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WILLS AND TRUSTS

by

Charles O. Galvin*

I. WILLS

CONSTRUCTION. The supreme court's decision in Perry v. Hinshaw\(^1\) highlights problems of construction associated with the distinction between individual and class gifts. Lydia Hinshaw's will granted Hattie Peterson a life estate in certain rental property. Upon termination of the life estate one-half of the rental property was to go to Lydia's sister, and the remaining one-half was to be shared equally among the surviving brothers and sisters of Lydia's husband listed in the will.\(^2\) Hattie Peterson was also the residuary beneficiary under Lydia's will.

Lydia died in 1976. At the death in 1978 of Hattie Peterson, the life tenant, the only surviving remainderman was Vera Perry, a sister of Lydia's husband. Vera contended that because she was the last surviving member of a class that included Lydia's sister and Lydia's husband's brothers and sisters, she was entitled to all the designated property. The residuary beneficiaries under Hattie Peterson's will contended Vera was entitled to only one-sixth of one-half of the designated property, and that the balance passed under the residuary clause of Lydia's will to Hattie Peterson and thence to the residuary beneficiaries of Hattie Peterson's will.

The trial court held that: (1) Lydia did not intend to make a class gift of the remainder; (2) each named remainder person was entitled to the particular share designated; (3) Vera, as the only survivor, was entitled to only one-sixth of one-half of the rental property; and (4) the balance of the particular rental property fell into Lydia's residuary estate, thus passing to Hattie Peterson and thence to the beneficiaries under Hattie Peterson's will. The court of appeals affirmed, holding that when the beneficiaries

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1. 633 S.W.2d 503 (Tex. 1982).

2. The will provided specifically that:

Upon the death of Hattie Peterson, I direct that the rental property from which the said Hattie Peterson, was receiving the rentals during her life time, be divided among the surviving sisters and brothers of myself and my beloved husband in the following manner: to my sister, Mrs. Hattie Hohhof of Chicago, Illinois, one-half (1/2); and the remaining half to be divided equally, share and share alike, among the surviving brothers and sisters of my beloved husband, D.E. Hinshaw, the same being William Hinshaw, Fannie Steele, Cosa Frensley, Luda Jones and Vera Perry, share and share alike.

\textit{Id.} at 504.
a class are named, the gift is to the named beneficiary, and the class description is merely for identification.\textsuperscript{3} The court of appeals found Vera was the only survivor to take her one-sixth of one-half share, and that the remainder of the bequests lapsed, falling into Lydia's residuary estate. The lapsed gifts, therefore, should pass under the will of Lydia's residuary beneficiary.\textsuperscript{4}

The Supreme Court of Texas reversed, holding that the one-half devised to Lydia's sister lapsed and fell into Lydia's residuary estate, but that the one-half devised among the surviving brothers and sisters of Lydia's husband passed outright to Vera as the sole survivor of that class.\textsuperscript{5} The court held that the essential ingredient for this construction was the use of words of survivorship.\textsuperscript{6}

This case serves as a signal to draftsmen concerning the distinction between class and individual gifts. The lesson it teaches is that a gift by $T$ of Blackacre, share and share alike, to the survivors of $A$, $B$, and $C$ would all go to $C$, if $C$ was the only person in the group to survive $T$. On the other hand, a gift by $T$ of Blackacre, share and share alike to $A$, $B$, and $C$ (with no words of survivorship) would go one-third to $C$ if he were the only one to survive $T$. The remaining two-thirds, the specific devises to $A$ and $B$, would lapse and fall into $T$'s residuary estate.

\textit{Karsten v. Nuhl}\textsuperscript{7} illustrates the importance of clearly expressing the testator's intent in the words of the will. The testator, John Perkins, died in 1968 leaving as survivors his widow, Leila, three children by a previous marriage, and a minor grandchild. John's will left all his property in fee simple to his surviving wife, but specially provided that "in the event my wife shall sell any of our properties, then one-half (1/2) of the net proceeds realized from the sale of said community properties . . . shall be divided equally between my said three (3) children."\textsuperscript{8} John's will further provided that in the event of a sale, the three children and the grandchild must join as grantors. In 1973 Leila, the surviving wife, made a gift of certain property to her sister, Myrtle Muhl, and reserved to herself a life estate in the property. Leila died in 1976 leaving all her property to Myrtle.

Following Leila's death, John's children brought an action in trespass to try title against Myrtle Muhl. The court of appeals affirmed the judgment of the trial court denying that the children had an interest in the property.\textsuperscript{9} The court stated that when the words of the will are clear and unambigu-

\textsuperscript{3} Id. at 753; see Benson v. Greenville Nat'l Exch. Bank, 253 S.W.2d 918, 924 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.); Hagood v. Hagood, 186 S.W. 220, 226 (Tex. Civ. App.—Fort Worth 1916, writ ref'd).
\textsuperscript{4} 625 S.W.2d 751, 753-54 (Tex. Ct. App.—Fort Worth 1981).
\textsuperscript{5} 633 S.W.2d 503, 505.
\textsuperscript{6} Id. On the issue of survivorship the court stated: "Lydia Hinshaw's will contains words of survivorship. Clearly, Vera Perry, as sole survivor of the brothers and sisters of D.E. Hinshaw, is entitled to an undivided 1/2 interest in the rental property." Id.
\textsuperscript{7} 624 S.W.2d 682 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).
\textsuperscript{8} Id. at 683.
\textsuperscript{9} Id. at 684.
ous, the testator's intent must be derived from the instrument itself.\textsuperscript{10} John's will provided for a bequest to his children only in the event of a sale of community property; Leila's transfer to Myrtle was by gift. The court held, therefore, that the children were not necessary parties to the deed of transfer and had no claim on the property.\textsuperscript{11}

The case demonstrates a point of draftsmanship. In all probability John intended that his second wife enjoy the property for her life, but if she disposed of any item, he intended that his children by his previous marriage have the benefit of the property or the proceeds from the transfer. The fact that he used the term sale rather than transfer or disposition afforded his second wife the opportunity to transfer the property to a member of her family, retaining the use for life. This circumvented what John probably meant to occur, but the inadvertence in drafting made the result unchallengeable.\textsuperscript{12}

\textbf{Probate—Revocation.} In \textit{Morris v. Morris}\textsuperscript{13} Sue Morris made application for the probate of the will of her husband, Floyd Lee Morris, Sr. The deceased's two sons filed a contest alleging that the deceased did not have testamentary capacity,\textsuperscript{14} that the will was not properly executed and attested, and that the decedent had taken steps to revoke the will. The jury found that the decedent did have testamentary capacity, that he understood the provisions of the will, but that he had revoked the will. The critical testimony was that: (1) the decedent had directed the proponent Sue to destroy the will; (2) Sue had taken a business envelope and torn it into shreds; and (3) the decedent believed that the will was destroyed. In fact the will was not in the envelope and was not destroyed. The trial court instructed the jury that if the deceased had instructed Sue to destroy the will, and if she destroyed in his presence an instrument he believed to be his will, then the will was revoked.

The appeals court reversed, holding that the trial court's jury instruction on the revocation issue was erroneous.\textsuperscript{15} The court stated that a will can only be revoked pursuant to the statutory method, and that method was not followed in this case.\textsuperscript{16} The contestants sought in the alternative to

\textsuperscript{10} Id. The court cited Gee v. Reed, 606 S.W.2d 677, 680 (Tex. 1980) (courts must construe the will as a whole), and Huffman v. Huffman, 161 Tex. 267, 271, 339 S.W.2d 885, 888 (1960) (if the words are clear and unambiguous the testator's intent must be derived from the words alone).

\textsuperscript{11} 624 S.W.2d at 684.

