CASE LAW UPDATE

GERRY W. BEYER

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

(806) 742-3990
gwb@ProfessorBeyer.com
http://www.ProfessorBeyer.com

29th ANNUAL ADVANCED ESTATE PLANNING & PROBATE COURSE

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Chapter 1

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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)

PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: The 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)
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)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Classes taught include Estate Planning, Wills & Estates, Trusts, Property, U.C.C.

SELECTED HONORS AND ACTIVITIES

Order of the Coif
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (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)
Outstanding Professor Award – Phi Delta Phi (St. Mary's University chapter) (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 (3d ed. 2005); TEACHING MATERIALS ON ESTATE PLANNING (3d ed. 2005); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (4th ed. 2000); TEXAS WILL MANUAL SERVICE; 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (1996); 19-19A WEST'S LEGAL FORMS — REAL ESTATE TRANSACTIONS (2002); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Estate Plans: The Durable Power of Attorney For Property Management*, 59 TEX. B.J. 314 (1996); *Estate Plans: Enhancing Estate Plans with Multiple-Party Accounts*, 57 Tex. B.J. 360 (1994); *Enhancing Self-Determination Through Guardian Self-Declaration*, 23 Ind. L. Rev. 71 (1990); *Statutory Will Methodologies — Incorporated Forms vs. Fill-in Forms: Rivalry or Peaceful Co-Existence?*, 94 Dick. L. Rev. 231 (1990); *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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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 article covers approximately 35 cases which were decided after the cut-off date for *Case Law Update*, in 1 STATE BAR OF TEXAS, 28TH ADVANCED ESTATE PLANNING AND PROBATE COURSE ch. 1 (2004). 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 8, 2005 (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 which 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 http://www.ProfessorBeyer.com and click on the "Texas Case Summaries" link.

II. INTESTACY

Despite the fact that the vast majority of Texans die without a valid will, there are no recent appellate cases dealing with intestacy.

III. WILLS

A. Testamentary Capacity

1. Evidence Sufficient to Raise Fact Issue

In re Estate of Browne, 140 S.W.3d 436
(Tex. App.—Beaumont 2004, no pet. h.).

After Testator's death, his wife of 20 years (Proponent) attempted to probate his will. His children and step-children contested the will claiming that Testator lacked testamentary capacity. The trial court granted summary judgment for Proponent.

The appellate court reversed. The court began its analysis by explaining that Proponent had the burden of establishing capacity under Probate Code § 88(b)(1). Proponent did submit sufficient evidence to met this burden such as affidavits from family members, doctors, and the attorney who drafted the will. However, Proponents, several of whom were doctors, submitted evidence that Testator's medical condition and treatment (e.g., using a respirator and taking powerful drugs) prevented him from having testamentary capacity. This evidence was sufficient to raise a fact question with respect to the existence of testamentary capacity which precluded a summary judgment in Proponent's favor.

Moral: A will proponent will have a difficult time sustaining a summary judgment that testamentary capacity exists if the contestant supplies evidence with probative value of lack of capacity.

2. Evidence Sufficient to Support Jury Verdict of Lack of Capacity

In re Estate of Robinson, 140 S.W.3d 782
(Tex. App.—Corpus Christi-Edinburg 2004,
no pet. h.).

Testatrix executed Will 1 and Will 2. A jury found that Will 2 was invalid because Testatrix lacked testamentary capacity and had been unduly influenced. Accordingly, the court admitted Will 1 to probate. Proponents of Will 2 appealed.

The appellate court affirmed. The court rejected Proponents' claim that the trial court improperly admitted the testimony of a doctor who testified as an expert witness because the testimony was unscientific and unreliable for failing to met the standards of Texas case law. Proponents claimed there was an impermissible analytical gap between the medical records the doctor examined and the conclusion that Testatrix lacked capacity. After an extensive review of the doctor's testimony, the court determined that the trial court did not abuse its discretion by admitting the testimony.

The appellate court also rejected Proponents' claim that there was insufficient evidence to support the jury's finding of lack of capacity. The court exhaustively reviewed the evidence presented to the

jury and determined that it was sufficient to support its verdict.

