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Wills and Trusts

Charles O. Galvin

WILLS AND TRUSTS

by

*Charles O. Galvin**

I. WILLS

During the past year, a number of decisions have been handed down by Texas courts within the area of the law of wills and trusts. These decisions include such areas of the law as construction of wills, gifts causa mortis, competence to make a will, joint and mutual wills, express and constructive trusts.

Construction. Perhaps in no other area of the law is the careful use of language so vital as in the drafting of a will. It is a basic rule of construction that the court will attempt to ascertain the intent of the testator within the four corners of the instrument, giving due consideration to each and every provision. The careful and consistent use of words and phrases is most important.

Stewart v. Selder[1] concerned the use of the word "cash." The testatrix's will in nine paragraphs devised specific properties to designated individuals, including a one-fourth undivided interest to a sister. There was no residuary clause; however, paragraph two provided: "If there is any cash, after expenses and debts are paid, I leave it to my aunt, Estell Stewart."[2] The testatrix owned at the time of her death, in addition to the specific properties left by her will, an undivided one-fourth interest in a homestead, a vacant lot, and an undivided one-half interest in various stocks and bonds. Certain heirs-at-law sued for an interest in these assets under the statutes of descent and distribution. The trial court concluded that the vacant lot, which was not mentioned in specific bequests and devises, passed to the heirs-at-law by intestacy, that the one-fourth undivided interest in the homestead passed to a sister along with a specific devise of an additional one-fourth interest to the same devisee, and that all stocks, bonds, and deposits readily convertible into cash passed to the aunt, Estell.

The court of civil appeals affirmed[3] the trial court on the issue of the disposition of the vacant lot, permitting it to pass by intestacy. As to the other properties not specifically bequeathed and devised, the intermediate court reversed the trial court and awarded these to the plaintiff heirs-at-law. This judgment the supreme court affirmed. Although the testatrix had little contact with the heirs-at-law, the supreme court held that there was no way that it could rewrite her will and redirect her properties. Accordingly, the vacant lot, the one-fourth interest in the homestead, and non-cash items

* B.S.C., Southern Methodist University; M.B.A., J.D., Northwestern University; S.J.D., Harvard University. Dean and Professor of Law, Southern Methodist University.

1. 473 S.W.2d 3 (Tex. 1971).
2. *Id.* at 5.
3. 461 S.W.2d 239 (Tex. Civ. App.—Dallas 1970).

passed by intestacy. The term "cash" passing under paragraph two meant actual cash, less debts and expenses, but not estate taxes; it did not include assets which were readily convertible into cash.

Stewart v. Selder is a good illustration of a situation in which, had the testatrix foreseen all the consequences, she would undoubtedly have disposed of all of her possessions. As the court pointed out, she may have thought that the residue of her estate would be consumed in paying debts and expenses, whereas, in fact, there was a substantial residue left over.

Pickering v. Miles[4] involved the oft-encountered problem of determining whether an estate is contingent, vested, or vested subject to divestment. The order of events is significant: Robbins made a will in 1952. He died in 1957, survived by an only son, the life beneficiary of an express testamentary trust. The corpus of the trust would vest in the children of Robbins, Jr. after his death, at such time when the youngest child reached the age of twenty-one. Robbins, Jr. died in 1966, survived by three minor children who became beneficiaries of the trust until the youngest child reached twenty-one years of age. One of the minor children, Thomas, died in 1969 at age fifteen, intestate and without issue. Thomas's heirs-at-law included his mother, his sisters, and two half-brothers by his mother's previous marriage. The trial court held that when Robbins, Jr. died in 1966 the property vested in his children subject to the testamentary trust in Robbins, Sr.'s will which continued until the youngest child reached twenty-one. The court of civil appeals reversed,[5] holding that the property did not vest until the youngest child reached twenty-one. Thus, the mother and two half-brothers would share in Thomas's interest under the trial court's ruling and would have no interest under the ruling of the court of civil appeals.

