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Decedent's Estates

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DECEDENT'S ESTATES

SOME fifty-five supreme court decisions were rendered in 1954 within the jurisdictions of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas covering the field of succession. The greater percentage of these cases, involving run-of-the-mill problems and well-settled legal principles, decided issues concerning the testator's intention, the use of fraud or undue influence on the testator, and the problem of testamentary capacity. However, these courts did render several "key" decisions of first impression or of difficult issues involving wills, and it is the purpose of this article to point up some of the more important questions decided.

I. INTESTATE SUCCESSION — DESCENT AND DISTRIBUTION

Under a statute concerning property jointly acquired during coverture, an Oklahoma opinion¹ held that when the surviving spouse died intestate, first cousins, as "next of kin," inherit to the entire exclusion of children of deceased first cousins. Inheritance by representation only extended through the enumerated classes and where the cousins are the only surviving relations, children of deceased cousins are cut off completely.² The term "next of kin," as used under statutes of descent and distribution,³ varies among states as to how far representation goes. Some jurisdictions greatly limit inheritance by representation, while others extend it to all collateral relatives.⁴ Oklahoma is evidently among those states applying a literal meaning in limiting the effect of these words to "blood relatives in the nearest degree."⁵ Whereas the term is applied literally to exclude children of deceased collaterals

¹ OKLA. STAT. tit. 84, § 213, subd. 2, 6 (1951); *In re Felgar's Estate*,Okla....., 272 P. 2d 453 (1954).

² *In re Felgar's Estate* is the first Oklahoma Supreme Court opinion directly extending such interpretation to cousins of the intestate. An earlier decision, *In re Hothamoes' Estate*, 200 Okla. 532, 198 P. 2d 638 (1948), is not directly on the point. There evidence showed appellant was the first cousin of the deceased, his "nearest of kin" and sole heir, and therefore entitled to inherit the entire estate. OKLA. STAT. tit. 84, § 213, subd. 6 (1951); *In re Humphrey's Estate*, 193 Okla. 151, 141 P. 2d 993 (1943), held living uncles take to the entire exclusion of children and grandchildren of the deceased uncles.

³ The term "next of kin" is often found in wills, and such usage must also be construed by the courts.

⁴ ATKINSON, WILLS 69 (2d ed. 1953).

⁵ *Withy v. Mangles*, 10 Cl. and F. 215, 8 Eng. Rep. 724 (1843).

such as nieces and nephews,⁶ other jurisdictions hold for universal representation⁷ or dispense with the term "next of kin," thus permitting representation to all generations no matter how remote.⁸ The unlimited representation view seems to be a somewhat more equitable and just rule in that a potential heir will not be disinherited solely because such person's parent is deceased.

II. WILLS — EXECUTION

An interesting Oklahoma decision⁹ of first impression upheld a will written on the front side of a printed form and signed on the reverse side by the testator. The court, in holding that the will had been "subscribed at the end" thereof, did not put form above substance, and found the instrument read "straight-forward and without interruption."¹⁰ The majority of American jurisdictions adopted the idea from the 1837 English Wills Act to have wills signed at the end in order to avoid any fraudulent additions and to help determine whether the signature was intended as that of the testator.¹¹ Where the will is required to be signed at the end, there is a conflict of authority as to the sufficiency of the testator's signature on the back of the will.¹² Although an early case upheld the signature on the back as sufficient to make the will valid,¹³ the contrary view is that such will is not properly signed at the end since the place where it is signed has no relationship to the nature of the will or its contents.¹⁴ The Oklahoma decision presented good reasoning and is in harmony with the tendency to move away from the overly-strict application of the "subscribed at the end" rule.

⁶ *Jahnke v. Selle*, 368 Ill. 268, 13 N.E. 2d 980 (1938); *In re Fretheim's Estate*, 156 Minn. 366, 194 N.W. 766 (1923).

⁷ TENN. CODE §§ 8380, 8381; *Barnes v. Redmond*, 127 Tenn. 45, 152 S.W. 1035 (1913). (Held for unlimited representation as to realty.)

⁸ CODE OF IOWA § 636.40 (1954); N. M. STAT. c. 29, art. 1, § 14 (1953); TEX. REV. CIV. STAT. art. 2570 (Vernon 1948).

⁹ OKLA. STAT. tit. 84, § 55 (1951); *Munson v. Snyder*,Okla....., 275 P. 2d 249 (1954).

¹⁰ *In re Field's Will*, 204 N.Y. 448, 97 N.E. 881 (1912). This decision is often cited concerning subscription by the testator to his will.

