MORALS FROM THE COURTHOUSE:

A STUDY OF RECENT TEXAS CASES IMPACTING THE WILLS, PROBATE, AND TRUST PRACTICE

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EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
Visiting Professor (virtual), University of Illinois College of Law (2017)

SELECTED HONORS

Order of the Coif
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (6th ed. 2015); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2016); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (7th ed. 2015); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3rd ed. 2007); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

TABLE OF CONTENTS

TABLE OF CASES iii

I. INTRODUCTION 1

II. INTESTATE SUCCESSION 1

A. Adoption by Estoppel 1

III. WILLS 1

A. Testamentary Capacity 1

1. Summary Judgment Improper 1
2. Jury Verdict Upheld 2

B. Formalities 2

1. Witnesses Attesting in Testator's Presence 2
2. Holographic Will 2
3. Non-Statutory Requirements 2

C. Interpretation & Construction 3

1. Jurisdiction 3
2. Dispositive Provisions 3

D. Exoneration 3

E. Lost Wills 4

F. Will Contest 4

1. Improper Reason for Disinheritance 4
2. Undue Influence 5

G. Tortious Interference With Inheritance Rights 5

IV. ESTATE ADMINISTRATION 6

A. Venue 6

B. Appeals 6

C. Muniment of Title 6

D. Attorney's Fees 7

E. Late Probate 7

F. Impact of Survivor's Homestead on Property Value 7

V. TRUSTS 8

A. Jurisdiction 8

B. Parties 8

C. Lost Trust Instrument 8

D. Receivers 9

VI. OTHER ESTATE PLANNING MATTERS 9
A. Power of Attorney 9

TABLE OF CASES

Anderson v. Archer 5
Byerley v. McCulley 7
Dampier v. Williams 1
Estate of Davidson 6
Estate of Hoskins 9
Estate of Koontz 1
Estate of Rhoades 3
Estate of Sloan 7
Gause v. Gause 8
In Estate of Romo 2
In re Davidson 6
In re Estate of Heider 3
In re Jacky 6
Lemus v. Aguilar 2
Matter of Kam 2, 5, 7
Merrick v. Helter 4
Texas Capital Bank v. Asche 2, 8
U.S. Bank v. TFHSP LLC Series 6481 8
Wise v. Mitchell 9
Woods v. Kenner 4

MORALS FROM THE COURTHOUSE: A STUDY OF RECENT TEXAS CASES IMPACTING THE WILLS, PROBATE, AND TRUST PRACTICE

I. INTRODUCTION

This article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The reader is warned that not all recent cases are presented and not all aspects of each cited case are analyzed. You must read and study the full text of each case before relying on it or using it as precedent. Writ histories were current as of April 8, 2017 (KeyCite service as provided on WESTLAW). The discussion of each case concludes with a moral, i.e., the important lesson to be learned from the case. By recognizing situations that have led to time consuming and costly litigation in the past, estate planners can reduce the likelihood of the same situations arising with their clients.

For summaries of cases decided after the closing date for this article, please visit my website at www.ProfessorBeyer.com and click on the "Texas Case Summaries" link.

II. INTESTATE SUCCESSION

A. Adoption by Estoppel

Dampier v. Williams, 493 S.W.3d 118 (Tex. App. – Houston [1st Dist.] 2016, no pet. h.).

After Intestate died, Tracy claimed that he was Intestate's sole heir as his adopted by estoppel son. The trial court rejected Tracy's claim because the alleged acts of estoppel occurred after Tracy reached age eighteen. Tracy appealed.

The appellate court affirmed. The court recognized that Tracy and Intestate had a very close father-son relationship for over thirty years. However, the relationship started when Tracy was an adult so there was never a legal impediment to a formal adoption. And, of course, Intestate could have executed a will in Tracy's favor. Accordingly, Intestate's unperformed oral promise to adopt Tracy did not operate to create a parent-child relationship by estoppel. Every Texas case where adoption by estoppel was deemed to exist involved a child who was a minor at the time the adoption by estoppel acts occurred.

Moral: An adult may not be adopted by estoppel.

III. WILLS

A. Testamentary Capacity

1. Summary Judgment Improper

Estate of Koontz, No. 04-15-00820-CV, 2016 WL 6775593 (Tex. App.—San Antonio Nov. 16, 2016, no pet. h.).

