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WILLS AND TRUSTS

by

Charles O. Galvin*

THE CASES reviewed in the text and footnotes of this *Survey* are collected under the following headings: Construction of Instruments; Procedural Matters; Taxation; Contractual Wills; and Trusts.

I. CONSTRUCTION OF INSTRUMENTS

Construction continues to be a major source of controversy. The need for care in the use of words and in the drafting of clauses is indicated by the issues in the following cases decided during the year under review.

In *Jones v. Walter*¹ H. J. and Genevieve were husband and wife. H. J. died in January 1959; his niece, Helen Jones, died in November 1959, leaving her entire estate to her husband, Leslie. H. J.'s wife, Genevieve, died in 1965. The third paragraph of H. J.'s will left his property to his wife, "with full right and title thereto." The fourth paragraph provided that if Genevieve be deceased when H. L.'s will was offered for probate, and upon her death "if any property be remaining," then the estate was to pass to designated parties. A clause then provided that if a legatee be deceased, then his interest should be vested in his heirs. Helen's husband sought to claim her interest as beneficiary under Helen's will.

The Texas supreme court by a six-to-two opinion construed the fourth paragraph as follows: The devolution of H. J.'s property depended on either of two contingencies: (1) the death of Genevieve before H. J.'s will was offered for probate; (2) the death of Genevieve after the will was offered for probate. The latter contingency having occurred, the next clause of paragraph four provided for vesting in Helen's heirs. Helen, having predeceased Genevieve, had no interest to devise; H. J.'s will provided that in such case Helen's interest was defeated and such interest passed to her heirs. The court construed the will of H. J. as vesting a remainder interest in Helen subject to defeasance by Genevieve's exercise of her power of disposition or subject to defeasance by Helen's death before Genevieve, in which case Helen's heirs took under H. J.'s will. Thus, this interest did not pass to devisees under Helen's will.

*Wattenburger v. Morris*² involved the interrelationship between a will and its codicils. The testator, Owen, Sr., made material provisions for his three sons in a will executed in 1944. In this will he established a trust in certain real estate for twenty-five years and a trust in certain money for twenty years. Owen, Jr. died in 1951 leaving three children surviving. Owen, Sr. thereafter in 1954 executed a codicil stating that it was his "desire, in lieu of all bequests" which Owen, Jr.'s children would have

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¹ 436 S.W.2d 130 (Tex. 1968).

² 436 S.W.2d 234 (Tex. Civ. App.—Fort Worth 1968), *error ref. n.r.e.*

under the original will, that such children of Owen, Jr. would receive \$2,000 each. After Owen, Sr. died in 1960, the executors of his estate paid the children of Owen, Jr. \$2,000 each and obtained releases from them.

In about five years both of Owen's other two sons died, leaving children surviving. The children of Owen, Jr. sought to participate in Owen, Sr.'s will, contending, among other things, that the codicil was merely precatory by reason of the use of the word "desire." The court of civil appeals, in affirming the trial court's take-nothing judgment against Owen Jr.'s children, held that in this case "desire" was used in the codicil in a mandatory sense. Even if the codicil was construed to be precatory, the court held that the children of Owen, Jr. were in any case precluded from taking anything under the will because they had elected to take under the codicil in which the words "in lieu of" were meant to be a substitute.

*Morris v. Finkelstein*³ involved the interrelationship of two paragraphs in a will. In paragraph II the testator bequeathed \$10,000 to his brother Morton, provided that if the brother should predecease him, the testator then gave the specific bequest and the residue of his estate to Jack "as hereinafter set out in paragraph III below." Both Morton and Jack survived. Morton contended that, read together, paragraphs II and III should be construed as vesting the residue in Jack only in the event Morton predeceased the testator. Because Morton survived the testator, Morton contended that he was entitled to the bequest of \$10,000 and that the balance of the estate passed by intestacy. The court of civil appeals held that the testator wanted to avoid intestacy as to any part of his estate. Accordingly, paragraphs II and III should be read as vesting the residue in Jack in any event and *in addition* paragraph II provided that he should receive the \$10,000 bequest if Morton had predeceased the testator.

