



January 1967

Wills and Trusts

Charles O. Galvin

Recommended Citation

Charles O. Galvin, *Wills and Trusts*, 21 SW L.J. 16 (1967)
<https://scholar.smu.edu/smulr/vol21/iss1/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

WILLS AND TRUSTS

by

Charles O. Galvin*

IT IS interesting to observe the increase in litigation in these fields of the law. Prior to World War II, the number of consultants engaged in estate planning in Texas was relatively small. There were few large trust departments even in the metropolitan areas. Indeed, it was not until 1943 that a statute relating to trusts was adopted.¹ In the intervening period, however, the rise in property values, the greater sophistication of property owners about estate planning, and the vastly increased amount of literature generally disseminated about effective family and business arrangements have all impelled greater activity in this area. As the wills and trust instruments of the last twenty-five years continue to mature, we will see more controversies boiling up through the lower courts and courts of civil appeals to the Texas Supreme Court involving questions of construction, powers of appointment, contingent and vested interests, breach of fiduciary obligations, and so on. The cases in the year under review are portentous of some of the more difficult issues yet to be litigated.

I. FORMALITIES OF EXECUTION

From the time of the Statute of Wills² the making of a will has been deemed a privilege. In order to exercise this privilege the testator must observe the formalities of execution with an abundance of care. In no other area of the law are the rituals enforced with greater strictness. Whether in the small county seat law office, the large offices of an urban law firm, the hospital ward, or the home, counsel is always advised to cause the execution of the will to proceed with the greatest solemnity and gravity. Under current Texas practice, there are usually two distinct stages in the ceremony: first, the declaration by the testator that he is signing his will, his actual signing before the witnesses, and the signing by the witnesses;³ second, the execution by the testator and witnesses of the self-proving affidavit.⁴ The first is necessary; the second is optional, relating as it does to matters of proof only.

*Boren v. Boren*⁵ deals with the interrelationship of the self-proving affi-

* 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 Texas Trust Act, TEX. REV. CIV. STAT. ANN. art. 7425b (1965).

² 1540, 32 Hen. 8, c. 1.

³ TEX. PROB. CODE ANN. § 59 (1965).

⁴ *Ibid.*

⁵ 402 S.W.2d 728 (Tex. 1966), 20 Sw. L.J. 426; *accord*, McGrew v. Bartlett, 387 S.W.2d 702 (Tex. Civ. App. 1965) *error ref.* (will held a nullity because signatures of both testator and witnesses appeared only on self-proving provisions).

davit with the will. The decedent signed a typewritten document which purported to be his last will. The names of the witnesses were not subscribed; however, attached to the will was a self-proving affidavit with the signatures of the testator and the witnesses, and the notary's acknowledgment. Although the affidavit recited that the witnesses did sign the document purporting to be the last will, they had in fact not done so. Reversing a decision of the court of civil appeals which had approved the document as a will on the grounds that there was *substantial* compliance with the formalities, the court held that a testamentary document, to be self-proved, must first be a will. Since the document was not a will, the entire instrument was a nullity.

Codicils must be executed with the same formalities attendant upon the execution of the original will. In a civil appeals case⁶ the purported codicil stated in part: "I have a will made out wholly to Floy. Thats [sic] all right but I want the stock dividends, farm income, etc divided with Alva. . . ." The court held that this merely expressed a wish or desire and did not give anything to any specific person. Because of the precatory language and the ambiguity created thereby, the instrument was not operative as a codicil.⁷

When a valid will has been admitted into court, the proponent still has the burden of showing that the will has not been revoked.⁸ As in the case of the execution of a will, revocation must be accomplished in one of the ways provided in the statute. In a civil appeals case⁹ the testator's daughter, in opposition to the proponents of the will, submitted an affidavit that her father had told her that he had willed property to a sixteen-year old girl. The court held that this was not sufficient to defeat the proponent's showing of non-revocation.

