

1963

Probate Law and Practice

Almon H. Maus

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Almon H. Maus, *Probate Law and Practice*, 28 MO. L. REV. (1963)
Available at: <http://scholarship.law.missouri.edu/mlr/vol28/iss4/5>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

PROBATE LAW AND PRACTICE*

ALMON H. MAUS**

I. JURISDICTION OF THE PROBATE COURT

The enactment of the 1955 Probate Code brought into focus several problems concerning the jurisdiction of the probate court. Recent decisions have centered principally around the jurisdiction of the probate court to determine issues "purely equitable in nature." Two sections¹ of the 1955 Probate Code served to emphasize this question. Section 472.020 provided:

The probate court has jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians of minors and persons of unsound mind, settling the accounts of executors, administrators and guardians, and the sale or leasing of lands by executors, administrators and guardians, including jurisdiction of the construction of wills as an incident to the administration of estates, of the determination of heirship, of the administration of testamentary trusts and of such other probate business as may be prescribed by law.

The underlined provisions were added by the 1955 Probate Code. The remainder is the same as the prior statute and the constitutional provision, Article V, Section 16.

Further, section 472.030 provided:

The court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments, and decrees in probate matters as the circuit court has in other matters. . . .

In 1961, section 456.225 was enacted to implement section 472.020. This new section prescribes the procedure involved in the exercise of the probate court's jurisdiction over testamentary trusts.

*The purpose of this article is to summarize and call to the attention of the Bar recent appellate decisions dealing with probate law and practice. Decisions covered are those in 357 S.W.2d to 370 S.W.2d, inclusive.

**LL.B., University of Missouri, 1948; Attorney, Monett, Mo.; Member of the Missouri Bar.

1. Statutory references are to RSMo 1959 unless otherwise set forth.

The problem of the jurisdiction of the probate court involves two questions which seem to be separate and distinct, but which are often intermingled. The first is the scope of the constitutional grant of jurisdiction to the probate court and whether or not the legislature may alter that grant by adding to or restricting that jurisdiction. The second is whether or not the legislature has, by a grant of additional jurisdiction or by implementation of the constitutional grant, vested the probate court with jurisdiction of the issue presented to the court.

The jurisdiction of the probate court has been before the appellate courts in two decisions since the adoption of the 1955 Probate Code and prior to the period covered. They are *In re Frech's Estate*² and *Stark v. Mofft*.³ The problem has been considered in three decisions during the period covered by this article.

In *State ex rel. Jenkins v. Bradley*,⁴ an action in mandamus to compel a probate judge to assume jurisdiction of a testamentary trust, the supreme court declined to pass upon the constitutionality of section 472.020, insofar as it purported to vest the probate court with jurisdiction over testamentary trusts, because the record did not show what questions the relator desired to present, what parties would be involved, whether there was any controversy about the administration of the trust or whether the relator had been prejudiced in any way.

In *Mathews v. Pratt*,⁵ an executor filed an action in the circuit court alleging that the decedent had been induced by undue influence and fraud to create joint bank accounts and praying the court to declare the same to be held by the surviving tenant under a resulting trust for the benefit of the estate, to cancel the defendant's name from the signature card and to order the account paid to the executor. The defendant's motion that the action be dismissed because the relief sought was a proper subject for a proceeding to discover assets and within the exclusive jurisdiction of the probate court was sustained by the trial court. The supreme court determined that the action was a suit in equity to establish and enforce a trust. The court noted section 472.030, declaring the powers of the probate court, and that the section was not discussed in *In re Frech's Estate*,⁶

2. 347 S.W.2d 224 (Mo. 1961).

3. 352 S.W.2d 165 (St. L. Mo. App. 1961).

4. 358 S.W.2d 38 (Mo. 1962).

5. 367 S.W.2d 632 (Mo. 1963).

6. *Supra* note 2.

but declined to construe the section. In holding that the circuit court had jurisdiction to hear the action, the supreme court stated: "It may be that the Probate Court would have the power to do the same things in a discovery proceeding under the existing Code, contrary to what has so long been declared. We do not so decide here. In such event, however, the probate jurisdiction could only be concurrent, for the inherent jurisdiction of our circuit courts to establish, declare and enforce trusts may certainly not be foreclosed by probate jurisdiction or proceedings."⁷

Section 473.357, enacted as a part of the 1955 Probate Code, authorizes the probate court, upon proper petition, to determine title to property in the possession of the executor or administrator. This section was construed in *State ex rel. Meletio v. Hensley*,⁸ discussed elsewhere in this article.

