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WILLS AND TRUSTS

by

Charles O. Galvin*

I. WILLS

Procedure.

Collateral Attack. In *Wycough v. Bennett*¹ Irvine and Bertha were married and had no children. Billy was the son of Irvine by a prior marriage, and James was the son of Bertha by a prior marriage. Irvine and Bertha acquired certain realty in Dallas County as community property. In May 1960 Irvine subscribed to a document purporting to be his last will in which he left all his property to Bertha. The document was improperly witnessed. Irvine died in 1964, and the purported will was not offered for probate within four years after his death.² Meanwhile, Bertha remarried and in 1969 conveyed the realty to her son, James. In the same year James filed Irvine's will for probate as a muniment of title.³ The probate court ordered the will admitted to probate and this judgment was not appealed. James then reconveyed the property to his mother. She thereafter died intestate, leaving only James as her heir-at-law.

Billy brought suit in the district court against James to partition the property and collaterally attacked the judgment of the probate court by contending that his father's will was a nullity. The trial court sustained James' motion for summary judgment, and the court of civil appeals affirmed. The district court held that the probate court had jurisdiction over the instrument offered for probate. Collateral attack is available as a remedy only when the court entering judgment has no jurisdiction.⁴ Thus, since the probate court had jurisdiction to admit the will to probate the only remedy available in this case was direct appeal of that order.

Bill of Review. *Sibert v. Devlin*⁵ involved the question of a bill of review to set aside a partition among heirs. James and Rosie McDowell were hus-

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1. 510 S.W.2d 112 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). See also *Stevens v. Douglass*, 505 S.W.2d 532 (Tex. 1974), holding that an order of the probate court constituted a final and appealable judgment.

2. TEX. PROB. CODE ANN. §§ 73, 74 (Supp. 1974) provide that under normal circumstances a will must be offered for probate within four years after the death of the testator.

3. A will may be probated after the expiration of four years from the date of death as a necessary link in a chain of title of property which passed under the will, so long as the party presenting the will as a muniment of title was not in default in presenting the will for probate before the expiration of the statutory period. See *Fortinberry v. Fortinberry*, 326 S.W.2d 717 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.).

4. Recently, in *Deen v. Kirk*, 508 S.W.2d 70 (Tex. 1974), the Texas Supreme Court has held that a collateral attack on a final judgment was improper where the court rendering judgment had jurisdiction to do so. See also *Hodges, Collateral Attacks on Judgments*, 41 TEXAS L. REV. 499, 505 (1963).

5. 508 S.W.2d 658 (Tex. Civ. App.—Texarkana 1974, no writ).

band and wife and had five children. They had acquired 148 acres of land as community property. James died intestate in 1918 and the five children acquired his half interest by descent and distribution, but the property was not divided. Rosie died in 1963 leaving a holographic will in which she provided that each of her five children would receive thirty acres, with two daughters to receive certain improved portions as their shares. The two daughters, Ola and Annie, filed their mother's will for probate in the county court and were appointed independent executrices on September 30, 1963. Two other children, Lanora and Aubie, filed a contest to the will in the county court. The county court denied the contest and ordered an equal division of the land into five parts with Ola and Annie to have the improvements on their portions. Lanora and Aubie gave notice of appeal from the judgment ordering partition but did not perfect the appeal. The commissioners appointed to make the partition divided the land into approximately five equal parts and awarded to Ola and Annie the improved parcels. Lanora and Aubie objected to the commissioner's report; they were overruled and perfected an appeal from the order approving the report to the district court.

Lanora and Aubie also commenced a *new* suit in the district court seeking to partition the acreage, contending, among other things, that the county court had no jurisdiction over the acreage which the five children had inherited from their father in 1918. This suit resulted in a new partition in unequal shares. Because of the illness of their attorney and a resulting mistake or accident, Ola and Annie and their brother Ruel failed to perfect an appeal from this judgment. Subsequently they filed a bill of review attacking the district court judgment and the bill of review was denied. The court of civil appeals reversed and granted the relief sought by the bill of review.

Section 386 of the Texas Probate Code⁶ authorizes an action of partition in the county court if a person has a joint interest with the estate of a decedent. The county court ordered such a partition from which no appeal was perfected. The appeal from the order approving the commissioner's partition on an equal basis entitled the district court to consider only issues touching on the approval of the commissioner's report. The district court, therefore, had no authority to repartition the land.