In another case, the language of the document was insufficient to avoid intestacy as to the residue. In *Alexander v. Botsford*⁴ the testatrix left a holographic will in which she made certain bequests of property and then provided in part as follows: "I give Charles complete power of attorney . . . [and] after all bills are paid I ask Charles to help Truitt, Jr. in any way he needs . . ."⁵

A nonjury trial resulted in a novel judgment that the above language should be construed as leaving the residuary estate in trust for the benefit of Truitt, Jr. for life with discretion in the trustee to distribute income and corpus to Truitt, Jr. as the latter's needs required. Upon Truitt, Jr.'s death the remainder was to go to the testatrix's heirs at law. In reversing the trial court, the court of civil appeals acknowledged that there is a strong presumption that a testator intends to dispose of his entire estate, and that if possible the court should try to find support for such a disposition. The court stated, however, that such a presumption is not strong enough to empower a court to write a residuary clause when there is

³ 442 S.W.2d 452 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

⁴ 439 S.W.2d 414 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*

⁵ *Id.* at 415-16.

none. The court also rejected the contention of Charles that the words "complete power of attorney" should be construed as a devise and bequest of the residue. The words "ask Charles to help Truitt, Jr." were merely precatory and insufficient to create a trust.

A will leaving "my home and acreage in Section 19 . . . to be used for a home for aged white men" and providing that the "revenue from my Royalties are to be left in trust . . . for the use and benefit of the home for aged white men" was effective to create a public charitable trust.⁶ As to other property owned by the testatrix not covered in the will, she died intestate. The *cy pres* doctrine permitted the court to delete the word "white" so that the trust could validly continue.⁷

Rule in Shelley's Case. When a person takes an estate for life with remainder to his heirs, or heirs of his body, the familiar rule in *Shelley's Case* determines the devise or conveyance as one in fee simple. By statute the rule has been abrogated in Texas effective as to conveyances taking effect on and after January 1, 1964.⁸ In a case involving the application of the rule prior to that date the court had before it a joint will of husband and wife leaving their estate to one another for life with life estates in their children, "and at the death of either of them, the share bequeathed to such child, shall pass to and vest in fee simple in the heirs of their body, and in the event that either of our said children shall die without issue, then the share herein bequeathed to them shall be divided equally between the children of our surviving children."⁹ The court held that the rule in *Shelley's Case* was applicable; the use of the words "heirs of their body" invoked the application of the rule.¹⁰ However, the subsequent language had the effect of reducing the fee simple to a defeasible or conditional fee.

Open Mine Doctrine. In *Johnson v. Messer*¹¹ the testatrix willed all her property to John for life with power to sell or mortgage any portion "that might be necessary for his comfortable support."¹² John gave the real estate to his wife, Esther, and thereafter oil and gas leases were executed. There was no showing that John needed to sell the property for his comfortable support. Moreover, the oil and gas leases were executed after the life estate began so that there were no wells open at the time of the testatrix's death. Therefore, Esther, as transferee of the life estate, had only the income from the royalties, not the royalties themselves.¹³

Expectancy. Section 58 of the Texas Probate Code¹⁴ permits the devise of an expectancy. Testator left his residuary estate to his wife. Subse-

⁶ *Wooten v. Fitz-Gerald*, 440 S.W.2d 719 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*

⁷ See *Coffee v. William Marsh Rice University*, 408 S.W.2d 269 (Tex. Civ. App.—Houston 1966), *error ref. n.r.e.*

⁸ TEX. REV. CIV. STAT. ANN. art. 1291a (Supp. 1969).

⁹ *Dallmeyer v. Hermann*, 437 S.W.2d 367, 368 (Tex. Civ. App.—Houston 1969).