The beneficiary of a prior will attempted to show that Testator lacked capacity when he executed a new will revoking the will that had named him as the beneficiary. The trial court granted the executor of the new will a no-evidence motion for summary judgment and awarded attorney's fees against the beneficiary of the prior will.

The appellate court reversed. The court examined the evidence, especially the affidavit of the beneficiary of the prior will and the testimony of the attorney who drafted the new will, and determined that there was enough evidence to raise a fact question regarding Testator's capacity. For example, Testator believed his wife of over 50 years was having an affair, he attempted to lease property he no longer owned, he was suffering from bipolar disorder, and he had attempted suicide.

Moral: A summary judgment that a testator had testamentary capacity is improper when there is "more than a scintilla of evidence to raise a genuine issue of material fact with regard to [the testator's] testamentary capacity." *Koontz* at *5.

2. Jury Verdict Upheld

Texas Capital Bank v. Asche, No. 05-15-00102-CV, 2017 WL 655923 (Tex. App.—Dallas Feb. 17, 2017, no pet. h.).

The trial court determined that the testator lacked capacity to execute multiple estate planning documents spanning over a decade. In addition, the trial court found that the testator was subjected to undue influence.

The appellate court made an exhaustive review of the evidence which included both medical and lay testimony. Although there was "unquestionably conflicting evidence" about the testator's capacity, the court explained that it may not substitute its judgment for that of the jury. The court then concluded that the evidence was legally and factually sufficient to support the jury's finding that the testator lacked capacity. Accordingly, the court did not need to address the undue influence issue.

Moral: Once a jury determines a testator's capacity to execute a will, it will be difficult to have that finding overturned on appeal unless the jury's finding is against the great weight of the evidence.

B. Formalities

1. Witnesses Attesting in Testator's Presence

In Estate of Romo, 503 S.W.3d 672 (Tex. App.—El Paso 2016, no pet. h.).

Contestants claimed that a will previously admitted to probate was invalid because the testator lacked testamentary capacity or executed the will when subjected to undue influence. After testimony at the trial that the witnesses did not attest in the testator's presence as required by Estates Code § 251.051(3), the court granted the contestant's motion for a directed verdict that the will was invalid.

The appellate court affirmed. The court explained that only a will which meets all Texas requirements may be admitted to probate. It was irrelevant that the trial was centered around two other grounds for finding the will to be invalid.

Moral: A court may set aside a will for failure to comply with the requirements of a valid will even if the contestant does not raise that ground in the pleadings.

2. Holographic Will

Lemus v. Aguilar, 491 S.W.3d 51 (Tex. App.—San Antonio 2016, no pet. h.).

Partner A and Partner B signed an unwitnessed document which they designated as a will. Except for Partner B's signature, the document was wholly in Partner A's handwriting. After Partner B died, both the trial and appellate courts held that the document was not a valid will because it was unwitnessed and not wholly in the deceased partner's handwriting.

Moral: Ann unwitnessed holographic will must be entirely in the handwriting of the actual testator; a signature on a will handwritten by another person, even a co-testator, is insufficient.

3. Non-Statutory Requirements

Matter of Kam, 484 S.W.3d 642 (Tex. App.—El Paso 2016, pet. denied).

Sister sought to admit Father's will to probate. Brother objected arguing that the will which completely excluded him was invalid for lack of proper execution. The trial court agreed and denied the probate application. Sister appealed.

The appellate court reversed and rendered judgment admitting the will to probate. Father prepared his will by using an Internet form with the help of Sister's now ex-boyfriend who was not an attorney. At a UPS Store, Father executed the will in front of Notary who then notarized the will which included Notary's signature. Later, two of Sister's friends witnessed the will. Neither witnesses saw Father sign the will and they did not see each other attest to the will. Witness One was confident she attested in front of Father.

However, when Witness Two attested, Father was not in the same room and thus was not a valid witness.

Consistent with prior cases, the court held that Notary could serve as the second witness to satisfy the two-witness requirement for non-holographic wills under Estates Code § 251.051. The court rejected Brother's claims that (1) witnesses need to be able to describe the contents of the will, (2) the testator must sign the will in the presence of the witnesses, and (3) the testator must speak at length with the witnesses before they attest.

Moral: A carefully conducted will execution ceremony will reduce problems such as those that arose in this case. And, of course, a testator should hire an experienced estate planning attorney rather than using a daughter's boyfriend to help prepare a will.

