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

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)
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 Chapter) (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
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

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; *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); *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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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 13, 2014 (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

A. Status of Sex-Changed Spouse

In re Estate of Araguz, 2014 WL 576085 (Tex. App.—Corpus Christi-Edinburg 2014, no pet. h.).

Husband died intestate and his mother filed an action to determine heirship which would exclude Wife as an heir claiming that the marriage was void because the Texas Constitution prohibits same-sex marriage. Wife asserted that the marriage was valid because even though Wife was born with male sex organs, Wife had spent her life living as a female, had her name changed to a female name, and had gender reassignment surgery. The court granted a summary judgment that the marriage was void relying on *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied), which held that gender is determined at birth and cannot be changed by surgical procedures.

The appellate court reversed. The court pointed to a post-*Littleton* amendment to Family Code § 2.005(b)(8) which permits the county clerk to rely on a court order certifying a sex change to issue a marriage license. Thus, the court held that "Texas law recognizes that an individual who has had a 'sex change' in eligible to marry a person of the opposite sex" and that *Littleton* was legislatively overruled. The court did not, however, determine that the marriage was valid but instead returned the case to the trial court because there is a genuine issue of material fact with respect to Wife's gender.

Moral: A person's legal gender may be altered by the appropriate surgery thus permitting two people who were the same gender at birth to marry each other as long as they are currently configured as members of different genders.

B. Inheritance Rights of Descendants of Adopted-Out Heir

In re Estate of Forister, 421 S.W.3d 175 (Tex. App.—San Antonio 2013, pet. denied).

Intestate died without a surviving spouse, descendants, parents, siblings, nieces, or nephews. Thus, her sole heir appeared to be her great-nephew who claimed her entire estate. A complication arose, however, because her nephew had been adopted by her sister-in-law's second husband. An assignee claimed that an alleged half-cousin of the intestate assigned to him 25% of whatever interest the half-cousin would have in the intestate's estate. The trial court dismissed the assignee's request for a bill of review determining that the great-nephew was the intestate's sole heir.

On appeal, the court affirmed. The court carefully examined the assignee's argument that Probate Code § 40 (now Estates Code § 201.054(b)) provides that only an adopted-out person retains the right to inherit from the biological relatives and that the right to inherit from the biological side of the family does not pass down to the descendants of the adopted-out person. The court rejected the assignee's claim that this results from the omission of "and his descendants" in the mandate that the adopted person "inherits from and through the [person's] natural parent or parents." The court explained that the statutory section must be construed as a whole and in doing so, it is clear that adoption does not cut off the inheritance rights of the

adopted person as well as those of the adopted person's descendants.

Moral: The descendants of an adopted-out person retain the right to inherit from the biological relatives unless the adopted-out person was adopted as an adult.

III. WILLS

A. Interpretation and Construction

1. Outright Gift v. Fee Simple Determinable

Roberts v. Wilson, 394 S.W.3d 45 (Tex. App.—El Paso 2012, no pet.).

Testatrix's will provided that if a named child died without a descendant, the property devised to that child would pass to his siblings. The specified child survived Testatrix and later died intestate. The child's surviving spouse claimed that Testatrix's will made an outright gift to her husband so that she would inherit one-half of this property by intestacy while the child's siblings and their descendants asserted that Testatrix devised only a fee simple determinable allowing them to receive the entire property now that the named child has died.

Both the trial and appellate courts held that Testatrix's devise was outright to the named child. The statement that "in the event [specified child] dies without child or children or their descendants" referred to the child dying before Testatrix, not thereafter. The court explained that the devise did not contain language traditionally used to create a defeasible fee, such as the term "revert." The court referenced *Flores v. De Garza*, 44 S.W.2d 909 (Tex. Comm'n. App. 1932, judgm't adopted), and stated:

> a provision in a will providing for a devise over to another after the remainderman dies without issue means death prior to the termination of the intervening estate, and that the remainderman is vested with fee simple title at the termination of such prior intervening estate, unless the language of the will discloses a different intent.

Moral: To avoid this type of claim, clear temporal references should be included when referring to events such as a future death of a beneficiary.

2. Vesting of Interests

Netherton v. Cowan, No. 04-12-00627-CV, 2013 WL 4091773 (Tex. App.—San Antonio Aug. 14, 2013, no pet.) (mem. op.).

Testator's will devised Beneficiary a remainder interest in certain real property but if Beneficiary predeceases Testator "or dies before the property * * * vests in him," the property passes to Alternate. Beneficiary died prior to the holder of the life estate. When the life estate owner died, a dispute arose between Beneficiary's estate and Alternate over the ownership of the land.

