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Wills and Trusts

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I. WILLS

Construction. The decision of the supreme court in Gee v. Read\(^1\) demonstrates the importance of clarity of expression and proper use of punctuation in a will. Ruth Cole’s will, which was written entirely in her own handwriting, provided, “I give, devise and bequeath all my property . . . to my sister, Laura Freeland, if deceased, to Ruth Gee, her daughter, nephew & nieces, namely . . . .”\(^2\)

Ruth Cole died in 1972 and Laura Freeland died in 1973. The district judge held that the will was unambiguous and ruled that everything went to Laura Freeland. Finding that the will was ambiguous, the court of civil appeals held that parol evidence should be admitted and considered in the construction of the will.\(^3\) The majority of the supreme court agreed with the court of appeals that the will was ambiguous, and that the matter should be remanded for the purpose of considering whatever evidence might indicate the intentions of the testatrix.\(^4\) Justice Pope, writing the dissent in which Justice McGee joined, argued persuasively that once Laura Freeland was determined to have survived Cole, Freeland was entitled to everything in accordance with the language quoted above. An ambiguity arose only if Laura Freeland predeceased the testatrix.\(^5\) The majority, however, found that an ambiguity existed even if Laura Freeland survived, because there was a question whether she received all of the property or shared with the nieces and nephews.\(^6\)

\(^1\) 606 S.W.2d 677 (Tex. 1980). This will has been the subject of protracted litigation. See Read v. Gee, 551 S.W.2d 496 (Tex. Civ. App.—Fort Worth), writ ref’d n.r.e. per curiam, 561 S.W.2d 777 (Tex. 1977); Gee v. Read, No. 17583 (Tex. Civ. App.—Fort Worth, Feb. 1, 1975, writ ref’d n.r.e.).

\(^2\) 606 S.W.2d at 678.

\(^3\) Read v. Gee, 580 S.W.2d 431, 432 (Tex. Civ. App.—Fort Worth 1979), aff’d, 606 S.W.2d 677 (Tex. 1980).

\(^4\) Id. at 678.

\(^5\) Id. at 681. In this case different results could be reached by using alternate forms of punctuation. Suppose the will had read “I give, devise and bequeath all of my property . . . to my sister, Laura Freeland; provided that, if my sister shall have predeceased me, then I give . . . to her daughter, Ruth Gee; provided further that if Ruth Gee shall have predeceased me, then I give . . . to my nieces and nephews, namely . . . share and share alike.” Alternatively, where the semicolons appear, periods could be inserted and new sentences could be started.
Shriner's Hospital for Crippled Children v. Stahl involved the important doctrine of ademption. Although the testatrix devised her home place to certain relatives, just before her death she sold the home place, taking an $80,000 note in payment. The supreme court held that the specific devise of the home place was adeemed by extinction; therefore, the note passed into the residue of the estate to be distributed to designated Masonic charities. The court of civil appeals had held that the note passed by intestacy, but the supreme court pointed out that the presumption must be that the testatrix did not intend to die partially intestate. Moreover, the rule is that lapsed bequests and devises fall into the residue unless the will expressly provides to the contrary.

Block v. Edge involved the question of the disposition of a lapsed bequest when the legatee was named in the residuary clause but predeceased the testatrix. The court of civil appeals held that the lapsed amount did not pass to the other residuary legatees but passed by intestacy. Had the residuary legatees been designated as a class rather than named individually, the death of a member of the class would have enlarged the shares of the others.

In Preston v. Preston a widow, shortly before her death, prepared and signed an instrument entirely in her own handwriting that stated, among other things, that she wanted certain persons "to be the [administrators to settle my estate." She then listed certain assets and concluded: "[t]o be disposed of as they see fit." The court held that no testamentary direction ran from the decedent such as "I give," or "I bequeath." The instrument, therefore, did not dispose of the property; it merely appointed two people as executors of her estate.

In Franzina v. Franzina the husband and wife, in their respective wills, sought to define property in their separate names as separate property and property held jointly or in both their names as community property. The court of civil appeals held that the parties could not change the nature of property under Texas law by such action. Accordingly, the surviving wife prevailed in her action for a declaratory judgment and an accounting.