\textsuperscript{12} The court concluded: "We cannot . . . distort the clear meaning of Testator's words to rewrite the will and find that he intended a devise of property conditioned upon any disposition of property when, throughout his will, Testator consistently and specifically refers to sale of property . . . ." \textit{Id.} (emphasis in original).

\textsuperscript{13} 631 S.W.2d 188 (Tex. Ct. App.—Tyler), \textit{aff'd}, 642 S.W.2d 448 (Tex. 1982).

\textsuperscript{14} 631 S.W.2d at 189. The contestants alleged that Sue, her attorney, and her attorney's secretary had subjected the decedent to pressure and influence while he was ill, and thus persuaded the decedent to execute an instrument as his will when he did not have testamentary capacity. \textit{Id.}

\textsuperscript{15} \textit{Id.} at 192.

\textsuperscript{16} \textit{Id.} at 191-92; \textit{see} \textit{TEX. PROB. CODE ANN.} § 63 (Vernon 1980) (provides that a will may only be revoked "by a subsequent will, codicil, and declaration in writing, executed his
impose a constructive trust on the decedent's estate because of Sue's fraud. The appellate court noted, however, that the will's only devisee was Floyd Lee Morris, Jr. and that Sue was not a beneficiary under the will, but merely trustee for the decedent's sons. The appellate court held that to impose a trust on the innocent beneficial owner because of the fraud of another would not be proper.\(^7\)

This case presented a dilemma. On the one hand, it is clear that the decedent meant to revoke his will and that the proponent's fraud prevented this result. On the other hand, the beneficiary under a valid will who was innocent of fraud should be entitled to the benefits of the will, irrespective of the fraud of a third party. The court's resolution subverted the testator's intention, but followed the statutory mandate.\(^8\)

**Probate—Execution.** *Fleming v. Wich*\(^9\) involved the question of the proper form of execution and attestation of a will. The will was a four-page typewritten document. The substantive provisions of the will ended in the middle of the third page, followed by the signature of the testatrix. The self-proving affidavit began immediately after the testatrix's signature. A second signature of the testatrix, accompanied by the only signatures of the two witnesses, appeared on the bottom of the third page at the conclusion of the self-proving affidavit. The issue presented to the court of appeals was whether or not the witnesses' signatures, which appeared only in the self-proving affidavit, but were signed on the same page and at the same time as the testatrix signed her will, were sufficient to satisfy the statutory requirement for witnesses to a will.\(^10\)

In reaching its conclusion the court considered the decision in *Boren v. Boren*.\(^11\) In that case the supreme court held that the witnesses' signatures on the self-proving affidavit were not sufficient to satisfy the requirement of witnesses for the will itself.\(^12\) The court distinguished *Boren*, holding that because the subscribing witnesses' signatures in this case appeared on the same page the will ended they were "on the face of the will itself," and this was sufficient compliance with the statutory mandate.\(^13\)

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\(^7\) 631 S.W.2d at 193. The court cited Bounds v. Caudle, 560 S.W.2d 925, 928 (Tex. 1977) (constructive trust imposed on property devised to beneficiary who had killed testator).

\(^8\) Another factor is that Sue Morris had complained to Floyd Morris, Sr. about being left out of his will. Thus, her action in not destroying the will at the direction of the testator was against her own interest in the matter. 631 S.W.2d at 190.


\(^10\) TEX. PROB. CODE ANN. § 59 (Vernon 1980) provides that wills not wholly in the handwriting of the testator must be attested by two witnesses who must sign the will in the presence of the testator.

\(^11\) 402 S.W.2d 728 (Tex. 1966) (self-proving affidavit was placed on a separate page).

\(^12\) *Id.* at 729.

\(^13\) 638 S.W.2d at 35.
On a motion for rehearing, the court refused to follow *Jones v. Jones*,24 a case factually similar to the instant case. In *Jones* the witnesses signed twice, once in the second line of the self-proving affidavit and once at the end of the affidavit. As in the instant case the first set of witnesses' signatures appeared on the same page as the testator's signature. Nevertheless, the Dallas court of appeals in *Jones* held that the witnessing was not properly performed and refused to admit the will to probate.25

The court distinguished *Jones* by noting that in the instant case the executrix sought probate of the will as an “attested written will,”26 thus making the language of the self-proving affidavit superfluous.27 The court apparently assumed that it could ignore the language of the affidavit, but retain the signatures following it and use it as part of the will. This reasoning is somewhat strained, and it appears the court placed great weight on the fact that applying the *Boren* rule in this case would allow a technicality to defeat the testatrix's intent.28

*Reagan v. Bailey*29 involved a related but more difficult question. Mable30 Warren executed a will in proper form. Later, while an attorney and notary public were in her home on other business, she produced an instrument, declared it to be a codicil to her will, signed it in the presence of the two parties, and had them sign in her presence and in the presence of each other. There were no lines on the will for the witnesses' signatures. The attorney signed to the left of the testatrix's signature and underneath his signature wrote the word witness. The other witness, a notary public, signed the document using the acknowledgement form on the codicil and placed thereon his notarial seal.

The contestant contended that the codicil was invalid because the signature of a notary in his official capacity cannot also serve as a signature of a witness. The court distinguished those cases involving the sufficiency of a self-proving affidavit from the instant case, noting that a self-proving affidavit requires different formalities than a codicil.31 The court stated that a decision to admit the codicil to probate was supported by sufficient case law,32 citing among others an early Texas Supreme Court case holding that the execution by a notary will also qualify as an execution by a witness.33 The court also found important the fact that the notary appeared
in his capacity as a witness at the time the will was offered for probate.\textsuperscript{34}

These cases illustrate the extreme care one must exercise to execute a will properly. Strict adherence to the Probate Code provisions relating to execution and attestation may yield harsh results in particular cases, but the statutory requirements are necessary to prevent fraud against the estate of the testator.

\textit{Probate—Testamentary Capacity}. In \textit{Wood v. Stute}\textsuperscript{35} the testatrix disinherit her daughter. The daughter contested her mother's will on the grounds that it had been executed under undue influence from the testatrix's son. The evidence showed that the son had referred his mother to his personal attorney, and that the attorney had prepared the will. Evidence was also presented that the mother relied on the son for advice in making business decisions. The court held that merely because the testatrix's son advised his mother and referred her to counsel in certain matters did not make a case for undue influence.\textsuperscript{36}

\textit{Procedure—Limitations on Actions}. In \textit{Escontrias v. Apodaca}\textsuperscript{37} the testatrix's will was admitted to probate on December 12, 1974. On June 6, 1978, a group of heirs brought suit against the two independent co-executrices of the estate to set aside the will on the grounds that the testatrix lacked testamentary capacity and was subject to undue influence. The trial court granted the defendant's motion for summary judgment on the grounds that two years had elapsed from the time the will was admitted to probate.\textsuperscript{38} The court of appeals reversed and remanded, holding that the defendant executrices had the burden of proving not only that two years had elapsed from the time of probate, but also that no undue influence was exercised.\textsuperscript{39} The Supreme Court of Texas reversed the court of appeals and affirmed the trial court, holding that the independent co-executrices met their summary judgment burden by showing that the heirs could have reasonably made the discovery of any undue influence or lack of testamentary capacity within two years from the time the will was admitted to probate.\textsuperscript{40}

The case is interesting because the evidence revealed that, just prior to the execution of the will, the testatrix had undergone two operations for

\textsuperscript{34} 626 S.W.2d at 142.
\textsuperscript{35} 627 S.W.2d 539 (Tex. Ct. App.—Fort Worth 1982, no writ).
\textsuperscript{36} \textit{Id.} at 541.
\textsuperscript{37} 629 S.W.2d 697 (Tex. 1982).
\textsuperscript{38} \textit{TEX. PROB. CODE ANN.} § 93 (Vernon 1980) provides for a two-year period of limitations on suits contesting the validity of a will.
\textsuperscript{39} 624 S.W.2d 600, 601-02 (Tex. Civ. App.—El Paso 1981).
\textsuperscript{40} 629 S.W.2d at 698-99.
the removal of blood clots from her head. The plaintiff heirs were not permitted to visit the testatrix from the time of the first operation until her death. The heirs stated that during this time the testatrix's attitude toward them changed drastically. In 1975 they knew the terms of the will "did not seem right."  

