Wills and Trusts

Charles O. Galvin
THE year under review was an active one in the areas of wills and trusts. Several significant cases were decided by the Supreme Court of Texas, and several of the cases from the courts of civil appeals are before the supreme court on applications for writ of error. The important lesson to be learned from these cases is that meticulous draftsmanship and strict adherence to the formalities attendant upon the execution of wills should be exercised. After the principal actor in the drama—the testator—is dead, only the documents are left to speak for him, and they should do so in the clearest possible terms.

I. WILLS

Construction. In Welch v. Straach the testator by a holographic will left the community homestead to his wife. Later by codicil he provided that the homestead should “remain in her possession as long as she live [sic] and remains a widow . . . .” Following the testator’s death the widow sold the homestead. The testator’s children contended that the effect of the codicil was to create a defeasible life estate in the widow and that the children, as beneficiaries of the residue of the estate, were vested with the remainder in their father’s undivided one-half interest in the homestead, subject only to a defeasible life estate in their mother. The court held, in spite of the rule that a devise should be construed as creating the largest estate possible subject only to express words of limitation, that the words “live and remains” should not be considered together as if the limitation had read “as long as she lives a widow and remains a widow.” Thus, the estate devised to the widow was construed to be a life estate determinable. In the court of civil appeals the children contended that the testator specifically intended to leave the homestead in which he and his wife were living at the time of the execution of the will, and because that homestead had been sold, there was an ademption of the devise. The court below held that no particular property was intended and that the words “homestead upon which we are living” meant the property upon which the testator and his wife were living at the time of the testator’s death. The decision of the Supreme court rendered this issue moot.

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2. 518 S.W.2d at 864.
3. Id. at 868. The general rule in Texas is that a will speaks from the death of the testator. See 10 E. BAILEY, TEXAS PRACTICE, WILLS § 561 (1968). However, the meaning of the language of the will, including questions concerning the identification of property or beneficiaries, is determined by reference to circumstances as they existed at the
An interesting mathematical formula was before the court in Price v. Austin National Bank. The will provided in part that a sum of money was to be distributed from the testatrix's estate which sum, "less the payments totaling $25,000 provided for in paragraphs 3a and 3d," when added to the value of a previously created trust (Trust No. 2) would equal $310,000. She then proceeded to make provisions for distributions to various persons on the basis of fractions, the denominator of which was 310. Paragraphs 3a, 3b, 3c, and 3d provided for special payments of $5000, $5000, $5000, and $10,000, respectively. Paragraph 3e provided for a payment of $57,050 to a special trust. The court construed the above quoted portions of the will to be read as "3a through 3d" rather than "3a and 3d" in order to make sense out of the $25,000 deduction.

The mathematics of the formula were then worked out as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Value of Trust No. 2</td>
<td>$188,571.15</td>
</tr>
<tr>
<td>less $25,000 for payments provided for in paragraphs 3a through 3d</td>
<td>$25,000.00</td>
</tr>
<tr>
<td>Net Value</td>
<td>$163,571.15</td>
</tr>
<tr>
<td>Sum to be provided under will for distribution to named beneficiaries</td>
<td>$310,000.00</td>
</tr>
<tr>
<td>Amount to be transferred from decedent's estate</td>
<td>$146,428.85</td>
</tr>
</tbody>
</table>

The named beneficiaries contended that the sum of $57,050 provided for in paragraph 3e should be deducted in addition to the $25,000 so that the final sum to be distributed would be $310,000, not $310,000 less $57,050. Their contention was that the testatrix's use of fractions each having a denominator of 310 clearly indicated her intention of having a distributable sum of $310,000, and they sought to introduce extrinsic evidence to corroborate this asserted intention. The court held, however, that extrinsic evidence was inadmissible because the formula in the will was unambiguous and should be applied as written. In all probability the testatrix intended to have a distributable sum of $310,000 to which the fraction would apply; yet, by inadroit drafting a different result was effected.

Goldring v. Goldring involved the following critical language for construction:

I give and bequeath to my said son . . . my farm . . . to have and to hold the same during his life in trust for his four children . . . . This clause is intended to create a life interest only to said land . . . in my time of the execution of the will. See, e.g., Winkler v. Pitreg, 410 S.W.2d 677 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.).

4. 522 S.W.2d 725 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).
5. Thus, the shares which had been expressed in fractions, the denominator of which was 310, would now be calculated by applying such fractions against the sum of $252,950 (i.e., $310,000-$57,050), rather than $310,000.
6. The Price court adhered to the well-established rule of Huffman v. Huffman, 161 Tex. 267, 339 S.W.2d 885 (1960), that when the words of the will are so plain as to be without doubt or ambiguity, the courts must follow the language of the will and may not speculate that some other result may have been intended.
said son and I desire that he take full charge of said land . . . to use and cultivate and maintain . . . and to equitably divide the rentals . . . into a fund to be used for . . . said minor children . . . .