Equitable Conversion. In *Lampman v. Sledge*⁷ plaintiff obtained a judgment against Lowe in 1970, which was recorded in the Abstract of Judgment records on February 24, 1971. Coatney was a feme sole who on February 12, 1971, entered into a contract of sale with Sledge covering a certain lot. However, this contract was not to become effective unless and until Sledge obtained adequate financing. On February 22, 1971, before the contract of sale was closed, Coatney died, leaving a will dated February 6, 1971, in which she devised one-fourth of her estate to Lowe. The will directed the

6. TEX. PROB. CODE ANN. § 386 (1956) provides in part: "Any person having a joint interest with the estate of a decedent in any property, real or personal, may make application to the court from which letters testamentary . . . have been granted thereon to have a partition thereof . . ."

7. 502 S.W.2d 957 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).

executor "to reduce all properties to cash before any distribution." The executor delivered to Sledge a deed to the lot, but Lampman contended that Lowe owned a one-fourth interest in the lot under Coatney's will, and that Lampman's judgment lien applied to the interest in the lot.

The court held that the contract, which was subject to a condition precedent that the purchaser obtain adequate financing, did not work an equitable conversion when executed. Nevertheless, the court held for Sledge upon the rationale that the will directed a reduction of all properties to cash so that the lot in question was equitably converted into cash and was not an interest in realty devised to Lowe to which the lien could attach.

Claims. *Collins v. State*⁸ involved the question of the proper filing of a claim against the estate of a decedent. Two state hospitals filed for reimbursement of costs for the support and maintenance of the deceased. As to issues presented in the case, the court held, among other things, (1) that the Texas Tuberculosis Code⁹ section 9(2)(b) authorized such a suit, (2) that state's counsel properly represented the interests of the hospitals, (3) that the certificate of the head of the hospital was sufficient evidence of the amount due and there was no requirement of a sworn account, (4) that the costs were not shown to be other than the actual costs to the state, and (5) that in the case of an independent administration suit may be commenced against the estate more than ninety days after the claim is rejected.¹⁰

In another case involving claims the court enunciated the rule that in the case of a power of sale in a deed of trust, a sale under such power after the mortgagor's death may be set aside by an administrator if administration is opened within four years of the mortgagor's death.¹¹

Timeliness of Probate. In *Brown v. Byrd*¹² Elizabeth died in May 1940, survived by three children. In April 1944 her holographic will and first codicil were discovered, but were not offered for probate until December 5, 1973. The question involved the application of Probate Code section 73(a) which provides that a will may not be admitted to probate after the lapse of four years from the death of the testator unless the party applying was not in default. In the instant case the proponent claimed that she learned of the will just prior to the expiration of four years after the death of the testatrix but she was then in California. She returned to Lufkin, Texas, in 1946 and remained until 1956. In addition, the proponent contended that she relied on a verbal family agreement, that she was not well educated and relied on a non-lawyer officer of the bank to do whatever was necessary, and that she was ignorant of what probate proceedings were. The county court admitted

8. 506 S.W.2d 293 (Tex. Civ. App.—San Antonio 1974, no writ).

9. TEX. REV. CIV. STAT. ANN. art. 4477-11 (1966).

10. TEX. PROB. CODE ANN. § 313 (1956) provides that when a claim has been rejected, the claimant must institute suit within 90 days after such rejection or the claim is barred. The supreme court has held, however, that this provision is not applicable to claims in an independent administration. See *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968).

11. *Delley v. Unknown Stockholders of the Brotherly & Sisterly Club of Christ, Inc.*, 509 S.W.2d 709 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); accord, *Pearce v. Stokes*, 155 Tex. 564, 291 S.W.2d 309 (1956).

12. 512 S.W.2d 753, 512 S.W.2d 758 (Tex. Civ. App.—Tyler 1974, no writ).

the will to probate, but the court of civil appeals reversed, holding that the proponent's reasons were not of such substance as to excuse her delay in filing the will thirty-three years after the death of the testatrix.