Moral: It is difficult to convince an appellate court to set aside a jury finding that a testator lacked testamentary capacity.

B. Testamentary Intent

In re Estate of Steed, 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. filed).

The jury determined that Testator's will was invalid because he had no intent for the instrument to be his will. The appellate court reversed holding that the jury's finding of lack of testamentary intent was so against the great weight and preponderance of the evidence that it was clearly wrong and unjust.

The court studied the will itself and found that it was brimming with testamentary intent. Testator was a lawyer who had a significant wills practice. Testator's holographic will was labeled as a "last will and testament," made a variety of gifts to his wife and family, and appointed his wife as the independent executrix of the estate. The only evidence negating Testator's testamentary intent was the testimony of individuals who simply "thought" Testator did not mean the document to be his will. There was no evidence of any unusual or extraordinary circumstances when Testator executed the will which cast doubt on his intent.

Moral: A jury's finding of lack of testamentary intent must be supported by evidence which creates more than a mere suspicion that a testator did not have intent to execute a will.

C. Formalities

1. Substantial Compliance

In re Estate of Iversen, 150 S.W.3d 824 (Tex. App.—Fort Worth 2004, no pet. h.).

The probate court admitted Testator's typed notarized will into probate even though it was unwitnessed. The court determined that the affidavits of two individuals who saw Testator sign the will were sufficient to satisfy the attestation requirement because the will was in "substantial compliance" with Probate Code § 59(a).

The appellate court reversed. The court examined Probate Code § 59(a) and determined that its requirements were "straight-forward," that is, a nonholographic will must be attested by at least two witnesses "who subscribe their names thereto in their own handwriting." The court recognized that the notary could be counted as an attesting witness but that still left the will one witness short. The court also explained that the "substantial compliance" language of the code applies to the form of the self-proving affidavit, not the will itself. Accordingly, Testator died intestate.

Moral: A non-holographic will needs two witnesses. Texas has not adopted the substantial compliance standard of Uniform Probate Code § 2-503.

2. Testator Reading the Will

In re Estate of Browne, 140 S.W.3d 436 (Tex. App.—Beaumont 2004, no pet. h.).

The appellate court agreed with Proponent that she was not required to prove that Testator actually read the will or had it read to him before signing it. These matters may, however, impact whether Testator had testamentary intent and capacity.

Moral: Even though not legally required under Probate Code § 59, it is good practice for the attorney supervising a will execution ceremony to make certain the testator has actually read the will and understands its contents. The attorney should establish that the testator read and understands the will in front of the witnesses.

3. Attestation in Testator's Presence

In re Estate of Browne, 140 S.W.3d 436 (Tex. App.—Beaumont 2004, no pet. h.).

The appellate court agreed with Contestants' assertion that the trial court erred in granting a summary judgment that Testator properly executed his will under Probate Code § 59. Contestants presented an affidavit which supplied facts which could lead to the conclusion that the witnesses did not attest to the will in Testator's presence, that is, they signed the will in a hospital waiting room while Testator was in his hospital room.

Moral: The witnesses to a will should always attest in close physical proximity to the testator so the testator may see them attesting.

4. Attestation by Notary

In re Estate of Teal, 135 S.W.3d 87 (Tex. App.—Corpus Christi 2002, no pet.).

Testator signed a two-page typed will. The attestation clause on the bottom of the front of page two was signed by Notary who also placed her notary seal on this page. On the back of page two appeared the signatures of two individuals with the word "witness" hand printed beneath each.

The trial court admitted the will to probate based on Notary's testimony; the designated witnesses could not be located. Surviving Spouse appealed asserting that the will did not comply with the formalities of Prob. Code § 59(a) and was not properly proved under Prob. Code § 88. Surviving Spouse claimed that Notary could not be considered as a witness to the will because she intended to sign the will as a notary, not as a witness.

The appellate court affirmed. The court focused on the role of a will witness which is to prove that the testator executed the will with "the formalities and solemnities and under the circumstances required to make the will valid." Teal at 90. The court held that Notary could serve as a subscribing witness even though she did not intend to be a subscribing witness when she signed. The court stressed what Notary actually did rather than what she thought she was doing. Notary engaged in witness-type behavior such as speaking with Testator, determining that he was of sound mind, and confirming that he was aware of the contents of the will.

