TEXAS CASE LAW UPDATE

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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
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 FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (4th ed. 2007); TEACHING MATERIALS ON ESTATE PLANNING (3d ed. 2005); 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); 19-19A WEST'S LEGAL FORMS — REAL ESTATE TRANSACTIONS (2002); *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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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 11, 2012 (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

1. Witnessing

In re Estate of Fuselier, 346 S.W.3d 1 (Tex. App.—Texarkana 2009, no pet.)

Query: This 2009 case was recently reported! I wonder about the reason for the three year delay.

Husband and Wife executed a joint will which had only one signature in addition to those of Husband and Wife. The probate court held that the will failed because it had only one witness. The appellate court reversed holding that a co-testator's signature may also serve as the signature of a witness even if the co-testator did not intend for her signature also to be that of a witness to the will.

Moral: First and foremost, do not prepare a joint will under any circumstances. And, make certain that every non-holographic will has two disinterested witnesses.

Note: A dissenting judge did not believe that a co-testator's signature on a joint will could also be considered as a witness.

2. Non-Statutory Requirements

In re Estate of Arrington, 2012 WL 668994 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.).

Testator executed a will two days after being diagnosed with a brain tumor. His will left his entire estate to Daughter to the exclusion of his other children and his Wife from whom he was in the process of getting a divorce. The court admitted the will to probate. Wife appealed claiming that there was no evidence to support the jury findings that Testator properly executed the will and had testamentary capacity.

The appellate court rejected Wife's claim that Testator did not properly execute the will. Wife argued that the will was invalid because Testator did not sign each page and because the witnesses did not read the will. The court explained that neither of these two steps are required under Probate Code § 59.

Moral: The court will not add requirements to the validity of a will such as to require that the witnesses read the will or that the testator signed each page of the will.

B. Contingent Will

In re Estate of Fuselier, 346 S.W.3d 1 (Tex. App.—Texarkana 2009, no pet.).

Query: This 2009 case was recently reported! I

wonder about the reason for the three year delay.

A joint will of Husband and Wife leaving the entire estate to one child began with the phrase, "In the event of our deaths." At the time of Husband's death, Wife was still alive and thus the non-children beneficiaries claimed that the will could not take effect because the contingency was not satisfied, that is, both of the testators were not deceased. The trial court granted summary judgment that the will was contingent.

The appellate court reversed. The court looked at the conflict between the singular "event" and plural "deaths" in the will and decided that the language is susceptible to different interpretations. The triggering event could be the death of one spouse or it could be the simultaneous deaths of both spouses. Because the will is ambiguous, summary judgment was improper and the court remanded for the probate court to construe the will after considering extrinsic evidence of the Husband's intent.

Moral: First and foremost, do not prepare a joint will under any circumstances. And, draft carefully so it is clear whether a will is absolute or contingent.

C. Anti-Lapse Statute

Lacis v. Lacis, 355 S.W.3d 727 (Tex. App.—Houston [1st Dist.] 2011, writ dism'd w.o.j.).

Testator's will left property to two of his children who predeceased Testator but who had descendants who survived Testator (Testator's grandchildren). Testator's grandchildren asserted that the lapsed property passed to them because of Probate Code § 68, the anti-lapse statute. However, Wife claimed that she was entitled to this property as the beneficiary of the residual clause. The trial court awarded the property to the grandchildren and the appellate court reversed.

The appellate court held that the anti-lapse statute did not apply because Testator's will specifically provided that lapsed gifts were to pass under the residuary clause. The key language provided that "the term 'residuary estate' means all property in which I may have any interest (including lapsed gifts) which is not disposed of by other than the [residuary clause]." The court rejected the grandchildren's argument that the term "lapsed gifts" referred only to gifts not saved by the anti-lapse statute. The court also recognized that no prior Texas case dealt with whether this type of language in a residuary clause would negate the application of the anti-lapse statute. Thus, the court examined cases in other states and found that the vast majority of them support Wife's claim.

Moral: Language in the residuary clause including within its scope lapsed gifts will prevent the application of the anti-lapse statute.

D. Interpretation and Construction

1. "Nieces and Nephews"

In re Estate of Reistino, 333 S.W.3d 767 (Tex. App.—Waco 2010, no pet.).

Testator's will established a trust for his daughter with the remainder passing to his "nieces and nephews who shall be living * * * per capita" upon his daughter's death. A dispute arose as to whether descendants of predeceased nieces and nephews were entitled to share in the distribution.

