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, Boston University School of Law (2014)

SELECTED HONORS

Order of the Coif
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 (2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech University) (2015) (2013) (2010) (2009) (2007) (2006)
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

Author and co-author of numerous law review articles, books, and book supplements including 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 2002); 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); *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).

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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 25, 2015 (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. INTESTACY

No cases to report.

III. WILLS

A. Interpretation

1. "Common Disaster"

Stephens v. Beard, 428 S.W.3d 385 (Tex. App.—Tyler 2014, pet. filed).

Husband murdered wife, immediately shot himself, but he did not die until a few hours later. Each will provided for legacies to named individuals if Husband and Wife died in a common disaster or if their death order could not be determined. The wills also provided that if one spouse failed to survive by 90 days that their property would pass to various contingent beneficiaries. The trial court determined that the legacies were effective because the spouses died in a common disaster.

The appellate court affirmed. The court held that the murder-suicide was a common disaster because Husband fired both the murder and suicide gunshots in one episode. The court determined it was irrelevant to the classification of the event as a common disaster that Husband "did not successfully kill himself immediately." *Id.* at 388. The court also determined that the 90-day survival period for the contingent gifts did not apply to the legacies because the survival language was not included in those gifts.

Moral: A murder-suicide may be considered a common disaster if that term is undefined in a will.

2. No Ambiguity

Dawkins v. Hysaw, 450 S.W.3d 147 (Tex. App.—San Antonio 2014, pet. filed).

Testatrix devised surface rights to tracts of land of different acreage to each of her three children. The children also received the mineral rights but subjected to royalty interests. After all the children died, the grandchildren fought over one of the children's royalty interest described as "an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any [of the tracts]." One group of descendants argued that the will granted a fractional royalty to each child (1/24) and another group argued that the will required the children to share all royalties equally. The trial court held that the royalties were to be shared equally.

The appellate court reversed holding that the will was unambiguous in giving this child the surface and mineral estate subject to a fixed fraction royalty to each of the other two children. The court engaged in an extensive discussion of the difference between fractional royalties (constant or fixed fraction of production) and fraction of royalty interests (floating fraction of whatever royalty interest is reserved in the lease). The court determined that different children received different types of interests thus rejecting the argument that Testatrix actually intended for all children to share all royalties equally. The court explained that even if she may have intended the children to share equally, the court is bound by the unambiguous words of her devises.

Moral: Wills granting interests in oil and gas properties need to be carefully drafted to assure that the interests being conveyed comport with the testator's intent. Prudent practice is to consult with an oil and gas expert when phrasing the terms of the grant.

B. Contractual Will

Estate of Finney, 424 S.W.3d 608 (Tex. App.—Dallas 2013, no pet.).

Testator's contractual will bequeathed Beneficiary $1,000,000 "on the express condition that she . . . reside with and care for me until my death." Testator provided a gift over to Daughter if Beneficiary failed to satisfy the condition. After Testator died, Daughter claimed that Beneficiary did not meet the condition. However, the jury found that Beneficiary did comply and the court signed a judgment awarding the bequest to Beneficiary. Sister appealed.

The appellate court affirmed. The key issues were not based in wills law, but rather in the law of evidence. For example, Daughter complained that the trial court erred when it excluded evidence of lifetime gifts Testator made to Beneficiary. The trial court determined that risk of unfair prejudice was greater than the probative value of the evidence and the appellate court agreed. Although not specifically discussed in the opinion, it would appear that Daughter was attempting to claim that the bequest was partially satisfied by lifetime gifts. Of course, mere proof of lifetime gifts is insufficient to show satisfaction; a writing indicating the "satisfaction nature" of the gift is needed under Estates Code § 255.101.

Moral: An estate litigator needs to be very familiar with the Texas Rules of Evidence.

C. Will Contests

1. Standing

In the Estate of Perez-Muzza, 446 S.W.3d 415 (Tex. App.—San Antonio 2014, pet. denied, rehearing filed).

The trial court dismissed will contestant's action for lack of standing on the ground that she was estopped from contesting the will. Even though she was not a beneficiary under the will, she had already accepted property that belonged to the decedent, had accepted the benefits of a non-probate asset, and had entered into an agreement with other estopped individuals. The appellate court reversed.

The court began its analysis by recognizing that a person who has standing to contest a will under Estates Code §§ 55.001 and 22.018 may lose that standing if the person accepts benefits under the will. The court explained that the contestant did not accept benefits under the will because she merely received some of the decedent's property from a donee of the will's beneficiary. (The property in question went from the testator's estate, to the will beneficiary who then gave it to a third person who later gave it to the contestant.)