The court construed the language as designating the son trustee for his children during his life, and upon his death the trust terminated with the remainder passing to the children. The son had no life interest in the farm; he acted only as trustee. Moreover, the court interpreted the word "desire" as having a mandatory effect because it appeared from the entire instrument that this was an expression of the testatrix's intent in disposing of the property.

In another case involving construction it was held that a joint tenancy with right of survivorship may be created by express provisions in a will and that a provision in a husband's holographic will devising "all my property to my beloved wife . . . to do with as she See fit except that she is not to Sell, Morage [sic], or Lease any of our real Estate for more than Three (3) years without the written agreeement of our son . . ." devised a fee simple estate, the restraints on sale, mortgage, and lease being void as restraints on alienation.

In Wood v. Paulus the construction of the words "begotten" and "born" was presented for judicial determination. The testatrix, Annie, provided that one-fourth of her estate should be held in trust "for any lawfully begotten children of my son Claude . . . born after my death . . . ." Annie died July 2, 1947, and Mary was born in September 1947 to Claude and his wife Lilla. Although there was evidence that Claude and Lilla were not lawfully married when Mary was conceived, the majority reasoned that "begotten" meant "born" and that "lawfully begotten" meant "born in wedlock." Because the trial court had taken the case from the jury, the controversy was remanded for trial to determine if Mary was born in wedlock. The concurring justice disagreed with respect to the construction of the word "begotten." There was evidence that the testatrix had reason to accord special treatment to her son Claude and that she intended that bequests for Claude's children be conditioned upon their being conceived in wedlock.

Proof of Will. In Hall v. White an instrument dated in 1965 was admitted

8. Id. at 756.
10. 524 S.W.2d 749 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). See also Moore v. Wardlaw, 522 S.W.2d 552 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), where it was held that language in a will devising the interest of the testatrix in a ranch to her three grandchildren subject to a right in her husband to "mortgage or dispose of same during his life time" did not constitute a power of appointment in the husband but rather a power of sale with tracing rights in the grandchildren.
11. 524 S.W.2d at 761.
12. 525 S.W.2d 860 (Tex. 1975). For other cases see Allen v. Nesmith, 525 S.W.2d 943 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (fact issue as to whether will was signed by testatrix in the presence of attesting witnesses required retrial); Stegall v. Harris, 525 S.W.2d 214 (Tex. Civ. App.—Eastland 1975, no writ) (presumption established that missing will was revoked by testator); Morgan v. Morgan,
to probate in September 1968, the year of the decedent's death. The instrument appeared to have been witnessed by Mr. and Mrs. John W. Weaver. In 1969 a suit was instituted by the brothers of the deceased to cancel the order admitting the will to probate. After trial in the probate court the will was upheld, and an appeal was taken to the district court in accordance with the procedure in effect in 1971. The issue was whether Mr. and Mrs. Weaver had signed the will as witnesses to its execution in the presence of the testator. The evidence in the record regarding the Weavers as witnesses consisted of an affidavit by Mrs. Weaver executed and filed with the probate court when the will was admitted to probate and the transcript of her testimony during the contested trial in the probate court. Section 89 of the Texas Probate Code provides that certified copies of the record of testimony may be used in evidence, as the original might be, on the trial of the same matter in any other court. The supreme court construed this provision as permitting the use of the affidavit and transcript only if the witness were unavailable. The court held that since Mrs. Weaver was only temporarily out of the jurisdiction at the time of the trial in the district court, she was not unavailable, and, therefore, the record of her testimony was not admissible.

Testamentary Capacity. The cases with respect to testamentary capacity are largely evidentiary and primarily concern the application of the rule of Carr v. Radkey that a witness may not make conclusionary statements about the testator's mental capacity to make and publish a will but may testify as to whether or not the testator had the capacity to know the objects of his bounty, the nature of the transaction in which he was engaged, the nature and extent of his estate, and similar questions. On the basis of testimony of witnesses on these matters the court in Williford v. Masten held that a jury could have properly found that the testatrix was not of sound mind. There was evidence of the testatrix's forgetfulness, her inability to comprehend her estate, and her lack of knowledge of the consequences of signing a will. In Hamill v. Brashear there was testimony from the testatrix's attorney, accountant, legal secretary, banker, doctor, and others supporting the existence of testamentary capacity at the time of execution of the will and codicils thereto. In Bettis v. Bettis there was evidence of the advanced alcoholism of the testator and the testimony of two psychiatrists and a doctor of internal medicine that the testator, who signed his will in January 1973 and thereafter died in March 1973, lacked testamentary capacity. On the other hand, an attorney who had done legal work for the testator, a former

