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Trusts and Succession

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TRUSTS AND SUCCESSION*

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I. INTRODUCTION

During the past year, the courts of Florida have dealt with almost all aspects of the law of trusts and succession, including interpretation of both case law and statutes. Moreover, the legislature has made significant changes in the statutes.

The purpose of this survey is to give the practitioner an overview of the area, beginning with legislation, followed by trusts and concluding with succession.

II. LEGISLATION

An attempt by the Legislature to clarify the law of trusts in Florida is found in section 689.075 of the 1969 Florida Statutes which lists powers that may be retained by the settlor of an inter vivos trust, either singly

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* This survey includes all reported cases from September, 1965, through August, 1969, and the legislation enacted by the 1969 First Regular Session of the Florida Legislature.

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or jointly, without affecting its nontestamentary character.[1] This amendment specifically mandates that when the settlor at any time becomes the sole trustee of the trust, the trust instrument shall be executed in accordance with the Statute of Wills. This would appear to make Totten Trusts void. Also worthy of note is the permissive power of the settlor to control the trustee or trustees in the administration of the trust.[2]

Section 660.12 of the Florida Statutes, which concerns the common trust fund investments of banks and trust companies, was significantly changed in 1967. The directive that no investments of a common trust fund shall be made in mortgages was deleted, impliedly sanctioning such investments if they comply with the other requirements of that section, *i.e.*, a proper investment for each fiduciary account owning an interest in the common trust fund.[3]

In the area of succession, the legislature recently amended section 731.23 of the Florida Statutes,[4] which concerns the order of succession in case of intestacy, to authorize a parent, with or without consideration, to disclaim, renounce, or refuse to accept an inheritance of property from any of his children by a written instrument. In such a case the disclaiming parent is deemed to have predeceased such child.

The statute on the form and manner of filing claims against an estate now makes a special distinction as to claims secured by insurance by including the proviso that failure to file a claim bars all rights except to the extent of the insurance.[5] Previously, heirs, legatees, or devisees were excused from filing any claims against the estate.[6] Since 1967, however, such persons must file claims for specific items, such as debts.[7]

The right of a widow to have a jury determine her right to dower has been modified.[8] Written demand for a jury must be made one week before trial, in contrast to the previous time limit of twenty-four hours. The requirement that the party demanding the jury also deposit costs in advance in connection therewith has been eliminated.

The procedure for granting an extension of time to the widow, faced with the alternative of electing dower, was broadened to include litigation of any matter affecting such estate wherein the full and complete extent of estate assets subject to dower are in doubt.[9]

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1. Fla. Laws 1969, ch. 69-192, at 436.

2. *But see* Lane v. Palmer First Nat'l Bank & Trust Co., 213 So.2d 301 (Fla. 2d Dist. 1968) discussed *infra* at p. 282.

3. *Compare* FLA. STAT. § 660.12 (1967) *with* FLA. STAT. § 660.12 (1965).

4. Fla. Laws 1969, ch. 69-173, at 415.

5. FLA. STAT. § 733.16(1)(d) (1967).

6. FLA. STAT. § 733.16(2) (1965).

7. FLA. STAT. § 733.16(2) (1967).

8. *Compare* FLA. STAT. § 733.12(3) (1967) *with* FLA. STAT. § 733.12(3) (1965).

9. FLA. STAT. § 731.35(2) (1967). *See also* First Nat'l Bank v. McFarland, 200 So.2d 244 (Fla. 2d Dist. 1967).

III. TRUSTS

A. *Express Trusts*

1. INTER VIVOS CREATION

The surviving spouse of the deceased wife sought to impress a trust upon all of the real and personal property which the wife possessed at the time of her death based on an alleged oral understanding that any and all possessions, real, personal, mixed, or otherwise, which the parties accumulated either by their sole or joint efforts, were to be held and owned for the mutual advantage of both parties. The third district, affirming the lower court, found that the factual allegations were not sufficient to support a finding of the existence of a trust.[10]

In *Bankers Life & Casualty Co. v. Gains Construction Co.*,[11] the third district again denied the existence of a trust. The court decided that where customers paid money to a utility company to secure service in return for the utility company's promise to repay the unused portion of the deposit, a debt was created. The basis of the decision was that the utility company was given absolute control over the deposit; hence, no trust relationship was created.