The court then addressed whether the contestant's acceptance of funds from a pay on death account the testator established would prevent her from contesting the will. The court explained that accepting benefits of a non-probate asset is not akin to accepting benefits under a will and thus the acceptance could not operate as an estoppel.

The court also rejected the argument that the contestant was estopped because she entered into an agreement to share the proceeds of any future settlement of the will contest with parties who were actually estopped from contesting. Likewise, the court determined the trial court's

dismissal of the contest as a sanction for the contestant's misstatements in her affidavit was too extreme of a sanction for her misbehavior and actually deprived her of due process.

Moral: Even though the contestant in this case was allowed to continue with her action, it would be prudent for a will contestant to refrain from accepting property that came from the testator's estate and to be truthful when submitting documents to the court, signing affidavits, and giving testimony.

2. Undue Influence

In re Estate of Reno, 443 S.W.3d 143 (Tex. App.—Texarkana 2009, no pet.).

Note: This case was released at the end of 2014. The reason for the five-year delay is unknown.

Testatrix wrote a will and a codicil thereto in the early 2000's and another will in 2007. After her death, the children of her first marriage successfully probated the first will and obtained a ruling that Testatrix was incompetent to execute the 2007 will and that the will resulted from undue influence.

Proponent of the 2007 will, the child of Testatrix's second marriage, appealed. Although the court agreed with Proponent that there was insufficient evidence to support the finding that Testatrix lacked testamentary capacity, the court affirmed the trial court's decision not to admit the 2007 will to probate because there was sufficient evidence to demonstrate each of the three main elements of undue influence as set forth in the leading Supreme Court of Texas case of *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963): (1) the existence and exertion of an influence (2) that subverted or overpowered the mind of Testatrix at the time of will execution (3) so that she executed a will that she would not otherwise have executed but for the influence.

The court examined key evidence such as the fact that the Proponent wrote the 2007 will without the intervention of a lawyer or anyone else and that she had constant contact with Testatrix. In fact, Proponent moved Testatrix into a nursing home, did not notify other family members, and told the nursing home not to reveal to family members that Testatrix was a resident. The court noted that Testatrix was susceptible to undue influence as she was in a weakened physical and mental condition, in hospice care, and had occasional episodes of disorientation and confusion. The court also pointed out the tremendous difference between the wills; the 2007 will left virtually Testatrix's entire estate to Proponent, while the earlier will made gifts to all of Testatrix's children and grandchildren as well as various charitable gifts. Although none of these facts standing alone would support a finding of undue influence, all of them taken together were enough to show the trial court's finding of undue influence was not against the great weight of the evidence.

Moral: A trial court's finding of undue influence will be difficult to set aside and thus the proponent of the contested will needs to put on the best possible evidence during the trial.

IV. ESTATE ADMINISTRATION

A. Jurisdiction

1. Family Settlement Agreements

Carter Ex Rel. Estate of Haley v. Campbell, 427 S.W.3d 503 (Tex. App.—Austin 2014, no pet.).

Siblings agreed to a family settlement dividing their mother's estate in approximately equal shares rather than under the mother's will, which provided for her children to receive unequal shares. The siblings also agreed for one of them to serve as the independent executor. Several years later, one of the other siblings requested an accounting and distribution. The executor sibling objected claiming that the family settlement agreement deprived the court of jurisdiction. The trial court disagreed and the executor appealed.

The appellate court affirmed stating that "the mere existence of a family settlement agreement does not automatically take an estate entirely outside of probate court jurisdiction." *Id.* at 506. The court explained that it had jurisdiction because the mother's estate was still under administration by the independent executor. The

family settlement agreement merely altered the distribution of the mother's estate; there was no agreement to waive any right to seek judicial remedies.

Moral: A family settlement agreement does not deprive a court of jurisdiction over the estate.

2. Foreign Personal Representative

Diaz v. Elkin, 434 S.W.3d 260 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Both the trial and appellate courts agreed that Texas courts lack jurisdiction over a personal representative who obtained that status under the law of another nation, especially when there is no estate property located in Texas. In this case, estate beneficiaries claim that a co-executor appointed by the courts of Peru breached her fiduciary duties. The court rejected the plaintiffs' assertion that they were suing the co-executor in her individual capacity rather than as a fiduciary. The court explained that the co-executor's fiduciary duties arose only from the plaintiffs' relationship with her as a co-executor, rather than with her individually.

Moral: Texas courts lack jurisdiction over a personal representative appointed by a foreign state or nation with regard to the representative's fiduciary duties even if the fiduciary lives in Texas.

3. Bill of Review

Smalley v. Smalley, 436 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2014, no pet. h.).