The appellate court examined the language of the testamentary trust and held that it was unambiguous and thus the grandnieces and grandnephews were not remainder beneficiaries. Just like the term "children" does not include grandchildren, the court held that grandnieces and grandnephews are not included in a gift to "nieces and nephews."

A concurring opinion made the excellent point that Testator imposed a survivorship requirement and mandated a per capita distribution. Thus, a niece or nephew must survive to be a beneficiary. Testator also mandated a per capita distribution which is inconsistent with allowing descendants of deceased beneficiaries to be included as beneficiaries (that is, a per stirpes or per capita with representation distribution).

Moral: To avoid confusion, testators should expressly state whether descendants of deceased beneficiaries are or are not to be substituted for deceased beneficiaries. Relying on phrases such as "who shall then be living" may appear clear but could lead to litigation.

2. Description of Devise

Coleman v. Coleman, 350 S.W.3d 201 (Tex. App.—San Antonio 2011, no pet. h.).

Testator's will left all of his mineral interests in property that a specific company was "presently making payments to me" to his wife for life. After Testator died, additional wells were drilled on this property and his wife received the royalties. Other beneficiaries claimed that the royalties from the new wells belonged to them claiming that the will devised the interest only in wells that were drilled at the time of Testator's death.

Both the trial and appellate courts rejected the claim of the other beneficiaries. The court held that the language was unambiguous. The terms of the devise clearly referred to the mineral interests in a particular parcel of land, not to specific wells that were drilled on the land.

Moral: To avoid this type of issue, grants should contain more succinct or technically precise phrasing.

E. Power of Appointment

Doggett v. Robinson, 345 S.W.3d 94 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

Husband's testamentary trusts granted Wife special powers of appointment over certain trust assets if she made a "specific reference" to the exercise of the power in her will. Husband's will then provided a detailed scheme for distributing these assets if Wife did not exercise her powers of appointment. After Wife died, estate litigation ensued, some of which focused on whether Wife's will validly exercised the power of appointment when it provided that she bequeathed "any other property over which I may have a power of appointment."

The court held that Wife's will was insufficient to exercise the power of appointment. The court assumed, but did not decide, that the language was sufficient to make a specific reference as Husband's will required even though it did not expressly refer to Husband's trusts. Instead, the court noted that this provision indicated Wife's intent to exercise the powers of appointment but did not state an appointee. Thus, the court examined the residuary clause to determine if it exercised the power when it bequeathed "my estate and property." The court held that this language referred to Wife's estate and property which would not encompass the powers of appointment she had the authority to exercise under Husband's trusts. A power of appointment is not property or an estate in property. Instead it is a power or right of disposition. Thus, Wife's residuary clause cannot be considered as naming an appointee even if the language describing her intent would be deemed a sufficient specific reference to the power. The property subject to the powers of appointment never belonged or could belong to Wife because she did not have the authority to appoint to herself.

Note: Probate Code § 58c which governs the exercise of powers of appointment did not apply because Wife executed her will before the effective date of this section.

Moral: A testator who wishes to exercise a power of appointment must do so in a very clear and unambiguous manner and must be certain to designate an appointee.

F. Contests

1. Statute of Limitations

Evans v. Allen, 358 S.W.3d 358 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.).

More than two years after the probate of the testator's will, a beneficiary of an earlier will attempted to contest the will. The appellate court held that a directed verdict in favor of Executor was proper because the two year statute of limitations under Probate Code § 93 had expired. The contestant made two arguments, both of which the court rejected.

First, the contestant claimed that the statute of limitations could not start to run until she learned of the existence of the probated will. Instead, the court held that she had constructive notice because the probate proceedings are on public record. Accordingly, the statute of limitations began to run on the date the court admitted the will to probate.

Second, the contestant claimed the will proponent was judicially estopped from probating the will because the proponent had admitted that the testator was incapacitated during guardianship proceedings which had occurred prior to the date the testator executed the will. The court rejected this argument because the standards for incapacity and the standards for testamentary capacity are different and thus the will proponent did not assert inconsistent positions.

The court also noted that a contest for lack of testamentary capacity does not fall within the exception to the two year statute of limitations for "forgery or other fraud" which provides that the two year time period runs from discovery of the forgery or fraud. Lack of capacity is neither forgery nor fraud.

Moral: A person who wishes to contest a will for lack of testamentary capacity must do so within two years of when the will is admitted to probate even if the person is unaware of the probate.

2. Sufficiency of General Denial

In re Estate of Hudson, 2011 WL 5433689 (Tex. App.—Dallas 2011, no pet. h.).