Presented with a complex business situation in which a seller of a ship agreed to lend money to the buyers in consideration of the purchase of the ship and a stock interest, to be held in trust by the buyers for the seller's son, the third district concluded that even though the loan was never made, the sons were entitled to beneficial ownership of the stock, even as to subsequent purchasers. The subsequent purchasers were not entitled to the defense that they were unaware of the beneficial interest of the sons, even though the trust stock was issued to bearer. Thus, the trust was enforced in accordance with the original agreement.[12]

The validity of an inter vivos trust, in which the settlor retained the power to revoke, modify, and invade the corpus, the power to direct the disposition of the corpus and the use of the income for life, was put in issue in *Lane v. Palmer First National Bank & Trust Co.*[13] The court held that an inter vivos trust is valid, even though it contains a power to control the trustee, if there is no actual evidence of day-to-day control by the settlor. In the event that day-to-day control is exercised by the settlor, an agency is created instead of a trust.[14]

A deed of trust executed by a 76-year-old man, suffering from arteriosclerosis and senile brain disease, which caused erratic behavior, was found to be void due to incompetency and undue influence. The donee, who was the vicar of the donor's church and who occupied a confidential

10. Feller v. Kline, 213 So.2d 300 (Fla. 3d Dist. 1968).
11. 199 So.2d 482 (Fla. 3d Dist. 1967).
12. Fraser v. Lewis, 187 So.2d 684 (Fla. 3d Dist. 1966).
13. 213 So.2d 301 (Fla. 2d Dist. 1968).
14. *But see* Fla. Laws 1969, ch. 69-192, at 436, discussed p. 281 *supra*.

relationship to him, failed to meet the burden of proof that no undue influence was exercised in the procurement of the trust deed.[15]

In *Watkins v. First National Bank*,[16] the second district determined that the intent of the donor of an irrevocable trust, created for the benefit of the donor's minor sons who were living with his divorced wife, was critical to its construction. The trustee sought clarification of the trust language which provided that the trustee should accumulate the income which was not needed for the sons' benefit because the mother of the beneficiaries refused to make an accounting of the trust disbursements.

The requirements of revocation of a revocable trust by will or writing attested to by two witnesses were discussed in *MacFarlane v. First National Bank*.[17] The settlor executed a revocation of the trust which was never delivered due to the neglect of a third party. The trustee continued to send the settlor monthly statements and other correspondence concerning the trust. The court decided that since the trust could be revoked by will, it seemed logical that delivery was not essential for its termination. The court further explained that the settlor's continued recognition of the trust after its revocation did not vitiate his revocation in light of the positive instructions to the third party to mail the instrument.

2. TESTAMENTARY CREATION

Three cases reached the third district concerning the funding of testamentary trusts. The first, *In re Estate of Cohen*,[18] involved the provisions of a marital deduction trust. The court relied upon the canons and rules of testamentary construction to establish the testator's intention. The second case, *In re Estate of Horner*,[19] concerned a residuary trust which was to come into being after the debts, taxes, and expenses of administration of the estate were paid. Before these items were settled, the beneficiary died. The court concluded that the beneficiary's estate was not entitled to the earnings of the trust during the time that the beneficiary survived the settlor because the residuary trust never came into being; and, therefore, no net income was generated. The third case, *Risolia v. First National Bank*,[20] differed from the second in one respect. The settlor created a trust to his widow for life in addition to a residuary trust. The court found that the right of the widow as the beneficiary of the first trust to receive the interest therefrom vested immediately. Hence, any income from the trust assets commenced to accrue upon the settlor's death, although the specific assets were not determined until later.

The Rule Against Perpetuities was discussed at length in *In re Estate*

15. Tallahassee Bank & Trust Co. v. Brooks, 200 So.2d 251 (Fla. 1st Dist. 1967).
16. 183 So.2d 575 (Fla. 2d Dist. 1966).
17. 203 So.2d 57 (Fla. 3d Dist. 1967).
18. 196 So.2d 447 (Fla. 3d Dist. 1967).
19. 207 So.2d 730 (Fla. 3d Dist. 1968).
20. 224 So.2d 714 (Fla. 3d Dist. 1969).

of McCune.[21] The will and codicil provided for a trust, the income of which was to be paid to the decedent's sister and to eleven other male beneficiaries. The codicil further provided that should any of the male beneficiaries predecease either the testator or his sister, his widow would receive his share of the income. The trust was to continue until the death of the last surviving beneficiary, whether it was one of the named individuals or a widow of one of the males. Upon the death of the last surviving beneficiary, the entire corpus was to be transferred to another trust. The trial court's finding that the rights of the widows of the male beneficiaries were invalid as an indefinite class gift which was violative of the Rule Against Perpetuities was reversed by the appellate court. The appellate court explained that the interest of each widow is independent of that of the others and therefore is not a class gift but rather a contingent interest. The designation of widows is sufficiently precise so that upon the death of the named males his widow can easily be determined. At the time of the testator's death all of the male beneficiaries were lives in being. Thus, the contingent interests of the wives would vest, if at all, at the death of their husbands.