519 S.W.2d 276 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (evidence supported finding that will had not been revoked); In re Estate of Kirby, 516 S.W.2d 284 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.) (words in instrument that "we will proceed to have papers drawn up" did not indicate testamentary intent); Bibbs v. Massey, 516 S.W.2d 273 (Tex. Civ. App.—Corpus Christi 1974, no writ) (forgery).
14. 393 S.W.2d 806 (Tex. 1965).
15. 521 S.W.2d 878 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).
16. 513 S.W.2d 602 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).
17. 518 S.W.2d 396 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).
employee and witness to the will, the attorney who drafted the will, and others testified as to the testator's capacity to make a will. The court rejected the contestant's argument that because of the testator's chronic alcoholism his testamentary capacity was to be determined solely by expert medical testimony. On the basis of all the testimony there was evidence to support a jury finding of testamentary capacity.\(^\text{18}\)

Joint and Mutual Wills. In *Morris v. Texas Elks Crippled Children's Hospital, Inc.*\(^\text{19}\) Mr. and Mrs. Denny executed a joint will in 1941 leaving all their properties to one another with remainders over for the benefit of certain nieces and nephews. Mrs. Denny died in 1950 and the will was filed for probate. In 1961 Mr. Denny executed a new will leaving his estate to his nephew, except for a ranch in Terrell County which he left to the appellee hospital for endowment. The nieces and nephews named in the 1941 will did not learn of the 1961 will until 1972. The dispute concerned whether the 1941 will was both joint and contractual. If so, and the survivor sought to make a new will leaving the properties to others, the beneficiaries under the contractual will could impose a constructive trust on the properties. The court held that the language of the 1941 will clearly showed a comprehensive plan for the disposition of the properties owned by Mr. and Mrs. Denny, and, therefore, each had acted in consideration of the other's act.\(^\text{20}\) The period of the statute of limitations did not begin to run until the beneficiaries under the 1941 will discovered their rights;\(^\text{21}\) accordingly, they were entitled to recover the ranch less certain monies paid by the hospital.\(^\text{22}\)

**Election.**\(^\text{23}\) *Lewis v. Campbell*\(^\text{24}\) concerned the question of whether the

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18. See also Findley v. McWhorter, 526 S.W.2d 720 (Tex. Civ. App.—Waco 1975, no writ) (evidence supported testamentary capacity); Cravens v. Chick, 524 S.W.2d 425 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.) (evidence raised issue of testamentary capacity to be resolved by jury on retrial); Denbo v. Butler, 523 S.W.2d 458 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (under Dead Man's Statute sister of deceased could not testify as to testamentary capacity and undue influence); Dearmin v. Smallwood, 520 S.W.2d 602 (Tex. Civ. App.—Beaumont 1975, no writ) (evidence supported finding of unsound mind); Rodriguez v. Garcia, 519 S.W.2d 908 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (evidence supported findings that elderly uncle did not have mental capacity to understand the execution of deeds and that niece had used undue influence upon him).

19. 525 S.W.2d 874 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

20. However, the court was careful to note that the mere presence of a joint will does not raise a presumption that there is a contractual relationship. *Id.* at 876.

21. The dissent argued that the statutes of limitation relating to adverse possession were operable and that title to the land was perfected by operation of those statutes. *Id.* at 881.

22. For other cases involving joint wills, see Reynolds v. Park, 521 S.W.2d 300 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (evidence sufficient to raise issue of fact as to the contractual nature of joint will executed in 1953; later 1970 will could not alter rights under earlier contractual will); Dickerson v. Keller, 521 S.W.2d 288 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.) (under joint will survivor had complete power of disposition; other beneficiaries had only a contingent remainder); Orsburn v. Miller, 521 S.W.2d 140 (Tex. Civ. App.—San Antonio 1975, no writ) (wife's admission that will was contractual conclusively established that will was contractual); *In re Estate of Jordan*, 519 S.W.2d 902 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (joint will construed as leaving life estate with power of disposition to survivor and remainder to church).

23. The principle of election is based on the notion that one who accepts benefits under a will must accept the whole will. See *Phillee v. Holliday*, 24 Tex. 38 (1859).

testator sought to dispose of all the community property or only his undivided one-half interest. If he intended to dispose of all of it, then his surviving wife would be put to an election to take under the will or take her share by law. The critical language read: "[W]e have accumulated a community estate and it is now my intention to dispose of whatever community property and whatever personal property I may own at my death in this will." The court held that the language should be construed to refer only to the testator's interest in the community estate; therefore, no election was required.