¹⁰ *Id.* at 371.

¹¹ 437 S.W.2d 643 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

¹² *Id.* at 645.

¹³ See *Mitchell v. Mitchell*, 151 Tex. 1, 244 S.W.2d 803 (1951).

¹⁴ TEX. PROB. CODE ANN. § 58 (1956).

quently, testator's unmarried sister died intestate. Testator's wife claimed the interest that testator would have received had he survived his sister. The court rejected the wife's contentions. At the testator's death he had an expectancy that he might receive something from his sister. When he predeceased his sister, that expectancy terminated. There was nothing, therefore, to leave his wife.¹⁵

II. PROCEDURE

A series of cases were decided involving procedural matters both relating to the probate of the will and the administration of the estate. Section 93 of the Texas Probate Code¹⁶ provides that a will can be contested within two years after the will has been admitted to probate or within two years after the discovery of forgery, provided that in the case of a minor the two-year period begins after removal of his disability. In *Ladehoff v. Ladehoff*¹⁷ the Texas supreme court held that a minor who had not been personally served but who had been represented by a guardian *ad litem* had the right after attaining majority to attack the probate judgment. The court reserved judgment on what the result would be if the minor had been personally served.

In *Corpus Christi Bank & Trust v. Alice National Bank*¹⁸ Mrs. East executed a will in 1960 to which she later added four codicils. In this will she named the Alice bank and two individuals, now deceased, as independent executors. Mrs. East died on February 11, 1961. Her 1960 will was admitted to probate on March 6, 1961, and on June 5, 1961, an order of the probate court approved the inventory, appraisement and list of claims prepared by the independent executors. On July 25, 1962, a number of heirs-at-law filed suit to set aside the probate of the 1960 will and later in 1964 an application was made to probate a will executed in 1948. The contestants also sought the appointment of a temporary administrator for the purpose of filing suits to cancel certain royalty assignments executed by Mrs. East during her lifetime. This appointment was made by the probate court in 1964, and in 1965 the Corpus Christi bank was appointed successor temporary administrator for this purpose.

In 1968 the probate court, after a trial on the merits, declared the 1960 will invalid, admitted the 1948 will to probate, and enlarged the powers of the Corpus Christi bank to administer the property in place of the Alice bank, "pending the finality of this judgment determining the merits of the will contest."¹⁹ The Alice bank appealed to the district court. The Alice bank also sought a temporary injunction from the district court for the period of the appeal to prevent the Corpus Christi bank and others from attempting to interfere with the Alice bank's possession of the estate. The district court denied the injunctive relief sought by the

¹⁵ *Ingram v. Medford*, 440 S.W.2d 391 (Tex. Civ. App.—Texarkana 1969).

¹⁶ TEX. PROB. CODE ANN. § 93 (1956).

¹⁷ 436 S.W.2d 334 (Tex. 1968).

¹⁸ 444 S.W.2d 632 (Tex. 1969).

¹⁹ *Id.* at 633.

Alice bank. The court of civil appeals reversed in part by granting the temporary injunction.²⁰

The Texas supreme court, in affirming the decision of the court of civil appeals, reasoned that the Alice bank was appointed the independent executor and, after filing the inventory, appraisal, and list of claims in 1961, was entitled to represent the estate of Mrs. East *free of judicial supervision except where provided by statute*. An independent executor can be removed for the specific reasons set out in sections 217²¹ and 222 (a)²² of the Texas Probate Code, but none of these reasons was present here. Section 132 (a)²³ permits the appointment of a temporary administrator *until* an executor or administrator with full powers has qualified. In this case the executor had already qualified. The case is an interesting one and suggests some matters for consideration in the drafting of clauses in wills regarding the appointment of executors, particularly in those cases in which a contest is contemplated. Thus, a testator might wish to affirm clearly, as far as he can, his own desires as to the person whom he wishes to control his estate during contest proceedings.

