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Trusts and Succession

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During the period under survey, several cases of first impression in Florida appeared before the appellate courts in the fields under consideration. One case dealt with the effect of adultery upon the right to dower.[1] Another concerned the effectiveness of a no contest clause inserted in a will.[2] Still another considered the interpretation of "possessed of property" under the venue statute in probate matters.[3] Several cases considered the problems incident to will construction,[4] particularly for the purpose of determining the application of ademption by extinction.[5] The constructive trust as an equitable remedy was considered on several occasions.

Although the courts considered several phases of the law of trusts and succession, the legislature was apparently too occupied with problems of constitutional revision to consider these fields to any great extent. The 1959 legislature enacted only eight statutory changes in the fields under discussion. The nature of the changes made, indicates that the legislature was motivated by specific problems rather than by a desire to examine and improve the law generally as applied to the fields of trusts and succession.

LEGISLATION

By a 1959 statute,[6] inter vivos trusts can be added to by testamentary disposition without fear that the statute of wills is violated. This is true although the settlor of the inter vivos trust reserved the power to amend and to revoke. Other statutes:[7] undertake to establish fees for multiple personal representatives of not less than one or more than two commissions established by statute for single personal representatives;[8] allow a widow 60 days to elect dower from the date extended by the county judge for the filing of claims by creditors or from the time allowed a personal representative to file objections to a claim or from the date of final judgment on a litigated claim;[9] permit deferment of payments due under the probate laws to alien beneficiaries where it appears the beneficiary

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1. Wax v. Wilson, 101 So.2d 54 (Fla. App. 1958).
2. Kolb v. Levy, 110 So.2d 25 (Fla. App. 1959).
3. *In re* Estate of Klipple, 101 So.2d 924 (Fla. App. 1958).
4. Parker v. Parker, 110 So.2d 498 (Fla. App. 1959); Singleton v. Martin, 110 So.2d 421 (Fla. App. 1959); Filkins v. Gurney, 108 So.2d 57 (Fla. App. 1959); Pancoast v. Pancoast, 107 So.2d 787 (Fla. App. 1958).
5. Park Lane Presbyterian Church v. Estate of Henry, 106 So.2d 215 (Fla. App. 1958); see Note, 14 U. MIAMI L. REV. 110 (1959).
6. Fla. Laws 1959, ch. 59-57.
7. FLA. STAT. § 734.01(1)(d)(1959).
8. FLA. STAT. § 734.01(1)(a)(1959).
9. FLA. STAT. § 731.35(1)(1959).

would not have the benefit and control of the property;[10] avoid the necessity of filing accounts and vouchers with accountings;[11] permit the entry of an order of administration unnecessary at any stage of the administration process;[12] exempt proceeds of insurance policies outside the estate from claims of creditors except when there is no surviving spouse or child;[13] and authorize the courts to appoint auditors to audit accounts of trustees.[14]

DECISIONS

Wrongful Conduct

In the absence of statute, abandonment alone does not deprive a surviving spouse of her right to dower. However, according to the Statute of Westminster II,[15] if a wife left her husband and lived in adultery she was barred from her dower right unless her husband condoned her conduct and permitted her to return to his house. Some states[16] have adopted similar statutory provisions while others[17] regard the Statute of Westminster II as part of their common law. In a case of first impression in Florida,[18] the District Court of Appeal for the Third District has adopted the position that adultery does not deprive a spouse of dower. In arriving at this conclusion, the court held that the Statute of Westminster II is not a part of the common law in Florida since it was adopted at a time when divorce a vinculo matrimonii was not available for adultery and since the purpose of the Statute was to provide a husband with a remedy in the event his wife left him and lived in adultery.[19] This reasoning might be acceptable were it not for the fact that the husband might not survive long enough to procure a divorce.

It appears reprehensible to permit a wife to share in her husband's estate after she has voluntarily abandoned her husband's home and lived in adultery.

