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
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
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).

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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 15, 2016 (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

No cases to report.

III. WILLS

A. Testamentary Capacity

In re Estate of Hemsley, 460 S.W.3d 629 (Tex. App.—El Paso 2014, pet. denied).

After the probate court determined that Testator had testamentary capacity, Contestants appealed. The appellate court affirmed. The court studied the evidence which included testimony of the attorney who drafted Testator's power of attorney. This attorney declined to draft Testator's will fearing a contest due to Testator's celebrity status (e.g., the character of George Jefferson from *All in the Family* and *The Jeffersons*). The court also heard evidence from the attorney who eventually prepared the will. This attorney had no doubt that Testator had full testamentary capacity. The two witnesses and a registered nurse caring for Testator testified in a similar manner. Nonetheless, Contestants claimed that this evidence was legally insufficient.

Moral: Regardless of how competent a person is at the time of will execution, family members dissatisfied with the terms of the will are likely to contest the will, especially if the estate has substantial value.

B. Interpretation – "Common Disaster"

Stephens v. Beard, Nos. 14-0406 & 14-0407, 2016 WL 1069089 (Tex. Mar. 18, 2016).

Husband murdered wife, immediately shot himself, but did not die until a few hours later. Each will provided for legacies to nine named individuals if they died in a common disaster or if their death order could not be determined. The trial court determined that the legacies were effective because the spouses died in a common disaster.

The appellate court affirmed in *Stephens v. Beard*, 428 S.W.3d 385 (Tex. App.—Tyler 2014). 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" even though he lived almost two hours longer than Wife. *Id.* at 388.

On appeal to the Supreme Court of Texas, the court reversed without even giving the parties the

opportunity to present oral arguments. The court focused on the well-recognized legal meaning of the term "common disaster" which means that the two parties "die at very nearly the same time, with no way of determining the order of their deaths." The court held that Husband and Wife did not die in a common disaster because although their deaths were temporally close, the order of their deaths is known with certainty.

Moral: A murder-suicide will not be considered as a common disaster if the death orders can be determined.

C. Election Wills

Estate of Cole, No. 02-13-00417-CV, 2015 WL 392230 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.).

A dispute arose as to whether Husband's will put Wife to an election to either (1) assert rights to her one-half of the community estate or (2) give up these rights in exchange for her gifts under the will. The trial court determined as a matter of law that the will put Wife to an election. Wife appealed.

The appellate court reversed. The court focused on the clause of Husband's will which provided that he intended only to dispose of his property "including my one-half interest in the community property." Wife claimed that this clause means that a gift in the will of an investment account to Son would only include funds that were Husband's separate or his community one-half. The court conducted a careful review of Texas election will cases and concluded that Husband's will did not clearly and unequivocally put Wife to an election. Husband's mere statement in the will that the investment account was his separate property "does not mitigate his prior clear and specific language that he intended only to dispose of his separate property and his one-half of the community property." Id. at *6. At most, this created an ambiguity which precluded a holding that the will put Wife to an election.

Moral: A married testator should include an election provision in the will expressly stating whether the will is or is not intended to trigger an election by the surviving spouse.

D. No Contest Clause

1. Suit to Determine Ownership

Estate of Cole, No. 02-13-00417-CV, 2015 WL 392230 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.).

Husband's will contained a no contest clause which, among other things, provided that if Wife contested the "characterization of my property as my separate property" she would forfeit all gifts to her under the will. Wife made a claim for her community property interest against an investment account Husband classified as his separate property. The trial court determined that her claim did not trigger the no contest clause but yet submitted the issue of her good faith and just cause to the jury which subsequently decided she was lacking. Wife appealed.

The appellate court first agreed with the trial court that Wife was not contesting the will or any of its provisions. Instead, she was merely asserting a right to her own property which the will did not prevent her from doing because Husband stated he was only disposing of his separate property and his one-half of the community property. Although puzzled about why the trial court submitted the issue of Wife's good faith and probable cause to the jury, such action did not impact the judgment and thus was harmless error.

