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WILLS AND TRUSTS

by

Charles O. Galvin*

THE CASES reviewed in this *Survey* Article either in the text or in the footnotes are collected under the following headings: Contractual Wills; Effect of Other Contractual Arrangements; Construction of Clauses and Statutes; Testamentary Capacity; Procedural Matters; Guardianship; and Trusts.

I. CONTRACTUAL WILLS

If two parties execute the same writing as their joint will, the document may be admitted to probate following the respective deaths of each of the testators. If two parties execute separate documents generally reciprocal in terms at or near the same time, each document may be admitted to probate following the death of the particular testator. In either of these cases the surviving party is free to revoke or change his will unless the arrangement was contractual in nature; that is, if a party executes a will under a contractual arrangement and receives benefits thereunder upon the death of the other, he may be held accountable in damages for breach of contract if he revokes or changes his will. Such agreements may be express or may arise by reason of the circumstances. The number of such cases seems to be increasing.

In *Lawrence v. Latch*¹ a brother and sister executed separate wills in 1946, pursuant to the terms of which each left to the other various personalty and the residue passed to a trustee, who was directed to pay the income to the survivor for life and to distribute the remainder to designated persons. The brother died in 1953, and the properties were distributed in accordance with his will. Subsequent to the brother's death the sister made new and different wills and finally her last will in 1959, so that when she died in 1962, the shares were changed from those which had been set out in the 1946 wills. The sister also provided that anyone contesting her will would forfeit his interest. On trial of the case it was determined that the separate wills executed by the brother and sister were not based on an agreement and that the suit brought by the contestants prevented their sharing at all under the will. This judgment was affirmed by the court of civil appeals.²

In reversing and remanding, the supreme court noted that one of the defendants-contestees had been allowed to testify to the effect that she had cared for the decedent and that the contestants had not bothered to visit the decedent prior to her death. The court held that the testimony of defendants was prejudicial and that admission of such testimony indicated

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¹ 431 S.W.2d 307 (Tex. 1968).

² 424 S.W.2d 260 (Tex. Civ. App. 1968), *error granted*.

that in the trial court the case had turned not on the contract question but rather on the question of who in justice should have the property. On a new trial the court directed that the contract issue should be sharply presented.

Once the will or wills are determined to be contractual, upon the death of the first testator the interests of the beneficiaries under the contractual arrangement are fixed subject to the interest of the surviving testator.³ Although the survivor may make another will, he cannot defeat by such later will the rights of the beneficiaries under the contractual will. In an interesting application of this principle, the supreme court held in *Dougherty v. Humphrey*⁴ that, if the parties have contracted with respect to the disposition of all their respective estates, it makes no difference that the survivor may accumulate substantial property subsequent to the death of the first to die; having accepted the benefits under the will, the survivor is bound to its terms as it applies to all property remaining at his death.

The interrelationship of the Statute of Frauds to the contractual will situation was before the supreme court in a case of first impression in *Meyer v. Texas National Bank of Commerce*.⁵ The wife's will of January 1944 left all her estate to her husband but made no provision for vesting of property in the event her husband predeceased her. The husband in July 1944 executed a will leaving his entire estate to his wife. In 1962 the husband changed his will and thereafter died. Then the wife died without changing her will. The estate consisted primarily of real property and the court assumed that the two 1944 wills were executed pursuant to an attendant oral agreement.

Because the husband died first, nothing passed to him under his wife's will. Nevertheless, the question presented was: Assuming the oral agreement, did the wife's non-revocation of her will constitute such performance on her part as to make the oral agreement enforceable notwithstanding the Statute of Frauds? That is, would equity require performance of an oral contract with respect to land?

The court distinguished the cases in which a party accepts a benefit under a contractual will and then seeks to revoke it.⁶ Here the husband, the first to die, received no benefit. The wife's non-revocation was held not such a performance as to require the intervention of equity.