The dower right is conditioned upon the marital relationship and a wife who is guilty of such gross misconduct should be deemed to have

10. FLA. STAT. § 731.28 (1959).
11. FLA. STAT. §§ 733.43, 733.44, 733.46, 733.47, 733.49 (1959).
12. FLA. STAT. § 735.051 (1959).
13. FLA. STAT. § 222.13 (1959).
14. FLA. STAT. § 737.12 (1959).
15. 13 Edw. I, c. 34 (1285).
16. See 3 VERNIER, AMERICAN FAMILY LAW §§ 202, 221 (1935).
17. Schmeizl v. Schmeizl, 186 Md. 371, 46 A.2d 619 (1946); Heicher v. Mysinger, 184 Tenn. 226, 1986 S.W.2d 330 (1946).
18. Wax v. Wilson, 101 So.2d 54 (Fla. App. 1958).
19. *Id.* at 57: "We are impressed, upon reading of the cases decided in other states, with the probability that the reason for the enactment of the Statute of Westminster II, was to provide a husband with a remedy in case his wife left him and lived in adultery with another man. And that by the law of England as it existed in 1285, adultery did not constitute a ground for divorce a vinculo matrimonii and thus did not constitute a basis for barring a wife of her claim of dower . . . No other reason for the passage of the statute is advanced by the briefs nor can be gleaned from the cases. It is apparent that the legislation of this state has covered all of the respective rights involved in the Statute of Westminster II. . . ."

severed that relationship and consequently precluded from benefiting from it. However, this appears to be a problem calling for legislative action.

Wrongful Conduct of a Creditor Toward Debtor

It is too well established to warrant extensive discussion that a person cannot profit from his own wrongdoing. It is equally well established that a person cannot be deemed to have forfeited his estate for the commission of a felony. Both of these principles found application in the recent case of *Morgenstern v. Ruza*.[20] In that case a wife obtained two judgments in New York against her husband. Later these judgments were established as Florida judgments. The Florida court also awarded the wife, in her action for divorce, a $5,000 lump sum alimony payable $15 per week. The wife killed her husband and was convicted of manslaughter. In establishing the wife's rights in her husband's estate, the court concluded that the two judgments which were vested in the wife prior to her wrong were valid claims against the estate of the husband, however, the $5,000 lump sum alimony was not since it was not a debt at the time of the husband's death and could not be made a debt by the wife's wrongful conduct.

Appointment of Administrator

The venue of probate of wills and the granting of letters of administration is in any county in which the decedent was possessed of any property if the decedent was not a domiciliary of Florida at the time of his death.[21] It is generally agreed that for the purpose of the appointment of an administrator, the decedent is deemed possessed of property if he held liability indemnity insurance in a Florida insurance company, or an insurance company authorized to do business in Florida.[22] However, if the insurance company is not authorized to do business in Florida, the Florida courts are not authorized to issue letters of administration for the non-resident decedent. Thus, when a non-resident defendant died after an action was instituted against him growing out of an automobile accident, the fact that he held liability indemnity insurance in a foreign corporation not authorized to do business in Florida, did not authorize the appointment of an administrator in Florida.[23]

No Contest Clause

Jurisdictions are in conflict as to the efficacy of no contest clauses inserted in wills. The modern view of text writers and the courts is against

20. 101 So.2d 429 (Fla. App. 1958).
21. FLA. STAT. § 732.06(2) (1959).
22. Furst v. Brady, 375 Ill. 425, 31 N.E.2d 606 (1940); *In re* Fagin's Estate, 105 (1938); Robinson v. Dana's Estate, 87 N.H. 114, 174 Atl. 772 (1934).
105; Robinson v. Dana's Estate, 87 N.H. 114, 174 Atl. 772 (1934).
23. *In re* Estate of Klipple, 101 So.2d 924 (Fla. App. 1958).

the validity of no contest clauses upon the ground that they are contrary to public policy.[24] According to the rationale employed, any attempt to discourage resort to a legal remedy is inconsistent with public policy. Other jurisdictions appear to give lip service only to forfeiture provisions of wills. While they state no contest clauses are valid, they acknowledge that such clauses must be strictly construed and as thus construed do not preclude a contest made in good faith and upon probable cause.[25] The rationale employed being that the testator could not have intended to prevent a beneficiary from having his doubtful rights judicially determined. Thus in *Kolb v. Levy*,[26] where the plaintiff filed a claim against the estate for breach of contract for failure to execute a will in his favor, the court held that the plaintiff was not precluded from taking under the will executed in his favor since the claim was not a contest within the purview of the no contest clause.