7. 610 S.W.2d 147 (Tex. 1981).
8. Ademption occurs when a bequest is extinguished by the testator's making another disposition of the property prior to his death. Black's Law Dictionary 60 (4th ed. 1968).
9. 610 S.W.2d at 150.
11. 610 S.W.2d at 152.
13. Id. at 341.
15. 617 S.W.2d 841 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).
16. Id. at 844.
17. 618 S.W.2d 570 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).
18. Id. at 571; see Tex. Const. art. XVI, § 15 (separate and community property of husband and wife defined).
with respect to the properties that were community properties under Texas law, regardless of the name in which title was held.\(^{19}\)

The proper construction of the term "children" was considered in *Busby v. Gray*.\(^{20}\) Bequests were made to certain individuals or their "then living children." The question was whether the use of "children" meant only descendants of the first degree or included grandchildren. The court held that absent a clear and unequivocal direction to the contrary, the testator's use of children meant descendants of the first degree.\(^{21}\)

*Mortenson v. Trammel*\(^{22}\) involved the construction of certain clauses in the decedent's will to determine what part of the estate should be charged with debts, claims, taxes, and expenses. The decedent by clause number three gave "all property" in Cameron County to his wife for her life and the remainder in equal shares to four children, two by a prior marriage and two by his last marriage. In clause number four he gave "all property" in Sherman County to the same four children and in clause number five he appointed an executor and successor executor. Although the trial court held that clause four was a residuary clause, the court of civil appeals found no residuary clause. Accordingly, the court of civil appeals held that, in the absence of a residuary clause, the debts, claims, expenses, and taxes had to be paid out of the personal property wherever situated and, second, out of the real estate wherever situated.\(^{23}\) Other questions regarding the nature of property as separate or community were resolved by testimony and the findings of the trial court. The case was made difficult because the testator had used a printed form in which he added his own handwriting. With children of two marriages and various separate and community interests, this was clearly a situation in which competent professional advice could have avoided costly and protracted litigation.

A successive interests question was presented in *Dalrymple v. Moss*.\(^{24}\) Mark A. Moss left his estate to his son Aaron for life, with remainder over to his grandson, Robert. He further provided that if Aaron predeceased him and Robert was not yet twenty-one, the estate was to go into trust to be administered by named trustees. Mark died in 1973 and Aaron died in 1977 when Robert was sixteen. The executrix sought a construction as to whether she should pay over the estate to Robert's guardian or to the designated testamentary trustees. The evidence presented indicated that Mark, the testator, had intended to leave the estate in trust until Robert became twenty-one. The court of civil appeals held to the contrary, however, because the will, which was unambiguous, directed the distribution to the trustees only in the event Aaron (1) predeceased the testator \(\text{and}\)

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19. Pursuant to *Tex. Fam. Code Ann.* § 5.43 (Vernon Supp. 1982), the spouses may now agree that income from separate property remains separate.
20. 616 S.W.2d 284 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).
21. *Id.* at 286. *See also* Briggs v. Peebles, 144 Tex. 47, 53, 188 S.W.2d 147, 150 (1945) (testator's use of "children" does not include grandchildren).
22. 604 S.W.2d 269 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).
23. *Id.* at 273.
Robert was under twenty-one. Because Aaron survived Mark, the clause creating the testamentary trust was inoperative.25

The testimony reflected that Mark's widow and the attorney who drafted the will had no doubt that the testamentary trust was intended to operate if Robert was under twenty-one when his father died. The unskillful drafting resulted in the intention of the testator being thwarted by the clear and unambiguous terms of the will. The court was without authority to add a new provision to the testator's will to effectuate his intent. This case demonstrates the importance of careful drafting in testamentary documents, because after the testator's death, no amount of testimony can change the clear provisions of his will.

In El Paso National Bank v. Shriners Hospital for Crippled Children26 the supreme court determined that a will providing that property be used primarily for crippled children's work by agencies of the Elks and Shriners did not mean that the property should be used exclusively for such agencies.27