Other procedural cases were as follows: In a suit for construction in which a church might participate in the estate, the church was an indispensable party.²⁴ In another case the heirs' petition in the district court to recover property and have an accounting from the widow-administratrix failed to show the necessity of intervention by the district court. The effect of the suit was to ask for a distribution before the debts of the estate were paid. This would take the case out of the hands of the administratrix and make the district court the administrator. The court concluded that complaints about handling of funds properly belonged in the probate court.²⁵

Another case involved a question of offsets and credits which was first raised in the probate court and later in the district court.²⁶ The decedent's will appointed one W. Lee Moore, Jr. as independent executor. A contest of the will was filed by Jeanne T. Moore, and after the contest was heard and overruled in the probate court, and such judgment appealed to the district court, the probate court removed W. Lee Moore, Jr. as independent executor and appointed him temporary administrator. Thereafter Mrs. Moore filed her application for widow's allowance, which the probate court ordered the temporary administrator to pay, less certain offsets. The order was appealed to the district court where, after a trial *de novo*, a judgment was entered and, on appeal, affirmed by the court of civil appeals. The

²⁰ Alice Nat'l Bank v. Corpus Christi Bank & Trust, 431 S.W.2d 611 (Tex. Civ. App.—Corpus Christi 1968), *aff'd*, 444 S.W.2d 632 (1969).

²¹ TEX. PROB. CODE ANN. § 217 (1956).

²² *Id.* § 222 (a) (Supp. 1969).

²³ *Id.* § 132 (a) (1956).

²⁴ Kelsey v. Hill, 433 S.W.2d 241 (Tex. Civ. App. 1968).

²⁵ Click v. Neville, 431 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1968); *see* Metting v. Metting, 431 S.W.2d 906 (Tex. Civ. App.—San Antonio 1968) (action in probate court looking to giving of security and subsequent removal of independent executor for allowing tax lien to become encumbrance belonged in district court).

²⁶ Moore v. Ellis, 435 S.W.2d 951 (Tex. Civ. App.—Dallas 1968).

supreme court refused to grant a writ of error. The temporary administrator refused to pay the claim. The county clerk issued an execution.

The temporary administrator contended that the judgment was covered by rule 313²⁷ and that no execution should issue thereon. He also contended that he was entitled to have the judgment sent back to the probate court and reviewed in light of possible credits. On the first issue the court held that rule 313 was inapplicable in view of the special nature and high priority of the family allowance. On the second issue the court held that offsets and credits had already been litigated in the probate court and district court and were not again reviewable.

In presenting preferred claims against the estate the claimant should consider the various options available. In *Montague v. Brassell*,²⁸ when the decedent and his former wife were divorced, he gave her a note secured by a deed of trust on an undivided half-interest in certain royalties. After the death of the husband the claimant's former wife had several ways in which she could collect her claim. She had the right to proceed to sell the mortgaged properties under the trust powers contained in the deed of trust, or she could proceed with a judicial foreclosure, in which event an ancillary receivership or garnishment would have been sufficient to assure that payments which accrued during the pendency of the foreclosure proceedings would have been available for application to the debt. Rather than pursue either of these direct methods, the claimant presented her claim under Texas Probate Code section 306(a)(2).²⁹ The court held that, having chosen this course, she could not reach royalty payments received by the executor *after* presentation of the claim and *prior* to foreclosure, because such items were "other assets." Nor was there an issue of waste of the security. Since the property was producing at the time the mortgage was placed on it, the mortgagor or his estate had the right to collect the oil runs from the property before a foreclosure sale.³⁰

Transactions between the executor or administrator and others must meet the high standards of conduct expected of a fiduciary. In a case in which a brother-in-law relationship existed between the administrator and the purchaser of real estate from the estate, the court stated that such relationship did not establish a conspiracy.³¹ Moreover, the heirs joined in the execution of a special warranty deed to the property which was also the subject of the administrator's deed. The acceptance by the heirs of the proceeds of the sale estopped the heirs from asserting that the deed was voidable.