C. Interpretation & Construction

1. Jurisdiction

Estate of Rhoades, 502 S.W.3d 406 (Tex. App.—Fort Worth 2016, pet. filed).

After the probate court set aside an order admitting Testatrix's will to probate, the court granted a summary judgment construing the dispositive provisions of the will. The appellate court determined that the probate court nonetheless had jurisdiction to construe the will and that its judgment was not merely an advisory opinion.

The court reported that there is "sparse case law" on whether a will must be currently admitted to probate before the court may construe it. However, the court explained that "in practice, Texas courts have construed wills under the [Uniform Declaratory Judgments Act] before, during, and after admitting the will to probate." *Rhoades* at *2.

Moral: Once a proponent presents a will to the court for probate, the court may construe the will even if it is not yet admitted to probate.

2. Dispositive Provisions

Estate of Rhoades, 502 S.W.3d 406 (Tex. App.—Fort Worth 2016, pet. filed).

Testatrix's will devised her (1) "residential homestead" (2) "personal property," and (3) "all the rest of my estate" to Beneficiary who predeceased Testator. The will provided that if Beneficiary died first, Alternate Beneficiary would receive "his portion" of property. This language is found only in the clause granting the rest of the estate and not in the clauses devising the homestead or bequeathing the personal property. The will also provided for property not otherwise gifted to pass to Testatrix's Heirs. Alternate Beneficiary claimed she was entitled to the entire estate while Heirs asserted that they should receive the homestead and the personal property with Alternate Beneficiary receiving only Testator's non-homestead real property. The appellate court agreed with the latter interpretation as being the only way of harmonizing all of the dispositive provisions. A dissenting justice agreed with Alternate Beneficiary's claim that she was entitled to Testatrix's entire estate.

Moral: A will should be carefully drafted and proofread. Testatrix's will is an example of very sloppy drafting. For example, in two of the dispositive provisions, the distribution is to be made in "equal shares" even though only one beneficiary is named.

D. Exoneration

In re Estate of Heider, 496 S.W.3d 118 (Tex. App.—Dallas 2016, no pet. h.).

Testatrix's will made a specific devise of land to Son. The land was subject to a secured debt. A dispute arose between Son and Remainder Beneficiary regarding whether the debt should be exonerated by other estate property not specifically devised. The trial court ruled in favor of Son that a portion of the debt secured by specific devise is to be exonerated. Remainder Beneficiary appealed.

The appellate court reversed. The court began its analysis by examining Estates Code §§ 255.301 and 255.302 which set forth a presumption that a

specific gift passes subject to secured debts unless the will expressly provides otherwise. The court rejected Son's claim that the devise which made no mention of how a secured debt was to be handled specifically stated that it should be exonerated. The court also rejected Son's claim that a will provision granting the executor the ability to transfer property subject to debts meant that if the executor does not exercise discretion, the debt is exonerated.

Moral: Whenever a testator makes a specific gift of property, the will should expressly address the issue of exoneration.

E. Lost Wills

Woods v. Kenner, 501 S.W.3d 185 (Tex. App. – Houston [1st Dist.] 2016, no pet. h.).

After Decedent's death, no will was located and his two children were declared to be his sole heirs. Thereafter, the children sold certain property to Purchaser. Later, a copy of Decedent's will was located which devised his property to his two children *and* his two step-children. The court admitted the will to probate as a muniment of title accepting the explanation that the original could not be found because it was destroyed by Hurricane Ike. The court also granted a bill of review setting aside the previous heirship determination.

The appellate court affirmed. First, the court determined that the probate court's granting of the bill of review was proper, rejecting a claim that a petition for a bill of review must make a prima facie showing of a meritorious claim or defense. All that is necessary, however, is to show substantial error in the prior decision which was the case here because the original order stated that Decedent died intestate which was not true.

Second, the court determined there was sufficient evidence to support the probate court's determination that Decedent did not revoke his will and instead that the original was destroyed by the massive flooding of his house which the hurricane caused.

Interestingly, the case does not address Purchaser's unfortunate situation even though Purchaser was the unsuccessful appellant. Is Purchaser a bona fide purchaser from what at the time of the sale were the legal title holders to the property? If not, would title insurance cover Purchaser's loss of 50% of the property? Will title insurance companies now refuse to insure sales from heirs at least until the time to file a bill of review has run fearing that a later will may be found?

