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Recommended Citation
Richard W. Hemingway, Wills and Trusts, 22 Sw L.J. 89 (1968)
https://scholar.smu.edu/smulr/vol22/iss1/9

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WILLS AND TRUSTS

by

Richard W. Hemingway*

This Article is intended to survey cases in the wills and trusts area decided by the Texas courts since the last Annual Survey issue, and covers cases appearing in volumes 406 through 417 of the South Western Reporter, Second Series. No attempt has been made to report all the cases, and only those which are deemed significant or of special interest have been included. The two most significant cases of the preceding year were In the Matter of the Guardianship of Neal concerning gifts by a guardian, and Thorman v. Carr dealing with allocation of trust income. For the convenience of the reader an outline of the cases reported follows. A numerical reference has been made to the paragraph in the Article where a particular case appears.

I. DESCENT AND DISTRIBUTION

II. WILLS—FORMALITIES AND VALIDITY
   (2) Holographic will—printed name of beneficiary, Gunn v. Phillips.
   (3) Attested will—notary as witness, Cooper v. Liverman.

III. WILLS—CONSTRUCTIONAL PROBLEMS AND EFFECT OF PROVISIONS
   (4) Partial intestacy, implied gift of property by gift of income, Haile v. Holtzclaw.
   (5) Partial intestacy resulting from clause in will of surviv-

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1 The following cases were considered but are not included in the discussion. An indication of the subject of each case is set forth for the reader's convenience:


2 407 S.W.2d 770 (Tex. 1966).
3 412 S.W.2d 41 (Tex. 1967).
4 410 S.W.2d 181 (Tex. 1966).
5 410 S.W.2d 202 (Tex. Civ. App. 1966) error ref. n.r.e.
7 414 S.W.2d 916 (Tex. 1967).
ing spouse dealing only with W's one-half of the community property, *Winkler v. Pitre.*


IV. WILLS—GUARDIANSHIP, ADMINISTRATION


(13) Attempted gift by ward's estate to avoid estate taxes, *In the Matter of the Guardianship of Neal.*

V. PRIVATE TRUSTS—CONSTRUCTIONAL PROBLEMS AND EFFECT OF PROVISIONS


VI. PRIVATE TRUSTS—ADMINISTRATION


VII. CHARITABLE TRUSTS

(18) Deviation from trust purposes, change of circumstances, *Coffee v. William Rice University.*


VIII. LEGISLATIVE CHANGES

(20) Payment of funeral expenses.

(21) Lowering age for execution of will.

(22) Form of order granting letters testamentary or of administration and appointment of appraisers and appraisement.

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8 410 S.W.2d 677 (Tex. Civ. App. 1967) error ref. n.r.e.
9 416 S.W.2d 613 (Tex. Civ. App. 1967) error ref. n.r.e.
12 415 S.W.2d 515 (Tex. Civ. App. 1967) error ref. n.r.e.
13 406 S.W.2d 419 (Tex. 1966).
16 407 S.W.2d 770 (Tex. 1966).
17 417 S.W.2d 387 (Tex. 1967).
19 412 S.W.2d 45 (Tex. 1967).
20 417 S.W.2d 438 (Tex. Civ. App. 1967) error ref. n.r.e.
21 408 S.W.2d 269 (Tex. Civ. App. 1966) error ref. n.r.e.
22 408 S.W.2d 330 (Tex. Civ. App. 1966) error ref. n.r.e.
I. DESCENT AND DISTRIBUTION

(1) The Texas Supreme Court in *Golden v. York*\(^{23}\) handed down a decision dealing with the division of an intestate decedent's estate into moieties, where deceased died without surviving parents, brothers or sisters, or their descendants. The case is noteworthy as the statutory provision is ambiguous in several respects and has seldom been interpreted.

In this case, intestate was survived by descendants of his maternal grandparents and descendants of his paternal great-grandparents. Although Probate Code section 34(4) provides for the division of a decedent's estate into two moieties, "one of which shall go to the paternal and the other to the maternal kindred," maternal descendants claimed the whole estate. This claim was based on the ground that the maternal descendants claimed through an ancestor of closer relationship with the deceased than did the paternal heirs. It was argued that, as there were no descendants from the deceased paternal grandparents, before the paternal moiety would ascend to the paternal great-grandparent level, there must be no surviving descendants from either side of the family on the grandparent level. However, it was held that the paternal moiety passed to the paternal kindred from the great-grandparents and not to the maternal kindred, and that each moiety would pass separately among the respective maternal and paternal descendants, without regard to the comparative degree of relationship of the ancestor through which such claim is made.

Confusion in statutory interpretation is caused by the last sentence in section 38(4): "If there is no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants."\(^{25}\) Although the language is susceptible to an interpretation that the estate is to be distributed as an entirety to all descendants surviving on the nearest ascending level, it appears to be the law in Texas that after the estate is divided into two moieties, each moiety will descend separately and independently of the other. This will be true both for the purpose of determining the descendants who will take and the level upon which a per capita division will be made among the survivors on that level and decedents leaving lineal descendants which will take by representation.\(^{26}\) The *Golden* case is consistent with the existing case law on the subject.

