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WILLS AND ESTATES

REQUISITES AND WITNESSES

IN 1947 the Texas Legislature enacted a statutory amendment regarding the requisites of wills and the attestation thereof. Article 8283¹ was amended to read as follows:

“Every last will and testament except where otherwise provided by law, shall be in writing and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in their own handwriting in the presence of the testator.”²

Article 8284³ was also amended:

“Where the will is wholly written in the handwriting of the testator the attestation of the subscribing witnesses may be dispensed with.”⁴

It will be noted that the words “wholly written by himself” of Article 8283 were changed to read “wholly in the handwriting of the testator.” The words “wholly written by the testator” of Article 8284 were changed to read “wholly written in the handwriting of the testator.” And the words “in their own handwriting” were added in Article 8283 to the requirement of attesting witnesses’ subscriptions.

Before these changes, the courts had generally construed “wholly written by the testator” to mean “in his handwriting,” so the changes were not revolutionary.⁵ With the statutory amend-

¹ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 8283.

² TEX. REV. CIV. STAT. ANN. (Vernon's Supp., 1947) Art. 8283.

³ TEX. REV. CIV. STAT. ANN. (Vernon's, 1925) Art. 8284.

⁴ TEX. REV. CIV. STAT. ANN. (Vernon's Supp., 1947) Art. 8284.

⁵ 44 TEX. JUR. 657, § 113 (1944): “When written wholly in the handwriting of the testator, no witness is required to sign the same to give it vitality as a will. In *Brackenridge v. Roberts*, 114 Tex. 418, 267 S. W. 244 (1924) an important question in deciding whether a holographic will had been executed with the proper formalities was whether it was written wholly in the testator's own handwriting. In *Bennett v. Jackson*, 172 S. W. (2d) 395 (Tex. Civ. App. 1943) *writ of error refused for want of merit*, an action was grounded

ment, it is now certain that a will must be wholly in the testator's handwriting or it will have to be attested by subscribing witnesses in their own handwriting.

CONSTRUCTION OF WILLS—"PERSONAL PROPERTY":

*Gilkey vs. Chambers*⁶ is a very interesting case in which the court construed the term "personal property" to include realty. The will was written wholly in the handwriting of the testatrix as follows:

"Forney, Texas, Jan. 26-1937

Mrs. A. L. Gilkey's Will T O Gilkey owns a half inerst in all of the live stock, at my death I will him all of my inerst in them, and all of my persnal property as long as he lives. If his wife Maud Ball Gilkey out lives him, at her death all of the property must go back to the Gilkey's heirs. This is my Will T O Gilkey executor without Bond.

Mrs A L Gilkey"

In a five-to-four decision the court construed the will as devising all of the testatrix's interest in the livestock and a life estate in all of her other property, real, personal, and mixed. The court pointed out that the testatrix was uneducated and obviously did not understand the legal meaning of the term "personal property." It was a liberal construction to arrive at the intent of the testatrix. She evidently employed the term "personal property" to distinguish between property which she owned individually and that which she owned in partnership with her son.⁸ The court attached

upon allegations that the will was not written wholly in the handwriting of the testator.

In *Maul v. Williams*, 69 S. W. (2d) 1107 (Tex. Comm. App. 1934) *approved*, the court held that an instrument intended by the testatrix as a holographic will should be given effect as such although it contained words not in the testatrix's handwriting, where such words were not necessary to complete the instrument in holographic form and did not affect the meaning; but as the printed matter was not written by the testatrix in any manner, the question raised by this case would not be affected by the amendment.

It should be noted that TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 23, provides that the terms "written" or "in writing" include any representation of words, letters or figures, whether by writing, printing or otherwise unless a different meaning is apparent from the context.

⁶ Tex., 207 S. W. (2d) 70 (1947).

⁷ *Ibid.*

⁸ "Especially where a will bears earmarks of having been drawn by a layman, and not by a lawyer, the court in the endeavor to arrive at the intent of the testator, will not

the popular rather than the technical meaning because the testatrix was obviously uneducated.⁹

The majority opinion also held that the expression, "all of the property," was a reference to all of the estate. It was susceptible of that interpretation and the court felt its duty was so to interpret it, in order to prevent partial intestacy. As the court pointed out in a previous case¹⁰, the very purpose of a will is to make such provisions that the testator will not die intestate.