Moral: Heirs should conduct a thorough search for a decedent's will. Of course, they may lack the motivation to do so because the will could disinherit them partially, as in this case, or totally.

F. Will Contest

1. Improper Reason for Disinheritance

Merrick v. Helter, 500 S.W.3d 671 (Tex. App.—Austin 2016, pet. denied).

Testator's will expressly disinherited Daughter. After the court admitted the will to probate, Daughter contested the will claiming that Testator's motive for excluding her violated public policy thus making the will invalid. She claimed that Testator had abused her sexually and that disinheriting her was his "vengeance" when she confronted him about the abuse many decades later. Executor said that these claims against Testator were unsubstantiated and brought only in an attempt to obtain property from the estate. The probate court dismissed Daughter's claim without reaching the merits of the claim because even if true, it would not provide her with a viable basis for setting aside the will. Daughter appealed.

The appellate court affirmed. The court examined Daughter's claims that terms in a will may be unenforceable on public policy grounds. For example (mine, not the court's), if a testator stated, "I leave Daughter $10,000 if you cut off my ex-wife's right hand," such provision would not be enforceable. Agreeing, of course, that Texas public policy condemns sexual abuse and related conduct, the court explained that nothing in the will specifically addressed this topic. Daughter's "challenge is grounded entirely in asserted conditions or limitations that appear

nowhere in the will's text." *Merrick* at *3. The court also emphasized that Daughter had no right or entitlement to an inheritance. A testator may disinherit an heir for any reason be it just or unjust.

Moral: A will contestant attempting to set aside a will or gift in the will on public policy grounds needs to point to express terms of the will which violate public policy.

2. Undue Influence

Matter of Kam, 484 S.W.3d 642 (Tex. App.—El Paso 2016, pet. denied).

Sister sought to admit Father's will to probate. Brother objected arguing that the will which completely excluded him was invalid because of undue influence. The trial court agreed and denied the probate application. Sister appealed.

The appellate court reversed explaining that "means, motive, and opportunity are not enough to show undue influence as a matter of law." *Id.* at 652. The court explained that there was insufficient evidence to support a finding that Father was unable to make his own decisions about the passage of property upon his death. The court recognized that Sister influenced Father to execute his will and that Father was unlikely to have signed his new will without her influence. However, Brother did not present legally or factually sufficient evidence to show that Sister overwhelmed Father's free agency. The evidence showed that Father was strong-willed, mentally sharp, drove his own car, and lived mostly independently. Merely because Father excluded one child from the will is not evidence of undue influence.

Moral: Evidence of undue influence must show that the testator's free will was supplanted by that of the influencer; mere opportunity to do so or assistance with will preparation is insufficient.

G. Tortious Interference With Inheritance Rights

Anderson v. Archer, 490 S.W.3d 175 (Tex. App.—Austin 2016, pet. filed).

The jury determined that Defendant tortiously interfered with Plaintiffs' rights to inherit from their uncle and the court award over $2.5 million in damages. Defendant appealed.

The court reversed holding that Texas does not recognize a cause of action for tortious interference with inheritance. The court conducted a detailed review of the numerous Texas cases discussing tortious interference and determined that although they may have discussed the tort, they never actually recognized it. The court also refused to interpret Estates Code § 54.001 as a legislative admission that the tort exists merely because this provision provides that filing or contesting a will is not tortious interference. The court then explained that express legislative action or a decision of the Texas Supreme Court is needed to recognize the tort.

The court also noted that Plaintiffs had already received the property with which they alleged Defendant tortiously interfered. The main component of their damages was not the recovery of the uncle's property but rather attorneys' fees incurred to receive their inheritance. Thus, Plaintiffs were actually using the tort as a fee-shifting mechanism to recover fees otherwise unrecoverable due to Texas following the American Rule that the winning party cannot recover attorneys' fees unless authorized by statute.

Moral: Whether Texas courts may award damages for tortious interference with inheritance rights is in a state of flux as intermediate appellate courts have differing opinions.

Note: On December 23, 2016, the Texas Supreme Court granted review in *Jackson Walker v. Kinsel* No. 07-13-00130-CV, 2015 WL 2085220 (Tex. App.—Amarillo Apr. 10, 2015, pet. granted), to determine whether Texas recognizes the tort.