*Nesbett v. Nesbett*⁷ illustrates an interesting procedural problem anent the contractual will question. A joint will executed by the husband and wife was offered for and admitted to probate following the husband's death. The wife accepted benefits thereunder, and then executed another will in which she revoked the earlier joint will. Following the death of the

³ *Weidner v. Crowther*, 157 Tex. 240, 301 S.W.2d 621 (1957), noted in 12 Sw. L.J. 142 (1958).

⁴ 424 S.W.2d 617 (Tex. 1968).

⁵ 424 S.W.2d 417 (Tex. 1968).

⁶ *Kirk v. Beard*, 162 Tex. 144, 345 S.W.2d 267 (1961). Two brothers orally agreed that they would make mutual and reciprocal wills. After the first brother died, the survivor accepted the benefits and then sought to change his own will. *Held*: equity should properly intervene to prevent a fraud in repudiation of the contract. In a companion case the expenses of litigation were held properly deductible as administration expenses, although not incurred in the normal administration of an estate. *Pitner v. United States*, 388 F.2d 651 (5th Cir. 1968).

⁷ 422 S.W.2d 746 (Tex. Civ. App. 1967), error dismissed *w.o.j.*, 428 S.W.2d 663 (Tex. 1968).

wife, the second will was offered for probate. Contestants of the second will offered for probate the earlier joint will. The probate court admitted the second will and denied probate to the joint will. The contestants appealed to the district court where the joint will was again denied probate. On appeal the court of civil appeals affirmed. In dismissing the application for writ of error for want of jurisdiction, the supreme court commented that the wife was competent to execute the second will, and, therefore, it was properly admitted to probate without regard to whether the joint will was contractual in nature. The court stated, however, that the contestants could now proceed without prejudice in the district court by a suit in contract. Thus, the will contest merely adjudicated the validity of the document offered as a will; the question of whether there had been a breach of contract was left to another lawsuit.⁸

What constitutes a contractual will may be shown by the provisions of the document, by testimony of competent witnesses, the relations or conduct of the parties, and other facts and circumstances supporting the existence of an agreement.⁹ In this regard, the draftsman is well advised to incorporate the most explicit language in the document affirming or negating the existence of the agreement. *Tips v. Yancey*¹⁰ is illustrative of the problems of construction presented in an ambiguous instrument. Mr. and Mrs. Smith executed a joint will, leaving all their respective properties to the survivor. In paragraph 2 they provided that in the event of their deaths in, or arising out of, a common accident, their properties should pass in accordance with specific directions. Paragraph 3 provided that in the event of death as in paragraph 2, all property was to pass to a trustee and executrix and ultimately was to be distributed to such party and her daughter. Paragraph 5 provided that at the death of the survivor the residue should pass as described in paragraph 3. After Mrs. Smith died, Mr. Smith executed another will.

The trial court, on appeal from the probate court, held that the joint will was contractual in nature and refused to admit the later will to probate. The contestants of the joint will urged that the provision in the joint will in paragraph 5 as to disposition on death of the survivor was, because of the reference to paragraph 3, limited to that circumstance in which death resulted from a common accident. The contestants further pointed out that paragraph 2, by which each spouse left his property to the other, provided that the survivor should own the property "without restriction or limitation and in fee simple." The proponents of the joint will contended that words such as "we," "our," "our mutual will and desire," and the like demonstrated the Smiths' intention to deal with the whole of their estate

⁸ The procedure varies. The court here is suggesting that a second will executed in conformity with the Statute of Wills may be admitted to probate with the right in the beneficiaries under the contractual will to sue in contract. See *Tips v. Yancey*, 422 S.W.2d 759 (Tex. Civ. App. 1967), *error ref. n.r.e.*, 431 S.W.2d 763 (Tex. 1968).

⁹ *Nye v. Bradford*, 144 Tex. 618, 193 S.W.2d 165 (1946).