II. WILLS—FORMALITIES AND VALIDITY

Although no cases were decided by the supreme court in this area, two cases were decided by courts of civil appeals, one dealing with formalities necessary for a holographic will and the other with the question of

\(^{23}\) 410 S.W.2d 181 (Tex. 1966).
\(^{25}\) Id. (emphasis added).
whether the notary public signing the self-proving clause is an attesting witness to a will.

(2) In Gunn v. Phillips the court had before it a holographic will which was entirely in cursive writing of the deceased with the exception of the name of the devisee, which was printed. The will was denied probate on the ground that the witnesses could not testify that the devisee’s name was written by the testator, neither witness having seen or been familiar with the printing of the decedent.

Although the court in this case assumed that a printed name would be in the “handwriting” of a decedent, no Texas case has so held, nor, apparently, discussed the question. Indeed, only one case in the United States has been found on point. It was there considered that a will which was entirely printed, including the signature of the testator, was a valid holographic will in the “handwriting” of the deceased. No authority was cited except a definition of “handwriting” from Ballentine’s Law Dictionary to the effect that “handwriting includes, generally, whatever the person has written with his hand, and not merely his common and usual style of chirography.”

The reason for excepting the holographic will from the stringent requirements of attested execution is based upon the protection afforded by identification of writing as the decedent’s. This of course may be done by witnesses familiar with the deceased’s signature, or by handwriting experts. Whether printing by the decedent is acceptable as “handwriting” of the deceased should be based upon the question of whether printing is capable of identification with the same precision as cursive writing. Although no extensive search was made on this point, handwriting authorities apparently would give an affirmative answer to the question.

(3) In Cooper v. Liverman there was an extension of existing case law that a self-proving clause does not constitute a part of the will. In the subject case one O. P. Deaner executed a holographic will, dated September 6, 1962. Later, on July 5, 1963, he executed a typewritten codicil. A self-proving affidavit on a separate sheet of paper was executed on July 13, 1963, and attached to the codicil. Mr. Deaner died two days later. The codicil was executed by the deceased as testator and by two attesting witnesses; however, it was shown that one of the witnesses did not sign in the presence of the testator, contrary to the express requirements of section 59 of the Texas Probate Code.

Proponents of the codicil
contended that the notary's signature on the self-proving clause would be sufficient to supply the second required witness. The codicil was denied probate on the ground that the self-proving clause was not a part of the codicil and, therefore, any signature thereon would not fulfill the subscribing witness requirement.

Cooper is the third case to so interpret the effect of signatures following the self-proving clause when proper signatures are not found following the attestation clause of the will. In all three cases the instruments were denied probate on the rationale that the self-proving provisions attached to a will are not a part of the will and concern the matter of its proof only. The execution of a valid will is a condition precedent to the usefulness of the self-proving provisions of section 59 of the Probate Code.

Although the law in Texas now seems fairly well settled in this regard, it would seem that the rationale for such a result is subject to some criticism. A will has been considered validly executed where a considerable blank space appears between the end of the will and the executory signatures. If the self-proving clause is to be disregarded as having any legal effect as part of the will itself, it would seem that the same factual situation would result as in the case of signatures separated by a blank space. This should follow also where the self-proving clause is found on paper physically attached to the will or shown by proof to have been present with the will at the time of the executory acts. Where a testator or a witness has signed with an intent to effectuate the will, the question should be addressed to the character of proof necessary to demonstrate the acts and intent of the parties, not to where signatures are placed on the paper.

This should be especially true in Texas where a testator is not required to publish his will, nor to sign it in the presence of the witnesses. Witnessing is the mental act of comprehending the signature of the testator, with the subscription of a witness's signature merely indicating such comprehension. Although the self-proving clause may not be a part of the will, or if considered a part of the will to be disregarded as superfluous, this is no bar to a conclusion that the paper upon which the self-proving clause and disputed signature are found is to be considered part of the will.

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In re Singer's Will, 19 Misc. 679, 44 N.Y.S. 806 (Sur. Ct. 1897) (two blank pages between testator's signature and signature of attesting witnesses); see In re Panousseris' Will, 52 Del. 21, 151 A.2d 518 (Orphans' Ct. 1959).

See In re Panousseris' Will, 52 Del. 21, 151 A.2d 518 (Orphans' Ct. 1959); In re Dunlap's Will, 87 Okla. 95, 209 P. 651 (1922).


Leeder v. Leeder, 161 S.W.2d 1112 (Tex. Civ. App. 1942) error ref.