Moral: Courts are willing to look at the substance, rather than the form, of a signature on a will. And, of course, a properly executed self-proving affidavit would prevent many of these types of problems.

Note #1: The court also reiterated several important will principles:

- A will which provides no pecuniary benefit to a witness is evidence that the witness is credible.
- If the original will is produced in court and shown to be valid, there is a presumption of continuity so the will proponent is not required to produce direct evidence of non-revocation.
- Marriage of a testator after executing a will does not revoke the will.
- A person who is not a will beneficiary lacks standing to complain about how a court rules on issues relating to the disposition of the estate.

Note #2: Although this case was decided in 2002, it was reported in mid-2004.

5. Execution

In re Estate of Steed, 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. filed).

A computer file was located on Testator's computer containing a document labeled as the final draft of his will. No signed copy of this will was presented to the court. The jury determined that Testator never executed this will.

On appeal, the court reversed holding that the jury's finding was against the great weight and preponderance of the evidence. The court recognized the existence of a variety of suspicious circumstances such as the fact that Testator's hard drives were removed by the proponents of the alleged will after Testator died and were not recovered until several months later. However, there was testimony from two witnesses and a notary that Testator had executed this will although the notary's record book did not reflect the execution of the self-proving affidavit. The court's reversal, however, does not mean that this will is valid or that the elements of proving a lost will were satisfied. Instead, the court merely determined that the jury's determination that Testator did not execute the will was improper.

Moral: The notary should be certain to have the testator and witnesses sign the notary record book to create better evidence of the will execution. The existence of such evidence in this case could have made it easier to find that Testator actually executed the will.

6. Holographic Joint Will

In re Estate of Capps, 154 S.W.3d 242 (Tex. App.—Texarkana 2005, no pet. h.).

A handwritten will purported to dispose of the estates of two individuals (sisters, I think). The evidence showed that the substance of the will was entirely in the handwriting of one of these two individuals. The appellate court sidestepped the issue of whether this will was an attested will (that is, could the signature of a co-testatrix be considered as the signature of a witness) and determined that the

document was the holographic will of the scribing testatrix. The signature of the co-testatrix and the notary as well as the notary's jurat were surplusage. Consistent with prior Texas law, non-holographic surplus material does not detract from the holographic character of the will.

Moral: The court followed the traditional Texas approach of treating non-holographic material to be mere surplusage because it did not impact the dispositive scheme of the testatrix. The more interesting unaddressed question is whether a co-testatrix's signature on a joint will may function as the signature of a witness.

D. Conditional Wills

In re Estate of Perez, 155 S.W.3d 599 (Tex. App.—San Antonio 2004, no pet. h.).

Testator's will included the following language, "because I am sick and waiting for a heart surgery, and providing ahead of any emergency, I make the following disposition to be fulfilled in case my death occurs during the surgery." Testator did not die during the surgery. Instead, he died later at his sister's home. The lower court admitted the will to probate and denied Contestants' motion for a summary judgment that the will was not entitled to probate.

The appellate court reversed. The court explained that the effectiveness of Testator's will was conditioned on his death during the surgery. Because he survived the surgery and died later, the will was ineffective. The court recognized that statements of the reasons why a person is executing a will are normally deemed inducements and not conditions. However, in this case, Testator's language was unambiguous that his will was to be effective only if he died during the surgery.

Moral: The court will give effect to a condition triggering the effectiveness of a will. Thus, a will drafter must be careful not to inadvertently impose a condition in situations where the testator does not actually intend to do so.

E. Lost Will

In re Estate of Capps, 154 S.W.3d 242 (Tex. App.—Texarkana 2005, no pet. h.).

Testatrix's will could not be found and thus Proponents were required to follow the requirements of Probate Code § 85 to probate the will, that is, prove that (1) the original was duly executed, (2) the reason why the original cannot be produced in court which satisfies the court that it cannot be produced by any reasonable diligence, and (3) the contents of the will by testimony of a credible witness who read the will or heard the will read. The trial court determined that Proponents proved these three elements and Contestants appealed.