Settlement Agreement. In Box v. Southern Farm Bureau Life Insurance Co. decedent and his first wife entered into a property settlement agreement pursuant to divorce in which a certain life insurance policy was to be kept in effect for the benefit of their children. Thereafter, in addition to borrowing against the policy, the decedent changed the beneficiary, naming a woman who later became his second wife. The court held that the net proceeds of the policy after deducting the loan and attorneys' fees should be awarded to the children who possessed an equitable interest in the policies superior to that of the second wife. The court further held that the amount of the loan which was deducted from the proceeds could be recovered from the decedent's estate.

Muniment of Title. Section 89 of the Probate Code provides that if the court finds that a will should be admitted to probate and that administration is unnecessary, the court may admit such will to probate as a muniment of title. In Washington v. Law it was held that the trial court did not err in admitting a will as a muniment of title where the evidence showed that avoidance of multiple administration of the same property was the reason for finding no necessity of administration.

Statute of Limitations. In Price v. Estate of Anderson Price was injured while riding as a passenger in an automobile driven by Anderson. The accident occurred on July 13, 1968, and suit was brought a few months later. Anderson died on December 3, 1968. His attorneys filed a suggestion of
death in accordance with rule 152 of the Texas Rules of Civil Procedure, and on October 13, 1969, they filed a motion to dismiss for failure to join necessary parties within a reasonable time. On October 16, 1969, Echols was appointed temporary administrator of Anderson's estate, and the order authorized the temporary administrator to accept service of process, notify insurance carriers, and retain counsel in personal injury claims against the estate. Price took a nonsuit on June 8, 1970, and on July 10, 1970, she instituted another suit naming as defendant "The Estate of Welton Terry Anderson." The petition alleged that the estate might be served with process through Echols, the temporary administrator. Echols was served, and his attorney filed on behalf of the estate various answers and motions, including on July 9, 1973, a motion to dismiss on the ground that the action was barred by the two-year statute of limitations. Price then amended her petition to name both the estate and the temporary administrator as defendants. The temporary administrator answered with a general denial and motion to dismiss, alleging that he was an indispensable party to the suit and that suit against him was barred by the statute of limitations. The trial court rendered a take-nothing judgment against the plaintiff Price, and the court of civil appeals affirmed.

The supreme court reversed and remanded for trial on the merits. The court grounded its decision on policy reasons; the purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available and the evidence is fresh in their minds. In the instant case the original petition was filed within the period of limitation and citation was served on the administrator. Although the administrator was not named as defendant, he was fully cognizant of all the facts and was not placed at a disadvantage in properly defending the action.

**Appeals and Jurisdiction.** Prior to 1973 the Texas Constitution provided for appellate jurisdiction in probate matters in the district court, and section 5 of the Texas Probate Code provided for appellate jurisdiction in all probate matters to be vested in the district court. By amendment to the Constitution, the legislature was given the power to confer original and appellate jurisdiction in probate matters. Pursuant to this constitutional amendment the legislature amended Probate Code sections 5 and 21. The amended section 5 permits transfer of contested probate proceedings from the constitutional county court to the district court in counties without a statutory county court. Moreover, all statutory county courts, except county criminal courts, were given jurisdiction to hear probate matters. Section 21 gives the right of trial by jury in all contested probate proceedings. All final orders in all counties were appealable to the courts of civil appeals. The legislature did not act on that portion of section 28 which provided for the

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35. Id. § 21 (1975).
right of appeal from probate court to district court, or upon section 30\textsuperscript{37} or article 1907\textsuperscript{38} all of which provided for certiorari proceedings.

In *Cluck v. Hester*\textsuperscript{39} the supreme court had before it important questions relating to the 1973 amendments to the Probate Code. The matter came before the court in a mandamus proceeding seeking an order to the district judge to dismiss an application for writ of certiorari which attacked an order of the county court denying probate of a will. Speaking for the court, Justice Reavley traced the history of the distinction between appeal and certiorari, and held that article 1907 and section 30 remained in effect and the writ of certiorari in the district court was, therefore, still available.

The matter came before the Texas Legislature again in 1975, and section 30 and article 1907 were repealed\textsuperscript{40} thus extinguishing the result of *Cluck v. Hester*. Section 5\textsuperscript{42} was amended to provide that in contested probate matters in those counties with no statutory court exercising the jurisdiction of a probate court the judge may on his own motion or on the motion of any party to the proceeding transfer the proceeding to the district court. Upon resolution of the contested matter the district court shall transfer the matter back to the county court for further proceedings. In those counties with a statutory court all contested matters shall be heard in such court. In all cases with final orders from courts exercising original probate jurisdiction appeals are made to the court of civil appeals.