IV. ESTATE ADMINISTRATION

A. Venue

In re Davidson, 485 S.W.3d 927 (Tex. App.—Tyler 2016, no pet.).

After Decedent's death but prior to being appointed, Executor sued Decedent's Debtor who was in default on a real estate lien note in Anderson County. Shortly thereafter, Executor was successful in obtaining an order in Anderson County admitting the will to probate and appointing him as the executor although Decedent was domiciled in San Augustine County at the time of his death. Debtor filed a motion to transfer the probate proceeding to San Augustine County. The court refused and Debtor sought mandamus.

The appellate court denied mandamus relief. The court acknowledged that mandatory venue was in San Augustine County, Decedent's domicile at death. Estates Code § 33.001(1). However, only an "interested person" has standing to request a transfer of venue. Estates Code § 33.102(a). The court held that Debtor was not an interested person as defined by Estates Code § 22.018(1). First, Debtor was not a creditor of the estate; Debtor owed money to the estate rather than being entitled to money from the estate. Second, Debtor's claim that Executor violated the Deceptive Trade Practices-Consumer Protection Act by filing in the wrong county did not make her a creditor of Decedent's estate but instead, merely a potential creditor of the Executor. Thus, the court denied mandamus and held that the trial court did not abuse its discretion when it denied Debtor's motion to transfer venue.

Moral: An estate debtor lacks standing to request a court to transfer a probate proceeding from a county of improper venue to a county of proper venue.

B. Appeals

Estate of Davidson, No. 05-15-00432-CV, 2016 WL 4254487 (Tex. App.—Dallas Aug. 11, 2016, no pet. h.).

The probate court appointed co-executors of the testator's estate. Later, a beneficiary of the will petitioned the court to remove the co-executors from office and to recover damages, costs, and attorney fees. The court granted the motion to remove the co-executors and thereafter appointed the beneficiary as the dependent administrator with the will annexed. Over one year later, one of the removed co-executors challenged the court's order removing him from office. The removed co-executor then moved for a new trial and the probate court denied the motion. An appeal followed.

The appellate court instructed the parties to address the issue of whether the original removal order was appealable. The court held that the order was final and rejected the removed co-executor's claim that it was not final because there were still related claims pending in the underlying probate action. The court explained that Texas law is clear that an order removing a personal representative is appealable as it adjudicates a substantial right.

Moral: A judgment removing a personal representative from office is a final judgment for appellate purposes.

C. Muniment of Title

In re Jacky, No. 01-16-00236-CV, 2016 WL 4203421 (Tex. App.—Houston [1st Dist.] Aug. 9, 2016, no pet. h.).

The probate court admitted the testator's will to probate as a muniment of title. After 3.5 years elapsed, the court reopened the estate and appointed an independent executor so the executor could pursue potential claims due to the testator's estate. A writ of mandamus was sought on the basis that the order admitting the will to probate as a muniment of title was a final order and thus the court lacked plenary power to reopen the estate.

The appellate court conditionally granted mandamus stating that the probate court's order was void as its plenary power had already expired. The court explained that the muniment of title order was final and that the two year period to file a bill of review under Estates Code § 55.251 elapsed prior to the probate court's appointment of an executor. The court rejected the argument that the estate did not actually close

because of the potential claim because to accept that proposition would mean "no estate in which a will is admitted to probate as a muniment of title could ever close because there always exists the possibility that an unknown claim needing administration might remain and might not come to light until later."

Moral: A person unhappy with a court admitting a will to probate as a muniment of title must either timely appeal or file a bill of review if the person wishes to have a personal representative appointed to administer the estate.

D. Attorney's Fees

Matter of Kam, 484 S.W.3d 642 (Tex. App.—El Paso 2016, pet. denied).

Sister sought to admit Father's will to probate. Brother objected arguing that the will which completely excluded him was invalid either for lack of proper execution or undue influence. The trial court agreed and denied the probate application. In addition, the court denied Sister's attorney's fees determining that she did not act in good faith or with just cause. Sister appealed.

The appellate court reversed. Because the court ordered that Father's will be admitted to probate, Sister conclusively established that her application was in good faith and with just cause. In fact, the good faith and just cause analysis is irrelevant when the will is actually admitted to probate. Accordingly, Sister was entitled to her attorney's fees under Estates Code § 352.052.

Moral: A successful will applicant is entitled to reasonable attorney's fees and the applicant's good faith or just cause is irrelevant.