¹⁰ 422 S.W.2d 759 (Tex. Civ. App. 1967), *error ref. n.r.e.*, 431 S.W.2d 763 (Tex. 1968). The supreme court, in the action on the petition for writ of error, instructed the district court to try separately the issue of which will should be admitted to probate and the issue of whether the earlier will was mutual and contractual. 431 S.W.2d at 765.

by contract. The court found that the will was ambiguous and that its terms did not establish, as a matter of law, a contract between the parties. The case was reversed and remanded.¹¹

II. EFFECT OF OTHER CONTRACTUAL ARRANGEMENTS

Frequently, the decedent will have entered into arrangements during his lifetime affecting the disposition of property at his death. If such arrangements are testamentary in character but do not comport with the statutes on wills, their validity may not be sustained.

*Land v. Marshall*¹² is an important case, for it demonstrates how carefully a revocable trust transaction must be handled. The revocable trust is often used as a tool in estate planning. The estate owner may wish to test a plan of disposition of his properties for a period of years before making the arrangement irrevocable. Or, he may dispose of properties to a revocable trust which becomes irrevocable at his death, thereby effecting a testamentary disposition through the medium of an *inter vivos* transfer.

In the principal case, the grantor without his wife's consent executed a trust instrument and transferred community stock to his daughter as trustee with directions to provide for the grantor and his wife for life and thereafter to the daughter for life and remainder to the granddaughter with alternate takers if the granddaughter was not living. The grantor later amended the trust to make the daughter-trustee the remainderman. The grantor retained all power over the trust. After the grantor's death, the wife sought to cancel the trust. The supreme court invoked the illusory trust doctrine in a case of first impression on this issue. The court held that the trust was invalid and that the grantor's widow was entitled to recover her community one-half therein outright and free of trust.¹³ Had the wife consented to the trust at the time of execution, or had the decedent-husband used a disinterested independent trustee, the results might have been different.

In *Gray v. Bush*¹⁴ a divorce and property settlement agreement provided that the husband would keep certain policies of life insurance in effect for the children's support and education. Later the husband created a trust for the children and assigned the policies to the trust. The trust provided that if the wife, or any person, should recover any amount from the husband's estate for the benefit of the children, the trust distributions

¹¹ Both parties filed motions for summary judgment, each contesting the will offered by the other. No proof was offered on either side. "[R]esolving all doubts against the movant for summary judgment, and viewing the evidence in the light most favorable to the other party, we have concluded that the will as a whole is ambiguous . . ." 422 S.W.2d at 762.

In a joint will in which the parties stated that "each of us desire and request that the survivor shall . . . leave all of the property . . . to [designated parties]," the court held that "desire and request" did not bind the survivor, but was only precatory. *Henry v. Curb*, 430 S.W.2d 29, 31 (Tex. Civ. App. 1968), *error ref. n.r.e.*; see *Dougherty v. Humphrey*, 424 S.W.2d 617 (Tex. 1968), in which the words "will and desire" followed by "that upon the death of such survivor any of such estate then remaining shall be divided" were held to create a contractual arrangement.

¹² 426 S.W.2d 841 (Tex. 1968).

¹³ It is important to note that the entire trust was held invalid, not just the portion that covered the wife's half of the community property.

¹⁴ 430 S.W.2d 258 (Tex. Civ. App. 1968), *error ref. n.r.e.*

would be reduced accordingly. The court of civil appeals allowed the former wife to recover a sum from the estate and held that such amounts would be deducted from the trust distributions. The litigation in the case might have been avoided by careful draftsmanship to integrate the provisions of the divorce and community property settlement agreement with the funded support trust and with the directions to the executor in the will.

Action in other cases under this section include the following: A son and his wife refused to convey ten acres with a house and well to his father until both parents orally promised that the survivor would devise the land to the son. On a showing that following the father's death the mother sought to sell the acreage, the son was entitled to impress a constructive trust on the property.¹⁵ In another case the court held that parties may contract for the joint and survivor ownership of property and this does not constitute a violation of any rule with respect to testamentary disposition.¹⁶

III. CONSTRUCTION OF CLAUSES AND STATUTES

Nowhere is the skill of the draftsman more severely tested than in the drafting of wills. The party whose directions are being formally incorporated into the document is now dead, and the court must find, if possible, his intention from the language of the will, harmonize contradictory clauses, and apply rules of property to the various estates and interests created. The following cases demonstrate how carefully words and phrases must be chosen to avoid later confusion, ambiguity, and protracted litigation.