See In re Panousseris' Will, 52 Del. 21, 151 A.2d 518 (Orphans' Ct. 1959); In re Dunlap's Will, 87 Okla. 91, 209 P. 651 (1922).
III. WILLS—CONSTRUCTIONAL PROBLEMS AND EFFECT OF PROVISIONS

As might be expected, the most numerous as well as the most interesting cases in the wills area were found dealing with problems of the meaning and effect of language. Cases decided dealt with three problem areas that are seldom litigated in Texas: the meaning of the phrase "death without issue;" perpetuities; and, the effect of a lapse in the residuary clause.

(4) Two cases decided during the last year provide an illustration of slippage that may develop between the conception of a testamentary plan and its execution. In each instance the result was a partial intestacy.

In *Haile v. Holtzclaw* the draftsman failed in two respects. The first failure occurred in providing for the disposition of income from real property and failing to provide for disposition of the realty itself. The court found from provisions in the will giving the wife full right to expend and dispose of income an implication of ownership of the right to the income from both the real and personal property (except royalty income). However, the court correctly rejected the contention that a right to ownership and disposition of income from the real property also by implication vested title to the corpus of the real property in the owner of the income. The holding therefore was that the right to two-elevenths of the royalty income had vested in the surviving spouse for life, with no disposition being made of the remainder interests.

The second error of the draftsman was to draft a residuary clause which would only be operative if testator survived his spouse, which did not occur. The result was that all real property (excluding the royalty income) passed by intestacy at the death of the testator as did the right to royalty income following the death of the surviving spouse.

The case is a good example of a draftsman getting lost in a maze of his own creation. It might be suggested that when drafting a complex will, a chart be made of each type of property interest created, present and future, real and personal, so that one may be certain proper disposition has been made of all property. Additionally, the residuary clause must be broad enough to catch all interests either not disposed of by the will, or which may lapse by operation of law on the death of named takers.

(5) In the other case, *Winkler v. Pitre*, the husband again predeceased his wife, leaving her all of his property. Upon the death of the wife and probate of her will, a question was raised whether the wife's will also disposed of the property she had previously acquired from her husband. Her will did not contain a residuary clause and throughout the wife prefaced dispositive provisions with the words "my half." The court concluded it was apparent that testatrix intended the recipients named in her will to ultimately receive all of the property. However, she apparently expected them to receive one-half from her and the other one-half from the will of her husband. Since she had outlived her husband these provisions in his will never became effective as to the other intended recipients.

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38 414 S.W.2d 916 (Tex. 1967).
39 410 S.W.2d 677 (Tex. Civ. App. 1967) error ref. n.r.e.
In both of the above cases the cause of intestacy was partly due to the fact that the respective draftsmen were incorrect in their assumptions as to the order of death of husband and wife and made no alternative provisions. It is highly probable that a majority of will construction cases are caused by failure of a draftsman to answer the question "when." Commonly overlooked is the practical effect of a will being an ambulatory instrument, with the result that language used may be capable of producing differing results depending upon the time at which the language is applied to the existing facts.

(6) In Harrison v. Brown, the court had before it the construction of the phrase "die without issue." Unless defined, the phrase is inherently ambiguous, both as to substantive meaning and as to time of application. Testatrix executed a will devising property to her son for life, with remainder over to his five children. The will contained a provision that "should any of said children die without issue, then the share of such child or children so dying without issue is hereby devised in fee to the survivor or survivors of such child or children of my son, . . . ." Testatrix was survived by the life tenant son, and all five grandchildren. The son died in 1958 and in 1963 testatrix' granddaughter, Pauline, died leaving all of her property to her husband, Gus, her only survivor. Pauline had never had children born or adopted by her.

Suit was brought by Pauline's surviving sisters against Gus, the surviving husband, for Pauline's interest on the ground that the phrase "die without issue" meant to so die at any time. The court correctly held that the estate of Pauline became absolutely vested at the death of the life tenant and therefore passed to her husband and not to the surviving sisters. The court found a manifestation of intent from a consideration of the wording of the instant will and that of a former revoked will. It was further stated that if such express intent was absent, the same result would occur from application of rules of construction as to implied intent.

The phrase "die without issue" has an interesting history and it is doubtful that everyone using this verbiage is aware of the inherent ambiguities that lurk therein. Initially courts were concerned with the problem of when issue must fail in order for the alternative gift to vest. Where a gift was made to "A, and if he die without issue, then to B and his heirs," early English cases made a distinction between the concepts of definite and indefinite failure of issue. A definite failure of issue could only occur at the time of the death of A. If A died leaving issue, B, or B's heirs, would never take. On the other hand, under the indefinite failure concept, failure of issue could occur at any time, either at the death of A or in succeeding generations, i.e., if A's line of issue ultimately died out, the property would then vest in B, or if B were dead, in B's successors.