Another aspect of the Rule Against Perpetuities was considered in *Brown v. Saake*.[22] The subject will created a trust wherein twenty-five per cent of the trust income was to be accumulated, while the other seventy-five per cent was to be distributed to specific religious organizations. The Second District Court of Appeal ruled that a gift of a public, permanent interest may be established as a trust and must vest, as must a private trust, within a life or lives in being and twenty-one years, plus the period of gestation. Furthermore, a gift for a charitable purpose may be perpetual in its duration and not be within the Rule Against Perpetuities. "If the bequest is a vested interest, a provision for accumulation of the income is valid and will be effectuated so long as it is not unreasonable."[23]

In a per curiam decision, the Third District Court of Appeal announced that a person named in a trust created by will as a remainderman has standing to maintain an action for removal of trustees because he occupies the status of a beneficiary.[24]

B. *Resulting Trusts*

1. ARISING FROM FAMILY RELATIONSHIPS

Prior to moving to Florida, the decedent and his widow had purchased personal property in the husband's name in a community property jurisdiction. The third district found a resulting trust in favor of the widow, explaining that "[u]nder Florida law, if a portion of the consideration

21. 214 So.2d 56 (Fla. 4th Dist. 1968).
22. 190 So.2d 56 (Fla. 2d Dist. 1966).
23. *Id.* at 59.
24. Railey v. Skaggs, 220 So.2d 689 (Fla. 3d Dist. 1969).

belongs to the wife and title is taken in the husband's name alone, a resulting trust arises in her favor by implication of law to the extent that consideration furnished by her is used. . . . Therefore, while the husband held legal title to the note and contract, he held a one-half interest in trust for his wife."[25]

An unsuccessful attempt to establish a resulting trust was presented in *Mordue v. Case*,[26] a divorce action. The wife sought to have properties which the husband had transferred to his sister and two daughters prior to the marriage sequestered. The wife proved that the husband continued to manage the property and to enjoy the profits therefrom. The court, however, said that "[i]n the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of intent."[27] The court further observed that "[t]he law favors a presumption that such gifts are voluntary, and the record does not disclose to the contrary."[28] The use of the property was a return gift which did not affect title.

In another unsuccessful attempt to have a resulting trust declared, the third district stated, "where property is purchased by the husband and conveyed to the wife, a presumption arises from their relationship at the time the conveyance was made that no trust was intended. The courts will presume that the wife takes the beneficial title as well as legal title, and that by placing title in her name, the husband intended a gift."[29]

In *Cook v. Katiba*,[30] the imposition of a purchase-money resulting trust in a parcel of land was upheld on a theory of estoppel. In addition, a resulting trust once established may be released by implied gift.[31]

2. ARISING FROM BUSINESS RELATIONSHIPS

Purchase-money resulting trusts may also be impressed as a result of a repurchase agreement relating to realty.

> A resulting trust arises when the legal estate in property is disposed of, conveyed or transferred, but the intent appears or is inferred from the terms of the disposition, or from accompanying facts and circumstances, that the beneficial interest is not to go to or be enjoyed with the legal title. In such a case a trust is implied or results in favor of the person whom equity deems to be the real owner.[32]

In such a case, however, the proponent of the resulting trust must overcome the presumption of correctness of deeds.[33]

25. Quintana v. Ordono, 195 So.2d 577, 580 (Fla. 3d Dist. 1967).
26. 201 So.2d 844 (Fla. 4th Dist. 1967).
27. *Id.* at 845.
28. *Id.* at 846.
29. Atlantic Coast Line R.R. v. Brax, 182 So.2d 491, 495 (Fla. 3d Dist. 1966).
30. 190 So.2d 309 (Fla. 1966).
31. Lamb v. Jones, 202 So.2d 810 (Fla. 3d Dist. 1967).
32. Howell v. Fiore, 210 So.2d 253, 255 (Fla. 2d Dist. 1968).
33. *Id.*

C. *Constructive Trusts*

1. ARISING OUT OF FAMILY RELATIONSHIPS

In *Staples v. Battisti*, the court upheld a complaint which sought to establish a constructive trust to prevent unjust enrichment, arising out of an alleged abuse of a confidential attorney-client relationship.[34]

The Second District Court of Appeal, in refusing to impress a constructive trust, indicated that it favored the presumption that a gift from parent to child is voluntary and that such a relationship is not so confidential as to create the presumption of fraud. Moreover, the court reasoned that the exclusion of some offspring from a parent's will does not raise a presumption of incompetency of the benefactor, nor fraud by the beneficiary.[35]

2. ARISING OUT OF BUSINESS RELATIONSHIPS

The courts are in agreement that "[i]n order to have a constructive trust, the party seeking it must convince the court by clear proof that refusal to impose such a trust will amount to a fraud."[36] In addition, although clear and convincing proof is presented, the claim to enforce a constructive trust may be barred by the doctrine of laches.[37]

A constructive trust may be impressed in a variety of business settings; for example, it may be declared on the proceeds realized by a real estate broker for secret profits gained from a sale to his principal.[38] Furthermore, the interest of a purchaser under a contract for sale of realty may be made the subject of a trust when the land is taken by eminent domain before the sale is consummated.[39] The constructive trustee, however, is entitled to be reimbursed for his services, expenses, and attorney fees expended in connection with the trust property.[40]

D. *Powers and Duties of the Trustee*

1. BANKS AS TRUSTEES

When funds are deposited in accounts designated trustee accounts, the bank has a duty of inquiry as to the authority of the persons designated trustees to pledge such funds as collateral for a loan. The Florida Supreme Court held that the descriptive word "trustee" following a depositor's name constitutes notice to the bank that the monies deposited in the account cannot be set off against the depositor's personal debts.[41]

34. 191 So.2d 583 (Fla. 3d Dist. 1966).