In another case, John W. Myers had been a collecting agent for Laclede Gas Company under an agreement which required Myers to keep the funds collected separate and apart from other funds, to deliver each day's collections to the company and to hold the proceeds of the collections "in trust" for the company. Instead, Myers had deposited the collections in an account in his individual name in which account he deposited other funds. At the time of his death, the balance of the account exceeded the amount claimed to be due the company. The company filed a petition in the probate court under section 473.357 setting forth the agreement, an itemized statement of collections made by Myers and the amount not paid to petitioner, and alleging the company was the owner of the account to the extent of the amount due. The executrix resisted the petition upon the basis that the probate court had no jurisdiction to hear the petition which involved a proceeding "strictly equitable in nature." The probate court dismissed the petition, but on appeal the circuit court granted the relief prayed. The St. Louis Court of Appeals, *In re Myers' Estate*,⁹ noted that the petition did not meet the requirements of the above section, but reversed the decision of the circuit court because the action attempting to establish a trust and to trace the trust funds into the bank account was beyond the jurisdiction of the probate court. The court cited *In re Freck's Estate*, as controlling. *In re Myers' Estate*, has been trans-

7. *Supra* note 5 at 637.

8. 358 S.W.2d 85 (St. L. Mo. App. 1962).

9. 368 S.W.2d 925 (St. L. Mo. App. 1963).

ferred to the supreme court, but no further decision in the case has been announced.

In *McIntosh v. Connecticut General Life Insurance Co.*,¹⁰ the supreme court commented upon the authority of the legislature to authorize the probate court to order the sale of real property solely upon the basis of the sale being in the "best interests of the estate." The court said, "No reason is immediately apparent which would lead us to conclude that Section 16, Article V, Constitution of Missouri 1945, does not grant authority to the legislature to validly invest the probate courts with jurisdiction by virtue of section 473.460 to order the sale, lease or exchange of real estate, when necessary for any of the purposes there listed, including the purpose stated in subparagraph 6." (The latter refers to a sale in the best interests of the estate.)

II. PROCEDURE IN THE PROBATE COURT

The 1955 Probate Code became effective January 1, 1956. Procedure prescribed by the provisions of the 1955 Code governs all proceedings in probate brought after the effective date of the Code and "also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would work injustice, in which event the former procedure shall apply."¹¹

In *In re Alexander's Estate*,¹² the administrator was appointed on May 23, 1952. He filed a final settlement on May 17, 1957, and two heirs filed exceptions to the settlement. These exceptions were not filed within ten days after the filing of the final settlement as required by section 473.590, but were filed within the same term at which the settlement was filed. The supreme court held that the application of section 473.590 would work injustice, and the former procedure should apply. Under the former procedure, exceptions to a final settlement were cognizable when filed at the same term at which the final settlement was filed and therefore the exceptions in question were considered timely.

In *Poppa v. Poppa*,¹³ the Kansas City Court of Appeals considered the procedure required for the perfection of an appeal from the probate

10. 366 S.W.2d 409 (Mo. 1963).

11. Enactment Clause, Laws 1955, p. 385, § A. 1.

12. 360 S.W.2d 92 (Mo. 1962).

13. 364 S.W.2d 52 (K.C. Mo. App. 1962).

court to the circuit court. The judgment of the probate court on a demand filed against the estate was entered on October 24, 1960, and notice of appeal was filed on October 25, 1960. However, the order granting the appeal was not entered until May 4, 1961, and the transcript of the proceedings filed in the circuit court on that day. The claimant filed a motion to dismiss the appeal because it was not taken within 30 days from the rendition of the decision. The motion was overruled. The appellate court held that an appeal was "taken" when the statutory affidavit was filed in the probate court and that in absence of prejudice the delay in entering the order granting the appeal and in filing the transcript, which could have been ordered by either party, did not justify dismissal of the appeal.