¹¹ 1 PAGE, WILLS 553 (3d ed. 1941).

¹² *Id.* at 564.

¹³ *Brown's Will*, 40 Ky. (1 B. Mon.) 56 (1840).

¹⁴ *In re Dieterich's Estate*, 193 Atl. 158 (Pa. Super. Ct. 1937). Also, *In the Estate of Bean*, 83 P., 2 All Eng. Rep. 348 (1944) (Held signature on reverse side of will is not sufficient.)

TESTAMENTARY CHARACTER

In 1954 the Texas Supreme Court rendered its first opinion directly deciding that a writing, which was executed as a will and named executors but did not purport to dispose of property, may be probated.¹⁵ Such instrument, although too vague and indefinite to dispose of property, amounted to an appointment of named persons as executors, and hence the writing was of testamentary character. This is in accord with the strong majority or well-established rule that an instrument not disposing of property is a valid will where its only subject matter involves the appointment of an executor.¹⁶ The theory behind the rule¹⁷ is that such appointment is a "special disposition of property to the executor for administrative purposes."¹⁸ An Iowa decision, holding that an instrument appointing an executor but not disposing of the testator's property is not a will,¹⁹ has been impliedly reversed by a later opinion.²⁰

COMPUTATION OF ESTATE TAXES

Under the ruling that the amount of estate tax upon a particular estate is determined by federal law, but the allocation of the tax burden among the beneficiaries is to be controlled by the states,²¹ Arkansas passed its apportionment law spreading the burden of the paid taxes "proportionately among the distributees, and/or beneficiaries of the estate, so that each shall bear his proportionate part of said burden."²² Subsequently Congress authorized marital deductions to equal the impact of the tax on common law and community property states;²³ such statute allowed deductions for interests going to the surviving spouse up to one-

¹⁵ TEX. REV. CIV. STAT. art. 3356 (Vernon 1948); *Boyles v. Gresham*,Tex....., 263 S.W. 2d 935 (1954).

¹⁶ *Fontaine v. Fontaine*, 169 Ark. 1077, 277 S.W. 867 (1925); *Leffler v. Leffler*, 151 Fla. 455, 10 So. 2d 799 (1942); *Reeves v. Duke*, 192 Okla. 519, 137 P. 2d 897 (1943); *In re John's Will*, 300 Ore. 494, 47 Pac. 341 (1896); *In re Sando's Estate*, 362 Pa. 1, 66 A. 2d 312 (1949); 1 PAGE, WILLS at 103, 104; 1 SCHOULER, WILLS 420 (6th ed. 1923).

¹⁷ 1 PAGE, WILLS at 104.

¹⁸ *Blackshear v. Northrup*, 176 Ala. 190, 57 So. 743 (1912).

¹⁹ *In re Manatt's Trust*, 214 Iowa 432, 239 N.W. 524 (1931).

²⁰ *In re Swanson's Estate*, 239 Iowa 294, 31 N.W. 2d 385 (1948).

²¹ *Riggs v. Del Drago*, 317 U. S. 95 (1942). This opinion is the recognized rule and is cited in over 100 decisions.

²² ARK. STAT. tit. 63-150 (1947).

²³ 16 U.S.C. § 812 (a) (1948).

half of the adjusted gross estate in arriving at the value of the net estate to figure such tax on. In its first decision since the marital deductions were allowed,²⁴ the Arkansas high court ruled²⁵ that although a widow's interest was deducted in figuring the value of the estate taxed, such widow's interest must bear its share of the tax. The statute makes no provision for carrying into the actual tax proration the deductions allowed in computing the estate's net value; the burden of the tax paid is spread among all the beneficiaries. While this decision is within the minority view that does not recognize the federal deductions in holding that the surviving spouse is not entitled to the benefit of the deduction,²⁶ the majority of jurisdictions follow the New York apportionment statute²⁷ and give the surviving spouse the benefit of deductions by explicitly carrying such deductions into proration of the tax burden.²⁸

CONSTRUCTION OF WILLS

Where the wife died testate, directing in her will that "all my just debts which I may owe, including the expenses of last illness and of my burial, be paid," the Arkansas Supreme Court²⁹ determined the surviving husband was not entitled to reimbursement from the estate for payments he personally made covering his deceased wife's medical expenses. This decision is submitted as the legal fiasco of the year. The court reasoned that, (1) if the testatrix had wanted her surviving spouse to be reimbursed, she could have expressed such intention — the provision of the will though does not constitute such an expression; and (2) such payment was the husband's legal obligation and an incident of his duty to maintain and protect his spouse. Three justices vigorously dissented stating that, (1) the husband's duty is not the question, but rather whether the testatrix had created a charge on her estate;

²⁴ *Terral v. Terral*, 212 Ark. 221, 205 S.W. 2d 198 (1947). The court held that a widow was a distributee or beneficiary and must bear her share of the tax burden; however, this opinion was rendered before 26 U.S.C. § 812 (a) (1948) authorized the marital deductions in arriving at the value of the net estate.