Although there are no Texas cases directly on point, the view in the United States has been to interpret the phrase as denoting a definite failure

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40 416 S.W.2d 613 (Tex. Civ. App. 1967) error ref. n.r.e.
41 Id. at 615.
of issue and to construe the gift as a fee simple subject to an executory interest in B and his heirs. It is therefore well settled that A must die without issue in order to vest the gift in B, and if A dies with issue B will never take. However, this does not answer a second and more pertinent question, namely when must A die without issue for B to take. Restating the form of the gift in the subject case: T to A for life, remainder to A's children, but if any of A's children die without issue, then such child's interest to B. Any child of A could die without issue at any one of three different times: (1) prior to the death of the testator; (2) following the death of the testator but before the death of the life tenant; or, (3) after the death of the life tenant.

If the phrase is construed to mean that a child must die without issue prior to the death of the life tenant (or prior to the death of the testator, as the case may be), the gift is clearly substitutional, viz., at A's death either the child of A or B will take, but in no event will both take. Where a child outlives A, B will never take this child's share, even if the child later dies without issue. Only if a child dies without issue prior to the death of A, would the property vest in B.

On the other hand, if the phrase is construed as denoting that the child may die without issue at any time, either before or after the death of A, the gift would be successive; a future interest would be created in B and both the child of A and B may take.4 The child will take by outliving A; B or B's successors can take if the child subsequently dies without issue.

The questions presented in the subject case are twofold: (a) whether Texas will follow a successive or substitutional concept of death without issue in this situation, and (b) if it follows the substitutional concept, the time at which a child must die without issue in order for B to take. Meager case law exists in Texas on this question. It has been held that Texas will follow a successive approach when the gift is in the form of "T to A and his heirs, but if A die without issue, to B." On the other hand, Texas has followed the substitutional rule where the gift has been in the form of "T to A, and if he die, to B." Where the gift is in the same form as in the subject case, i.e., a life estate in A, followed by a remainder to B, with gift to C upon B's death without issue, it appears this is a case of first impression in this jurisdiction.

The majority view in the United States is that the gift is substitutional on the death of the life tenant,4 a view which was followed by the subject case. This approach is rational and consistent with other rules of construction as to presumed intent dealing with the time of closing of class gifts

43 Id.

44 For ease in understanding the gifts may be paraphrased: If substitutional: T to A for life, remainder to A's children, but if any of A's children die without issue before the death of A, then to B. If successive: T to A for life, remainder to A's children, but if any of A's children die without issue at any time, then to B.

45 St. Paul's Sanitarium v. Freeman, 102 Tex. 376, 117 S.W. 425 (1909); Cruse v. Reinhard, 208 S.W.2d 398 (Tex. Civ. App. 1948) error ref. n.r.e.


47 See also Flores v. DeGarza, 44 S.W.2d 909 (Tex. Comm'n App. 1932) cited in subject case.
and implied conditions of survivorship, which many times are tied to the
time of distribution of the life tenant's estate.

It might be mentioned that several other problems have arisen which
may not have been adequately litigated in Texas and which should be an-
ticipated by the careful draftsman. Does a person die without issue when a
child is born to him during his lifetime but the child dies before the par-
ent? No basis can be seen for implying a condition of survivorship by the
child to the time of the death of the parent. Texas apparently follows this
view. It would also seem that a child in gestation should be considered
a child in being to prevent death without issue. A further question may
arise as to the meaning of the word "issue." The English view is to include
all lineal descendants as per capita takers, whether or not there are living
ancestors, i.e., both children and grandchildren of \( T \) would be classified as
issue. The prevailing viewpoint in this country is to construe issue as be-
ing those persons who would take within the statute of descent and dis-
tribution if \( T \) died intestate. But what about adopted and illegitimate chil-
dren? No answer is found in Texas.

(7) A perpetuities issue was involved in Sellers v. Powers, in which
writ has been granted by the Texas Supreme Court. The gift in a will,
which is set forth below, was in the form of: "\( T \) to \( A \) and \( B \) as joint ten-
ants for life, remainder to the issue of \( A \) and \( B \) as joint tenants for life,
remainder in fee to those persons who would take under the statute of
descent and distribution as if \( T \) had died intestate immediately after the
death of the last life tenant to die." \( A \) and \( B \) survived \( T \) and both had
children born to them. The contest was between the children of \( A \) and
\( B \), and \( A \), one of the parents. The trial court construed the will as giving
\( A \) and \( B \) life estates; remainder to the children of the first to die of either
\( A \) or \( B \), for life pur autre vie the survivor of \( A \) and \( B \); and, upon the death
of the last to die of \( A \) and \( B \), remainder in fee to the heirs of \( T \) to be de-
termined at that time.

Giraud v. Crockett, 142 S.W.2d 243 (Tex. Civ. App. 1940) error ref. According to
Professor Simes this is the minority view.