Both the trial and appellate court held that the property was part of Beneficiary's estate. The court explained that Texas law favors a construction that results in vesting at the earliest possible time and thus the remainder interest vested in Beneficiary immediately upon Testator's death. In addition, the court noted that Testator's will did not include language requiring the holder of the remainder interest to outlive the life tenant as a condition of the devise.

Moral: "[W]hen a testator bequeaths [sic] a life estate in property and a remainder interest in the same property, the remainder interest is considered vested upon the death of the testator." *Id.* Thus, if a testator wants the interest to be contingent on the remainder beneficiary outliving the life tenant, the devise should include express survivorship language.

B. Title of Devisee

Meekins v. Wisnoski, 404 S.W.3d 690 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

A beneficiary claimed that a receiver appointed to sell property of the testator's estate could not sell his interest because of the well-established principle that the interest of a beneficiary vests immediately upon the testator's death. Estates Code § 101.001. The appellate court rejected this argument explaining that once an executor is appointed, the executor holds legal title along with a superior right to possess the property to pay the decedent's debts. Estates Code § 101.051(a). Thus, when the probate court appointed a receiver to partition and sell estate property to pay a tax debt and the sale properly took place, the purchaser received the testator's interest in the property.

Moral: A beneficiary's vested interest in the estate remains subject to the testator's creditors and thus a beneficiary may lose his or her entire bequest or devise.

C. In Terrorem Provision

Di Portanova v. Monroe, 402 S.W.3d 711 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

The trial court granted applicants' request for eight trusts to be consolidated under the court's deviation authority provided in Property Code § 112.054. The court explained that "[b]ecause of circumstances not known to or anticipated by the settlors, the original terms of the Eight Trusts would substantially impair the accomplishment of the purposes of the Eight Trusts in ways [the settlors] could not have anticipated." *Id.* at 716. The consolidation did not impact the dispositive provisions of the trusts.

Appellants assert that the consolidation violated *in terrorem* will provisions which stated that forfeiture occurs if an action is brought "for the purpose of modifying, varying, setting aside or nullifying any provision thereof * * * on any ground whatsoever." *Id.* at 715. The appellate court rejected this assertion holding that the suit for judicial modification of administrative terms was not intended to thwart the testators' intent and thus did not trigger forfeiture. In fact, the wills did not prohibit consolidation and the consolidation would prevent waste and avoid impairment of the administration of the trust.

Moral: Courts strictly construe *in terrorem* provisions and are unlikely to enforce them when property disposition is not impacted by the lawsuit.

D. Discharged Independent Executor as Proper Party to Contest

In re Estate of Whittington, 409 S.W.3d 666 (Tex. App.—Eastland 2013, no pet.).

The court admitted the testator's will to probate and appointed Independent Executor. After completing his duties, Independent Executor obtained a judicial discharge under Probate Code § 149E (now Estates Code § 405.003). Approximately six months later, Contestant filed a will contest and had citation served upon Independent Executor. The trial court granted Independent Executor's motion to be dismissed from the action on the ground that he was not a proper party due to the judicial discharge. Although the trial court originally imposed sanctions on the ground that there was no existing law supporting why Independent Executor would be a proper party and that the argument to establish a new rule was frivolous, the court later reconsidered and denied sanctions.

The appellate court agreed that Independent Executor was not a proper party due to the judicial discharge. A judicial discharge is designed for the executor to "obtain a shield from any liability involving matters related to the past administration of the estate that have been fully and fairly disclosed." *Id.* at 670. In addition, it would be absurd to force the executor to defend the will with his or her own money as all of the estate assets have already been distributed and there is no guarantee that the beneficiaries have retained any of those assets for reimbursement purposes.

The court also agreed that sanctions were not appropriate because this issue was a matter of first impression.

Moral: An independent executor who obtains a judicial discharge is not a proper party to a subsequent contest of the will.

E. Tortious Interference With Inheritance Rights

In re Estate of Valdez, 406 S.W.3d 228 (Tex. App.—San Antonio 2013, pet. denied).

After Proponent filed applications to probate the testatrix's will, Contestant filed a will contest. Proponent then attempted to hold Contestant liable for tortious interference with inheritance rights. The trial court granted Contestant a summary judgment.

The appellate court affirmed. Citing Probate Code § 10C (now Estates Code § 54.001), the court explained that Contestant could not be held liable "because his lawful act of filing a will contest was not tortious conduct." *Id.* at 234.