While married, Husband, an employee covered by the Federal Employees' Retirement System, named Wife as the beneficiary of a savings plan and savings bonds. Their petition of divorce awarded these assets to Husband. Husband died without making any changes to the beneficiary designations and Wife collected these assets. The independent executor then sought to enforce the terms of the divorce decree and reclaim these assets for the estate. Both the trial and appellate court in an earlier case held that the divorce decree operated as a waiver of Wife's right to claim these assets. In addition, the court determined that federal law did not preempt the terms of the divorce decree.

Subsequently, the Supreme Court of the United States decided *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), which held that local law voiding an ex-spouse beneficiary designation on an insurance policy governed by the Federal Employees' Group Life Insurance Act of 1954 was preempted by federal law allowing the ex-spouse to collect the proceeds. Wife filed a statutory bill of review along with a petition for a writ *audita querela* claiming that the prior decision must be set aside because of the *Hillman* opinion. The executor then filed a motion to dismiss for lack of jurisdiction. The probate court granted the motion to dismiss and Wife appealed.

The appellate court affirmed holding that the trial court properly considered the motion to dismiss because the motion challenged the court's subject matter jurisdiction. The court explained that a statutory bill of review under Probate Code § 31 [recodified in Estates Code § 55.251] permits the probate court to revise or correct an order that the court itself previously made. In this case, however, Wife is trying to set aside the appellate court's prior affirmance of the probate court's decision. Thus, the probate court had no jurisdiction over the bill of review.

The court also rejected Wife's writ of *audita querela* for lack of jurisdiction. The court explained that there is no authority that this common law writ is available as a remedy under Texas law to extend the probate court's jurisdiction to an attack on an appellate court's judgment.

Moral: A bill of review cannot be used to modify a probate court judgment once an appellate court has issued its mandate and it is problematic whether Texas courts will recognize *audita querela* writs.

B. Venue

In re Hannah, 431 S.W.3d 801 (Tex. App.—Houston [14th Dist.] no pet. h.).

A dispute arose regarding the proper court that has venue over a tortious interference with inheritance rights case. Plaintiff filed suit in a

county in which one of the alleged tortfeasors was domiciled. This defendant later claimed that the action was related to a probate proceeding and thus should be heard in the county in which the decedent was domiciled at the time of death. The judge agreed and transferred the case. Plaintiff then sought mandamus relief.

The appellate court conditionally granted a writ of mandamus. The court focused on the definition of "probate proceeding" in Estates Code § 31.001 and determined that the tortious interference case did not fall within any of the enumerated proceedings. The court explained that the action was one for money damages based on alleged conduct amounting to tortious interference. There was no will contest, no claim of heirship, and no claim that the decedent owed money to Plaintiff. No probate law would be involved in resolving the case; instead, it would be tort law. In addition, any judgment against the defendants would not be paid from assets of the decedent's estate. As the court stated, "The only connection between relator's suit and the decedent's estate is the measure of damages–i.e., what, if anything, relator would have received through probate proceedings were it not for the defendants' alleged actions." *Id.* at 809.

Accordingly, the trial court abused its discretion by not following Plaintiff's election to have venue in the county where one of the defendants was domiciled pursuant to Civil Practice and Remedies Code § 15.017.

Moral: An action for tortious interference with inheritance rights may not necessarily be treated as a probate proceeding.

C. Interested Person

In re McDonald, 424 S.W.3d 774 (Tex. App.—Beaumont 2014, mand. denied).

Father claimed that he had standing to participate in the probate proceedings for his deceased Son as an "interested person" under Estates Code § 22.018 based on (1) his status as a creditor because he paid for Son's funeral expenses and (2) his interest in the welfare of his minor grandson who was born as a result of a relationship between Son and a woman who may or may not be Son's wife. The trial court determined that Father was not an interested person. Father then sought mandamus relief.

The appellate court determined that the trial court abused its discretion and thus conditionally granted a writ of mandamus. The court explained that the evidence clearly showed that Father paid for many expenses associated with Son's funeral and thus Father is a creditor who has standing under the plain language of the Estates Code. The court also held that Father had standing in both the administration and heirship proceedings because the alleged wife decided to combine them in the same cause.

The alleged wife claimed that since she had deposited funds with the registry of the court, which would cover Father's claim, that Father was no longer an interested person. The court rejected this argument because once an administrator is appointed, he or she could dispute Father's claim and refuse to pay it.

The court also reviewed Father's claim that he had standing because of being interested in the welfare of his son. After reviewing the evidence, such as the Texas Department of Family and Protective Services order placing Son in Father's custody, the court determined that Father had standing in this role as well.