*Sellers v. Powers*¹⁷ involved a perpetuities question; the court's construction provides an unusual result. Ordinarily, the Rule Against Perpetuities is construed to mean that a property given or devised outright or in trust must finally vest within a period of lives in being at the time of the creation of the interests plus twenty-one years and the period of gestation. Thus, assuming that a testator, with only a son living at the time of the transaction, created an estate for the life of the son with a life estate in the son's children, the remainders to vest in the children within twenty-one years and the period of gestation from the death of the son, the ultimate vesting is within the period of the Rule so that the remainder and the intervening estates are valid. The supreme court, however, stretched this period far beyond that usually identified with the Rule.

The testatrix was survived by her son and daughter. Paragraph 3 of her will as construed by the supreme court, provided for a joint life estate in the son and daughter with a continuation of the life estate in the children of the first to die and after the death of the survivor of the son and daughter a continuation of the life estate in all the grandchildren. Paragraph 4 provided for remainders over to the heirs-at-law of the decedent upon the death of the last surviving grandchild.

¹⁵ *Gause v. Gause*, 430 S.W.2d 409 (Tex. Civ. App. 1968).

¹⁶ *Terrill v. Davis*, 418 S.W.2d 333 (Tex. Civ. App. 1967), *error ref. n.r.c.*; TEX. PROB. CODE ANN. § 46 (Supp. 1968).

¹⁷ 426 S.W.2d 533 (Tex. 1968).

The surviving son instituted suit for construction of the will contending that paragraph 3 violated the Rule Against Perpetuities by attempting to devise a life estate to persons not yet in being and that paragraph 4 violated the Rule because of too remote vesting. Accordingly, he contended that the estate should vest immediately in the decedent's heirs-at-law, *i.e.*, the son and daughter.

The court, faced with the alternatives of voiding the entire disposition, or only so much of it as was invalid, chose the latter course. The court vested the joint life estate in the son and daughter because they were lives in being at the testatrix's death, and also held that, because the succeeding life estate in the grandchildren would vest on termination of the lives of their parents, it was within the period of the Rule. But the court held that the remainders were invalid because they might vest in a period beyond the period of the Rule. Therefore, there was a reversion in the son and daughter subject to the intervening life estates in the son and daughter and, after their deaths, the life estates in their children. It is this latter result that is unusual, for at the time of the testatrix's death, all of the grandchildren of testatrix were not necessarily in being. A grandchild born many years after the death of the testatrix would enjoy his portion of the life estate for his entire life, thereby postponing the ultimate vesting of the reversion to a period far beyond the contemplated period of lives in being at the testatrix's death and twenty-one years and, when necessary, the approximately nine-month period of gestation.¹⁸

A testatrix in another case devised land to her son for life, with remainders over to his children, but with the proviso that should a child die without issue his share went in fee to the survivor, and that should all children die without issue the estate was *devised to the son*. When the son, the life tenant, died, he left five children surviving, one of whom thereafter died without issue. The other four children claimed the share of the deceased child. The court read into the provision an intention of the testatrix that the share of the deceased child was defeasible *only* if she died *before* her parent (the life tenant) died. Having survived the parent, her share was not thereafter defeasible because she died without issue.¹⁹

A testatrix left an estate for life in her son with remainder over to the son's heirs-at-law. At the time the testatrix executed her will, the son was a single man with children by a previous marriage. He later remarried and at his death his widow contended that she was included in the class of heirs-at-law. Following the execution of the will and after the testatrix's death,

¹⁸ The court cited J. GRAY, *THE RULE AGAINST PERPETUITIES* 392 (4th ed. 1942): "A devise to the testator's grandchildren as a class is good if the vesting is not postponed to a time after they become of age, for they must all become of age within twenty-one years after the death of their parents (the testator's children), and the parents must all have been born (or begotten) in the testator's lifetime." Construing the above rule, the court stated that the vesting of a life estate in the grandchildren following the life estate of their parents was such a vesting as to be within the Rule. 426 S.W.2d at 536. The Rule is usually construed as requiring a vesting of the fee following lives in being at the death of the testator, or at the time of the creation of the estate, plus twenty-one years, and not merely the vesting of a second life estate.