Will Construction

The Florida appellate courts have on numerous occasions acknowledged that in the construction of wills, the intent of the testator is the polar star by which courts are guided. The intent of the testator is to be ascertained by considering the entire will and not an isolated segment only. If the will is unambiguous, the words employed by the testator will be given their ordinary meaning since the court will assume that the testator meant what he said.

If any doubt exists from the reading of the will as to the testator's intent, it is proper to consider all circumstances surrounding the execution of the will, the condition, nature and extent of the property devised, the testator's relationship and attitude toward the members of his family and to the beneficiaries under the will and in general, the relationship of all parties concerned.[27]

Under certain circumstances, the practical interpretation placed on a will by the parties in interest for a long period of time will be accepted by the courts.[28]

During the period under survey there were several cases involving the application of the foregoing principles. Thus, where the testatrix created a residuary trust for the benefit of her sons or the surviving son, it was held that upon the death of one son his interest did not pass to his widow or children since the intent of the testatrix, which is controlling, clearly

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24. 2 SIMES, FUTURE INTERESTS (1st ed. 1936).
25. THOMPSON, CONSTRUCTION OF WILLS 676-78 (2d ed. 1936).
26. 110 So.2d 25 (Fla. App. 1959).
27. Iles v. Iles, 158 Fla. 493, 29 So.2d 21 (1947); Marshall v. Hewett, 156 Fla. 645, 24 So.2d 1 (1945); Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930); See also *In re* Thompson's Estate, 161 Kan. 641, 171 P.2d 294 (1946).
28. 2 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS § 841 (6th ed. 1923).

indicated that her sons alone should benefit.[29] In the words of the court, "The fundamental and controlling axiom is to ascertain and effectuate the intention of the testator as gathered from what was written in the will. In order to do this the court should as nearly as humanly possible try to put itself in the place of, or the armchair of, the testator."[30]

Similarly, when testatrix created a life estate in her husband with provision for the remainder to be divided equally between her daughter and son, the daughter's interest was held to be a vested interest descendible in favor of her husband upon her father's death where the daughter predeceased her father.[31] In holding to that effect, the court declared, "Testamentary intention is the polar star by which wills are to be construed and in that task the words used by the testator must be given their commonly accepted meaning and that meaning applied in accordance with law."[32]

In a case of first impression in Florida, a testatrix devised and bequeathed a portion of her estate to a beneficiary "for and during her natural life, she using the income, and if necessary so much of the property itself to sustain and maintain herself in a good and comfortable way and manner." It was contended that the life tenant was not to be the sole judge as to the amount needed to support her in a comfortable manner, but that an objective standard should be employed. However, the Florida court subscribed to what appears to be the prevailing view which is to the effect that dispositions by the life tenant are valid irrespective of her needs so long as she acts in good faith.[33] This view, according to the court, best effectuates the intent of the testatrix.

Contract to Will and Mutual Wills

Since January 1, 1958, all contracts to execute a will must be in writing and signed by the party whose personal representative is to be charged.[34] Insofar as the statute applies to agreements entered into prior to its effective date, it is violative of the constitutional guarantee against the impairment of the obligation of contract. Before the statute became effective, oral agreements to execute wills were sustained. However, the person alleging the existence of such an agreement had to sustain the burden of proof by definite, cogent and convincing evidence. The mere fact that parties executed mutual wills did not alone indicate the existence of a contract. Therefore, no presumption was created by the mere existence of mutual wills and the person alleging the existence of a contract had the burden of proof.

29. Pancoast v. Pancoast, 107 So.2d 787 (Fla. App. 1958).
30. *Id.* at 789.
31. Singleton v. Martin, 110 So.2d 421 (Fla. App. 1959).
32. *Id.* at 422.
33. Richards v. West, 110 So.2d 698 (Fla. App. 1959).
34. FLA. STAT. § 731.051 (1959).