Apparently, however, the legal significance of these facts was not known until they consulted with a lawyer in 1977. In summary, they slept on their rights until it was too late to file suit.

Procedure—Right to Sever; Right to Intervene. Barrows v. Ezer involved a complex procedural maze. The will of George R. Canada was admitted to probate in county court in 1958. The will named Charles Ezer as independent executor and created a trust with Canada's widow and Ezer as co-trustees. The testamentary trust provided that Mrs. Canada was the life beneficiary, and upon her death the assets would be transferred to a second trust of which Charles Ezer and Gil Phares would be co-trustees. The trustees were to make various bequests out of the second trust and then deliver the remainder to Ezer.

Mrs. Canada died in 1978, and Phares refused to act as co-trustee. Ezer brought suit in the district court in 1978 to determine how to carry out the trust. George H. Canada, the only son of the testator and a beneficiary under the second trust, was named defendant. He counterclaimed that the will was invalid and sought to impose a constructive trust on the property obtained by Ezer under the will. The district court dismissed Canada's counterclaim for lack of jurisdiction and granted the relief sought by Ezer by appointing a co-trustee and ordering distribution of the trust assets. Canada appealed the dismissal of his counterclaim, but did not appeal the district court's order of relief. The court of civil appeals in a case styled Canada v. Ezer held first that the district court was correct in ruling itself to be without jurisdiction to hear the will contest because that part of the counterclaim was a collateral attack on the will in probate and was, therefore, an attack on the jurisdiction of the county court. Second, the court held that the district court did have authority to hear evidence and to rule on that part of Canada's counterclaim dealing with the imposition of a constructive trust. The court reversed and remanded the case to determine the constructive trust issue.

Meanwhile, Canada filed a will contest over his father's will in county court, and subsequently transferred the action to the district court. On a motion to the district court, Ezer consolidated the will contest with the previous constructive trust litigation. At the same time Ezer was successful in severing the issue of the relief granted by the district court, that is, the appointment of the co-trustee, and the order of distribution of trust assets.

41. Id. at 698.
42. Id.
43. 624 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).
44. 584 S.W.2d 568 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).
45. Id. at 569.
46. Id.
47. Id.
Canada appealed the order of severance. Simultaneously, other heirs sought to intervene and to consolidate their causes relating to the Canada estate with the basic action between Canada and Ezer. On Ezer’s motion the trial court denied the intervention, and the opponents also appealed this order.

Thus, the posture of the matter in the instant case on appeal was as follows: (1) the court consolidated the will contest and the constructive trust issue; (2) the court severed the issue of the order of appointment of the co-trustee and the delivery of the trust assets to Ezer; and (3) the court denied the intervention of the other Canada heirs. The issues before the court on appeal were whether the severance and intervention holdings were correct.

In ruling on the severance question the court of civil appeals stated that the issues on the appointment of the co-trustee and the delivery of the remaining trust assets to Ezer were decided in the initial hearing in the district court. Canada failed to complain about these issues in his first appeal; therefore, the court held that under the “law of the case” doctrine Canada had waived his right to question that portion of the district court’s judgment. Because these issues on the order granting relief must therefore stand as decided, the court held they were properly severed from the other issues. With respect to the issue of intervention, the court held that the trial court should have granted the intervenors a hearing to determine if they had the requisite pecuniary interest in the estate of Canada. The matter was accordingly reversed and remanded, thus leaving the intervention issue and the constructive trust issue still open.

This case is a classic presentation of procedural problems. Canada’s will was admitted to probate in 1958, and Ezer was named independent executor and trustee. Twenty years later when Ezer raised in the district court the issue of the appointment of his co-trustees, he started a chain reaction that caused others to challenge the original will and to seek to impose a constructive trust. One would expect that at the trial on the merits the question of the statute of limitations would surely be raised concerning the challenge to a will admitted to probate in 1958.

Procedure—Jurisdiction of County and District Courts. In re Estate of Merrick held that the acts creating the county courts at law of Lubbock

48. The court defined the “law of the case” doctrine as “that principle which states that questions of law decided on appeal to a court of ultimate last resort will govern the case throughout all of its subsequent stages, including a retrial and subsequent appeal.” 624 S.W.2d at 616 (citing Kropp v. Prather, 526 S.W.2d 283 (Tex. Civ. App.—Tyler 1975, writ ref’d n.r.e.); Houston Endowment, Inc. v. City of Houston, 468 S.W.2d 540 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref’d n.r.e.); Allied Fin. Co. v. M.T. Shaw, 373 S.W.2d 100, 106 (Tex. Civ. App.—Fort Worth 1963, writ ref’d n.r.e.).

49. 624 S.W.2d at 617.

50. Id.

51. Id. at 617-18.

52. 630 S.W.2d 500 (Tex. Ct. App.—Amarillo 1982, writ ref’d n.r.e.).
County gave such courts original jurisdiction over general probate matters under Texas Probate Code section 5. In this case the application for probate was filed in the Lubbock County Court. Another related action was filed in the Taylor County Court and thereafter transferred to the Lubbock County district court. Pursuant to Texas Probate Code section 8(c)(1), the court of civil appeals held that the transfer from Taylor County should have been to the Lubbock County court as the proper court possessing venue priority. A district court is to have probate jurisdiction only when no statutory county court has been created.

Administration—Administrator's Settlement without Court Authorization. In Catlett v. Catlett the court had before it a question of construction of Texas Probate Code section 234(a)(4). In Catlett an administrator instituted an action on behalf of the estate. During the trial the parties reached a settlement, which the administrator assented to in open court without an order from the probate court. Thereafter, the probate court ratified the settlement. Subsequent to this ratification, the administrator sought to revoke his consent to the settlement on the grounds that he had acted without authority from the probate court. The court, however, found that a settlement, made without authority, is voidable but not void. The court held in the instant case that the subsequent ratification by the probate court cured the lack of authority, thus precluding the administrator from revoking his consent.

Administration—Jurisdiction of Probate Court to Issue a Temporary Injunction. In Onoray Davis Trucking Co. v. Lewis Davis Trucking sought to foreclose upon property securing a promissory note. The property was part of an estate in the process of administration, and the executrix obtained a temporary injunction enjoining the foreclosure sale. Davis Trucking challenged the authority of the probate court to issue an injunction. The court held that Texas Probate Code section 5(d) authorizes a probate court to enjoin a foreclosure sale of properties that are part of an estate.

