TEXAS CASE LAW UPDATE

GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
1802 Hartford St.
Lubbock, TX 79409-0004

(806) 742-3990, ext. 302
gwb@ProfessorBeyer.com
http://www.ProfessorBeyer.com
http://BeyerBlog.com/

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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

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)

SELECTED HONORS AND ACTIVITIES

Order of the Coif
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech University Chapter) (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)
Outstanding Faculty Member – Delta Theta Phi (St. Mary's University chapter) (1989)
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
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)
Guest lecturer on estate planning topics for attorney and non-attorney organizations

SELECTED PUBLICATIONS

Author and co-author of numerous law review articles, books, and book supplements including WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (5th ed. 2012); 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 (5th ed. 2006); 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; *Will 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); *The Will Execution Ceremony — History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1988); *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).

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TEXAS CASE LAW UPDATE

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 May 21, 2013 (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 significant cases]

III. WILLS

A. Formalities

In re Estate of Pilkilton, 2013 WL 485773 (Tex. App.—Dallas 2013, no pet. h.).

A dispute arose whether pages of a properly executed will were replaced by different ("corrected") pages at a later date. The appellate court agreed with the trial court that the evidence was legally sufficient to support a finding that page substitution did not occur especially because no one testified that the testator executed the will prior to all corrections being made.

Moral: A prudent attorney should have the testator and the witnesses initial each page of the will. This practice will make it easier to rebut claims of page substitution.

B. Interpretation and Construction

1. Debts "paid out of my estate"

In re Estate of Anderegg, 360 S.W.3d 677 (Tex. App.—El Paso 2012, no pet.).

Testator's will provided that all debts and expenses should be "paid out of my estate." Both the trial and appellate courts held that this statement was sufficient to alter the statutory abatement order provided in Probate Code § 322B. Thus, Testator's debts are to be paid pro rata from all estate property. The courts rejected the argument that Testator's language was too general to alter the statutory order.

Moral: Many wills contain boilerplate language requiring debts and expenses to be paid out of the estate. There is now authority that this language is sufficient to trump the normal abatement order. Accordingly, every will should contain an express statement describing how the testator wants debts and expenses to be paid, e.g., via the statutory order, pro rata, or in some other way.

2. "All Monies"

In re Estate of Anderegg, 360 S.W.3d 677 (Tex. App.—El Paso 2012, no pet.).

Testator's will stated that Beneficiary was to receive "all monies I may have at the time of my death, be they in the form of cash, checking accounts or savings accounts, all stocks, bonds, annuities, etc., and any accounts I may have with [named institutions] or others." Both the trial and appellate courts held that Beneficiary was entitled to a lump sum death benefit and an income tax refund. The appellate court explained that the death benefit and tax refund are relatively liquid financial assets of the same basic type described. The court found it significant that Testator included the abbreviation "etc." in the

list meaning that additional, unspecified similar items were to be included in the gift and that the list was not meant to be exclusive (*expressio unius est exclusio alterius).*

Moral: Attempts to define a gift of money and similar items are fraught with interpretation problems. Thus, the drafting attorney must exercise great care or consider a different way of achieving the client's goal such as naming pay on death payees.

3. Distribution Provisions

Nash v. Beckett, 365 S.W.3d 131 (Tex. App.—Texarkana 2012, pet. denied).

Mother and Father created two trusts, one for each of their children. Upon the death of the last child, the property was to be distributed to their descendants equally. The trial court held that the remainder of each child's trust passed only to that child's descendants. The appellate court reversed, holding that each descendant is entitled to an equal share of both trusts.