Moral: A will contestant cannot be held liable for tortious interference with inheritance rights.

IV. ESTATE ADMINISTRATION

A. Jurisdiction

Haga v. Thomas, 409 S.W.3d 731 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

Decedent was a North Carolina resident at the time of his death. Beneficiary was successful in getting a court in North Carolina to admit Decedent's will to probate. After Decedent's parents had a Texas probate court admit the will to probate and construe that will with regard to how it disposed of Texas real property, Beneficiary appealed, claiming that the North Carolina court had exclusive jurisdiction over Decedent's will and the administration of his estate.

The appellate court affirmed. The court began its analysis by examining Probate Code § 95(a), which

allows a will probated elsewhere to be admitted to probate in Texas. However, the court pointed out that this section "does not address whether a Texas probate court has jurisdiction to resolve disputes concerning the administration of an estate or the construction of a will of a decedent who died in another state and was domiciled in that other state, but who owned real property in Texas." *Id.* The court reviewed leading Texas cases and concluded that "the existence of real property in Texas gives Texas courts jurisdiction over an administration concerning that property." *Id.*

Moral: Texas courts have jurisdiction regarding the administration of Texas real property regardless of where the will was admitted to probate.

B. Venue

In re San Jacinto County, 416 S.W.3d 639 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.).

An estate administration was ongoing in Harris County, the county in which the testator was domiciled at the time of his death. An issue arose regarding the proper venue for a declaratory judgment action that would impact property the testator devised to San Jacinto County. The independent executor argued that venue was proper in Harris County where the estate was being administered and San Jacinto County asserted that venue was proper in San Jacinto County because of Texas Civil Practice & Remedies Code § 15.015 which states that an action against a county must be brought in that county. The probate court determined that venue was proper in Harris County causing San Jacinto County to seek a writ of mandamus.

The appellate court conditionally granted the writ. The court explained that § 15.015 is a mandatory venue statute with no exceptions. "Therefore, when a county is sued, venue is mandatory in that country irrespective of any other venue statutes, whether mandatory or permissive." Id. at 642.

Moral: If a probate action potentially could result in a judgment against a county, proper venue for that action is in that county.

C. Transfer

In re Estate of Trevino, 415 S.W.3d 442 (Tex. App.—San Antonio 2013, no pet. h.).

The testator's wife filed the testator's will for probate in the constitutional county court (the county does not have a statutory probate court or county court at law with probate jurisdiction) the same day that her husband died. A few days later, she filed an action against the testator's son alleging, among other things, breach of fiduciary duty and undue influence. Using the authority under Probate Code § 4D(a)(2) [now Estates Code § 32.003(a)(2)], the judge transferred the case to a district court. Later, the testator's son objected to the transfer and requested the assignment of a statutory probate court judge which the court denied. The son then requested a writ of mandamus.

The appellate court conditionally granted the writ. The court explained that as of the date of the transfer order, no probate matter was contested because the only party who had appeared in the case was the testator's wife and thus no parties had adopted adversarial positions. The ability to transfer a probate case to district court does not arise when the matter is filed but instead is triggered when a contest occurs. It is irrelevant that the testator's wife anticipated that the testator's son would file a contest. Accordingly, the transfer to the district court was improper.

The court also held that denial of the testator's son request for the assignment of a statutory probate court judge was not an abuse of discretion because his request was not filed until after the transfer order was signed even though the transfer order was itself improper. The judge has a mandatory duty to grant the assignment motion only if the motion is filed prior to a transfer to a district court under Probate Code § 4D(d) [now Estates Code § 32.003(b)].

Moral: Do not ask the court do perform an action, such as transferring a case from a constitutional county court to a district court, prematurely, e.g., before a contest actually exists.

D. Statute of Limitations to Probate Will

In re Estate of Allen, 407 S.W.3d 335 (Tex. App.—Eastland 2013, no pet.).

Wife filed Husband's will for probate as a muniment of title more than four years after his death. The will left his entire estate to his wife of over fifty-six years. The trial court admitted the will to probate under Probate Code § 73(a) after finding that Wife was not in default in failing to probate the will within the four year period. Son appealed.

The appellate court affirmed. The court reviewed the facts, which showed that Wife had consulted an attorney shortly after her husband's death. The attorney told her she had the option of probating the will as a muniment of title or executing an affidavit of heirship and that regardless of which option she

selected, she would receive the entire estate. Because Wife wanted the estate handled quickly and inexpensively, she opted for the affidavit of heirship.