Procedure—Sale by Community Administrator. When a wife dies intestate possessed only of her half of the community property, her surviving husband may qualify as community administrator of the property for the benefit of the children.28 An early case, Wingo v. Rudder,29 held that a sale of the property by the husband would be a repudiation of the administrator's relationship with the children. A similar fact situation was presented in Estate of Jackson.30 Acting as community administrator, the surviving husband sold community land some time in 1963 and 1964. The husband died in 1978 and left everything to one daughter to the exclusion of another daughter, Mrs. Parker. Mrs. Parker sued the estate for an accounting for her mother's interest. The trial court held that her action was barred by the two-year statute of limitations because the suit for an accounting should have been filed within two years of the sale. The court of appeals reversed and remanded, holding that Mrs. Parker's father had done nothing so inconsistent with his role as community administrator as to put Mrs. Parker on notice that he had not properly accounted for her share. Accordingly, when she discovered after her father's death that the proceeds were not available to her, she then had two years to commence her action. The court noted that Wingo, if followed, would essentially abrogate the broad powers granted a community administrator by section 167 of the Texas Probate Code.31 In a per curiam opinion the supreme court agreed

25. Id. at 942.
27. Id. at 185.
29. 103 Tex. 150, 124 S.W. 899 (1910).
30. 613 S.W.2d 80 (Tex. Civ. App.—Amarillo), writ ref'd n.r.e. per curiam sub nom. Harrison v. Parker, 620 S.W.2d 102 (Tex. 1981).
31. 613 S.W.2d at 84. Section 167 generally gives the community administrator broad trustee powers. TEX. PROB. CODE ANN. § 167 (Vernon 1980). For further requirements for community administration, see id. §§ 161-177 (Vernon 1980).
that a sale of land by the community administrator was not a repudiation of his relationship with the children, but was an exercise of his trustee power under section 167. The supreme court overruled *Wingo* insofar as it conflicted with this decision.\(^{32}\)

**Procedure—Limitations on Action.** In *Harlin v. Mooney*\(^ {33}\) plaintiff contended that the decedent, English, had promised to name her as beneficiary in a codicil to his will if she would continue to see him and care for him. English died on March 29, 1974, and application was immediately made for probate of his will. More than four years later, the plaintiff filed her suit against the executor of the estate. In his motion for summary judgment the defendant asserted that her suit was barred by limitations. The trial court sustained the defendant's motion on the grounds that the limitations period had run. In an opinion on an issue of first impression the court of civil appeals upon review held that, although the plaintiff may have had constructive notice of the proceedings in probate, she was not necessarily charged with notice of all the facts an ordinary prudent person would have discovered if such a person had had actual knowledge of the probate proceedings.\(^ {34}\) Accordingly, the defendant had the burden to establish as a matter of law that more than two years before the suit was filed the plaintiff had knowledge of facts that would have led a person of ordinary prudence to make an inquiry. In addition, the defendant had to show that such inquiry, if pursued with reasonable diligence, would have disclosed the falsity of English's alleged representations concerning the codicil. The defendant had not carried this burden in his motion for summary judgment; the case therefore was remanded for trial.

The supreme court reversed the court of appeals and affirmed the decision of the trial court, holding that reasonable diligence required plaintiff's examination of the probate records. An examination would have revealed that English had made no bequest to her. The court concluded that because the applicable two-year statute of limitations began to run upon the admission of the will to probate and because plaintiff had not filed suit until four years and seven months after that time, her suit was barred by limitations as a matter of law.\(^ {35}\)

Two other cases during the survey period also considered the question of barred claims. The court in *City of Austin v. Aguilar*\(^ {36}\) held that when the city's defective claim against an estate was rejected, and more than ninety days had passed since that rejection, the claim was barred. In *Kotz*

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35. 622 S.W.2d at 85.
a will contest was filed one year and 364 days from the date of probate, but no citation or notice was given to the opposing party. The court of civil appeals affirmed the trial court's action in sustaining a plea in abatement. The court held that Texas Probate Code section 93.38 when read with the Texas Rules of Civil Procedure,39 required citation or notice.40

Procedure—Venue and Jurisdiction. In Boman v. Howell41 a will was admitted to probate in the probate court of Dallas County. Later a suit for construction was filed in the district court of Tarrant County. The court held that under Texas Probate Code section 5A the probate court in Dallas County had acquired exclusive jurisdiction over the estate so that a suit for construction properly lay in the court.42 In Olson v. Tromba43 two residents of Potter County, one Raymond and one Parks, were killed in an accident. A Houston attorney, at the request of Parks's estate, filed an application to be temporary administrator of the estate of Raymond. This action was taken in order to get venue in Harris County, where it was expected a lawsuit brought by Parks's estate against Raymond's estate would receive more favorable treatment. The court sustained the trial court's transfer of venue to Potter County, and held that the Harris County venue had been manufactured so as to deprive Raymond's estate of valuable rights.44