II. PROCEDURE

Receivership. A trustee held a substantial block of stock in a corporation controlled by residuary beneficiaries of the trust. The residuary beneficiaries alleged mismanagement and misconduct. Although receivership is regarded as a harsh remedy, the court of civil appeals could not find that the trial judge on all the facts had abused his discretion in appointing a receiver.¹⁰ Nor would an injunction in the circumstances have been less onerous.¹¹

Bill of Review. A decedent died intestate, and an administrator was

⁶ *Fitzgerald v. Agnew*, 402 S.W.2d 811 (Tex. Civ. App. 1966).

⁷ *Accord*, *Hinson v. Hinson*, 154 Tex. 561, 280 S.W.2d 731 (1955).

⁸ *Brackenridge v. Roberts*, 114 Tex. 418, 270 S.W. 1001 (1925).

⁹ *Betts v. Betts*, 395 S.W.2d 673 (Tex. Civ. App. 1965).

¹⁰ *Pfeiffer v. Pfeiffer*, 394 S.W.2d 679 (Tex. Civ. App. 1965) *error dismissed*.

¹¹ *Id.* at 681.

appointed by the probate court. It was established that the court erred in failing to require commissioners to partition real estate and in failing to appoint attorneys *ad litem* to represent unknown heirs. The appellant maintained that the orders were void, and hence that subsequent orders were pertinent for the running of the statute of limitations. However, the original orders were found to be merely *voidable*; thus the two-year period within which a bill of review could be filed began with the date of such orders. On this ground the civil appeals court¹² held that the filing of the bill was not timely since more than two years had elapsed since the date of such orders.

Allowance of Attorneys' Fees. Prior to the adoption of section 243 of the Probate Code there was no Texas statute expressly providing for the allowance of attorneys' fees and other expenses incurred by the executor in probating or defending the will. In *Salmon v. Salmon*¹³ a case of first impression construing section 243 with respect to whether or not the payment of a contingent fee is authorized, the court held that "reasonable attorney's fees" in the statute means fees *certain* and not fees contingent.¹⁴ The court also held that the fee was a charge against the residue and should not be apportioned among the parties in proportion as they gained from the litigation.¹⁵

Executors and Administrators. The use of the independent executor without bond is quite common in Texas as contrasted with the more usual practice in other jurisdictions of administration under court supervision.¹⁶ Cases during the year determined that the probate court does not have authority to remove an independent executor,¹⁷ even though he is accused

¹² *Parkins v. Martin*, 395 S.W.2d 862 (Tex. Civ. App. 1965) *error ref. n.r.e.*; TEX. PROB. CODE ANN. § 31 (1965).

¹³ 395 S.W.2d 29 (Tex. 1965), 19 Sw. L.J. 866.

¹⁴ *Id.* at 32. Since the evidence dealt with what a reasonable contingent fee would be for the services, the error could not be cured by remittitur, but only by retrial. For other recent cases involving attorneys' fees, see *Hartman v. Crain*, 398 S.W.2d 387 (Tex. Civ. App. 1966); *Kitchens v. Culhane*, 398 S.W.2d 165 (Tex. Civ. App. 1965) *error ref. n.r.e.*; *Jacobs v. United States*, 248 F. Supp. 695 (E.D. Tex. 1965) (fees and expenses must benefit estate as a whole to be deductible for federal estate tax purposes).

¹⁵ One Raymond Salmon contended that he had not entered into a family settlement agreement which would eliminate the probate of the will. The dissenting judges were of the view that, since the litigation was concerned with the question of whether or not there was an agreement, no fees should be charged to the estate but rather to the individuals as in any other contract action. 395 S.W.2d at 33. See *Plummer v. Durden*, 401 S.W.2d 374 (Tex. Civ. App. 1966) (attorney's fees not chargeable against widow who elected not to take under husband's will).

¹⁶ TEX. PROB. CODE ANN. § 3q (1965). Statutes in Arizona, Idaho, Puerto Rico, Texas, and Washington provide for administration without supervision of the court. Only in Washington is the practice generally followed. The term "independent administration" used in Texas is synonymous with "administration under a nonintervention will" used elsewhere. See Marschall, *Independent Administration of Decedents' Estates*, 33 TEXAS L. REV. 95 (1954).