The appellate court affirmed. The court admitted that the original was last seen in Testatrix's possession which raises a presumption that she destroyed it with intention to revoke. But, the court determined that there was sufficient evidence to rebut the presumption by a preponderance of the evidence. For example, Testatrix arranged for the principal beneficiaries to have copies of the will, she announced at a church meeting her intention to leave her property as set forth in the will, she continued to have affection for the beneficiaries named in the will, and she was the type of person who would have told others if she had revoked the will.

Moral: The court may be willing to stretch the evidence to uphold a lost will when the court truly believes the decedent intended to die testate.

F. Ademption & Patent Ambiguity

Harris v. Hines, 137 S.W.3d 898 (Tex. App.—Texarkana 2004, no pet. h.).

Testatrix's will devised specific real property owned jointly with her husband. Prior to her death, Testatrix and her husband sold this property and received a promissory note in exchange. A dispute arose as to whether the devise adeemed. The trial court held that the gift was not ambiguous and did not adeem because the gift included the phrase "together with all additions thereto and substitutions therefor." The court determined that this language specifically provided for the proceeds of the sale of the property to pass to the devisees and thus they were entitled to Testatrix's one-half interest in the promissory note.

On appeal, the court began its lengthy analysis by determining that the devise is reasonably susceptible to more than one meaning. The court recognized that there are reasonable arguments for both inclusion and exclusion of the proceeds from the devise. The will does not provide a clear indication of whether Testatrix intended to include the proceeds from the possible future sale of the property in the devise. Accordingly, the court determined that this ambiguity is patent because the ambiguity is apparent from reading the

will. The court then examined extrinsic evidence to ascertain Testatrix's intent.

The court studied affidavits from Testatrix's husband and her attorney. These affidavits made it clear that Testatrix excluded her daughter from the specific devise because she did not want the daughter's husband to have any control over this real property. Her daughter, however, shared equally with the other children as residuary beneficiaries. Because the real property was no longer in the estate, the reason for excluding this child from the devise no longer existed. In addition, the attorney's testimony explained that the "substitution" language referred to replacement of personal property included with the devised realty. Consequently, the court held that the sale of the specifically devised property caused an ademption and that the proceeds would pass under the residuary clause of Testatrix's will.

Moral: Specific gifts need to be carefully worded to avoid ambiguity. In addition, the testator should contemplate possible ademption and the will should be drafted to reflect the testator's intent.

G. Interpretation and Construction

1. Adopted Great-Grandchildren

Parker v. Parker, 131 S.W.3d 524 (Tex. App.—Fort Worth 2004, pet. denied).

In a case with a highly complex procedural history, the key issue was whether adopted great-grandchildren are eligible beneficiaries of certain testamentary trusts. Both the trial and appellate courts agreed that they were eligible beneficiaries.

The court recognized that it was bound by the law as it existed at the time the will was executed which was the 1931 version of the Texas adoption statute that presumed that adopted children do not take under a will executed by a third person unless the testator provided otherwise in the will. Testator stated in the will that *grandchildren* had to be "born of [the child's] body" to qualify as beneficiaries. However, *great-grandchildren* were not subject to the same limitation. Instead, the will provided that "the children, and their heirs, of any deceased child of [the child's] body [are] entitled to their parent's portion per stirpes." Because the testator omitted the "of the body" language from this gift over to great-grandchildren, testator intended to include adopted great-grandchildren and the otherwise applicable presumption against the inclusion of adopted individuals did not apply. The court recognized that it might not be logical for the testator to exclude adopted grandchildren but include adopted great-grandchildren. However, the court was unwilling to redraft the will to carry out a presumed intent.

Moral: Wills and trusts must be carefully drafted to carry out the client's intent. If a client wishes to exclude non-blood descendants from taking, a clear, unambiguous statement should be included in the will such as, "Under no circumstances may a non-blood related person receive property under this will as a child, grandchild, great-grandchild, or other descendant."

2. Rights of Life Tenant

Steger v. Muenster Drilling Co., Inc., 134 S.W.3d 359 (Tex. App.—Fort Worth 2003, pet. denied).