Procedure—Death of Spouse Caused by Survivor. Two cases, Ovalle v. Ovalle45 and Powell v. Powell,46 involved surviving widows who had killed their husbands and were seeking certain benefits from the estates of their deceased husbands. In Ovalle the widow was seeking a widow's allowance and certain property, as well as the right to occupy the homestead. The trial court allowed the claims on the grounds that the wife's killing of the husband had been in self-defense. The court of civil appeals, however, held that the finding was against the great weight and preponderance of

39. See Tex. R. Civ. P. 2, 21a, 72. Rule 2 provides scope of rules; rule 21a provides notice requirements; rule 72 provides service on adverse parties.
40. 613 S.W.2d at 760.
41. 618 S.W.2d 913 (Tex. Civ. App.—Fort Worth 1981, no writ).
42. Tex. Prob. Code Ann. § 5A (Vernon 1980) provides: “In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court.”
44. Id. at 329. For a case in which the court held that because defendant's answer had been on file for some time he thereby waived his right to a plea of privilege, see Corpening v. Corpening, 608 S.W.2d 329 (Tex. Civ. App.—Fort Worth 1980, remanded), aff'd, 619 S.W.2d 38 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.). See also Jackson v. Thompson, 610 S.W.2d 519 (Texas Civ. App.—Houston [1st Dist] 1980, no writ) (bill of review).
46. 604 S.W.2d 491 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).
evidence, and that the killing was not justified, so she could not benefit from her husband’s estate. In Powell the widow sought to displace her mother-in-law as administratrix of her husband’s estate. Since the widow had been acquitted of the murder of her husband the probate court removed the decedent’s mother and appointed the widow as administratrix. The court of civil appeals affirmed on the grounds that there was sufficient evidence to justify the finding that the killing was in self-defense.

Procedure—Parties. Hackfeld v. Ryburn held that the attorney general must be joined as a party in a petition for writ of error from the probate court to the court of civil appeals when the heirs at law attempt to set aside a will containing a charitable bequest.

Procedure and Administration—Miscellaneous. Meek v. Hart held that an order cancelling an order of sale in administration was not appealable because the matter was still open for further hearing. Leggett v. Church of St. Pius held that a foreign will did not give the executor power of sale and, therefore, an instrument of conveyance of mineral rights executed by a foreign executor was a nullity. In Lawyers Surety Corp. v. Snell the court held that testimony of an insurance agent conclusively established that the temporary administratrix could not have obtained fire insurance on the houses and, therefore, she was not negligent for not having acquired such insurance. Orders of the court approving payment of expenses for maintenance and upkeep of estate property and payment of attorneys’ fees were sustained in Armstrong v. Stallworth. Gilkey v. Allen held that when no suspicious circumstances or irregularities were shown regarding the execution of a will, no issue had been raised by the evidence or should have been submitted to the jury as to testator’s knowledge or understanding of the contents of his will.

Probate—Execution. Rodgers v. King is an excellent example of why counsel should supervise the complete execution of a will, including the self-proving affidavit. Charlene King signed an instrument in which she clearly declared it to be her last will and testament. A proper self-proving affidavit ...

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47. 604 S.W.2d at 529-30.
48. 604 S.W.2d at 492.
49. 606 S.W.2d 340 (Tex. Civ. App.—Tyler 1980, writ dism’d w.o.j.).
50. See TEX. REV. CIV. STAT. ANN. art. 4412(a), §§ 1, 2 (Vernon 1976) (requiring the attorney general to be a necessary party to suits involving charitable trusts).
52. 619 S.W.2d 191 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.).
55. 617 S.W.2d 308 (Tex. Civ. App.—Tyler 1981, no writ); accord, Boyd v. Frost Nat’l Bank, 145 Tex. 206, 196 S.W.2d 497 (1946) (presumption is that testator knows the contents of the will). See also Lade v. Keller, 615 S.W.2d 916 (Tex. Civ. App.—Tyler 1981, no writ) (allegations of bias of witness and judge not material).
affidavit was later executed by Charlene King and two witnesses before a notary. There were, however, no witnesses to her signature on the will itself and there was no attestation clause. The court of civil appeals held that the signatures of the witnesses to the self-proving affidavit, although part of the same instrument, could not be used in lieu of witnesses to the will.\textsuperscript{57}