The supreme court reversed the court of civil appeals and affirmed the trial court. The principle of construction is that, if a condition is incorporated into a gift over, the remainder is contingent; but if the condition is added after a vested gift is made, the remainder is vested subject to divestment. The critical language of the seventh paragraph of the will of Robbins, Sr. directed that the residue of the estate at Robbins, Jr.'s death "be delivered to the child or children of the said T.N. Robbins, Jr. that are living at his death . . ." with the limitation that the trustee "continue to handle and manage said estate until his youngest child reaches the age of twenty-one . . . ."[6] The court held that the reading of the whole will required a construction that at the death of Robbins, Jr. the equitable estate vested in each of his minor children subject to the legal title in the trustee to manage the property until the termination of the trust.

In contrast to *Pickering v. Miles* is *Wilkes v. Wilkes*.[7] Belle Shumard's will contained a testamentary trust providing for a life income until the death of the last survivor of the group, at which time the trust terminated and was to be distributed among the then surviving beneficiaries. In

4. 477 S.W.2d 267 (Tex. 1972).
5. 465 S.W.2d 452 (Tex. Civ. App.—Austin 1971).
6. 477 S.W.2d at 270.
7. 488 S.W.2d 398 (Tex. 1972).

particular, the testatrix's will provided that her adopted daughter's share should pass to the beneficiaries under the daughter's will, or to her lineal descendants, if any, with reversion to the testatrix's estate if the daughter's share did not otherwise vest. The testatrix died in 1923. Virginia, the adopted daughter, died in 1960, leaving one son, Robert. The trust was still in existence when Robert died in 1969 leaving his wife, Margaret, and two sons surviving. Robert, in his will, designated his wife as a beneficiary of his trust interest. The supreme court held that the will looked to a class of beneficiaries: the original life tenants and their lineal descendants. As persons were added to or dropped from the class, they acquired no vested interest other than their participation in the class. Robert and his sons were lineal descendants; his wife, Margaret, however, was not a member of the class. Until the trust finally terminated, there was no vesting; thus, Robert could not devise his interest to his wife by will because he had no vested estate which continued beyond his membership in the class.

Other Construction Cases. In *O'Neill v. Alford*[8] the court determined that a specific bequest of a number of shares in a particular corporation covered additional shares that were received by the testatrix as a two-for-one stock split *after* she executed the will but *before* her death. In *Mercantile National Bank v. National Cancer Research Foundation*[9] a bequest of $10,000 to the National Cancer Research Foundation was construed to be intended for the National Cancer Foundation. The latter was a local foundation with which the testatrix would have been familiar; the former, on the other hand, was a charity operating principally in New York City and vicinity. In *City of Austin v. Austin National Bank*[10] a holographic will appointing the "Austin National Bank to administer my estate" was construed as appointing the bank not only as executor but also as trustee of a charitable trust for the Humane Society. The words "nothing to be sold at house—everything left to be given to Goodwill . . ." meant that Goodwill Industries was entitled to what was left of furniture, silver, and household wares after decedent's godchild was given first choice of testatrix's personal property remaining in the house.

In another case, *Hamilton v. Austin National Bank*, a holographic will provided that all property passed to the testator's wife, and further, that after her death, if it were not necessary to dispose of their home, he "would like our home . . . to be given to the Texas Fine Arts Association for a small museum."[11] The words "would like" were construed to be precatory, not mandatory, so that on the wife's death, the Association acquired nothing under the will.

In *Howard v. Neary*[12] a husband's will granted the residue of his estate to his wife for life with remainder to his daughter. The will further provided that his wife could sell, convey, mortgage, or encumber the property

8. 485 S.W.2d 935 (Tex. Civ. App.—Houston [1st Dist.] 1972).
9. 488 S.W.2d 605 (Tex. Civ. App.—Dallas 1972), *error. ref. n.r.e.*
10. 488 S.W.2d 586 (Tex. Civ. App.—Austin 1972), *error granted.*
11. 487 S.W.2d 201, 202 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*
12. 485 S.W.2d 591 (Tex. Civ. App.—Waco 1972).

"as she may see fit" and use the income or proceeds "in such manner as she shall deem proper," it "being my intention that she shall have full control . . . ."[13] The court held that these words gave the wife full power of disposition, including the right to use the property in a purely personal manner.[14]

In *Betts v. Haggard*[15] a son executed his will in 1955 leaving everything to his mother, and died May 19, 1971. The mother executed her will on June 14, 1971, and died on November 2, 1971. The third paragraph of the mother's will left the "remainder of my estate then existing after the foregoing bequests have been complied with . . ." and the fourth paragraph left all "the rest, residue and remainder of the property which I may own at the time of my death . . . , including all lapsed legacies and devides[*sic*] . . . ."[16] Certain beneficiaries under the fourth paragraph contended that the words "then existing" in the third paragraph referred to the testatrix's own property as distinguished from the property which she received from her son and that the fourth paragraph was the only residuary clause. The court construed the third paragraph as the residuary clause and the fourth paragraph as a contingent residuary clause to be effective only if bequests in the prior paragraphs became ineffective.