Moral: An beneficiary's action must first fall within the scope of a no contest clause before the beneficiary's good faith and just cause in bringing that action is relevant as a defense to forfeiture.

2. Suit for Breach of Duty

Ard v. Hudson, No. 02-13-00198-CV, 2015 WL 4967045 (Tex. App.—Fort Worth Aug. 20, 2015, pet. filed).

Testatrix's will contained the following *in terrorem* provision:

> If any beneficiary hereunder shall contest the probate or validity of this Will or any provision thereof, or shall institute or join in (except as a party

> defendant) any proceeding to contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits shall pass to the non-contesting residuary beneficiaries of this Will in the proportion that the share of each such non-contesting residuary beneficiary bears to the aggregate of the effective (non-contesting) shares of the residuary.... Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all provisions of this Will.

One of the beneficiaries, Mary, brought suit against the executors and trustees for breach of duty, sought temporary and permanent injunctive relief, and requested the appointment of a receiver. The fiduciaries claimed these actions triggered forfeiture of her benefits under the will. The trial court agreed and Mary appealed.

The appellate court reversed. The court held that "a beneficiary has an inherent right to challenge the actions of a fiduciary and does not trigger a forfeiture clause by doing so." Id. at *8. The court continued by explaining that this right would be "worthless" if the beneficiary could not seek remedies. Accordingly, the court also held that "a beneficiary exercising his or her inherent right to challenge a fiduciary may seek injunctive and other relief, including the appointment of a receiver, from the trial court to protect what the testator or grantor intended the beneficiary to have without triggering the forfeiture clause." Id.

The court then turned its attention to the last line of the *in terrorem* clause which imposes a condition precedent on being a beneficiary, that is, to "accept and agree" to the will provisions. Consistent with its holding on the forfeiture part of the clause, the court stated that Mary's actions did not violate the condition precedent. Mary's challenges are to the conduct of the fiduciaries, not the terms of the will.

Moral: *In terrorem* clauses are enforceable if a beneficiary attempts to change the testator's dispositive plan. They are not effective to protect executors and other fiduciaries from claims of breach of fiduciary duty.

E. Will Contest

In re Estate of Parrimore, No. 14-14-00820-CV, 2016 WL 750293 (Tex. App.—Houston [14th Dist] Feb. 25, 2016, no pet. h.).

Testator and Wife worked together on Testator's will using a computer program which prepared his will according to his answers to questions generated by the software which included an express provision that he was intentionally omitting his two children. Sometime thereafter, Testator suffered a stroke and was hospitalized for three days. Eleven days after being discharged, Testator had a will signing party at his home attended by family members and friends. After socializing with the guests and shooting pool, the will execution ceremony took place. One of the guests, a notary, testified that Testator asked his wife to sign the will for him and that three witnesses attested to the will in Testator's presence. During the months which followed, Testator continued his therapy, was able to drive, and even went back to work. About a year after the will execution ceremony, Testator died.

Wife filed the will for probate and Testator's children contested alleging that Testator lacked testamentary intent and testamentary capacity as well as being under Wife's undue influence. The trial court heard the testimony of the people at the will party and admitted the will to probate. Testator's children appealed.

The appellate court affirmed. First, the court examined the document itself such as being labeled as a "last will and testament," providing for the disposition of his property, and naming an executor. The court held this was sufficient to support the trial court's implied finding that Testator had testamentary intent.

Second, the court examined the evidence which supposedly demonstrated that Testator lacked testamentary capacity. The court recognized that

Testator's stroke shortly before executing the will could put his capacity into question. However, there was ample testimony from individuals present at the will execution party who swore that Testator appeared to be of sound mind and that he knew he was executing a will.