Upon disqualification of the probate judge, the cause in which he is disqualified is certified to the circuit court.¹⁴ The jurisdiction of the circuit court on hearing the cause so certified is derivative and the proceeding retains its probate character. However, the circuit court acquires jurisdiction as a circuit court and the judgment entered in a cause so certified is a judgment of the circuit court. The affidavit for appeal from that judgment must be from and filed in the circuit court and not in the probate court.¹⁵

Pleadings in the probate court have been considered in two recent appellate decisions. In *Malone v. Adams*,¹⁶ the claimant sought to recover a commission for the sale of real estate. His demand, omitting the formal portions, stated, "To commission on sale of farm at \$11,000.00 which farm was listed with E. J. Malone on October 9, 1959, at 10% . . . \$1100.00." On appeal to the circuit court, in a jury waived trial, the claimant did not prove an express contract for the payment of the commission, but did prove his agency in the sale of the farm and the reasonable value of his services. The defendant administrator contended that the demand was based upon an express contract and the claimant could not recover upon quantum meruit. The appellate court noted the general rule that pleadings in the probate court are not strictly construed, and held that where "it is impossible to say with definiteness whether the plaintiff is counting upon an express contract or upon quantum meruit, he will be permitted to recover upon whichever of the two theories his evidence may warrant."

In *Bench v. Egan's Estate*,¹⁷ the claimant sought to recover in the

14. § 472.060, RSMo 1959.

15. *In re Schwidde's Estate*, 363 S.W.2d 585 (Mo. 1963).

16. 362 S.W.2d 95 (Spr. Mo. App. 1962).

17. 363 S.W.2d 547 (Mo. 1963).

probate court upon a demand for \$20,000 on account of "breach of contract of lease, said contract being that drawn between James and Bessie Egan and Leroy S. Bench dated May 6, 1960, and being the same as that agreement referred to in the inventory filed in the James Egan estate." The claimant, more than nine months subsequent to the first publication of the notice of letters, sought to file an amended demand setting forth in detail the alleged breach of contract. The amendment was not permitted. The original demand did not set forth in what particular the contract was breached and failed to state a cause of action. A claimant is not permitted to file an amended demand which first states a cause of action after the expiration of the non-claim period.

III. NON-CLAIM STATUTE

Under the non-claim provisions of the 1955 Probate Code, as originally enacted, an action against an executor or administrator in a court of record was considered a claim filed against an estate only when service was had upon the executor or administrator and a copy of the return of process was filed in the probate court.¹⁸ In 1959, the section was amended to require that written notice of the institution of the action be filed in the probate court in lieu of the requirement that a copy of the return of process be so filed. Also in 1959, the sub-section prescribing the effect of failure to comply with the statute of non-claim was amended to provide that unless an action was commenced as required by the statute of non-claim, no recovery might be had in such action on any judgment therein against the executor or administrator out of any assets being administered upon in the probate court or from any distributee or other person receiving such assets.¹⁹

In *State ex rel. Whitaker v. Hall*,²⁰ the supreme court reaffirmed its prior decision in *Clarke v. Organ*,²¹ and held that compliance with the statute of non-claim is mandatory and the circuit court has no jurisdiction to hear an action against an administrator barred by the statute of non-claim. As the administrator was not a proper defendant, the county of the residence of the administrator was not the proper venue for an action against the administrator and a co-defendant who lived in another county.

18. § 473.367, RSMo 1949, 1955 Supp.

19. § 473.360 (2), RSMo 1959.

20. 358 S.W.2d 845 (Mo. En Banc 1962).

21. 329 S.W.2d 670 (Mo. En Banc 1959).

The court also held the 1959 amendment was not retroactive and had no application to a claim barred prior to the effective date of the amendment.

In *Potts v. Vadnais*,²² the plaintiff contended that he had filed a copy of the process in the probate court within the time limited. A hearing was had upon this contention of defendant's motion to dismiss and the issue determined adversely to the plaintiff. The court held the plaintiff's action was barred even though the statute of non-claim was first raised by an amended answer and later by motion to dismiss, filed after the 1959 amendment, even though there was an issue as to whether or not the plaintiff had properly filed a copy of the return of process in the probate court. The court also restated the jurisdictional nature of the statute of non-claim and held the 1959 amendment not to be retroactive.

In *Steele v. Cross*,²³ the plaintiff sought an accounting for oil royalties collected and appropriated by the deceased life tenant. The decedent had not segregated the funds. The petition sought to trace the funds and to establish a trust. The life tenant died in 1950 and the case was decided on the basis of the non-claim statute in force prior to the adoption of the 1955 Probate Code. The court held that the statute of non-claim was applicable to an equitable claim for a sum of money even though the probate court may not have jurisdiction of such an action. The court reviewed and reaffirmed the rule of *Helliker v. Bram*.²⁴ The court expressly declined to express its views as to the effect of the non-claim statute upon an action to trace funds to [or which have been converted into] specific personal or real property.

