7-1-1962

Trusts and Succession

Thomas A. Thomas

TRUSTS AND SUCCESSION

THOMAS A. THOMAS*

INTRODUCTION

The interval between the last[1] and present *Survey* has been an active one for the courts of Florida in relation to trusts and succession. The appellate courts have added further interpretations[2] to the statutes in these fields and have also acted upon matters in related fields that directly affected the probate laws of Florida.[3] The courts also considered several matters of first impression, including the time permitted for filing a claim for wrongful death against an estate[4] and the rights of lineal descendants to take as a class under alternative circumstances.[5]

While the revision of statutes affecting trusts and the law of succession was quite limited, the courts did not lose the opportunity to recommend to the legislature certain changes and revisions considered necessary or advisable to remedy problems arising under existing statutes.

LEGISLATION

Among the statutes passed by the 1961 session of the legislature was an act authorizing the disposition of testamentary bequests and devises to the trustee of an inter vivos trust that is evidenced by a written instrument in existence at the time of the making of the will.[6] This provision is applicable despite certain conditions that might have disqualified it previously.[7] A statute was also passed for the purpose of clearly delineating the liabilities of a trustee and restricting this liability to the trustee's own defaults and negligence and imposing no liability upon him for the acts of a co-trustee, banker, or other person entrusted with the responsibility of handling trust assets.[8] A further protection for the trustee is afforded by this statutory

* Professor of Law, University of Miami.

1. Thomas, *Trusts and Succession, Fourth Survey of Fla. Law*, 14 U. MIAMI L. REV. 693 (1960).
2. *In re* Estate of Blankenship, 122 So.2d 466 (Fla. 1960); Toney v. Adair, 120 So.2d 622 (Fla. App. 1960); *In re* Aron's Estate, 118 So.2d 546 (Fla. App. 1960); Robinson v. Malik, 115 So.2d 702 (Fla. App. 1959); Drafts v. Drafts, 114 So.2d 473 (Fla. App. 1959).
3. Geistman v. Zimmerman Trusts, 126 So.2d 576 (Fla. App. 1961); Martin v. Wilson, 115 So.2d 573 (Fla. App. 1959).
4. Toney v. Adair, 120 So.2d 622 (Fla. App. 1960).
5. Drafts v. Drafts, 114 So.2d 473 (Fla. App. 1959).
6. FLA. STAT. § 736.17 (1961).
7. Notwithstanding that the trust is amendable, revocable, or both; that it has been amended or revoked in part after execution of the will or codicil; that the trust instrument was not executed as required by the statute of wills; that the trust res may only be the expectancy of life insurance.
8. FLA. STAT. § 691.04(8) (1961).

revision by exempting the trustee from liability, where the settlor has reserved the authority to direct investments to be made by the trust.

Several statutory revisions were enacted relating to claims against decedents' estates. Shorter periods and new procedures for payment of and objections to claims against decedents' estates have been adopted.[9] Creditors must now file their claims within six months from the date of first publication of notice to creditors instead of eight months as previously provided. Shorter periods have also been provided for the delivery of legacies and distributive shares,[10] the presenting of claims against unadministered estates,[11] and the filing of claims against estates with administration unnecessary.[12]

These statutory modifications are obviously calculated to avoid unnecessary delay in closing decedents' estates. They will also afford a surviving widow a better opportunity to determine whether to elect dower since the time for election remains at nine months from the date of first publication of notice to creditors.

SUCCESSION

A. *Charitable Bequests*

One of the problems encountered in making charitable bequests was not definitely solved by a recent statutory amendment.[13] In *In re Blankenship's Estate*[14] the supreme court interpreted the statute[15] relating to charitable devises and bequests made within six months of the testator's death. The court delineated two conditions that must exist in order to protect these bequests from invalidation by the statute: (1) the testator must have expressed substantially the same bequest in the next to last will made by him, and (2) the next to the last will must have been executed at least six months prior to the testator's death. The court stated that, while it considered the results illogical, it could not remedy what must be done by the legislature.