Third, the court determined that there was insufficient evidence to set aside the will on the basis of undue influence. Although there was circumstantial evidence that Wife could have exerted undue influence such as being named as the sole beneficiary to the exclusion of his children and participating in the preparation and execution of the will, there was insufficient evidence that she actually exerted any undue influence. Merely having the opportunity to exert such influence does not prove that Wife took advantage of that opportunity.

Moral: Anytime a testator has a medical condition which could give rise to a contest based on lack of capacity or undue influence, the attorney should take steps to preserve evidence which demonstrates capacity and lack of undue influence. In addition, a testator should consult with an attorney when executing a will rather than using a computer program and then throwing a will execution party.

F. Tortious Interference With Inheritance Rights

1. Type of Counterclaim

Stern v. Marshall, 471 S.W.3d 498 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.).

Note: This case is another in the series of Anna Nicole Smith decisions. This case provides an excellent summary of all the litigation regarding J. Howard Marshall's estate.

The appellate court held that a claim for tortious interference with inheritance rights is not a compulsory counterclaim to a petition for the probate of the testator's will. A tortious interference claim is not against the testator's estate. If the claim is successful, no estate funds would be used to pay the judgment. Instead, the judgment would be against the person who tortiously interfered.

Moral: A claim for tortious interference with inheritance rights is not a compulsory counterclaim to the probate of the "interfering" will.

2. Austin District

Anderson v. Archer, No. 03-13-00790-CV, 2016 WL 859017 (Tex. App.—Austin Mar. 2, 2016, no pet. h.).

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. Hopefully, the Texas Supreme Court will grant petition to one of these cases and decide the issue.

G. Criminal Law Interface

McCay v. State, No. 05-12-01199-CR, 2015 WL 5247081 (Tex. App.—Dallas Sept. 9, 2015, pet. ref'd).

The appellate court held that a person commits the criminal offence of theft if the person with intent to steal causes a will to be executed in his or her favor and then files that will for probate.

Moral: A person who exercises undue influence, duress, or fraud over a testator to execute a will and then files that will for probate, may be prosecuted for the criminal offense of theft.

IV. ESTATE ADMINISTRATION

A. Bill of Review

Valdez v. Hollenbeck, 465 S.W.3d 217 (Tex. 2015).

Heirs sought to reopen an estate administration by using a bill of review ten years after it was closed and more than three years after learning that a probate court clerk had stolen over $500,000 from the estate. The probate court denied a statutory bill of review because two years had past since the date of closing but granted the heirs' request for an equitable bill of review by applying the longer four year period and the discovery rule. The heirs then litigated their claims and prevailed against the administrator and surety both at the trial and appellate levels.

The Supreme Court of Texas reversed holding that the time period to bring a bill of review had elapsed. The heirs' ability to bring a bill of review was governed by the Probate Code's (now Estates Code § 55.251) two year period. In effect, the Code's time period abrogated the equitable bill of review in a probate context. Accordingly, the heir's action was untimely regardless of whether limitations was tolled until they discovered the actions of the evil probate clerk. Note that although the court did not approve of tolling based on the discovery rule, it left open the issue of whether tolling should be allowed when violations of fiduciary duties and fraudulent concealment are at issue.

Moral: In the probate context, bills of review are statutorily based, not based on equity. Thus, the statutory two-year period applies. The Texas Supreme Court indicated its unwillingness to approve a discovery rule generally but left open the possibility that a discovery rule might be acceptable if the claim is based on a breach of fiduciary duty coupled with fraudulent concealment of that breach.

B. Appeal

In Matter of Estate of Romo, 469 S.W.3d 260 (Tex. App.—El Paso 2015, no pet. h.).

After an application to probate the testator's 2001 will was filed, an application to probate testator's 2006 will was filed and granted. The proponent of the 2001 will then contested the 2006 will on grounds that the testator lacked testamentary capacity or that the testator signed the will under undue influence. The court concluded that the 2006 will did not even comport with the statutory requirements for a valid will and set aside its order admitting the 2006 will to probate. The court did not rule on the validity of the 2001 will. The proponent of the 2006 will appealed.