*Lost Will. Mingo v. Mingo*¹³ concerned an unproduced written will. In 1953 an attorney prepared a will for the testatrix and retained in his office a conformed copy of the original. The testatrix died in 1972 and the original could not be found. It was last seen in the custody of the testatrix seven or eight years before her death. Accordingly, the proponent had the burden of rebutting the presumption of revocation.¹⁴ Although there was considerable testimony about the decedent and her family, there was no testimony that shed any light on the issue of revocation. Thus, the proponent failed to overcome the presumption.

Defective Pleadings—Testamentary Capacity Issue. In *Melady v. Coulter*¹⁵ a will was admitted to probate in the county court and the contestants appealed. In the district court the jury answered two special issues finding first, that the testatrix did not possess testamentary capacity, and second, that she was induced to make the will because of undue influence of her surviving husband. The district court denied probate, and the proponents appealed. The court of civil appeals reversed and remanded. The court held that the testamentary capacity issue had not been raised in the county court and it was not permissible to raise the issue in the district court.¹⁶

Turning to the merits and more specifically the issue of undue influence, the court found that the testatrix had executed the will three days before her death from cancer. Her husband had made physical assaults on her over a period of years prior to her death, and there were four divorce suits filed in which they were parties, two of which went to final judgment. However, they were remarried at the time of her death. The husband discouraged visits by the relatives of his wife, and the lawyer who prepared the will represented the husband in one or more of his divorce actions. His wife had told the nurse she did not want to sign the will but she would do so.

Despite all these facts the court of civil appeals found no *direct* threats of coercion at the time the will was signed and described the evidence as so circumstantial as to arouse little more than speculation and suspicion.

Foreign Will—Dead Man's Statute. In *Holt v. Drake*¹⁷ the executor of the decedent's estate filed the decedent's will in New Hampshire, contending that the decedent was a resident of that state. The will was offered in Texas

13. 507 S.W.2d 310 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

14. The generally recognized rule is that where a will was in the possession of the testator or when he had ready access to it when last seen, failure to produce the will after his death raises the presumption the testator destroyed it with the intention to revoke it, and the burden to prove to the contrary is on the proponent. See *Bailey v. Bailey*, 171 S.W.2d 162, 165 (Tex. Civ. App.—Amarillo 1943, no writ); *accord, McElroy v. Phink*, 97 Tex. 147, 76 S.W. 753, *motion for rehearing denied*, 77 S.W. 1025 (1903); *Citizens First Nat'l Bank v. Rushing*, 433 S.W.2d 741 (Tex. Civ. App.—Tyler 1968, no writ).

15. 504 S.W.2d 524 (Tex. Civ. App.—Texarkana 1973, no writ).

16. For additional support for this proposition see *Harkey v. Texas Employers' Ins. Ass'n*, 146 Tex. 504, 208 S.W.2d 919 (1948); *Morton v. Humber*, 399 S.W.2d 831 (Tex. Civ. App.—Eastland 1966, no writ).

17. 505 S.W.2d 650 (Tex. Civ. App.—Eastland 1974, no writ).

for probate as a foreign will. The executor testified as to conversations he had with the deceased, and the ancillary administratrix objected under the Dead Man's Statute.¹⁸ The trial court overruled the objection. The court of civil appeals reversed on the grounds that the testimony of the executor was prohibited under the statute and the objection should have been sustained.

Conflict of Interest—Coexecutors. In *7-Up Bottling Co. v. Capital National Bank*¹⁹ the bank and one Kuempel were independent coexecutors of the estate of Knebel, a stockholder in the bottling company. Kuempel was also an officer, director, and shareholder of the corporation. Pursuant to an agreement with the deceased the bottling company sought to purchase the stock of the deceased and a value was determined by the bank's trust department.

Among other things the sale under the agreement was voided under Texas Probate Code section 352. Because Kuempel was acting as coexecutor of the estate and also as principal stockholder of the bottling company, the statute specifically proscribes such a transaction, however much in good faith it may be.²⁰

Election. During the period under review the case of *Turcotte v. Trevino*²¹ was decided by the court of civil appeals at Corpus Christi. This is one of numerous cases arising out of the contest of the highly publicized will of Sarita K. East. Mrs. East died in 1971, a resident of Nueces County, possessed of an estate valued at twenty-nine million dollars. Mrs. East had no children, and there were numerous parties who claimed an interest in her estate under either of two wills and codicils thereto: a 1948 will and a 1960 will. Seven separate appeals were perfected out of the extensive litigation. This particular case turned on the question of whether or not Edgar Turcotte, a first cousin, who was appointed executor under the 1960 will had accepted such benefits under the will so as to estop him from contesting the 1960 will. The court of civil appeals remanded with directions. The fact that he received an executor's fee and salary was a proper cost of administration and not a benefit. Moreover, the court held that Turcotte did not have sufficient knowledge of all his rights so as to have made a conscious election of benefits.

