Volume 3
Issue 3 *Survey of Texas Law for the Year 1948*

Article 5

1949

Wills and Estates

Samuel E. Daugherty

WILLS AND ESTATES

EXECUTORS AND ADMINISTRATORS ANCILLARY PROBATE OF FOREIGN WILLS

Adams v. Duncan[1] in addition to being an interesting case from the standpoint of the facts involved, shows a very good application of Article 8305,[2] which provides that when a foreign will recorded in Texas gives an executor power to sell real estate situated in this state no order of court shall be necessary to authorize the executor to make sale and execute a proper conveyance. In this case the conveyance in question was made in 1906 by an executor acting under authority of letters taken out in Pennsylvania. Article 8305 was not passed until 1915, and the conveyance was attacked on the grounds that the statute did not apply since it was not in effect at the time the conveyance was made. The Supreme Court held that the statute *did* apply, pointing out that Article 8305, was enacted as Article 7878a of the revised statutes of 1911, and that following it, as Article 7878b, was a validation act which validated all sales and conveyances previously made, where duly filed and recorded, as if they were made and recorded after the passage of this act.

CONSTRUCTION OF WILLS—RIGHTS OF SURVIVOR UNDER JOINT AND MUTUAL WILL

In *Harrell v. Hickman*[3] the court agreed that the joint and mutual will validly executed in question was contractual as well as testamentary in character which follows the well established rule to that effect.[4] There is one significant point in the case, however, and

---

[1] ..... Tex. ....., 215 S. W. (2d) 599 (1948).

[2] TEX. REV. CIV. STAT. (Vernon 1925) art. 8305.

[3] ..... Tex. ....., 215 S. W. (2d) 876 (1948).

[4] Nye v. Bradford, 144 Tex. 618, 193 S. W. (2d) 876 (1946), noted in 169 A. L. R. 1 (1947); Larrabee v. Porter, 166 S. W. 395 (Tex. Civ. App. 1914) *writ of error refused;* Moore v. Moore, 198 S. W. 659 (Tex. Civ. App. 1917) *writ of error refused.*

while it presents nothing new, it is a point that may often be overlooked. The court points out that there is a distinction to be drawn between an absolute fee or conditional fee (sometimes called a defeasable fee) and a life estate with a power of sale conveyed in a joint and mutual will, and that the rights of the survivor under each are considerably different. It appears that the rule is that where the will is construed to be an absolute conditional or defeasable fee the survivor has absolute power to dispose of the estate without any regard for the remaindermen, while if the will is construed as conveying a life estate with a power of sale, the survivor is limited to "good faith" conveyances "for the sole use and benefit of the survivor." Of course, as to just what kind of an estate is created by the will is a matter of construction to be drawn from the particular language used in the will.

In this case H and W—husband and wife—executed the will in question. W died first and H took under the will. Several years later H conveyed by deed (for $10.00 and love and affection) 400 acres of land to his second wife and later died. A devisee of the land under the will of H and W claimed this conveyance was fraudulent as to her because the will of H and W was a joint and mutual will, executed by the testators in pursuance of an agreement and that the survivor took only a life estate with a power of sale. The court said the language of the will[5] devised an absolute fee simple to H limited only by paragraph four of the will[6] which had the effect of turning it into a conditional or defeasable fee, the condition being that if H should die seized of any property, it would go to the various institutions and persons named in the will.

The opinion distinguished *Nye v. Bradford*[7] as being a case

[5] "We give, bequeath and devise to the survivor of us... all our property, real, personal and mixed for the sole benefit of the survivor of us."

[6] "After the death of both of us... the remainder of our property, of which the survivor of us shall die seized and possessed shall be disposed of as follows:" then follows bequests to institutions and individuals.