Son filed a general denial when Mother applied to probate Father's will. The appellate court held that this was sufficient as a contest under Probate Code § 10 and thus Son was entitled to be heard during the probate of the will and that his request for a jury trial should be honored under Probate Code § 21. The court noted that § 10 does not require that a will contestant identify with specificity the grounds on which the contestant is opposing the will.

Moral: A general denial of a will proponent's application to probate a will qualifies as a contest of the will.

3. Lack of Testamentary Capacity

a. Weak Evidence

In re Estate of Arrington, 2012 WL 668994 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.).

Testator executed a will two days after being diagnosed with a brain tumor which left his entire estate to Daughter to the exclusion of his other children and his Wife from whom he was in the process of getting a divorce. The court admitted the will to probate. Wife appealed claiming that there was no evidence to support the jury findings that Testator properly executed the will and had testamentary capacity.

The appellate court rejected Wife's claim that Testator lacked testamentary capacity. The court explained that the jury heard direct evidence of Testator's capacity on the date of will execution from the subscribing witnesses one of whom had known Testator for twenty years. The court rejected Wife's claim that Testator lacked capacity because the will named a person as a child who was never legally adopted and omitted an alleged additional child. As the court stated, "a finding of testamentary capacity does not hinge entirely on direct evidence that the testator discussed the details of his children, wealth, or disposition at the time he signed his will."

Moral: Family descriptions in wills should be accurate to help prevent attacks on the will based on lack of testamentary capacity.

b. Weak Evidence – Another Case

In re Estate of Vackar, 345 S.W.3d 588 (Tex. App.—San Antonio 2011, no pet.).

Brother executed a will after a serious accident leaving all of his property to Sister and omitting his Wife and Son, both from whom he was estranged. After Brother's death, Wife and Son contested the validity of Brother's will leaving his entire estate to Sister and naming Sister as his

agent under a durable power of attorney. The jury found that Brother lacked testamentary capacity and Sister appealed.

The appellate court reversed. The court first addressed the issue of whether certain medical records which could have supported the finding of lack of capacity were properly admitted into evidence. Because the proper predicate was not laid, these records could not support the jury's finding but that one record could be considered because Sister waived her objection. The court then examined the other evidence and found that it was insufficient to support a finding of lack of capacity and that the jury's finding otherwise was against the great weight and preponderance of the evidence. Instead, the evidence showed that Brother had capacity when he executed his will and durable power of attorney.

Moral: Although difficult to do, it is possible to overturn a jury finding of lack of capacity on appeal if the evidence upon which the jury relied was extremely weak.

4. Forgery

Haisler v. Coburn, 2010 WL 2953372 (Tex. App.—Waco 2010, pet. denied).

Father died with a will leaving his entire estate to Step-Mother. Daughter contested the will but later dismissed the contest after receiving property under a family settlement agreement. Years later, Daughter learned that Father's will had been forged. Daughter then filed an equitable bill of review to set aside the order admitting the will to probate. The trial court refused and she appealed.

The appellate court affirmed. A bill of review is proper when there is extrinsic fraud which prevents a party from fully litigating all of the party's rights or defenses. The court explained that in this case the fraud was merely intrinsic, that is, "She was not kept from court; no false promises of compromise were alleged to have been made; and she was not denied knowledge of application to probate the will."

Moral: Once a forged will is admitted to probate, it may be difficult to have the order reversed even when there is clear evidence of forgery.

5. Undue Influence

In re Estate of Johnson, 340 S.W.3d 769 (Tex. App.—San Antonio 2011, pet. stricken).

The jury determined that several of Testator's wills and trusts were invalid because they were executed as a result of undue influence. The appellate court affirmed. The court began with an extensive discussion of the law of undue influence and the leading Texas cases. It then went through each element of undue influence reviewing some of the evidence developed during the four month trial which supported the jury's determination that the elements of undue influence were satisfied.

Moral: Overturning a jury finding of undue influence on appeal is difficult. Accordingly, the will proponent should present the best evidence at trial.

6. Inconsistent Findings

In re Estate of Lynch, 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied).

The jury found that the testator executed his will at a time when he lacked testamentary capacity and that he was simultaneously unduly influenced. The proponent of the will asserted that these findings create an irreconcilable conflict because only a person who has testamentary capacity can be subject to undue influence.

The appellate court examined the leading Texas cases. The court acknowledged that the cases recognize that a finding of undue influence "implies" that the testator had testamentary capacity. However, the cases do not hold that a finding of undue influence "requires" the existence of testamentary capacity. The court concluded that "testamentary capacity and undue influence are not necessarily mutually exclusive; in fact, one (incapacity) may be a factor in the existence of the other (undue influence)."