The court focused on the unambiguous language of the trusts which said that upon termination, the trust is to be "divided into as many equal shares as there are children of my two sons surviving, together with an equal share per stirpes for the surviving child or children of any deceased grandchild." The court found additional support for this argument in that the trusts did not terminate until the last child died. If the balance of each trust would pass only to the descendants of the child for whom the trust was created, there would be no reason to delay distribution until the other child died. Accordingly, the terms of the trusts cannot logically be read to give the balance of each trust only to the descendants of the child for whom that trust was originally created. The court recognized the Rule Against Perpetuities savings clause would have yielded this result but this clause was not the cause of the trusts terminating. Also, the fact that a child could exercise a power of appointment over trust property that would pass to his descendants did not mean that the entire trust corpus would pass only to his descendants.

Moral: The provisions under dispute appear to have been expertly drafted. Thus, the lesson is that no matter how well-drafted a provision may be, someone who is unhappy with the resulting disposition may assert that the provision does not mean what it clearly states.

C. Contests

1. Statute of Limitations

Omohundro v. Ramirez-Justus, 392 S.W.3d 218 (Tex. App.—El Paso 2012, pet. filed).

The appellate court affirmed a summary judgment because the suit was time-barred under Probate Code § 93 (two years from date of probate to contest a will subject to limited exceptions not applicable to this case). Accordingly, the court did not address any of the appellant's substantives issues.

Moral: A person who believes a will is invalid must contest that will on a timely basis. Otherwise, even meritorious claims will be lost.

2. Discovery

In re Chesses, 388 S.W.3d 330 (Tex. App.—El Paso 2012, no pet.).

Contestant sought disclosure of Testator's Adult Protective Services (APS) file and the right to depose the APS caseworker. The trial court denied the request and Contestant sought a writ of mandamus. The appellate court conditionally granted the writ determining that the APS file and caseworker testimony are essential to the administration of justice.

Moral: Courts are willing to permit access to certain confidential material if necessary to administer justice.

3. Lack of Testamentary Capacity

a. Insufficient Evidence

In re Estate of Pilkilton, 2013 WL 485773 (Tex. App.—Dallas 2013, no pet. h.).

A dispute arose whether the testator had testamentary capacity. The appellate court agreed with the trial court that the evidence was legally sufficient to support a finding that the testator had testamentary capacity. Although there was evidence that the testator suffered from dementia, Alzheimer's disease, and a closed head injury, the testimony of the attorney who supervised the execution ceremony, the two witnesses, and the notary was convincing in showing that the testator had testamentary capacity.

The court also reaffirmed the long-standing principle that testamentary capacity is based on a different standard than that used to determine whether a person is incapacitated for guardianship purposes. The fact that a person is under a guardianship does not necessarily mean that the person lacked testamentary capacity when he or she executed the will.

Moral: The most important evidence of testamentary capacity is likely to come from the individuals who were actually present during the execution ceremony: the attorney, the witnesses, and the notary.

b. Sufficient Evidence

Le v. Nguyen, 2012 WL 5266388 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.).

Testator executed a will on December 1, 2009 at which time his capacity was not challenged. Testator's condition deteriorated rapidly and later in the month, an attorney met with Testator to discuss the changes he wanted to make to his will. The attorney returned several times to have Testator sign the new will but Testator was unable to sign. At the end of his last visit on December 31, he left the will with Testator's fiancée. Later that evening, Testator executed the will in front of two witnesses.

The court first admitted the December 1 will to probate but later set aside the order and probated the December 31 will. The proponent of the December 1 will then contested the December 31 will. After a jury trial, the court found that Testator lacked testamentary capacity when he executed the new will. The proponent of the December 31 will appealed.

The appellate court affirmed. The court made a careful review of the conflicting evidence presented to the jury. The court explained that there was "more than a scintilla of evidence supporting the jury's finding that [Testator] did not have testamentary capacity" and that the finding was "not so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust."

Moral: A will proponent will have a difficult time overturning a jury finding that a testator lacked testamentary capacity. Accordingly, a proponent needs to present the jury with convincing evidence the testator possessed testamentary capacity.

4. Undue Influence

a. Insufficient Evidence

In re Estate of Sidranksy, 2012 WL 3363710 (Tex. App.—El Paso 2012, pet. denied).