35. Roberts v. Bryant, 201 So.2d 811 (Fla. 2d Dist. 1967).

36. Price v. Rome, 222 So.2d 252, 253 (Fla. 3d Dist. 1969). *Accord*, Carberry v. Foley, 213 So.2d 635 (Fla. 3d Dist. 1968).

37. Friend v. Kapchuk, 216 So.2d 783 (Fla. 3d Dist. 1968).

38. Gammage v. Turner, 206 So.2d 252 (Fla. 2d Dist. 1967).

39. Arko Enterprises, Inc. v. Wood, 185 So.2d 734 (Fla. 1st Dist. 1966).

40. Hartig v. Leone, 189 So.2d 485 (Fla. 4th Dist. 1966).

41. Homes Fed. Sav. & Loan Ass'n v. Emile, 216 So.2d 443 (Fla. 1968), *aff'g* Emile v. Bright, 203 So.2d 328 (Fla. 4th Dist. 1967).

In another instance of a bank overreaching its fiduciary duties, the fourth district stated,

> [w]hen a bank receives money to be applied to a particular purpose and it fails to properly apply it, such bank becomes a trustee and is answerable to the owner of the money as for a breach of trust.... Under such circumstances title to the deposit remains in the depositor, and the relation of debtor and creditor does not exist.[42]

The power of a bank to act as trustee was put in issue in *Florida Northside Bank v. Lowni Corp.*[43] The defendant bank had released forty-seven automobiles without payment violating an oral trust to take possession of transferable indicia of title upon receipt of payment for each car. The bank denied liability on the basis that it had no authority under law[44] to act as trustee. The court found for the plaintiff automobile importer on the grounds that the bank had failed to prove it was without authority to perform such duties.[45]

2. OTHERS AS TRUSTEES

An example of a judgment creditor's attempt to levy on stock certificates owned by the debtor's children with the debtor as trustee was presented in *Harvest v. Craft Construction Corporation.*[46] The court declined to merge the beneficial and legal estates and found that insufficient evidence was presented by the creditor to prove that the money used to purchase the stock was furnished by the debtor, even though the debtor remained primarily liable on notes also given for the stock.

The problem of whether capital-gain dividends received by a testamentary trust from investments in mutual funds were attributable to principal or income was settled in the case of *In re Trust under Jenkins' Will.*[47] The will provided that the determination of the income and principal by the trustees should be in accordance with the income and principal statute in the State of Florida. The law at the time of the will's execution[48] was substantially different than that when the capital-gain dividends were received by the trust. At the latter time, Florida Statutes section 690.06(1) provided that all distributions of capital of mutual investment trusts shall be deemed principal irrespective of the choice made by the trustee. The first district ruled that although the income beneficiary has

42. Bank of West Orange v. Associates Discount Corp., 197 So.2d 858, 862 (Fla. 4th Dist. 1967).

43. 213 So.2d 729 (Fla. 1st Dist. 1968).

44. FLA. STAT. § 660.10 (1967).

45. It is submitted that the court should have based its opinion on estoppel since the officers of the bank frankly admitted they had never obtained trust powers, although they had widely advertised their possession of such powers.

46. 187 So.2d 72 (Fla. 3d Dist. 1966).

47. 224 So.2d 345 (Fla. 1st Dist. 1969).

48. FLA. STAT. § 690.06(1) (1937) provided that the dividends in shares of the distributing corporation would be deemed principal, and all dividends payable otherwise would be deemed income.

a vested right in income, he has no right, vested or otherwise, in the formula or rule by which income is determined and that a capital-gain dividend is in fact a capital distribution rather than income. The rationale of this ruling was that if the trustees had invested directly in the securities, instead of through a mutual fund, the same result would have obtained.

Discussing the liability of the trustee for expenses incurred in connection with the conservation of the trust corpus, the third district in *Vazquez v. Goodrich*[49] decided that a trustee is entitled to legal expenses incurred in good faith defense of the trust property, but not expenses, legal or otherwise, incurred in defiance of the trust relationship. In addition, "[i]f the trustee fails to keep clear, distinct and accurate accounts, all presumptions are against him and all obscurities and doubts are to be taken adversely to him."[50]

In an action by the trustee to recover compensation from the beneficiary for services rendered in the preservation of the trust, the court found that there was no individual responsibility on the part of the beneficiary for such services.[51] The trustee accepted his fiduciary responsibilities in return for the set salary afforded him from the profits of the trust. The trustee, therefore, has no claim against the beneficiary but only against the trust assets.

