

**Reverse, Render and Remand; Opinion Filed November 1, 2018.**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-17-01072-CV**

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**IN THE ESTATE OF FRANCES FACCIBENE, DECEASED**

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**On Appeal from the Probate Court No. 2  
Dallas County, Texas  
Trial Court Cause No. PR-17-00683-2**

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**MEMORANDUM OPINION**

Before Justices Myers, Evans, and Brown  
Opinion by Justice Myers

Joseph Faccibene, Jr. appeals the summary judgment in favor of Anthony Papa (Papa) declaring the will of Frances Faccibene and Joseph Faccibene, Sr. to be a contractual will. Appellant brings one issue on appeal contending the trial court erred by granting Papa's motion for summary judgment and denying appellant's motion for summary judgment. We reverse the trial court's judgment, render judgment that the will was not contractual, and remand the cause to the trial court for further proceedings.

**BACKGROUND**

In 1997, Joseph Faccibene, Sr. and his wife, Frances Faccibene, executed one will leaving their property to their four children: appellant, Papa, Maria Faccibene, and Vito Papa. Frances died on July 2, 2016. Five days later, on July 7, 2016, Joseph, Sr. executed a new will. This will stated, "I have two children," appellant and Maria Faccibene, and the will left Joseph, Sr.'s estate

to them. This second will did not mention the Papas. In September 2016, the 1997 will was admitted to probate as part of administering Frances's estate. Joseph, Sr. died on January 27, 2017.

The next month, appellant filed a suit for declaratory judgment in the case of Frances's estate seeking declaratory judgment that (1) the 1997 will was not contractual, (2) when Frances died, her property vested in Joseph, Sr., and (3) Joseph, Sr. was free to revoke the joint will and execute a will after Frances's death. Appellant also sought an award of attorney's fees under the Declaratory Judgment Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. Appellant and Papa filed cross-motions for summary judgment with appellant seeking a declaration that the 1997 will was not contractual<sup>1</sup> and Papa seeking a declaration that the 1997 will was contractual. The trial court denied appellant's motion for summary judgment, granted Papa's cross-motion for summary judgment, and declared that the 1997 will was contractual.

## **SUMMARY JUDGMENT**

In his sole issue, appellant contends the trial court erred by granting Papa's motion for summary judgment and denying appellant's motion. In a traditional motion for summary judgment, the movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

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<sup>1</sup> Appellant did not move for summary judgment on his other requests for declaratory judgment.

When, as here, both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 862 (Tex. 1993); *Howard v. INA Cty. Mut. Ins. Co.*, 933 S.W.2d 212, 216 (Tex. App.—Dallas 1996, writ denied). Neither party can prevail because of the other’s failure to discharge its burden. *Howard*, 933 S.W.2d at 216. When both parties move for summary judgment, we consider all the evidence accompanying both motions in determining whether to grant either party’s motion. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). When the trial court grants one motion and denies the other, the reviewing court should determine all questions presented. *Id.* The reviewing court should render the judgment that the trial court should have rendered. *Id.*

## **CONTRACTUAL WILLS**

The party asserting a will is contractual has the burden of establishing that fact. *Nye v. Bradford*, 193 S.W.2d 165, 167 (Tex. 1946). Section 254.004 of the Texas Estates Code governs whether a will is a contractual will. According to that statute:

- (a) A contract executed or entered into on or after September 1, 1979, to make a will or devise, or not to revoke a will or devise, may be established only by:
  - (1) a written agreement that is binding and enforceable; or
  - (2) a will stating:
    - (A) that a contract exists; and
    - (B) the material provisions of the contract.
- (b) The execution of a joint will or reciprocal wills does not constitute by itself sufficient evidence of the existence of a contract.

TEX. EST. CODE ANN. § 254.004.

## **THE WILL**

The 1997 will provided:

Will of Frances and Josheph [sic] Faccibene

We, , [sic] a resident [sic] of [address], declare that this is our will.

We revoke all wills and codicils we've previously made.

We are married to each other and all references in this will are to ourselves.  
We weren [sic] not previously married to any one else.

We have four children now living, whose names and dates of birth are:

[Listing appellant, Maria Faccibene, Vito Papa, and Papa.]

We have two grandchildren living, whose names and dates of birth are:

[Listing the Papa grandchildren]

We make the following specific gifts of personal property:

....

We make the following gifts of real estate:

....

We give our residuary estate, i.e., the rest of our property not otherwise specifically and validly disposed of by this will or in any other manner, to split equally between all four children, or, if all four children fails [sic] to survive me [sic] to our grandchildren . . . .

We nominate Joseph Faccibene [J]r. and Anthony Joseph Papa to serve as executors without bond. If either of these persons fails to survive us, or is otherwise unavailable to serve, the remaining surviving executor shall function as a sole executor also without bond. If both of these persons fail to survive us, or are otherwise unavailable to serve, we nominate Maria Faccibene and Vito Vincent Papa to serve as executors without bond.

We direct that our executors take all actions legally permissible to have the probate of our estate done as simply as possible, including filing a petition in the appropriate court for the independent administration of our estate.

Except as otherwise provided in our will, [w]e hereby grant to our executors the following powers, to be exercised as he or she deems to be in the best interest of our estate:

[Listing executors' powers.]

The foregoing powers, authority and discretion granted to our executor are intended to be [sic]

Frances Faccibene have [sic] made and paid funeral arrangements with Pine Lawn Funeral Home, Long Island, New York, and we direct our executors to take all steps necessary to carry out such arrangements.