Chief Justice Alexander was joined by three other justices in a vigorous dissent, saying that the testatrix used apt words to limit her bequests to her personal property only, and the Court should not, under the label of liberalism, place a construction on the words of her will entirely different from their well-established meaning, and thereby thwart her purpose as expressed by her. The dissent contended there was no ambiguity in the terms of the will as to the character of property bequeathed and a presumption that the testatrix did not intend to die intestate as to part of her estate may be invoked only where the will is by its own terms ambiguous.¹¹

The dissent especially protested the allowing of three witnesses to testify that they had heard the testatrix use the expression "personal property" to refer to both real and personal property owned by her individually, as distinguished from that owned jointly by her with others.¹² The majority opinion, however, contended it did not need to rule on the admissibility of the parol evidence for such evidence was not essential to support the decision anyway.

view the language technically but liberally and with reference to its popular meaning." 28 R. C. L. 224, § 185 (1929).

⁹ "The court should consider whether the drawer of the will was or was not familiar with the technical meaning of the words or terms used, . . . not placing too great emphasis on the precise meaning of the language used where the will is the product of one not familiar with legal terms, or not trained in their use." 69 C. J. 77, § 1130 (1934).

¹⁰ *Heller v. Heller*, 114 Tex. 401, 269 S. W. 771 (1925).

¹¹ 69 C. J. 132, § 1172 (1934).

¹² "Extrinsic evidence may not be received for the purpose of increasing, diminishing, or varying the estate or interest given by an unambiguous will, or to vary the legal effect of the language used." 4 PACE ON WILLS 642, § 1621 (1941).

CONSTRUCTION OF WILLS-GENERAL LIFE ESTATE

In *Medlin v. Medlin*,¹³ the testator's will was construed to devise a general rather than a limited life estate. The testator bequeathed to his wife all his property for her life with the remainder to go to his children at her death. The controversy centered around the following provision:

"... in order to keep and preserve the estate in the best manner, and for my wife to live comfortably, it will be necessary for her in some instances to lease, sell, transfer, mortgage, and convey part or all of such properties."¹⁴

The court held such words do not indicate an intention to limit the life estate only to such use as might be necessary for her reasonable and comfortable maintenance and support. The court reasons thusly because the will then goes on to say,

"I hereby authorize . . . my said wife, Minnie Medlin, to so handle and care for such property as she may see fit and proper, including the mortgaging and sale of any part thereof . . . ; her judgment in all of such matters to be controlling and binding."¹⁵

In an analogous case, where testator gave his wife the property "for and during her natural life, to be applied as she may deem best to the support and maintenance of herself and our children," the court was confirmed in the opinion that testator intended to confer upon his wife, with reference to the property, the absolute and unrestrained power of disposition.¹⁶

The court will not impose a burden on the life estate granted unless there is an express limitation.¹⁷ As no express limitation can be found in the principal case, *Medlin v. Medlin*, a general life estate was held to be granted.

¹³ 203 S. W. (2d) 635 (Tex. Civ. App. 1947) *writ of error refused*.

¹⁴ *Id.* at 637.

¹⁵ *Ibid.*

¹⁶ *Orr v. O'Brien*, 55 Tex. 149 (1881).

¹⁷ In *Johnson v. Goldstein*, 215 S. W. 840 (Tex. Comm. App. 1919), the will, providing devisee should have the homestead "to be used and enjoyed by him as a home to live at for and during his natural life," was held to devise only a right of occupancy and not a life estate.

PRESUMPTION OF DEATH—ADMINISTRATION OF ESTATE
OF LIVING PERSON

*Christiansen v. Christiansen*¹⁸ is apparently the first case in which Article 5541 has been brought forward as arresting the running of statutes of limitation. Article 5541 provides that an estate recovered on presumption of death shall be restored to the absentee on proving that he is alive in later suit.¹⁹

In 1934, Chris and Johanna, brother and sister of the deceased landowner, obtained a partition decree in Texas against Alfred and other heirs presumed dead because of seven years continuous absence, unheard of, from their home and residence. Actually Alfred was alive until 1940. Chris entered into possession of the lands under the partition decree and claimed adversely against his co-tenant, Alfred. Margaret, widow and sole heir of Alfred, brings this action in Texas in 1945 to recover Alfred's interest in the land, having just discovered the partition decree.