¹⁹ *Harrison v. Brown*, 416 S.W.2d 613 (Tex. Civ. App.), *error ref.*, 422 S.W.2d 718 (Tex. 1967). The fact that the phrase "die without issue" was in the same paragraph with the directions regarding the son's life estate evidenced an intention that the provision related to events occurring within the son's life and not thereafter. 416 S.W.2d at 617.

but before the death of the son in 1960, the Probate Code was adopted in 1955 to make clear that surviving spouses are included in the class of heirs-at-law.²⁰ The court held, however, that the intent of the testatrix at the time the will was drawn should control. The widow was, therefore, not an heir-at-law.²¹

A bequest in trust for the benefit of a faithful servant for life with remainders over provided that if in the opinion of the life beneficiary or the several trustees, "it is deemed desirable for the comfort and pleasure of [the life tenant], said trustees are directed to sell any or all of above named properties and give the proceeds to [life tenant] to spend as he desires" The life tenant filed suit against the trustee asking the court to direct the trustees to sell certain property and turn the proceeds over to him for his "comfort and pleasure." Thereafter, he died. The court held that the interest created was a life estate and terminated with his death. Thus, he could not effectively leave any part of the property by his will or assign an interest therein to his attorneys.²²

A testatrix made specific bequests in her will and directed payment of all debts, expenses, administration costs, and taxes out of the residue "even though a part of such property may not be subjected to administration hereunder by my Executor as a part of the estate passing under this will" The court construed this language as evidencing the intent of the testatrix to include in the residue property over which she had a general power of appointment; otherwise, certain special bequests would have been consumed in order to pay such debts, expenses, and taxes.²³

A testatrix left a will which devised property to her daughter for life with remainders to the daughter's children. On the daughter's death a question arose as to whether an adopted child of the daughter was properly included in the class of remaindermen. Article 46a, section 9, provides that an adopted child shall be deemed "for every purpose" the child of its parents by adoption.²⁴ The court held that the statute applied between adopted child and adopting parent but did not apply to documents executed by third persons unless a contrary intent appeared.²⁵

Other will construction cases were as follows. The words "whatever property I shall have or be interested in at time of my death" covered only the testator's interest and not the interest owned by him and his former wife as community property.²⁶ A provision that testator's tenants "be permitted to remain on my farm . . . until the same is sold . . ." did not devise to the tenants a tenancy for a term so that the tenants could retain the rentals which they otherwise owed the landlord-testator. The direction

²⁰ TEX. PROB. CODE ANN. § 3(o) (1956).

²¹ *Davis v. Corabi*, 421 S.W.2d 677 (Tex. Civ. App. 1967), *error ref. n.r.e.*

²² *Bridges v. First Nat'l Bank*, 430 S.W.2d 376 (Tex. Civ. App. 1968).

²³ *Krausse v. Barton*, 430 S.W.2d 44 (Tex. Civ. App. 1968), *error ref. n.r.e.*

²⁴ TEX. REV. CIV. STAT. ANN. art. 46a, § 9 (1959): "When a minor child is adopted in accordance with the provisions of this article . . . such child shall thereafter be deemed and held to be for every purpose the child of its parent or parents by adoption"

²⁵ *Decker v. Elliott*, 425 S.W.2d 880 (Tex. Civ. App. 1968), *error ref. n.r.e. Accord*, *Vaughn v. Vaughn*, 161 Tex. 104, 337 S.W.2d 793 (1960).

