Trusts and Succession

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The Florida courts are to be commended for the sound approach employed in substantially all cases involving trusts and succession decided during the period under survey. The courts appear to have been motivated by a strong desire to administer understandable justice and refused to be impeded by form, orthodox views or over aged common law concepts. In one case,1 flexibility was reserved for the purpose of granting relief in future cases of fraud or unjust enrichment. In another,2 the common law in existence on July 4, 1776 and made a part of ours by statute3 was discarded for a more modern view in keeping with our society. In still another case,4 a majority view was discarded for a modern ruling devoid of speculation and exceptions. Thanks to the Florida Supreme Court, the distinction between resulting and constructive trusts was made understandably known.5

Unfortunately, the legislature continues to lag behind the courts in spirit. While several statutes were amended in an effort to prevent injustices, several long outstanding problems remain to be resolved by legislative actions. For example, legislation regarding the appointment of administrators C.T.A. still remains uncertain as previously discussed.6 The effect of wrongful conduct upon the rights of inheritance should also be determined by legislation. The creation of a complete relationship between adopting parents and adopted child would constitute a progressive step in the right direction.

LEGISLATION

One of the most significant changes made by the legislature was with reference to charitable devises and bequests. Prior to 1957,7 all devises and bequests to charity executed within six months of the testator’s death could be avoided by the surviving spouse, lineal descendants or adopted child. However, by virtue of amendment, institutions of higher learning were exempted from the operation of the statute. Additional legislative enactments bar dower unless applied for within nine months after first notice to creditors or three years after death,8 require

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1. Wadlington v. Edwards, 92 So.2d 629 (Fla. 1957).
4. Lopez v. Lopez, 96 So.2d 463 (Fla. 1957).
5. Revell v. Crews, 97 So.2d 336 (Fla. 1957).
the county judge to mail a copy of creditor's claim to be supplied by the creditor to the personal representatives; establish the state's attorney as the representative of all unknown or unascertainable beneficiaries in all proceedings involving charitable trusts; require all agreements to make a will or to give a legacy or make a devise to be in writing and signed by the party whose estate is to be changed in the presence of two subscribing witnesses; and exempt personal representatives, whether individual or corporation, from personal liability unless suit is brought within one year from the date of discharge.

DECISIONS

CONTRACT TO MAKE A WILL

Generally, a contract to make a will is regarded as non testamentary in character and need not be executed in accordance with the Statute of Wills. Its essential validity is determined by the law of contracts. Thus it is agreed that the terms of such agreement must be certain as in the case of other contracts. However, in this respect courts are considerably lenient in determining the requisite certainty. Agreements to will the promisee enough so that she would not be obliged to work have been sustained. Similarly, agreements to provide by will a sufficient amount to permit the promisee to live in comfort as theretofore enjoyed have also been upheld. Florida courts have subscribed to this leniency as evidenced by the case of the First Atlantic National Bank of Daytona Beach v. Cobbett, wherein it was held that an agreement by the testator to make such provision for the plaintiff in his will as would be sufficient to provide for her financial needs for the rest of her life was valid and enforceable.

It is further agreed that contracts to make a will are not within the Statute of Frauds if applied to personalty. However, by the great weight of authority, contracts to devise realty must comply with the Statute of Frauds requirements.

Prior to 1957, the Florida courts recognized oral agreements to make a will where the subject matter involved was personalty. However, in that year, the Florida Legislature provided that all agreements to make a will must be signed in the presence of two subscribing witnesses to be binding and enforceable.

16. 82 So.2d 87 (Fla. 1955).
17. Hull v. Thomas, 82 Conn. 647, 73 Lah. 925 (1910).
19. See note 4 supra.
A resulting trust has been defined as one which arises when the legal estate in property is disposed of, conveyed or transferred under circumstances which indicate that the beneficial interest is to follow or be enjoyed with the legal title.\textsuperscript{21}

The circumstances giving rise to the creation of a resulting trust are:
(1) when an attempt to create an express trust fails, (2) when the purpose of an express trust has been fulfilled and no provision has been made for disposition of the remainder, (3) 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 by far the most important class of resulting trusts and is referred to generally as a purchase money trust.