[7] 144 Tex. 618, 193 S. W. (2d) 165 (1946).

where the survivor became a life tenant with authority to sell the property. Speaking of the *Nye* case the court said:

> "It was our holding that a power to sell and thereby defeat the remaindermen, does not include the power to accomplish that result by a gift,"[8]

and of the instant case,

> ". . . the phrase 'for the sole use and benefit of the survivor of us . . .' is not a restriction or limitation upon the right of the survivor, but to the contrary, it affirmatively excludes the theory that the survivor should hold for the use and benefit of any other person."[9]

JOINT AND MUTUAL WILLS—VALIDITY WHERE INEFFECTIVE AS TO ONE PARTY

In *Graser v. Graser*[10] H and W—husband and wife—executed, in 1930, a joint and mutual will which purported to dispose of the bulk of their community and only estate.[11] The instrument was entirely in the handwriting of H, but was signed by both H and W and also a third party, but there was nothing in the nature of an attestation clause. H died in 1932 and the instrument was probated as his will, W procuring appointment of herself as administratrix and taking benefits under the will. Then, in 1939 W died and five of the children sought to probate the instrument as her will, which was denied, because it was not holographic or properly witnessed as to her, and no appeal was taken from that judgment. Administration was had on W's estate and both it and the proceedings incident to her prior deceased husband's estate were closed before the present litigation. Two of the children (defendants in this action and who would take more by W's

---

[8] ..... Tex. ...., 215 S. W. (2d) 876, 879 (1948).

[9] *Ibid.*

[10] .... Tex. ....., 215 S. W. (2d) (1948).

[11] "9-10-30
Waco, Texas
"This is our last will and testament that we agree the last living from us both shall keep part lot 6-7, 94 ft 100 and all the notes and cash money on hand. The other propperty shall be devidet as follows:" the gifts to the various children follow.

intestacy) took the position that while the instrument was the will of their father, it was not the will of their mother, who accordingly, and in fact as adjudged by the probate court, died intestate. The trial court upheld this contention of the two children that W died intestate.

The Court of Civil Appeals of the tenth district reversed the trial court and held that the children took under the will.[12] The court said:

> "Therefore, it is quite clear to us from all the words actually used in the instrument as a whole and from all the extrinsic evidence properly relating thereto, that it was the intention of both parents in the execution thereof to evidence thereby their joint and mutual will made in pursuance of their bilateral agreement therein expressed to the effect that both and each did thereby jointly and mutually agree to give, devise and bequeath to the survivor of them a life estate in their common property, with remainder to their several children as therein specified. . . . We think it is immaterial that Mrs. Graser might have executed the same [will] under such circumstances as to render it invalid as her separate and individual will, or that for any reason such instrument might have been revocable or unenforceable as a testamentary contract during the lifetime of the husband, because the indisputed evidence shows that neither she nor her husband attempted to revoke the same as to repudiate the agreement therein contained but each and both consistently acted thereon until the time of the death of each as if it had been in all respects mutually binding upon both. That being true it is our opinion that the parties to this suit are now estopped from denying the validity or binding effect of the instrument as it was originally executed. . ."[13]

The court further pointed out that the law is well settled in Texas that where a husband and wife make a joint and mutual will pursuant to contract between them by which each devises to the other a life estate in their common property with remainder to their children the survivor becomes bound thereby if he or she accepts benefits accruing under such contract and will. (Citing cases).

---

[12] 212 S. W. (2d) 859 (Tex. Civ. App. 1948) *rehearing denied.*

[13] *Id.* at 864; see footnote 11 *supra*, for the language used in the will.

The Supreme Court reversed the judgment of the Court of Civil Appeals and held that the terms of the instrument were not enforceable against the community interest of W either as a will or as a contract. The instrument was not the will of W, for it was not validly executed as to her, and the judgment of the probate court denying it probate was final and conclusive. It was not a case for application of the doctrine of election, because it was the will of H only and as such did not purport to dispose of the community interest of W. The instrument showed that H believed that, as executed by both him and W, it would operate to pass both community halves according to its terms; but the fact that W accepted benefits under the will which she would not otherwise have enjoyed, realizing that H believed that it was also her will, was held not to be sufficient equity on which to bind her half of the estate. But it was contended by the respondents that it was not merely a matter of accepting benefits under the will of H with knowledge of his expectations, but was also a matter of a contract by W, evidenced by the terms of the instrument, and which neither she nor her heirs might equitably repudiate after full performance by H and acceptance by W of the benefits of such performance. For this proposition respondents relied upon *Larrabee v. Porter*[14] and other decisions in which mutual wills validly executed by both parties were enforced against the survivor or the survivor's successors in interest on the ground of equity arising out of a contract performed by the death of the first testator to die and acceptance of the benefits thereof by the surviving testator. Respondents contended that since all the elements of contract, performance, and acceptance of benefits thereunder were present in this case, the community interest of W became bound by the terms of the instrument, even though it failed as her will. But the court held that to enforce the terms of the instrument as the contract of W would be violative of the provisions of Article 4610,[15]