Likewise, the court determined that it was improper for the trial court to deny Father a jury trial because he timely filed a written demand for a jury trial and paid the jury fee.

Moral: A creditor of an estate, as well as a person interested in the welfare of minor who is potentially an heir, has standing to participate in estate proceedings.

D. Appeal

1. Accelerated Appeal

Estate of Fisher, 421 S.W.3d 682 (Tex. App.—Texarkana 2014, no pet.).

After Testator's will was filed for probate, Contestant claimed the will was the product of undue influence. The trial court determined there was no evidence of undue influence and issued a partial no-evidence summary judgment against

Contestant. Contestant then filed an accelerated permissive appeal under Civil Practice & Remedies Code § 51.014(d).

The appellate court held that it lacked jurisdiction, thereby dismissing the permissive appeal. The court began its analysis by recognizing that the summary judgment was an interlocutory order and thus not appealable unless the special accelerated permissive appeal provision applies. The court explained that the procedure requires that the order involve a "controlling question of law." In this case, the controlling issue was fact-based, that is, whether undue influence was exerted. Accordingly, Contestant will have to wait and appeal a later order such as an order admitting the will to probate

Moral: A party seeking an accelerated permissive appeal needs to have a claim that a controlling issue of law was improperly decided and not a mere disagreement about fact-finding.

2. Jurisdiction

In re Estate of Aguilar, 435 S.W.3d 831 (Tex. App.—San Antonio 2014, no pet. h.).

After plaintiffs in a wrongful death action sued the alleged tortfeaser in El Paso County, the personal representative filed a motion to transfer the case to Bexar County where the administration of the decedent's estate was pending. The probate court granted the motion under Estates Code § 34.001. The plaintiffs appealed.

The appellate court held that it lacked jurisdiction to hear the appeal. The court explained that a transfer under Estates Code § 34.001 "is essentially a specialized form of venue transfer for matters relating to a probate proceeding pending in a probate court." *Id.* at 833. The decision to grant the motion is thus interlocutory and the plaintiffs must wait until a final judgment before appealing the venue ruling.

The court recognized that mandamus relief is available when a court allegedly transfers a case to itself without statutory authority. The court also noted that in some situations the court may treat an appeal as a petition for a writ of mandamus. In this case, however, this option was not available because the appellants did not make a specific request that the appeal be treated as a mandamus petition.

Moral: A party seeking relief when a court transfers a case improperly should be certain to request that its appeal be treated as a mandamus petition to invoke the appellate court's original jurisdiction.

E. Personal Representative Qualification

Gossett v. Back, No. 05-13-00283-CV, 2014 WL 3828217 (Tex. App.—Dallas 2014, no pet. h.).

The trial court determined that the named executor was disqualified from serving due to several conflicts of interest. For example, in her capacity as the decedent's agent, she had transferred property to herself that may have breached her fiduciary duties. If she were appointed as the executor, she would then have to sue herself to set aside the transfer. The named executor appealed.

The appellate court affirmed. The court explained that as long as there is more than a scintilla of evidence supporting the trial court's finding, the named executor's no-evidence challenge must fail. The court then examined the facts and determined that more than enough evidence existed to support the trial court's finding that the named executor was unsuitable under Probate Code § 78(e) [recodified as Estates Code § 304.003(5)].

Moral: A person deemed unsuitable to serve as a personal representative will have a difficult time overturning that finding on appeal as long as there is at least a scintilla of evidence supporting the trial court's determination.

F. Late Probate – Proponent in Default

Orr v. Walker, 438 S.W.3d 766 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.).

Testatrix died in 1992 and her will was not probated. In 2006, one of Testatrix's daughters (Marguerite) died and her executrix (her daughter, Charlotte) found Testatrix's will, told

her sister (Mary) about it, and gave a copy to her uncle (Kenneth) in 2007. After Kenneth died, Mary filed an application to probate Testatrix's will in 2012. Kenneth's wife (Lucy) opposed the application claiming that Mary was in default for not timely probating Testatrix's will. The trial court agreed and Mary appealed.

The appellate court affirmed. The court began its analysis by explaining that Mary had the burden of showing she was not in default in failing to present Testatrix's will for probate within four years of her death under Probate Code § 73 [recodified as Estates Code § 256.003]. Lucy claimed that Marguerite's failure to probate the will should be imputed to Mary. The court explained that there is a split of authority between the courts of appeal regarding whether an heir's default passes on to the heir's successors in interest. However, the court did not reach this issue holding that the evidence sufficiently showed that Mary herself was in default by her own inaction to probate Testatrix's will.