When Wife and Son had a dispute over keeping livestock on certain real property, Wife consulted a different attorney. This attorney discovered that Husband owned hundreds of acres of land as his separate property in which his children would have a substantial interest under intestacy (e.g., two-thirds outright plus a life estate in Wife's life estate in the other one-third of the property). Within a month of learning of her children's interest in the property under the affidavit of heirship, Wife filed the will for probate.

The court reviewed the evidence and found that it was sufficient to support the trial court's finding that Wife was not in default. She relied on the advice of an attorney in not probating the will in a timely manner. She had no legal training and had no reason to distrust her attorney when he asserted that she would receive all of Husband's property under an affidavit of heirship. Once she realized that her first attorney had given her bad advice, she promptly filed the will for probate.

Moral: Texas courts are "quite liberal in permitting a will to be offered as a muniment of title after the statute of limitations has expired upon the showing of an excuse by the proponent for failure to offer the will earlier." *Id.* at *4. Also, if a decedent dies with a will, it is better practice to probate that will rather than to use a technique designed for an intestate death, such as an affidavit of heirship.

E. Appeal – Authority of Trial Court in Gap Between Opinion and Mandate

Pine v. deBlieux, 405 S.W.3d 140 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

In a prior opinion, the appellate court determined that the administratrix was unsuitable as a matter of law. The executrix sought review by the Supreme Court of Texas which denied her petition. The appellate court then issued its mandate. However, in the interim, the trial court rendered a final judgment disposing of some of the decedent's assets.

When the trial court's action was brought to the attention of the appellate court, the court held that the trial court should not have rendered a final judgment while the unsuitable administratrix was still in office. Accordingly, the court reversed the trial court's determination of the proper recipient of certain of the decedent's assets.

The court recognized that Probate Code § 28 (now Estates Code § 351.053) allows the administratrix to continue to act and that Texas Rule of Appellate Procedure 18.6 provides that an interlocutory order takes effect when the mandate is issued. However, the court explained that the administratrix acted at her own peril when she continued to make claims to estate property hoping that the Supreme Court of Texas would grant her petition and then find in her favor.

Moral: In the gap period between the appellate court's opinion and the court's issuance of its mandate, a final judgment of a trial court is likely to be set aside if it is in conflict with the opinion and mandate.

F. Personal Representative

1. Appointment of Administrator

In re Estate of Arizola, 401 S.W.3d 664 (Tex. App.—San Antonio 2013, pet. denied).

The applicant for letters of administration failed to list an heir in violation of Probate Code § 82(e). The trial court nonetheless appointed the applicant. The appellate court held that this error did not lead to an improper judgment as the applicant was qualified and had a superior right to serve as the administrator. Accordingly, the court held that the appointment was proper.

With regard to a different estate, the court examined a claim that the appointment of an administrator was improper because the complaining party was not personally served with notice of the application. The court rejected this claim pointing to Probate Code § 128(a), which requires service only by posting of the citation, which was properly done.

Moral: An application for letters should contain all of the statutory required items and notice of the application by posting rather than mail or personal service, which is sufficient.

2. Removal

The appellate court affirmed the trial court's refusal to remove an administrator for misapplication, waste, or embezzlement of estate assets under Probate Code § 222(a)(F) merely because he filed a motion seeking ratification of certain conduct. The court explained that although seeking prior court approval may be a better approach, failure to do so is not clear and convincing evidence of a misapplication or embezzlement.

Moral: A dependent personal representative should usually seek prior court approval (permission) rather than take the action and then seek ratification (forgiveness).

G. Attorney Fees

In re Estate of Bessire, 399 S.W.3d 642 (Tex. App.—Amarillo 2013, pet. denied).

Son was appointed as the independent executor of Mother's estate. Son later accused Daughter (his sister) of improperly taking money from Mother's estate before she died. Extensive discovery proceedings and legal maneuvering subsequently occurred resulting in Son being removed as the executor and Daughter being appointed in his place. In addition, Son was denied his attorney's fees, which amounted to over $80,000. Son appealed.

The appellate court affirmed. After writing extensively on the procedural aspects of the claim, the court focused on whether the evidence supported a legal theory justifying the trial court's denial of Son's attorney's fees. The court began its analysis by recognizing that Son was a fiduciary and was charged with collecting estate property under Probate Code § 233. However, this duty must be exercised with reasonable care. The court examined the evidence, which revealed that Son actually admitted that he had no basis for his claim that Daughter had taken estate property. Accordingly, Son's attorney's fees were not expended in the best interest of the estate and should not be paid out of estate funds under Probate Code § 242. The court explained that "when the personal representative's own omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the personal representative for his attorney's fees." *Id.* at 659.