For its creation, it is necessary that a complainant allege and prove that he paid a specific sum for a distinct interest in or aliquot part of the land or that he obligated himself by agreement to pay at the time of the conveyance.\textsuperscript{22} Any agreement to pay executed subsequent to the vesting of title is sufficient.\textsuperscript{23}

\section*{Satisfaction}

According to the majority view, a legacy to a creditor of the testator which is equal to or greater in amount than the indebtedness will be presumed to have been intended as a satisfaction of the debt.\textsuperscript{24} In the absence of evidence showing a contrary intent on the part of the testator, the creditor is obligated to elect to either accept the legacy or proceed to recover his claim against the executor. The majority view has been criticized\textsuperscript{25} and is held inapplicable under the following circumstances:

(1) when the legacy and debt are of a different nature.
(2) when the will contains an express direction for the payment of the testator's debts.
(3) when the debt is unliquidated.
(4) when the debt is owed by the testator as a trustee or other representative capacity.

As a result of dissatisfaction with the majority rule and the exceptions attached to it by the courts in an effort to prevent injustices based upon a speculation of the testator's intent, a modern rule has been formulated

\begin{itemize}
\item \textsuperscript{21} Paramore v. Hampton, 55 Fla. 672, 45 So.992 (1908); Rosenthal v. Largo Land Co., 146 Fla. 81, 200 So.233 (1941); Womack v. Madison Drug Co., 155 Fla. 335, 20 So.2d 256 (1944).
\item \textsuperscript{22} Revell v. Crews, 97 So.2d 336 (Fla. 1957).
\item \textsuperscript{23} Sorrells v. McNally, 89 Fla. 457, 105 So.106 (1925); Fox v. Kimball, 92 Fla. 401, 109 So.465 (1925); Walker v. Landress, 111 Fla. 356, 149 So.545 (1933).
\item \textsuperscript{24} In re Steinkraus' Estate, 233 Wis. 186, 288 N.W. 772 (1939). See Note, 25 MINN. L. REV. 122 (1940).
\item \textsuperscript{25} Milheran's Executors v. Gillespie, 12 Wend. 349 (N.Y. 1834).
\end{itemize}
to which Florida subscribes. According to this rule, no presumption is indulged that a legacy is in satisfaction of an indebtedness due the legatee. To bring about such a result, the testator must manifest his intent to that effect in the will.

This modern rule appears to be the most equitable and rational. Why speculate as to a testator’s intent to the possible detriment of others and possibly in violation of the Statute of Wills? Further, why adhere to a rule which has been cluttered, complicated and rendered ineffective by virtue of several exceptions deemed necessary to prevent inequities?

**Construction of Wills**

In construing wills, courts generally apply the cardinal rule that the intent of the testator shall prevail. Although this rule is meritorious and worthy of continued application, it is subject to practical limitations. For example, courts are of course required to hold that they will not compel an executor to perform an act which would be entirely nugatory. In addition, by virtue of legislative mandate generally imposed, courts are bound by the law in force in England on July 4, 1776, except as changed by statute or constitution.

The foregoing rule together with its limitations was interpreted by the Florida Supreme Court for the first time in the case of *Morgenthaler, Jr. et al v. First Atlantic National Bank of Daytona Beach.* The testatrix devised the residue of her estate to trustees whom she directed to purchase annuities assuring designated beneficiaries an income for life. The beneficiaries sought to obtain the corpus of the estate in lieu of the annuity, contending that they were the absolute owners of the corpus and consequently could dispose of it in any manner they desired. This contention was based upon the English rule that a bequest of money to be used in the purchase of an annuity gives the legatee a right to the money and he can insist that the annuity shall not be purchased. Apparently, this English rule, first adopted in 1725, derived justification from the fact that an annuity in England could be sold by the beneficiary without loss or sacrifice. Consequently, a beneficiary of an annuity should not be required to accept a res which he could immediately convert. In other words, an executor should not be obligated to purchase an annuity against the desire of the beneficiary, since the beneficiary could immediately sell it and obtain the corpus.