The court dismissed the appeal finding that it lacked jurisdiction as the order setting aside the probate of the 2006 will was not a final order. The court explained that Estates Code § 256.101 prescribes a procedure when two applications are simultaneously pending, that is, the court must determine which will (if either) to admit to probate. Because the court had not yet ruled on the validity of the 2001 will, the order was not final.

Moral: If multiple wills are filed for probate, the court must decide on the validity of each will before an appellate court will have jurisdiction to hear an appeal.

C. Personal Representative Qualification

In re Estate of Montemayor, No. 04-14-00391-CV, 2015 WL 1875978 (Tex. App.—San Antonio Apr. 22, 2015, no pet.).

The trial court removed Independent Executor. The court based its decision on evidence that he lived in the house which was the main estate

asset, was not making good faith efforts to sell the house, was not making necessary repairs, and prevented the other beneficiaries from accessing the house. He also stated that he would live in the house until the day he died. The order stated that he was guilty of gross mismanagement and was incapable of performing his fiduciary duties due to a material conflict of interest and thus removal was authorized under Estates Code § 404.0035(b)(3), (5). Independent Executor appealed.

The appellate court affirmed. The court explained that the trial court's decision is reviewed under an abuse of discretion standard and there was no evidence of such abuse. The court also rejected Independent Executor's claim that removal was improper because the pleadings did not specifically use the terms "gross misconduct" and "gross mismanagement" since the pleadings gave fair notice by alleging breaches of fiduciary duty and self-dealing.

Moral: A trial court's order removing an independent executor from office will be difficult to overturn on appeal.

D. Lost Wills

Matter of Estate of Standefer, No. 11-14-00221-CV, 2015 WL 5191443 (Tex. App.—Eastland Aug. 21, 2015, no pet. h.).

The trial court admitted Testator's will to probate although Proponent was unable to produce the original; he was only able to locate a photocopy. The appellate court affirmed.

The court began by examining the evidence presented at trial. The alleged will left Testator's entire estate to his two sons to the exclusion of his daughter who is now claiming that Testator died intestate so she could inherit one-third of the estate. Proponent testified that Testator told him about the existence of a will and that he searched diligently for the original after Testator died. Proponent had also testified that the will was probably stored in a lockbox to which other people had access and who had even improperly removed a title to one of Testator's cars. An employee of Testator testified that she had previously seen an envelope labeled "Last Will and Testament" in the lockbox. There was additional testimony about the drafting of the will and the contents of the will.

The court understood that a presumption exists that when the original will is last seen in the testator's presence and cannot be found after death, that the testator destroyed the will with revocation intent. However, in this case, the evidence discussed above was sufficient to rebut the presumption by a preponderance of the evidence.

The court next addressed whether the will was properly executed. Because the will had a proper self-proving affidavit, there is a presumption of proper execution even though the affidavit is merely a photocopy. Testator signed the will with his middle and last names rather than with his first, middle, and last names as was typed on the will. The court explained that "there is no requirement that [a testator's] signature match exactly the type-written version of his name." Id. at *5. Other arguments about the validity of the signature (handwritten or stamped, thickness of ink was different between Testator and the witnesses, etc.) were likewise rejected.

The court also addressed the fact that the person who wrote the will for Testator was not an attorney and thus by engaging in the unauthorized practice of law, her testimony lacks credibility about what happened during the will execution ceremony. The court stated there was no authority to support this proposition.

Moral: To avoid problems such as those in this case, a testator needs to store the original will with great care and seek the assistance of an attorney with estate planning experience to draft the will, rather than bookkeeper who then would be practicing law without a license.

E. Sale of Estate Property

In re Estate of Stone, 475 S.W.3d 370 (Tex. App.—Waco 2014, pet. denied).