Moral: A will may be simultaneously contested on grounds of lack of capacity and undue influence.

7. Attorney Fees

In re Estate of Lynch, 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied).

Unsuccessful will proponent incurred over $600,000 in reasonable and necessary attorney fees. However, the jury found that she did not act in good faith and with just cause and thus the trial court declined to award those fees under Probate Code § 243. The appellate court held that merely because fees are deemed reasonable and necessary does not mean the contestant pursued the action in good faith or with just cause.

Moral: A jury finding that the attorney fees of an unsuccessful will proponent are reasonable does not necessarily mean they were incurred in good faith or with just cause.

IV. ESTATE ADMINISTRATION

A. Standing and Capacity

1. Parent of Deceased Minor

Lopez-Franco v. Hernandez, 351 S.W.3d 387 (Tex. App.—El Paso 2011, pet. denied).

The appellate court held that a parent of a minor child had standing and capacity to represent the child's estate even though the parent was not appointed as the child's personal representative. The court explained that under *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998), an heir may appear as a representative of a decedent's estate if the heir proves that no administration of the decedent's estate is pending or necessary. The court determined that the fact that this case involved life insurance proceeds rather than a survival action as in *Shepherd* was irrelevant. Likewise, it did not matter that the parent paid for the child's funeral. The payment did not create a debt of the estate because there was no promise to repay. The court stressed that Probate Code § 178(b) does not authorize an administration unless it is necessary.

Moral: An heir may represent the estate of an intestate decedent if no administration is necessary or pending.

2. Beneficiary

In re O'Quinn, 2011 WL 5357628 (Tex. App.—Houston [1st Dist.] 2011, mand. denied).

Alleged common law wife claimed that the sole beneficiary of the decedent's will lacked standing to assert claims for declaratory relief which included a request for a finding that no common law marriage existed. The appellate court disagreed explaining that the beneficiary had a justiciable interest. If the alleged common law wife was successful in proving a marriage, then the size of the estate passing to the beneficiary would be reduced. In addition, Civil Practice & Remedies Code § 37.005(3) gives the court the ability to determine any question arising in the administration of an estate.

Moral: A beneficiary has standing to intervene in an action if the petitioner's action would result in a lessening of the beneficiary's share of the estate.

B. Jurisdiction

1. Contesting Jurisdiction

In re Estate of Puig, 351 S.W.3d 301 (Tex. 2011).

According to a divorce decree, ex-wife was entitled to 60% of a parcel of community property. At the time of ex-wife's death, ex-husband had not yet deeded over this 60% interest to wife. Ex-wife's will was duly probated in the county court at law in ex-wife's county of residence (Fort Bend). Independent administratrix then sued to have ex-husband deed over the property. When he refused, the court appointed a master in chancery to execute the deed. Later, other parties filed suit in district court in the county where the property is located

(Webb) to set aside the portion of the divorce decree dealing with this property. The district court denied a plea to the jurisdiction and the appellate court denied a writ of mandamus. Independent administratrix appealed.

The Texas Supreme Court began its analysis by determining that the Fort Bend county court at law had jurisdiction to hear the Webb county action as it dealt with the proper distribution of estate property. Because both the Fort Bend county court at law and Webb county district court had jurisdiction, the issue was which court has dominant jurisdiction. Because the Fort Bend county court at law action was initiated first, it had dominant jurisdiction. But, the proper method of resolving this type of jurisdictional dispute is a plea in abatement, not a plea to the jurisdiction. Accordingly, district court's denial of a plea to the jurisdiction was not an abuse of discretion which resulted in the deprivation of an adequate appellate remedy. The court then denied the petition for a writ of mandamus.

Note: This case was governed by the jurisdictional provisions of the Probate Code as they existed prior to September 1, 2009.

Moral: "The proper method for contesting a court's lack of dominant jurisdiction is the filing of a plea in abatement, not a plea to the jurisdiction." Puig at 13.

2. Multiple Actions Under One Case Number

In re Robinson, 358 S.W.3d 351 (Tex. App.—Dallas 2011, no pet. h.).

The trial court granted Daughter One's application for a determination of heirship. No one appealed the judgment or sought a new trial. Later, Daughter Two filed an application to probate a will as a muniment of title under the same cause number as the heirship proceeding. Daughter One then contested the will and asserted that the heirship determination was res judicata. Daughter One's response was to file a plea to the jurisdiction asserting that the court lost plenary power after it determined heirship. The trial court rejected the plea. Daughter One then sought mandamus.