Husband's will granted Wife a life estate in all his property including extensive powers such as the authority to manage, control, and lease the property for all purposes. Wife entered into mineral leases with secondary terms extending for as long as oil or gas is produced in paying quantities. Wife died in 1960. One of the remainder beneficiaries received a secondary life estate. This remainder beneficiary also entered into mineral leases extending for as long as paying quantities of oil or gas are produced. In a similar manner to the devise to Wife, Husband's will granted this remainder beneficiary the power to enter into leases. This beneficiary died in 1993. In 1996, Child, the sole surviving remainder beneficiary, questioned the continued validity of some of these leases. Child asserts that Husband's will did not authorize Wife and the remainder beneficiary to execute oil and gas leases extending beyond their lifetimes.

The appellate court agreed with the trial court that the express terms of Husband's will granted Wife and the remainder beneficiary the right to enter into these long-term leases. The court studied the language of Husband's will, especially the phrases "for all purposes" and "whatever nature" which followed the grants to the life tenants of the power to lease the property. Construing the language of Husband's will according to the ordinary meaning of the words used, the court held that Husband's will unambiguously authorized Wife and the remainder beneficiary to execute any type of oil and gas lease including leases that extended beyond their lifetimes. The court rejected Child's argument that because Wife and the remainder beneficiary could enter into leases only while they were alive, they could not create a lease which would remain effective after their deaths.

Moral: Regardless of the clarity of language a testator uses in a will, the will may still be attacked on the ground that it should not be given effect as it is written. Any additional guidance which the testator provides in the will could reduce such claims. In this case, for example, Husband could have added the phrase, "including leases which extend beyond the life tenant's lifetime."

H. Will Contests Generally

1. Statute of Limitations

In re Estate of Robinson, 140 S.W.3d 782 (Tex. App.—Corpus Christi-Edinburg 2004, no pet. h.).

A will was properly contested within two years after its admission to probate as required by Probate Code § 93. After the two years elapsed, additional parties joined the contest. Both the trial and appellate court agreed that these parties were not barred by the two year statute of limitations because they *intervened* as plaintiffs even though they would have been barred if they had instituted their suit in a separate action.

Moral: A party may join a timely filed will contest even after the normal statute of limitations has expired.

2. Procedural Matters

In re Estate of Swanson, 130 S.W.3d 144 (Tex. App.—El Paso 2003, no pet.).

Proponent obtained an order admitting Testatrix's will to probate as a muniment of title. Later, Contestant challenged the will asserting that Testatrix's signature was a forgery and that even if the signature was valid, that Testatrix lacked testamentary capacity or was subject to undue influence. Proponent responded by claiming that there was no evidence to support Contestant's claims. Contestant replied and submitted several affidavits but did not object to the global natural of Proponent's no-evidence summary judgment motion. The probate court agreed with Proponent and Contestant appealed.

The appellate court reversed. The court began by addressing a procedural issue with regard to the impact of failing to object to a no-evidence motion. The court rejected its earlier holdings and joined with other appellate courts in holding that "even if the nonmovant does not object or respond to a defective no-evidence motion, if it is conclusory, general, or does not state the elements for which there is no evidence, it cannot support the judgment and may be challenged for the first time on appeal." Swanson at 147.

The court then examined Proponent's response and agreed with Contestant that the motion contained only global and conclusory statements regarding the lack of evidence of forgery, lack of capacity, and the existence of undue influence. The court also explained that even if the motion was adequate, Contestant presented sufficient evidence of the forgery of Testatrix's name to withstand a no-evidence motion. For example, Contestant stated that she was familiar with the appearance of Testatrix's signature and that the signature on the will was not that of Testatrix.

Moral: Will contestants and proponents must not only be familiar with the substantive law of wills, but must also have a firm grasp of the applicable procedural rules.

3. Proper Briefing

Proctor v. White, 155 S.W.3d 438 (Tex. App.—El Paso 2004, pet. denied).