*Rodriguez v. Valdez*\textsuperscript{43} involved the question of whether the appellants could base their appeal on a nunc pro tunc order, since appeal from the original judgment had not been timely perfected. Holding that the judgment nunc pro tunc was null and void, the court of civil appeals noted that under rule 316\textsuperscript{44} only clerical errors may be corrected and that under rule 329b(5)\textsuperscript{45} the original judgment had become final before entry of the order nunc pro tunc\textsuperscript{46}.

**Independent Administration—Final Accounting.** In *Burke v. Satterfield*\textsuperscript{47} the decedent's wife Lela in 1966 offered her husband's will for probate, and

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  \item 37. *Id.* § 30 (1956) (repealed 1975).
  \item 39. 521 S.W.2d 845 (Tex. 1975).
  \item 41. 521 S.W.2d 845 (Tex. 1975).
  \item 43. 521 S.W.2d 668 (Tex. Civ. App.—San Antonio 1975, no writ).
  \item 44. *Tex. R. Civ. P.* 316.
  \item 46. Other cases involving questions of appeal and jurisdiction include: *Christian v. Howeth*, 522 S.W.2d 700 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.) (under 1973 amendment district court had no appellate jurisdiction from probate court; accordingly, appeal from district court to court of civil appeals was dismissed); *accord*, Estate of Bourland v. Hanes, 526 S.W.2d 156 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); *Leckow v. Moore*, 524 S.W.2d 614 (Tex. Civ. App.—Austin 1975, no writ); *Thomas v. Iliff*, 524 S.W.2d 568 (Tex. Civ. App.—Taxarkana 1975, no writ); *Dean v. Boyd v. Dean*, 515 S.W.2d 753 (Tex. Civ. App.—Beaumont 1974, no writ). *See also Richards v. Daniel*, 518 S.W.2d 556 (Tex. Civ. App.—Beaumont 1975, no writ) (county court's judgment setting aside prior judgment was void because prior judgment of county court had been appealed to district court which had tried matter de novo and rendered judgment).
  \item 47. 525 S.W.2d 950 (Tex. 1975).
she duly qualified and was appointed independent executrix. Robert, the decedent's son by a prior marriage, filed in the probate court on August 8, 1973, a demand for an accounting pursuant to section 149A of the Texas Probate Code. On October 24, 1973, the independent executrix filed a "Final Accounting" and prayed the court, after notice to all interested parties, to ratify and approve the final accounting. The son, on January 31, 1974, filed numerous objections and exceptions to the final accounting. The court of civil appeals, although recognizing that a probate court's control over independent administration is strictly limited, concluded nevertheless that the executrix, by asking that all interested parties be notified, thereby invoked the potential jurisdiction of the probate court to determine the correctness of the final accounting.

The supreme court held that the probate court had no authority to approve or disapprove the final accounting. Further, the accounting submitted was not a final accounting within the purview of probate code section 151 because there remained funds to be disbursed and the attached affidavit did not positively and unqualifiedly represent the facts as disclosed to be true. The court further held that under section 145 the probate court's jurisdiction over independent executors was strictly limited, and such courts would not have jurisdiction to consider either objections by a devisee that related to a judgment in a prior independent proceeding in the district court or the matter of the executor's commission.

Qualification. Section 69 of the Texas Probate Code provides that if a testator is divorced after making a will, then all provisions in the will in favor of the testator's spouse or appointing such spouse to any fiduciary capacity shall be null and void. In what appears to be a case of first impression, the court of civil appeals held in Smith v. Smith that, if the divorced parties subsequently remarry each other, the section is inapplicable and the surviving widow is not disqualified as executrix.

Attorneys' Fees. In Knebel v. Capital National Bank the decedent Knebel was a fifty percent stockholder in 7-Up Bottling Company of Austin, Inc. The other fifty percent was owned by Kuempel and others. In 1962 Knebel entered into a contract with the corporation whereby the corporation was given an option to purchase the stock of a deceased stockholder at book value. By his will executed in 1955 Knebel named the Capital National Bank and Kuempel as independent co-executors. After Knebel's death the corporation exercised the option to acquire the stock. The bank accepted a cash payment and a note for the balance of the purchase price and delivered the stock to the corporation. Later, several of the beneficiaries of Knebel's estate expressed dissatisfaction with the price obtained for the stock, and the