Dependent Administratrix found two potential purchasers for estate property. The court confirmed the second offer which was financially a better deal for the estate. The person who made the first offer two years earlier claimed the trial

court's approval of the second offer was improper and appealed.

The appellate court affirmed. The court reviewed the procedure Administratrix and the trial court followed and found that the procedure was in full compliance with the applicable statutory provisions. The court then examined the court's decision to confirm the second offer and held that the trial court's action was not an abuse of discretion. In fact, the second offer was a considerably better contract for the estate – the purchaser offered a higher price for just the surface rights than the first potential purchaser offered for both the surface and mineral rights.

The court rejected the argument that the first purchaser should prevail because had Administratrix timely filed a request within 30 days for the court to confirm the sale as required by the statute, the court would have done so because the offered price was fair at that time. The court explained that it is unknown whether an expert would have been hired to determine that the offered price for both the surface and mineral interests was not actually fair to the estate. After examining additional evidence, the court determined that was no showing that the first purchaser was injured or disadvantaged by Administratrix's failure to file the report of sale within 30 days.

The first purchaser also claimed that Administratrix was not following the terms of the will in disposing of estate property. The court disposed of this argument in short order by explaining the first purchaser lacked standing to complain about the Administratrix's conduct.

Moral: A potential purchaser of estate property from a dependent personal representative needs to avoid relying on the sale as a fait accompli until the court actually confirms the sale.

V. TRUSTS

A. Standing

In re XTO Energy, Inc., 471 S.W.3d 126 (Tex. App.—Dallas 2015, no pet. h.).

Trustee failed to pursue litigation on behalf of the trust under the terms of the trust which granted Trustee the discretion to carry out the trustee's powers and perform the trustee's duties. Beneficiary, unhappy with Trustee's inaction, brought action against Defendant on behalf of the trust. Trustee and Defendant seek a writ of mandamus to force the trial court to dismiss Beneficiary's suit for lack of subject matter jurisdiction.

The appellate court began its analysis by recognizing that a trust beneficiary may sue a third party on behalf of the trust if the trustee cannot or will not bring the action. However, a beneficiary cannot bring an action merely because the trustee has refused to do so because "[t]o allow such an action would render the trustee's authority to manage litigation on behalf of the trust illusory." Id.

The court concluded that a beneficiary may not bring the suit unless "the beneficiary pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct, or a clear abuse of discretion." Id. The court then engaged in a detailed analysis of the underlying dispute and determined that there were no facts that would support a finding that Trustee's decision not to bring suit was the result of fraud, misconduct, or a clear abuse of discretion. Accordingly, the court conditionally granted mandamus relief. (The court, however, allowed Beneficiary's claims against Trustee for breach of duty to continue.)

Moral: This case appears to be the first time a Texas court has ruled on "the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue." The rule announced by the court is that the action may proceed if the trustee's failure to bring the action is the result of fraud, misconduct, or a clear abuse of discretion.

B. Jurisdiction

Dowell v. Quiroz, 462 S.W.3d 578 (Tex. App.—Corpus Christi 2015, no pet.).

The appellate court held that a statutory county court at law with probate jurisdiction does not have subject matter jurisdiction to hear survival and wrongful death claims that are incident to an

estate under Probate Code § 5A as it existed on the date the claims were filed. This appears consistent with current law under Estates Code § 31.002(b).

Moral: A party bringing survival or wrongful death claims must ascertain the correct court in which to bring the actions.

C. Revocation

Gordon v. Gordon, No. 11-14-00086-CV, 2016 WL 1274076 (Tex. App.—Eastland Mar. 31, 2016, no pet. h.).

Husband and Wife created a revocable trust which required a revocation to be in a signed acknowledged writing delivered to the trustee. Thereafter, they executed a joint will which provided that the will overrides "any prior allocations described in trust documents." After Husband's death, a dispute arose as to whether the property they had transferred to the trust would be governed by the terms of the trust or the will. Wife claimed that the trust controlled and Executor of Husband's will contended that the will controlled. The trial court held that the will provision did not act to revoke the trust and thus the trust assets pass under the terms of the trust. Executor appealed.