²⁶ *Speed v. Griffin*, 427 S.W.2d 917 (Tex. Civ. App. 1968).

merely affirmed the prior contractual arrangement; it did not enlarge the tenant's estate.²⁷ The word "securities" ordinarily would cover savings accounts, but when used in the phrase "all stocks, bonds, and other securities," the testatrix's intent was construed under the *ejusdem generis* rule to mean securities like stocks and bonds and not savings accounts.²⁸ The testator devised property to his wife in fee with the proviso that any property remaining on the death of the wife would be vested in designated beneficiaries, including a niece. The niece predeceased the wife. The court held that the niece had only a contingent remainder, which terminated at her death.²⁹

IV. TESTAMENTARY CAPACITY

In *Lee v. Lee*³⁰ the testator died in 1964 at ninety years of age. He had executed a will in 1961 leaving ten dollars to each of two children and the residue to his other children. In a contest among the children the district court on a jury verdict of "unsound mind" rendered judgment for the contestants. The court of civil appeals reversed and rendered judgment admitting the will to probate on the grounds that the evidence offered by the contestants could at most only create a suspicion of incapacity at intermittent periods not associated with the date of execution and that the evidence failed to support the finding of unsound mind. The supreme court reviewed important rules relating to evidence on the issue of testamentary capacity. The fundamental question was: Was there any evidence of probative value that the testator was mentally incapacitated on the day he executed the will?³¹ In answering this question the court said that it must consider only the evidence which when viewed in its most favorable light tends to support such a finding, and must disregard all evidence that would lead to a contrary conclusion. The court then noted that the evidence on lack of testamentary capacity constituted more than a mere scintilla; therefore, the civil appeals judgment admitting the will to probate was erroneous. The supreme court affirmed the judgment reversing the trial court, but reversed the judgment of rendition and remanded for a new trial. The court pointed out that on retrial the issue to be submitted is whether the testator lacked testamentary capacity on the date of execution of the will, not whether he was of unsound mind.³²

²⁷ *Setliff v. Fielder*, 422 S.W.2d 527 (Tex. Civ. App. 1967).

²⁸ *Huckabee v. Hansen*, 422 S.W.2d 606 (Tex. Civ. App. 1967).

²⁹ *Jones v. Walter*, 423 S.W.2d 180 (Tex. Civ. App. 1967), *error granted*; see *Harrison v. Brown*, 416 S.W.2d 613 (Tex. Civ. App.), *error ref.*, 422 S.W.2d 718 (Tex. 1967). Devise to son for life with remainders to son's five children; provided that if a child should die, his share would pass to the others. *Held*: defeasance clause applied only if one of son's children *predeceased* son; death of one of son's children *after* son's death did not terminate child's estate.

³⁰ 424 S.W.2d 609 (Tex. 1968).

³¹ See *Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965), *noted in* 20 Sw. L.J. 662 (1966); Galvin, *Wills and Trusts, Annual Survey of Texas Law*, 21 Sw. L.J. 16, 23 (1967); Ray, *Evidence, Annual Survey of Texas Law*, 21 Sw. L.J. 173, 174 (1967).

³² See *Sims v. McKnight*, 420 S.W.2d 173 (Tex. Civ. App. 1967), *error ref. n.r.e.* Testamentary capacity case in which jury misconduct allegations were resolved against the contentions of contestants.

V. PROCEDURAL MATTERS

Formalities of Execution. The testator, while in the hospital, executed his will. The attesting witnesses signed, but there was some evidence that they were away from testator's view in the room.³³ The court of civil appeals in *Nichols v. Rowan*³⁴ held that the witnesses may validly attest to the will by signing within the "conscious presence" of the testator; that is, in such position that testator can, if not blind, see them or could with slight physical exertion so alter his position as to see them. In another case the plaintiff sought to prove a contract between husband and wife by the terms of which they would execute a joint and mutual will and plaintiff would receive one-half of the community property. The only evidence was an unsigned carbon copy of a will. Absent any evidence of the execution of a will and the existence of an agreement, the court of civil appeals in *Norwood v. Harlow*³⁵ instructed a take nothing judgment against plaintiff.