54. 630 S.W.2d at 503. Tex. Prob. Code Ann. § 5 (Vernon 1980) vests probate jurisdiction in the statutory probate courts, county courts at law, and concurrently in the district courts where no statutory courts have been created.
56. 630 S.W.2d at 504.
57. Id. at 503.
58. 630 S.W.2d 478 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.).
59. Tex. Prob. Code Ann. § 234(a)(4) (Vernon 1980) provides: "When a personal representative [of an estate] deems it for the interest of the estate, he may, upon written application to the court, and by order granting authority . . . (4) make compromises or settlements in relation to property or claims in dispute or litigation . . . ." (emphasis added.)
60. 630 S.W.2d at 483 (citing Hughes v. Hess, 141 Tex. 511, 172 S.W.2d 301 (1943)).
61. 630 S.W.2d at 483.
63. 635 S.W.2d at 624. Tex. Prob. Code Ann. § 5(d) (Vernon 1980) provides: "All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate . . . ."
The order of the trial court authorizing the injunction was affirmed. 64

Administration—Claim for Attorney's Fees. In Anderson v. Anderson 65 Wesley Anderson executed a will in which he created a trust for the benefit of his minor children. He named his brother, J.C. Anderson, independent executor of the estate and trustee. J.C. caused Wesley to change the beneficiary designations of a life insurance policy and certain stock in favor of himself, leaving the testamentary trust unfunded. After Wesley's death the children through their next friend filed a will contest and a suit to set aside the beneficiary designation under the insurance policy. At trial the court ordered J.C. to obtain separate counsel for himself in his individual capacity and in his capacity as independent executor. The will was admitted to probate, but J.C. was denied appointment as the independent executor, and the beneficiary designation of the life insurance policy was set aside. The attorney who represented J.C. in his capacity as independent executor withdrew as counsel. A claim for attorneys' fees was filed with the successor executor, Corpus Christi National Bank, which approved the claim.

Texas Probate Code section 243 requires payment of reasonable attorneys' fees to the executor for any proceedings involved in admitting the will to probate, whether such proceedings are successful or not. 66 In the instant case, however, the court denied the claim on the grounds that: (1) the attorney had filed the claim rather than the executor, as the statute requires; and (2) even if the executor had filed the claim, it would be against public policy to allow the claim against the estate on behalf of an executor who had tried to defraud the estate. 67 Chief Justice Nye dissented on the grounds that the claim was properly presented, and the work done was in good faith and pursuant to the trial court's order. 68 A writ of error has been granted in this case by the Texas Supreme Court. The supreme court's opinion will be covered in the next Survey.

In another case for attorneys' fees, Paulus v. Lawyers Surety Corp. 69 the successor administrator sued a temporary administratrix for negligence in managing certain estate properties. The administratrix and her surety ultimately prevailed, 70 but the probate court granted the successor administrator's claim for recovery of attorneys' fees from the temporary administratrix. The administratrix's surety paid the attorneys' fees and then sought reimbursement from the administratrix as provided in the

64. 635 S.W.2d at 625.
66. TEX. PROB. CODE ANN. § 243 (Vernon 1980) provides:
When any person designated as executor in a will, or as administrator with the
will annexed, defends it or prosecutes any proceeding in good faith, and with
just cause, for the purpose of having the will admitted to probate, whether
successful or not, he shall be allowed out of the estate his necessary expenses
and disbursements, including reasonable attorney's fees, in such proceedings.
67. 638 S.W.2d at 58.
68. Id. at 59-60.
69. 625 S.W.2d 843 (Tex. Ct. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).
70. Lawyers Surety Corp. v. Snell, 617 S.W.2d 750 (Tex. Civ. App.—Houston [14th
Dist.] 1981, no writ).
The administratrix contended she was not obligated to reimburse the surety because the probate court’s order granting the claim for attorneys’ fees was not a final adjudication. The court held that the probate court’s order was final as it conclusively adjudicated the disputed issue. Thus, the court found under the surety contract the administratrix was required to reimburse the surety for the attorneys’ fees it had paid.

Administration—Widow’s Allowance. In *Noble v. Noble* the county court awarded the decedent’s widow a widow’s allowance, and the decedent’s son by a prior marriage appealed. The court of appeals reversed, holding that Texas Probate Code sections 287 and 288 require that the widow’s own resources be taken into account before a charge can be made against her husband’s estate. The court of appeals denied the allowance, finding in this instance the widow’s separate property was sufficient for her maintenance.

Administration—Accounting Between Separate and Community. In *Anderson v. Gilliland* an independent executrix and widow of the decedent refused to include as an asset of her husband’s estate his right of reimbursement for community funds he had expended to enhance the value of his wife’s separate estate. The widow contended that four months before her husband’s death he had given her a quitclaim deed relinquishing whatever claim or interest he or his estate might have in the reimbursement due the community estate. The court of appeals held that the right of reimbursement was only a claim for money and not a right, title, or interest in land that passed by the quitclaim deed. Accordingly, the amount of reimbursement was properly includable in the community assets of the decedent’s estate. Mr. Justice Stephens wrote a lengthy dissent in which he contended that the surrounding facts and circumstances should be considered in construing the language of the quitclaim. It was clear the decedent intended his wife to have her separate property free of any debt to the community estate; the decedent by quitclaiming his “right, title, and interest” undoubtedly believed that he was releasing the claim of the community estate against his wife’s separate property, and her testimony corroborated this intent. The case is a close one and a significant illus-

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71. 625 S.W.2d at 846.
72. *Id.*
73. 636 S.W.2d 551 (Tex. Ct. App.—San Antonio 1982, no writ).
75. 636 S.W.2d at 552; *see Tex. Prob. Code Ann.* § 287 (Vernon 1980) (directing the court to consider the facts and circumstances then existing and those anticipated to exist during the year after such death); *id.* § 288 (no allowance shall be made when the survivor has separate property adequate to the survivor’s maintenance).
76. 636 S.W.2d at 553.
77. 624 S.W.2d 243 (Tex. Ct. App.—Dallas 1982, writ ref’d n.r.e.).
78. *Id.* at 244-45 (quoting *Burton v. Bell*, 380 S.W.2d 561, 564-65 (Tex. 1964)).
79. 624 S.W.2d at 245.
80. *Id.* at 248 (Stephens, J., dissenting).
tration of a strict legal construction prevailing over the ordinary or plain meaning of words used by a layman to express his intent.

**Administration—Accounting for Decedent's Renewal Commissions.** In *Klein v. Klein* the decedent was an agent for a casualty company with whom he had a contract providing for commissions on policy renewals. Before the decedent's death the company agreed to pay renewal commissions accruing after his death to Donald, his son by a prior marriage. In the agreement the decedent reserved the right to change the designation of the beneficiary of these commissions. This agreement was dated April 9, 1979. Subsequently, the decedent executed his will, dated June 9, 1979, naming his wife, Annabelle, the principal beneficiary. After her husband's death, Annabelle contended that the commissions belonged to her. The court held that the agreement between the decedent and the company was a third-party beneficiary contract for the benefit of Donald, and that the agreement was not testamentary in character so as to require compliance with the statute of wills. Accordingly, the decedent's will naming Annabelle as principal beneficiary did not revoke the designation of Donald as the recipient of the renewal commissions.

The trial court had decided in favor of Donald on motion for summary judgment. Because a fact question was raised as to the decedent's execution of the agreement for the benefit of Donald, the case was remanded for further fact finding to determine the circumstances under which such agreement was accomplished.