The trial court conducted a bench trial and found that Testatrix had testamentary capacity. The court then granted a summary judgment motion that Testatrix was not subject to undue influence when she executed her will.

On appeal, the court conducted a careful review of the evidence and found that it did not raise "a genuine issue of material fact on the existence and exertion of influence." The court stressed that evidence showing that Testatrix was susceptible to undue influence because of a weakened physical and mental condition did not constitute evidence that any undue influence actually was exerted. Accordingly, the appellate court affirmed the trial court's judgment and ended its opinion with the phrase, "May she rest in peace."

Moral: A contestant who claims that a will was the product of undue influence must be certain to present evidence showing that the influence was actually exerted because evidence showing only susceptibility is insufficient to prevent a

summary judgment that the will was not the product of undue influence.

b. Insufficient Evidence – Another Case

In re Estate of Pilkilton, 2013 WL 485773 (Tex. App.—Dallas 2013, no pet. h.).

A dispute arose whether the testator was unduly influenced to make his will. The appellate court agreed with the trial court that the evidence was legally sufficient to support a finding that the testator was not subject to undue influence. Although there was evidence that the testator was susceptible to undue influence and certain individuals had the opportunity to exert undue influence, there was no solid evidence that any undue influence was actually exerted.

Moral: Undue influence cannot be inferred merely because the testator was susceptible and individuals had the opportunity to exert the influence.

D. Payment of Taxes

In re Estate of Denman, 362 S.W.3d 134 (Tex. App.—San Antonio 2011, no pet.).

A dispute arose regarding whether generation-skipping transfer taxes should be allocated against the residuary estate or against the generation-skipping transfer. Both the trial and appellate courts in *In re Estate of Denman*, 270 S.W.3d 639 (Tex. App.—San Antonio 2008, pet. denied), agreed that the GSTT should be charged against the transfer itself.

GST Beneficiary claimed that a will provision which provided that "taxes shall be paid out of my residuary estate" clearly expressed the testator's intent that the gift pass without reduction for the GSTT triggered by the gift. However, the Residuary Beneficiary pointed to I.R.C. § 2603(b) which mandates that a GST bears the burden of the tax unless otherwise directed by a "specific reference to the [GSTT]" in the will. The will's reference to "transfer, estate, inheritance, succession and other death taxes" was not a specific reference to the GSTT and thus the tax was allocated against the GST.

In this case, GST Beneficiary sought reimbursement of the GSTT paid from the estate noting that the court in the original case stated in a footnote that the issue of reimbursement was not before the court. Both the trial and appellate courts held that GST Beneficiary was not entitled to a reimbursement or "grossing up" of his devise to account for the GSTT. The court, however, did not actually reach the merits of the GST Beneficiary's claim and instead determined that the statute of limitations had run on the claim.

Moral: Failure to bring a action within the statute of limitations period precludes a claim even if that claim may actually be meritorious.

IV. ESTATE ADMINISTRATION

A. Bill of Review

In re Estate of Aguilar, 2013 WL 520282 (Tex. App.—San Antonio 2013, no pet. h.).

Son One probated Father's will as a muniment of title. Seven months later, Son Two attempted to set aside the probate by filing an equitable bill of review (not a statutory bill of review under Probate Code § 31). Both the trial and appellate courts denied the application.

The appellate court explained that to obtain an equitable bill of review,

> the applicant must plead and prove: (1) a meritorious defense to the underlying cause of action, (2) which the applicant was prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake, (3) unmixed with any fault or negligence on its own part.

Son Two attempted to rely on a special situation where absence of service or lack of notice of the dispositive trial setting acts to relieve the applicant from showing the normal elements for an equitable bill of review. The court rejected this argument because the evidence showed that Son One gave proper notice of the muniment of title action by posting as required by Probate Code § 128(a). (This notice also demonstrates that element two was not satisfied.)