Perhaps, an indication of the answer to the latter situation is found in *Strumberg v. Mercantile Trust Co.*²⁵ In that case, the decedent had entered into a written agreement with his partner whereby each agreed that upon the death of the other partner, the survivor would purchase the interest of the deceased partner for a designated amount. The surviving partner tendered the designated amount but the executor declined to convey the partnership interest. The surviving partner filed an action in the circuit court to enforce the partnership agreement. The action was not filed in the manner and time required by the statute of

22. 362 S.W.2d 543 (Mo. 1962).

23. 366 S.W.2d 434 (Mo. 1963).

24. 277 S.W.2d 556 (Mo. 1955).

25. 367 S.W.2d 535 (Mo. 1963).

non-claim. The court stated the ultimate question was whether or not the cause of action of the surviving partner was a "claim" against the estate as the term was used in the statute of non-claim. It was said that the term claim as used in connection with probate matters usually referred to a pecuniary obligation or a debt and did not include a claim to specific assets. In the instant case, the surviving partner did not have an option to buy, but was compelled to buy and on decedent's death the claimant became the equitable owner of the partnership interest. The cause of action to establish that ownership and determine the amount due the estate was not barred by the statute of non-claim.

IV. DISCOVERY OF ASSETS

The procedure in a proceeding to discover assets²⁶ was considered in *In re Baker's Estate*.²⁷ In that case, the administratrix was charged with withholding assets of the estate. The administratrix filed a general denial of the allegations of the affidavit. Interrogatories were then filed and served. No answers were filed, but trial was had. Thereafter, while the cause was under advisement the administratrix filed answers. A judgment was rendered against the administratrix. The judgment recited the failure of the administratrix to file answers. The Springfield Court of Appeals reviewed the applicable statutes and set forth a concise outline of the procedure to be followed in discovery proceedings:

- (1) An affidavit is filed and citation is issued.
- (2) The defendant may admit or deny the allegations of the affidavit.
- (3) If defendant denies the allegations of the affidavit, the petitioner has the right to subject the defendant to oral examination.
- (4) The petitioner files interrogatories.
- (5) The defendant files answers to such interrogatories.
- (6) Trial is had on the issues thus raised.

The statutes do not fix a time within which the answers to the interrogatories must be filed, but it is the duty of the court to do so. The issues in a discovery proceeding are framed by the interrogatories and answers and unless the defendant can be considered in default, no trial

26. §§ 473.340-353, RSMo 1959.

27. 359 S.W.2d 238 (Spr. Mo. App. 1962).

on the merits could have been had. In the absence of such a limitation on the time for filing answers, it was improper to hear the matter and render a judgment against the administratrix even though she appeared and participated in the trial.

V. DETERMINATION OF TITLE TO PERSONAL PROPERTY

The 1955 Probate Code contains a section designed to provide a procedure by which the probate court can determine title to personal property in the possession of an executor or administrator wrongfully withheld from the owner thereof.²⁸ In *State ex rel. Meletio v. Hensley*,²⁹ the St. Louis Court of Appeals summarized the essential allegations of a petition under this section. They are: "(1) That the decedent was not the owner of the described and disputed personal property; (2) That the petitioner is the owner; (3) How the petitioner acquired ownership; (4) That possession thereof is being wrongfully withheld from petitioner by the executor or administrator."³⁰ In that case, decedent and petitioner (The Meletio Company) entered into a Stock Retirement Agreement which provided for the purchase of the decedent's corporate stock by the petitioner. The petition set forth this agreement and prayed the court to order the executor to transfer the corporate stock and accept payment therefor. The petition was defective in that it did not allege the decedent was not the owner of the property, but in fact alleged that decedent did own the property. The order prayed for would have been the equivalent of a decree for specific performance of a contract and not a determination of title as contemplated by the above mentioned section.

VI. SALE OF REAL PROPERTY

Section 473.460 specifies five specific bases upon which the court may order the sale of real property of a decedent. The sixth sub-section thereof authorizes a sale "for any other purpose in the best interests of the estate." In *McIntosh v. Connecticut General Life Insurance Co.*,³¹ a petition to sell real estate was filed alleging that such sale was "for the best interests of the estate in that the real estate is in different tracts and not contiguous and there are so many different fractional interests that the same can never

28. § 473.357, RSMo 1949, 1955 Supp.