¹⁷ *Bell v. Still*, 403 S.W.2d 353 (Tex. 1966). The case leaves open the question of whether or not the district court has the power of removal. The court suggests the need for legislative action in this area. Section 152 permits the closing of independent administration upon showing of no further need therefor.

of gross mismanagement,¹⁸ and that independent administration may not be closed under section 152 by a purchaser from a distributee, but only by a distributee.¹⁹ In the case of administration under the auspices of the court one case held that to protect the orderly administration of estates an administrator against whom a removal action is taken should remain as administrator while the case is on appeal.²⁰

Proving a Lost Will. When, in one case,²¹ a holographic will dated July 1962, was admitted to probate, the testator's children filed a petition to set aside the July will on the grounds that it was revoked by a later holographic will dated November 1962. The November will could not be produced, and the trial court excluded testimony of three of the testator's children, who would have testified as to the lost will, on the grounds that such testimony violated the Dead Man's Statute.²²

In a case of first impression in Texas, the court of civil appeals held that evidence as to the contents of a lost instrument executed by a deceased person is admissible if the testimony as to the contents is not based on a transaction with the deceased. In the instant case the proffered testimony did not relate to a *transaction* with the deceased,²³ but only to the contents of a document as the witnesses remembered it.

The "Open Mine" Doctrine. The general Texas rule is that if at the time mineral property vests in the life tenant, the property is not under lease, then any bonus and royalty subsequently received must be held as corpus with only the income therefrom accruing to the remaindermen.²⁴ Discussing this point,²⁵ a civil appeals court approved this general rule; however,

¹⁸ *Cf.*, *Ware v. Ware*, 403 S.W.2d 227 (Tex. Civ. App. 1966). There, the county court removed an independent executor on February 4. On February 24 the independent executor moved to set aside the judgment. Other executors contended that the independent executor who was removed had not given notice of appeal within ten days, had not filed an appeal bond nor designated contents of a transcript on appeal. On March 23 the county court reinstated the independent executor. On appeal, the district court held that the county court did not have authority to reinstate. The independent executor claimed that the county court's action was void since an independent executor could not be removed by a county court except for failure to give bond. The court of civil appeals stated that TEX. PROB. CODE ANN. § 222 provides otherwise, and that the removed party, by failing to avail himself of proper remedies within the time required, could not be reinstated by a county court. His action did not constitute a bill of review of the judgment removing him.

¹⁹ *Carter v. Brady*, 400 S.W.2d 621 (Tex. Civ. App. 1966). See note 18 *supra*.

²⁰ *Bywaters v. Joyce*, 399 S.W.2d 832 (Tex. Civ. App. 1966). See *Farley v. Cook*, 402 S.W.2d 779 (Tex. Civ. App. 1966). See also *Turcotte v. Alice Nat'l Bank*, 402 S.W.2d 894 (Tex. 1966) (appeal from injunction granted by county court should have been to court of civil appeals, not district court).

²¹ *Roberts v. Roberts*, 405 S.W.2d 211 (Tex. Civ. App. 1966) *error ref. n.r.c.* For further discussion see Ray, *Evidence*, this Survey at footnote 1.

²² TEX. REV. CIV. STAT. ANN. art. 3716 (1965).

²³ *Cf.*, *Martin v. McAdams*, 87 Tex. 225, 27 S.W. 255 (1894); Walker, *The Dead Man's Statute*, 27 TEXAS BAR J. 315 (1964).

²⁴ *Youngman v. Shuler*, 155 Tex. 437, 288 S.W.2d 495 (1956); *Mitchell v. Mitchell*, 151 Tex. 1, 244 S.W.2d 803 (1951).

²⁵ *Hamilton v. Clyde*, 405 S.W.2d 850 (Tex. Civ. App. 1966), *error granted*, 10 Tex. Sup. Ct. J. 139 (1966). For further discussion see Flittie, *Oil and Gas*, this Survey at footnote 40.

the result is confusing because the court held that bonuses and royalties, which seem to have accrued from properties that were "open" at the inception of the life estate, were the property of the remaindermen. The supreme court has granted the application for writ of error on the "open mine" question,²⁶ and subsequent developments in the case should be watched. This case, like so many with similar facts, suggests the need for the greatest precision in drafting when dealing with mineral-bearing, or potentially mineral-bearing, properties.