²⁵ ARK. STAT. tit. 63-150 (1947); *Williamson v. Williamson*,Ark....., 272 S.W. 2d 72 (1954).

²⁶ *Weinberg v. Safe Deposit and Trust Co.*, 85 A. 2d 50, 57 (Md. Ct. of App. 1951).

²⁷ CONSOLIDATED LAWS of N. Y. c. 13, § 124 (1949).

²⁸ *Jerome v. Jerome*, 139 Conn. 285, 93 A. 2d 139 (1952); *In re Fuch's Estate*,Fla....., 60 So. 2d 536 (1952); *In re Peter's Will*, 88 N. Y. S. 2d 142 (N. Y. Surr. Ct. 1949); *In re Harvey's Estate*, 350 Pa. 53, 38 A. 2d 262 (1944).

²⁹ *Barry v. Brittain*,Ark....., 268 S.W. 2d 12 (1954).

(2) the will shows such charge is created; (3) a married woman may bind her estate for her medical expenses; and (4) and an analogy to cases where the wife had bound her estate for funeral expenses points out that the majority is incorrect. Clearly the dissent's view is more in line with better legal principles and the intention expressed in the will. Common law and statutory enactments have imposed upon the husband a duty to support and maintain his wife, provide essentials for her health and comfort, and to pay her burial expenses at death.³⁰ Although some jurisdictions give effect to express directions in wills charging estates with debts, while others hold such provisions are merely formal and add nothing,³¹ the majority view is that where the will of a wife directs her funeral expenses to be paid, the surviving husband can recover his outlays from the estate.³² A fortiori the dissent in the principal case is given added weight by a previous Arkansas decision,³³ cited by the majority which held a surviving spouse could pay medical and funeral expenses of her deceased husband and then claim reimbursement from the intestate estate as a creditor of the first class.

JOINT AND MUTUAL WILLS

The Texas Supreme Court ruled³⁴ that where a husband and wife executed joint and mutual wills, contractual in nature, and the wife accepted the benefits of the probated will upon death of the husband, subsequent codicils of the wife would only pass property acquired by her after the husband's death. The joint and mutual wills attached only to the property owned by the spouses, either or both, at the time of the husband's death. Although such mutual wills can clearly provide for all property of the survivor to pass at his death, the court correctly reasoned that in absence of any such clearly expressed intention, "better reasoning" supports the rule that after-acquired property obtained by the survivor in his or her own right does not pass under the mutual will.

³⁰ MADDEN, DOMESTIC RELATIONS 179, 180 (1931).

³¹ 4 PAGE, WILLS at 285.

³² *Pickett's Estate v. Pickett*, 162 Md. 10, 158 Atl. 29 (1932); *Brown v. Brown*, 199 N. C. 173, 154 S.E. 731 (1930). *Contra*: *Lee v. Hemphy*, 172 N.E. 421 (Ohio Ct. of App. 1929).

³³ *Burns v. Wegman*, 200 Ark. 225, 138 S.W. 2d 389 (1940).

³⁴ *Murphy v. Slaton*,Tex....., 273 S.W. 2d 588 (1954).

This prevents an "impossible and intolerable situation."³⁵ Although this was the first Texas case directly on the point, an earlier opinion³⁶ took cognizance of the wife's right to dispose of her individually acquired property in a mutual will situation. Even with the great weight of authority holding that mutual wills may be validly drawn,³⁷ and that once probated, cannot be revoked by the survivor who derives benefits under the will,³⁸ different complex situations do arise. The language in a mutual will can be broad enough to also include property the surviving husband owns at his death;³⁹ however, where a contract covered only joint property of the husband and wife, and the mutual will provided for disposition of all property which the survivor may have owned at his death, the court construed the will so as not to cover property the survivor held individually.⁴⁰ The Texas Supreme Court opinion is in line with the suggested rule that a devise cannot be expanded beyond its own import to include after-acquired interests unless it appears from the will as a whole that such was the testator's intention.⁴¹

SURVIVOR BENEFICIARIES

Where the will in a Louisiana case⁴² bequeathed all personalty of the testatrix to two great grand nephews "share and share alike," and the next paragraph of the will stated it was the "wish and desire" that if either dies before a certain specified age, the remaining one gets all, the court decided that the beneficiaries were entitled to their legacies on the death of the testatrix. The court was satisfied that the testatrix did not intend for the executors to retain possession of the property until the minors reached the recited ages; the true intention of the latter paragraph did not have to be determined. The law favors vesting of estates,⁴³ and

³⁵ *Ibid.*

³⁶ *Kirtley v. Spencer*, 222 S.W. 328 (Tex. Civ. App. 1920), *error ref.*

³⁷ 1 PAGE, WILLS at 223.