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50. TEX. PROB. CODE ANN. § 151 (1956).
51. Id. § 145 (1975).
52. Id. § 69 (1956).
53. 519 S.W.2d 152 (Tex. Civ. App.—Dallas 1974, writ ref'd).
54. 518 S.W.2d 795 (Tex. 1974).
bank filed suit for a construction of the option and a determination of the book value of the stock. Because of Kuempel's dual relationship as a co-executor and officer, director, and stockholder of the corporation, the trial court rendered partial summary judgment declaring the transaction null and void ab initio, and this judgment was affirmed by the court of civil appeals.\(^5\)

In 1972 Kuempel resigned as independent co-executor of the Knebel estate and the bank then filed an action to determine if the option could be exercised. The trial court determined that the option was not exercisable and that the bank was entitled to recover attorneys' fees for the services rendered. As to the beneficiaries of the estate, the trial court denied recovery out of the estate for attorneys' fees, and the court of civil appeals affirmed.\(^6\)

The supreme court held that it was not shown as a matter of law that the Knebel estate would gain a benefit or suffer a detriment as a result of the litigation, and since the court of civil appeals had not considered the benefit or detriment question, the cause was remanded to that court for a determination of that issue. The court also held that, if the court of civil appeals should determine that the evidence supports an implied finding of no benefit, it should affirm the trial court. On the other hand, if the court of civil appeals should determine that an implied finding of no benefit is not supported by the evidence, the case should be remanded to the trial court for the exercise of its equitable powers in determining the extent to which the estate will be benefitted and the fees allocable therefor. The supreme court also denied a claim of reimbursement for attorneys' fees against the executors. On remand the court of civil appeals held that there was insufficient evidence on the benefit-detriment question and remanded for a new trial.\(^5\)

In another case involving attorneys' fees, Russell v. Moeling,\(^5\) the decedent died leaving two wills. The executrix under the earlier will was successful in offering that will for probate, but upon appeal the later will was admitted to probate. The executrix under the earlier will then applied for allowance of attorneys' fees and expenses incurred in her unsuccessful attempt to have the earlier will probated. The probate court allowed such attorneys' fees, but the district court granted the administrator under the second will a summary judgment denying recovery. The court of civil appeals reversed and remanded, requiring the lower court to make findings with respect to "good faith" and "just cause" which are necessary to the

\(^5\) 7-Up Bottling Co. of Austin, Inc. v. Capital Nat'l Bank, 505 S.W.2d 624 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).
\(^5\) Knebel v. Capital Nat'l Bank, 523 S.W.2d 799 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).
award of attorneys' fees and expenses for an executor. The supreme court reversed the judgment of the court of civil appeals and affirmed the judgment of the district court. The court pointed out that the executrix under the earlier will had employed counsel under a contingent fee arrangement, and since she was unsuccessful, she would owe nothing. Moreover, the court held that the issues of good faith and just cause should have been raised in the original probate proceedings.

Administrator—Liability for Loss. In Frost National Bank v. Kayton a bank was appointed temporary administrator of the decedent's estate in 1969. The bank failed to secure extended coverage protection on certain estate property. After the bank had served about a year, Kayton, the grandfather of the deceased's minor son, made application to become permanent administrator and on July 29, 1970, executed the oath, filed his bond, and duly qualified as the permanent administrator. On August 3, 1970, a hurricane did severe damage to properties owned by the estate in Port Aransas, Texas. The court of civil appeals held that the evidence supported a jury finding that the bank was negligent in not acquiring extended coverage and that the loss should be borne by it and not the permanent administrator. The case was remanded to determine the cost of repairs.

Contract of Sale—Death of Vendee. In Furman v. Sanchez vendor Furman entered into an executory contract of sale in 1964 under which Mrs. Sanchez was to make certain monthly payments. Mrs. Sanchez died on August 26, 1970, and the payments became delinquent. On April 7, 1971, Furman terminated the contract and entered into another contract. The question was whether Furman should have proceeded through an administration of the estate of the buyer. The court, citing Pearce v. Stokes, held that the vendor could not terminate the contract within four years of the buyer's death without an administration of the buyer's estate, and that the administrator had the right to void the termination or seek damages for its termination. The court fashioned an award based on the fair market value of the property less the amount still owing from the decedent.