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27. In determining 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 attitudes towards the members of his family and to the beneficiaries of the will, their financial condition and in general the relationship of all parties. *Pancoast v. Pancoast*, 97 So.2d 875 (Fla. 1957).
30. 80 So.2d 446 (Fla. 1955).
The beneficiaries further contended that since the English rule from 1725 to date is consistent with their contention, the court has no alternative but to adopt it by virtue of the Florida Statute adopting the common law in force on July 4, 1776.32

In denouncing this contention, the court held to the effect that the common law will be given forced effect so long as it is not contrary to our modern conditions and circumstances and that since an annuity according to modern concepts is very different from corpus, the intent of the testator must be given effect. In order to properly carry out this intent, the trustees must purchase an annuity on behalf of the beneficiaries and must provide by contract that the beneficiaries will not be permitted to sell, mortgage, transfer, hypothecate or otherwise deal with the annuity in a manner inconsistent with the testatrix’s intent.

This opinion is quite interesting in two respects: (1) The Florida Supreme Court has again acknowledged that the common law rules in effect on July 4, 1776 must give way not only to inconsistent statutes and constitutional provisions, but also to “modern ways.” The effect of this holding is to render the statute adopting the common law a nullity. (2) The court implied restraints upon alienation, both voluntary and involuntary, which are normally discouraged because of adverse effects upon commercial transactions. Thus we find the supreme court placing greater emphasis upon the intent of the testatrix than upon the public policy favoring free alienation of property.

TRUSTS AND SUCCESSION

Appointment of Administrator

The Florida statutes relative to the appointment of administrators of decedent’s estates are typical of those enacted by other states in so far as they establish an order of preference based upon relationship to the intestate.33 According to the Florida statutes, first preference is given to the surviving spouse; however, in the event such spouse fails, refuses or is incapable of acting as administrator, then to the next of kin. In the event a person entitled to preference fails to apply for letters of administration, the county judge is authorized to appoint a qualified person not associated with his office. However, before the county judge is empowered to issue letters of administration to a person not entitled to preference, he must issue citation to all known persons entitled to preference over the person applying unless such persons waived their right to act in writing. This holding was clearly and unequivocally demonstrated in the case of Estate of Bush.34 In that case, the intestate left surviving a brother and eleven nieces and nephews, all of whom were non-residents of the State

32. See note 22, supra.
of Florida. Nine and one-half months after the intestate’s death, one of her alleged creditors filed a petition requesting that her attorney be appointed administrator of the estate. Although citation was not served on the intestate’s brother, the county judge issued letters of administration in favor of the alleged creditor’s attorney. Thereafter, the intestate’s brother filed a petition for revocation of the letters. In sustaining the petition for revocation of letters, the supreme court established two propositions not previously determined:

(1) The statute establishing the procedural requirements for the issuance of letters of administration⁴⁰ must first be met before the statute relating to preference becomes effective.

(2) The right of parties for letters are determined at the time the petition is filed and are not affected by waivers subsequently issued.

_Totten Trust_

It is generally agreed that a deposit in trust for the benefit of another does not alone create an irrevocable trust.⁴⁶ The reason for this holding is the lack of a genuine trust intent.⁴⁷ The depositor may have intended to create no trust, but rather to conceal his true asset or to avoid a bank rule limiting the size of individual accounts. He may have intended to create a trust in the future or to create a present trust subject to the power to revoke.

The leading American case involving bank account trusts, _In re Totten’s Estate_,⁴⁸ announced the doctrine⁴⁹ which was subscribed to completely and unequivocally by the Florida Supreme Court in deciding the case of _Seymour v. Seymour_.⁵⁰

A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

Factually, the _Seymour_ case was typical of a bank account trust. S opened a savings account with the signature providing “S in trust for X.”

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34. 80 So.2d 673 (Fla. 1955).
35. FLA. STAT. § 732.43 (1957).
37. Ibid.
38. 179 N.Y. 112, 71 N.E. 748 (1904).
39. Id. at 752.
40. 85 So.2d 726 (Fla. 1956).
S made deposits and withdrawals during her lifetime and at her death, $2,055.34 remained in the account. In holding that X was entitled to the balance in the account, the supreme court adhered to the *Totten* trust doctrine in lieu of going behind it to consider whether retention of the power to make withdrawals is analogous to retention of dominion and control over the trust res. If the analogy is present, how can one contend a valid inter vivos trust was created? If there is no analogy, how can dominion and control be exercised over a bank account except through reservation of the power to make withdrawals?