29. 358 S.W.2d 85 (St. L. Mo. App. 1962).

30. *Id.* at 87.

31. 366 S.W.2d 409 (Mo. 1963).

be divided in kind and for the reason it is to the best interests of the estate and all of the heirs that said real property be sold" by the administrator at private sale for cash. Thereafter, before an order of sale was made, an heir filed an action for partition of the same land. Upon motion, the partition action was dismissed by the trial court on the basis that upon the filing of the petition to sell, the probate court acquired exclusive jurisdiction of the real estate. The heir appealed to the supreme court, which reversed the trial court's action on the ground that the probate court had not acquired jurisdiction because the petition to sell the real estate had been inadequate. The court pointed out that those portions of the 1955 Probate Code dealing with decedent's estates treat the estates as separate entities, distinct and apart from the individuals who are the decedent's successors. The petition was defective and the probate court did not acquire jurisdiction of the real estate (assuming the constitutionality of the sub-section, which the court did not pass upon) because it did not allege any reason why the sale was in the best interests of the estate, considered as an entity distinct from the distributees. The court also stated that it had been unable to hypothecate a situation where it would be necessary to sell real property for the best interests of the estate for a purpose not included in or a part of the purposes specified in the first five sub-sections of section 473.460.

VII. MARITAL INTERESTS

In *Edgar v. Fitzpatrick*,³² decedent, when 78 years of age and in a hospital for an undisclosed reason, created a revocable inter vivos trust in personal property of the value of about \$33,000, for the benefit of decedent for his life, with remainder in his three children by a prior marriage. At that time, his gross estate was approximately \$99,000. When decedent died two years later, his gross estate was approximately \$66,000, but was further reduced by \$28,000 because of a claim presented by the Internal Revenue Service and the cost of defense of the same. The widow filed an action to set aside the intervivos trust as a transfer in fraud of her marital rights. It is a point to note that even if the inter vivos trust had been in fraud of the marital interests, the same would be set aside only to the extent necessary to protect those interests and the beneficiaries would not be deprived of their interests in the remainder. The Springfield Court of Ap-

32. 369 S.W.2d 592 (Spr. Mo. App. 1963).

peals felt the question of whether or not the transfer was in fraud of the marital interests of the wife should be determined by the effect of the transfer rather than by the purpose or intention of the settlor to defraud. Judged by that standard the court would have declared the transfer in question to be in fraud of the wife's marital interests. However, the court felt bound by *Reinheimer v. Rhedans*,³³ in which the supreme court held that section 474.150 did not create a new definition of fraud, as used in this connection, and assumed that the law was as declared in prior cases in which the question was determined upon the basis of the transferor's personal motive and intent. In the instant case, the court determined that the amount transferred was not of such proportions as to justify an inference of a fraudulent intent.

In *Heil v. Shriners' Hospital for Crippled Children*,³⁴ the wife left her husband and filed an action for divorce. The husband filed a cross bill. However, the husband wrote a series of letters expressing his affection for the wife and urging a reconciliation. The letters were ignored by the wife. The case was tried, but the husband died before a proposed decree in favor of the husband was entered. The widow's application for a support allowance and exempt property was denied in the trial court. The widow, for the purpose of the appeal, conceded that her petition for divorce was filed in bad faith, but contended that she could not be guilty of abandonment for one whole year while her husband was maintaining a cross bill for divorce. The court held that under the circumstances, the husband had no choice but to defend himself by filing a cross bill and maintaining the same while urging a reconciliation by letters and his actions did not constitute consent and acquiescence in the separation. The widow's application was properly denied.

In *Quint v. Quint*,³⁵ the Kansas City Court of Appeals determined the validity of an antenuptial contract executed in 1952. The contract provided that upon the death of the husband, the wife would receive the household goods, if not disposed of, and provided for a mutual release by each spouse of all interests in the other's property. The validity of the contract was determined upon the basis of the jointure statute in force in 1952, section 469.160. The antenuptial contract was held to be invalid

33. 327 S.W.2d 823 (Mo. 1959).

34. 365 S.W.2d 736 (K.C. Mo. App. 1963).