Mary had knowledge of the will back in 2006, which is more than four years before she attempted to probate the will. The court explained that "to maintain the status of non-defaulting, Mary . . . had to take reasonable actions to timely file the application after the date of discovery." *Id.* at 769. Thus, by waiting more than four years, Mary lost her status as being not in default even assuming Marguerite's default is not imputed to her.

Moral: Once a "stale" will is discovered, a person who wishes to probate that will should do so in a timely manner.

G. Attorney Fees

Jones v. Coyle, 451 S.W.3d 486 (Tex. App.—Dallas 2014, no pet. h.).

Independent Executrix demanded that Beneficiary return property belonging to Testatrix so that this property could be properly administered. Beneficiary refused and the probate court allowed Beneficiary to retain the estate property. After obtaining a writ of mandamus to force the turnover, Executrix asked the probate court to award her attorneys' fees against Beneficiary under Probate Code § 242 [recodified as Estates Code § 352.051]. The probate court refused and Executrix appealed.

The appellate court affirmed, holding that the probate court lacked the discretion to hold Beneficiary responsible for the attorneys' fees. Instead, the estate is responsible for the fees. The court explained that Texas follows the "American Rule" that fee awards are not allowed unless expressly authorized by a statute or a contract. The court closely examined the statute and found no basis for shifting the fees from the estate to the losing party. Although the statute is written in the passive voice and does not state from whom the court should order the payment of fees, the court noted that fees are awarded regardless of whether the personal representative wins or loses the case. Thus, it is implied that the estate is responsible, not another party.

The court did, however, provide future litigants with sage advice by recommending that they seek attorneys' fees under other statutes, which authorize them such as the Texas Theft Liability Act.

Moral: Under the Estates Code, the court lacks the authority to award the winner's attorneys' fees against the losing party even if failure to do so significantly reduces the size of the decedent's estate.

Note: In a trust case, however, Property Code § 114.064 allows the court to make an award of costs and attorneys' fees against any party as long as the award is "equitable and just."

V. TRUSTS

A. Jurisdiction

1. Mediator

In re Willa Peters Hubberd Testamentary Trust, 432 S.W.3d 358 (Tex. App.—San Antonio 2014, no pet.).

Father established a testamentary trust for Daughter. After a dispute arose regarding the depreciation allowance applicable to distributions from mineral income, all the parties and their

attorneys signed a mediated settlement agreement modifying the terms of the trust. After the probate court issued orders in compliance with the settlement agreement, Daughter appealed.

Daughter claimed that the probate court lacked jurisdiction to order the modification because the mediator (rather than a trustee or a beneficiary) filed the petition. Daughter pointed to Property Code § 112.054, which limits the persons who may request deviation to trustees and beneficiaries. The appellate court rejected Daughter's contention explaining that the mediator, a lawyer, was acting as an agent for the beneficiaries and thus had authority to file the petition.

Moral: A person acting as an authorized representative of a beneficiary has standing to file petitions on behalf of the beneficiary.

2. Contrasted with Family Court

Warren v. Weiner, No. 01-13-01077-CV, 2015 WL 505208 (Tex. App.—Houston [1st Dist.], Feb. 5, 2015, no pet. h.).

Mother and Father created a trust for a child and named themselves as co-trustees. Mother and Father divorce, however, the divorce decree provided for them to continue serving as trustees. They are now accusing each other of violating the terms of the trust. Mother brought an action in probate court to terminate the trust or remove Father as a co-trustee. Father claimed that the probate court lacked jurisdiction because the family court has continuing, exclusive jurisdiction. The probate court agreed and Mother appealed.

The appellate court reversed. The court determined that the Family Code did not give the family court exclusive jurisdiction over the trust. Instead, the family court has exclusive jurisdiction only over matters implicating the Family Code. The divorce decree cannot grant or waive a court's jurisdiction by agreement.

The court also determined that the family court did not have dominant jurisdiction. The claims of breach of trust were not connected with the divorce proceedings in family court. Neither the child nor the trust were parties to the divorce. There was no dispute relating to the trust at the time of the divorce.

Moral: A family court does not acquire exclusive jurisdiction over a trust even though trust matters may be covered in the divorce decree.

B. Principal and Income Allocation

In re Estate of Jones, 422 S.W.3d 775 (Tex. App.—Texarkana 2013, no pet.).

Testator died owning annuities which were payable to his estate. Based on the terms of Testator's will and trusts created thereunder, it became pivotal to determine whether the death benefits payable from the annuities are considered principal or income. If they are income, Surviving Spouse would receive them all, but if they are principal, then she would only receive the income generated by the proceeds of the annuities. The trial court determined the death benefits were principal and Surviving Spouse appealed.