**Joint Tenancy.** A joint tenancy with right of survivorship has not been favored under Texas law. Texas Probate Code section 46(a) provides, nonetheless, that parties may create a joint tenancy by an agreement in

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81. 638 S.W.2d 94 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.).
82. *Id.* at 96. The court compared the beneficiary designation in the agreement to the beneficiary designations in life insurance contracts. The latter are clearly third-party beneficiary contracts. *See* Washington Life Ins. Co. v. Berwald, 97 Tex. 111, 76 S.W. 442 (1903); Buehler v. Buehler, 323 S.W.2d 67 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.); Hilderbrand, *Contracts for the Benefit of Third Parties in Texas*, 9 Tex. L. Rev. 125 (1931).
84. 638 S.W.2d at 97-98. The trial court held by summary judgment that the decedent did not follow the procedure for changing the beneficiary of the policy renewal commissions, which was defined in the agreement. *Id.* Similarly, life insurance beneficiaries may be changed only as provided in the contract. *See* Kotch v. Kotch, 151 Tex. 471, 476-77, 251 S.W.2d 520, 523 (1952); Tips v. Security Life & Accident Co., 144 Tex. 461, 464-65, 191 S.W.2d 470, 471-72 (1945); Garabrant v. Burns, 130 Tex. 518, 524-25, 111 S.W.2d 1100, 1104 (Tex. Comm'n App. 1938, opinion adopted); Wright v. Wright, 44 S.W.2d 1019, 1021-22 (Tex. Civ. App.—Fort Worth 1932, writ ref'd).
85. *See* Weems v. Frost Nat'l Bank, 301 S.W.2d 714, 718 (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.) (joint tenancy with right of survivorship not created by words "to be held by them jointly"); Schroff v. Deaton, 220 S.W.2d 489, 492 (Tex. Civ. App.—Texarkana 1949, no writ) (contract must clearly and explicitly create joint tenancy with right of survivorship).
Similarly, section 439(a) provides that if a party has signed a joint tenancy agreement, money held in a joint bank account will pass to the surviving party. Survivorship will not, however, be inferred from the "mere fact that the account is a joint account." In *William Marsh Rice University v. Birdwell* the court determined that four bank accounts passed outside the testator's will. The signature cards used on two of the accounts in question used the term "survivor," which the court held raised a presumption of an intention to create a joint tenancy with right of survivorship. As to the other bank accounts, the court held that the provisions of the testator's will, together with all the surrounding facts and circumstances, created a presumption in favor of the joint tenancy as to all bank accounts. These survivorship presumptions were not rebutted with clear and satisfactory evidence, and the accounts properly passed outside the testator's will.

**Administration—Claim for Taxes.** In *State v. Blair* J.W. Blair qualified, in the Collin County Court, as administrator of the Hopson estate. In 1977 the state attorney general's office advised Blair that the estate owed certain taxes. When Blair failed to pay the amount, the state sued in Travis County and obtained judgment. Without causing the judgment to be certified, Blair procured a final accounting and an order of partition and distribution in the Collin County Court. Subsequently, the state caused the Travis County judgment to be certified and filed in Collin County. The Collin County Court denied the claim.

The court of appeals held that the Travis County judgment was valid and that the judgment's recitation that execution would issue, which was contrary to rule 313 of the Texas Rules of Civil Procedure, was not fa-

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87. TEX. PROB. CODE ANN. § 439(a) (Vernon 1980).
88. Id.
89. 624 S.W.2d 661 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).
91. 624 S.W.2d at 664. The testator specifically indicated in his will that all joint bank accounts had been excluded from the will and its administration. The probate court determined that the testator intended to create joint accounts with rights of survivorship even though the bank cards were devoid of survivorship language. Due to a lack of findings of fact, the court of appeals assumed that the probate court had sufficient evidence to determine the testator's intent. Id.
92. Id. The 1981 Texas Legislature made important amendments to § 46 with respect to joint bank accounts with right of survivorship. Section 46(b) now permits spouses, by written agreement, to arrange with financial institutions to hold either community or separate funds in joint tenancy with right of survivorship. TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1982-1983).
93. 629 S.W.2d 148 (Tex. Ct. App.—Dallas), aff'd, 640 S.W.2d 867 (Tex. 1982).
94. 629 S.W.2d at 150.
95. TEX. R. CIV. P. 313 provides:

A judgment for the recovery of money against an executor, administrator or guardian, as such, shall state that it is to be paid in the due course of adminis-
Additionally, the court held that the Texas Probate Code requirement that the judgment be certified to the Collin County Court within thirty days of its rendition was directory, not mandatory, although the language of the statute indicates to the contrary. Finally, the court held that Blair, as administrator of the estate and with full knowledge of the outstanding judgment, had the affirmative duty to seek certification of the Travis County judgment prior to the final accounting and partition of the estate. The Supreme Court of Texas has subsequently affirmed the holding.

Administration—Executors’ Authority—Failure to Serve Process on Attorney General. In Dallas Services for Visually Impaired Children, Inc. v. Broadmoor the testator died in 1965, leaving certain property to Jesse Harris and Emma Kramer for life, with the remainder to Dallas Services for Visually Impaired Children, Inc. a charity. The will named Harris and Kramer independent co-executors with authority to sell the property if it became necessary to preserve the testator’s estate. The will also gave the executors the same rights and powers a trustee has under the Texas Trust Act. In 1968 Harris and Kramer, acting individually and as independent executors, conveyed the property, and by mesne conveyances it came into the possession of Broadmoor in 1973. Dallas Services contended that Broadmoor had good title only to a life estate for the lives of Harris and Kramer, and that the executors acted under invalid appointments because the state attorney general was not made a party. Additionally, the charity claimed that the executors, even if validly appointed, had no authority to sell, and that the executors had acted after the estate was closed.

The court of appeals held that article 4412a, as it existed when the will was offered for probate, did not require that the attorney general be made
WILLS AND TRUSTS

a party to the probate proceeding in the case of the devise of a charitable remainder. Joinder of the attorney general was only required in proceedings to contest a will bequeathing money or property for charitable purposes. Here there was no contest, only the offering of the will for probate. The court further held that the independent executors had power to sell either because of outstanding debts against the estate, or because the will gave the executors the same broad powers that a trustee has under the Texas Trust Act. Moreover, pursuant to Texas Probate Code section 188, the purchasers were entitled to rely on the authority of the executors to act. With respect to the issue of the executors' making the sale after the closing of administration, the court held that so long as the estate had not been formally closed by an affidavit under Texas Probate Code


> For and on behalf of the interests of the general public of this state in such matters, the Attorney General shall be a necessary party to and shall be served with process, as hereinafter provided, in any suit or judicial proceeding, the object of which is:

> a. To terminate a charitable trust or to distribute its assets to other than charitable donees, or

> b. To depart from the objects of a charitable trust as the same are set forth in the instrument creating the trust, including any proceedings for the application of the doctrine of cy pres, or

> c. To construe, nullify or impair the provisions of any instrument, testamentary or otherwise, creating or affecting a charitable trust, or

> d. To contest or set aside the probate of an alleged will by the terms of which any money, property or other thing of value is given, devised or bequeathed for charitable purposes.

The court noted that the statute was amended in 1981 in parts not material to the outcome in *Dallas Services*. 635 S.W.2d at 575 n.2; see **Tex. Rev. Civ. Stat. Ann.** art. 4412a, § 2(a) (Vernon Supp. 1982-1983). But see infra note 103 (discussing the impact of art. 4412a, § 2(a)(6) on the holding in *Dallas Services*).

103. In addition to the provisions on construction of estates creating or affecting charitable trusts, the statute now requires joinder of the attorney general in any proceeding to “determine matters incident to the probate and administration of an estate involving a charitable trust.” **Tex. Rev. Civ. Stat. Ann.** art. 4412a, § 2(a)(6) (Vernon Supp. 1982-1983). Although the scope of § 2(a)(6) has not yet been tested, it seems clear that the statute would allow the attorney general to contest or offer for probate a will containing a charitable trust. Whether or not the attorney general is now a necessary party to such a proceeding is unclear. Nevertheless, it is unlikely that the attorney general’s office will take an active role in every probate proceeding involving a charitable bequest.

104. 635 S.W.2d at 576.

105. *Id.* Section 25 of the Texas Trust Act provides that, unless the settlor has provided otherwise, a trustee shall have the power “to sell real or personal property at public auction or at private sale” and “to execute and deliver any deed or other instrument . . . necessary, desirable or advisable for carrying out any of the [denominated] powers.” **Tex. Rev. Civ. Stat. Ann.** art. 7425b—25(B), (G) (Vernon 1960 & Supp. 1982-1983).