Moral: A party seeking an equitable bill of review must be certain to prove the required elements.

B. Appeal

In re Estate of Scott, 364 S.W.3d 926 (Tex. App.—Dallas 2012, no pet.).

The trial court issued an order approving an account for final settlement and authorizing the distribution of the estate. The order also specified that additional steps are required before the estate could be closed such as distributing the estate pursuant to a determination of heirship. The appellate court held that this order is not final and thus not appealable because the "order merely sets the stage for a further resolution of the proceeding."

Moral: An order approving account for final settlement is interlocutory and consequently not appealable.

C. Personal Representative

1. Unsuitability

Pine v. deBlieux, 360 S.W.3d 45 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

A dispute arose among the decedent's children regarding who should serve as the personal representative. After the trial court appointed one of the children, two of the other children appealed claiming that a conflict of interest made her unsuitable to serve under Probate Code § 78(e). The appellate court agreed.

The court recognized that a trial court has broad discretion in determining whether someone is unsuitable to serve as a personal representative and that the trial court's determination stands unless there is an abuse of discretion. The court also explained that just because a personal representative has a claim against an estate or is a beneficiary or an heir does not render the person automatically unsuitable. However, under the facts of this case, the child's conflict of interest caused by her claim to a substantial portion of her father's assets rendered her unsuitable to serve as a matter of law. The personal representative was not seeking satisfaction of a claim from estate assets. Instead, the personal representative is claiming disputed assets to the exclusion of the estate. Her personal interests are so adverse to those of the estate that both cannot be fairly represented by the same person. The court noted that the personal representative was not one the decedent selected. The court was also mindful that the ability to determine that someone is unsuitable at the time of appointment is broader than the grounds for removing a person from office. See *Kappus v. Kappus*, 284 S.W.3d 831 (Tex. 2009).

Moral: A person may be unsuitable for appointment as a personal representative if the person claims disputed assets to the exclusion of the decedent's estate.

2. Removal

Kirkland v. Schaff, 391 S.W.3d 649 (Tex. App.—Dallas 2013, no pet. h.).

The probate court removed decedent's surviving spouse as the administrator of her husband's estate under Probate Code § 222 finding that she was guilty of gross misconduct and mismanagement in the performance of her duties. The appellate court reviewed the evidence and affirmed the removal. The list of grounds supporting the removal was lengthy and included such conduct as misappropriating property which would pass to her step-children by intestacy, failing to account for the value of the decedent's business, and under reporting income from that business to the I.R.S.

Moral: A step-parent may not be pleased that the deceased spouse's one-half of the community property along with a majority of the deceased spouse's separate property passes to step-children upon an intestate death and thus fail to protect the step-children's rights.

D. Executor's Ability to Recover Estate Property

In re Estate of Hutchins, 391 S.W.3d 578 (Tex. App.—Dallas 2012, no pet. h.).

One of Testatrix's children obtained possession of certain items of estate property without proper authority. Independent Executrix filed a "Motion for Turnover Order" in her attempt to force the child to return the estate property. She based her request on Probate Code § 37 which provides that the personal representative has "the right to possession of the estate as it existed at the death of the testator." The trial court denied the turnover motion on the basis that Independent Executrix was not a judgment creditor and thus could not use the turnover procedure provided in Civil Practice and Remedies Code § 31.002. Independent Executrix petitioned for a writ of mandamus.

The appellate court granted mandamus. The court explained that Independent Executrix was not seeking a turnover order under Civil Practice and Remedies Code § 31.002. Instead, Independent Executrix was specifically requesting relief under Probate Code § 37 which gives the personal representative the right to possession of all estate property.

The court made two other findings. First, that a separate lawsuit under Probate Code § 233A granting the personal representative the right to sue to recover estate property is not necessary to recover estate property under Probate Code § 37. Second, that even if an alleged family agreement actually existed, the personal representative is nonetheless entitled to possession of the estate as it existed on date of death; the court found no case which concluded that § 37 is superseded by a family settlement agreement.