Third I give, devise and bequeath all the rest and residue of my said property and
estate ... to my daughter Edna Ray Sellers Walker, and my son Johnny Ray Sellers
for life, if they both survive me, to have and to hold said residue of my estate as
joint tenants during their joint lives; provided, however, if only one of my said
children survive me, or if both survive me but one later dies then I give and devise
to my surviving child an estate for life in one-half of said residue and to the living
issue of my deceased child an estate for life in the other one-half of said residue.
Upon the death of the last survivor of my son and daughter, or upon my death if
neither my son nor my daughter survive me, I give, devise and bequeath all the
rest and residue of my estate to the issue of my daughter ... and my son ..., as
joint tenants during the respective lives of such issue and the life of the survivor,
or, if only one of such issue survives me, then I give and devise such property and
estate to such survivor for life.

Fourth Upon the death of the last surviving life tenant heretofore provided for in
paragraph Third of this will, I give, devise and bequeath the remainder of my said
property and estate in fee simple title to the person who would be entitled to inherit
said property in accordance with the laws of descent and distribution of the State
of Texas, if I had died intestate immediately after the death of the last surviving life
tenant heretofore provided for in paragraph Third of this will.
A appealed on the grounds, (1) that voiding any part of the gift by application of the Rule Against Perpetuities would so distort the testamentary plan that the entire devise must be abrogated and property should descend by descent and distribution, and (2) that it was error to vest a fee estate in the grandchildren who were only given a life estate by the terms of the will. The judgment of the trial court was upheld in the court of civil appeals on the ground that a general intent may be perceived from the will to provide for T’s children and grandchildren by a series of life estates, and that only the particular provision affected by the Rule should be declared void.

It is noted that writ has been granted in this case by the Texas Supreme Court, and perhaps discussion should be curtailed. However, several matters seem significant. In the first place it would appear that only the gift over following the death of the last of the issue of A and B to die violates the Rule. The Rule may be paraphrased that interests will be declared void that may not vest within twenty-one years after the death of some life in being at the time an instrument takes effect. As this case is being litigated during the lifetimes of A and B there is no basis upon which to apply the “wait and see” doctrine to determine if, in fact, all interests will vest before the period of the Rule, i.e., if at the death of the last to die of A or B, all of their lineal descendants have predeceased them.

A and B are the only lives in being. Their children cannot be classified as lives in being, even those that are alive at T’s death, as the gift over is to a class and not to individual children. For a class to serve as lives in being, all possible takers in the class must be in being at the time of death of T. As both A and B are alive and are capable in law of having more children, the living children of neither are lives in being. Although class closing rules may sometimes split such a class by decreeing distribution at a T’s death, thereby constituting children then living as the sole members of the class and, hence, lives in being, such rules have no application in this case. Therefore, for a gift in the will to be good, it must vest within twenty-one years after the death of both A and B.

Following the gifts to A and B, the remaining gifts over are first to “issue” and second to “takers within the laws of descent and distribution.” For gifts to violate the Rule they must be classified as contingent gifts. The latter gift is clearly a contingent gift for it is essentially a gift to heirs, to be determined at a date later than the death of the ancestor. However, there appears to be a split of authority whether implicit in the term “issue” is an implied condition of survivorship. Whether a condition of survivorship should be implied depends upon whether “issue” are considered more akin to “heirs” or to “children.” The more popular view (questionable perhaps) is to imply a condition of survivorship, which would result in a classification of the interest as a contingent remainder for life.

Treating both interests as contingent, will either or both remainders vest within the period of the Rule? The answer seems to be yes, as to the remainder to issue, and, no as to the remainder to heirs to be determined at
the death of the last of the issue to die. The remainder to the issue of A and B, if considered contingent, must vest as of the time of death of the last to die of A and B, and is surely good. However, as some of the "issue" may be born after T's death (as a class they may not be used as lives in being), and, as there is no assurance that the last of the issue will die within twenty-one years after the death of A or B, the gift over to heirs, to be determined at the time of death of the last of the issue to die, is void.

From the facts as reported in the case no intention appears to have been manifested by T as to disposition if any part of the gift violated the Rule. The question involved is not as stated by the court of civil appeals, i.e., whether the prior life estates should be voided, but, on the contrary, what disposition should be made of the remainder in fee. The action of the trial court seems improper in (a) converting the gift to issue for life into a life estate pur autre vie A and B, and (b) accelerating the time to determine heirs for disposition of the fee from the death of the last to die of the issue of A and B, to the time of death of A and B, the only lives in being. This in large measure constitutes reformation of the will, which may not be done. The only proper course seems to be to declare the remainder in fee void, which interest will then fall into the residuary clause of the will (if it has one) or will pass to the heirs of law of T to be determined as of the time of T's death.

(8) As happens almost annually, the courts have again been presented with a case of some significance involving wills that purportedly have been drawn pursuant to a contract. The case is that of Meyer v. Texas National Bank of Commerce, decided by a court of civil appeals and for which writ has been granted by the Texas Supreme Court. The facts are well stated by the court.