Mutual wills, like others, are ambulatory in nature and revocability is an essential characteristic. Although a mutual will is based upon a valid contract, it is still revocable, however, the contract is valid and enforceable although there is no provision "not to revoke." If the contract is valid, a provision not to revoke will be implied.[35]

Classification of Devises and Bequests

Devises and bequests are classified as either residuary, general, specific or demonstrative. The purpose for this classification are threefold: (1) to determine liability for the debts and obligations of the testator under abatement statutes; (2) to determine the applicability of ademption by extinction; (3) to determine entitlement to income derived subsequent to the will's execution and during the administration process.

A specific devise or bequest is a gift by will of property which is particularly designated and which is to be satisfied only by the receipt of the particular property described.[36] Income received during administration from property specifically devised enures to the benefit of the specific devisee.

A general devise or bequest is not limited to any particular property and can be satisfied out of the general assets of the estate. The income received from property which is the subject matter of a general devise passes into the residue of the estate. These principles recently found application in the factually interesting case of *In re Estate of Parker*.[37] The testator bequeathed 155 shares of stock to his three daughters and 100 shares in the same corporation to his wife. Twenty-one months prior to his death, the testator received an additional 255 shares of stock in the corporation as a result of a stock split. In holding that the specific legatees were entitled to the additional shares of stock, the court declared:

> The pronounced tendency of the courts has been to hold, upon the slightest evidence of testamentary intent, that bequests of corporate stock are sufficiently clothed with the characteristics of a specific bequest as to avoid abatement or ademption either in value or in kind.[38]

The reason for the court's holding was based upon the conclusion that a stock split is a mere change in form and not in substance, consequently, it is more consistent with the testator's intent that additional shares resulting from the split should pass under a specific bequest of the original shares.[39]

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35. Keith v. Culp, 111 So.2d 278 (Fla. App. 1959).
36. REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 231 (3d ed. 1957).
37. 110 So.2d 498 (Fla. App. 1959).
38. *Id.* at 502.
39. See *In re* Vail's Estate, 67 So.2d 665 (Fla. 1953).

Constructive Trust

A constructive trust is a remedial device created by a court of equity for the purpose of preventing fraud or unjust enrichment. One of the circumstances giving rise to its creation occurs when a person acquires title to property by means of a confidential relationship under circumstances which indicate that retention of the property will result in an injustice. No definite meaning has been attributed to the term "confidential relationship" in order to afford the courts sufficient flexibility to balance the equities in particular cases. Thus, when a son conveyed his interest in his father's estate to his mother upon her oral promise to leave the entire estate (inherited from the father) to her son, relief will be granted in the form of a constructive trust based upon the confidential relationship between mother and son.[40]

Resulting Trust

A resulting trust is one created by a court of equity based upon the inferred intent of the parties. It is generally created when an attempt to create an express trust fails; or when the purpose of a trust has been fulfilled and no disposition made of the remainder, or when one person pays the consideration for property and has title taken in the name of another under circumstances which indicate no gift was intended. This latter type is referred to as a purchase money resulting trust. Thus, when a husband and wife agreed to purchase property jointly, however, title was taken in the name of the husband, a tenancy by the entireties was created with the husband taking title as trustee for himself and his wife.[41]

Compensation of Trustees

At the early common law in England, trustees were not entitled to compensation since it was deemed to be an honor to act in such a high fiduciary capacity. Today in the United States it is agreed that trustees are entitled to be compensated for services rendered unless a contract was executed waiving the right of remuneration. In the absence of statute, the amount of compensation is discretionary with the chancellor who will consider all relevant facts in determining reasonable compensation. Among the facts considered are: (1) the skill exhibited by the trustee, (2) the success of his administration and, (3) the amount of work involved and the degree of responsibility imposed upon him.