Moral: Family members have a tendency to grab a decedent's assets even if they have no authority to do so. The personal representative has a right to possession of all estate assets and a duty to acquire that possession. Obtaining a turnover order under the authority of Probate Code § 37 is one way for the personal representative to satisfy that duty.

E. Bank Account Recovery

Coffey v. Bank of America, 2013 WL 257363 (Tex. App.—Beaumont 2013, no pet. h.).

After Depositor died, Executrix claimed that Bank paid checks that were not properly payable and thus the estate should recover the amounts of those checks. Both the trial and appellate courts rejected Executrix's claims on a variety of grounds based on the Uniform Commercial Code.

The account at issue was a pay on death account. Bank proved that it provided monthly statements to Depositor and, after Depositor's death, to the pay on death payee. Because they did not report the alleged unauthorized transactions within sixty days (the statutory one year period having been shortened by contract), it was too late to recover from Bank. Besides, the account was a non-probate asset and not in Depositor's estate.

The court pointed to *Jefferson State Bank v. Lenk*, 323 S.W.3d 146 (Tex. 2010), as support for Executrix's claim that the time period did not actually begin to run until Executrix was appointed. The court held that even if this were the case, Executrix did not report the alleged not properly payable checks to Bank until after the time period had run. The court explained that merely filing a lawsuit within that time was insufficient as the pleading did not specifically identify the checks at issue.

Moral: An executor who wishes to claim that a decedent's checks were not properly payable must act promptly to provide detailed notice to the financial institution. In addition, the executor must remember that survivorship, trust, and P.O.D. accounts are non-probate assets and that the new owner of the account should bring any claims associated with the account.

F. Attorney Fees

1. Fees Denied – Lack of Good Faith

In re Estate of Anderegg, 360 S.W.3d 677 (Tex. App.—El Paso 2012, no pet.).

Executors were removed from office for gross misconduct under Probate Code § 149C(a)(2), (5). The trial court refused to charge the estate for their attorney's fees in defending the removal action. The appellate court affirmed because Executors did not defend the action in good faith

as is required before the court can burden the estate with their attorney's fees under Probate Code § 149C(c).

The court reviewed the evidence and found that it was more than sufficient to support a finding that the defense was in bad faith. For example, Executors used a credit card they found in the decedent's safe to charge their personal expenses even though the judge instructed them not to borrow money from the estate. In addition, they continued to make personal charges even after their attorney told them not to do so. One of the executors even admitted that she knew her actions were wrong.

Moral: An executor who acts inappropriately and with notice that the actions are wrong, cannot later defend a removal action and expect the estate to cover his or her attorney's fees.

2. Fees Denied – Late Request

Kirkland v. Schaff, 391 S.W.3d 649 (Tex. App.—Dallas 2013, no pet. h.).

The appellate court held that the probate court erred in allowing a trial amendment to request attorney's fees under Probate Code § 245. The probate court had already issued a final order removing the administrator from office. Accordingly, "the probate court abused its discretion by granting the trial amendment and awarding appellees attorney's fees after the probate court's final order removing appellant as administrator was signed." *Id*. at 655.

Moral: A party to a probate dispute who wishes to recover attorney's fees should request them in the original complaint or answer, or as shortly thereafter as possible.

V. TRUSTS

A. Trust Intent

Coterill-Jenkins v. Texas Medical Ass'n, 383 S.W.3d 581 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

A medical group purchased a professional liability policy from an insurer on behalf of a physician. Shortly thereafter, the physician died and the insurer returned the premiums to the medical group. The executor contended that the premiums should have been returned to the physician's estate. Both the trial and appellate court rejected the claim, especially the assertion that the medical group was the trustee of a trust for the physician's benefit. The appellate court explained that merely because the word "trust" is contained in the medical group's name does not create a trust. Instead the word was merely descriptive. In addition, the insurance policy had no language showing that the parties intended to create a trust.