Chris asserted that he is now protected by the Texas statutes of limitations, but the court refused to permit the defeat of Margaret's recovery by limitation. The Circuit Court of Appeals held the partition decree rendered in such circumstances

"... was not a notorious act of ouster and was not color of title upon which to predicate adverse possession, and only by retaking of possession under adverse claim and in denunciation or renunciation of the decree could Chris's possession become adverse so as to ripen into a title by limitation."²⁰

It was concluded that Article 3292 and Article 5541, governing absentees and administration of estates of living persons, undertook to prevent the taking of a living person's property on presumption of death, and are on condition that the property be restored to absentee if he was not dead.²¹ The court said:

¹⁸ 159 F. (2d) 366 (C. C. A. 5th 1947).

¹⁹ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 5541.

²⁰ 159 F. (2d) 366, 370 (C. C. A. 5th 1947).

²¹ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 3292, art. 5541.

"Since the passing of property of a living absentee under the probate of a will or administration of an estate is void, consistency would seem also to require that any attempt at passing of title to property of a living absentee by any other judicial proceeding predicated upon the presumption of death under Art. 5541, the 'Dead Man's Statute', should be either proscribed, or else so circumscribed or conditioned as to afford protection to an absentee later found to be alive."²²

Chris took possession under the partition decree and it was held he must hold under the statutes under which he took, with the obligation to return the property on finding the presumption of death rebutted. So at present in Texas, limitations will not run against recovery of his estate by an absentee presumed dead, where the one in possession holds under the presumption of death statute.²³

PROPONENT—"PERSON INTERESTED"

*Logan v. Thomason*²⁴ gives the best definition so far of "person interested" under Article 3339, which provides:

"Applications for the probate of a will may be made by the testamentary executor, or by any person interested in the estate of the testator."²⁵

It seems to be the first case in Texas in which a proponent actually possessed no interest to be affected by the probate of the will. The proponent was the son of the principal beneficiary, who predeceased the testator. As the beneficiary was not a lineal descendant of testator, his gift lapsed. Therefore his son, the pro-

²² 159 F. (2d) 366, 369 (C. C. A. 5th 1947):

²³ In *Pollock v. Wunch*, 116 S. W. (2d) 796 (Tex. Civ. App. 1938), the absentee returned and recovered his property two years after a judgment had declared him dead under the seven years' absence statute. The court there declared that death is a jurisdictional fact, for Article 3292 reads, "... administration of an estate of a living person shall be void."

In *Beckwith v. Bates*, 228 Mich. 400, 200 N. W. 151 (1924), the plaintiff was absent twenty years. Two years after being judicially presumed dead, she was allowed to recover her inheritance from the administrator who had already distributed it. Holding such probate proceedings void *ab initio*, the court said, "The probate court for want of subject matter, had no jurisdiction to administer and distribute the property of plaintiff."

²⁴ ___ Tex. ___, 202 S. W. (2d) 212 (1947).

²⁵ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 3339.

ponent, would take nothing under the will in the event it was admitted to probate.

In dismissing the application for probate, the court held that under the statutes requiring a proponent or contestant of a will to be a "person interested" in the estate, the interest referred to must be a pecuniary one held by the party either as an individual or in a representative capacity, which will be affected by the probate or defeat of the will. An interest resting on sentiment or sympathy, or any other basis, other than gain or loss of money or its equivalent, is insufficient.

Previous Texas cases involved proponents who were "persons interested" and in holding them competent, certain principles were established with reference to their qualifications which support the holding in the principal case.²⁶

The court in the principal case also says that it sees no reason why the same principle should not apply to the term, "person interested," as used in Article 3339 with reference to proponents of a will as it does to the same terms as used in Article 3315²⁷ with reference to contestants.²⁸

REPUBLICATION BY CODICIL

*Kotula v. Kotula*²⁹ seems to be applying old law to slightly different facts. The testatrix's will of March 24, 1922, gave a son a share in the residuary estate; a first codicil reduced the devise; a second codicil recited settlement agreement and revoked all

²⁶ *Ryan v. Texas & Pacific R. R.*, 64 Tex. 239 (1885): anyone claiming an interest under a will may present it for probate. *Howley v. Sweeney*, 288 S. W. 602 (Tex. Civ. App. 1926): good faith purchasers from devisees and heirs of testator. *Hardin v. Hardin*, 66 S. W. (2d) 362 (Tex. Civ. App. 1933): grantees and mortgagees of property devised to testatrix's husband.