IV. SUCCESSION

A. *Formal Requisites*

1. ATTESTATION AND SIGNING

Under Florida Statutes section 731.07 a testator may execute his will by making his mark instead of writing his alphabetical name.[52] The greatest protection against fraud, according to the Florida Supreme Court, is furnished by the requirement that the will be signed in the presence of, or acknowledged in the presence of, at least two attesting witnesses.[53]

2. NUNCUPATIVE AND HOLOGRAPHIC WILLS

In order to impliedly revoke a prior will, a subsequent will must be executed according to Florida Statutes section 731.12. The issue of whether a nuncupative will may revoke a prior written will was resolved in *In re Estate of Carlton*.[54] The court reached the conclusion that the legislative intent of the above statute was that in order to constitute an effective revocation, the subsequent will must be in writing.

The constitutionality of Florida Statutes section 731.07, which re-

49. 206 So.2d 54 (Fla. 3d Dist. 1968).
50. *Id.* at 55.
51. Lamb v. Jones, 202 So.2d 810 (Fla. 3d Dist. 1967).
52. *In re* Estate of Williams, 182 So.2d 10 (Fla. 1965).
53. *Id.*
54. 221 So.2d 184 (Fla. 4th Dist. 1969).

quires every will to be witnessed, was upheld by the Florida Supreme Court.[55] Further, this statute properly applies to an unwitnessed holographic will because the intent of the statute is to assure authenticity and to avoid fraud and imposition.

3. COMPETENCY

The Florida Supreme Court clarified the burden of proof of testamentary capacity in *In re Estate of Ziy*.[56] It explained that, after an adjudication of incompetency the burden of going forward with evidence as to testamentary capacity shifts to the will's proponent. While the burden of proof on the opponent never shifts, the burden of going forward with evidence (sometimes mistakenly designated burden of proof) does. This standard is more important than the terminology used.

The principles mentioned above were applied in *In re Estate of Perez*,[57] where the court held that the testator had the requisite testamentary capacity, despite the fact that he was physically frail and for long periods did not know what was going on around him. The court added that "the will appears to have been made under fair circumstances and was not unnatural in the disposition of the property."[58]

The district courts of appeal recognize that the county courts are in the best position to determine competency. It is, therefore, difficult to obtain a reversal of the county court's finding in this regard, absent a clear showing that the county judge misapprehended the legal effect of the evidence.[59]

In one instance, however, the county judge took judicial notice of separate records on file in his court pertaining to a competency proceeding. The first district held that it was error to resort to judicial knowledge to raise controversies not presented by the record.[60]

The question of whether the use of narcotics deprived a testator of the requisite mental capacity to execute a will was raised in *In re Estate of Cole*,[61] where the testator had been given an injection two hours before the signing of the will to reduce pain from terminal cancer. The court concluded that, although a testator's use of drugs does not render him at all times incapable of possession of testamentary capacity, if at the time of the will's execution the testator does not understand the nature and extent of the property to be disposed of, his relation to those who would natur-

55. *In re* Estate of Olson, 181 So.2d 642 (Fla. 1966).
56. 223 So.2d 42 (Fla. 1969).
57. 206 So.2d 58 (Fla. 3d Dist. 1968).
58. *Id.* at 59.
59. *See* Miami Bay Oaks Soroptimist Home for the Aged, Inc. v. Smith, 224 So.2d 444 (Fla. 3d Dist. 1969); *In re* Estate of Judy, 220 So.2d 651 (Fla. 2d Dist. 1969); *In re* Estate of Balch, 215 So.2d 343 (Fla. 4th Dist. 1968); *In re* Estate of Edmunds, 214 So.2d 65 (Fla. 4th Dist. 1968); *In re* Estate of Burkhart, 204 So.2d 737 (Fla. 2d Dist. 1967); *In re* Estate of Sulin, 204 So.2d 28 (Fla. 2d Dist. 1967).
60. *In re* Estate of Simpkins, 195 So.2d 590 (Fla. 1st Dist. 1967).
61. 205 So.2d 554 (Fla. 2d Dist. 1968).

ally claim a substantial benefit from his will, and the practical effect of his will as executed; he does not possess the requisite capacity.

According to *First National Bank v. First Federal Savings and Loan Association*,[62] when a donor of a Totten trust becomes incompetent, the depositor's guardian may not withdraw the corpus unless it is necessary for the ward's support.