Shortly after Proponents filed Testator's will for probate, Contestants asserted that Testator lacked testamentary capacity and was subject to undue influence. The appellate court affirmed the trial court's grant of a summary judgment in favor of Proponents. Contestants, many of whom were Testator's children upset that Testator had left property to his wife, their step-mother, did not adequately brief the issue on appeal. Instead of referring to relevant cases or legal principles, they simply included pages of references to depositions and documents filed in the clerk's record. The court concluded that Contestants waived their claim that the summary judgment was improper because it was not adequately briefed.

Moral: To overturn a trial court's grant of summary judgment, the appealing party should brief the issue thoroughly and include references to the applicable cases and legal principles.

I. Undue Influence

In re Estate of Steed, 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. filed).

The jury determined that Testator's will was invalid because he was subjected to undue influence. The appellate court reversed holding that the evidence was factually insufficient to support the jury's finding.

The court began its analysis by stating the *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963), three prong test of undue influence, that is, the contestant must prove the (1) existence and exertion of an influence (2) that subverted or overpowered Testator's mind at the time he executed the will (3) so that Testator executed a will he would not have executed but for the influence. The court carefully examined the evidence, including statements that Testator made to others that he wrote the will to pacify his wife, the primary beneficiary, to get her off the "warpath" and curb her spending. But, when coupled with other evidence such as that Testator was a lawyer and accomplished businessman, his wife often lived over 500 miles away from him, Testator wrote the will while alone, and Testator sent his wife the will in the mail, there was insufficient evidence to support a jury finding of undue influence.

Moral: Although difficult, it is possible to overturn on appeal a jury finding that a testator was subject to undue influence.

J. Waiver

In re Estate of Steed, 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. filed).

The probate court was presented with three wills. Two of the wills were the subject of controversy and a third, the earliest of the wills, was undisputed. The trial court determined that as a matter of law the probate of this earliest will was waived. The appellate court reversed holding that there was no support for a waiver from the record. The parties took no action to abandon this will and because the will was self-proved, it required no action from the jury to validate it.

Moral: To avoid assertions of waiver, proponents of a will, even one they think may have been revoked by a later will, should be certain to plead and obtain findings to support the will.

IV. ESTATE ADMINISTRATION

A. Disqualification of Judge

In re Orsagh, 151 S.W.3d 263 (Tex. App.—Eastland 2004, no pet. h.).

Judge, before taking the bench, filed an application to probate a will for his client in a constitutional county court. After Judge became the judge of this county court, the validity of the will was contested. Although Article V, § 11 of the Texas Constitution prohibits Judge from presiding over the case, Judge entered an order transferring the case to the district court under Prob. Code § 5(b). Over the next several years, the district court issued orders in the case. An individual who was both a debtor and creditor of the estate now claims that Judge had no authority to issue the transfer order and that all of the district court orders are consequently void.

The appellate court agreed that Judge had no authority to issue the transfer order because he had served as an attorney in the case and conditionally granted a writ of mandamus. The district court must withdraw its orders and remand the case to the constitutional country court.

The court explained that Article V, § 16 of the Texas Constitution provides two methods for handling a disqualification: (1) the parties may appoint a proper person to try the case, or (2) a competent person may be appointed to try the case in the manner prescribed by other applicable law (e.g., Government Code § 26.012). Judge's issuance of the transfer order did not fall into either of these options. The parties did not agree to substitute the district court judge and the issuance of a transfer order was a discretionary act which is, under the Texas Constitution, void and thus not a method "prescribed by law."

Moral: A county judge who is disqualified should follow the procedures in the constitution or the Government Code to resolve the situation.

B. Standing

1. Substitution

Moore v. Johnson, 143 S.W.3d 339 (Tex. App.—Dallas 2004, no pet. h.).

Patient brought a medical malpractice against Doctor and subsequently died while the lawsuit was pending. The court admitted Patient's will to probate and appointed her children as independent executors. They filed a suggestion of death, requested that they be named as plaintiffs, and that the suit continue in their names. Without specifying any grounds, the trial judge granted Doctor a summary judgment on all claims. The independent executors appealed.