35. 359 S.W.2d 29 (K.C. Mo. App. 1962).

and not a statutory jointure because it did not unconditionally convey an estate to the wife for her support and the wife was not estopped from asserting the invalidity of the agreement.

VIII. SETTLEMENTS

In *In re Alexander's Estate*,³⁶ the supreme court reviewed the settlement of an estate on which letters of administration were granted on May 23, 1953, and final settlement was filed on May 17, 1957, after which the administrator was removed and subsequent settlements were filed. In reviewing the exceptions raised to the settlements, the court stated that a party bringing charges of maladministration against an executor or administrator must present sufficient evidence to make a prima facie case of maladministration, except where it is admitted or established that the executor or administration has received assets, in which case he has the burden of producing those assets or accounting for them. Statutes prescribing the time within which settlements are to be filed are to be strictly applied. Where there is unusual delay in closing the administration, the executor or administrator must justify the delay. The court held the administrator was properly charged with the following items: (1) Interest on bonds for which the administrator had not accounted; (2) Dividends on corporate stock for which the administrator had not accounted; (3) The value, at the time of the conversion, of a Cadillac purchased with funds of the decedent when the administrator was acting as guardian and which was placed in the name of the administrator; (4) That portion of a claim allowed and paid by the estate which could have been successfully defended upon the basis of the non-claim statute applicable to the estate of the decedent when she was declared an incompetent, but which defense was not raised by the administrator; (5) Bond premiums and box rent for the period during which the final settlement of the estate was unreasonably delayed; (6) Bond premiums for an indemnity bond for securities carelessly lost by the administrator; and (7) Penalties and interest accrued on income taxes by reason of an unexplained delay in payment. The administrator had also assumed operation of a farm of the decedent without an order of the probate court. All income received and disbursements made by reason of this operation were excluded from the settlement. Because of the maladministration, the services of the

36. *Supra* note 12.

administrator and his attorneys were not beneficial to the estate and they were denied compensation from the estate.

In *Reis v. Travelers Indemnity Co.*³⁷ a petition in equity was filed to set aside a final settlement which had been filed eight years after the appointment of the executor. The petition alleged the executor withdrew and used assets of the estate for his own purposes, received a \$52 cost refund for which he did not account, caused an unreasonable delay in filing the final settlement of the estate which resulted in loss to the estate due to additional charges for bond premiums, box rentals, court costs and attorney fees, and improperly, failed to invest assets for the estate and that by reason of the executor's concealment of these fraudulent acts of maladministration, the probate court was caused to enter an order approving the final settlement. In determining the sufficiency of the petition to state a cause of action, the court disregarded the allegation of concealment, because it did not allege facts which supported that conclusion. The balance of the petition was not sufficient to state a cause of action to set aside a final settlement for fraud, which must "relate to the manner in which the judgment is obtained, and not to the propriety of the judgment itself." The cost deposit could be recovered in an action in the probate court, and all other alleged irregularities were before the probate court at the time the final settlement was considered, and its judgment on the propriety of the settlement was conclusive.

IX. DISTRIBUTION

In *In re Schwidde's Estate*,³⁸ the legatees and heirs of the decedent entered into an agreement for the settlement of a will contest. Under this agreement, the legatees were to pay a percentage of distributions to an attorney for the heirs. The probate court entered an order of partial distribution in favor of the legatees. The administrator, c.t.a., who was also an heir, tendered each legatee two checks, one for his portion of the distribution and the other payable to the attorney for the attorney's portion [share] of the distribution. The checks were tendered upon condition the legatee execute a receipt for the full amount of the distribution. This action of the administrator was held to be improper. The duty of the administrator to make distribution as directed by the order of the

37. 366 S.W.2d 11 (St. L. Mo. App. 1963).

38. 363 S.W.2d 585 (Mo. 1963).

court was not altered by the agreement. Neither the administrator nor the probate court had power to pass upon the rights or claims of third parties against the legatees or to substitute contending parties in the place of the legatees.

X. CONSTRUCTION OF WILLS

In *Shaw v. Wertz*,³⁹ the testator devised the remainder of his estate to his wife, "she to have complete control and free will in the management and disposal of the same so long as she may live." The case presented an issue between the heirs of the husband and the devisees of the wife concerning whether or not the devise in question vested in the wife a fee or a life estate with power of disposition. The court noted that if the testator had stopped after the words, "to my beloved wife" there would be no question that she acquired a fee as words of inheritance are not required to create a fee, and further that the addition of the grant of complete control and free will in the management and disposal of the same did not alter the grant of the fee. The crucial question was the effect of the words "for so long as she may live." In construing the devise, the court referred to two rules of construction. First, where the testator purports to dispose of his entire estate, there is a strong presumption against partial intestacy. Second, where a fee is once granted it cannot be cut down by a subsequent limitation unless such a limitation over clearly appears and the expressions and words used to denote such limitation over exclude any other construction. The court held the devise in question vested a fee in the wife.