The appellate court affirmed. The court engaged in a sophisticated discussion of the applicable provisions of the Texas Trust Code, which are based on the Revised Uniform and Principal Act, in reaching the conclusion that the death benefits were principal at the time when they became due and payable. The benefits were a single payment owed because of Testator's death and payable to Testator's estate. The benefits were not payable to the trust to which they were later allocated and they were not a right to receive future payments or an annuity. See Prop. Code § 116.164 (deemed "persuasive, analogous authority that the death benefits (similar to insurance policy proceeds)" are principal).

The court also explained that the initial characterization of the benefits as principal would not change merely because the estate purchased five-year annuities with the benefits and transferred the annuities from Testator's estate into a trust. See Prop. Code § 116.161 (proceeds from the sale of principal are allocated to principal).

Moral: Annuities payable to a decedent's estate are principal even if they, or their proceeds, later pass into a trust.

C. Deviation

In re Willa Peters Hubberd Testamentary Trust, 432 S.W.3d 358 (Tex. App.—San Antonio 2014, no pet.).

Father established a testamentary trust for Daughter. After a dispute arose regarding the depreciation allowance applicable to distributions from mineral income, all the parties and their attorneys signed a mediated settlement agreement modifying the terms of the trust. After the probate court issued orders in compliance with the settlement agreement, Daughter appealed.

Daughter claimed that the probate court erred in ordering the modifications under Property Code § 112.054 because the order was inconsistent with the material purposes of the trust, she did not agree to them, they did not conform to Father's intentions, and one of the modifications was not contained in the agreement. The court carefully reviewed the trust and the modifications and decided that the probate court abused its discretion in ordering some, but not all, of the modifications. The court explained that the parties could not agree to modifications that are inconsistent with a material purpose of the trust because the statute does not authorize these deviations.

Moral: The court will not authorize a deviation from the terms of a trust that is not clearly authorized by Property Code § 112.054 even if the beneficiaries agree to the change.

D. Breach of Fiduciary Duty

Ward v. Stanford, 443 S.W.3d 334 (Tex. App.—Dallas, 2014, pet. filed).

Beneficiary sued Trustee alleging that Trustee did not timely attempt to collect on a promissory note which the Settlor executed payable to the trust. The trial court rendered summary judgment against Beneficiary on a variety of grounds based on the running of the statute of limitations or res judicata. Beneficiary appealed.

The appellate court first examined whether the promissory note was negotiable because the statute of limitations applicable to the Trustee's ability to sue on the note would be six years if the note were negotiable, but only four years if it were non-negotiable. After a detailed review of the note and the elements of negotiability, the court held as a matter of law that the note was negotiable and thus the six-year statute of limitations applied. After a further review of the evidence, the court concluded that there were fact issues regarding whether the note's due date was accelerated and if so, whether that acceleration was withdrawn, revoked, or abandoned.

The court then addressed the key issue, that is, when did Beneficiary's cause of action for breach of fiduciary duty accrue. Beneficiary claims it accrued on the *last* date the Trustees could have sued on the note without being barred by the statute of limitations. Trustees claim it accrued on the *first* date Trustees could have filed suit on the note. The court rejected both of these claims, as they were extreme. If it accrued immediately, the breach could occur unreasonably soon, but if accrued on the last date, then the breach could occur unreasonably late. Accordingly, the court held the date on which Trustee's failure to sue on the note breached a fiduciary duty by causing Beneficiary an injury is a fact question. Likewise, there remained genuine issues of material fact that needed to be resolved to determine when Beneficiary discovered or should have discovered Beneficiary's injury, perhaps delaying the running of the statute of limitations.

Moral: Beneficiaries should closely monitor the actions of their trustees, request regular and timely accountings, and promptly bring actions for breach of fiduciary duties.

E. Distribution Upon Termination

Kellner v. Kellner, 419 S.W.3d 541 (Tex. App.—San Antonio 2013, pet. denied).

The settlor created an inter vivos trust to terminate at her death with the property passing to the executor of her estate to then be disposed of according to the terms of her will. After the settlor died, her will was admitted to probate as muniment of title. A dispute arose between the

beneficiaries named in the will and one of the trustees who claimed the property was still in the trust and should pass by intestacy. The trial court agreed with the trustee.

The appellate court reversed. The court explained that after the settlor died and the trust terminated, the title to the trust property immediately vested in the beneficiaries named in the settlor's will.

Moral: Title to trust property that passes through a will automatically vests in the beneficiaries of the will in the same manner as non-trust property.

VI. OTHER ESTATE PLANNING MATTERS

A. Malpractice

Messner v. Boon, No. 06-14-00020-CV, 2015 WL 407928 (Tex. App.—Texarkana, Jan. 28, 2015, pet. filed).