Joseph and Alpha Meyer, husband and wife, orally agreed to will their property to each other. Each executed a will leaving their property to the other. Two months before his death, Joseph Meyer covertly and without the knowledge of Alpha Meyer, breached his agreement by executing a new will leaving his wife one-third and his brothers two-thirds of his estate. The wife died 27 days [after Joseph died], without having executed a new will. Alpha's estate seeks enforcement of the oral agreement she made with her husband, and prayed that a trust be impressed in its favor on the two-thirds of the estate devised to the two brothers.

The trial court granted plaintiff's motion for summary judgment and impressed a trust on two-thirds of Joseph's estate in favor of Alpha's estate. This was affirmed by the court of civil appeals on the ground that the oral contract had been taken out of the statute of frauds by part performance by Alpha, i.e., by dying, citing Kirk v. Beard.

It is apparently settled in Texas that if wills are executed pursuant to an oral contract, such contract may be proved by parol after the death of one of the parties who has died without knowledge that the other party

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53 Id. at 959.
54 162 Tex. 144, 345 S.W.2d 267 (1961).
has changed his or her will. This was indicated in *Weidner v. Crowther*, and was so held in the *Kirk* case. However, in *Kirk* the parties involved were brothers and no question was raised whether such a contract outside the will could be entered into. The case in point is between husband and wife and it has been held that such contract must arise from the wills, either expressly or by implication, or such contract will be void as violative of article 4610 in changing the order of descent.

As some confusion appears in the cases discussing the nature of the contract that will be enforced in the case of husband and wife, it will be interesting to see if the supreme court will address itself to this point as well as to a discussion of the conceptual basis for allowing proof of the oral contract after the death of one party.

(9) In a lower court opinion it was held that where a later codicil revoked two residuary gifts of one-fourth each, the portion of the residuary estate so revoked passed by intestacy to the heirs of the decedent and did not go to augment the gifts of the remaining residuary takers. Although the question of whether a lapse can occur in the residuary clause has been discussed by writers in connection with a residuary clause drawn in broad terms, the subject case is doubtlessly correct as the residuary clause here involved gave each taker a specific undivided interest in the residue. No basis is present upon which to increase the stated share. The clause is set forth below.

IV. Wills—Guardianship, Administration

(10) In another case of first impression, *Hutchings v. Bates*, the Texas Supreme Court held that a contract for child support to last to a certain age, without further provision, would survive the death of the promisor and bind his estate until the termination date of the contract. In this case, brought by the next friend of children of a first marriage against the surviving second wife of the deceased, the court noted two lines of authority existed where a contract (such as in this case) did not expressly purport to bind the heirs and personal representatives of the deceased and which contained no affirmative provisions binding the promisor after death. One line of decisions, following the common law rule, would hold that the father's estate is not responsible for payments accruing after his death, with the contrary line binding the estate unless it affirmatively appeared that the obligation was purely personal. In following the second line of

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55 157 Tex. 240, 301 S.W.2d 621 (1957).
56 Graser v. Graser, 147 Tex. 404, 215 S.W.2d 867 (1948).
58 See generally T. ATKINSON, LAW OF WILLS § 140 (2d ed. 1953).
59 THIRD: RESIDUARY ESTATE. I give, devise and bequeath my entire residuary estate . . . to the following named persons in the proportions set opposite the name of each if they are living at the time of my death, otherwise, the share of each such person to vest in such person's heirs, or, if such person has died leaving a will, such share to vest in such person's devisees and legatees under such will just as if the bequests made herein were a part of such person's estate at the time of his death.
60 406 S.W.2d 419 (Tex. 1966). For further discussion, see Smith, Family Law, this Survey, at footnote 65.
authority, the rationale for the decision was stated to be upon the basic principles of contract law that the obligation would be so binding unless expressly limited.

(11) (12) Two civil appeals cases dealt with the question of jurisdiction of courts to allow attorney's fees. The first, In re Guardianship of Price v. Murfee, held that the probate court and not the district court had jurisdiction for approval of attorney's fees in guardianship cases, and that Probate Code sections 4 and 242 had changed prior law. In the second case, Thornhill v. Elskes, the contrary result was reached where the subject matter of the controversy was attorney's fees incident to independent administration, and it was held that the district court and not the probate court had jurisdiction over approval.

The Price case, additionally, held that an "aggrieved" person under sections 3(r), 28, and 31 of the Probate Code was one who had a present legal right in the property of the estate, and that grandchildren, who had no further interest in the ward's estate, did not come within the definition.

(13) In In the Matter of the Guardianship of Neal, one of the most important cases in the area for the year, the Texas Supreme Court refused writ of error in a brief per curiam opinion, denying authorization for a guardian to make a gift from the estate of a non compos mentis ninety-six year old ward to the residuary beneficiaries of the ward's will for the purpose of reducing estate tax liability upon death. This conclusion was based upon the fact that no express authority existed in the Probate Code for such a transfer. In the lower court findings of fact were made that abundant funds were available for the ward's care (annual income being approximately $274,000); all prospective heirs were in favor of the transfer; that prior transactions of the ward, before becoming incompetent, demonstrated she was appreciative of tax savings and she had in fact made numerous such gifts for tax savings purposes; that the gift contemplated was in fact in the mind of the ward at the time she became incompetent and she was prevented from carrying it out only by reason of her incompetency; that the ward, if competent, would make the gift for such purpose; and that, even if the ward died within three years, the gift would still result in savings on federal estate tax of approximately $240,000, as the gross estate of the decedent would be reduced by the amount of the federal gift tax paid, with the gift tax paid allowed as a credit against estate tax.

