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WILLS AND TRUSTS

by

*Charles O. Galvin**

I. WILLS

Construction. In order to avoid partial intestacy, the creation of unusual property interests, or unusual devolutions of property, the courts will endeavor to ascertain the testator's intent. In making this analysis the court must find the meaning within the four corners of the instrument, giving effect to every part of it and giving reasonable construction to the words used.

In *Taylor v. Baten*[1] the will provided: "I leave Anna . . . , my granddaughter, . . . my oil (not gas) royalties in and to and under the tracts now producing and which the Gulf Oil Corp. is here now producing and paying for such royalties."[2] The residue of the estate was left to the testatrix's son. The granddaughter contended that she was entitled to a royalty interest in the tracts in question without qualification; that is, she was not restricted to royalties from the four wells in production then being paid by Gulf. The son, as residuary devisee, contended that liquid hydrocarbons should not be considered as "oil," and that the granddaughter's royalty interest was to terminate when production from the four wells ceased. The court held that the oil royalties devised to the granddaughter included all royalties from the tracts in question. The reference to the royalties paid by the Gulf Corporation was not a delimiting designation, but was merely a layman's way of identifying the tracts in question. With respect to the words "oil (not gas)" the court held that liquid hydrocarbons are included in the term "oil"; the term "gas" was held to apply to vapors, or dry gas, as that term is commonly understood.

In *Pipkin v. Hays*[3] the testatrix had provided in her will for each of the devisees and legatees to pay his proportionate part of any and all inheritance taxes. The question was whether the phrase "any and all inheritance taxes" included all death taxes, including estate taxes. The court held that the phrase included federal estate taxes. Because state inheritance taxes are chargeable against the shares of the individual beneficiaries, the phrase would be superfluous if it applied only to state taxes. If the words are applied to all death taxes, however, they take on meaning, because taxes otherwise chargeable against the residue would be chargeable to each beneficiary's particular share.

Elections. In *Martin v. Lott*[4] Martin had sold to Patterson a royalty interest pursuant to a letter agreement that Patterson would not sell or transfer the interest without first offering it to Martin at a certain price, less any royalty payments received by Patterson. Subsequently, Patterson died, and by her will she left all income from the royalties to Martin for life with remainders over. Patterson's executrix advised Martin that his repurchase option was null and

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[1] 481 S.W.2d 450 (Tex. Civ. App.—Beaumont 1972).

[2] *Id.* at 450.

[3] 482 S.W.2d 59 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*

[4] 482 S.W.2d 917 (Tex. Civ. App.—Dallas 1972).

void on the death of Mrs. Patterson, but that he was entitled to the royalty income for life. After having accepted nine monthly payments from the executrix, Martin sought to exercise his repurchase option. The executrix contended that Martin, by accepting the royalty checks, had elected to take under the will, and therefore, had waived his rights under the letter agreement. The court held that when Mrs. Patterson devised the life estate in the royalty income to Martin, she was in breach of the letter agreement. At this point Martin could either insist on specific performance under the letter agreement or elect to accept the benefits under the will. The question was whether Martin had consciously made an election. The court stated that when he was advised by the executrix that his preemptive right was null and void, his acceptance of the royalty checks may have been evidence of an intention to elect between two inconsistent rights. Accordingly, the case was remanded for a determination of Martin's intention.

Contractual Wills. Parties may execute the same document as their joint will, or may execute similar documents as mutual wills. Whether such arrangements are contractual and binding is a question of intention to be determined from the facts and circumstances of each case. *Atkinson v. Schmidt*[5] involved wills executed by a husband and wife containing identical reciprocal provisions disposing of their community property to the same persons. The wife died in 1956. In 1963 the husband executed a new will changing the devise of property which had been contained in the mutual wills. The court held that the testimony of the attorney who drew the mutual wills was sufficient to indicate an intention to enter into an oral contract with respect to the wills. Accordingly, when the wife died, the husband was bound by his contract not to revoke his mutual will.[6] Moreover, the wife's will in some particulars sought to deal with the entire community property. Consequently, at her death, the husband's election to accept the benefits under the wife's will bound him not to change the disposition of the properties in question.