4. UNDUE INFLUENCE

When a beneficiary who occupies a confidential relationship with the testator is active in the procurement of a will, a presumption of undue influence arises.[63] However, a mere confidential relationship between the testator and the legatee who offers the will for probate is not sufficient to raise a presumption of undue influence.[64] Although undue influence need not be great where the testator is weak and his intellect clouded, the undue influence may not be inferred solely from the existence of the testator's condition,[65] nor are kindness and solicitude evidence of undue influence.[66] An example of a clear case of undue influence is found in *In re Estate of MacPhee*,[67] where the beneficiary had the testatrix's power of attorney, arranged many business transactions for her, and arranged for the drafting of the will by giving instructions as to its contents.

5. CONTRACTS TO MAKE A WILL

In *Sharps v. Sharps*[68] the widow and her deceased husband had entered into an antenuptial agreement in which the widow agreed to waive all other claims or interest except $150,000 from her husband's estate. The testator's will, however, left her the sum of $250,000. In answer to the widow's attempt to assert a creditor's claim of $150,000 against the estate in addition to the bequest, the Third District Court of Appeal decided that the antenuptial agreement was a valid contract to make a will. The testator simply exceeded his promise with the larger bequest.

An oral contract to make a will was at issue in *Hagan v. Laragione*.[69] The plaintiff's attorney testified that the wife had raised no objections to the execution of reciprocal wills, but had taken little part in arranging for their preparation. The chancellor found that the testatrix had not known that she was entering into an agreement to dispose of her estate exactly as set forth, nor that she could not change it without the consent

62. 196 So.2d 211 (Fla. 2d Dist. 1967).

63. *See In re* Estate of Barfield, 220 So.2d 388 (Fla. 4th Dist. 1969); *In re* Estate of Gay, 201 So.2d 807 (Fla. 4th Dist. 1967); *In re* Estate of MacPhee, 187 So.2d 679 (Fla. 2d Dist. 1966).

64. *In re* Estate of Duke, 219 So.2d 124 (Fla. 2d Dist. 1969).

65. *In re* Estate of Perez, 206 So.2d 58 (Fla. 3d Dist. 1968).

66. *In re* Estate of Duke, 219 So.2d 124 (Fla. 2d Dist. 1969).

67. 187 So.2d 679 (Fla. 2d Dist. 1966).

68. 219 So.2d 735 (Fla. 3d Dist. 1969).

69. 205 So.2d 289 (Fla. 1967), *rev'g* Laragione v. Hagan, 195 So.2d 246 (Fla. 2d Dist. 1967).

of her husband. The Florida Supreme Court sustained the chancellor's conclusion, stating that the requirement of proof by disinterested witnesses is not an absolute rule but simply indicative of the kind of proof which would meet the clear and convincing test.

Florida Statutes section 731.051, which provides that contracts to make a will must be in writing and signed in the presence of two witnesses, was applied in *Langer v. Langer*[70] to defeat an attempt by the testatrix's surviving husband to impress a trust in his favor. The stock in issue had been bequeathed to the testatrix's sisters contrary to an alleged oral promise by the wife to bequeath it to her sons. Although the surviving husband had made a gift of the stock to the testatrix in reliance on this promise, it was unenforceable.

B. *Interests Arising out of the Marital Tie*

Florida Statutes section 731.101 invalidates a bequest to a spouse when the parties are divorced subsequent to the execution of a will. *In re Estate of Guess*[71] interpreted the statute to mean that the remarriage of the parties does not affect the invalidation. The court then found that the lapsed residuary clause in favor of the wife passed by intestacy to the decedent's heirs at law pursuant to Florida Statutes section 731.20(2).

Statutory construction was also the task of the court in *In re Estate of Anders*,[72] which construed Florida Statutes section 731.35 to mean that the filing of a claim against an estate, whether by the widow of a testator, a beneficiary named in the will, or any other person asserting a claim against the estate, has the effect of tolling the nine months period within which the widow is required to make her election to take dower. In connection with the election, the court also determined that a widow does not waive her right to elect against the will by having accepted a partial distribution of the estate pursuant to the provisions of the will, provided that her election is timely filed. It was intimated that a different result might have obtained had the circumstances been prejudicial to the other beneficiaries of the will.

The second district in the case of *In re Estate of Pearsons*[73] found that the death of an incompetent widow terminates her right to dower just as it does a competent widow's right. If an incompetent widow dies and her election through her guardian has not been ruled upon, her election is null and void since the guardian's power terminates at the ward's death.

A 1927 statute[74] was applied in *Brown v. Floyd*[75] to enforce a partition action. The court found that according to the prior law, when a head of a family dies leaving a widow and children, the widow is entitled to

70. 190 So.2d 406 (Fla. 3d Dist. 1966).
71. 213 So.2d 638 (Fla. 3d Dist. 1968).
72. 197 So.2d 837 (Fla. 1st Dist. 1967).
73. 192 So.2d 89 (Fla. 2d Dist. 1966).
74. Fla. Comp. Gen. Laws §§ 4659-61 (1927) [now FLA. STAT. §§ 95.22-.23 (1967)].
75. 202 So.2d 215 (Fla. 1st Dist. 1967).

dower or a child's part; and, if she fails to elect to take a child's part, she is confined to dower, which is a life estate only.[76] Therefore, the widow's deed of the land conveyed only her life estate, and the defendant's lands were impressed with the homestead character. As a result, since the statute providing that after a lapse of twenty years from record of any deed or probate of any will purporting to convey lands, no person shall assert any claim to said lands against claimants under such deed or will[77] is not applicable to homestead lands, the statute could not be asserted as a defense to the action.