Payment of Debts, Claims, and Expenses. *Hutchings v. Bates*²⁷ is an important case in which the supreme court held that, although the common law liability of the father to support his minor children terminates with his death, the spouses may contract in a divorce and property settlement agreement that the support obligation shall continue in any event until the child reaches eighteen years of age.

Ordinarily, debts, claims, expenses, and taxes are borne out of the residuary estate. Specific bequests and devises usually pass to the legatees and devisees free and clear of charges against the residue. In a civil appeals case,²⁸ the testatrix in provision III of her will devised one-half of her separate property to her uncle, and in provision IV she devised the "rest, residue and remainder . . ." to a trust for the benefit of her husband with remainders over to certain charities and to an individual. A provision of the will directed that each beneficiary should bear the proportionate part of estate and inheritance taxes attributable to his share and that the charities whose bequests were not subject to tax should bear no part of the tax. The provision also directed that the husband's life interest be free of tax. The first paragraph of the will required that all debts be paid; however, no provision was made that such debts be dischargeable out of any certain funds or property.

The court of civil appeals affirmed the trial court's judgment that the individual beneficiaries were required to share state and federal taxes in proportion to their respective shares of the estate. Debts were allocated, together with expenses, to *all* beneficiaries in accordance with their shares. Although the uncle's devise was set out in provision III and the residue was disposed of in provision IV, the court held that it was the testatrix's intention that the uncle's devise was not to be a specific devise but was to be part of the residue. The case suggests that provisions for payment of claims and expenses should be given careful consideration.

In connection with drafting, counsel is well advised to consider the impact of federal estate and state inheritance taxes apart from that of debts

²⁶ 10 Tex. Sup. Ct. J. 139 (1966).

²⁷ 406 S.W.2d 419 (Tex. 1966). For further discussion see Smith, *Family Law*, this Survey at footnote 69. For commentary on the civil appeals holding see 19 Sw. L.J. 666 (1965).

²⁸ *Elkin v. Sanders*, 397 S.W.2d 309 (Tex. Civ. App. 1965) *error ref. n.r.e.*

and expenses. Without the benefit of an apportionment statute, counsel's failure to give due regard to such items may mean that the residue of the estate, which the testator ordinarily leaves to the natural objects of his bounty, will be required to bear a much larger proportion of such items than the testator would have intended.

III. CONSTRUCTION OF CLAUSES

Generally. Ambiguities created by inconsistent clauses in a will provide a source of continuing litigation. These difficulties often arise because testators prepare their own wills without the benefit of expert review. Even in the absence of patent ambiguities, the language of the document may dispose of properties in a way that was not intended by the testator.

A civil appeals case²⁹ illustrates a difficulty in the case of lapsed devises. Section 68 of the Probate Code prevents the lapse of a devise when the devise is to a child or other descendant who predeceases the testator. In such case the lapsed devise passes to the descendants of the deceased devisee. The descendants of collaterals, however, are not so protected. In the instant case, a brother predeceased the testator; therefore, the devise lapsed. Ordinarily, such a devise would have fallen into the residuary estate. However, because the residuary clause expressly *excepted* properties devised in other parts of the will, the court held that the lapsed devise passed by intestacy.

Another instance of ambiguity was presented³⁰ in a case in which the testator gave his wife his estate "during her natural life to use as she sees proper . . ." then provided that she had "full authority to sell," then provided for the division of his estate among his children if she remarried. The court of civil appeals held that the widow's remarriage terminated her power of sale for her children's interest. The Supreme Court of Texas has granted application for writ of error on the issue of the limitation on the widow's power.

To give logical meaning to a holographic will, a court of civil appeals³¹ read the testatrix's words: "In event my death predeceased her . . ." as "In event she predeceases me," using a prior typewritten will to determine the testatrix's intentions.³² One case³³ applied Probate Code Section 43 to the words "revert back to my heirs" as requiring a per stirpes, rather than a per capita distribution. With respect to the meaning of the word

²⁹ *Neinast v. Brauckmuller*, 401 S.W.2d 113 (Tex. Civ. App. 1966).