Crain v. Mitchell[7] involved the same issue with respect to a joint will. Although the parties referred to their acts in the first person plural, this was not sufficient, absent extrinsic evidence, to indicate an intention to make their joint will a contractual obligation between them.[8]

Probate and Administration. Procedural Matters. In *Cable v. Estate of Cable*[9] Mrs. Arledge had made application to probate the will of Opal Nichols Cable. Sidney Cable, the surviving husband, contested the application. The county court admitted the will to probate, and, on appeal for trial de novo, the district court granted the proponent's motion for summary judgment to

[5] 482 S.W.2d 687 (Tex. Civ. App.—Austin 1972).

[6] In this type of situation, the Statute of Frauds is inapplicable since the death of one of the parties is interpreted as part performance of the oral contract. *E.g.*, Kirk v. Beard, 162 Tex. 144, 345 S.W.2d 267 (1961).

[7] 479 S.W.2d 956 (Tex. Civ. App.—Fort Worth 1972), *error dismissed. See also* Middleton v. Middleton, 479 S.W.2d 775 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*

[8] The court noted that the only extrinsic evidence of record indicated that the joint will was prepared in an attempt to reduce the amount of attorney's fees.

[9] 480 S.W.2d 820 (Tex. Civ. App.—Fort Worth 1972).

admit the will to probate. The will offered for probate was a copy of the original will and was not found among the decedent's papers. There was also evidence that raised the issue of revocation of the will by the testatrix. The court pointed out that the proponent has the burden of proving non-revocation. In this case there was no original document, and there was evidence that the testatrix was seen with torn pieces of the will in her hands. Accordingly, the case was remanded to try the issue of revocation *vel non* on the merits.

Hamilton v. Gregory[10] also involved a lost will. Hamilton filed a will of the deceased Esther Mowrer for probate. Depelchin Faith Home contested the will, alleging that the home was the beneficiary under a prior will which was lost, and that the subsequent will was invalid. Hamilton challenged the home's right to contest the will on the ground that it was not an "interested person,"[11] and requested a separate trial on this issue. Meanwhile, the home filed an application to probate the lost will, and the cases were consolidated for trial. Hamilton then sought to require a separate trial on the issue of the home's interest by action for mandamus in the district court. The court of civil appeals noted that it was error not to require the contestants of the will to support their allegations of an interest in the estate with evidence. It held, however, that the requested writ of mandamus was not the proper procedure, because Hamilton, the proponent of the will, had an absolute right of appeal to the district court where he would have the right to a trial de novo. If the issue of interest on the part of the contestants was not tried *in limine* by the probate court, the district court could correct the error on appeal.

McKinley v. McKinley[12] dealt with the initial versus the appellate power of the district courts. On November 4, 1970, the independent executor filed in the probate court an inventory listing two savings and loan certificates as separate property. On the same day the probate court approved the inventory. The decedent's widow filed suit in the district court to restrain the distribution of assets by the executor. Subsequently, amended pleadings were filed which sought a declaratory judgment that the certificates were community property. The district court held that the certificates were community property and rendered judgment against the executor. On appeal the executor contended that the case should have been brought by appeal or on certiorari from the probate court. The court of civil appeals held that under article 2524-1,[13] the Uniform Declaratory Judgments Act, the district court had jurisdiction to hear the cause. Other issues in the case related to the tracing of property to determine its community or separate character.[14]

Whitehead v. Teague[15] involved a claim against the estate of Perkins by

[10] 482 S.W.2d 287 (Tex. Civ. App.—Houston [1st Dist.] 1972).

[11] TEX. PROB. CODE ANN. §§ 3, 10 (1956).

[12] 483 S.W.2d 310 (Tex. Civ. App.—Tyler 1972), *error granted.*

[13] TEX. REV. CIV. STAT. ANN. art. 2524-1 (1965).

[14] The district court interpreted the word "home" in the decedent's will to include the contents of the house, such as the furniture and appliances. The court of appeals disagreed, and held that the word meant only the actual residence. The evidence before the court indicated that the funds used to purchase the savings certificates had come from joint bank accounts consisting of commingled funds, and therefore, the certificates were held to be community property.