B. *Election to Take Dower*

Legislative inadequacies were also the basis for comment by the court when it was forced to preclude an incompetent wife from asserting dower rights under the statute[16] because she had not filed within the time permitted. The wife of the testator had been adjudged mentally incompetent

9. FLA. STAT. § 733.18 (1961).
10. FLA. STAT. § 734.02 (1961).
11. FLA. STAT. §§ 734.29(3)-(5) (1961).
12. FLA. STAT. § 735.11(1) (1961).
13. Fla. Laws 1957, ch. 57-243, § 1, at 461.
14. 122 So.2d 466 (Fla. 1960).
15. FLA. STAT. § 731.19 (1961).
16. FLA. STAT. § 731.35 (1961).

and was still incompetent at the time of her husband's death. The will of the husband specified that the wife was to get a share equal to that of each of his two daughters. When the wife, through her appointed guardian, elected to take dower, a daughter successfully contested the election in that it was not filed within nine months after the first publication of the notice to creditors, although filed within nine months from the guardian's appointment.[17]

While this conclusion operated as a hardship, the court was powerless to hold otherwise in view of the legislation presently in effect. When the legislature provides a specific period for the assertion of a right, the courts are powerless to make exceptions, since to do so would constitute judicial legislation.

C. *Lapse*

At the common law, when a testamentary provision was made in favor of a person who predeceased the testator, the provision lapsed with no exception. That modern jurisdictions do not favor lapse is evidenced by the fact that statutes have been enacted limiting lapse under certain circumstances. The Florida anti-lapse statute[18] is typical; it provides that if a testamentary provision is made in favor of an adopted child or blood kindred of the testator who predeceases the testator leaving surviving lineal descendants, the gift does not lapse, but rather inures to the benefit of the lineal descendants of the named beneficiary.

The anti-lapse statute applies with equal force to a class consisting of the testator's blood relatives who are living at the time of the execution of the will. However, as to members of a class who die prior to the will's execution, the anti-lapse statute has no application and the provision made in favor of such persons is deemed to fail. These principles found application in *Drafts v. Drafts*.[19] The testatrix had seven brothers and sisters, three of whom died prior to the execution of the will leaving lineal descendants surviving. Two others died after the execution of the will, but prior to the death of the testatrix, and left lineal descendants surviving. In determining the rights of the lineal descendants of the beneficiaries under the will of the testatrix, the court concluded that the anti-lapse statute had no application to the members of the class of brothers and sisters who predeceased the execution of the will, as a consequence of which the lineal descendants of these class members were not entitled to share in the estate.

D. *Testamentary Capacity*

Any person eighteen years of age or older who is of sound mind has

17. *In re* Aron's Estate, 118 So.2d 546 (Fla. App. 1960).
18. FLA. STAT. § 731.20 (1961).
19. 114 So.2d 473 (Fla. App. 1959), 14 U. MIAMI L. REV. 702 (1960).

capacity to execute a will.[20] A person is considered to be mentally sound for purposes of determining capacity if at the time of the will's execution he has the ability to comprehend the nature of the disposition, his relationships with the objects of his bounty and a recognition of the extent of his property.[21] The fact that a testator may have been adjudged mentally incompetent before or after the time the will was executed does not necessarily invalidate the will.[22] The mental condition of the testator at the time of the will's execution is the controlling factor and while his mental condition prior to and subsequent to the execution of the will may be admissible into evidence, such evidence is not conclusive. If a person executes a will after he has been adjudged mentally incompetent by a court of competent jurisdiction, a rebuttable presumption is created that his mental incompetency existed at the time he executed his will.[23] The burden of rebutting this presumption is upon the proponent of the will. Thus, in *Chapman v. Campbell*[24] the court declared that when a will was executed by a testator six years after he had been declared incompetent, the testator was presumed to remain incompetent until the proponent of the will demonstrated that the testator's sanity had been restored or that the will was executed during a lucid interval.