106. **Tex. Prob. Code Ann.** § 188 (Vernon 1980) provides:

> When an executor or administrator, legally qualified as such, has performed any acts as such executor or administrator in conformity with his authority and the law, such acts shall continue to be valid to all intents and purposes, so far as regards the rights of innocent purchasers of any of the property of the estate from such executor or administrator, for a valuable consideration, in good faith, and without notice of any illegality in the title to the same, notwithstanding such acts or the authority under which they were performed may afterward be set aside, annulled, and declared invalid.
The holding in this case with respect to the question of closing administration is particularly important. Frequently, an independent executor will collect the assets, pay all debts, and distribute the estate properties, but will not file an affidavit of closing or obtain a court order under Texas Probate Code sections 151 or 152. *Dallas Services* indicates that without a formal closing the independent executor may indefinitely continue to act independently of the probate court. Those persons dealing with the executor, therefore, should have no need to inquire further into his power to administer estate assets.

Administration—Conflict Between Will and Prior Deed. In *Anderson v. Anderson* the testatrix executed a will leaving her homeplace to her son, Frank. Later, she executed a deed conveying the same property to her granddaughter in return for the granddaughter's promise to care for her for the remainder of her life. Approximately two years later, the granddaughter conveyed the property without consideration to William, another son of the testatrix. The granddaughter never fulfilled her obligation of support. The trial court set aside the deed, and the property therefore passed under the will to the son, Frank. The court of appeals affirmed, holding that the granddaughter obtained the deed of conveyance under facts that showed she assented to and participated in a misrepresentation as to the support obligation. Furthermore, the court held that the con-

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107. *Id.* § 151(a) provides:
   When all of the debts known to exist against the estate have been paid . . . and when the independent executor has distributed to the persons entitled thereto all assets of the estate, if any, remaining after payment of debts, the independent executor may file with the court a final account verified by affidavit.

108. *Id.* § 152(a) states:
   At any time after an estate has been fully administered and there is no further need for an independent administration of such estate, any distributee may file an application to close the administration; and, after citation upon the independent executor, and upon hearing, the court may enter an order closing the administration and terminating the power of the independent executor to act as such.

109. 635 S.W.2d at 578; see also *Ford v. Roberts*, 478 S.W.2d 129, 132 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (Probate Code §§ 151 and 152 provide statutory means for closing independent administrations, overcoming common law presumption that administration ceases one year after qualification of executor); *Bradford v. Bradford*, 377 S.W.2d 747, 749 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.) (independent administration not closed until interested party files proper pleadings and county court declares administration closed); *Marschall, Independent Administration of Decedents' Estates*, 33 Tex. L. Rev. 95, 115 (1954) (discussing power of independent executors to close estates).


111. *Id.* at 819; see also *Chambers v. Wyatt*, 151 S.W. 864, 866 (Tex. Civ. App.—El Paso 1912, no writ) (general rule that failure to perform promise of support is not fraud justifying cancellation of deed given in consideration for such promise is inapplicable when promise was made to defraud and with no intention to perform). Texas courts, however, are reluctant to find an intent to defraud and have, therefore, frequently held that the support requirement was a covenant and not a condition subsequent. In this case the grantor's remedy
sideration for the conveyance to the granddaughter totally failed.\footnote{112}

\textit{Joint and Mutual Wills}. A joint will is generally regarded as a single testamentary document signed by two or more people disposing of their respective properties.\footnote{113} The instrument functions as a will for each party, is subject to amendment by codicil, and may be revoked.\footnote{114} A joint and mutual will is a similar type instrument, but introduces the element of contract. In such a will, the parties have not only made a testamentary disposition pursuant to the Probate Code, but also each party has contractually agreed not to change the current dispository scheme. The mutual testamentary obligations of the parties to a joint and mutual will become irrevocable upon the death of one party.\footnote{115} In \textit{Baugh v. Myers}\footnote{116} J.H. and Evvie Myers, husband and wife, executed a will in which each left his or her estate to the other to be used, enjoyed, or occupied during the life of the survivor, then to certain heirs for life, followed by remainders over the heirs' children. The will provided that none of the beneficiaries, with the exception of the last taker, had the right to alienate, sell, or dispose of the estate. After the husband's death, the surviving wife leased certain property, giving the lessee an option either to re-lease or purchase the property. An assignee of the lessee sought to exercise the option and obtain fee simple title. The court held that the will reflected an intention of each spouse to bind the other contractually not to dispose of the estate other than as the will provided.\footnote{117} Accordingly, the surviving wife did not have the power to convey fee simple title.\footnote{118}

By contrast, in \textit{Bridger v. Kirkland}\footnote{119} the court held that a joint will executed by a husband and wife was not contractual in nature.\footnote{120} The surviving spouse was not, therefore, precluded from revoking the joint will after her husband's death, thereby altering the disposition of their property. The court stressed the fact that the person who contends that a will is contractual has the burden of establishing the contract, and no such evi-


\textsuperscript{116} 620 S.W.2d 909 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

\textsuperscript{117} \textit{Id.} at 911. The court stated that a "joint and mutual will creates contractual obligations between the signing parties to dispose of the property according to a plan." \textit{Id.; see cases cited supra note 115 and accompanying text.}

\textsuperscript{118} 620 S.W.2d at 912.

\textsuperscript{119} 628 S.W.2d 511 (Tex. Ct. App.—Texarkana 1982, writ ref'd n.r.e.).

\textsuperscript{120} \textit{Id.} at 513.
idence was adduced in this case. To the contrary, the court allowed the attorney who drafted the will to testify that the two makers of the joint will had made no reference to any contractual intent. The case is important because it illustrates that, if a contractual will is intended, the parties should affirmatively and positively indicate this intention in the will itself. In the absence of clear declarations of the testators' intention, however, the court may look to extrinsic evidence.

II. TRUSTS

Construction—Powers. In Price v. Johnston the will of Rose Morris created two testamentary trusts: one for the benefit of the testatrix's daughter, Cecile Morris Price, and one for the equal benefit of three grandsons, Robert, Harold, and Thomas. Each trust held an undivided one-half interest in a house and the land on which it stood. Robert was the trustee of Cecile's trust. The trust for the grandsons' benefit was terminated and, by various conveyances, Harold became the outright sole owner of the one-half interest in the house originally owned by the grandsons' trust. Robert, as trustee of Cecile's trust, sold to Harold the undivided one-half interest in the realty owned by her trust, making Harold the fee simple owner of the property. Cecile sued to cancel this conveyance as outside the powers granted under the Texas Trust Act. She also sought to remove Robert as trustee of her trust for breach of fiduciary duty. Robert and Harold contended that the provisions of the will that gave the trustee broad and general powers overrode the Texas Trust Act provisions that preclude sales by a trustee to a relative. On a motion for summary judgment Robert and Harold prevailed.

On appeal the court held that, although the trustee was given extensive powers, there was no specific provision authorizing the trustee to sell the property to his brother, and that if the testatrix had so desired, it would have been a simple matter to provide for such a sale in her will. Since the will did not explicitly grant the trustee the right to sell to a relative, the Texas Trust Act applied, thereby prohibiting the proposed sale. On a motion for rehearing the court held, however, that should the evidence show the trustee to have acted honestly and reasonably for adequate consideration, the trial court could ratify the sale and excuse the trustee. Accordingly, the cause was remanded with instructions.