The appellate court denied Daughter One's request. The court explained that Daughter Two made a claim for affirmative relief when she filed her application to probate their mother's will as a muniment of title. The court explained that the application for probate was an independent lawsuit even though Daughter Two filed it under the same cause number. Accordingly, mandamus was not proper because the trial court did not abuse its discretion in exercising jurisdiction over the muniment of title action.

Moral: Although several petitions may be filed in the same cause number, they may nonetheless be considered independent lawsuits.

C. Appeal

1. Determination that Alleged Spouse Previously Divorced Intestate

In re Estate of Morales, 345 S.W.3d 781 (Tex. App.—El Paso 2011, no pet. h.).

After Intestate died, Alleged Widow filed an application to determine heirship. Son claimed she had no interest in Intestate's estate because they had been divorced for over twenty years. The probate court found that they were indeed divorced and Alleged Widow appealed.

The appellate court determined it lacked jurisdiction because the probate court's order was not final. The court had not yet determined Intestate's heirs or resolved other issues pending in the case.

Moral: A person who wishes to appeal a case which is not yet final should seek a partition order if the person wishes to appeal sooner than the case's normal termination.

2. Orders to Clear Title

In re Estate of Brown, 346 S.W.3d 780 (Tex. App.—Dallas 2011, no pet. h.).

The court held that orders to clear title to estate property are not appealable. Instead, they are

interlocutory because they are merely steps in the process of settling an estate. The court explained, "There is no statute that makes an order approving a settlement agreement final and appealable. Moreover, these two orders do not finally settle the estate." *Id.* at 781.

Moral: The court's approval of a settlement agreement which does not completely settle the estate is not appealable.

D. Late Probate

In re Estate of Campbell, 343 S.W.3d 899 (Tex. App.—Amarillo 2011, no pet. h.).

Testator died in 2002 with a will leaving his entire estate to his wife. The will was not probated. Wife died in October 2008. While rummaging through a lock box in Wife's office in December 2008, Proponent (Wife's son, Testator's step-son) discovered Testator's will along with his mother's will. Shortly thereafter, Proponent filed an application to probate Testator's will alleging that he was not in default under Probate Code § 73 for filing his application more than four years after Testator's death because he was unaware that Testator had executed a will. The court admitted Testator's will to probate and Testator's Daughter appealed.

The appellate court affirmed. The court explained that Proponent was not in default and thus the late probate was excused. The fact that Wife was likely in default in not timely probating Testator's will is irrelevant as the statute only requires the proponent to be not in default. As stated by the court, "the default of another does not preclude a non-defaulting applicant from offering a will for probate."

Moral: Late probate is available when the proponent is not in default even if other beneficiaries to the will may have been in default.

E. Personal Representative

1. Unsuitability

Guyton v. Monteau, 332 S.W.3d 687 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

At first, the trial court appeared willing to appoint Daughter as the successor administratrix even though she had been convicted of a Class C misdemeanor five years previously. At the urging of Mother, the court reopened the evidence and took judicial notice of all matters in the record. The court then ruled Daughter was unsuitable due to family discord, hostility, and a potential conflict of interest. Daughter appealed.

The appellate court reversed. The court recognized that there is no legislative or judicial definition of what causes a person to be unsuitable to serve as a personal representative under Probate Code § 78 and thus the trial court has broad discretion to make that determination. However, the appellate court determined that the trial court abused its discretion by making an arbitrary and unreasonable determination of unsuitability without reference to guiding principles.

The court explained that the only ground for disqualification properly before the trial court was the misdemeanor conviction which the court rejected. The alleged discord, hostility, and potential conflict of interest were never placed at issue but rather were raised by the trial court sua sponte after the hearing was over and without giving the parties proper notice. Even if the court may determine unsuitability sua sponte, the evidence did not support the court's ruling. The court abused its discretion by taking judicial notice of all documents and testimony in the dozen years the estate had been litigated. Judicial notice is only for facts not subject to reasonable dispute; personal knowledge is not judicial knowledge.

The appellate court also rejected an argument that if Daughter's attorney could serve as the estate's attorney, then Daughter could not serve and that estate expenses are less if the personal representative is an attorney. A personal representative, even if an attorney, may recover reasonable attorney fees. An estate can be separately charged for both legal and administrative services even if they are both performed by the same person.

Moral: To show that a person is unsuitable to serve as a personal representative, "hard" evidence of unsuitability is needed, rather than speculation and innuendo. To have the greatest impact, this evidence should be brought forth in an adversarial context so there is notice and opportunity to rebut.