[15] 483 S.W.2d 378 (Tex. Civ. App.—Tyler 1972). *See* Dowden v. Cannon, 480 S.W.2d 822 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error dismissed*, in which the court

Whitehead, who had furnished money for the down payment on certain real property taken in the name of Perkins. Perkins died intestate and Teague was appointed administrator. Whitehead presented a claim against the estate of the $3,000 furnished as the down payment on a $20,000 piece of property. Whitehead also filed an affidavit in the deed records asserting a resulting trust on the property. The claim was denied and Whitehead filed suit in the district court under section 313 of the Probate Code.[16] The district court rendered a take nothing judgment. The court of civil appeals held that Whitehead's claim was not for money, but was an assertion of an equitable title in specific property. Accordingly, since there was no claim for money as required by section 298(a) of the Probate Code,[17] a suit on a rejected claim could not be maintained under section 313. Thus, the trial court had no jurisdiction of the suit, and the case should have been dismissed.

In another resulting trust situation[18] the administrator sued to recover possession of an automobile, title to which was in the name of the deceased, but which was partially purchased by trading in another automobile, which had been provided by the defendant. The trial court awarded the administrator possession of the car. The court of civil appeals held that as a matter of law a resulting trust was created. The defendant had an interest in the automobile, and therefore, the administrator was not entitled to sole possession. The cause was reversed and remanded for a determination of the exact nature of the resulting trust.

Foreclosure. In *American Savings & Loan Ass'n v. Jones*[19] Mrs. Newton, on May 23, 1962, had executed a deed of trust on a tract of property as security for a loan. On November 1, 1966, Mrs. Newton died intestate. Subsequent to her death, the installments provided for in the note secured by the deed of trust were not paid when due. The lender knew of Mrs. Newton's death, but on December 12, 1966, prior to the appointment of an administrator, posted the property for foreclosure sale. On January 3, 1967, the property was sold under the power of sale contained in the deed of trust. On April 20, 1967, Mrs. Jones was issued letters of administration and she immediately filed suit to set aside the sale and recover damages. The court cited the rule of *Pearce v. Stokes*[20] that the death of the grantor in a deed of trust does not revoke or suspend the power of sale in the deed of trust, but that a sale by the trustee after the death of the grantor, before the expiration of four years, and before the opening of administration of the estate is not void but voidable. The administrator may, therefore, move to void the sale. In *Jones* the lender

held that an action to revise probate proceedings must be brought in the same county in which the probate proceedings were held. *See also* Fort Worth Nat'l Bank v. Stiff, 482 S.W.2d 337 (Tex. Civ. App.—Eastland 1972), *error dismissed*, in which it was held that a bank's suit against the executors of an estate was a waiver of its objections to venue in that county with respect to a cross action by the executors which arose out of the subject matter of the bank's suit.

[16] TEX. PROB. CODE ANN. § 313 (1956).

[17] *Id.* § 298(a): "All claims for money against a testator or intestate shall be presented to the executor or administrator . . . ."

[18] Allen v. Rodriguez, 480 S.W.2d 270 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*

[19] 482 S.W.2d 62 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.*

[20] 155 Tex. 564, 291 S.W.2d 309 (1956).

conceded the right of the administratrix to set aside the trustee's sale, but contended that it should not be liable for the use of the property from the date of sale to the date of trial. The court of civil appeals held that it was consistent with *Pearce* to award damages for the value of the use of the property. The savings and loan association knew of the death of the borrower, and could have initiated the application for letters of administration before the foreclosure sale.[21] Having taken the chance that no administration would be opened on the estate, it had to face the consequence of damages for use of the property when such administration was opened and its sale set aside.

Effect of Partnership. In 1967 Parker, as independent executor of Mrs. Donald's estate, obtained a judgment against Mr. Donald for one half of the effects of Mr. and Mrs. Donald at the time of her death.[22] Parker later sought a declaratory judgment that, as independent executor of the estate, he was entitled to recover real property formerly owned by the law partnership of Donald & Donald.[23] The law partnership was dissolved in 1959. Therefore, both the trial court and the court of appeals held that as a matter of law Parker did not have a claim against the partnership.[24] Parker contended that under the Uniform Partnership Act a partnership continues until its affairs have been wound up.[25] The supreme court stated that the rule was inapplicable here because the Act had not been adopted in Texas at the time of the husband's sale of his interest to his law partner.[26] With respect to Parker's prayer for an accounting, the court reversed and remanded the case for a determination of which transactions would affect Parker's claim to an accounting during the period 1961 to 1966.