The appellate court affirmed. The court explained that the language of the will addressing the disposition of property was testamentary in nature, that is, it would take effect after death even though the language of the will revoking previous wills was effective immediately. The will did not contain a provision revoking the trust which complied with the requirements for revocation set forth in the trust.

Moral: An inter vivos trust is a non-probate asset and the property transferred to the trust is governed by the terms of the trust, not a subsequent will unless the will can serve as a presently effective trust revocation following the terms of the trust.

VI. OTHER ESTATE PLANNING MATTERS

A. Multiple-Party Accounts

Bank of America, N.A. v. Eisenhauer, 474 S.W.3d 264 (Tex. 2015).

Husband and Wife opened a joint account with survivorship rights that also named two pay on death beneficiaries upon the death of the last joint owner. After Husband died, Beneficiary One closed the account even though Wife was still alive. Bank issued equal checks to Beneficiary One and Beneficiary Two. Beneficiary Two realized that this was incorrect so he used the power of attorney he had for Wife and deposited the funds into a new account in Wife's name with himself as the pay on death beneficiary. Beneficiary One kept the funds she improperly received from the account.

After Wife died, Beneficiary Two became Wife's executor and sued Bank for the money it improperly distributed to Beneficiary One. The jury found that Bank failed to comply with the deposit agreement but that the estate suffered no damages. The court granted Beneficiary Two's request for a judgment notwithstanding the verdict and the appellate court affirmed.

The Texas Supreme Court reversed without even hearing oral arguments. The court explained that neither Wife nor her estate lost anything when Beneficiary One received half of the account funds. The account was a non-probate asset and none of the funds would have been in the estate even if the account had remained open until Wife's death.

Moral: The personal representative of a decedent who opened a multiple-party account which would transfer the money outside of probate lacks the ability to recover for breach of that contract because none of the funds would be in the decedent's estate whether or not the contract was breached.

B. Power of Attorney

Miller v. Lucas, No. 02-13-00298-CV, 2015 WL 2437887 (Tex. App.—Fort Worth May 21, 2015, pet. denied).

Agent transferred Principal's property to himself using the authority granted under a durable power of attorney. After Principal died, the distributees of Principal's estate entered into a family settlement agreement and assigned to Plaintiff the right to pursue an action against Agent. The trial court granted a summary judgment in favor of Plaintiff and ordered that the property be conveyed to Plaintiff free of all encumbrances. Agent appealed.

The appellate court affirmed the trial court's finding of breach of fiduciary duty because the self-dealing was conclusively established – Agent used the power of attorney to convey Principal's property to himself by deed. However, the appellate court determined that the trial court's remedy was excessive because it exceeded the relief Plaintiff sought. The trial court erroneously ordered the property conveyed free of *all* encumbrances, not just those which arose after Agent sold the property to himself.

Moral: An agent should not breach fiduciary duties by selling a principal's property to him/herself.

C. Disposition of Body

In re Estate of Hemsley, 460 S.W.3d 629 (Tex. App.—El Paso 2014, pet. denied).

Decedent did not specify a person to control the disposition of his remains under Health & Safety Code § 711.002. A dispute arose between Half-Brother and Testator's Friend who was also the sole beneficiary and executor of his will. The trial court determined that the Friend's instructions prevailed and Half-Brother appealed.

The appellate court concluded that the issue was moot and thus it could not render a decision regarding whose instructions had priority. Half-Brother did not suspend the trial court's judgment for the period of the appeal allowing Friend to have Testator buried. Whether Half-Brother can have Testator disinterred and buried elsewhere was not an issue before the court.

Moral: A person should execute an Appointment of Agent to Control Disposition of Remains so that the individual the person wishes to control the disposition has clear legal authority to do so.