In *Estate of McKinney v. Hair*³² the proponent of a self-proved will was denied probate on the grounds that the proponent (1) had failed to show that the decedent was a resident of the county in which the will was filed for probate, and (2) had failed to show that the will had not been re-

²⁷ TEX. PROB. CODE ANN. § 313 (1956).

²⁸ 443 S.W.2d 703 (Tex. Civ. App.—Beaumont 1969) (royalties received *after* claim presented but *before* foreclosure are not reached by deed of trust sale).

²⁹ TEX. PROB. CODE ANN. § 306(a)(2) (1956).

³⁰ 443 S.W.2d at 703.

³¹ *Kemp v. Harrison*, 431 S.W.2d 900 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

³² 434 S.W.2d 217 (Tex. Civ. App.—Waco 1968), *error ref. n.r.e.*

voked. The court of civil appeals reversed on both grounds, holding (1) that the testator's recitation of his residence in Falls County should be accepted as evidence of his residence in the absence of a showing of a change in residence before his death, and (2) that the proponent is entitled to the presumption of continuity of the will. The contestant had the burden of overcoming the presumption.

In *Utay v. Urbish*³³ the payee of a note executed an instrument which purported to cancel a note at the death of the payee. The instrument provided that interest payments would be paid during the lifetime of the payee and at her death the note was cancelled. After the payee's death her administrator sought collection of the note. The court held that the document was not testamentary in character and therefore revocable; rather, it constituted a novation pursuant to which the parties agreed that the note would be cancelled at the payee's death in consideration for the maker's paying interest to the payee during her lifetime. The maker did perform his part of the agreement by paying the interest and was entitled to the cancellation.

If a will was in the possession of the testator or where he had ready access to it when last seen, failure to produce it after death raises the presumption that the testator has destroyed it with the intention of revoking it. The proponent has the burden of proving non-revocation. If the will was last seen in the possession of some other person, the burden shifts to the contestant.³⁴ In *Citizens First National Bank v. Rushing*³⁵ a carbon of the will was offered. The proponents contended that the original document was last seen in the hands of another; however, even indulging every legitimate conclusion in favor of the proponents, they had not shown by sufficient evidence that the document last seen was in fact the original of the carbon copy offered.³⁶ Hence the proponents had the burden of proving non-revocation.

III. TAXATION

In *Wallrath v. Calvert*³⁷ a brother and sister opened joint and survivor accounts at the bank. When the sister died, the Comptroller included one half the balance in the accounts at the time of the sister's death in her taxable estate for inheritance tax purposes. The court of civil appeals held that the defeasible interest acquired by the sister reverted at her death to

³³ 433 S.W.2d 905 (Tex. Civ. App.—Dallas 1968), *error ref. n.r.e.*

³⁴ *Aschenbeck v. Aschenbeck*, 62 S.W.2d 326 (Tex. Civ. App.—Austin 1933), *error dismissed*.

³⁵ 433 S.W.2d 741 (Tex. Civ. App.—Tyler 1968).

³⁶ See *In re Estate of Simms*, 442 S.W.2d 426 (Tex. Civ. App.—Texarkana 1969), *error ref. n.r.e.* (all witnesses to alleged lost will and codicil must testify as to attestation, execution, and the like before secondary evidence can be offered); *Huckaby v. Huckaby*, 436 S.W.2d 601 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.* (evidence of existence of 1957 will sufficient to support finding that 1953 will had been revoked).