Administratrix filed suit against Attorney alleging malpractice for representation of (1) Decedent while Decedent was alive and (2) Executrix after Decedent died. The trial court granted a take-nothing judgment against Administratrix and she appealed. The appellate court held that Administratrix had standing to pursue claims for malpractice which Decedent had while alive but lacked standing with regard to Attorney's representation of Executrix.

With regard to the claim that Attorney was negligent in the representation of Decedent, the court followed the clear line of authority of Supreme Court of Texas cases holding that although Attorney owes no duties to non-client beneficiaries, Attorney owed duties to Decedent and it is those duties which Administratrix claims were breached. In other words, Administratrix is merely bringing the action Decedent could have brought had he not died.

However, with regard to Attorney's duties to Executrix, those duties are owed only to Executrix. Thus, a successor personal representative such as Administratrix lacks standing to bring those claims. The court rejected Administratrix's claim that she stepped into Executrix's shoes when she took office and thus could bring whatever claims Executrix could have brought if she had remained in office. The court explained that Decedent could not have brought suit against Attorney for this alleged malpractice and thus neither can Administratrix. Of course, Executrix or her estate has standing to bring a malpractice claim against Attorney.

Moral: A successor personal representative lacks standing to sue an attorney for malpractice who provided advice to a previous personal representative.

B. Multiple-Party Accounts

Mims-Brown v. Brown, 428 S.W.3d 366 (Tex. App.—Dallas, no pet.).

Depositor opened an account checking the box that stated, "Joint Tenants with Right of Survivorship." Both the depositor and the other joint party (depositor's step-mother, I think) signed the account contract. In addition, the terms of the contract incorporated both existing and subsequent consumer information brochures which explained that a joint account with right of survivorship means that "on the death of any account holder, the deceased party's ownership of the account passes to the surviving account holders." Upon Depositor's death, Depositor's surviving spouse claimed that the account did not meet the statutory requirements to imbue the account with the survivorship feature. The trial court rejected this claim and the surviving spouse appealed.

The appellate court affirmed. The court conducted a detailed review of the account contract and the applicable provisions of the Probate Code in determining the account had the survivorship feature. The court rejected the surviving spouse's argument that the safe harbor language set forth in the statute had to be followed precisely to create the right of survivorship. Instead, the court pointed to the statutory language, which clearly shows that the exact language of the statute is not necessary as long as it is substantially similar.

Moral: Financial institutions are well-advised to use the precise language of the Estates Code on their account contracts to avoid claims such as the one made in this case. Likewise, estate

planners should carefully inspect the signature cards and account contracts of clients to ascertain that the language used will carry out their clients' intent and unlikely give rise to litigation.

C. Inherited Individual Retirement Accounts

Clark v. Rameker, 134 S. Ct. 2242 (2014).

The Supreme Court of the United States in a unanimous opinion held that funds contained in an inherited IRA are not exempt from the owner's bankruptcy estate. These funds are not the "retirement funds" of the new owner but are instead part of the owner's general assets.

Moral: A person who inherits an IRA may need to take steps to protect those funds from creditor attack. If in Bankruptcy, use the Texas exemptions that protect inherited IRAs. Property Code § 42.0021.

D. Homestead

Wassmer v. Hopper, No. 08-12-00331-CV, 2014 WL 6865445 (Tex. App.—El Paso, Dec. 3, 2004, no pet. h.).

Husband and Wife purchased a home while married. After Husband died intestate, Husband's children from a prior marriage attempted to force Wife to sell her interest in the homestead (her one-half outright ownership of the community property home plus her homestead right to occupy the entire homestead for life or until abandonment).

The appellate court first examined Wife's claim that Husband's children had no standing because they had already conveyed their interest in the home to a third-party. The children claim they conveyed the property to a limited liability company to protect their interests during the appeal and would then have the LLC reconvey the property to them after the appeal is resolved. Nonetheless, there was no current controversy between the children and Wife; therefore the children lacked standing with regard to any issues regarding the homestead.

The court also held that Wife has the exclusive right to use and possess the homestead regardless of the desires of the current title holder and that the homestead cannot be partitioned as long as Wife maintains the property as her homestead.

Morals: A party who wants to make claims with respect to inherited property must own that property when making a claim. Persons inheriting property subject to a homestead right must wait patiently for the homestead claimant to die or abandon the homestead before they can use or occupy it; they cannot force a premature partition.

E. Tortious Interference With Inheritance Rights

Jackson Walker v. Kinsel, No. 07-13-00130-CV, 2015 WL 729518 (Tex. App.—Amarillo, Feb. 13, 2015, no pet. h.).