C. *Insurance Proceeds*

The care required in the drafting of bequests of insurance proceeds is demonstrated by *In re Estate of Hunt*,[78] where the decedent's will left the residuary of the estate to his spouse without specific mention of the insurance policies which named the estate as beneficiary. The surviving children of the decedent sought to apply Florida Statutes section 222.13, which provides that if the decedent's will does not effectively bequeath insurance proceeds, they shall be for the benefit of the spouse and children in equal portions. The court concluded that "in order for the will of a decedent Florida resident to effectively bequeath the proceeds of life insurance policies which are payable to his estate, it must contain a specific or general expression which refers to and bequeaths sufficiently and effectively the insurance or insurance proceeds."[79] In the instant case the general clause was held to be insufficient.

D. *Construction*

In the case of *In re Estate of Gold*,[80] the Third District Court of Appeal reiterated that a provision for a charitable gift will be construed liberally and upheld if reasonably susceptible of a construction which gives it validity.

The reasonableness of the terms of a will was put in issue in the case of *In re Estate of Tobias*,[81] where the testatrix devised the major portion of her estate to a school, leaving her only daughter $5,000. The court decided that the unreasonableness of the terms of the will cannot be considered in determining its validity except in connection with fraud. Since the evidence established that the will was prepared in accordance with the wishes of the decedent, it was valid.

A devise is not adeemed when the testator (who became incompetent after the will's execution) does not need the proceeds of the sale of such

76. Fla. Comp. Gen. Laws § 5484 (1927) [now FLA. STAT. § 731.27 (1967)].
77. Fla. Comp. Gen. Laws § 4659-61 (1927) [now FLA. STAT. §§ 95.22-.23 (1967)].
78. 222 So.2d 272 (Fla. 3d Dist. 1969).
79. *Id.* at 273.
80. 189 So.2d 905 (Fla. 3d Dist. 1966).
81. 192 So.2d 83 (Fla. 2d Dist. 1966).

devise for her support and maintenance. The court indicated that the identity theory need not be followed in a situation where the proceeds of the sale are a minor portion of the estate.[82]

Where the decedent, prior to execution of the will, had crossed out an article with her pen, had written above "omit and cancel," and had initialed the same in the presence of two witnesses who also affixed their initials thereto, Florida Statutes section 731.13 was inapplicable. Revocation need not be made by a written instrument since the alterations were made in the will prior to execution.[83]

Florida's lapse statute[84] received construction in three situations. The Fourth District Court of Appeal in *Davis v. Arkenberg*[85] decided that where beneficiaries in a will are referred to by name, the disposition constitutes gifts to individuals and not gifts to a class; and, therefore, the provisions for the predeceased beneficiaries lapse. The Second District Court of Appeal in *In re Estate of Walker*[86] found that where a residuary gift lapses due to the nonexistence of the beneficiary, the lapsed portion goes to the remaining residuary beneficiary. The Third District Court of Appeal in *In re Estate of Levy*[87] concluded that where the testator leaves his entire estate to six beneficiaries, three of whom predeceased the testator, and specifically makes no provision for his sole heir, the legacies of the predeceased beneficiaries lapse. The lapsed legacies become a part of the residuum which pass by intestacy to the sole heir. "In order to cut off an heir's right to succession a testator must do more than merely evince an intention that the heir shall not share in the estate—he must make a valid disposition of his property."[88]

An executrix who receives by will the power to dispose of property without the order or confirmation of the court may validly exercise such power when "it is *necessary* for purpose of administration that assets of the estate be liquidated. . . . But where it is *not necessary* to make such liquidation in order to administer the estate, even under a general power of sale, the Probate Court should sanction the sale."[89] In such a case Florida Statutes section 733.23, concerning sales where no power is conferred, would apply.

According to Florida Statutes section 734.041(a) and 734.06, the burden of estate taxes and costs of administration exceeding the residuary estate falls first upon general legatees; the burden is not apportionable among general and specific legatees alike.[90]

82. Forbes v. Burket, 181 So.2d 682 (Fla. 2d Dist. 1966).
83. *In re* Estate of Golden, 211 So.2d 234 (Fla. 4th Dist. 1968).
84. FLA. STAT. § 731.20 (1967).
85. 195 So.2d 46 (Fla. 4th Dist. 1967).
86. 204 So.2d 44 (Fla. 2d Dist. 1967).
87. 196 So.2d 225 (Fla. 3d Dist. 1967).
88. *Id.* at 229.
89. *In re* Estate of Smith, 200 So.2d 547, 554 (Fla. 2d Dist. 1967).
90. *In re* Estate of George, 200 So.2d 256 (Fla. 3d Dist. 1967).