E. *Mistakes*

Courts are reluctant to modify a will because of a mistake made by either the testator or by the draftsman of the will. This reluctance was emphasized by the court in the case of *In re Mullin's Estate*.[25] The testatrix had executed a codicil to her last will and testament which, when finally executed and by virtue of the draftsman's mistake, did not correspond to her instructions. While the court acknowledged that relief would be granted if a will or any portion is obtained by fraud or undue influence, it would be contrary to sound public policy to permit a mistake by the draftsman to defeat the duly solemnized act of the testator. In denying relief, the court was obviously concerned with the possibility of opening the door to the perpetration of frauds. It appears to be more consistent with public policy to permit a mistake by the testator or the draftsman of the will to stand, rather than permit the possibility of fraudulent conduct in attempting to rectify a mistake.

F. *Release of Dower*

In *Youngleson v. Youngleson's Estate*[26] the wife claimed she signed

20. FLA. STAT. § 731.04 (1961).
21. *In re* Bailey's Estate, 122 So.2d 243 (Fla. App. 1960).
22. Chapman v. Campbell, 119 So.2d 61 (Fla. App. 1960).
23. *Ibid.*
24. 119 So.2d 61 (Fla. App. 1960).
25. 128 So.2d 617 (Fla. App. 1961).
26. 114 So.2d 642 (Fla. App. 1959).

a release of dower based upon consideration of her husband's consent to a religious marriage ceremony. A second release for an added consideration was also signed by the wife in favor of the husband's personal representative and heirs. The wife sought to set both releases aside in an effort to elect dower. The court held that in the absence of a showing of fraud or overreaching, a widow who has waived rights by agreement cannot regain them. The wife sought to obtain additional funds by petitioning the court for a family allowance. The court, in dealing with this aspect of the case, held that the use of a claim for family allowance is not permitted as a device to evade an agreement releasing dower since the family allowance is to be resorted to only in emergency situations and is within the sound discretion of the county judge.

G. *Attorneys' Fees*

While appraisers are permitted reasonable compensation for their services,[27] there is no statutory provision for the payment of fees charged by attorneys employed by the appraisers and in the absence of a statutory provision, payment of these fees cannot be authorized by the court.[28] The appraisers of an estate valued at more than 600,000 dollars had asked for 1500 dollars each for their services, and also asked for attorneys' fees from the estate to cover the cost of their appeal from a court order setting their fees at a lower figure. Since no separate agreement provided for the payment of such attorneys' fees by the estate, these amounts could not be recovered from the estate.[29]

H. *Statute of Limitations*

In the case of *In re Brown's Estate*[30] the Florida Supreme Court was called upon to consider whether the statutory limitation of actions on claims against estates to three years came within the purview of the constitution. In that case, the claim sought to be recovered was filed in 1949. A statute[31] passed in 1953 provided that if a claim "has not been paid, settled or otherwise disposed of and no proceeding is pending for the enforcement . . . thereof, then at the expiration of three years from the date such claim is filed such claim shall be forever barred . . . ."

The court held that the constitutional provision[32] prohibiting the enactment of a statute lessening the time for commencement of civil actions existing at the time of the enactment referred only to causes of action covered by the general statutes of limitations. Since in probate matters

27. FLA. STAT. § 733.07 (1961).
28. *In re* Field's Estate, 121 So.2d 46 (Fla. App. 1960).
29. *Ibid.*
30. 117 So.2d 478 (Fla. 1960).
31. FLA. STAT. § 733.211 (1961).
32. FLA. CONST. art. III, § 33.

there had been no previous time limit, the statute was held to be constitutional. The statute, continued the court, was passed as a matter of public policy to require estates to be speedily and finally determined.

The statute of limitations does not commence to run against the heirs until they are in a position to institute a suit.[33] This result is true even though the statutory time to preclude the estate itself from maintaining the action may have elapsed.

I. *Jurisdiction*

While by statute[34] the circuit court has concurrent jurisdiction with the county judge's courts to construe wills, the latter has exclusive jurisdiction to pass upon the validity of wills. *In re Dahl's Estate*[35] was the result of a contest to declare invalid the will of the decedent and to annul his marriage to his surviving widow. The jurisdiction of the circuit court was invoked on the grounds that it had exclusive jurisdiction as to the annulment of a marriage and concurrent jurisdiction with the county judge to determine the validity of a will. The appellate court held it to be error on the part of the county judge to have relinquished jurisdiction over the subject matter within the exclusive jurisdiction of that court. The fact that the county judge provided that he would reassume jurisdiction in the event the circuit court did not act did not overcome the error.