A jury found that Defendants were liable for tortiously interfering with their inheritance rights. The trial court then awarded damages as well as other remedies in an attempt to undo the interference. Defendants appealed not on the ground that their conduct was not tortious, but rather that the tort is not recognized as a cause of action.

The appellate court agreed and reversed. The court based its holding on the fact that neither the Supreme Court of Texas nor the Fort Worth Court of Appeals have expressly recognized the tort. [The Supreme Court of Texas transferred the case from the Fort Worth Court to the Amarillo Court as part of its docket equalization efforts.]

The strong dissent points out that six of the Texas intermediate appellate courts previously recognized the tort, including the Amarillo court. Additionally, six other courts, including the Fort Worth court, discussed the tort assuming it was a valid cause of action.

Note: Surprisingly, neither opinion cited to Estates Code § 54.001 [formerly Probate Code § 10C], which, in my opinion, impliedly provides legislative recognition of the tort. In relevant part, this section states, "The filing or contesting in probate court of a pleading relating to a decedents' estate does not constitute tortious interference with inheritance of the estate." Why would the legislature say something cannot be

tortious interference if Texas does not recognize the tort in the first place?

Moral: At the moment, individuals residing in the areas encompassed by the Fort Worth Court of Appeals may tortiously interfere with inheritance rights without fear of liability if they are lucky enough to have the case transferred to the Amarillo court.

F. Power of Attorney

1. Standing

Dawson v. Lowrey, 441 S.W.3d 825 (Tex. App.—Texarkana 2014, no pet. h.).

Decedent named Son as a party to a joint bank account with rights of survivorship. Several years later, Decedent also named Son as his agent under a durable power of attorney. Two days before Decedent's death, a former step-child assisted Decedent in opening a pay on death account which named Son, Daughter, and two former step-children as the P.O.D. payees. The money came from Decedent's joint account. Shortly thereafter, Son used his authority as Decedent's agent to close this account. After Decedent's death, one of the stepchildren brought suit against Son to recover the funds he would have received as a P.O.D. payee. The trial court granted Son a summary judgment and this appeal followed.

The appellate court affirmed. The court began its analysis by examining the signature card for the P.O.D. account. It determined that it was properly signed and created a P.O.D. account even though the signature card did not precisely track the statutory language.

The court next evaluated whether the former stepchild had standing to assert that Son breached his fiduciary duties to Decedent and then obtain a constructive trust on the P.O.D. account proceeds. Son replied that his duties were owed to Decedent and that it is Decedent's estate that would have standing to complain about his conduct. The court agreed and declined to recognize "an estate in anticipation" in a P.O.D. account. The court also explained that although Son may have engaged in self-dealing, "the statutory scheme establishing and governing the use of durable powers of attorney does not authorize a stranger to the ceded power to request an accounting." *Id.* at 836. The legislature could expand the right to demand an accounting to persons who at one time had the potential of receiving a largess from the principal but it has not done so.

A dissenting judge argued that the disgruntled P.O.D. payee had standing to assert a breach of fiduciary duty against Son.

Moral: An agent's breach of duty could escape remedy if the injury is not to the principal's estate, beneficiaries, or heirs because third parties lack standing to complain.

2. Duties of Agent

Jordan v. Lyles, No. 12-13-00035-CV, 2015 WL 393791 (Tex. App.—Tyler Jan. 30, 2015, no pet. h.).

Agent was accused of breach of fiduciary duty by placing a significant portion of Principal's property into accounts naming her as a pay on death beneficiary or giving her survivorship rights.

The appellate court first addressed whether Principal's heirs had standing to bring a suit for breach of fiduciary duty. The court explained that normally an heir lacks standing because the principal's personal representative usually has the exclusive right to bring the suit. However, because Principal's estate was handled with a muniment of title, there was no executor appointed and thus the heirs had standing.

The jury awarded the heirs damages for breach of fiduciary duty and tortious interference with inheritance rights. However, the court granted Agent's motion for a judgment notwithstanding the verdict. Agent argued that the court was correct because the transactions were fair to Principal. However, Agent was unable to prove that she specifically discussed the transactions with Principal and informed him of the material facts relating to them. Agent unsuccessfully claimed she was merely a scrivener when she completed various actions for Principal rather than acting in a fiduciary capacity. Accordingly,

the appellate court reversed and reinstated the jury verdict.

Moral: An agent owes fiduciary duties to the principal at all times, even when technically not acting under the authority granted by the power of attorney. Thus, an agent should act with the utmost degree of loyalty to the principal and avoid being involved in any transaction which could potentially benefit the agent.