Heirship. In Davis v. Davis Charles married Mary Nell in 1966 in Texas. In 1967 he left without her for Australia, then to Iran, and in August 1968 he was transferred to Singapore. On October 2, 1968, a Buddhist wedding ceremony was performed uniting Charles and Nancy and they lived in Singapore until Charles was killed by shipwreck on December 24, 1970. Approximately one month after the death of Charles both Mary Nell and

60. 526 S.W.2d 654 (Tex. Civ. App.—San Antonio 1975, writ ref’d n.r.e.).
62. 155 Tex. 564, 291 S.W.2d 309 (1956). See also Radford v. Coker, 519 S.W.2d 934 (Tex. Civ. App.—Waco 1975, no writ) (one cotenant cannot burden the property with debts, force a foreclosure, and then purchase the entire interest).
63. 521 S.W.2d 603 (Tex. 1975). This was a landmark case in the area of family law. See McKnight Family Law, Annual Survey of Texas Law, 29 Sw. L.J. 67, 96 (1975). See also Deveroex v. Nelson, 529 S.W.2d 510 (Tex. 1975).
Nancy gave birth to daughters. The supreme court held that Nancy was not the lawful widow of Charles. Although there is a presumption that Charles and Mary Nell were divorced prior to the wedding of Charles and Nancy, Mary Nell presented evidence showing no divorce in Texas, Australia, or Singapore, and this was held sufficient to rebut the presumption. However, the court held that Nancy was the putative wife of Charles, having entered into and continued the relationship in good faith and that Nancy was, therefore, entitled to the same rights in the property acquired during her relationship with Charles as if she were his lawful wife. As to the legitimacy of Mary Nell's daughter, Mary Nell herself gave testimony with respect to non-access by Charles during the time when the child might have been conceived. Mr. Justice Reavley, for the court, traced the history of Lord Mansfield's Rule which precludes testimony of husband or wife to the effect that a child born during the marriage is not that of the husband. The court rejected the Rule because it could find no reason for continuing to support a legal proposition which prevents the discovery of the truth.

II. TRUSTS

Construction. In Becknal v. Atwood a grantor created in 1960 an irrevocable trust with a ten-year duration for the benefit of his three children. His wife was appointed primary trustee and, in the event of her inability to serve, a bank was named as substitute trustee. The trustee was given powers of management and disposition of the income and corpus for the support and education of the beneficiaries. The trust contained a spendthrift clause prohibiting a beneficiary from alienating corpus or income from the trust estate. The grantor conveyed certain realty to the trust, and in 1965 the three named beneficiaries executed a warranty deed conveying interests in a tract of realty from the trust to their mother for life and then to their father for life. The father died in 1969. In 1974 one of the beneficiaries brought a declaratory judgment to construe the trust instrument with particular reference to the effect of the spendthrift clause. Among other issues the court pointed out that all parties to the trust—grantor, trustee, and beneficiaries—could effect a modification or termination of the trust. In this case the parties had joined in conveying a life estate to their mother but had not terminated the trust. Accordingly, the court held that upon termination of the trust in 1970 the realty conveyed vested in the three children subject to the life estate of their mother.


66. See also Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (once assignment is validly made, spendthrift clause does not preclude further assignments); Fewell v. Republic Nat'l Bank, 513 S.W.2d 596 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.) (inclusion of settlor as a spendthrift beneficiary does not give settlor right to revoke trust where other beneficiaries were properly included under the spendthrift clause).
In another construction case, Byrd v. Caruth, a testamentary trust provided that upon the death of the testator's wife, the entire net income was to be paid to his daughter's children. In a suit for construction the court held that undistributed income of the daughter's trust belonged to the daughter's estate at her death and that such amounts could not be carried forward in trust for the daughter's children.

In Humane Society v. Austin National Bank the corporate trustee invested trust assets in its own fully secured certificates of deposit for a period of sixteen months. The Humane Society, beneficiary of the trust, accused the trustee of self-dealing, but the court held that the investments were proper. The court reasoned that the greater security afforded by the certificates of deposit justified the loss of interest income which might have been earned had the trust assets been placed into higher risk investments.

Constructive Trust. In Meadows v. Bierschwale vendors referred to as Bierschwale sold an apartment complex to Oakes in return for fifty-nine notes. Oakes transferred the apartment complex to his wholly-owned corporation, United Properties, Inc. United Properties transferred the property to Goldman, a bona fide purchaser, for cash and notes. Meadows, a real estate broker, represented Bierschwale. At Bierschwale's request, Oakes transferred certain notes due the vendors to Meadows for his sales commission. In the trial court Oakes was found guilty of fraud in misrepresenting the facts concerning the fifty-nine notes given in consideration of the first sale.

The supreme court held that, as the sale to Oakes was procured by fraud on the part of Oakes, Bierschwale was entitled to a constructive trust on the proceeds of the sale to Goldman, which in turn was construed to mean the Goldman notes plus a money judgment for cash received. The benefits of the constructive trust were extended to Meadows. The court also held that Bierschwale's constructive trust right arose prior to the right of Smith, a creditor of Oakes who took seven of the Goldman notes as security for a prior obligation.

