by proceeding as she did, she lost her right to payments earned by the royalty interest between the time of filing the claim and the trustee's sale, since the payments received by the executor were "other assets."

Testamentary Capacity. In *Storey v. Hayes*³⁰ the court reaffirmed the rule concerning evidence of testamentary capacity—that a witness may not testify to a legal conclusion as to testamentary capacity, but he may testify as to facts and circumstances which demonstrate the capacity or non-capacity of the testator. In *Storey* an issue arose over the exclusion of the testimony of a nephew and that of a druggist who filled prescriptions. The nephew's testimony which was received was held to make obvious the opinion that he was not allowed to state explicitly and to be of as much or more significance than the excluded portion. Therefore, the court held the exclusion to be harmless error. Similarly, since the druggist was allowed to testify concerning prescriptions given the testator before the execution of a disputed codicil, it was proper to exclude testimony as to prescriptions furnished after its execution.

Miscellaneous Procedural Matters. A court of civil appeals held that a court-approved compromise agreement concerning estate assets could not

²⁶ 443 S.W.2d 601 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*

²⁷ 443 S.W.2d 703 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

²⁸ TEX. PROB. CODE ANN. § 306(a)(2) (1956).

²⁹ *Id.* § 306(c).

³⁰ 448 S.W.2d 179 (Tex. Civ. App.—San Antonio 1969), *error dismissed w.o.j.*

be overturned by the court's later decision giving the widow a smaller interest in certain properties, absent a showing that the compromise had been procured by fraud.³¹ In the case of a solvent estate, a widow was not entitled to have the community homestead set aside to her in fee simple; moreover, the exemption as to tools, apparatus, and books in the barber and beauty shops operated by her husband in partnership was held not to entitle the widow to a fee simple therein.³² In another case, neither the district court nor the court of civil appeals had jurisdiction of an appeal from a county court where the appellants failed to file an appeal bond or bond for issuance of writ of certiorari.³³ And in a case in which a bank as independent executor sought a writ of certiorari to set aside an order of the probate court appointing a temporary administrator, the dismissal of the writ was proper because: (1) the administrator had been relieved of any further responsibility to the estate before certiorari jurisdiction was invoked, and (2) the appeal from the order appointing a successor as temporary administrator was still pending.³⁴

An order of the county court for a final accounting in a probate matter was filed June 26, 1967. Rule 332 requires that notice of appeal be given or filed within ten days.³⁵ The period is mandatory, and a notice dated September 1, 1967, and filed September 5, 1967, was not timely.³⁶

In another case, a widow sought to sell the homestead after her husband's death and have the proceeds invested for her benefit, because rising taxes had made the homestead an economic burden.³⁷ The court held that the district court was without equitable powers to "lend a helping hand"³⁸ in such a situation and thus deprive the children of their title in the real estate.

If a suit against a party is begun and he answers and thereafter dies, his answer inures to the benefit of his legal representatives. Thus, a writ of *scire facias* requiring the executor to appear "by filing a written answer" was complied with by a deceased who filed an answer before he died.³⁹

IV. TAXATION

In *Calvert v. Coke*⁴⁰ the Texas supreme court reversed a court of civil appeals decision,⁴¹ and held that interest accruing after death on indebtedness owing by the decedent at the time of his death cannot be deducted for inheritance tax purposes.

³¹ *Mapp v. Snitker*, 449 S.W.2d 857 (Tex. Civ. App.—Amarillo 1970).

³² *Kelly v. Shields*, 448 S.W.2d 135 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*

³³ *Biddy v. Jones*, 446 S.W.2d 388 (Tex. Civ. App.—Tyler 1969).

³⁴ *Alice Nat'l Bank v. Trevino*, 445 S.W.2d 237 (Tex. Civ. App.—Beaumont 1969). *See also Lopez v. Wallace*, 453 S.W.2d 383 (Tex. Civ. App.—El Paso 1970) (court had jurisdiction of claims which were rejected by the administrator but had been filed within 90 days in the district court).

³⁵ TEX. R. CIV. P. 332.

³⁶ *Allen v. Heuermann*, 444 S.W.2d 646 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

³⁷ *Williamson v. Kelly*, 444 S.W.2d 311 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

³⁸ *Id.* at 313.

³⁹ *Estate of Pewthers v. Holland Page Indus., Inc.*, 443 S.W.2d 392, 393 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*

⁴⁰ 14 Tex. Sup. Ct. J. 25 (1970).

⁴¹ 449 S.W.2d 831 (Tex. Civ. App.—Austin 1970).