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122. 628 S.W.2d at 513; see Magids v. American Title Ins. Co., 473 S.W.2d 460, 467 (Tex. 1971).
123. 638 S.W.2d 1 (Tex. Ct. App.—Corpus Christi 1982, no writ).
124. Id. at 3.
126. 638 S.W.2d at 4. The court reviewed the Texas Trust Act, Tex. Rev. Civ. Stat. Ann. art. 7425—24E (Vernon 1960), which allows a court to relieve a trustee who has acted “honestly and reasonably” from duties and limitations otherwise imposed by the Act. Id.
127. 638 S.W.2d at 4.
Construction—Surcharge. In *Epperson v. Greer*\(^{128}\) the testatrix left her ranch lands in trust for her son and his wife for life, then to their two children, Jane and James, for their lives, with remainders over to the grandchildren. Jane filed a suit for partition, accounting, and removal of her brother as trustee. The parties reached a settlement in connection with the case. Jane died and her husband, as executor of her estate, sought to recover attorneys' fees as a surcharge against the trustee. The court held that the award of attorneys' fees must have an express statutory provision or contractual basis\(^{129}\) and that the Texas Trust Act provision allowing a surcharge against a trustee could not by implication be construed to permit personal recovery against the trustee for attorneys' fees.\(^{130}\) Moreover, there was no finding of malfeasance or negligence for which a surcharge, which is in the nature of a penalty, could be made.\(^{131}\)

Mr. Justice Cantu, dissenting in part but concurring in the result, wrote that in an appropriate case, a trial court could in its discretion surcharge a trustee for attorneys' fees.\(^{132}\) On the record in this case, however, he concluded that the trial court had not abused its discretion in refusing to surcharge the trustee.\(^{133}\)

Procedure—Notice to Beneficiaries of Litigation. Texas Trust Act section 19 requires that a plaintiff seeking recovery against a trust give notice to the beneficiaries prior to the judgment.\(^{134}\) In *Republic National Bank v.*
A breach of contract action was filed against a trust for the benefit of minor beneficiaries. The beneficiaries were not given notice of the contract action, which was decided adversely to the trust, until after the verdict was rendered. The court held that the beneficiaries were entitled to show that at a trial on the merits they would have handled matters differently in protecting their interests in the trust. Accordingly, the court remanded the breach of contract action for a retrial.

Administration—Sale by Independent Executor or Trustee. In McInnis v. Corpus Christi National Bank the trustors created a trust for their joint lives and the life of the survivor, with a remainder to the survivor's estate. The bank was trustee of the trust and independent executor of the survivor's estate. After the survivor's death the bank sold certain stock that subsequently increased in value. The estate beneficiaries sued, contending that the bank exceeded its authority both as trustee, because the trust had terminated, and as executor, because there were no claims against the estate.

The court affirmed the trial court's holding that the bank sold the stock pursuant to the authority of Texas Probate Code section 333, which authorizes the sale of personalty that may deteriorate in value. The stock in question did not have an active market, was subject to substantial market fluctuations, and had a low dividend return. Accordingly, the court held that sufficient evidence of a probative nature existed to support the trial court's findings that the bank acted in good faith.

Constructive Trusts. A constructive trust is a creature of equity. If one is in a fiduciary relationship or a relationship of confidence with another and acquires property in violation of that relationship, a trust will be imposed on the property in favor of the wronged party. In Sanchez v. Matthews the parties jointly owned undeveloped land in which Matthews held a one-fourth share. Sanchez held title to the property and contracted for its sale under an arrangement through which he reacquired an interest from the seller. Subsequently, he sold the interest at a substantial profit.

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136. Id. at 520-21. In Transamerican Leasing Co. v. Three Bears, Inc., 586 S.W.2d 472 (Tex. 1979), extensively reviewed by the Republic National court, the Texas Supreme Court held that beneficiaries who were not given notice until after judgment were not entitled to a new trial. The court's decision, however, turned on the beneficiaries' failure "to show anything they would have done differently or in addition to what was done in defense of the Trust liability." Id. at 476.
137. 637 S.W.2d at 521.
138. 621 S.W.2d 451 (Tex. Ct. App.—Corpus Christi 1981, writ ref'd n.r.e.).
139. Id. at 453-54. TEX. PROB. CODE ANN. § 333 (Vernon 1980) provides in part:
   The representative of an estate, after approval of inventory and appraisement, shall promptly apply for an order of the court to sell at public auction or privately, for cash or on credit not exceeding six months, all of the estate that is liable to perish, waste, or deteriorate in value, or that will be an expense or disadvantage to the estate if kept.
140. 621 S.W.2d at 453.
142. 636 S.W.2d 455 (Tex. Ct. App.—San Antonio 1982, writ ref'd n.r.e.).
The court reviewed at length the nature of the fiduciary duty between joint venturers. Because Sanchez, as manager of the venture, did not disclose the full terms of the agreement to Matthews, the court imposed a constructive trust on the proceeds of the second sale, requiring Sanchez to account to Matthews for a one-fourth interest in the profits of the second sale.\footnote{Id. at 458-59; see Omohundro v. Matthews, 161 Tex. 367, 372-81, 341 S.W.2d 401, 404-10 (1960); Tuck v. Miller, 483 S.W.2d 898, 904-05 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).}

The joint venturer's acquisition of the property through the use of confidential information constituted a breach of his fiduciary duty such that he was required to hold the property in constructive trust for the benefit of his coventurers.\footnote{631 S.W.2d at 780.}

By contrast, in \textit{Taub v. Ginther}\footnote{638 S.W.2d 189 (Tex. Ct. App.—Waco 1982, no writ).} Ginther and Warren, independent oil and gas operators, assigned a two-thirds interest in an oil and gas lease to Taub, who owned the remaining interest in the lease. Taub agreed to pay the delay rentals on the entire tract for the bankrupt operators with an understanding that they could receive a reconveyance of their two-thirds interest by repaying Taub within six months. The six-month period expired. Later, Ginther and Warren executed a correction assignment to remedy a typographical error in the original assignment and contended that the assignee held the interest in trust for them. The court held that the transaction was consummated at arms' length and that no basis for imposing a trust existed.\footnote{638 S.W.2d 189 (Tex. Ct. App.—Waco 1982, no writ).}

In this case no preexisting joint venture existed between Taub and the operators. The court held that "[t]he fact that parties have had prior dealings with each other and that one party subjectively trusts the other does not create a confidential relationship."\footnote{631 S.W.2d at 779-80; see also Vaquero Petroleum Co. v. Simmons, 636 S.W.2d 762 (Tex. Ct. App.—Corpus Christi 1982, no writ) (preexisting confidential relationship did not justify imposition of constructive trust when relationship had terminated and defendants were not shown to have violated any fiduciary duty); Wheeler v. Blacklands Prod. Credit Ass'n, 627 S.W.2d 846 (Tex. Ct. App.—Fort Worth 1982, no writ) (creditor was entitled to constructive trust on assets fraudulently conveyed but not on all assets of debtor); Hatton v. Turner, 622 S.W.2d 450 (Tex. Ct. App.—Tyler 1981, no writ) (grantee's reassurance to other heirs of grantor that he held property for their benefit justified imposition of constructive trust).}

Taub had offered his assistance in order to help the assignors who were in financial straits, but no fiduciary or confidential relationship existed between them.

### III. Guardianship

\textit{Reimbursement to State for Support.} In \textit{State v. Whitaker} the testatrix died, naming Whitaker as executor of her estate and as guardian of the persons and of the estates of her two sons, both of whom were non compositi mentis and residents of the Mexia State School for the mentally retarded. She made certain insurance policies payable to the wards' estates, and her will provided that the executor should establish a trust in the amount of
$7,500 to be used for the sons' last rites and burial. The State of Texas brought suit to recover expenses the state incurred in the support and maintenance of the two sons. The trial court concluded that the estates of the two sons were in the form of trusts that did not constitute assets that the state could reach under article 5547—300,opa the statutory provision for recovery by the state of expenses incurred in the maintenance and care of mentally retarded persons.

