



**THE ATTORNEY GENERAL  
OF TEXAS**

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~~JOHN BEN SHEPPERD~~  
ATTORNEY GENERAL

Honorable George H. Shepperd  
Comptroller of Public Accounts  
Austin, Texas

Dear Sir:

Opinion No. O-2936

Re: Application of the Texas Inheritance Tax Law to a situation where a will is contested and the contest is compromised; and then the will is probated subject to such compromise agreement.

We are in receipt of your letter of November 27, 1940, in which you refer to our Opinion No. O-2851. In said opinion this department ruled where a will was probated and the same was then contested, which contest was compromised, that the entire amount received by the devisee under the will became subject to the payment of the Texas Inheritance Tax regardless of such compromise agreement. You are not concerned with the situation where under a like set of facts the will is probated but in the order of the court probating the will the same is probated subject to the compromise agreement.

In the case in question the county judge entered the following order:

" No. 28,700 ) IN THE COUNTY  
ESTATE OF G. W. BURKITT, JR. ) COURT OF HARRIS  
DECEASED ) COUNTY, TEXAS

"On this the 17th day of May, 1939, came on to be heard the application of ELIZABETH E. CRENA, for the probate of the last will and testament of G.W. BURKITT, JR., DECEASED, dated the 25th day of July, 1925, and a codicil thereto dated the 18th day of July, 1931, and it appearing to the Court that due notice of said application has been given in the manner and for the length of time prescribed by law; and from the evidence it appearing to the Court that the Testator, at the respective times when he executed the said will and codicil, was at least twenty-one (21) years of age and was of sound mind, and that he is now dead, and it further appearing that said will and codicil, and each of the same, were executed by the said Testator, with the formalities and solemnities, and under the circumstances required by law to make said will and codicil a valid will, and that said Testator at the time of his death was a resident citizen of Harris County, Texas, and that he never revoked said will or codicil; and it further appearing that a contest of said application has been filed, and that the applicant and said

contestant have settled and compromised their differences, as appears by a copy of their compromise agreement, dated May 15, 1939, hereto attached, marked 'Exhibit A,' and hereby referred to and made a part of this decree for all purposes;

"IT IS ORDERED, ADJUDGED AND DECREED, that said will and codicil, subject to the terms and provisions of said Agreement, shall be and the same are hereby admitted to probate as the last will and testament of G. W. Burkitt, Jr., Deceased, and the Clerk is hereby ordered to record said will and codicil, together with the application for probate thereof, and the testimony of the witnesses introduced for the purpose of establishing the same.

"It is further ordered, adjudged and decreed, that said contest shall be and the same is hereby dismissed and the Clerk is directed to strike the same from his files."

In effect, the above judgment of the probate court finds the decedent as having had testamentary capacity and as having complied with the law in the making of his will, and, therefore, the Judge ordered the will probated and dismissed the contest. The Court ordered as follows:

"IT IS ORDERED, ADJUDGED AND DECREED, that said will and codicil, subject to the terms and provisions of said agreement, shall be and the same are hereby admitted to probate. . . ."

The question in this case arises from the language used - - that the will is probated subject to the terms and provisions of the compromise agreement. It is our opinion, however, that such Decree amounts to no more than the probating of the will as written and that the phrase "subject to the terms and provisions of said Agreement," is of no effect and meaningless. This is true because a probate court does not have the power or authority to dispose of property under a will or to direct to whom the same shall pass aside from either probating the will or refusing to probate same.