Although the result in the Neal case would seem to foreclose the question as the Probate Code now is written, this has been a problem that has arisen in other jurisdictions where legislation has been passed to allow such gifts for tax reduction purposes. Such legislation would be salutary in this jurisdiction.

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64 TEX. PROB. CODE ANN. §§ 3(r), 28, 31 (1965).
65 407 S.W.2d 770 (Tex. 1966).
V. Private Trusts—Constructional Problems and Effect of Provisions

(14) Seemingly, perpetuities cases presented problems for the courts in the last year. In the trust area the Texas Supreme Court was presented with such a problem in the case of Rekdahl v. Long. 66

In this case the provisions in question were contained in a testamentary trust, part of the decedent's will. Following specific gifts of income for life to the brother, sister, and son of the decedent, the will contained two provisions to accumulate income up until the time of the death of the decedent's son. It was then provided that after all the foregoing had been satisfied, any income remaining should be paid to the son of the decedent for life, and upon his death one-fourth of the income would be paid to the son's surviving wife, with the remainder of the income to be paid:

[1]n equal shares to his children who survive him, provided that if any child of Aramis Rekdahl dies leaving issue then such issue shall take the share which his or her parent would have taken had he or she survived him. . . . Such payments shall continue until such child receiving hereunder is thirty-five years of age, at which time each of such children successively becoming thirty-five years of age, shall cease to receive any money therefrom and the full balance of such payment shall be made to such child or such children of Aramis Rekdahl who has not or have not attained the age of thirty-five years, . . . 67

It was further provided that upon the death of the brother and sister of the decedent and upon the time that all of the children of Aramis Rekdahl have reached thirty-five years of age, the trust should terminate and be distributed "in equal and undivided shares to the children of Aramis Rekdahl who survive him, provided, however, that if such children die leaving issue who survive Aramis Rekdahl, then such issue shall take the share which such parent would otherwise have taken." 68 The trust also contained a spendthrift provision to the effect that none of the assets or income would vest in any of the beneficiaries until (1) termination of the trust, or (2) such assets or the income therefrom were actually paid.

The plaintiff, Aramis Rekdahl, son of the decedent, contended that, as the ultimate beneficiaries of the trust could not be determined until the period of ultimate distribution of the estate, the trust created by his mother's will was void by virtue of violating the Rule Against Perpetuities. The precise question involved in the case, therefore, was a determination of the terminational language of the trust which provided "if such children die leaving issue who survive Aramis Rekdahl, then such issue shall take the share which such parent would otherwise have taken." 69

It was argued by the plaintiff that the language could be interpreted to include a child of the son, Aramis, born after the decedent's death which child could outlive all other children of Aramis, for a period of more than

66 417 S.W.2d 387 (Tex. 1967).
67 Id. at 393.
68 Id. at 390.
69 Id.
twenty-one years and then die. Since the child was not a life in being termin-
ination of the trust would occur beyond the period of the Rule Against Per-
petuities.

The court correctly construed the will as designating the death of Aramis Rekdahl as the moment in time when the determination of all ben-
cessaries would be made. The gift was held to be substitutional, at the
death of Aramis, to children or issue of deceased children, as the case may
be. Since the termination of the trust was to be measured by the life of Aramis Rekdahl, a life in being, it did not violate the Rule Against Per-
petuities.

(1) In Marshall v. Land there was an attempt to create an **inter vivos**
trust and at the same time to reserve extensive rights of control over the
property. It was held that the instrument in question was an attempt to
make a testamentary disposition of the wife's interest in the community
property, and was void as it did not comply with the Statute of Wills.

The court mentioned in passing that if the instrument had been a valid
testamentary disposition, as it attempted also to dispose of the wife's one-
half interest in the community property, she would have the right to elect
against the will and claim her half of the community.

After holding that the instrument was an invalid attempt to make test-
amentary disposition, the court also disposed of the contention that it
might have been a gift of the securities in question. Due to the extensive
rights of control reserved in the grantor, the court held that the right of
the grantor to control and manage the property after execution of the in-
strument was identical to the right existing before the instrument was
executed and, hence, no gift was in fact made.

A point was raised but not passed on by the court that the instrument
constituted an illusory trust, as exemplified in the New York case of
Newman v. Dore.