Moral: The court will not turn a contract relationship into a trust relationship merely because the word "trust" is used without evidence that the alleged settlor had trust intent.

B. Statute of Frauds

Wolfe v. Devon Energy Production Co., LP, 382 S.W.3d 434 (Tex. App.—Waco 2012, pet. filed).

In a highly complex case regarding the ownership of oil and gas properties, one of the claimants attempt to demonstrate that the property was held in trust. Although there was neither a trust instrument nor any document setting out the terms of the trust, the claim was made that the use of the word "trustee" in a deed was sufficient to establish the existence of a trust. The court explained that when the term "trustee" is used in a deed without more, the term "is merely a description and of no legal effect." *Id*. at 445. The court likewise rejected a claim that a trust was nonetheless created because the alleged trustee did not actually comply with the terms of the alleged oral trust. However, the court recognized that there was a fact issue with regard to whether a purchase-money resulting trust existed.

Moral: A trust should be clearly documented in a trust instrument.

C. Discovery

In re Paschall, 2013 WL 474368 (Tex. App.—Waco 2013, no pet. h.).

Testatrix died with a will leaving her entire estate to the trustee of her inter vivos trust. Seven years later, a dispute arose regarding the validity of the will and thus the passage of the estate under the trust. Distant intestate heirs (first cousins, twice removed) were successful in getting the trial court judge to order the production of the trust instrument. Executor sought a writ of mandamus asserting that the contestants lacked standing.

The appellate court denied the writ. The court explained that the contestants have a contingent pecuniary interest in the estate, that is, if they are successful in setting aside the will and proving they are the intestate heirs, they would be entitled to the property that is now being held in Testatrix's trust. Accordingly, they have standing to seek discovery of the trust instrument.

Moral: An inter vivos trust may not be as private as believed as even remote claims to the trust property may result in the trust instrument being discoverable.

D. Funding with Homestead

Martinek Grain & Bins, Inc. v. Bulldog Farms, Inc., 366 S.W.3d 800 (Tex. App.—Dallas 2012, no pet.).

The court held that the transfer of property to a trust which was the settlors' undisputed homestead could not be set aside as a fraudulent conveyance because the homestead is generally exempt under nonbankruptcy law from the claims of creditors.

Moral: Transfers to a trust of a homestead or other exempt property are unlikely to be set aside as fraudulent transfers.

E. Revocability

Vela v. CRC Land Holdings, Ltd., 383 S.W.3d 248 (Tex. App.—San Antonio 2012, no pet. h.).

The settlor created an inter vivos trust, conveyed property to that trust by deed, and later removed one of the trust beneficiaries. After the settlor's death when the remaining beneficiaries sought to partition the property, the removed beneficiary claimed that the trust was made irrevocable when the settlor deeded property to the trust. The trial court rejected this claim and the appellate court affirmed.

The court explained that under Texas law an inter vivos trust is presumed revocable unless the trust expressly provides otherwise. Trust Code § 112.051. Although the removed beneficiary agreed with this rule of law, he claimed that the settlor's deed of the property to the trust made the trust irrevocable because it used the term "forever" in the granting language. The court held that this type of standard form language in a warranty deed did not reflect an intent on the settlor's part to transform a revocable trust into an irrevocable one.

Moral: Standard language used in a deed to transfer property to a trust does not have the effect of making the trust irrevocable.

F. Arbitration

Rachal v. Reitz, 2013 WL 1859249 (Tex. 2013).