2. Unsuitability – Another Case

In re Estate of Gober, 350 S.W.3d 597 (Tex. App.—Texarkana 2011, no pet. h.).

Testatrix named Son and Daughter as co-executors of her will. Son agreed not to serve and then convinced the trial court to deem Daughter unsuitable. The appellate court reversed.

The court began its analysis by examining Probate Code § 78(e) which disqualifies a person whom the court deems unsuitable. The statute does not provide guidance for how a court determines unsuitability and thus it is left to the court's discretion. However, that discretion is not unbridled and can be reviewed for abuse. The court then examined the evidence and determined that the trial court acted in an arbitrary and unreasonable manner in finding that Daughter was unsuitable.

For example, the trial court relied on evidence that Daughter was living in Testatrix's house and did not want to pay rent. The appellate court explained that title vested in Daughter as a co-beneficiary of the estate. As a co-tenant with her brother, she had the right to live in the house rent-free as long as she did not preclude her brother from using the house and there was no evidence that she denied him access.

The appellate court also rejected the trial court's finding of unsuitability based on personality conflicts between Son and Daughter. Mere family discord is insufficient to disqualify a person from serving as an executor. In fact, the will provided that if one child refused to serve, the remaining child could serve alone and thus any conflict regarding the administration of the estate was, in effect, removed.

Moral: Personality conflicts alone are insufficient to deem a person unsuitable to serve as an executor. Likewise, merely because an executor is occupying property which was devised, in part, to the executor does not create a conflict of interest that makes the executor unsuitable.

F. Creditors

Mohseni v. Hartman, 2011 WL 2304133 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.).

Unsecured Creditor (UC) sued Independent Executor (IE) for breach of fiduciary duty, negligence, fraud, and conversion. UC claimed that IE's misconduct caused the estate to lack sufficient funds to pay his claim. The trial court granted IE summary judgment ruling that an independent executor owes no legal duty to an unsecured creditor of the estate. UC appealed.

The appellate court affirmed holding "that an independent executor does not owe a general legal duty of care to the unsecured creditor of an estate in the management of the estate's assets." The court explained that the executor's duty runs to the beneficiaries of the estate. It is the beneficiaries who have title to the property under Probate Code § 37 subject to the payment of debts. The executor thus holds the property in trust for the benefit of the title holders, not the creditors. The court made the analogy that a creditor cannot bring an action against living debtors who cannot pay their debts because they mismanage property.

The court also discussed how public policy supports the court's holding. To create "such a duty would undermine independent administrations and conflict with the executor's duty to administer the estate for the benefit of the heirs and legatees * * *. Also, it could conflict with the executor's statutory duties to other classes of creditors. * * * The creditor's remedy is to seek a judgment against the executor in her capacity as the estate administrator and seek execution against the estate['s] assets."

Moral: An independent executor's duties run toward the heirs and beneficiaries, not unsecured

creditors who seek to deprive them of the property to which they are otherwise entitled.

G. Attorney Fees

1. Removal of Personal Representative

In re Estate of Vrana, 335 S.W.3d 322 (Tex. App.—San Antonio 2010, pet. denied).

The trial court removed Independent Executor (IE) from office after Beneficiaries proved that IE breached his fiduciary duties. Beneficiaries then obtained a judgment awarding them the attorneys' fees they incurred in having IE removed. IE appealed.

The appellate court affirmed. IE claimed that only an estate is entitled to reimbursement of attorneys' fees, not the beneficiaries directly. The court rejected this argument, pointing to Probate Code § 245 which authorizes the court to award reasonable attorneys' fees against the executor who is removed from office. The statute is silent with respect to the entity entitled to recover the fees and thus the statute does not limit recovery of attorneys' fees to the estate.

The court also rejected IE's claim that the award of fees was improper because Beneficiaries did not segregate recoverable fees from nonrecoverable fees. The court determined that the work the attorneys performed with respect to the removal action was inextricably intertwined with Beneficiaries' other causes of action against the IE so that the general duty to segregate did not apply.

Moral: A beneficiary who is successful in removing a personal representative from office is entitled to recover reasonable attorneys' fees which the beneficiary pays out of his or her own pocket.

2. Will Proponent

In re Estate of Johnson, 340 S.W.3d 769 (Tex. App.—San Antonio 2011, pet. stricken).

The jury determined that will proponents probated wills (and thus contested other wills) in good faith and with just cause. The jury then awarded over $3 million in reasonable and necessary attorneys' fees under Probate Code § 243. The appellate court affirmed the award, rejecting the argument that the award of fees was improper because the individual plaintiffs did not personally pay the fees but that they were instead paid by trusts created for their benefit. The court explained that the manner in which attorneys' fees are paid does not preclude their recovery.