The Texas Supreme Court has granted writ of error in Land v. Marshall
to consider three points of error raised by petitioner's brief. These points
concern, first, the testamentary character of the gift; secondly, the sever-
ance of title in the trust property by the grantor; and, finally, whether
this constituted fraud on the wife's interest as a matter of law. That deci-
sion should provide illuminating interpretation as to the nature of the
husband's control and the extent of his power.

**VI. Private Trusts—Administration**

(16) Thorman v. Carr is the second of the two most significant cases
decided by the Texas courts in the wills and trusts field during the report-
ing period. This case involved the allocation of funds between income and
corpus, *i.e.*, life tenant and remainderman, under a testamentary trust.

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70 413 S.W.2d 820 (Tex. Civ. App. 1967) error granted. For further discussion, see McKnight, *Matrimonial Property*, this Survey, at footnote 61.
71 275 N.Y. 371, 9 N.E.2d 966 (1937).
73 412 S.W.2d 45 (Tex. 1967).
Involved was the proper allocation of a seven per cent debenture with face value of $2,950, net proceeds from the sale of 117 shares of stock, and the gain in value of the stock through appreciation. The 117 shares of stock consisted of 110 shares which originally formed part of the trust corpus, and seven which represented a stock dividend (excluding gain in value from time of inception of the trust). The trust contained a clause giving the trustees discretion to determine principal and income. In an action for declaratory judgment the trial court determined that the trustees had improperly allocated to income both the debenture and the net proceeds from the sale of the securities. However, they had properly allocated to income the gain in value through appreciation of the securities. The holding was affirmed by the court of civil appeals. Upon appeal to the Supreme Court of Texas error was refused, n.r.e., in a per curiam opinion as to the holding of the lower court that the debenture and the net proceeds of the stock sale should be allocated to corpus. The allocation of the gain in value by appreciation was not before the court.

Apparently the trustees were of the opinion they were authorized, under the discretionary clause of the trust, to make any allocation they desired. However, as no wording such as "absolute," "full," or "uncontrollable" was contained in the clause, the lower court was of the opinion that the trustees were bound to exercise their discretion in a reasonable manner. In refusing error the supreme court stated that the absence of such wording was of no significance, but did not further discuss the standard of action for the trustee. Although it would seem unquestionable that the debenture which formed part of the trust should be allocated to the trust corpus, it is unfortunate that the court did not go into a more extended discussion of the problems involved in securities allocation under a discretionary clause. Rather than unduly lengthen this Survey Article, attention is drawn to an excellent discussion of the case and underlying law in a recent issue of the Journal.74

(17) In a court of civil appeals opinion a trustee was held to be excused neither from liability for self-dealing, nor from failure to make an estate productive, by an exculpatory clause contained in the trust instrument.

VII. Charitable Trusts

(18) Few cases were found dealing with charitable trusts during the reporting period. Although Coffey v. William Rice University technical-ly falls within the period now being reported it was discussed in the last Survey and attention is directed to such discussion.77

(19) It is generally stated that one of the essential characteristics of a charitable trust is an indefinite beneficiary. In a court of civil appeals

76 408 S.W.2d 269 (Tex. Civ. App. 1966) error ref. n.r.e.
WILLS AND TRUSTS

opinion it was held that the conveyance in trust of a tract of 3.18 acres of land, to be "used as a park for educational and recreational purposes" for all persons who had purchased or would purchase property from subdivider's 500-acre tract, did not constitute a charitable trust as the beneficiaries could readily be identified. The trust was construed to be a private revocable express trust that could be revoked without joinder of the Attorney General of Texas. No discussion was made whether an equitable dedication of the park had occurred.

It might be mentioned that the more modern view of beneficiaries of a charitable trust does not necessarily depend upon whether they are identifiable. Of more significance is whether the group constitutes a sufficiently large segment of society that the benefit of such a group for charitable purposes is socially desirable. For instance, a trust to provide for medical and health benefits of a labor union has been upheld as a charitable trust, although all members entitled to such benefits may be readily ascertainable. Application of this test might have produced a different result in the subject case.

VIII. LEGISLATIVE CHANGES

It is not possible to incorporate the details of the legislative changes, and reference is made to the amended statutes.

(20) Probate Code section 320A was amended to provide for the payment of funeral expenses and similar items out of the decedent's estate rather than from the community share of the surviving spouse.

(21) The amendment having the broadest application is that amending Probate Code section 57, where the age requirement necessary for the execution of a will was lowered from nineteen to eighteen years of age.

(22) It should also be noted that Probate Code sections 181, 248, 249, 250, and 256, have been amended, and section 254 has been repealed, to conform with the pattern of payment of state inheritance taxes through state offices in Austin, Texas, rather than through the local probate courts. The amendments affected the form of the order granting letters testamentary or of administration and orders for the appointment of appraisers and appraisement.

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78 Butler v. Shelton, 408 S.W.2d 530 (Tex. Civ. App. 1966) error ref. n.r.e.
81 Id. § 57.
82 Id. §§ 181, 248-50, 254 (repealed), 256.