A beneficiary brought suit asserting that the trustee misappropriated trust property and failed to provide a proper accounting. Because the settlor included a provision in his inter vivos trust requiring the beneficiaries to arbitrate any dispute with the trustees, the trustee moved to compel arbitration. Both the trial and intermediate appellate courts held that this provision was unenforceable. The appellate court explained that a person cannot be compelled to arbitrate a dispute if the person did not agree to relinquish the person's ordinary right to litigate. The beneficiary is merely a recipient of equitable title to property and not a party to the trust instrument. A trust is a conveyance of property coupled with a split of legal and equitable title and the imposition of fiduciary duties on the trustee. A trust is not an agreement or contract.

The Texas Supreme Court reversed, holding that the arbitration provision is enforceable against

the beneficiaries for two reasons. First, the court will enforce conditions the settlor attached to the gifts to carry out the settlor's intent. The settlor included a clear statement that he wanted all disputes to be arbitrated and thus the court will give effect to that provision.

Second, the Texas Arbitration Act requires the enforcement of agreements to arbitrate. Even though the beneficiaries did not expressly agree, they are deemed to have agreed through the doctrine of "direct benefits estoppel" because they accepted benefits of the trust and filed suit to enforce the terms of the trust. These actions are the assent required to form an enforceable arbitration agreement. If a beneficiary is unhappy with the arbitration provision, the beneficiary may disclaim under Trust Code § 112.010. The court stated that "it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms." *Id.* at 535.

Comments:

- Although this was a trusts case, it would seem likely the court would reach the same result if the arbitration provision was contained in a will.

- Although beneficiaries do have the ability to disclaim before accepting benefits, it is unlikely that beneficiaries read the trust and seek legal advice about the consequences of accepting benefits. Instead, beneficiaries just collect the benefits and study the trust instrument in detail only when something goes wrong.

- The court does not discuss how to handle the situation where the beneficiaries are minors or incompetent individuals.

- Arbitration provisions may become boilerplate so that the justification that the settlor intentionally imposed the requirement may be problematic.

- If a settlor really wanted to mandate arbitration, the settlor could include a provision requiring the trustee to obtain the beneficiary's written consent to arbitrate as a condition precedent to receiving trust distributions.

Moral: An arbitration clause in a trust is enforceable.

VI. OTHER ESTATE PLANNING MATTERS

A. Social Security Benefits for Posthumous Children

Astrue v. Capato, 132 S. Ct. 2021 (2012).

Wife used her deceased Husband's frozen sperm to create two children through in vitro fertilization. The children were born eighteen months after Husband's death. Wife then attempted to obtain Social Security survivors benefits for these children.

The Supreme Court of the United States focused on 42 U.S.C. § 416(h)(2)(A) which states that the determination of whether a person is a child for survivors benefits purposes depends on whether that person would be an heir under the intestacy law of the deceased parent's domiciliary state. Under the applicable law (Florida), a child must be conceived before the decedent's death to be an heir. Thus, the Court held in a unanimous opinion that these two children did not qualify for survivors benefits as conception occurred after Husband's death.

Query: What would happen if instead of frozen sperm, Wife had used frozen embryos? Then, she could argue that conception occurred prior to Husband's death.

Texas: Probate Code § 41(a) allows posthumous lineal descendants to qualify as heirs. There is no express requirement of conception prior to a parent's death. Note, however, that when this statute was originally enacted, the possibility of post-death conception did not exist.

Moral: A posthumously conceived child of a Texas domiciliary has a good chance of qualifying for Social Security survivors benefits.

B. Beneficiary Designations on Non-Probate Assets

In re Estate of Abernethy, 390 S.W.3d 431 (Tex. App.—El Paso 2012, no pet.).

Decedent and Beneficiary were very close personal friends. In addition, Beneficiary was a certified public accountant who prepared tax returns for Decedent. Decedent named Beneficiary as the beneficiary of an IRA and as the party with survivorship rights on various bank accounts. After Decedent died and Beneficiary collected approximately $1.2 million from these accounts, Independent Executor asserted that Decedent and Beneficiary were in a fiduciary relationship and that Beneficiary breached her duties by allowing herself to be named as the beneficiary of these accounts. The trial court rejected Independent Executor's claim and granted summary judgment in favor of Beneficiary.