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40. Williams v. Grogan, 100 So.2d 407 (Fla. 1958). See also Traub v. Traub, 102 So.2d 157 (Fla. App. 1958). Three brothers were the owners of property. One brother agreed to pay the taxes due on the property and to hold it in trust for himself and the other brothers who could pay their proportionate liability for the taxes when they were financially able. Later, the two brothers tendered their share of the taxes and demanded conveyance of their share of the property which was refused. *Held*: a constructive trust would be created in order to prevent an inequity.

41. Picchi v. Picchi, 100 So.2d 627 (Fla. 1958).

In the absence of an agreement to the contrary, the compensation of the trustee is to be satisfied out of income unless otherwise provided by the settlor.[42] Thus, where the settlor evidenced an intent to preserve the corpus of the trust, the compensation of the trustee would be satisfied out of income.[43] When there are two or more trustees, the amount of compensation will ordinarily be the same as if there were only one unless otherwise provided by the trust or by statute.[44]

Alienability of Beneficial Interest of a Trust

It is generally agreed that the beneficiary's interest in a trust is assignable by him in the absence of a contrary intent by the settlor. Restraints upon alienation can be either expressed or implied. If the settlor expressly provides for restraints upon voluntary and involuntary alienation, the trust is referred to as a spendthrift trust. If a trust is created for the support and maintenance of the beneficiary, a restraint upon alienation is implied from the purpose. If the settlor authorizes the trustee, in his discretion, to deprive the beneficiary of all income a discretionary trust is created and the beneficiary has no interest which he can assign until the trustee's discretion has been exercised in his favor.[45]

Method of Distribution

When a person dies intestate leaving surviving children and grandchildren from a predeceased child, the question is presented, how should the estate be divided? Should the children and grandchildren share equally or per capita? Or should the estate be divided per stirpes or according to the number of decedent's children? According to the prevailing view, when the members of the class of takers under the laws of descent and distribution are of equal degree of relationship, the division should be per capita or equal. However, in Florida by statute,[46] division of an intestate's estate is always per stirpes. Thus, where an intestate left as his only survivors nephews and nieces from predeceased brothers and sisters, it was held that the per stirpes method of distribution would be used.[47]

Compensation of Personal Representatives

Personal representatives who have satisfactorily administered an estate, are entitled to the statutory compensation without further proof.[48] If a

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42. FLA. STAT. § 690.13(1)(1959).
43. West Coast Hospital Ass'n v. Florida Nat'l Bank of Jacksonville, 100 So.2d 807 (Fla. 1958).
44. *Ibid.*
45. See Philp v. Trainor, 100 So.2d 181 (Fla. App. 1958).
46. FLA. STAT. § 731.25 (1959).
47. *In re* Estate of Davol, 100 So.2d 188 (Fla. App. 1958).
48. *In re* Estate of Lieber, 103 So.2d 192 (Fla. 1958).

personal representative performs extraordinary services, he is entitled to additional compensation depending upon the value of those extraordinary services. In determining the value of such services, the court should consider other fees, commissions or compensations paid in the administration process.[49]

A personal representative who properly incurs legal expenses is entitled to reimbursement. The value of an attorney's services to an estate, should be determined only after receiving testimony of competent disinterestd attorneys. If the personal representative is himself an attorney, he is entitled to compensation for legal services rendered to the estate.[50] If he is a member of a law firm, it is completely proper for him to employ a member of his firm to perform services for the estate.[51]

Widow's Allowance

In cases of necessity, a widow is entitled to an allowance for her maintenance and support from the estate of her deceased husband.[52] In the event the allowance provided by statute is inadequate, the county judge is authorized to grant a supplemental allowance.[53] The purpose of the allowance provisions of the statutes is obviously to sustain the widow during the administration of the estate and prior to distribution. If a widow executes a prenuptial agreement, and later, contests its validity, her right to a widow's allowance is not barred prior to a determination of the validity of the agreement.[54]

49. *Ibid.*
50. FLA. STAT. § 734.01(4)(1959).
51. See note 48 *supra.*
52. FLA. STAT. § 733.20(d) (1959).
53. FLA. STAT. § 733.20(i) (1959).
54. *In re* Estate of Stein, 106 So.2d 2 (Fla. App. 1958).