Bailey v. Price[17] concerned the construction of the word "children." In various places the testator provided for his children. Section XI of his will provided, "wherever herein my children are referred to, it is my intention to include not only my children above named, but any other children who may be born to my wife and me, or adopted by us."[18] The testator had a daughter by a former marriage. Evidence was introduced to show that testator's relationship to this child was not a normal father-daughter relationship. In consideration of such evidence, the court held that "children" meant only the children named.

Alamo National Bank v. Hurd concerned the use of the word "royalties." Testator, an experienced oil man, had left "all . . . royalties, . . . as distinguished from . . . leases"[19] to a designated beneficiary. The court construed the bequest of royalties as including overriding royalties and production payments.

In *Langston v. Hoening*[20] a widow with a life estate and power of disposition invested $120,000 in a partnership. The agreement provided that the amount was to be repaid out of one-fourth of the net profits beginning sixty days from the date actual operations began, and on the anniversary date of the partnership, one-half of the profits "then on hand" would be

13. *Id.* at 592.
14. In Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823 (1945), the supreme court held that the remainderman could follow the unexpended proceeds of sales by a life tenant with power of disposition; in that case, however, the proceeds were still in hand, whereas in the instant case, the life tenant expended the proceeds in living expenses.
15. 495 S.W.2d 602 (Tex. Civ. App.—Tyler 1973), *error ref. n.r.e.*
16. *Id.* at 604, 605.
17. 495 S.W.2d 378 (Tex. Civ. App.—Eastland 1973), *error ref. n.r.e.*
18. *Id.* at 380.
19. 485 S.W.2d 335, 337 (Tex. Civ. App.—San Antonio 1972).
20. 494 S.W.2d 615 (Tex. Civ. App.—Fort Worth 1973).

applied to the loan. At her death her heirs contended that the amount was immediately repayable; the partner contended that repayment was to be made only out of partnership profits, of which there had been none. The court sustained the latter construction.

In *Swift v. Fort Worth National Bank*[21] a direction to pay debts, taxes, and administration costs out of estate income applied with equal force to income attributable to individual beneficiaries and that attributable to trust beneficiaries.

Open Mine Doctrine. In *Moore v. Vines*[22] a husband and wife executed a joint, but not a contractual, will in August 1959, leaving their properties to the survivor for life with remainders over to designated parties. In October 1959 the wife died and the joint will was probated. An oil and gas lease executed by the husband and wife in 1951 on two tracts which respectively were the separate property of the husband and wife expired in 1961 with no production. A new lease was executed by the husband in 1961 on what had been his separate property before his wife's death. At the same time, the husband leased the property which had formerly been the wife's separate property, but which was now subject to a life estate in the husband by virtue of the wife's will. The latter lease raised the question of the applicability of the "open mine" doctrine. Ordinarily, the life tenant who dissipates the corpus of an estate is liable to the remainderman for waste. The "open mine" doctrine has been invoked where wells were producing at the time the life estate came into being under a lease executed by the testator or where producing wells are drilled after the vesting of the life estate, but under an oil and gas lease in force and effect at the time the life estate commenced.[23] If the "open mine" doctrine is held applicable, the life tenant may continue to enjoy the rents and profits from the wells or mines, even though he only holds a life estate; he is not liable to the remainderman for waste. In *Moore*, however, the supreme court held that the "open mine" doctrine was not applicable to the lease on the former separate property of the wife because there had been no producing wells obtained during the duration of the lease executed by the testator-wife.