The court of appeals reversed and rendered, holding that the wards' estates held by the testamentarily appointed guardian were not trusts so as to enjoy the protection of the statute. Moreover, the trust for last rites and burial was not to be created out of the wards' estates, but out of the testatrix's probate estate. The testatrix had originally created an express trust for the benefit of her sons, but by codicil subsequently revoked this provision of her will. Additionally, the testatrix had specifically created a trust for the last rites and burial of her two sons. The court of appeals held these two factors indicated that the testatrix did not intend to create a support and maintenance trust by implication. The state, therefore, could reach all the proceeds of the insurance policies, plus certain amounts payable to the wards from the Veterans Administration.

Recovery of Attorneys' Fees. In Gordon v. Terrence a daughter of the ward sought removal of the ward's nephew as guardian on the ground that she was the next of kin of the ward with priority of right to serve as guardian and on the ground that the nephew had converted the ward's assets to his own use. The probate court removed the ward's nephew as guardian and allowed the daughter to replace him. Additionally, the probate court granted recovery to the daughter of the value of certain property belonging to the ward, plus her attorneys' fees. Reversing the probate court, the court of appeals held that no evidence of any negligence on the nephew's part existed that would support a recovery for the loss in property value. With respect to attorneys' fees, the court held that these items are not re-

149. TEX. REV. CIV. STAT. art. 5547—300 § 61(b), (g) (Vernon Supp. 1982) provides:
   (b) . . . [T]he mentally retarded person and his estate shall be liable for his support and maintenance regardless of his age, except as provided in Subsection (g) of this section.
   . . .
   (g) For the purposes of this subchapter no portion of the corpus or income of a trust or trusts, with an aggregate principle [sic] amount not to exceed $50,000, of which a mentally retarded person is a beneficiary shall be considered to be the property of such mentally retarded person or his estate, and no portion of the corpus or income of such trust shall be liable for the support and maintenance of such mentally retarded person regardless of his age.

150. 638 S.W.2d at 191. The court drew two distinctions between trust and guardianships. First, legal title to trust property is held by the trustee, whereas in a guardianship the ward holds title while the guardian manages the property. Id. Secondly, the statute of limitations, which is applied against trustees as if they were the true owners of the property, has not been applied to guardians because ownership is in the ward. Id.

151. Id.

152. Id.


154. Id. at 651-52.
coverable against the predecessor guardian in favor of the successor guardian. The court reasoned that Texas Probate Code section 245 authorizes recovery of costs if a personal representative is removed for cause, but earlier Texas cases have held that costs do not include attorneys' fees.

IV. HEIRSHIP

Heir by Equitable Adoption. Texas has long recognized equitable adoption or adoption by estoppel. Under this doctrine, a relationship of parent and child can be established by estoppel under an invalid adoption agreement if persons take a minor into their home and deal with the child as if he or she were their own, and if the child treats the parties as if they were his parents. Equitable adoption does not, however, create the same status as a statutory adoption, under which the child is treated for all purposes as the child of the adoptive parents. In Pouncy v. Garner an equitably adopted son claimed to be entitled to an intestate share of the estate of his adoptive parents' natural daughter. The court held that an equitably adopted child will not inherit from his adoptive relations other than his adoptive parents. The doctrine of equitable adoption estops only the adoptive parents and their privies from denying the parent-child relationship. The court stated that "'[p]rivity,' as here used, is the legal relationship between parties incident to succession on the part of one party . . . to an estate or interest formerly held by the other." Because no part of the daughter's estate vested in the deceased parents, the heirs of the daughter's estate were not in privity with the adoptive parents and were, therefore, not stopped to deny the status of the equitably adopted son.

155. Id. at 654.
157. 633 S.W.2d at 653; see Dumitrov v. Hitt, 601 S.W.2d 472, 473-75 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (attorneys' fees incurred by former administrator in defending removal action are not reasonable expenses of administration under Probate Code § 242); Trinity Universal Ins. Co. v. Drake, 587 S.W.2d 458, 462 (Tex. Civ. App.—Dallas 1979) (attorneys' fees not recoverable under Probate Code § 245), rev'd on other grounds, 600 S.W.2d 768 (Tex. 1980).
158. See Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934); Bailey, Adoption "By Estoppel," 36 Tex. L. Rev. 30 (1957).
159. See Cavanaugh v. Davis, 149 Tex. 573, 578, 235 S.W.2d 972, 975 (1951); Cubley v. Barbee, 123 Tex. 411, 425-26, 73 S.W.2d 72, 79 (1934); Ruenbuhl v. Holland, 250 S.W.2d 455. 457 (Tex. Civ. App.—Galveston 1952, no writ).
161. 626 S.W.2d 337 (Tex. Ct. App.—Tyler 1982, writ ref'd n.r.e.).
162. Id. at 342; cf. Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963) (heirs of adoptive parents held not permitted to inherit from equitably adopted child who died intestate); Asbeck v. Asbeck, 362 S.W.2d 891 (Tex. Civ. App.—Texarkana 1962), aff'd, 369 S.W.2d 915 (Tex. 1963) (equitably adopted son of intestate's brother held not entitled to interest in intestate's estate).
163. 626 S.W.2d at 341; see Heien v. Crabtree, 369 S.W.2d 28, 30 (Tex. 1963); Asbeck v. Asbeck, 362 S.W.2d 891, 893 (Tex. Civ. App.—Texarkana 1962), aff'd, 369 S.W.2d 915 (Tex. 1963).
164. 626 S.W.2d at 341 (emphasis in original).
165. Id. at 342.
Per Capita or Per Stirpes. In Hockman v. Estate of Lowe\(^{166}\) Braddie Lowe died intestate leaving no surviving husband, children, father, mother, brothers, or sisters. She had six sisters who predeceased her, leaving nine nieces and nephews. One nephew had died leaving two children. A surviving nephew contended that he should inherit what his mother would have inherited, or one-fifth.\(^{167}\) The temporary administratrix filed application to divide the estate into nine shares, one for the eight living nieces and nephews and one divided between the two children of the deceased nephew.

The court of appeals construed Texas Probate Code section 43\(^{168}\) as requiring a per capita distribution among the nieces and nephews.\(^{169}\) Under the statute when the nearest survivors of the decedent are in the same degree of relationship, in this case nieces and nephews, they share per capita, with the share of any deceased survivor of the same degree passing per stirpes to his then living children.\(^{170}\) The court, therefore, affirmed the trial court’s judgment dividing the estate into nine shares, in accordance with the administratrix’s application.\(^{171}\)

\(^{166}\) 624 S.W.2d 719 (Tex. Ct. App.—Beaumont 1981, writ ref’d n.r.e.).

\(^{167}\) Apparently, the intestate was predeceased by a sister who left no surviving children.

\(^{168}\) TEX. PROB. CODE ANN. § 43 (Vernon 1980) provides:

When the intestate’s children, or brothers, sisters, uncles, and aunts, or any other relatives of the deceased standing in the first or same degree alone come into the distribution upon intestacy, they shall take per capita, namely: by persons; and, when a part of them being dead and a part living, the descendants of those dead shall have . . . only such portion of said property as the parent through whom they inherit would be entitled to if alive.

\(^{169}\) 624 S.W.2d at 721.

\(^{170}\) The court cited Peters v. Clancy, 192 S.W.2d 937 (Tex. Civ. App.—Galveston 1946, no writ), for this interpretation of Probate Code § 43. In Peters the intestate died with only his sister’s son and children of his deceased brother surviving him. There the court held that the statutory predecessor to § 43 require a per capita distribution among the intestate’s nieces and nephews. 192 S.W.2d at 939.

\(^{171}\) 624 S.W.2d at 721.