*Constructive Trust*

The distinction between a resulting and constructive trust in principle is simple; however, in practical application considerable confusion has needlessly developed. A resulting trust is based upon an inferred or presumed intent that it shall exist. A constructive trust is a remedial device created by a court of equity irrespective of intent for the purpose of preventing fraud or unjust enrichment.\(^{41}\)

The type of confusion frequently created is illustrated by the case of *Wadlington v. Edwards*.\(^{42}\) Appellant alleged that she paid the purchase price for her homestead out of her separate estate; however, title was taken in the name of her husband without her knowledge or consent. Her husband died on March 21, 1935, and through her own admission, the appellant knew of the alleged fraud a few days prior to her husband’s death and waited until October 20, 1955, to bring an action. By her complaint, the appellant sought the creation of a constructive trust; however, by her brief on appeal she sought a resulting trust. The type of trust involved was quite material in the case in order to determine the applicable statute of limitations.

Generally, in the case of a resulting trust, the statute of limitations does not affect the beneficiary's interest until the beneficiary knows or should know of the trustee’s repudiation. In the case of a constructive trust, the prevailing view applies the statute of limitations from the date the beneficiary knows or should have known of the facts on which a constructive trust could be based.\(^{43}\)

On appeal, the appellant contended that since her husband did not assert a right antagonistic to hers, the statute of limitations did not bar her recovery. In denying the appellant relief, the supreme court deviated from the prevailing view by holding that the statute of limitations does not apply to constructive trusts. Instead, the doctrine of laches applies, which a court of equity will apply consistent with the appropriate statute

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41. Canova v. Corran, 92 So.2d 614 (Fla. 1957); Armenian Hotel Owners, Inc. v. Hulhonjeans, 96 So.2d 146 (Fla. 1957); Roberts v. Roberts, 84 So.2d 717 (Fla. 1956).
42. 92 So.2d 629 (Fla. 1957).
43. Tide v. Pak, 135 Ala. 131, 33 So.175 (1902); Holloway v. Eagle, 135 Ark 206, 205 S.W. 113 (1918); Hudson v. Cahoon, 193 Mo. 547, 91 S.W. 72 (1906); In re Marshall's Estate, 138 Pa. 285, 22a24 (1890).
of limitations in the absence of intervening equities. The purpose for the holding was to afford the court greater flexibility in granting relief by constructive trust. If it held the statute of limitations applicable, it would have had no alternative but to apply it in every instance irrespective of the equities involved between the parties. Under the present state of the law in Florida, courts are free to consider intervening equities irrespective of the time lapse in all cases involving constructive trusts.

**Removal of Trustee**

Although a court of equity has the inherent right to remove a trustee and to appoint a successor, it is reluctant to do so for two very authentic reasons: (1) Removal inevitably has a discrediting effect upon a trustee's reputation. (2) If the trustee was appointed by the settlor, his removal is necessarily contrary to the settlor's intent.

Consequently, before a court of equity will order removal, there must be a clear showing that the financial interests of the cestuis will be seriously impaired if the trustee continued to administer the estate.

Thus, where testamentary trustees were authorized to conduct testator's business until properties could be disposed of advantageously, the fact that the trustees handled the estate for eleven years without disposing of the estate did not alone constitute grounds for removal.44

**Miscellaneous**

In addition to the foregoing, the Florida courts have considered a variety of problems involving trusts and succession which are worthy of note. For example, it has been determined, consistent with the prevailing view, that a gift made by will to named beneficiaries creates a presumption that no class gift was intended.46 A case48 dealing with the problem of mental capacity to execute a will held that mental capacity at the time of the will's execution could be established either by direct proof or inferences in the light of circumstances existing before and after the will's execution. The nature of the disposition, if unnatural, is also material and can be considered. Additional cases held to the effect that a wife's dower right was not subject to her husband's debts;47 no relief can be granted for mistake in the inducement while executing a will;48 and that a wife's claim against her husband's estate arising out of a separation and trust agreement executed prior to divorce of the parties must be filed within eight months as provided by statute49 or it will be barred.50

44. Powell v. Cocowitch, 94 So.2d 589 (Fla. 1957).
46. Zimmerman v. Zimmerman, 84 So.2d 560 (Fla. 1956).
47. In re Estate of Poyne, 83 So.2d 109 (Fla. 1955).
48. Forsythe v. Sprelberger, 86 So.2d 427 (Fla. 1956).
49. FLA. STAT. § 733.16 (1957).
50. Van Sciver v. First Nat'l Bank, 88 So.2d 912 (Fla. 1956).