In the case of Clements vs. Maury, 110 S.W. 185, by the Court of Civil Appeals of Texas, writ of error refused by the Supreme Court, the Court stated as follows in this connection:

". . . The plaintiffs objected to the probation of the will upon the ground that it attempted to dispose of their interest in the property in controversy. When a sane person who has reached the age of majority voluntarily, and without undue influence, makes a will in the manner prescribed by

law, such will is entitled to be probated, regardless of its terms. What property it applies to, and how such property shall be disposed of are questions that cannot be adjudicated in a proceeding to probate the will. Hence we hold that the probate court, in the proceeding referred to, in determining whether or not the will should be probated, had no power to adjudicate the plaintiff's interest in the property in controversy. Especially was such the case when the plaintiffs were not claiming under the testator, and were asserting title adverse to the will. The judgment probating the will merely adjudicated the fact that the instrument propounded as such was the last will and testament of W. J. Clements, and it did not adjudicate any person's title to any particular property. . . ."

The Texarkana Court of Civil Appeals in the case of Ellsworth vs. Aldrich, 295 S.W. 205, writ of error refused by the Supreme Court, further elucidated on the province of a probate court as follows:

". . . In a proceeding to probate a will the court is limited to these inquiries: Is the instrument properly executed? Is it the last will of the testator? If these are proved, it is the duty of the court to order the instrument probated. In passing upon an application to probate a will, the court has no authority to construe the will or to give effect to prior contracts to make devises of property. A judgment probating a will merely determines that the instrument is the last will of the testator, without reference to the right of the latter to devise the property he undertakes to dispose of. . . ."

In this same connection, the Supreme Court of Texas, in the case of the Masterson vs. Harris, 174 S.W. 570, stated as follows:

". . . An action to probate a will is generally recognized as a proceeding in rem. The judgment of probate is therefore, as a rule, binding upon all the world until revoked or set aside. Steele v. Rem, 50 Tex. 467, 32 Am. Rep. 605; Connolly v. Connolly, 32 Grat. (Va) 657; Brock's Adm'r. v. Frank, 51 Ala. 85; Black on Judgments, Sec. 635. The reason of this rule is that the issues in the proceeding are simply the competency of the testator to make a will, and whether the instrument propounded for probate is his will. The judgment is not for or against any person, but deter-

mines the status of the subject-matter of the proceeding; and when it duly establishes the instrument as the will, it is conclusive upon everybody."

In our case, in so far as the probate judge may have attempted to read the compromise agreement into the will itself, such language is of no force and effect. The case of *Burton vs. Connecticut General Life Insurance Company*, 72 S.W. (2d) 318, by the Fort Worth Court of Civil Appeals, writ of error refused by the Supreme Court, is authority for the proposition that any order of the probate court vesting title in the property inherited by the devisees is void and subject to collateral attack. The court stated as follows:

"(3) 28 Ruling Case Law, p. 377, section 379, reads: 'The function of a probate court when a will is propounded for probate are limited to inquiring and determining whether or not the instrument presented to it as the last will of the decedent was executed by him in the manner prescribed by statute, and when he was legally competent to execute it, and free from duress, menace, fraud and undue influence. Questions as to the property rights of devisees, legatees, heirs and others which might arise out of a construction of the terms of a will are not to be determined in a proceeding for the probate of a will, and therefore the mere probating of a will is not final and conclusive as to the construction of the instrument. . . .

". . . Hence those orders of the probate court were void as to the title inherited by the plaintiffs from their mother, and therefore subject to collateral attack. . . ."

A like rule of law was announced by the San Antonio Court of Civil Appeals in the case of *Laborde vs. First State Bank and Trust Company*, of Rio Grande City, 101 S.W. (2d) 389, writ of error refused by the Supreme Court. The court stated as follows:

". . . We hold, however, that the conclusion expressed in the order of probate, that the codicil in connection with the will, 'passes title to' the testator's widow, 'to all of the property of the testator therein described, and especially passes title to said testator Francois Laborde's community interest therein to the applicant (the widow), the said Eva Marks Laborde, absolutely, in fee simple and forever, ' was ineffectual to construe that instrument to the extent of adjudicating the title to the estate therein devised. *Chatham Phenix Nat. Bank & Trust Co. v. Hiatt* (Tex. Civ. App. writ ref.) 78 S.W. (2d) 1105, and authorities cited."