Moral: The court may award attorneys' fees under Probate Code § 243 even if the claimant did not personally pay or advance those fees.

V. TRUSTS

A. Trust Intent

Stauffacher v. Coadum Capital Fund 1, LLC, 344 S.W.3d 584 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

In a case involving alleged breaches of a joint-venture agreement, the defendant argued that he was not personally liable because he signed "as trustee" and thus would not incur personal liability under Trust Code § 114.084. For two reasons, the appellate court concluded that this action did not relieve the defendant of liability. First, merely signing an agreement "as trustee" and using the term "trustee" in the agreement does not create a trust. The parties intended to create a joint-venture, not a trust. Trust Code § 112.001. "A court has no authority to impose a trust unless the prerequisites of a trust are satisfied." Stauffacher at 588. Second, even if a trust were involved, the exclusion of personal liability triggered by a signature "as trustee" applies not to the trustee's liability to the parties to the trust (settlor and beneficiary) but rather to the trustee's liability to third parties who are contracting with the trustee.

Moral: A court will not hold that a trust was created unless the parties actually manifested trust intent.

B. Long-Term Leases

Myrick v. Moody Nat'l Bank, 336 S.W.3d 795 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Trustee entered into a lease extending beyond the termination of the trust. Beneficiary sued asserting that doing so was a breach of duty. The trial court found in favor of Trustee and Beneficiary appealed.

The appellate court affirmed. Section 113.011(b) of the Trust Code grants the trustee the authority to "execute a lease containing terms or options that extend beyond the duration of the trust" unless the trust instrument provides otherwise. See § 113.001. The court examined the trust instrument and found no provision which would limit Trustee's ability to enter into a long-term lease. The court rejected Beneficiary's argument that the requirement that Trustee distribute property to Beneficiary when the trust terminates operates to prohibit long-term leases. See § 112.052.

Moral: A settlor who wishes to prohibit long-term leases must expressly so provide in the trust instrument.

C. Arbitration

Rachal v. Reitz, 347 S.W.3d 305 (Tex. App.—Dallas 2011, pet. filed).

Settlor included a provision in his trust requiring the beneficiaries to arbitrate any dispute with the trustees. Both the trial and appellate courts held that this provision was unenforceable. 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.

Note: A four judge dissent argued that the settlor's intent for disputes to be arbitrated should prevail and that the beneficiaries were benefiting from the trust and thus "agreed" to the trust even though the trust is not a contract.

Note: At least one state (Arizona) authorizes settlors to mandate arbitration or other alternative dispute resolution methods as long as the method is reasonable.

Moral: An arbitration clause in a trust is unenforceable unless the beneficiary expressly consents to this provision.

D. Attorneys' Fees

In re Estate of Johnson, 340 S.W.3d 769 (Tex. App.—San Antonio 2011, pet. stricken).

The jury awarded the successful contestants of several trusts over $3 million in reasonable and necessary attorneys' fees. The appellate court affirmed. The court explained that Trust Code § 114.064 permits the trial court to make the award in any manner that is "equitable and just." The court examined the evidence and found it sufficient to show that the trial court did not abuse its discretion or make an award by acting without reference to any guiding rules or principles. The court rejected the claim that it is not equitable or just to award attorneys' fees in favor of individuals who did not personally pay the fees but where the fees were instead paid by trusts created for their benefit.

Moral: The court may award attorneys' fees under Trust Code § 114.064 even if the claimant did not personally pay or advance those fees.

VI. OTHER ESTATE PLANNING MATTERS

A. Joint Account

Kennemer v. Fort Worth Cmty. Credit Union, 335 S.W.3d 843 (Tex. App.—El Paso 2011, pet. denied).

Credit Union used a single contract to govern all of a customer's accounts opened under the same membership number. The contract provided that any joint accounts opened under the contract would have rights of survivorship. After one

party (husband) to a joint account died, Credit Union paid all funds in the account to the survivor (wife). Approximately one year later, Independent Executor claimed that the account lacked the survivorship feature because the specific account lacked its own survivorship agreement. Accordingly, the executor asserted that the estate was entitled to one-half of the account because the account contained community property. The trial court granted summary judgment in favor of Credit Union and Independent Executor appealed.

The appellate court affirmed. The court found that the language of the contract which both husband and wife signed governed all of the accounts they had in Credit Union whether they were open at the time they signed the agreement or thereafter.