**Probate—Two Wills.** In \textit{Lane v. Sherrill}\textsuperscript{58} a 1978 holographic will of Roy C. Lane, the deceased, was offered for probate, and shortly thereafter, a 1974 holographic will was offered. While the 1974 will contained a clause revoking all prior wills, the 1978 will had no such clause. The court of civil appeals affirmed the trial court’s admission of both wills to probate.\textsuperscript{59}

The trial court harmonized the two wills so that read together they constituted a single testament. The various principles of construction enumerated as guidance for the court were:

First, as we pointed out above, a holographic will should be liberally construed to effect the testator’s intent. Second, a clearly expressed intention in one part of a will will not yield to a doubtful construction in another. Where a testator has executed more than one will or a will with a codicil, the instruments will be construed together as the last will and testament of the testator except to the extent of revocation. Third, the law favors testate over intestate passage of property. Fourth, the court should reject an interpretation which results in the testator’s having done a useless thing. Finally, the court should avoid a construction which contravenes the intent expressed in the will as a whole.\textsuperscript{60}

**Probate—Testamentary Capacity.** This year’s survey period contained the usual cases involving testamentary capacity. The ultimate finding depended on the state of the testator’s mind when the will was executed. Advanced age, failing health, moodiness, and anger at particular family members do not of themselves preclude the making of a valid will. Testamentary capacity was sustained in \textit{Rich v. Rich}\textsuperscript{61} and \textit{Faulkner v. Thrapp}.\textsuperscript{62}

\textsuperscript{57} \textit{Id.} at 898. \textit{See also} Boren \textit{v. Boren}, 402 S.W.2d 728 (Tex. 1966) (will not attested not rendered admissible by attachment of self-proving affidavit).

\textsuperscript{58} 614 S.W.2d 619 (Tex. Civ. App.—Austin 1981, no writ). \textit{See also} Pipkin \textit{v. Dezen-dorf}, 618 S.W.2d 924 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.) (presumption of revocation because will cannot be found does not raise issue of testator’s capacity to revoke).

\textsuperscript{59} 614 S.W.2d at 620.

\textsuperscript{60} \textit{Id.} at 623 (footnotes omitted).

\textsuperscript{61} 615 S.W.2d 795 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). With respect to the issue of testamentary capacity the court said:

By testamentary capacity is meant that the person at the time of the execution of the Will has sufficient mental ability to understand the business in which he is engaged, the effect of his act making the Will, and the general nature and extent of his property. He must also be able to know his next of kin and natural objects of his bounty. He must have memory sufficient to collect in his mind the elements of the business to be transacted and to hold them long enough to perceive at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.

\textit{Id.} at 796. One of the leading cases concerning testamentary capacity is Carr \textit{v. Radkey}, 393
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In Johnson v. Estate of Sullivan\(^6\) evidence was offered that the testatrix, at age 88, was not capable of knowing what she was doing, and at the time she made her will was influenced by her nurse, who was the sole beneficiary and executrix named in the document. The court held, therefore, that there was evidence to support the trial court's findings that the testatrix, at the time she executed her will, was under the undue influence of the sole named beneficiary, and an earlier will was properly admitted to probate.\(^6\)

Joint and Mutual Will. In Hutton v. Methodist Home\(^6\) W.E. Price and his wife, Minnie, executed a joint and mutual will leaving their properties one to the other for life with the remainder to the Methodist Home in Waco. The Price's ranch was leased by Hutton. The will provided that the survivor had the right to renew and extend the leases on their ranch land, and at the death of such survivor, Hutton was given an option to extend the lease for five years. At the expiration of the extension period Hutton was given a second option to purchase the land for $24,000 from the Methodist Home. After W.E.'s death Minnie elected not to extend further the leases to Hutton. Hutton, however, continued to pay rentals, and after Minnie's death he paid rentals to the Methodist Home. Upon Hutton's death his heirs sought to buy the land from the Methodist Home under the purchase option. The court of civil appeals affirmed the trial court's judgment that Minnie's refusal to extend the leases meant that at her death Hutton had no lease to extend, and because he had no lease, he had no option to purchase. The option to purchase was dependent upon his operating under an existing lease. Moreover, the option to purchase, if any, was personal to Hutton and expired upon his death.\(^6\)