Venue. In *Deason v. Rogers*²² plaintiffs filed suit in the district court in Aransas County against William Deason who was independent executor and

18. TEX. REV. CIV. STAT. ANN. art. 3716 (1926). It is now clearly settled that the Dead Man's Statute is applicable in actions to probate wills. *See, e.g., Thomason v. Burch*, 223 S.W.2d 320, 323 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.).

19. 505 S.W.2d 624 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.). *See* companion case, *Knebel v. Capital Nat'l Bank*, 505 S.W.2d 628 (Tex. Civ. App.—Austin 1974, writ granted).

20. TEX. PROB. CODE ANN. § 352 (1956) provides:

The personal representative of an estate shall not become the purchaser, directly or indirectly, of any property of the estate sold by him, or by any co-representative if one be acting. If any such purchase is made, any person interested in the estate may file a written complaint with the court [and] . . . such sale shall be by the court declared void, and shall be set aside by the court and the property ordered to be reconveyed to the estate.

21. 499 S.W.2d 705 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.).

22. 499 S.W.2d 14 (Tex. Civ. App.—Corpus Christi 1973, writ dism'd).

sole beneficiary under the will of B.F. Deason. Aransas County was the county in which the estate was administered. William Deason filed a plea of privilege to be sued in San Patricio County, the county of his residence.

Article 1995(6) of the Texas Revised Civil Statutes provides that a suit against an executor may be brought in the county in which such estate is administered. However, in this case Deason was sued in his individual capacity so that subdivision 6 was inapplicable. Nevertheless, subsection 11 was held to substantiate venue in Aransas County because it provides that if the "defendant has inherited an estate concerning which the suit is commenced, suit may be brought in the county where such estate principally lies." The court construed "inherited" as meaning an estate taken under a will²³ so that the venue under the statute was properly in Aransas County.

Indispensable Parties. *Crickmer v. King*²⁴ was a suit for declaratory judgment to construe the joint and mutual wills of a husband and wife who left their properties to each other and further provided that should they die "simultaneously, or approximately so" their property would vest in "the children of either of us." If the deaths were not simultaneous or approximately so, the properties were left undisposed of, and would vest by the laws of descent and distribution. The wife died on January 28, 1973, and the husband died of unrelated causes on February 4, 1973. The independent executor of the joint will filed a suit seeking a construction of the "simultaneous death" provision to determine if the deaths came within that provision. Citations were not issued nor served on the children listed in the will nor on the heirs of the husband, who was the last to die. The court of civil appeals held that all these people were indispensable parties to the declaratory judgment action and, accordingly, reversed and remanded for a new trial.²⁵ It should be noted that the court based its holding primarily upon the language of the Uniform Declaratory Judgment Act²⁶ which provides in section 11 that all parties who have or claim an interest which would be affected by the declaration *shall be made parties*. This type of statutory language has been held to have a mandatory connotation,²⁷ and thus the act seems clearly to indicate that parties possessing property interests affected by the will must be joined as parties to an action seeking a construction of the provisions of the will. Were there no such statutory mandate the joinder of additional parties would be left to the discretion of the trial judge pursuant to rule 39 of

23. *Pacheco v. Fernandez*, 277 S.W. 197 (Tex. Civ. App.—San Antonio 1925, writ ref'd).

24. 507 S.W.2d 314 (Tex. Civ. App.—Texarkana 1974, no writ).

25. In its holding the court adhered to the general rule that all parties whose interest in the property will be affected by the will are indispensable parties to an action to construe the will. See *Schoenhals v. Schoenhals*, 366 S.W.2d 594 (Tex. Civ. App.—Amarillo 1963, no writ). This rule has been applied in Texas to devisees and legatees named in the will, see *Kelsey v. Hill*, 433 S.W.2d 241 (Tex. Civ. App.—Texarkana 1968, no writ), and to heirs at law in other jurisdictions, see *City Trust Co. v. Bulkley*, 151 Conn. 598, 201 A.2d 196 (1964); *City of St. Louis v. McAllister*, 302 Mo. 152, 257 S.W. 425 (1923). Thus, since this case requires heirs at law to be brought in as indispensable parties it seems to harmonize Texas law with that which has been long established in other jurisdictions.