³⁷ 442 S.W.2d 884 (Tex. Civ. App.—Austin 1969), *error granted*. In another tax case, *United States v. Collins*, 399 F.2d 90 (5th Cir. 1968), the court allowed only one-half the funeral expenses as a deduction in calculating the husband's taxable one-half of the community estate. The case arose before May 27, 1967, the effective date of the amendment of TEX. PROB. CODE ANN. § 320A (Supp. 1969) which specifically provides for the deduction of the entire funeral expenses against the estate of deceased spouse.

her brother; this, therefore, was a taxable event. In this case, however, there was testimony to the effect that the brother had reservations about the joint account when it was created; that is, the brother's testimony indicated that he intended that the sister have an interest in the account for the purpose of paying the brother's obligations if he became incapacitated. On this basis, the case was remanded for further findings of fact.

IV. CONTRACTUAL WILLS

In last year's survey period, there had developed a rash of cases under this topic. The issue has been less important this year. In *Kastrin v. Janke*³⁸ Alexander and his wife, Lena, executed documents which were alleged to be mutual wills, which each executed in consideration of the other. The contention was that after the first one died, the survivor was bound contractually to carry out the agreement.

The court stated that the parties supporting the contractual theory have the burden of establishing by clear and satisfactory proof that each of the spouses made his will in consideration of the other. Two issues were submitted:

Do you find, from a preponderance of the evidence, that on or before the 22nd day of May, 1953, [Alexander and Lena] entered into an agreement between themselves regarding the disposition of their respective property in the event of their death? Answer 'Yes' or 'No.' We answer 'Yes.'

If you have answered 'yes' to the preceding special issue, then but not otherwise answer the following issue:

Special Issue No. 2

Do you find, from a preponderance of the evidence, that pursuant to such agreement, if any, [Alexander and Lena] executed their wills dated May 22, 1953? Answer 'Yes' or 'No.'

We answer 'Yes.'³⁹

The court held that the foregoing issues were not decisive because there was lacking in the issues submitted the basic *quid pro quo* element. Had the issues been framed in such a way as to elicit the fact of the making of one will in consideration of the other, the result might have been different.

V. TRUSTS

*Murphey v. Johnson*⁴⁰ is an interesting case distinguishing between an express trust and a resulting trust. John and Faye persuaded Faye's parents to convey a tract of land to obtain funds for the down payment on a business. There was an express oral trust that John and Faye would reconvey to Faye's parents. The business failed, and judgment was entered in favor of a creditor. Meanwhile, John conveyed the property to his wife. A writ of execution was issued, but prior to sale under execution Faye conveyed the tract to her parents. The court held that, although the oral trust was invalid under the Texas Trust Act,⁴¹ a resulting trust arose from

³⁸ 432 S.W.2d 539 (Tex. Civ. App.—El Paso 1968), *error ref. n.r.e.*

³⁹ *Id.* at 542, 543.

⁴⁰ 439 S.W.2d 440 (Tex. Civ. App.—Houston 1969).

⁴¹ TEX. REV. CIV. STAT. ANN. art. 7425b-7 (1960).

the transaction. Therefore, Faye held only legal title subject to the trust in favor of her parents. The creditors could not reach the parents' equitable estate.⁴²

*First City National Bank v. Toombs*⁴³ involved the doctrine of partial renunciation of benefits under a will. Two daughters were beneficiaries of cash bequests under a will and were also life income beneficiaries under testamentary trusts. The two beneficiaries accepted the cash bequests but renounced their benefits under the trusts. The court sustained the renunciations holding that if two separate and independent bequests are made to a beneficiary, he may renounce one and accept the other. In this case both gifts were beneficial, and neither involved burdensome features. The renunciation does not result in loss or hardship to other devisees or legatees, and nothing in the will conditioned the acceptance of one gift on the acceptance of the other.

⁴² For a case on the question of constructive trust, see *Alexander v. Gilkerson*, 433 S.W.2d 13 (Tex. Civ. App.—Eastland 1968), *error ref. n.r.e.*

⁴³ 431 S.W.2d 404 (Tex. Civ. App.—San Antonio 1968), *error ref. n.r.e.*