II. TRUSTS

Construction. In Foshee v. Republic National Bank\(^6\) Bernice Schlosberg bequeathed to the bank the sum of $40,000 to be administered in the Hillcrest Mausoleum Special Gifts Trust Fund. Schlosberg's will specified that the maximum amount of income permitted under the laws of the State of Texas was to be used for the maintenance and beautification of a family burial room. The executor contended that the bequest was invalid because it violated the rule against perpetuities, and did not qualify for the charitable exception. The court of civil appeals held that article 912a, section 18, of the Revised Civil Statutes permitted a special care fund for a cemetery to be treated as a charity, and therefore, the gift under Mrs. Schlosberg's

S.W.2d 806 (Tex. 1965). See also Lee v. Lee, 424 S.W.2d 609 (Tex. 1968) (testamentary incapacity is to be determined on day will was executed).
62. 616 S.W.2d 344 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.).
64. Id. at 234.
66. Id. at 292.
67. 617 S.W.2d 675 (Tex. 1981).
The supreme court reversed the court of civil appeals, holding that although section 15 of the Cemetery Act authorizes perpetual care funds to be treated as charities, section 18 does not define a special care fund as a charity. Moreover, because the will made a gift for a noncharitable purpose, the doctrine of cy pres was inapplicable to use the money for other charitable purposes. The court determined that as to 75% of the bequest, or $30,000, the gift was void; the remaining 25% of the amount, or $10,000 of the bequest was ambiguous, and the matter was remanded to the trial court for determination of the testatrix's intent. Justice Barrow in his dissenting opinion stated that the intent of Mrs. Schlosberg was that whatever portion of the bequest was legally required to be used for general maintenance was for a charitable purpose and should be so recognized.

The testatrix in *Estate of Blardonne v. McConnico* had created a testamentary trust for her son in which she imposed a condition that distribution could be made to the son only in the event that he owed no one more than $100. As there was no finding that the son met the condition, there was no vesting of the trust in him prior to his death, and therefore, his heirs took nothing. The supreme court pointed out in a per curiam opinion that the distribution condition was a condition precedent. The clarification was considered necessary because the court of civil appeals had referred to the condition as both a condition precedent and a condition subsequent, and such descriptions were inconsistent.

In *Brinker v. Wobaco Trust Ltd.*, Maureen Connally Brinker and Norman E. Brinker created trusts for their two daughters known as the Brinker Family Trusts. Maureen's will provided that her residuary estate would pass to the Brinker Family Trusts after the deaths of her mother and Norman. Norman remarried, and had a child by his second marriage for whom he created a trust out of the residuary trust assets left under Maureen's will. The children of the first marriage contended that they were the only intended beneficiaries under the Brinker Family Trusts. There was

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69. 617 S.W.2d at 678. The court stated: Also, the Legislature saw fit to specifically provide that the perpetual care fund of a perpetual care cemetery and the special gift fund of a non-perpetual care cemetery were not to be deemed as perpetuities, yet the Legislature gave no indication that it considered the special care fund of a perpetual care cemetery as charitable or eleemosynary. *Id.* at 678; see *Tex. Rev. Civ. Stat. Ann.* art. 912a—18 (Vernon 1964), & art. 912a—15 (Vernon Supp. 1982).
70. 617 S.W.2d at 679. The court held that reference to *Tex. Rev. Civ. Stat. Ann.* art. 912a—18 (Vernon 1964) made it clear that 75% was for noncharitable purposes, while it was unclear whether testatrix intended 25% to be spent for the general upkeep of the cemetery. *Id.* at 680 (Barrow, J., dissenting).
71. 608 S.W.2d 618 (Tex. 1980).
72. 604 S.W.2d 278 (Tex. Civ. App.—Corpus Christi), *writ ref'd n.r.e. per curiam*, 608 S.W.2d 618 (Tex. 1980).
73. 610 S.W.2d 160 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).
some question in the documents as to the use of the word "settlor" and the meaning of the term "issue of settlor."

The court of civil appeals held that Maureen's children had established a case for reformation of the trust instrument that required remanding for a new trial. The court also ruled on an important issue relating to "pour over" trusts. Because Maureen had died, the contention was that the pour over trust had become testamentary in character and could not be changed. The court construed the Texas version of the Uniform Testamentary Additions to Trusts Act as providing that a gift over at death to an inter vivos trust merely augmented the inter vivos trust but did not make such trust testamentary in character.