³⁰ *Satterwhite v. Commercial Bank Unincorp.*, 402 S.W.2d 789 (Tex. Civ. App. 1966) *error granted*.

³¹ *Pruett v. Berkeley*, 405 S.W.2d 433 (Tex. Civ. App. 1966).

³² There was evidence that the testatrix attempted to copy the typewritten will in her holographic will. *Id.* at 455.

³³ *Hamilton v. Clyde*, 405 S.W.2d 850 (Tex. Civ. App. 1966), *error granted on other issues*, 10 Tex. Sup. Ct. J. 139 (1966).

"desire," a case³⁴ held that the following clause was mandatory and not precatory. "It is my desire that each year out of the annual rent proceeds . . . they pay to my sister . . . \$2,400."

Charitable Bequests. A case of considerable public interest is *Coffee v. Rice University*.³⁵ William Marsh Rice created a charitable trust for the establishment of a university for white citizens with free tuition. The trustees of Rice University instituted an action against the Attorney General for a construction of the trust instrument and for an application of the equitable doctrine of cy pres to eliminate the limitations as to white citizens and free tuition. Coffee and others intervened, representing themselves and Rice alumni who opposed the change; Bybee and others intervened, representing themselves and other Rice alumni who favored the change. The district court judgment allowed the change. Coffee appealed, and the Houston Court of Civil Appeals, on its own motion, dismissed the appeal on the grounds that Coffee did not have sufficient interest to prosecute the appeal. By a six to three decision, the supreme court held that Coffee was permitted to enter the case as a defendant without challenge; therefore, he had standing to appeal. On remand to the court of civil appeals for a hearing on the merits, the judgment for Rice was affirmed.³⁶ The benefactor's main charitable purpose of maintaining a first class institution would otherwise be thwarted by rising costs and a policy of discrimination.

In a civil appeals case a bequest for the maintenance and operation of a named garden was juxtaposed with a bequest for the establishment of a memorial for a deceased father.³⁷ The former was held to be a proper charitable purpose and the latter a private purpose. The latter violated the Rule Against Perpetuities. Because the charitable and noncharitable gifts were intermingled, the whole gift failed.

Widow's Election. In the case of community property or separate property of the wife, if the husband attempts to devise the wife's interest, she is put to an election: she may claim her own property interest outright, or she may elect to abide by the disposition in the will of her husband. Once having made the election, she may not act inconsistently with the will by altering the subsequent disposition of the property. There must first be a determination that the husband did in fact intend that his will should dispose of his wife's interest. In one civil appeals case³⁸ the husband's will

³⁴ *Levin v. Fisch*, 404 S.W.2d 889 (Tex. Civ. App. 1966) *error ref. n.r.e.*

³⁵ 403 S.W.2d 340 (Tex. 1966).

³⁶ *Coffee v. Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App. 1966). "The court . . . has the power under the cy pres doctrine to order the trust funds to be applied to a charitable purpose different from that named by the trustor, where the settlor had an intent to benefit charity generally, and the accomplishment of the settlor's charitable purpose is impossible, impractical or inexpedient." BOGERT, TRUSTS 376 (1963).

³⁷ *Carr v. Jones*, 403 S.W.2d 181 (Tex. Civ. App. 1966) *error ref. n.r.e.*

³⁸ *Ing v. Cannon*, 398 S.W.2d 789 (Tex. Civ. App. 1965) *error ref. n.r.e.*

spoke of "my property" and "my estate." In what seems to be an unusual construction of the will, the court held that the husband sought to devise the community property of his wife. Another interesting aspect of the case is that the husband and wife were residents of Oklahoma and purchased the land in Texas with the husband's earnings. The court recognized that the husband's earnings in Oklahoma were his separate property, but when such earnings were invested in Texas realty, it was held that the *realty became community property*. This conclusion seems clearly erroneous in view of the well-established principle that the separate property of the spouses when invested in other properties during marriage may be traced into such other properties and impart to them a separate character.

In a similar case,³⁹ the court held when the husband devised "the following property" he meant *his* property interest, not the whole community property.