Rescission. Stephens County Museum, Inc. v. Swenson involved two elderly Swenson sisters and their older brother. The brother in 1967 employed an attorney to draft testamentary trusts to care for the sisters and

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67. 520 S.W.2d 849 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.). See also Currie v. Currie, 518 S.W.2d 386 (Tex. Civ. App.—San Antonio 1974, writ dism'd) (income not distributable does not become part of community estate of distributee).
70. 517 S.W.2d 257 (Tex. 1974).
their brother and his wife. Following their deaths, the trust would be used for charitable purposes in Stephens County. In 1969 the Stephens County Museum, a non-profit corporation, was organized, and the sisters made cash contributions totaling $100,000, conveyed a 1,761-acre tract subject to a lifetime lease, and executed a trust involving the 5,777-acre Swenson ranch for the maintenance of the Swensons with the remainder of the net income being used for the museum. The sisters consulted an attorney who advised them that they had given away their entire estate, and they then sued to set aside all contributions.

The trial court found no undue influence as to the first cash contribution. With respect to the deed to the 1,761-acre tract, the court found no delivery of the deed. These holdings were affirmed by the supreme court. Concerning the second cash contribution and conveyance of the 5,777-acre tract, the supreme court remanded these issues to the trial court for determination of whether the Swenson brother acted as a fiduciary, whether he fully informed his sisters of the nature and effect of the transactions, and whether the sisters' actions were the result of voluntary and intelligent action.

III. Taxation

Unrelated Business Income. In State National Bank v. United States\(^\text{71}\) a bank as trustee of a charitable trust paid deficiencies in income tax on unrelated business income and brought suit for a refund. The trust owned a 2,875-acre irrigated farm which it leased to Calhoun under terms which made the lessor-trust responsible for maintenance and repair of improvements, and for furnishing tools, labor, and seed to the lessee. The Fifth Circuit held that there was an issue as to whether this arrangement was a management contract or a rental agreement. Accordingly, a directed verdict for taxpayer was held improper and the case was remanded for trial.\(^\text{72}\)

Life Estate-Depreciation. In Kuhn v. United States\(^\text{73}\) the taxpayer widow was put to an election under her husband's will and exchanged her interest in their community property for a life interest in the entire community estate. Because the value of what she gave up was greater than the value she received, she paid gift tax on the excess. The Federal District Court for the Southern District of Texas held that the widow was entitled to amortize her basis against the income received from her husband's portion of the life estate.

IV. Legislation

Gifts from Estates of Incompetents. A new subsection of section 230 of the Texas Probate Code provides that on application of a guardian or any interested party, after notice, and upon a showing that the ward will

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\(^\text{71}\) 509 F.2d 832 (5th Cir. 1975).
probably remain incompetent, the court may authorize gifts from the ward’s
estate. The ward’s intentions are to be ascertained, if possible, but he will
be presumed to favor reduction of inheritance taxes by partial distributions
of his estate.

**Inheritance Tax Procedures.** A new procedure for the handling of small
and nontaxable estates has been developed by the state comptroller’s
office. As of July 16, 1975, the comptroller will no longer require county
clerks to send copies of wills and inventories to the Inheritance Tax Division,
but the clerk will give a short report on each estate. New forms for estates
under $60,000 are available from the Inheritance Tax Division.

**Uniform Gifts to Minors.** Several amendments have expanded the Texas
Uniform Gifts to Minors Act to treat Texas credit unions as if they were
banks, and the definition of custodial property has been enlarged. The
new rules provide for the appointment of a successor custodian including
designation of the successor by a resigning custodian, donor, guardian,
parent, or adult member of the minor’s family.

**Examination of Estates by Court.** Section 36 of the Texas Probate Code is
amended to relieve the county or probate judge from examining each estate,
but now requires examination only if, in the court’s opinion, it is necessary.

**Small Estates.** Section 137 of the Texas Probate Code now provides that
estates not exceeding $5000 may be distributed on affidavit of the distribu-
tees.

**Employees' Trusts.** New amendments alter the law governing trusts forming
part of stock bonus, pension, or profit-sharing plans under section 401 of
the Internal Revenue Code of 1954. Payments may be made to *inter vivos*
and testamentary trustees. If the trustee makes no claim for the death
benefit within a period of one year after the death of the employee, payment
shall be made as required or permitted by such employee’s beneficiary
designation, the plan or the retirement annuity contract, or, failing such
designation, to the personal representative of the deceased employee as part
of the employee’s estate. Such payments are exempt from taxes and debts.

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78. *Id.* § 137.