Proceeds of Life Insurance. Brault v. Brigham[24] concerned a dispute over the proceeds of a life insurance policy. A husband took out an insurance policy on his life, his wife's life, and the lives of his minor children. He designated his wife as beneficiary, and named his mother as secondary beneficiary. The husband, wife, and one minor child were killed in an airplane accident. The wife's sister took the surviving four minor children into her home and was appointed guardian of their persons and estates as well as administratrix of the estates of their parents. The husband's mother sued the wife's sister for the proceeds of the insurance policy. The jury found that the husband's designation of his mother as secondary beneficiary was

21. 486 S.W.2d 859 (Tex. Civ. App.—Eastland 1972).
22. 474 S.W.2d 437 (Tex. 1972).
23. Youngman v. Shular, 155 Tex. 437, 288 S.W.2d 495 (1956).
24. 493 S.W.2d 576 (Tex. Civ. App.—Waco 1973).

intended to create a trust relationship for the benefit of his children. Because the mother sought the proceeds individually and not as trustee, the trial court regarded her suit as repudiating the trust. The court removed the mother as trustee and designated the wife's sister as trustee. The court of civil appeals affirmed.

Gifts Causa Mortis. Yates v. Blake[25] involved the question of completeness of a gift. An elderly aunt had certificates of deposit reissued in the joint names of herself and her niece and gave them to her niece for safekeeping to be hers upon the aunt's death. Later, the donor-aunt requested the return of the certificates but died before receiving them. In a suit between the niece and the executor of the aunt's estate, the executor prevailed, the court holding that a completed gift had not been made and that the gift of certificates was revocable at any time to the aunt's death.

Competence To Make a Will. Testamentary capacity and undue influence were before the court in *Reynolds v. Park.*[26] Sidney Park and Ruth Park executed a joint will in 1953, in which the survivor was to take the estate, and upon the death of the survivor or in the case of simultaneous deaths, two daughters were to take a life estate, subject to certain limitations, with a gift over in fee simple to the grandchildren. Ruth died in 1956, and the joint will was admitted to probate. Sidney remarried in 1957, and subsequently executed a codicil to the 1953 will in which he left the separate property acquired after the death of his first wife and the community property of his second marriage to his second wife. On October 17, 1970, Sidney was rushed to the hospital where he remained until his death on November, 5, 1970. On October 27, 1970, while in the hospital, he requested an attorney to draft a new will dividing his estate between his second wife and his daughters, and it was this will that was contested by the daughters who raised the issues of testamentary capacity and undue influence. The jury found issues favorable to the proponents of the second will, and the contestant-daughters appealed.

The court of civil appeals affirmed, ruling that the tests of *Brown v. Mitchell*[27] and *Carr v. Radkey*[28] were properly applied: a witness may not testify as to a legal conclusion that the testator was of sound mind but may testify as to all those elements, such as the business in which he is engaged, the effect of his act in making a will, the nature and extent of his property, recognition of next of kin and the objects of his bounty, which make up testamentary capacity and sound mind. Furthermore, the tests of *Rothermel v. Duncan*[29] were correctly applied to the issue of undue influence: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution

25. 491 S.W.2d 751 (Tex. Civ. App.—Corpus Christi 1973).
26. 485 S.W.2d 807 (Tex. Civ. App.—Amarillo 1972).
27. 88 Tex. 350, 31 S.W. 621 (1895).
28. 393 S.W.2d 806 (Tex. 1965).
29. 369 S.W.2d 917 (Tex. 1963).

of a testament which the maker thereof would not have executed but for such influence.[30]

Joint and Mutual Wills. The question of whether identical wills are contractual in nature continues to come before the courts. In *Magids v. American Title Insurance Co.*[31] Charles and his wife Fannie executed identical wills devising to each other a life estate in all property "of which I die possessed" with the remainder to their three children. The identical wills were executed in February 1964, and Fannie died in June 1964. After his wife's death, Charles discovered that his son, Barnett, was claiming an interest in certain "Glendale" property and other interests under deeds to himself which bore the forged signatures of his mother and father. Barnett had mortgaged the property to Houston First Savings Association which had insured the title with American Title Insurance Company. Upon discovery of the forgeries, Charles executed a new will revoking his previous will and sued to remove the clouds cast on the title to properties. American Title cross-claimed to foreclose its lien. The trial court rendered judgment in favor of Charles for one-half interest in the fee and a life interest in his wife's one-half interest in the properties. As to American Title, the trial court held that the son, Barnett, being one of three children, had a one-third interest in his mother's one-half of the properties, or a one-sixth interest. Such interest was defeasible, but its vesting depended on Barnett's surviving his father. This one-sixth defeasible interest was subject to a lien in favor of American Title.