In a civil appeals case⁴⁰ the husband and wife executed mutual wills which for all practical purposes were identical. The language was ambiguous; accordingly, the court read into the transaction an agreement between the parties that once the wife had accepted the benefits of the husband's will, she was bound by the terms thereof and was estopped to claim any other interest in certain community property than a life estate. The case is significant because it represents the first time that a Texas court has found an implied contract in the case of mutual wills as opposed to joint and mutual wills. The supreme court has granted an application for writ of error in this case, and further developments should be watched.

IV. TESTAMENTARY CAPACITY

When a testator disposes of property in his will to those not usually considered the natural objects of his bounty, two questions may arise: whether or not the testator was of sound mind; whether or not the testator acted under undue influence. Two important cases have been decided by the Supreme Court of Texas relative to these two matters.

In *Carr v. Radkey*,⁴¹ a case involving a testator's mental capacity to make and publish a will, the supreme court set forth a broad evidentiary rule that testimony dealing with the testator's general mental capacity, as dis-

³⁹ *Buschman v. Bryant*, 400 S.W.2d 950 (Tex. Civ. App. 1966).

⁴⁰ *Haile v. Holtzclaw*, 400 S.W.2d 603 (Tex. Civ. App. 1966) *error granted*.

⁴¹ 393 S.W.2d 806 (Tex. 1965), 20 Sw. L.J. 662 (1966). For further discussion see Ray, *Evidence*, this Survey at footnote 12. *Carr v. Radkey* also overruled *Pickering v. Harris*, 23 S.W.2d 316 (Tex. Comm'n App. 1930) which set out a strict limitation on admission of evidence. See *Schmidt v. Schmidt*, 403 S.W.2d 531 (Tex. Civ. App. 1966) (testator was 94 years old; jury found testamentary capacity); *In re Estate of Price*, 401 S.W.2d 98 (Tex. Civ. App. 1966) *error ref. n.r.e.* (capacity upheld); *Douthitt v. Haynie*, 398 S.W.2d 831 (Tex. Civ. App. 1966) *error ref. n.r.e.* (capacity upheld); *Hamlin v. Bryant*, 399 S.W.2d 572 (Tex. Civ. App. 1966).

tinguished from testimony calling for legal definitions or conclusions, should be admissible.

In *Pearce v. Cross*⁴² the court pointed out the two elements of undue influence: the *external*, that is, the words or acts that bring the pressure to bear; and the *internal*, that is, the collapse of the will of the testator. The declarations of the testator are no evidence of the external but may be of the internal. In the instant case the question was whether or not there was sufficient circumstantial evidence to support the external factor.

Cross and his wife lived with Mrs. Ferguson, treating her with solicitude. Mrs. Ferguson wanted Cross to have a cash bequest and a life estate and so ordered in her will. Mrs. Pearce, a sister of Mrs. Ferguson, sought to have Cross excluded from Mrs. Ferguson's bounty. She caused a second will to be drawn and had Mrs. Ferguson execute it. There was evidence that Mrs. Ferguson regretted the action almost immediately.

The majority found sufficient circumstantial evidence of undue influence. The dissenters saw the evidence otherwise. They pointed out that when Mrs. Ferguson executed the second will the lawyer, witnesses, and notary were present, that Mrs. Pearce did not unduly influence Mrs. Ferguson's execution, and that Mrs. Ferguson's act was her own. Thus, concluded the dissenters, the evidence fell short of the necessary force to show undue influence. The dissenters' point is well made. The fact that the testator understands the will, signs it freely, and so states to the witnesses and notary (if the will is self-proved), is usually sufficient to establish that the testator is not under any duress or influence.

V. DIVISION OF COMMUNITY

Although no consent of the wife is necessary for the husband's effective transfer or assignment of community property, excessive donations of community to third persons may constitute a fraud on the wife. A civil appeals case⁴³ held that the element of actual intent to defraud may not have to be proved; the fact of excessive or capricious gifts will be prima facie evidence of fraudulent intent.

VI. ESTATE AND GIFT TAX CONSEQUENCES

Oftentimes the parties to wills and trusts will achieve their desires for effective management and disposition of properties and yet overlook the possibility of making relatively slight changes in language which may substantially alter the tax consequences.