Administration. In Jewett v. Capital National Bank an inter vivos trust contained a broad exculpatory clause relieving the trustee from all liability for any loss of trust funds resulting from the investment and reinvestment of trust assets. The beneficiaries, who were children of the grantor, sought to prove that the bank had allowed the assets to diminish to almost nothing. The trial court granted the bank's motion for summary judgment. The court of civil appeals reversed and remanded, holding that the exculpatory clause had to be read strictly and could not relieve the trustee bank of liability for breach of fiduciary duty.

First City National Bank v. Haynes also involved a question of a trustee's negligence in the administration of trust assets. Although the issue of negligence was supported by the evidence, the court reversed the award of punitive damages. According to the court, there must be more than gross negligence to support an award of punitive damages; there must be a showing of a state of mind of ill will, spite, evil motive, or the like, and those factors were lacking in Haynes.

75. Id. at 166.
76. Tex. Prob. Code Ann. § 58a (Vernon 1980) provides:

[b]y a will duly executed pursuant to the provisions of this Code, a testator may devise or bequeath property to the trustee of any trust (including an unfunded life insurance trust, even though the trustor has reserved any or all rights of ownership in the insurance contracts) the terms of which are evidenced by a written instrument in existence before or concurrently with the execution of such will and which is identified in such will, even though such trust is subject to amendment, modification, revocation or termination. The property so devised or bequeathed shall be added to the corpus of such trust to be administered as a part thereof and shall thereafter be governed by the terms and provisions of the instrument establishing such trust, including written amendments or modifications thereto made before the death of the testator. An entire revocation of the trust prior to the testator's death shall cause the devise or bequest to lapse.
77. 610 S.W.2d at 165.
78. 618 S.W.2d 109 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).
79. Id. at 112.
81. Id. at 609; see Clements v. Withers, 437 S.W.2d 818 (Tex. 1969) (elements for punitive damages reviewed). See also Ogle v. Craig, 464 S.W.2d 95 (Tex. 1971) (holding there must be more than wrongful act to justify punitive damages).
III. Guardianship

Gabriel had been appointed guardian of two minors in *Gabriel v. Snell*. In 1976 she and her surety were discharged when the guardianship of one of the minors was closed. At her request she was removed as guardian of the other minor in 1978. The successor guardian of the younger minor sued for mismanagement of his ward's estate, and sought recovery from Gabriel and the surety. The trial court rendered judgment against Gabriel and her surety, and the court of civil appeals affirmed. The discharge of the surety in 1976 had affected only the first minor's estate, and the surety's liability continued as to the second minor. Although the surety issued a single bond on both estates, the order of discharge did not release it from liability as to the second minor's estate.

IV. Heirship

Illegitimate Child—Inheritance from Father. In *Jones v. Davis* an illegitimate child and an illegitimate grandchild sought to be declared heirs of Davis. Davis died in 1978 after the decision of the United States Supreme Court in *Trimble v. Gordon* but before the 1979 amendment to Texas Probate Code section 42. *Trimble* held that an illegitimate child should be able to inherit from both his father and mother. The probate court in *Jones* applied the Texas statute as it existed before *Trimble* and concluded that the plaintiffs as a matter of law could not be heirs of Davis. The court of civil appeals reversed and remanded, holding that Probate Code section 42 was unconstitutional pursuant to the 1978 *Trimble* decision.

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82. 613 S.W.2d 810 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).
84. The child, Kathryn, was claiming as the illegitimate daughter of decedent Warren Davis, Sr. The grandchild, Craig, was claiming as the illegitimate son of Warren Davis, Jr., who apparently died without an estate in 1960, prior to Craig's birth. Neither Kathryn nor Craig were officially legitimated.
86. Tex. Prob. Code Ann. § 42(b) (Vernon 1980). The section was amended in 1979 to read:

> Paternal Inheritance. For the purpose of inheritance, a child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother or is legitimated by a court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

87. Id. at 772-76. In a 5-4 decision the Supreme Court struck down an Illinois intestate succession statute that required marriage and acknowledgment to support legitimation. The Court found that Illinois' genuine interest in the orderly disposition of estates did not require such an insurmountable obstacle to legitimation, especially when alternative methods were available. As such, the Court concluded that the discrimination of the statute between legitimate and illegitimate children was a violation of the equal protection clause of the fourteenth amendment. Id. at 772-76.
sion, and that the plaintiffs were entitled to a new trial to prove their relationship with Davis.89