American Title appealed, contending that it had a lien on both one-sixth interests: the interest Barnett received from his mother and the interest he would receive from his father. The title company's contentions were that the wills of Charles and Fannie were contractual in nature, and that when Fannie died, Charles was bound by the contract. Thus, under the purported contract, Charles's own one-half interest in the community property vested in the remainderman subject to his own life estate. Under this theory the son, Barnett, had a remainder in a one-third interest subject to foreclosure. The issue presented, therefore, was the question of whether or not the wills were contractual.

The trial court refused to find that the identical wills were contractual. The court of civil appeals reversed and remanded.[32] The supreme court reversed the court of civil appeals and affirmed the trial court. It held that the burden of proof was on American Title to prove that the wills were contractual, rather than on Charles to prove they were not. From the evidence, the supreme court could find an agreement to execute identical wills but

30. Findings regarding allegations that the testator lacked testamentary capacity were approved in Bailey v. Rains, 485 S.W.2d 837 (Tex. Civ. App.—Waco 1972), *error ref. n.r.e. See also* Phillips v. Christian Science Church, 498 S.W.2d 680 (Tex. Civ. App.—Corpus Christi 1973), *error ref. n.r.e.* (certiorari jurisdiction of district court properly invoked on issue of testamentary capacity); Dulak v. Dulak, 496 S.W.2d 776 (Tex. Civ. App.—Austin 1973); Grohn v. Marquardt, 487 S.W.2d 214 (Tex. Civ. App. —San Antonio 1972), *error ref. n.r.e.*

31. 473 S.W.2d 460 (Tex. 1971).

32. 459 S.W.2d 238 (Tex. Civ. App.—Houston [1st Dist.] 1970).

no agreement to make the wills contractual. Each will clearly dealt with the spouse's own property and did not purport to deal with the other's. If wills are intended to be contractual, the draftsman is well advised to reflect the intention to contract in clear and precise language.

In contrast to the *Magids* case is *Danner v. McMahan*,[33] in which a husband and wife without issue executed a joint will which the parties agreed was contractual. In accordance with the wills each left a life estate to the other with power of disposition and with the provision that at the death of the survivor, "any of such estate then remaining" should pass half to designated heirs of the husband and half to designated heirs of the wife. Each named the other as independent executor or executrix. The husband died and the joint will was probated. Subsequently, the wife remarried, then executed another will specifying that it did not revoke the earlier joint will. At her death, her second husband became independent executor of her estate. A suit ensued between the successor administratrix of the first husband's estate and the independent executor of the wife's estate. The court held that at the death of the husband, the beneficiaries under the joint will were vested with remainders in the estate subject to the life estate in the wife. At the wife's death, her executor had the responsibility of administering and distributing the interests established under the joint will and the properties acquired by the wife subsequent to the death of the first husband which were the subject of disposition under the second will. Thus, in effect, an earlier joint will and a later second will were applicable to the wife's estate.

In *Dalton v. Pruett*[34] a joint, mutual, and contractual will provided for a life estate in the surviving spouse with remainders over to two designated beneficiaries. Between the date of death of the father and that of the mother, one of the son beneficiaries died leaving all his property to his wife. The court held that on the death of the father, the remainders vested in the beneficiaries subject only to the life estate in the mother. Therefore, when one of the sons died, his vested interest passed to his wife subject only to the life estate of the mother.

Community or Separate Property. In *McKinley v. McKinley*[35] the supreme court had before it the question of the community or separate character of two savings certificates with a savings and loan association. In the case of one of the certificates, the court determined that the husband's separate property owned before marriage could be traced to it; in the case of the other certificate, the evidence of additions and withdrawals was inconclusive so that the statutory presumption of community character was not overcome.

II. TRUSTS

Express trusts are subject to the Texas Trust Act; constructive trusts, on the other hand, arise by operation of equity in cases in which there has been fraud or overreaching.

33. 490 S.W.2d 213 (Tex. Civ. App.—Amarillo 1973), *error ref. n.r.e.*
34. 483 S.W.2d 926 (Tex. Civ. App.—Texarkana 1972).
35. 496 S.W.2d 540 (Tex. 1973).