Moral: An executor should have an actual basis in fact before seeking to recover estate property. If an executor makes wild and unsupported accusations that then trigger attorney's fees, the court is unlikely to permit the recovery of those fees from the estate.

V. TRUSTS

A. Characterization of Distributions

Benavides v. Mathis, No. 04-13-00270-CV, 2014 WL 1242512 (Tex. App.—San Antonio Mar. 26, 2014, no pet. h.).

The court determined that a beneficiary of a trust was incompetent and appointed a guardian of the estate. A dispute arose as to the person entitled to trust income. The guardian claimed that because the settlor created the trust before the beneficiary was married, the income was separate property. On the other hand, the beneficiary's wife claimed one-half of the income as community property because the trust income was income from separate property which is deemed community property under Texas law. The trial court granted summary judgment in favor of the guardian. The beneficiary's wife appealed.

The appellate court affirmed. The court recognized that ordinarily income from separate property is community property. However, in this case, the trust was irrevocable and the beneficiary had no present possessory right to any part of the corpus. Because the beneficiary had no such right, the beneficiary could not be considered an owner of the trust corpus and thus all distributions are the beneficiary's separate property.

Moral: Income distributions from an irrevocable trust are community property only if the beneficiary has a present possessory right to a portion of the corpus.

B. Distribution Upon Termination

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

The settlor created an inter vivos trust which terminated at her death with the property passing to the executor of her estate to 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 which passes through a will automatically vests in the beneficiaries of the will in the same manner as non-trust property.

C. Breach of Fiduciary Duty

Cluck v. Mecom, 401 S.W.3d 110 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Beneficiaries (children) sued Trustee (father) alleging the he breached fiduciary duties in administering the settlor's (the children's grandfather) trust. The trial

court granted summary judgment in favor of Trustee and Beneficiaries appealed.

1. Evidence

The appellate court reviewed the record and determined that there was plenty of evidence raising material issues of fact that precluded the trial court from rendering a no-evidence summary judgment. The court pointed to a laundry list of deposition questions that addressed Trustee's self-dealing. Trustee consistently answered inquires with answers such as "I'm not sure," "I can't remember," and "I don't recall." The court also rejected Trustee's assertion that he deferred to the judgment of other professionals and that such deferral justified his inability to prove the fairness of the self-dealing transactions.

2. Statute of Limitations

The court also addressed Trustee's claim that even if he had breached his duties, Beneficiaries were aware of the conduct so long ago that the statute of limitations on their claims would have run. The court began its discussion by recognizing that the statute of limitations for breach of fiduciary duty is four years under the Civil Practice & Remedies Code § 16.004(a)(5) and that the discovery rule is applicable. Trustee alleged that the time period began to run at the latest in 1998 based on various conversations and a letter. The court explained that the date on which Beneficiaries knew or should have known of the breach is a fact question, unless reasonable minds could not differ on when the period began to run under the facts. The court held that Trustee did not prove as a matter of law that Beneficiaries knew about the breach in 1998. Accordingly, the trial court's summary judgment for Trustee was improper.

Moral: Trustees should not self-deal and will have a difficult time justifying the self-dealing by not remembering what they did or by telling Beneficiaries to consult with the trustee's advisors. In addition, a court will be reluctant to determine that the statute of limitations has run on a breach of fiduciary claim unless it is clear from the facts that the beneficiaries were aware of the breach and did not take timely action to pursue their claim.

D. Receivership

Elliott v. Weatherman, 396 S.W.3d 224 (Tex. App.—Austin 2013, no pet.).

After settlors died, their three children became co-trustees of their trust. Two of the trustees sued the third trustee alleging that he had violated the terms of the trust, breached fiduciary duties, and converted some of the trust property. To resolve this dispute, the trial court appointed a receiver upon the request of the allegedly breaching trustee over certain assets of the trust as authorized by Trust Code § 114.008(a)(5). The other two trustees appealed.

The appellate court reversed. The court stated that "[e]ven if a specific statutory provision authorizes a receivership, a trial court should not appoint a receiver if another remedy exists at law or in equity that is adequate and complete." *Id.* at 228. The court also explained that the two other trustees did not have sufficient notice that the receivership remedy was requested, that is, a minimum of three days notice under the Tex. R. Civ. P. 695 because real property was involved. Even with respect to the personal property subject to the receivership, the court held that the evidence was insufficient to justify the appointment of a receiver without notice and the opportunity to be heard.