The supreme court reversed the court of civil appeals and affirmed the trial court,90 holding that the Texas statute was constitutional in light of the United States Supreme Court's post-Trimble decision, Lalli v. Lalli.91 In Lalli the Supreme Court upheld a New York statute that required either marriage or a formal order of paternity to legitimate an illegitimate child. The Texas Supreme Court found that Lalli's interpretation of Trimble made clear that the state interest of orderly disposition of estates could be constitutionally served by reasonable legislation. The court concluded that the 1977 Texas statute,92 in force at the time this suit was brought, had a rational objective and did not impose an overly burdensome obstacle to legitimation.93

In Winn v. Lackey94 Winn had sought in 1978 to partition property that he owned in undivided interests with his brothers. He alleged that a brother had died in 1973 intestate, unmarried, and with children. In 1978 the grandson of Julie York entered the suit, contending that Julie was the illegitimate child of the unmarried deceased brother. A principal question in the case was whether Trimble v. Gordon95 should be applied to a case in which the father died prior to the Trimble decision. The trial court entered judgment favoring the minor's interest. The court of civil appeals held that the Trimble rule should not be applied retroactively because of the chaos it would create in property titles.96 Thus, the pre-Trimble Texas rule was applied to the effect that the illegitimate child did not inherit from his father.97

Disclaimer. In Welder v. Hitchcock98 Tom Welder died intestate leaving no spouse, children, or parents surviving him. Although two of his brothers predeceased him, Welder did leave a surviving brother, Amos. Sev-

89. 616 S.W.2d at 278.
92. In 1977, § 42(c) of the Probate Code provided that illegitimates could inherit from their mothers and their maternal kindred. In addition, if the father and mother subsequently married, illegitimates could inherit from their fathers and their paternal kindred. In the event that legitimization occurred through voluntary proceedings, however, they could inherit from their fathers but not their paternal kindred. 1977 Tex. Gen. Laws, ch. 290, § 1, at 762.
96. 618 S.W.2d at 912.
98. 617 S.W.2d 294 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).
enty-four days after Welder's death Amos filed a disclaimer of his intestate share. Seven nieces and nephews of Tom contended that if Amos's existence was disregarded, their relationship with Tom was in the same degree of consanguinity and, therefore, they should each take one-seventh of Tom's estate. The court of civil appeals, in affirming the trial court, held that Amos could not by his disclaimer alter the rules of descent and distribution. Instead, Amos, as one of three brothers of Tom, could disclaim only his one-third interest, which would pass to his children. The children of each of the other brothers would share their parents' respective one-third interests to which they were entitled irrespective of the disclaimer by Amos.99

Mental Incompetence. Sublett v. Black100 sustained a petition for bill of review of an order declaring a person mentally incompetent where personal service had not been properly served. The guardian contended that although a bill of review was usually a direct attack, under the circumstances of the case it was a collateral attack, and therefore the court's recitals of due notice could not be questioned. Noting that the policy for precluding inquiry into the record behind a judgment regular on its face was a public policy to protect property rights, the court of civil appeals drew a distinction between the review of the status of the person and the review of the validity of conveyances or other acts of the guardian of an incompetent. Since Sublett sought only a review of the finding of incompetence, the need to forbid attack to protect third parties that had relied upon the judgment was not present.

V. LEGISLATION

Taxation. The 67th Legislature significantly changed the Texas death tax rules when it repealed the Texas Inheritance Tax101 and the Additional Inheritance and Transfer Tax102 and substituted a new statute that should be easier to understand and administer. Effective for decedents dying after August 31, 1981, all of whose property is in Texas, the state inheritance tax103 will be equal to the credit computed under Internal Revenue Code section 2011.104 In the case of residents subject to tax in other states105 or in the case of nonresidents106 or aliens,107 with real property or tangible

99. Id. at 299. The court relied on Tex. Prob. Code Ann. § 37A (Vernon 1980), which provides that “disclaimer evidenced as provided herein, shall be effective as of the death of decedent and the property subject thereof shall pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent unless decedent's will provides otherwise.”

100. 617 S.W.2d 754 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ dism'd w.o.j.).
106. Id. § 211.052.
107. Id. § 211.053.
personal property having a situs in the State of Texas, the state inheritance tax will be an allocable portion of the federal credit.