The appellate court reversed. The court examined Doctor's claim that the independent executors lacked standing because they did not file letters testamentary when they make the request to be substituted as plaintiffs in the malpractice action. The court also

reviewed Doctor's claim that the substitution was inappropriate because one of the independent executors took the oath of office after filing the substitution request. The court rejected these claims. Both independent executors were duly qualified years before Doctor filed the summary judgment motion. The court also explained that the issuance of letters is a ministerial act under Probate Code § 182. Texas law does not require that letters testamentary be filed along with the suggestion of death.

Moral: To avoid this type of suit, a personal representative may find it helpful to promptly file the oath, give any necessary bond, and obtain letters before filing a suggestion of death. A copy of the letters may then be filed along with the suggestion of death.

2. *In Limine* Determination

In re Estate of Armstrong, 155 S.W.3d 448 (Tex. App.—San Antonio 2004, no pet. h.).

Daughter was appointed as the temporary administratrix of Testator's estate after she submitted an application to which she attached a copy of Testator's will. Alleged Common Law Wife (ACLW) contested asserting Testator had revoked the will. Daughter agreed and thereafter claimed that Testator died intestate and sought to be appointed as the administratrix and for the court to determine heirship. Instead, the probate court appointed a third party as a successor temporary administrator because of the dispute over whether Testator was married to ACLW at the time of his death. After complex procedural maneuvering, the probate court determined in a motion *in limine* that ACLW was not Testator's wife and because she was not an interested person with standing, denied her plea to intervene in the case to dispute the payment of various estate expenses. Next, the court determined that she was also precluded from presenting the issue of her marital status to a jury in the heirship proceeding. The court reasoned that the *in limine* finding that she was not married to Testator was conclusive for purposes of the heirship proceeding.

After a careful review of similar Texas cases, the appellate court held that the probate court's determination of standing at the *in limine* hearing was a collateral matter to the issue of the propriety of the payment of administration expenses. Accordingly, this finding was not conclusive for purposes of the heirship proceeding and ACLW was not barred from seeking a jury trial in the heirship action.

Moral: A person seeking to establish a right to inherit as a common law spouse must make careful strategic decisions on how to proceed to make certain he or she is not inadvertently precluded from pursuing the claim.

C. Jurisdiction

1. Generally

In re Stark, 126 S.W.3d 635 (Tex. App.—Beaumont 2004, mandamus denied).

Testatrix's estate was pending in a County Court at Law. Beneficiary brought an action in District Court against a variety of persons including the independent executors of Testatrix's estate. The District Court granted a motion to transfer Beneficiary's action to the County Court at Law where the administration was pending. Beneficiary then brought this mandamus action to force the District Court to withdraw the transfer order.

The appellate court denied mandamus. The court began by rejecting Beneficiary's claim that a district court lacks the authority to transfer a case to a statutory county court. The court explained that such a transfer is authorized under the Government Code when permitted by local rules as was the case here.

The court next addressed Beneficiary's claim that the transfer was improper because Beneficiary was seeking a constructive trust remedy which is not available in a county court at law. The court stated that "the mere request for a constructive trust will not necessarily oust the dominant jurisdiction of a statutory county court sitting in probate. * * * A district court properly declines to exercise its jurisdiction over matters incident to an estate when, although a constructive trust is requested, the statutory county court has the power to afford adequate relief." Id. at 640. In this case, the estate contained sufficient assets to pay the damages Beneficiary was seeking.

Note: A strong dissent argued that because Beneficiary was seeking a constructive trust over certain real property and that every parcel of real property is unique, Beneficiary would suffer irreparable injury if instead of recovering the property, the court awarded only monetary damages.

Beneficiary's final argument was that the District Court should have retained the case because it also involved a charitable trust and Trust Code § 115.001 gives the District Court exclusive jurisdiction over trusts when the county does not have a statutory probate court. The court rejected this argument because Beneficiary's claims were tort claims not

within the meaning of the section because they are of a totally different character than the enumerated actions.

Moral: An action which might presumably be handled in District Court in a county without a statutory probate court such as to impose a constructive trust or deal with tort claims against a trust, may actually end up being heard in a county court at law.

2. Class Certification

Shell Cortez Pipeline Co. v. Shores, 127 S.W.3d 286 (Tex. App.—Fort Worth 2004, no pet.).

A statutory probate court certified a class in a complex case involving the alleged underpayment of carbon dioxide royalties. Defendants appealed.