³⁸ *Harrell v. Hickman*, 147 Tex. 396, 215 S.W. 2d 876 (1948); *Chadwick v. Bristow*, 146 Tex. 481, 208 S.W. 2d 888 (1948); ATKINSON, WILLS at 226. See cases collected, 169 A.L.R. 48 (1947).

³⁹ *Eckardt v. Osborne*, 338 Ill. 611, 170 N.E. 774 (1930).

⁴⁰ *Sample v. Butler University*, 211 Ind. 122, 5 N.E. 2d 888 (1937).

⁴¹ *Smith v. Wheeler*,Mass....., 93 N.E. 2d 544 (1950).

⁴² *Succession of Douglass*, 225 La. 65, 72 So. 2d 262 (1954).

⁴³ *Jones v. Pueblo Savings and Trust Co.*, 103 Colo. 455, 87 P. 2d 2 (1939).

the testator's intention should receive a sensible interpretation.⁴⁴ Where enjoyment of the estate is seemingly postponed, the testator's intention is more doubtful;⁴⁵ it is suggested to treat the devise as a vested one where the property is given in absolute terms and is followed by a provision that the beneficiary is not to receive the devise until a future time.⁴⁶ Thus a legacy to two nieces to be held in trust "until their majority" is not construed as postponing the older sister's right to such legacy until the younger sister reaches her majority.⁴⁷ Such construction by the courts concerning postponements of possession of devises is most dependent upon the strength of the language used in the will. A Massachusetts opinion⁴⁸ correctly postponed division of the decedent's estate where his will left property to be divided equally among his two children when they arrive at the age of 35 years.

PROBATION AND ADMISTRATION

In what seemingly amounted to the first Oklahoma decision⁴⁹ on the issue, the Supreme Court rendered a 6-2 opinion in probating a will in part and denying probate as to a part of such will shown to be the result of undue influence on the testatrix. The statute in question⁵⁰ was adopted from a North Dakota statute⁵¹ that had been previously construed as providing that a will may be probated in part and denied probate in part.⁵² The great majority of jurisdictions follow the rule that if part of a will is obtained by fraud or undue influence, the remainder is admitted to probate where it is intelligible and complete in itself and not affected by the invalid part.⁵³ A minority view states that as a matter of law the will must be an entirety, and undue influence which renders

⁴⁴ *Industrial Trust Co. v. Hall*, 66 R. I. 201, 18 A. 2d 629 (1941).

⁴⁵ 3 PACE, WILLS at 702, 703.

⁴⁶ *Ibid.*

⁴⁷ *Harding v. Schapiro*, 120 Md. 541, 87 Atl. 951 (1913).

⁴⁸ *Jones v. Jones*, 304 Mass. 653, 24 N. E. 2d 669 (1939).

⁴⁹ OKLA. STAT. tit. 84, § 43 (1951); *In re Herrley's Estate*,Okla., 276 P. 2d 247 (1954).

⁵⁰ OKLA. STAT. tit. 84, § 43 (1951).

⁵¹ N.D. REV. CODE C-56, § 56-203 (1943).

⁵² *Black v. Smith*, 58 N.D. 109, 224 N.W. 915 (1929).

⁵³ *Hyatt v. Wroten*, 184 Ark. 847, 43 S.W. 2d 726 (1931); *Pepin v. Ryan*, 133 Conn. 12, 47 A. 2d 846 (1946); *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25 (1912); *Walker v. Irby*, 233 S.W. 884 (Tex. Comm. App. 1922); *In re Hartz's Estate*, 237 Minn. 313, 54 N.W. 2d 784 (1952); *Trimbelstown v. D'Alton*, 1 Dow and Cl. 85, 6 Eng. Rep. 456 (1827); ATKINSON, WILLS at 289; 1 PACE, WILLS at 390.