The attaching of jurisdiction was also considered in determining the dower interests in partnership property located in other states. In the case of *In re Binkow's Estate*[36] the court held that if the decedent was a Florida resident, the courts of this state would characterize the partnership property for purposes of dower as would the courts of the situs of the property. If such a consideration establishes that the partnership property is realty, the Florida courts would have no jurisdiction to award dower in it; if, however, the determination establishes the partnership property to be personalty, jurisdiction of the Florida courts would attach based upon the decedent's domicile in this state at the time of his death.

J. *Personal Liability of Beneficiary*

The beneficiary under a will is not personally liable in a tort action which survives against the testator's personal representative. However, property inherited by a beneficiary is subject to any condition or charge imposed by the testator. This conclusion is predicated upon the well established proposition that a person can dispose of his property in any manner

33. Connelly v. Florida Nat'l Bank, 120 So.2d 647 (Fla. App. 1960).
34. FLA. STAT. § 732.42 (1961).
35. 125 So.2d 332 (Fla. App. 1960).
36. 120 So.2d 15 (Fla. App. 1960).

he sees fit so long as the disposition is not contrary to law or public policy. The necessary corollary permits a testator to attach any condition upon a testamentary gift so long as the condition is consistent with law and public policy.

Thus in *Cameron v. Mittuch*[37] the court held that the sole beneficiary under the decedent's will could not be substituted as a party defendant in an action for trespass pending at the time of the decedent's death in the absence of a provision subjecting the beneficiary's interest to satisfaction of tort claims.

K. *Will Contest*

A beneficiary under a will who seeks to contest the will must first divest himself of any beneficial interest in the estate.[38] To hold otherwise would, in effect, permit a person "to bite the hand that feeds him." This divestment is considered a condition precedent to maintaining a cause of action. In the case of *In re Pellicer's Estate*[39] the court stated that the divestment must be set out in the petition contesting the will. The court did not consider that the renunciation of the will was accomplished as a matter of course by the institution of the action itself.

L. *Contract to Make a Will*

Since 1957, all agreements to make a will must be in writing and signed in the presence of two subscribing witnesses to be binding and enforceable.[40] However, oral contracts to make a will entered into prior to 1957 are enforceable if all elements of the contract are established by clear and convincing proof. Evidence that the decedent was indebted to another for many favors was held not to be sufficient to support an oral promise to make a testamentary gift. However, mutual promises are sufficient consideration for the execution of joint and mutual wills and a court of equity will enforce a covenant not to change the will by a later codicil.[41]

M. *Undue Influence*

Affection or a desire to help is not a sufficient basis for the revocation of a will on the ground of undue influence. The court, in *Siddens v. Brown*,[42] restated the definition of undue influence established in an earlier case:

Undue influence contemplates overt persuasion, coercion, or force

37. 113 So.2d 389 (Fla. App. 1959).
38. *In re* Pellicer's Estate, 118 So.2d 59 (Fla. App. 1960).
39. 118 So.2d 59 (Fla. App. 1960).
40. FLA. STAT. § 731.051(1) (1961).
41. Ugent v. Boehmke, 123 So.2d 387 (Fla. App. 1960). See also *In re* Shepherd's Estate, 130 So.2d 888 (Fla. App. 1961), 16 U. MIAMI L. REV. 331 (1961).
42. 119 So.2d 703 (Fla. App. 1960).

> that destroys or hampers the free agency and will power of a testator. Mere affection or attachment or a desire to gratify the wishes of one highly esteemed, respected or trusted may not of itself amount to undue influence affecting the testamentary capacity of a testator.[43]

N. *Lost Instruments*

The fact that the original of a codicil is not found was held not to be conclusive of the fact that the testatrix had revoked it. In *In re Yost's Estate*[44] the testatrix, a Florida resident, had left the codicil with her attorney in Pennsylvania. The attorney produced the will, but did not disclose the fact that a codicil had been executed until a year after the will had been filed for probate. He then produced a copy of the codicil which he claimed to have "found" in his safe. The court held that the evidence was not sufficient to create a presumption that the testatrix had revoked the codicil to her will. When this presumption is sought to be established, evidence must first establish that the testatrix had retained possession of the codicil.