In *Edgar v. Fitzpatrick*,⁴⁰ Fitzpatrick executed, on July 29, 1957, a revocable inter vivos trust in favor of himself for life and then to his three children by his first wife. On February 13, 1958, he executed his will which contained specific devises of real property to his children and others and devised to his wife his household goods, \$2400, and a sum equal to one-third "of my entire estate, the amount of said sum to be determined by a fair and reasonable appraisal of the clear market value of all of the property of which I die seized, not only the real estate herein specifically devised to my children, but all other property, real and personal, owned by me at the time of my death. . . ." The widow, who also attacked the trust as being in fraud of her marital rights, contended that in computing the

39. 369 S.W.2d 215 (Mo. 1963).

40. *Supra* note 32.

amount to which she was entitled, there should be included the value of the personal property held under the inter vivos trust. The Springfield Court of Appeals denied the contention of the widow and held that the sum due the widow should be computed including only the property included in the estate of the decedent. The court found the words of the testator unambiguous either by ordinary or legal standards and that the testator had not included property which he had transferred prior to his death.

In *Mercantile Trust Company v. Sowell*,⁴¹ the testatrix had no children, left a surviving husband, two nieces and four nephews. In 1949, she executed her will devising her household goods and certain personal property to her husband and the residue of her estate to her trustees. The trust was to be held for the benefit of her husband for life, then to be divided into five equal parts, one to be held for a Presbyterian Church and one for each of four named individuals. The trustee was to hold the trust for a period of ten years after the death of the husband and to pay the income to the designated beneficiaries. The will provided that if one beneficiary died, payments of the income from that trust would cease and the income and principal of that trust should be added to the trusts held for the surviving beneficiaries. In the event all of the individual beneficiaries, "above named," predeceased testatrix or died within the ten year period and testatrix's husband was then dead, the trusts were to terminate and the trust assets be paid 90% to Washington University and 10% to the Presbyterian Church. None of the named individuals died during the ten year period. The heirs of the testatrix contended that she died intestate as to the remainder interest in the trusts. The court held that even though the specifically designated contingency did not occur, at the expiration of the trust the will of the testatrix devised the trust estates to Washington University and the Presbyterian Church. In so construing the will, the court emphasized the requirement that construction of the will should carry out the general scheme or intention of the testatrix as shown by the whole instrument. The court found the testatrix intended to dispose of all of her property, for to hold otherwise would mean that she did not intend Washington University or the Presbyterian Church to be beneficiaries unless a highly unlikely circumstance occurred. This construction was also supported by a transposition of the language of the testatrix to reach this result. Two dissenting opinions were to the effect that such a con-

41. 359 S.W.2d 719 (Mo. En Banc 1962).

struction was speculation on what testatrix would have provided had she made provision for disposition of the remainder interest in the trusts and that in the absence of such provision the court should not rewrite the will to supply the same.

XI. INCOMPETENTS

In *Murphy v. Murphy*,⁴² on August 15, 1957, the husband had been adjudged mentally ill and in need of hospitalization in a proceeding initiated by the wife under section 202.837. He was committed to a state hospital and released on October 30, 1957. He was discharged on the records of the state hospital on August 18, 1958. There was evidence that upon his release his treating physicians were of the opinion that he was not mentally ill and was capable of conducting his business affairs, and that he had thereafter returned to his normal way of life. On April 6, 1960, after a trial in which the husband appeared in person and by counsel and offered testimony, the wife was awarded a decree of divorce. The husband sought to set aside the decree of divorce by a petition in the nature of a writ of error coram nobis. The petition was based upon his contention that he was mentally incapable of defending the divorce action and a guardian ad litem was not appointed for him. One of the principal arguments of the husband was apparently that he had been adjudged incompetent, had not been restored to competency by a judgment of the probate court, and therefore was presumed to be incompetent or of unsound mind. The supreme court pointed out that the adjudication under the provisions of section 202.837 was not an adjudication of incompetency, but merely of mental illness. The judicial restoration provided in section 475.360 does not apply to proceedings for judicial hospitalization under section 202.837. Therefore cases holding that an adjudication of insanity usually gives rise to a presumption of continued incapacity are not applicable. The most that could be said was that there was a presumption that the plaintiff continued to have some sort of mental illness. The court held that upon the basis of the evidence presented, the plaintiff husband was not insane and was mentally able to defend the divorce action. The petition was denied.