A letter stating that testatrix "would like to make some changes in my will" and a writing describing changes "to be made" was not sufficient to constitute a codicil.³⁶ In another case a holographic will was admitted to probate on testimony as to the testatrix's handwriting by one witness instead of two, as required by Probate Code section 84(b). The order admitting to probate recited all the necessary elements, and in Texas such recitations control even though parts of the record are faulty. Therefore, a collateral attack on the judgment failed.³⁷

Probate Proceedings. A blood kin of decedent contested his will. Decedent's widow who was the beneficiary of all his estate contended that the decedent had no separate property so that even if the will was invalid, contestant had no interest in the property and, therefore, no standing to sue. There was un rebutted evidence that the decedent did have some separate property; accordingly, the court in *Earles v. Earles*³⁸ held that the contestant showed such interest as to entitle him to sue. In *Ladehoff v. Ladehoff*³⁹ the court of civil appeals refused to permit one to contest a will who had been represented when a minor by a guardian *ad litem* in a contest instituted by another. Thus, sections 31 and 93⁴⁰ of the Probate Code were held inapplicable in this kind of situation. The supreme court has granted

³³ TEX. PROB. CODE ANN. § 59 (Supp. 1968) requires that the subscribing witness sign "in the presence of the testator."

³⁴ 422 S.W.2d 21 (Tex. Civ. App. 1967), *error ref. n.r.e.*

³⁵ 429 S.W.2d 670 (Tex. Civ. App. 1968), *error ref. n.r.e.*

³⁶ *Price v. Huntsman*, 430 S.W.2d 831 (Tex. Civ. App. 1968), *error ref. n.r.e.*

³⁷ *Noel v. Orr*, 418 S.W.2d 690 (Tex. Civ. App. 1967), *error ref.* See *Kessler v. Texas Employers' Ins. Ass'n*, 421 S.W.2d 133 (Tex. Civ. App. 1967), *error ref. n.r.e.* (collateral attack on non-resident guardian denied).

³⁸ 428 S.W.2d 104 (Tex. Civ. App. 1968). One claiming to be a common-law wife was precluded from testifying as to the mental condition of the decedent under TEX. REV. CIV. STAT. ANN. art. 3716 (1926), because she was claiming an interest in the estate. *Kottler v. Stephens*, 424 S.W.2d 454 (Tex. Civ. App. 1968).

³⁹ 423 S.W.2d 115 (Tex. Civ. App. 1967), *error granted.*

⁴⁰ The referenced sections provide for a bill of review or contest of probate within two years after the minor reaches majority. The principal case holds, however, that these sections may not be availed of to reopen matters in which the minor was represented. See *Holliday v. Smith*, 422 S.W.2d 791 (Tex. Civ. App. 1967), *error ref. n.r.e.* Married women not covered by the tolling sections of TEX. PROB. CODE ANN. §§ 31, 93 (1956).

writ of error. In another case a testatrix was under a mistaken belief that her husband had already taken care of two of her four children. The court of civil appeals held this did not establish grounds to refuse to probate her will because shares therein favored the other two children.⁴¹ In another case contestants alleged an agreement for the benefit of the contestee that it would not be necessary to offer evidence in the county court. The agreement, however, was not shown to be in writing, and failure to tender evidence was held to be an abandonment of the will contest as a matter of law.⁴²

Administration of Estates. Prior to the adoption of the Texas Probate Code the supreme court had repeatedly held that the general provisions for establishing claims against an estate were not applicable to an estate administered by an independent executor. In *Pearson v. Bunting*⁴³ the court of civil appeals held that the Probate Code changed this result so that a claim not acted upon by an independent executrix within thirty days must be considered rejected and the claimant would have ninety days within which to file suit; otherwise, the claim was barred.⁴⁴ The supreme court, construing the applicable statutes as effecting no change, reversed the court of civil appeals⁴⁵ and affirmed the trial court's judgment permitting recovery against the independent executrix in a suit commenced more than ninety days after the claim was rejected.