Express Trusts. In *Lokey v. Texas Methodist Foundation*[36] a Methodist minister created a trust for the primary purpose of strengthening the ministry of the Methodist Church among people of Mexican, South American, or Central American backgrounds. Lokey sought to remove the foundation as trustee and to have the funds transferred to a special trust account at Southwestern University. The National Division of the Board of Missions intervened, contending that Lokey was in their employ and that he was not authorized to raise funds to create an independent foundation. The trial court and court of civil appeals[37] held that Lokey had no standing to sue and that the foundation held the funds for the benefit of the National Division of the Board of Missions. The supreme court reversed and remanded. Citing article 7425b-39,[38] the court held that Lokey was a person "actually interested" in the trust and was entitled to his day in court.

Westerfeld v. Huckaby[39] involved the doctrine of illusory trusts. In 1966 Virginia, a *feme sole*, executed two declarations of trust and quitclaimed to herself as trustee certain real property. The trusts provided that the properties in trust were for the use and benefit of Huckaby and that upon the settlor's death, the successor trustee was to deliver the properties outright to Huckaby. Huckaby was named successor trustee. Virginia reserved to herself the power to mortgage the properties, collect the income therefrom, and in her sole discretion, to accumulate the income or pay it to herself. She reserved the power to revoke at any time; a sale of the property was to constitute a revocation. The death of the beneficiary revoked the designation of him as beneficiary, and the settlor reserved the right to designate a new beneficiary; otherwise, the properties in trust reverted to her estate. By a five-four decision, the court sustained the validity of the trust. In *Land v. Marshall*[40] the court had held that a husband who transferred community property to a revocable trust had created an illusory trust and the trust was, therefore, invalid. The majority distinguished that case and the instant case, however, on the grounds that in *Land* the wife did not consent to the use of her property and, thus, the invalidation of the husband's transfer of the wife's half of the properties so frustrated the settlor's plans that the entire trust scheme was aborted.

Ford v. Ford[41] involved a reformation of an irrevocable trust which the settlors intended should conform to the Internal Revenue Code provisions dealing with so called "Clifford trusts."[42] The settlors intended the trusts to last in excess of ten years, but inadvertently provided for a termination when the beneficiary reached twenty-one years of age, which would be less

36. 479 S.W.2d 260 (Tex. 1972).
37. 468 S.W.2d 945 (Tex. Civ. App.—Austin 1971).
38. TEX. REV. CIV. STAT. ANN. art. 7425b-39 (1960).
39. 474 S.W.2d 189 (Tex. 1971).
40. 426 S.W.2d 841 (Tex. 1968).
41. 492 S.W.2d 376 (Tex. Civ. App.—Texarkana 1973), *error ref. n.r.e. See also* Comer v. El Paso Nat'l Bank, 498 S.W.2d 457 (Tex. Civ. App.—El Paso 1973) (incompetent's attempt to revoke trust enjoined); Austin Lake Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.* (trust did not fail for lack of cash consideration).
42. INT. REV. CODE of 1954, § 673.

than ten years from the trust's inception. On a clear showing of the intention of the settlors and the error in drafting, the court approved the reformation of the instrument.

In another case the court held that a beneficiary's action against a trustee and fidelity bondsman was properly transferred to Travis County where bond was filed.[43] And in an action against several trustees, venue lay not in the county of the trust's principal office but in the county of residence of a principal defendant.[44]

Constructive Trust. A sister whose husband suffered a stroke relied on her brother for advice and management of her estate. The jury found that the brother was acting in a fiduciary capacity and was a constructive trustee for his sister. She was entitled to an accounting and interest of sums taken by her brother and used for his own benefit.[45]

43. Morse v. Fisher, 493 S.W.2d 550 (Tex. Civ. App.—Houston [1st Dist.] 1973).

44. McCormick v. Hines, 498 S.W.2d 58 (Tex. Civ. App.—Amarillo 1973), *error dismissed.*

45. Oak Cliff Bank & Trust Co. v. Steenbergen, 497 S.W.2d 489 (Tex. Civ. App.—Waco 1973), *error ref. n.r.e. See also* Batten v. Batten, 497 S.W.2d 394 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*; Grunwald v. Grunwald, 487 S.W.2d 240 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*; Woodson v. Tyra, 486 S.W.2d 173 (Tex. Civ. App.—El Paso 1972).