There are numerous cases in this State which discuss the province of the probate court and hold that such court does not have authority to construe the will but the court's authority is only as to the proposition of whether the will should be probated or not. See Allday vs. Cage, 148 S.W. 838; Brown vs. Burke, 26 S.W. (2d) 415; Harris vs. Harris' Estate, 275 S.W. 964; Combs vs. Howard, 131 S.W. (2d) 206; and McMalley vs. Sealy, 122 S.W. (2d) 330, writ of error dismissed by the Supreme Court.

A situation very similar to the one you present confronted the Commission of Appeals in the case of Pierce vs. Foreign Mission Boards of Southern Baptist Convention, 235 S.W. 552. In that case the county court ordered the will probated and a suit was then filed in said court to vacate such order. The court rendered judgment refusing to do so. Appeal was taken to the District Court. In said court a compromise agreement was filed<sup>and</sup> in accordance with the terms of such agreement the district court rendered judgment probating the will and denying the contest. The judgment, however, went further and embodied the terms of the compromise agreement, therein, which terms in effect varied the terms of the will as written. The court held that the district court had only appellate jurisdiction in this case and that the court's jurisdiction in the case was only co-extensive with the jurisdiction of the county court in the matter. The court stated as follows:

" . . . The controlling question in this case, as we view it, is whether or not the district court had jurisdiction to render the agreed judgment it did render. We think the district court was without such jurisdiction, and that the judgment so entered was void. The jurisdiction of district courts in the administration of estates of deceased persons is appellate only. All persons interested in the administration of an estate have the right to appeal to the district court from an order of the county court made in such administration. Upon such appeal the issues involved in the order or action of the court appealed from will be tried de novo in the district court, but the latter's jurisdiction over the administration extends only to the determination of the questions presented by the appeal; that is to say, the case must remain in the district court the same suit it was in the county court, for, the jurisdiction of the former in the matter being appellate only, it cannot be extended beyond that of the county court. . . .

" . . . It is elementary that jurisdiction cannot be conferred by consent or agreement of the parties.

. . .

". . . As a matter of fact, the judgment was not consistent in its parts. It provided that the will should be admitted to probate and certified the same to the county court for observance. Then, in the very next breath, the judgment annulled practically every provision of that very will and took the administration of the estate out of the hands of those named in the will as executors and placed it in the hands of receivers to be appointed by the district court and responsible to it. The net result of the judgment was to transfer the permanent administration of the estate indefinitely from the county court to the district court. For the many reasons stated, we are clearly of the view that the district court was without jurisdiction to render the judgment it did render.

"we are not unmindful of the fact that adverse claimants under a will to the property of the testator frequently compromise their differences with respect to it, while the probate of the will is an issue in a court of competent jurisdiction. A will is also frequently probated originally by the county court as a result of certain outside agreements, the latter agreements often necessitate resort to district courts. When that is true, an original proceeding can be brought there, and under proper pleadings, the issue can be adjudicated there. This is true, even though probate matters may be incidentally in issue. As one illustration, we know that in ordinary trespass to try title cases originally brought in district courts it is frequently true that the judgment to be rendered depends upon the proper construction of a will long before probated in a county court.

"Being of the view that the judgment in question was not within the jurisdiction of the district court, and therefore void, we do not think it necessary to consider the other ruling of the Court of Civil Appeals. . . ."

It is the opinion of this department that in the case you present the order of the county judge is one which has the effect of probating the will as written and also has the effect of dismissing the contest of the same. You are therefore advised that the Texas Inheritance Tax should be applied against the estate in accordance with the terms of the will as written and that any disposition of the property either by compromise or otherwise is ineffectual for such tax purpose.

Yours very truly

BG:EP:egw  
APPROVED DEC 6, 1940  
/s/ R. W. Fairchild  
Acting ATTORNEY GENERAL OF TEXAS

ATTORNEY GENERAL OF TEXAS  
By /s/ Billy Goldberg  
Assistant