Moral: Receivership is an "extreme" remedy and will be granted "only where great emergency or imperative necessity requires it." *Id.* at 229, quoting *Krummnow v. Krummnow*, 174 S.W.3d 820, 828 (Tex. App.—Waco 2005, pet. denied).

E. Bankruptcy

Bullock v. BankChampaign, 133 S. Ct. 1754 (2013).

Settlor created a trust for his children and named one of the children as the trustee. The trustee breached his fiduciary duties by borrowing funds from the trust and thus his siblings obtained a judgment against him for the benefits he received from his self-dealing. The trustee had previously repaid all borrowed funds with interest and the trial court determined that he had no malicious motive. The trustee later filed for bankruptcy and sought discharge of the judgment. The Bankruptcy Court held that the debt was not dischargeable under 11 U.S.C. § 523(a)(4), which provides that discharge is not available "for fraud or defalcation while acting in a fiduciary capacity." Both the Federal District Court and the Eleventh Circuit Court of Appeals agreed.

The Supreme Court of the United States in a unanimous opinion reversed. The Court explained that the debt could be discharged because the trustee was not (in my words) "evil." The Court held that for the debt to be non-dischargeable, the trustee must have

acted with a culpable statement mind "involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior."

Moral: A bankrupt trustee, who breached fiduciary duties but not in an evil manner, may be successful in getting a judgment based on that breach discharged.

VI. OTHER ESTATE PLANNING MATTERS

A. Multiple-Party Accounts

Hicks v. Texas, 419 S.W.3d 555 (Tex. App.—Amarillo 2013, no pet. h .).

Defendant befriended her father-in-law and they opened a joint bank account. Defendant withdrew money from that account in excess of her net contributions. She used these funds for herself and her family members such as remodeling her home, purchasing appliances, obtaining cosmetic surgery, and paying for cheerleading classes. She was subsequently convicted of theft. Defendant appealed.

The appellate court affirmed. The court recognized that a party to a joint account has the right to withdraw funds in excess of that party's net contributions. However, doing so without authority and without evidence that the other party was making a gift, can be deemed theft. In other words, even though she had the right to withdraw the funds, she did not thereby obtain rightful ownership of those funds.

Moral: Merely because a party to a joint account has the right to withdraw, does not mean that person may withdraw funds in excess of that party's net contributions without the fear of civil conversion liability or a criminal conviction for theft.

B. Life Insurance

Hillman v. Maretta, 133 S. Ct. 1943 (2013).

Insured named his then-wife as the beneficiary of a life insurance policy covered by the Federal Employees' Group Life Insurance Act of 1954. Insured later divorced the beneficiary and remarried but he neglected to change the beneficiary of the policy. After his death, both his current wife and his former wife claimed the proceeds. His current wife claimed that the divorce acted to revoke Insured's designation of his now ex-wife as a beneficiary under Virginia law. On the other hand, his former wife asserted that local law was preempted by federal law and thus the designation of her as the beneficiary remained effective. In addition, the former wife also claimed that the Virginia statute holding her liable for the proceeds even if preemption occurred was likewise preempted.

The Supreme Court of the United States agreed that the Virginia statute was preempted and that the ex-wife was entitled to the proceeds of the life insurance policy.

Moral: Upon divorce (or even while the divorce is pending), life insurance beneficiary designations need to be updated to reflect the insured's intent because policies governed by federal law will not get the benefit of state law, which automatically voids a beneficiary designation in favor of an ex-spouse.

C. Body Disposition

In re Estate of Woods, 402 S.W.3d 845 (Tex. App.—Tyler 2013, no pet.).

After the decedent died, a battle ensued between his surviving spouse and the independent executor, his son from a prior marriage, over who has priority to decide on the disposition of the decedent's cremains. The trial court determined the son had priority.

The appellate court reversed. The court pointed to Health & Safety Code § 711.002(a) which states that the surviving spouse has priority over body disposition if the deceased spouse did not make other arrangements. The court held that it was irrelevant that decedent had filed for a divorce from his wife a few months before his death.

Moral: Because a marriage is terminated only by a court decree or death, a person in the process of divorce needs to update his or her entire estate plan to remove the spouse from the normal priority the spouse has to make financial, medical, and body disposition arrangements.