E. Late Probate

Byerley v. McCulley, No. 12-16-00124-CV, 2017 WL 605089 (Tex. App.—Tyler Feb. 15, 2017, no pet. h.).

The probate court admitted Testatrix's will to probate nineteen years after her death. The court determined that Applicant was not in default for probating the will within four years of the date of Testatrix's death and that service was made by posting. Heir sought a bill of review asserting that he did not receive sufficient notice.

The appellate court agreed and granted the bill of review. Applicant claimed that under the law at the time of Testatrix's death, service for a late probate by posting was sufficient. Prob. Code § 128(a). Heir asserts that the law applicable when Applicant filed the will for probate governs which requires service on heirs whose addresses can be ascertained with reasonable diligence. Est. Code § 258.001.

The court recognized that when the law was changed to require service in 1999, the legislation contained a savings clause providing that the change to require service on the heirs upon a late probate applied only if the person died on or after September 1, 1999. Prob. Code § 128B. However, when Probate Code § 128B was repealed and replaced by Estates Code § 258.001, there was no express savings clause. Because there was no savings clause and the text of § 258.001 does not limit the applicability of the notice requirements, notice to the heirs was required. Accordingly, admitting the will to probate after only notice by posting was a substantial error justifying the issuance of a bill of review.

Moral: Applicants for a late probate need to provide notice to the heirs regardless of when the testator died.

F. Impact of Survivor's Homestead on Property Value

Estate of Sloan, 496 S.W.3d 299 (Tex. App.—Fort Worth 2016, pet. denied).

Husband and Wife established a homestead on property that was Wife's separate property. Upon Wife's death, Husband was appointed as the independent executor of Wife's will which gave him the right to purchase property in Wife's estate at fair market value which he later did by conveying his interest in $222,000 of property in Wife's estate. After Husband's death, an attempt was made to show Husband had violated his fiduciary duty by purchasing the property for less than its fair market value. The trial court agreed finding that Husband's homestead interest had no effect on the fair market value of the property.

On appeal, the court reversed. The court explained that Husband's right as a surviving spouse to occupy the homestead for the rest of his life (unless he abandons the property) under Tex. Const. art. XVI, § 52, reduces the amount a willing seller would pay for the remainder interest "left over" after Husband's homestead right which is akin to a life estate.

Note that the court did not need to determine the amount of the decrease in value because the parties agreed that if Husband's homestead right lowered the value of the property, then Husband's estate was not liable.

Moral: A surviving spouse's homestead right reduces the fair market value of the homestead property.

V. TRUSTS

A. Jurisdiction

U.S. Bank v. TFHSP LLC Series 6481, 487 S.W.3d 715 (Tex. App.—Fort Worth 2016, no pet. h.).

Beneficiary sued Trustee, a foreign corporation, and received a no-answer default judgment. Trustee appealed. The appellate court examined the pleadings and determined that the trial court lacked personal jurisdiction over Trustee because Beneficiary's service of process was invalid.

The court focused on Estates Code §§ 505.001-.006 which governs service of process on foreign corporate fiduciaries. Beneficiary failed to assert jurisdictional facts such as providing the proper Estates Code section under which service of process should be made and alleging that Trustee was a foreign corporate fiduciary. The court explained that jurisdictional facts cannot be inferred from Trustee's name as found in the petition.

A concurring opinion points out that Beneficiary's failure to reference the proper section of the Estates Code appeared to be a mere typographical error.

Moral: When suing a foreign corporate fiduciary, the plaintiff must be certain to recite the applicable jurisdictional facts and carefully proofread citations to the Estates Code.

B. Parties

Texas Capital Bank v. Asche, No. 05-15-00102-CV, 2017 WL 655923 (Tex. App.—Dallas Feb. 17, 2017, no pet. h.).

The trial court determined that a settlor lacked capacity to create a trust. However, the contestant failed to join the trustee of the trust as a party. Accordingly, the appellate court reversed because "[i]t is well established that suits against a trust must be brought against its legal representative, the trustee." The fact that the same entity was a party to the lawsuit as the settlor's executor was insufficient as "[e]xecutor and trustee are separate and distinct capacities."

Moral: A trust is not a legal entity that can sue or be sued. In any action involving a trust, the trustee in his/her/its representative capacity must be made a party.

C. Lost Trust Instrument

Gause v. Gause, 496 S.W.3d 913 (Tex. App.—Austin 2016, no pet. h.).