O. *Competency of Parties*

The testimony of an attorney regarding the competency of a husband who waived his interest in the will of his wife was held not required when substantial evidence was available from other sources.[45] In this way, the court avoided the necessity of considering the matter of privilege.

P. *Will Construction*

The intent of the testator remains the "polestar" of the courts in will construction cases. Thus in *Lawyer v. Munro*,[46] in which the testatrix had by will "requested" the executor to give her children the option to purchase her property at a competitive price, the court refused to inquire into the motive of the beneficiary in exercising the option conferred.

Q. *Inter Vivos Gift*

In *Sullivan v. Chase Fed. Sav. & Loan Ass'n*[47] a joint bank account with right of survivorship was held to be subject to attack upon the ground that a testamentary gift was intended without complying with the requirements of the statute of wills. The court reasoned that since the creator of the account did not intend an interest to pass until after his death, the disposition was testamentary in character and the account became an asset of the decedent's estate upon his death.

---

43. *Id.* at 704.
44. 117 So.2d 753 (Fla. App. 1960).
45. *In re* Lohbiller's Estate, 113 So.2d 248 (Fla. App. 1959).
46. 118 So.2d 654 (Fla. App. 1960).
47. 119 So.2d 78 (Fla. App. 1960).

R. *Adopted Children*

When the remainder interest of an adopted child is contingent and not vested, the supreme court will refuse to consider the rights of inheritance of the adopted child. The court held in *Geistman v. Zimmerman Trusts*[48] that, while by statute[49] adopted children are given legal status, there can be no adjudication of their rights until they have become vested. The court stated that it would not give an opinion on a hypothetical question or on a situation that might never materialize.

TRUSTS AND TRUSTEES

A. *Resulting Trust*

In a situation in which the husband conveyed all of his property to his mother before marriage and then paid for the property with the joint earnings of himself and his wife, the court held that a resulting trust could be imposed on the property in favor of the wife to the extent of her contribution.[50]

While parol evidence may be used to establish a resulting trust, the claim must be asserted before the passage of time has sealed the lips of those with knowledge of the transaction.[51] Although the Statute of Frauds[52] has no application in establishing a resulting trust, diligence must be used in asserting the claim. The evidence needed to support a claim of a resulting trust must be clear, positive and unequivocal.[53]

B. *Duties of a Trustee*

One of the most important duties imposed upon a trustee is the duty to exercise good faith and due diligence in the administration of the trust estate. If the trustee while exercising good faith incurs an obligation, he is entitled to reimbursement from the trust estate. This result is particularly true when the obligation incurred confers benefit upon the trust. Thus when the trustee hired an auditor, through whose service the trust received benefit, the cost of the audit was appropriately charged against the trust estate.[54]

C. *Constructive Trust*

A constructive trust is a remedial device designed to prevent fraud or unjust enrichment. Since it is a creature of a court of equity and arises

48. 126 So.2d 576 (Fla. App. 1961).
49. FLA. STAT. § 72.22 (1961).
50. King v. King, 113 So.2d 242 (Fla. App. 1959).
51. Martin v. Wilson, 115 So.2d 573 (Fla. App. 1959).
52. FLA. STAT. § 725.01 (1961).
53. Estey v. Vizor, 113 So.2d 576 (Fla. App. 1959).
54. Johnson v. Taylor, 116 So.2d 480 (Fla. App. 1959).

by operation of law, the statute of limitations is not applicable to bar its creation in an action brought against a defalcating testator.[55] The constructive trust is by no means limited to the rectification of wrongs committed by trustees or other fiduciaries. It will also be created against a third party who takes property belonging to a trust or estate from a fiduciary with knowledge of all material facts.

55. *Supra* note 33.