The appellate court affirmed. The court began its analysis by recognizing "[t]here are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as attorney-client, partnership, trustee, and principal-agent relationships and informal fiduciary relationships or 'confidential relationships' that may arise from moral, social, domestic, or personal relationships." *Id.* at 437. The court recognized that whether an informal relationship gives rise to fiduciary duties depends on "the actualities of the relationship between the persons" and that duties will not be "lightly created." *Id*. at 438. The court also explained that merely "trusting" someone does not mean that a fiduciary relationship has been created.

The court then examined the evidence. Although the evidence showed that Decedent and Beneficiary had a long-standing close personal relationship, there was no evidence of a fiduciary relationship. The court explained that there was no competent evidence that Decedent was "accustomed to being guided by the judgment or advice" of Beneficiary. *Id*. at 438. Accordingly, there were no fiduciary duties that Beneficiary could have breached when she was named as the beneficiary of the IRA and bank accounts.

Moral: A person attempting to set aside a beneficiary designation needs to present solid evidence of a legitimate reason other than simply being unhappy with the designation such as breach of a genuine fiduciary duty, undue influence, fraud, or lack of capacity.

C. Community Property Survivorship Agreements

In re Estate of Cunningham, 390 S.W.3d 685 (Tex. App.—Dallas 2012, no pet. h.).

Husband and Wife entered into a community property survivorship agreement by using a fill-in-the-blank form with the assistance of family members rather than an attorney. After Husband died, the trial court granted Wife's application to adjudicate the agreement as valid. Four months later, one of Husband's children (Wife's stepson) filed a bill of review under Probate Code § 31 claiming that the court made a substantial error because some of the property allegedly covered by the agreement was actually Husband's separate property. The trial court denied the bill of review.

The appellate court reversed. The court explained that the community property survivorship agreement, although purporting to include "all inheritance property" within its scope, did not meet the requirements of Family Code §§ 4.203 and 4.205 to act as a conversion of separate property (the inherited property) into community property which would then be covered by the survivorship agreement. For example, the agreement did not state that Husband and Wife were converting separate property into community property. In addition, there was no evidence showing that either spouse received the required fair and reasonable disclosure of the legal effect of converting separate property to community property. Because the survivorship agreement did not convert Husband's separate property into community property, the original order was substantially in error and the trial court erred in not granting the bill of review.

Moral: A community property survivorship agreement is designed to provide survivorship

rights to community property, not to convert separate property into community property. Unless the agreement also meets the requirement of a conversion agreement, it will be ineffective to create survivorship rights in separate property.

D. Anatomical Matters

Evanston Ins. Co. v. Legacy of Life Inc., 370 S.W.3d 377 (Tex. 2012).

Daughter allowed Organ Donation Charity to harvest Mother's tissues. Daughter asserts that Charity told her it would distribute them on a non-profit basis. She claims that Mother's estate is entitled to restitution damages and that she has suffered mental anguish because Charity transferred Mother's tissues to companies that sold them at a profit. After litigation with Charity's insurance carrier arose, the Texas Supreme Court accepted certified questions relating to insurance coverage. In deciding that no coverage existed, the court made two significant holdings.

First, the court held that Daughter had at most a quasi-property interest in Mother's tissue. The court stated, "we cannot say that tissues have attained the status of property of the next of kin." It is true that the next of kin may donate a decedent's organs but they have no right to use those tissues unless the decedent named one or more of them as donees.

Second, the court concluded that Mother's tissues were not the property of her estate. A person's estate cannot designate a donee under the Texas Anatomical Gift Act. See Tex. Health & Safety Code § 692A.009(a). Because the court "held that tissues are not the property of the next of kin, [the court] necessarily conclude[d] that tissues are also not the property of the estate."

Moral: A family member unhappy with how a donee handles an anatomical gift will have difficulty recovering on property-based claims.