⁴² 400 S.W.2d 622 (Tex. Civ. App. 1966) *error granted*. See *Furr v. Furr*, 403 S.W.2d 866 (Tex. Civ. App. 1966) (undue influence shown); *Douthitt v. Haynie*, 398 S.W.2d 831 (Tex. Civ. App. 1966) *error ref. n.r.e.* (no undue influence); *Hamlin v. Bryant*, 399 S.W.2d 572 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁴³ *Hartman v. Crain*, 398 S.W.2d 387 (Tex. Civ. App. 1966).

In a federal case,⁴⁴ the decedent, Stephen, was the beneficiary of three trusts. Trust number one had a clause to the effect that if Stephen died *before he attained thirty years of age*, the trust would continue for his children. Trusts numbers two and three each had a clause to the effect that if Stephen died *before final distribution of the trust*, the trusts would continue for his children. Stephen attained thirty years of age in 1954 and died in 1956. No one of the trusts had been distributed to him. Stephen's widow demanded the funds of all three trusts, but only trust number one was delivered to her. In a non-collusive state action it was determined that Stephen had a defeasible interest in trusts numbers two and three. As against the contention of the government that trusts numbers two and three were includable in Stephen's taxable gross estate, the Court of Appeals for the Fifth Circuit held that the trusts were not so includable, sustaining thereby the construction given to Stephen's interests in the trusts by the Texas courts.

A state civil appeals case⁴⁵ involved a construction of newly enacted amendments to the inheritance tax provisions. The decedent died in 1962 and left his residuary estate to a tax exempt foundation in Virginia. Former article 14.06 of the inheritance tax provisions,⁴⁶ in effect at the date of decedent's death, did not exempt bequests of the kind here under consideration. However, article 14.07 states that article 14.06 applies with respect to a decedent dying "before the effective date of this Act if the tax imposed by article 14.06, as heretofore amended, has not been paid prior to the effective date of this Act, . . ." In 1963 article 14.06 was amended to exempt from the imposition of inheritance taxes property passing to an organization in another jurisdiction which grants a reciprocal exemption. The estate contended that article 14.07 as applied to *amended* article 14.06 permitted the estate to claim the exemption since the tax had not been paid. The court, however, held that article 14.07 applied to article 14.06 as *originally* written but not as amended.

VII. BONDS AND SAVINGS ACCOUNTS IN JOINT AND SURVIVOR NAMES

Williams v. McKnight,⁴⁷ is one of a series of important cases dealing with transactions in which Texas marital partners by a written signed agreement sought to convert community funds into a joint tenancy. The court

⁴⁴ United States v. Farish, 360 F.2d 595 (5th Cir. 1966).

⁴⁵ Calvert v. Beazley, 403 S.W.2d 905 (Tex. Civ. App. 1966) *error ref. n.r.e.* For another case on charitable exemption from tax, see Young v. Phinney, 255 F. Supp. 817 (W.D. Tex. 1966) (provision that charitable bequest should be paid no later than five years did not mean that valuation of bequest for federal estate tax purposes should be discounted as if bequest would be paid in five years.)

⁴⁶ TEX. TAX-GEN. ANN. (1963).

⁴⁷ 402 S.W.2d 505 (Tex. 1966), 19 Sw. L.J. 835 (1965), 20 Sw. L.J. 221 (1966). For further discussion see McKnight, *Matrimonial Property*, this Survey at footnote 22.

of civil appeals held that since the constitution provides for partition of community under such requirements as the legislature may enact, and since section 46 of the Probate Code enumerates a method for effecting a partition and a holding in joint tenancy with right of survivorship, the latter section was constitutional.⁴⁸ The supreme court reversed, stating that statutory partition of the community estate resulting in separate property is a necessary prerequisite to a written agreement under section 46 of the Probate Code. To the extent that section 46 authorizes the creation of a joint estate with right of survivorship out of community property, it is unconstitutional.

*Quilter v. Wendland*⁴⁹ is another important development on joint and survivor accounts. There, one who applied for a joint and survivor account failed to obtain the signature of one of the joint owners. The supreme court held that the contract between the one opening the account and the savings association was complete when the account was opened and the passbook was accepted. The joint owner, therefore, could claim the account on a third-party-beneficiary theory.