Sound Mind To Make a Will. In *Moeling v. Russell*[27] the courts sustained the admission to probate of the will of an eighty-five-year-old testatrix who left modest bequests to nieces and a nephew and the residue of her estate to a nonrelative who befriended her. The testimony of her physician, her attorney, a subscribing witness, a bank employee, and others all supported the finding that she was of sound mind. The court upheld the competency of a subscribing witness who had seen the testatrix for only five minutes because the witness was merely stating her conclusion that the testatrix was of sound mind at that time.[28] The refusal to admit letters written by the testatrix saying she was leaving her

[21] *See* TEX. PROB. CODE ANN. §§ 77, 80 (1956).

[22] Parker v. Holland, 444 S.W.2d 581 (Tex. 1969), upheld the judgment on appeal.

[23] Parker v. Donald, 482 S.W.2d 846 (Tex. 1972). Another case involving an accounting for a deceased partner's interest in a law firm was Seaman v. Neel, 480 S.W.2d 430 (Tex. Civ. App.—Corpus Christi 1972), *error ref. n.r.e.* In *Seaman* an amount awarded by the trial court under an agreement for division of fees for work done prior to the attorney's death was sustained as being reasonable in amount.

[24] Parker v. Donald, 477 S.W.2d 947 (Tex. Civ. App.—Eastland 1972).

[25] *See* TEX. REV. CIV. STAT. ANN. art. 6132b, § 30 (1970).

[26] The court recognized that at common law a partnership was so terminated. *See* Moore v. Steele, 67 Tex. 435, 3 S.W. 448 (1887); Traders' & Gen. Ins. Co. v. Emmert, 76 S.W.2d 208 (Tex. Civ. App.—Waco 1934), *error ref.*

[27] 483 S.W.2d 21 (Tex. Civ. App.—Tyler 1972).

[28] The court stated that only if the witness says that the testator was of unsound mind is a detailed statement of facts supporting that conclusion necessary. *Id.* at 23.

house to her dog was found to be a technical error in interpretation of the dead man's statute,[29] but not of such weight as to constitute reversible error.

II. TRUSTS

Charitable Trust—Federal Estate Tax. A decedent created a testamentary trust providing for income to his wife for life and remainder over to a charity. The decedent gave his trustee broad powers of investment and apportionment between principal and income. Under these facts, the court held in *Atwell v. United States*[30] that under Texas law there was no way of determining what remainder interest would ultimately vest in the charities; accordingly, the charitable deductions was disallowed.[31]

Trust Accounting. Gurley v. Lindsley[32] involved payments under a prior consent judgment. The court concluded that the effect of the arrangement was that the land and its income were impressed with a trust in favor of the plaintiffs. The defendants, who were successors to the former parties to the judgment were, therefore, fiduciaries obligated to make prompt payment of funds to the plaintiffs relative to the property which they took subject to the trust. The fact that the nonresident defendants were trustees of assets located in Texas was sufficient to impose jurisdiction over them under article 2031b.[33] The defendants were not allowed to assert the defense of laches, since the court found that there had been no repudiation of the trust. Further, the court pointed out that even if the defendants had repudiated the trust, no notice of the repudiation had been given to the beneficiaries. The court also held that the plaintiffs were entitled to ten percent interest on their judgment.

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[29] TEX. REV. CIV. STAT. ANN. art. 3716 (1926).

[30] 339 F. Supp. 425 (S.D. Tex. 1972).

[31] *See also* Merchants Nat'l Bank v. Commissioner, 320 U.S. 256 (1943); First Nat'l Bank v. United States, 443 F.2d 480 (5th Cir.), *cert. denied*, 404 U.S. 983 (1971); Miami Beach First Nat'l Bank v. United States, 443 F.2d 475 (5th Cir.), *cert. denied*, 404 U.S. 984 (1971); Florida Bank v. United States, 443 F.2d 467 (5th Cir. 1971).

[32] 459 F.2d 268 (5th Cir. 1972).

[33] TEX. REV. CIV. STAT. ANN. art. 2031b (1964).