²⁷ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) art. 3315.

²⁸ Cases in regard to contestants being "persons interested": *Moore v. Stark*, 21 S. W. (2d) 296 (Tex. Comm. App. 1929); *Abrams v. Ross' Estate*, 250 S. W. 1019 (Tex. Comm. App. 1923); *Smith v. Mann*, 296 S. W. 613 (Tex. Civ. App. 1927) writ of error refused; *Daniels v. Jones*, 224 S. W. 476 (Tex. Civ. App. 1920) writ of error refused.

²⁹ 198 S. W. (2d) 637 (Tex. Civ. App. 1947) writ of error refused.

previous testamentary declarations to the son; the third codicil said,

"... my last will and testament made by me on March 24, 1922, is reaffirmed and continued in full force and effect."³⁰

The son failed in his contention that the third codicil revoked the antecedent codicils and republished only the original will. The court held that the third codicil ratified not only the will but also the first two codicils so the son took nothing because the second codicil had revoked all devises to him.³¹

In a previous decision, it had been held that a second codicil vesting property in others on the death of the devisee without heirs of the body surviving did not revoke the first codicil giving the devisee the right of disposition during her life.³² And it has also been said that the failure of the testator in one codicil to refer to a former codicil does not revoke the former codicil.³³

OWELTY

The sum assessed against one party to equalize a partition is called "owelty."³⁴ *Atwood v. King, Atwood v. Kleberg*³⁵ has the interesting circumstance of the testamentary trustees themselves applying this doctrine of owelty in partitioning the residuary estate of the testatrix. It had previously been held that the court in a partition proceeding has a right to assess "owelty" in adjusting equities between tenants in common.³⁶

In the principal case, the testatrix devised the residuary estate to trustees in trust for ten years and until the final partition and

³⁰ *Ibid.*

³¹ "A mere reference to the date of the original will . . . does not effect a revocation of the antecedent codicils, but is a ratification of the will as modified by the codicils." 68 C. J. 868, § 585 (1934).

³² *Eubank v. Moore*, 15 S. W. (2d) 567 (Tex. Comm. App. 1929).

³³ *Warnken v. Warnken*, 104 S. W. (2d) 935 (Tex. Civ. App. 1937) *writ of error dismissed by agreement*.

³⁴ 30 WORDS AND PHRASES 588 (1940).

³⁵ 163 F. (2d) 108 (C. C. A. 5th 1947).

³⁶ *Sayers v. Pyland*, 139 Tex. 57, 161 S. W. (2d) 769 (1942).

distribution by them of all her estate. Furthermore, the will authorized them to act as though they were the owners of the property, except where the will expressly provided otherwise.

In making the deeds in partition, the trustees charged the parties receiving the residuary estate with debts of the estate to the extent of the full value of the residuary estate. The court held that the doctrine of owelty is well recognized in Texas and such action was within the discretion of the trustees.

INTEREST ON PECUNIARY LEGACIES

*Williams v. Smith*³⁷ clearly states the fundamental purpose in awarding interest. It is the general rule that pecuniary legacies bear interest from the time they are due and payable.³⁸ This case holds that such interest is awarded purely as an incident of, or accretion to, the legacy itself as compensation for loss the beneficiary suffers by reason of delay, and is not imposed on the executor or testamentary trustee as a penalty for default or neglect.³⁹

R. L. S.

³⁷ Tex., 206 S. W. (2d) 208 (1947).

³⁸ *Claffin v. Holmes*, 202 Mass. 157, 88 N. E. 664 (1909); *In re Brandon's Estate*, 164 Wis. 387, 160 N. W. 177 (1916); 69 C. J. 1260 (1934).

³⁹ *State Bank of Chicago v. Gross*, 344 Ill. 512, 176 N. E. 739 (1931); *Davidson v. Rake*, 44 N. J. Eq. 506, 16 A. 227 (1888).