A different situation was presented in *Williams v. Pyles*,⁴³ where the plaintiff filed a petition for specific performance of a contract to sell real

42. 358 S.W.2d 778 (Mo. 1962).

43. 363 S.W.2d 675 (Mo. 1963).

property. On the date set for the hearing, counsel for the defendants suggested the incompetency of one of the defendants (neither defendant was present) and filed a motion for a continuance. The motion was overruled and trial was held in the absence of both defendants. The record was subsequently reopened to permit introduction of the record of an adjudication of mental illness under section 202.837 approximately six months before the date of the trial in question. A decree of specific performance was entered against the defendants. Upon appeal, the supreme court noted the decision of *Murphy v. Murphy*,⁴⁴ but further noted that an entirely different set of circumstances was presented in the instant case. There was no urgency that specific performance be granted immediately and the only possible witness against the plaintiff had been adjudged mentally ill and ordered hospitalized. While the defendant may not have been legally insane, a guardian ad litem should have been appointed and given an opportunity to investigate the facts and establish whether or not the defendant was legally insane. The case was reversed and remanded so that a guardian ad litem could be appointed and every other safeguard employed to prevent a possible injustice in an equitable proceeding to a party who was obviously mentally ill although not legally or technically insane.

XII. WILL CONTESTS

The case of *State ex rel Chicago Cardinals Football Club, Inc. v. Nangle*,⁴⁵ does not directly involve a probate proceeding but does pass upon several questions of importance to the probate field. In this case, the decedent was the majority shareholder of the relator corporation. She was a resident of Illinois at the time of her death and her will was admitted to probate in the Probate Court of Cook County, Illinois. Thereafter, the husband of the decedent contested the admission of her will to probate, which contest was determined adversely to him at a time after the instant case was filed. He then filed an action in Illinois to declare the adoption by decedent of her two sons (principal beneficiaries under the will) void and to establish his renunciation of that will and claim his marital share. The petition also announced that the husband intended to contest the will. Both aspects of this action were contested by the sons. The husband then brought the instant action in which he alleged that the two sons had ousted

44. *Supra* note 42.

45. 369 S.W.2d 167 (Mo. En Banc 1963).

the husband from the management of the corporation and, although inexperienced, had taken over the management, employed a new coach and moved to more costly offices, and that this all had been done as a result of a conspiracy to embarrass, humiliate and discredit the husband and deprive him of his share as a surviving spouse. The husband prayed for the appointment of a receiver of the assets of the corporation located in Missouri. Relief was granted by the trial court. The supreme court noted that the appointment of a receiver is proper only when it is auxiliary to some litigation pending in a court, not necessarily in the trial court itself. Such relief has been granted under certain circumstances pending probate of a will or the appointment of a custodian of the property of the decedent. But in the instant case, no assets of the decedent were located in Missouri, the corporate stock having a situs in Illinois and being in custody of the executor appointed by the Illinois probate court and subject to the orders of that court. Under these circumstances, it was held that the plaintiff alleged no basis to disregard the corporate entity and no basis upon which a Missouri court could assume jurisdiction and control of specific assets of the corporation as assets of the estate of the decedent. The court further pointed out that in Missouri a receiver of property of a decedent may be properly appointed only when remedy afforded by the probate court to protect and care for that property is inadequate. The decision of *State ex rel. Hampe v. Ittner*,⁴⁶ authorizing the appointment of a receiver of real property pending a will contest was overruled by the later case of *Seibert v. Harden*,⁴⁷ holding that the authority of the probate court to appoint an administrator ad litem was an adequate remedy and the real estate was within the jurisdiction of the probate court. The latter decision was reviewed and approved in the principal case, and the supreme court prohibited the trial court from proceeding with the appointment of a receiver.

46. 304 Mo. 135, 263 S.W. 158 (1924).

47. 319 Mo. 1105, 8 S.W.2d 905 (1928).