26. TEX. REV. CIV. STAT. ANN. art. 2524-1, § 11 (1965).

27. *State Bd. of Ins. v. Betts*, 158 Tex. 612, 315 S.W.2d 279 (1958).

the Texas Rules of Civil Procedure. However, it has been recently emphasized by the supreme court that when a rule of the court conflicts with a legislative enactment, the rule must yield.²⁸

What Constitutes a Valid Will. The cases continue to demonstrate how carefully the requirements of the statutes must be complied with. In *In re Estate of Brown*²⁹ the testatrix executed a formal and witnessed will in 1965. Following her death in 1970 this will was duly probated without contest. Thereafter one Josephine Benton filed application for probate of a written instrument as a codicil which was allegedly executed after the will of 1965.³⁰ The writing was a cryptic note entirely in the handwriting of the decedent and written on an envelope in which there was a certificate of deposit. Extrinsic evidence was admitted to explain the testatrix's intention with respect to the certificate. The court sustained the writing as a valid holographic codicil, and this holding was affirmed on appeal.

*Cherry v. Reed*³¹ involved a writing of two pages which contained a self-proving affidavit in conformity with section 59 of the Texas Probate Code. This affidavit was properly completed, but the will itself had no signatures or blanks for signatures for the testatrix and the witnesses. The document was denied probate as failing to comply with the requirements for a valid will. The reasoning which supports this strict application of the statutory requirements for execution is that a testamentary document must first be a valid will before the self-proving clause has any effect.³² Conversely, a self-proving affidavit is not an instrument executed with testamentary intent and thus even though it is properly executed it can lend no validity to an otherwise improperly executed will.

Construction. *City of Austin v. Austin National Bank*³³ concerned a holographic will which provided in part that all of the income from the remainder of the decedent's estate was to go to the Humane Society. Elsewhere in the will the testatrix provided that she wanted the Austin National Bank to administer her estate. The supreme court held the trust insufficient because "the will does not manifest a clear intent to separate the income from the corpus nor to create a trust."³⁴ On another issue the court affirmed the judgment of the lower courts that a gift of land to the city of Austin "as a park to be used for no other purpose—not to be used by any other organization—otherwise it shall be given to . . . Humane Society . . ." was a gift of land on condition subsequent.

In *Morris v. Pickett*³⁵ paragraph 8 of the testatrix's will provided that stock dividends or division of shares should go to her residuary estate except as

28. *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971); *accord*, *Missouri, K. & T. Ry. v. Beasley*, 106 Tex. 160, 155 S.W. 183 (1913).

29. 507 S.W.2d 801 (Tex. Civ. App.—Dallas 1974, no writ).

30. Under TEX. PROB. CODE ANN. § 63 (1956) a subsequent will or codicil revokes all previous wills.

31. 512 S.W.2d 705 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); *accord*, *In re Estate of Pettengill*, 508 S.W.2d 463 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

32. *Boren v. Boren*, 402 S.W.2d 728, 729 (Tex. 1966).

33. 503 S.W.2d 759 (Tex. 1973).

34. *Id.* at 760.

35. 503 S.W.2d 344 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

otherwise provided. In paragraph 11 she provided that stock splits and stock dividends belonged to the beneficiary to whom the original shares were given. The court determined that these provisions were effective to pass to the beneficiaries of the original stock a stock split approved before the testatrix executed her will but distributed after such execution and before the testatrix's death.

In *Bryan v. Melvin*³⁶ under the wills and codicils of George Adams and Mary Adams the residue of their estates was left to their three children and a granddaughter, Ann, the only child of a deceased son, Barton. The instruments provided that amounts owing the testators "as evidenced by notes or written obligations" were forgiven. During his lifetime George Adams advanced various sums of money to his children and kept open account books reflecting these amounts. Barton, the deceased son, owed his father \$73,000, of which \$50,000 was evidenced by a note. Ann, Barton's only child and sole heir, had no obligation to her grandparents, George and Mary. The administrator of the estates of George and Mary Adams contended that the testators intended that Ann should repay the \$73,000 and that the account books kept by George constituted written obligations.