Other cases were as follows: Decedent, without divorcing his common law wife, attempted another marriage. Upon his death, his common law wife was entitled to preferential right to appointment as administratrix.⁴⁶ An executor and third parties entered into an agreement that third parties would receive properties which they would have received if testatrix's proposed will had been executed. Such agreement is not enforceable. Only beneficiaries can alter the distribution of an estate. The executor had no interest that would be a proper subject of compromise or settlement.⁴⁷

VI. GUARDIANSHIP

A father was killed in an industrial accident and the mother of his children, a non-resident, was appointed guardian of their estates to receive the compensation award. The insurance carrier attacked the appointment of the mother as guardian since she had not been appointed guardian in the state of her residence. The court held that the judgment appointing the non-resident as guardian could not be attacked. The court was loath to upset the appointment unless there was a serious contravention of statutory authority.⁴⁸ In another case, the court of civil appeals reversed a trial

⁴¹ *Carpenter v. Tinney*, 420 S.W.2d 241 (Tex. Civ. App. 1967).

⁴² *Thompson v. Kirkland*, 422 S.W.2d 258 (Tex. Civ. App. 1967).

⁴³ 423 S.W.2d 177 (Tex. Civ. App. 1967), *rev'd*, 430 S.W.2d 470 (Tex. 1968).

⁴⁴ TEX. PROB. CODE ANN. §§ 310, 313 (1956).

⁴⁵ *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968).

⁴⁶ *Foix v. Jordan*, 421 S.W.2d 481 (Tex. Civ. App. 1967), *error ref. n.r.e.*

⁴⁷ *Manning v. Sammons*, 418 S.W.2d 362 (Tex. Civ. App. 1967), *error ref. n.r.e.*

⁴⁸ *Kessler v. Texas Employers' Ins. Ass'n*, 421 S.W.2d 133 (Tex. Civ. App. 1967), *error ref. n.r.e.*; *see Noel v. Orr*, 418 S.W.2d 690 (Tex. Civ. App. 1967), *error ref. n.r.e.* (collateral attack

court's sweeping prohibition against any court's considering a guardian's application for funds and payment of administrative fees.⁴⁹ In another case a guardian was appointed after a district court, pursuant to article 1994,⁵⁰ had deposited into savings accounts for the benefit of minors proceeds for personal injuries and for the death of their mother. The guardian's request for the funds was denied. The court of civil appeals held that the specific statutes relating to the appointment and duties of guardians prevail over article 1994.⁵¹ The guardian, therefore, was entitled to the funds.⁵²

VII. TRUSTS

A decedent, who was the beneficiary of a profit-sharing trust, entered into a divorce and community property settlement agreement with his first wife, married again, and died. In *Duncan v. Estes*⁵³ the court held that no part of the accumulations were vested at the time of the divorce and thus all benefits belonged to the husband. Upon the decedent-husband's death, therefore, the trust was entirely distributable from his estate to his second wife.

In another trust case the court held that undistributed income of a spendthrift trust for the benefit of a husband was so restricted as to its availability to the husband as not be part of the community estate.⁵⁴ A trustee bank did not breach its fiduciary duty in acquiring property from trusts for its own use;⁵⁵ however, in another case, despite an exculpatory clause, trustees were held to have engaged in self-dealing with trust funds even though balances in special bank accounts were never below amounts owing by the trustees to the trust. Trustees were charged interest on the balance.⁵⁶

on judgment admitting will to probate denied where holographic will was not proved by sufficient witnesses).

⁴⁹ *In re Guardianship Estates of Kaufman*, 429 S.W.2d 612 (Tex. Civ. App. 1968).

⁵⁰ TEX. REV. CIV. STAT. ANN. art. 1994 (1964) provides for deposit of funds resulting from a judgment.

⁵¹ TEX. PROB. CODE ANN. §§ 230, 231, 233 (1956).

⁵² *Decker v. Wiggins*, 421 S.W.2d 189 (Tex. Civ. App. 1967).

⁵³ *Duncan v. Estes*, 428 S.W.2d 675 (Tex. Civ. App. 1968).

⁵⁴ *Buckler v. Buckler*, 424 S.W.2d 514 (Tex. Civ. App. 1968), *error dismissed*.

⁵⁵ *Grey v. First Nat'l Bank*, 393 F.2d 371 (5th Cir. 1968).

⁵⁶ *Langford v. Shamburger*, 392 F.2d 939 (5th Cir. 1968); *see* companion case in the state court, *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App. 1967), *error ref. n.r.e.*