VIII. INTESTATE SUCCESSION

As adoptions become more numerous, questions of inheritance by and through adopted children will occur more often. Moreover, the rules with respect to adoption have become more exacting so that procedures under which adoptions were valid at an earlier time would not be proper under present laws. Discussing an interesting case in point,⁵⁰ a court of civil appeals determined that a child adopted validly in accordance with the law in effect in 1925 was entitled to succeed through her deceased adoptive father to the estate of his father who died in 1963.

IX. GIFTS FROM THE ESTATE OF AN INCOMPETENT

When the estate of a person of unsound mind is placed in the hands of a guardian, the question may arise about what action the guardian can take to effect tax economies by the use of estate planning techniques. The prob-

⁴⁸ Note, 19 Sw. L.J. 835 (1965).

⁴⁹ 403 S.W.2d 335 (Tex. 1966). See Note, *Donee Beneficiary Contracts as Applied to Joint Survivorship Accounts*, in this issue *infra*. For further discussion see Harding, *Contracts*, this Survey at footnote 9.

⁵⁰ *Hamilton v. Butler*, 397 S.W.2d 932 (Tex. Civ. App. 1965) *error ref. n.r.e.* An interesting study of legislative intent and history is presented. The court noted that in 1951 article 46a, dealing with adoption, was amended to provide that an adopted child would be considered the natural kin of his adoptive parents only if the adoption procedure met requirements set out in the amended act. The adoption procedure in the present case did not meet such requirements. However, in 1955 article 46a was amended and the provision providing for the exclusive adoptive procedure was deleted.

lem has been recently considered in a civil appeals decision,⁵¹ a case of first impression in Texas. A bank was acting as guardian of the estate of a person of unsound mind and made application to the probate court for authorization to make a gift of \$1,500,000 from the estate of the ward to the residuary legatees under the ward's will in order to minimize estate taxes. There was no opposition to the application. However, it was denied by the probate court and, on appeal, by the district court. The court of civil appeals affirmed the judgment of the two lower courts on this issue.

A witness had testified that, if the gifts were made from the ward's estate, the savings in estate taxes and the corresponding increase in the value of the estate for the benefit of the ward's grandchildren, who were the natural objects of her bounty and the residuary legatees in her will, would be not less than about \$240,000 and could be almost double that amount if the gift were not one "in contemplation of death." The guardian contended that, under section 230(b) of the Probate Code, it should manage the estate as a prudent man would manage his own property and that a prudent man would make the gift in this instance. The court held, however, that section 230(b) had to be read in connection with other sections of the Probate Code, particularly section 398 relating to contributions from the ward's estate for charitable purposes and section 421 relating to payments for the support of the ward's family. Since these sections are restrictive provisions concerning the guardian's right to deplete the ward's estate, the court held that there could be no broad general power to dispose of the ward's property.

To do what the guardian proposed to do in this case, irrespective of the merits of the proposal, would require corrective legislation. The case is important, therefore, to those representing estates of incompetents since it indicates that some rather commonly employed estate planning techniques are not available to the guardian, although if the ward were competent, he or she might reasonably be expected to have taken advantage of such techniques.

X. CREATION OF TRUST

In a civil appeals case⁵² the grantors conveyed land to a "trustee" to be held for the benefit of named beneficiaries, subject however to a life estate in another. The "trustee" was given only one discretionary power. Therefore, in determining the intent of the parties, it was presumed that they intended to convey the greatest estate possible under the given language. Despite the designation of a "trustee," it was held that the conveyance was that of a life estate with remainders over.

⁵¹ In the Matter of Elizabeth M. Neal, 405 S.W.2d 496 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁵² Clark v. Wisdom, 403 S.W.2d 877 (Tex. Civ. App. 1966) *error ref. n.r.e.*

XI. CONCLUSION

An overview of the cases decided makes demonstrably clear how carefully documents must be drafted to avoid confusion and controversy. A will or trust instrument executed early in life may not take effect until a date many years later. Thereafter, it may be in effect for an additional substantial period of time. If the mind of the testator or settlor is to be known long after he and those with whom he consulted are gone, one can appreciate the precision and care in drafting that must be exercised.