A primary rule of construction of wills is to ascertain and follow the intention of the testator³⁷ as evidenced by the language of the will itself.³⁸ The court held that the wills unambiguously forgave the entire indebtedness of Ann because she never executed a note nor owed anything to her grandparents. In addition the court held that the accounts kept of her father's indebtedness could not be considered written obligations.

*Capers v. Jackson*³⁹ held that a wife had the power to convey the entire community estate under a husband's will leaving property to the wife and the remainder to "her heirs by me" "to manage, sell or dispose of as she may wish or see proper." The court reasoned that a conveyance to a living person's heirs indicates that the primary devisee, in this case the wife, should have complete control over the property during her lifetime, since a living person cannot have heirs until his death.⁴⁰

*Deegan v. Frost National Bank*⁴¹ construed the following provisions in a holographic will as leaving a life estate despite the fact that life estates in personalty are not favored in the law: "I give my sister . . . all personal belongings such as car, jewelry . . . and cash of all nature. After the death of my sister . . . I wish my entire estate . . . to go to my mother . . ." ⁴²

*Hill v. El Paso National Bank*⁴³ presented a construction question as to

36. 499 S.W.2d 17 (Tex. Civ. App.—Waco 1973, no writ).

37. See, e.g., *Republic Nat'l Bank v. Fredericks*, 155 Tex. 79, 283 S.W.2d 39 (1955); *Hobson v. Shelton*, 302 S.W.2d 268 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.).

38. See, e.g., *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971); *Rekdahl v. Long*, 417 S.W.2d 387 (Tex. 1967).

39. 503 S.W.2d 681 (Tex. Civ. App.—Eastland 1973, no writ).

40. This rationale is in harmony with the generally accepted common law view which has been adhered to by the Supreme Court of Texas. See *Templeman v. McFerrin*, 102 Tex. 530, 120 S.W. 167 (1909).

41. 505 S.W.2d 428 (Tex. Civ. App.—San Antonio 1974, writ ref'd). See also *Bergin v. Bergin*, 159 Tex. 83, 315 S.W.2d 943 (1958).

42. 505 S.W.2d at 430.

43. 511 S.W.2d 421 (Tex. Civ. App.—El Paso 1974, no writ).

allocation of shares. The decedent provided for the distribution of his estate as follows: Paragraph A of section 5.06 of the will provided for 30% to go to an educational trust but not to exceed \$60,000. Paragraph B provided for 10% to go outright, and under paragraph C the "balance and remaining" 60% was allocated to designated relatives. Under section 5.11 of the will any undistributed remainder was to go to the educational trust. The estate was about \$516,000. Thus, the 30% to be distributed in accordance with the provisions of paragraph A would be about \$155,000, and of that amount, \$60,000 would go into the educational trust. The problem arose concerning the \$95,000 excess over the \$60,000 limit provided in paragraph A.

The attorney general contended that the \$95,000 left over from paragraph A was covered by section 5.11 and passed to the educational trust. The individual beneficiaries contended that the specific limitation of paragraph A precluded more than \$60,000 passing to the educational trust so that the "balance" was allocated under paragraph C. The court of civil appeals sustained this latter interpretation, reasoning that the enforcement of the specific limitation of \$60,000 was more in harmony with the whole scheme of the will.⁴⁴ Although there were inconsistencies in the will provisions, the court held that the specific dollar limitation should take precedence over other will provisions couched in more general terms. Thus, the "balance" after covering the bequests in paragraphs A and B would include any surplus left over from A, all of which was distributable under C.

II. TRUSTS

Removal—Breach of Fiduciary Duty. *Yturri v. Yturri*⁴⁵ concerned the removal of trustees of a testamentary trust. One of the trustees had attempted to make a sale of property to the trust at a profit to himself. His sister, a remainderman under the trust, discovered the transaction and because of her protests, the transaction was not closed. The sister sought to remove her brother, her mother, and another brother, who were co-trustees, because the latter two by their inaction had permitted the breach of fiduciary duty by the former. From a judgment in favor of the trustee the sister appealed. The court of civil appeals reversed and remanded, holding that the fact that the trustee's plan was frustrated did not purify his actions in attempting to profit at the expense of the trust.