[14] 166 S. W. 395 (Tex. Civ. App. 1914) *writ of error refused.*

[15] TEX. REV. CIV. STAT. (Vernon 1925) art. 4610, which provides that parties intending marriage may not enter into an agreement "the object of which would be to alter

in that the terms of the instrument would have the effect of altering the legal orders of descent with respect to the children of H and W. It was stated that inasmuch as spouses may, generally speaking, dispose of their property respectively by conveyance or by will, including mutual wills, in such manner as they see fit, without regard to the legal orders of descent and even to the extent of disinheriting their children, it would seem to be a legitimate inference that Article 4610 was designed to apply to cases where an agreement to make a will or mutual will or wills is not followed by actual effective execution of the necessary testamentary documents. Such cases as *Ellsworth v. Aldrich*,[16] holding that an instrument may sometimes be enforceable as a contract though denied probate as a will were said to deal merely with the technical effect of probate or refusal to probate and to be no authority for the proposition that what could have been valid in a properly executed will is necessarily valid as a contract where the will fails merely because of defective execution.

The argument was advanced by the respondents that under *Johnson v. Durst*[17] a contract in violation of Article 4610 is not void but merely voidable; that in this case W had ratified her contract by offering the instrument for probate as the will of H and by taking benefits thereunder; that she thereby became estopped to contest its validity and that the petitioners stood in the same position. As to this, the court declared (1) that this would deny the protection of the statute to the children, who are the ones it was designed to benefit; and (2) that if the petitioners had themselves been guilty of conduct raising an estoppel, possibly the argument would be valid but that it was not intended that they should be bound by the actions of W.

The question raised by this case is one of first impression in

---

the legal orders of descent either with respect to themselves, in what concerns the inheritance of their children or posterity, which either may have by another person, or in respect to their common children." The article applies to past nuptial agreements as well as pre-nuptial agreements.

[16] 295 S. W. 206 (Tex. Civ. App. 1927) *writ of error refused.*

[17] 115 S. W. (2d) 1000 (Tex. Civ. App. 1938) *writ of error dismissed.*

Texas. The petitioners relied upon the case of *Ireland v. Jacobs*,[18] which the court said appeared to be the only one in which the appellate court of any state had resolved the question, and which

> "... is undoubtedly a holding that under circumstances substantially the same as those of the instant case, the surviving wife took under the instrument as the will of her husband but, despite its contractual or 'mutual' character, was not bound by her own commitments in it, since it was defectively executed as her will."

The reasoning of that case was that the agreement between the husband and wife failed for lack of consideration, since the instrument was not validly executed by the wife as her will. The Texas court observed that the rationale of that case may not be sound and has been vigorously criticized in the state where it was rendered, but approved its result as being in accord with our own peculiar institutions,

> "... at least in a case like the present, where we have the additional element of children of the deceased testators or would-be testators."

This case being one of first impression, as the Supreme Court pointed out, brings to mind two other interesting questions:

Query: (1) In a proper case where no children are involved and the amount left to the surviving spouse does not fall below his statutory share, so that Article 4610, *supra*, would not be violated, in view of the observation given to the *Ireland* case, *supra*, what will be the result in Texas?

(2) In view of the court's observations, suppose probate of the instrument involved here had been challenged by H's relatives on the grounds of failure of consideration. Should it have been probated?

Samuel E. Daugherty.

---

[18] 144 Colo. 168, 163 P. (2d) 203 (1945) noted in 161 A. L. R. 1419 (1946) and criticized by Sears, *Joint and Mutual Wills*, 18 ROCKY MT. L. REV. 366 (1946).