any part invalid renders the whole will void.⁵⁴ Of course the majority rightly holds the entire will invalid where it is impractical to determine which provisions are caused by undue influence and which are free from it,⁵⁵ or if effect cannot be given to provisions not caused by the undue influence without at the same time defeating the testator's intention.⁵⁶

CONTEST OF CONTRACTS TO MAKE WILLS

A narrow 5-4 Oklahoma decision⁵⁷ provided one of the most interesting succession problems of 1954. The court allowed recovery by foster children against their foster father's estate on an oral contract between the deceased parents whereby it was agreed to leave their entire estate to the children. Pursuant to such oral contract, the mother wrote a purported holographic will which was signed by both the mother and father. The parents were in an automobile collision in which the mother was instantly killed, while the father died a short time later. In a previous action the will was admitted to probate as that of the mother and denied probate as the last will of the father. The Supreme Court majority ruled: (1) the previous probate proceeding is not *res judicata* as to this suit as here the action is on the contract — a different cause of action — and the same evidence would not support both actions; (2) evidence of the written will itself is some evidence of a contract to make a will; (3) in an action to enforce a contract to make a will, whether the "forced-heir" statute⁵⁸ renders the will void or voidable makes no difference as it is valid as to all others, and no surviving spouse or "forced-heir" is plead; (4) the children, third party beneficiaries under the alleged contract, can sue to enforce such contract; (5) mutual promises of the parents are sufficient consideration; and (6) the written will and oral evidence proved the alleged oral contract to make a will.

⁵⁴ *In re Lavinburg's Estate*, 161 Cal. 536, 119 Pac. 915 (1911); *In re Estate of Freud*, 73 Cal. 555, 15 Pac. 135 (1887); *Snyder v. Steele*, 304 Ill. 387, 136 N.E. 649 (1922); 32 YALE L.J. 294 (1923) criticized the *Snyder v. Steele* decision as being declarative of unsound reasoning.

⁵⁵ *In re Eiker's*, 233 Iowa 315, 6 N.W. 2d 318 (1942).

⁵⁶ *In re Rosenberg's Estate*, 196 Ore. 219, 246 P. 2d 858 (1952); *Walker v. Irby*, 238 S.W. 884 (Tex. Com. App. 1922).

⁵⁷ OKLA. STAT. tit. 84, § 44 (1951); *Tucker v. Zachary*, _____ Oka., 269 P. 2d 773 (1954).

⁵⁸ OKLA. STAT. tit. 84, § 44 (1951).

The dissent said that there was lack of consideration for the contract, and there was no proof of the contractual obligations. In most jurisdictions a third party beneficiary may sue⁵⁹ to enforce a contract to make a mutual will⁶⁰ where there is consideration and the elements of a contract are met.⁶¹ A holographic will entirely written by (A), but signed by (A) and (B), and disposing of property of (A) and (B), is not invalid because it disposes of (B's) property,⁶² and evidence of such executed will may be sufficient to establish an oral contract to devise property⁶³ where the court determines the contract is clearly and decisively established.⁶⁴ There is a split of authority among jurisdictions as to whether wills can be allowed to prove an alleged oral contract to devise property;⁶⁵ however, wills are often admitted in evidence to prove such contract although the will itself is of no effect because it is not properly executed.⁶⁶ This latter viewpoint lends a certain added authority to the close Oklahoma decision.

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⁵⁹ ATKINSON, WILLS at 213.

⁶⁰ 4 PAGE, WILLS at 826.

⁶¹ *Id.* at 850.

⁶² *In re Cole's Will*, 171 N.C. 74, 87 S.E. 962 (1912).

⁶³ *Maurer v. Johansson*, 223 Iowa 1102, 274 N.W. 99 (1937); *Robinette v. Olson*, 114 Neb. 728, 209 N.W. 614 (1926).

⁶⁴ *Robinson v. Haynes*, 147 Okla. 95, 294 Pac. 803 (1930); *In re Krause's Estate*, Wash., 21 P. 2d 268 (1933).

⁶⁵ 4 PAGE, WILLS at 928, 929.

⁶⁶ *Skinner v. Rasche*, 165 Ky. 108, 176 S.W. 942 (1915) (Beneficiary signed as subscribing witness, but will admitted to help prove the contract); *Tiggelbeck v. Russell*, 187 Ore. 554, 213 P. 2d 156 (1949) (The instrument was invalid because it lacked the statutory number of witnesses; however, proof of the will corroborated evidence of the oral contract to devise property); *Estate of Lube*, 225 Wis. 365, 274 N.W. 276 (1937) (Witnesses did not sign in the presence of each other, but the will was admitted to help prove the contract); 4 PAGE, WILLS at 929.