Another similar case⁴⁶ involved a breach of fiduciary duty by an individual trustee who was also an officer of a bank in which the trustees had a checking account. It has been established in Texas that a bank is liable for a trustee's wrongful acts concerning a trust account only "if the bank has notice or

44. See *McMullen v. Sims*, 37 S.W.2d 141 (Tex. Comm'n App. 1931, holding approved).

45. 504 S.W.2d 809 (Tex. Civ. App.—San Antonio 1973, no writ).

46. *Texas Bank & Trust v. Helmcamp*, 506 S.W.2d 667 (Tex. Civ. App.—Fort Worth 1974, no writ). See also *McCormick v. Hines*, 503 S.W.2d 333 (Tex. Civ. App.—Amarillo 1973, no writ), in which plaintiffs sought removal of trustees and appointment of successors. The removal issue was determined but the succession issue was pending when an appeal was taken. The court dismissed the appeal because the trial court's judgment was not final.

knowledge that a breach of the trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud"⁴⁷ Following this precept, the court held that the bank was not liable because the bank had no knowledge of the transaction,⁴⁸ derived no gains therefrom, and had no powers to act as trustee.

Constructive Trust. A constructive trust arises in cases where one purchases property with funds wrongfully taken from another. The trust arises in favor of the one supplying the funds. Thus, in *Searle-Taylor Machinery Co. v. Brown Oil Tools*⁴⁹ Brown authorized Searle-Taylor to purchase equipment for Brown and Brown supplied the money. He then authorized Searle-Taylor to sell the equipment. Searle-Taylor did sell the equipment but made no proper accounting of the funds. Among other things the court decreed that a constructive trust existed on automobiles and real estate held in the name of Searle-Taylor but purchased with funds belonging to Brown.

Estate Tax. In *National Bank of Commerce v. United States*⁵⁰ a testator provided in his will for a testamentary trust in which his wife had a life interest and the remainder was left to charity. The trust provisions permitted the trustee to invade corpus for the benefit of the surviving wife. The issue concerned whether or not the charitable remainder could be ascertained for estate tax deduction purposes. The estate contended that the power of invasion required a balancing of interests between the individual life tenant and charitable remainder so that such invasion would be governed by fiduciary standards. However, the court construed Texas law as essentially a hands-off policy with respect to court interference with the trustee's exercise of discretion in the absence of fraud, misconduct, or clear abuse of discretion.⁵¹ Therefore, there was no way to determine how much the corpus would be invaded and, accordingly, no way to determine the value of the remainder passing to charity. Thus, no charitable deduction was allowed.

47. *Wichita Royalty Co. v. City Nat'l Bank*, 127 Tex. 158, 170, 89 S.W.2d 394, 400 (1935), quoting *Gray v. Johnston*, L.R. 3 Eng. & Ir. App. 1 (1868); *accord*, *Quannah, A. & P. Ry. v. Wichita State Bank & Trust Co.*, 127 Tex. 407, 412, 93 S.W.2d 701, 705 (1936).

48. The court rejected the appellee's contention that notice of the misuse of funds could be imputed to the bank because its officer had knowledge of the transaction. Rather, the court held that notice to an officer of a bank received outside the scope of his duties as a bank officer is not imputed to the bank. 506 S.W.2d at 669. *See also O'Brien v. First State Bank & Trust Co.*, 241 S.W. 556 (Tex. Civ. App.—San Antonio 1922, writ *dism'd*).

49. 512 S.W.2d 335 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ *ref'd n.r.e.*). *See Marshall v. Marshall*, 511 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ), in which a divorced husband was deemed constructive trustee of disability portion of pension paid for with community funds. *See also Dobbs v. Navarro*, 506 S.W.2d 671 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); *Dairy Queen v. Quinn*, 502 S.W.2d 889 (Tex. Civ. App.—Dallas 1973, writ *ref'd n.r.e.*), holding that oral agreement to reconvey property violated Statute of Frauds and constructive trust could not be imposed. *Marsh v. Greyhound Lines, Inc.*, 488 F.2d 278 (5th Cir. 1974) (pension trustees did not act in bad faith in declining disability retirement benefits).

50. 369 F. Supp. 990 (W.D. Tex. 1973).

51. *See Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ *ref'd n.r.e.*).