Note: The court reached an issue which was not necessary to decide, that is, whether the account had the survivorship feature. Credit Union was entitled to pay any party to the joint account any part of or all of the funds in the account under Probate Code § 445. The court failed to distinguish between ownership of the funds in the account and the ability to withdraw those funds. Even if the account lacked the survivorship feature, Credit Union had the authority to pay all funds in the account to the surviving joint party.

Moral: A financial institution may rely on one account contract to govern multiple accounts.

B. Tortious Interference With Inheritance Rights

Haisler v. Coburn, 2010 WL 2953372 (Tex. App.—Waco 2010, pet. denied).

Father died with a will leaving his entire estate to Step-Mother. Daughter contested the will but later dismissed the contest after receiving property under a family settlement agreement. Years later, Daughter learned that Father's will had been forged. Daughter then brought a claim against the forger and individuals who had prior knowledge of the forgery for tortious interference with inheritance rights. The trial court dismissed and she appealed.

The appellate court affirmed. The court explained that the statute of limitations had run on Daughter's cause of action. The court refused to adopt a discovery rule stating that neither Probate Code § 93 nor Civil Practice & Remedies Code § 16.003 provide for limitations to run based on the date of discovery.

Moral: A claim for tortuous interference with inheritance rights must be brought timely or it will be lost.

C. Durable Power of Attorney

In re Estate of Vackar, 345 S.W.3d 588 (Tex. App.—San Antonio 2011, no pet.).

See the discussion of this case on page 4.

D. Life Insurance

1. Non-Spouse Beneficiary

In re Estate of Vackar, 345 S.W.3d 588 (Tex. App.—San Antonio 2011, no pet.).

Sister was named as the beneficiary of Brother's life insurance policy. Because the policy was purchased with community property, both the trial and appellate courts held that the gift was unfair even though Brother and Wife had been living apart and estranged for many years. "A surviving spouse establishes a prima facie case of constructive fraud on the community with proof that the life insurance policy was purchased with community funds for the benefit of a person outside the community." Vackar at 598. To determine whether the gift was fair, the court considered "(1) the size of the gift in relation to the total size of the community estate; (2) the adequacy of the estate remaining to support the surviving spouse in spite of the gift; (3) the relationship of the donor to the donee; and (4) whether special circumstances existed to justify the gift." Vackar at 598.

Moral: When a spouse names a non-spouse as the beneficiary of a life insurance policy purchased with community funds, the other spouse's consent should be obtained to prevent claims that the beneficiary designation is unfair.

2. Beneficiary Designation

Lopez-Franco v. Hernandez, 351 S.W.3d 387 (Tex. App.—El Paso 2011, pet. denied).

The insured's life insurance policy listed three beneficiaries. The beneficiary listed first on the list claimed all of the proceeds while the other two beneficiaries asserted they were each entitled to one-third of the proceeds. The top-listed beneficiary argued that the policy was ambiguous as a matter of law because of the different interpretations. The court rejected this argument finding that the policy was unambiguous.

The policy listed three primary beneficiaries which means that each is entitled to one-third of the proceeds. The policy stated that all surviving beneficiaries of the same class share equally. The fact that one part of the beneficiary designation was somewhat sloppily completed did not make the policy ambiguous.

Moral: To prevent litigation, beneficiary designations should be extremely clear and neatly written.

E. Non-Testamentary Transfers

McKeehan v. McKeehan, 355 S.W.3d 282 (Tex. App.—Austin 2011, no pet. h.).

Husband and Wife were joint owners of an investment program. After Husband died, a dispute arose between Wife who claimed the investment had the survivorship feature and Husband's Children from a prior relationship who claimed the investment lacked the survivorship feature. The trial court viewed the investment under Texas law and because there was no express provision for survivorship, ruled in favor of Children. Wife appealed.

The appellate court determined that the investment contained a valid choice-of-law clause which clearly provided for Michigan law to govern the investment. The evidence demonstrated that Husband agreed to be governed by this clause. In addition, the choice of law clause was valid under Texas law because it dealt with an issue in dispute which could have been resolved by an express provision in the contract. Under Michigan law, the investment did have the survivorship feature. Michigan law presumes that jointly held property has the right of survivorship even if the survivorship feature is not expressly stated. The court rejected Children's claim that because the investment is personal property, it must be governed by Texas law as Texas was the Husband's domicile at death. Accordingly, the court reversed and awarded the investment to Wife.

Moral: Instruments governing non-probate transfers need to be studied carefully to determine if they have a choice of law provision which would cause another state's law to apply which may yield significantly different results than the application of Texas law.