E. *Will Contests and Other Proceedings*

An agreement not to contest which is supported by sufficient consideration can be recognized by the county judge without a trial and evidentiary hearing if only its legal effect is in issue.[91]

The issue of whether an administrator ad litem appointed sua sponte by the county court has the right to appeal the probate of the will after the county judge has discharged such administrator ad litem was considered by the Florida Supreme Court in *In re Estate of Herlan*.[92] The court found that the probate of a will would not preclude the ultimate completion of investigative proceedings by appropriate appellate review.

Rule 5.090(c) of the Probate and Guardianship Rules provides that the proponent of a will in due form shall receive his costs and attorney fees out of the estate even though he is unsuccessful. According to *In re Estate of MacPhee*,[93] however, the judge has the discretion to decide whether the executor was justified in offering the will for probate; "and in exercising such discretion, to observe the following precepts: (1) that the executor or proponent acted in good faith, (2) that his conduct was free from fraud, (3) that the litigation benefited the estate, and (4) if the attorney fees were payable on a contingent basis, such contingency materialized."[94] The court reached its conclusion by applying section 732.14 of the Florida Statutes (which provides that costs may be awarded in the discretion of the county judge) to the above-mentioned rule.

In order to invoke the limitation provision for revocation of probate under section 732.28 of the Florida Statutes *actual* compliance must be observed. Any failure to comply strictly with the statute is fatal to the election under the procedure, which may result in a contest just prior to the discharge of the personal representatives.[95]

F. *Jurisdictional Problems*

"The circuit court has jurisdiction to construe the provisions of a will so long as the will has first been probated and the circuit court was the court first obtaining jurisdiction for construction."[96] The circuit court also has sole jurisdiction over the validity and administration of trusts.[97] Thus, where the county judge ordered the guardian of a Totten trust to transfer the fund to the estate on the theory that the decedent's will revoked the trust, the appellate court found that the county judge lacked jurisdiction to enter such an order. "A county judge has no power to

91. *In re* Estate of Garvey, 196 So.2d 36 (Fla. 3d Dist. 1967).

92. 209 So.2d 225 (Fla. 1968), *rev'g In re* Estate of Herlan, 191 So.2d 276 (Fla. 1st Dist. 1966).

93. 216 So.2d 489 (Fla. 2d Dist. 1968).

94. *Id.* at 491. *See In re* Estate of Reid, 182 So.2d 54 (Fla. 3d Dist. 1966).

95. *In re* Estate of Dalton, 206 So.2d 264 (Fla. 3d Dist. 1968).

96. First Nat'l Bank v. Risolia, 200 So.2d 260 (Fla. 3d Dist. 1967).

97. *See In re* Estate of Young, 199 So.2d 115 (Fla. 2d Dist. 1967); Robinson v. Horne, 192 So.2d 332 (Fla. 1st Dist. 1966).

determine ownership of personal property as between an estate and a stranger thereto."[98]

The county court has jurisdiction to confirm and effectuate agreements not to contest a will.[99]

Since section 732.06 of the Florida Statutes fixes venue for probate in the county of the decedent's domicile, the action of a county judge's court in one county to probate an estate of a decedent, concededly in another county at the time of his death, is an unlawful exercise of jurisdiction.[100] In order to protect the rights of creditors and distributees, a probate proceeding is not susceptible to waiver of the venue established by law.

The county judge has jurisdiction to assess attorney's fees against a distributee's share of an estate, but, where the services of the attorneys are performed primarily in the establishment of the testamentary trust, the fees are correctly assessed against the corpus of the trust.[101]

The circuit court does not have jurisdiction to seal a file of proceedings in the probate court.[102]

G. *Personal Liability of the Beneficiary*

Under Florida law title to real estate passes at the death of the devisee, subject only to the right of the executor to sell for certain reasons. Therefore, when a devisee refuses to accept distribution, the court has the authority to charge preservation costs against the devisee.[103]

98. *In re* Estate of Young, 199 So.2d 115, 116 (Fla. 2d Dist. 1967).
99. *In re* Estate of Garvey, 196 So.2d 36 (Fla. 3d Dist. 1967).
100. State *ex rel.* McGreevy v. Dowling, 223 So.2d 89 (Fla. 3d Dist. 1969).
101. *In re* Estate of Gerhart, 220 So.2d 655 (Fla. 3d Dist. 1969).
102. *In re* Trust under Robinson's Will, 197 So.2d 826 (Fla. 3d Dist. 1967).
103. *In re* Estate of Pearsons, 190 So.2d 593 (Fla. 2d Dist. 1966).