Settlor created an inter vivos trust in the 1940's but the trust instrument disappeared shortly after Settlor's death in 1998. Settlor's wife, a primary beneficiary of the trust, claimed that a non-beneficiary child intentionally destroyed or lost the trust instrument. In 2000, this non-beneficiary child convinced her mother (Settlor's wife) who was then in poor health to convey the trust property to her for a nominal consideration. A few months later, Settlor's wife successfully sued her daughter to cancel the deed. Then, in 2002, Settlor's wife conveyed all of the trust property to another of the non-beneficiary children. In 2007, one of the beneficiary children successfully sued to set aside this conveyance and Settlor's wife appealed.

The appellate court affirmed rejecting Settlor's wife's claim that the trial court erred in determining the existence and terms of the trust based on parol evidence. The court explained that a trust instrument is not rendered ineffective merely because it is lost or destroyed if there is

sufficient evidence to prove its contents. In this case, Settlor's wife swore to the terms of the trust when she successfully set aside her 2000 deed. The court also determined that Trust Code § 112.004's statute of frauds requirement of a written and signed document "does not remove trust instruments from the operation of general rules relating to the proof of lost documents." *Gause* at 917. In addition, the court explained that judicial estoppel prevents Settlor's wife from now claiming she had no memory of the trust when she earlier gave detailed sworn testimony about the trust and its contents.

Moral: The existence and terms of a trust may be proven with competent evidence when the original has been lost or destroyed.

D. Receivers

Estate of Hoskins, 501 S.W.3d 295 (Tex. App.—Corpus Christi 2016, no pet. h.).

Litigation over the testator's estate had been ongoing for thirty years. In an attempt to resolve some of the issues, the probate court appointed a receiver with the limited duty of creating a report on the status of the assets in the testator's estate. The appellate court agreed that under the facts of the case, the appointment of a receiver was appropriate.

The court explained that the appointment of a receiver is reviewed under an abuse of discretion standard. After conducting a detailed review of prior litigation and the current status of this protracted litigation, the court found that there was sufficient evidence to support the appointment of a receiver. The court acknowledged that receivership may be a severe remedy but that in this case, the receiver's duty was limited to preparing a report on estate assets. The trustees and administrator retained the power and responsibility to take action after reviewing the receiver's report. The court explained that "[r]ather than the harsh control of a true receivership, the probate court's order resembles another remedy: the appointment of an auditor." *Hoskins* at 309.

Moral: Trust Code § 114.008(a)(5) authorizes the court to appoint a receiver if the facts so justify. An appellate court will not set aside the appointment unless the judge abused his or her discretion.

VI. OTHER ESTATE PLANNING MATTERS

A. Power of Attorney

Wise v. Mitchell, No. 05-015-00610-CV, 2016 WL 3398447 (Tex. App.—Dallas June 20, 2016, pet. denied).

Grandmother (Principal) transferred land to Grandson retaining a life estate, the authority to sell, and the power to change the remainder owners. Agent, under a durable power of attorney, entered into a contract to sell the land and filed a revocation of the original deed and alternatively, appointed different individuals as the remainder owners. Agent was later appointed as Principal's guardian and requested court permission to sell the property. Before the court could rule on the motion, Principal died. Agent was then appointed as Principal's executor. A protracted dispute arose between Grandson and Principal over the land. After Principal prevailed, Grandson appealed.

The appellate court affirmed. The court explained that Agent's failure to file the durable power of attorney before entering into the real property transaction did not impact the validity of the revocation. In addition, the statutory provision Grandson alleged Agent did not follow was not part of Texas law although it is part of the Uniform Power of Attorney Act which Texas has not adopted. The court also explained that the form Principal used was not the statutory one and thus Agent's powers are determined by its terms. The court determined that the language granting Agent the power to "perform any and all acts in my stead and to do and perform all such other matters as may be necessary and expedient for the purposes of carrying out the objects above mentioned" was sufficient to authorize Agent to revoke the deed.

Moral: The facts in the case occurred prior to the enactment of the Texas Real Property Transfer on Death Act, Estates Code ch. 114. Although § 114.054(b) precludes the creation of

a transfer on death deed by an agent, it does not speak to whether an agent may revoke an already existing TODD. To avoid controversy, prudent practice may be to expressly address this issue in the durable power of attorney.