We subscribe our name to this will this 12 day of April, 1997, at Dallas County, Texas State, and do hereby declare that we sign and execute this instrument as our last will and that we sign it willingly, that we execute it as our free and voluntary act for the purposes therein expressed, and that we're [sic] of the age of majority or otherwise legally empowered to make a will, and under no constraint or undue influence.

The will is signed by Frances and Joseph, Sr. and contains the signatures of three witnesses.

## ANALYSIS

Appellant asserted in its motion for summary judgment and response to appellee's motion for summary judgment that the will was not contractual because it did not meet the requirements of section 254.004. Under section 254.004, for a will to be contractual, there must be either (1) an enforceable written agreement providing that the will is contractual, or (2) a statement in the will that it is contractual and the terms of the contract must be set out in the will. *ESTATES* § 254.004. In this case, there is no evidence of a written agreement that the will was contractual. Nor does the will state that a contract exists, and it does not set forth any contractual provisions. Therefore, as a matter of law, the will does not meet the requirements of section 245.004 and cannot be a contractual will. *Id.* § 254.004(a). The fact that the will may be a joint will does not make it contractual. *Id.* § 254.004(b).

Appellee cites numerous cases providing that a will is contractual if it sets forth "a comprehensive plan for disposing of the whole estate of either or both" testators. *In re Estate of Osborne*, 111 S.W.3d 218, 220 (Tex. App.—Texarkana 2003, pet. dism'd) (quoting *Murphy v. Slaton*, 273 S.W.2d 588, 593 (Tex. 1954); *see Novak v. Stevens*, 596 S.W.2d 848, 852 (Tex. 1980)). However, all of these cases involved wills executed before September 1, 1979; therefore, section 254.004 and its predecessor, section 59A of the Probate Code, did not apply to them.

Only one of the cases appellee cites for whether a will is contractual involved a will executed after September 1, 1997, *Coffman v. Woods*, 696 S.W.2d 386 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). In *Coffman*, the will stated,

So that no contention may arise concerning the same, when we or either of us be dead, we do hereby each mutually in consideration of the other making this will, and of the provisions made herein in each other's behalf, make this our last will and testament and agree that the same cannot be changed or varied by either without the consent in writing of the other.

*Id.* at 387. The court of appeals concluded the will was contractual even though it did not contain the word “contract” because the quoted language “clearly delineates the existence of a contract. The parties stated that they were entering a mutual agreement supported by consideration. The will, on its face, expressly recites the basic elements necessary to form a contract . . . .” *Id.* at 388 (citations omitted). The will in this case contains no such language. It contains no language of mutual obligation and consideration like that in the *Coffman* case. The rest of the cases appellee cites involved allegedly contractual wills executed before September 1, 1979, and they are not relevant to whether the will in this case complies with section 254.004.<sup>2</sup>

We conclude the trial court erred by granting Papa’s motion for summary judgment.

Papa argues that even if the will did not meet the requirements for a contractual will, the trial court properly denied appellant’s motion for summary judgment. Papa asserts appellant’s motion for summary judgment sought summary judgment for a declaration that Frances’s estate vested in Joseph, Sr. We disagree. The only declaration for which appellant sought summary judgment was a declaration that the will was not contractual. Although appellant’s petition

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<sup>2</sup> The San Antonio Court of Appeals discussed the history of section 59A of the Probate Code, which was the predecessor to section 254.004 of the Estates Code:

Prior to the enactment of § 59A, contractual wills were considered “litigation breeders” and this statute was passed in an attempt to eradicate some of the litigation resulting from both contractual wills and contracts concerning succession. Ozgur K. Bayazitoglu, *Applying Realist Statutory Interpretation To Texas Probate Code § 59A—Contracts Concerning Succession*, 33 Hous. L. Rev. 1175, 1185–86 (1996) (discussing the history and development of 59A).

*In re Estate of Wallace*, No. 04-05-00567-CV, 2006 WL 3611277, at \*4 (Tex. App.—San Antonio Dec. 13, 2006, no pet.) (mem. op.). The court also noted, “Given the scant number of cases filed after 1979 involving the enforcement, either in equity or at law, of an oral agreement to make a will, it would appear that the legislature was successful in this endeavor.” *Id.* at n.8.

requested declarations that when Frances died, her property vested in Joseph, Sr., and that Joseph, Sr. was free to revoke the joint will and execute a will after Frances's death, appellant's motion for summary judgment did not contain any grounds or argument attempting to prove his right to those declarations. Because the will did not comply with section 254.004, appellant proved his entitlement to judgment for the declaration that the will was not contractual, and the trial court erred by denying his motion for summary judgment.

We sustain appellant's sole issue on appeal.

### **CONCLUSION**

We reverse the trial court's judgment, render judgment that the will is not contractual, and remand the cause to the trial court for further proceedings.

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/Lana Myers/  
LANA MYERS  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

IN THE ESTATE OF FRANCES  
FACCIBENE, DECEASED

No. 05-17-01072-CV

On Appeal from the Probate Court No. 2,  
Dallas County, Texas  
Trial Court Cause No. PR-17-00683-2.  
Opinion delivered by Justice Myers.  
Justices Evans and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** declaring that the April 12, 1997 Will of Frances and Josheph [sic] Faccibene is not a contractual will; and we **REMAND** the cause to the trial court for further proceedings consistent with this opinion.

We **ORDER** that appellant Joseph Faccibene, Jr. recover his costs of this appeal from appellee Anthony Papa.

Judgment entered this 1<sup>st</sup> day of November, 2018.