The appellate court first determined that it had jurisdiction to address the issue whether the statutory probate court had subject matter jurisdiction over the class claims. The court then found that the statutory probate court lacked jurisdiction. The court rejected plaintiff's claim that the statutory probate court had jurisdiction under Probate Code § 5A(c) (1999 version) because one of the named plaintiffs was an inter vivos trust. The court explained that for § 5A(c) to grant jurisdiction to the statutory probate court, the district court must first have jurisdiction over the case under Trust Code § 115.001. The court examined the lengthy list of claims which included actions such as breach of contract and conspiracy, and determined that none of these actions actually involved an inter vivos trust. "[T]he mere fact that an inter vivos trust has the same or similar claims as the members of the class does not transform the class claims into actions that involved the trust." *Shell* at 294.

The court also rejected the claim that the probate court had jurisdiction under Probate Code § 5A(d) (1999 version) which conferred ancillary or pendent jurisdiction over claims that bear some relationship to the estate pending before the court. In this case, there was no estate pending in probate court, no close relationship between non-probate class claims and pending probate matters, and the resolution of the class claims would not aid in the efficient administration of anything related to the trust.

Note: See also *Mobil Oil Corp. v. Shores*, 128 S.W.3d 718 (Tex. App.—Fort Worth 2004, no pet.).

Moral: A statutory probate court does not have jurisdiction over a case merely because one of the parties is a trust.

3. Survival Actions

County of Dallas v. Sempe, 151 S.W.3d 291 (Tex. App.—Dallas 2004, pet. filed).

Prisoner was killed by a fellow inmate during a jailhouse fight. Children brought a survival action alleging that Prisoner's death was the result of the jail being overcrowded. County claimed that Children lacked standing to bring the survival action. The appellate court explained that because Children waited until more than four years from the date of Prisoner's death to sue, they were not required to allege that there was no administration pending and that none was necessary. In addition, they were not required to file suit within the four-year period for instituting probate proceedings. The statute of limitations on Prisoner's claim had not run when he died and was tolled during Children's minority.

Moral: Survival actions may be heard many years after the decedent's death if the heirs are minors because the statute of limitations is tolled.

4. Appellate

In re Estate of Robinson, 140 S.W.3d 801 (Tex. App.—Corpus Christi-Edinburg 2004, pet. dism'd).

The appellate court determined, sua sponte, that it had jurisdiction to hear the appeal of a case which found that a named co-executor was disqualified for being unsuitable. The court applying the *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995), test, held that the order disqualifying the named co-executor from serving was a final order and thus appealable.

Moral: An appellant should always include a clear analysis of why the court has jurisdiction to hear the appeal.

5. Sale of Property Not Completely Owned by Decedent

Walker v. Walker, 152 S.W.3d 220 (Tex. App.—Dallas 2005, no pet. h.).

Mother died with a valid will leaving her interest in a home equally to her two daughters (Pattie and Barbara), each of whom had already inherited a one-quarter interest from Father who had previously died intestate. Pattie served as the independent executor but took many actions allegedly in breach of her fiduciary duties such as living in the house without paying rent or compensating the estate for her use of the house.

Barbara was successful in having Pattie removed as the independent executor and securing the appointment of a third party as a dependent executor (Executor). Executor obtained court permission to sell the house. Pattie appealed raising a variety of jurisdictional issues including an assertion that the trial court lacked jurisdiction to order the sale of the house.

The appellate court affirmed. Pattie claimed that Executor had no authority to sell the house and that the trial court lacked jurisdiction to issue an order to sell the house because only one-half of the house was in Mother's estate. The court examined the Probate Code along with case law and found nothing to support Pattie's claim that all joint owners must join in a request for a partition for the court to have jurisdiction to issue an order of sale. The court explained that the probate court's jurisdiction extended to the one-half interest Mother did not own under Probate Code § 5A(b) because the partition action was incident to Mother's estate.

Moral: The probate court may issue an order to sell estate property even if an interest in that property is owned by someone other than the decedent.

D. Venue

1. Wrongful Death Claims

Gonzalez v. Reliant Energy, Inc., 48 Tex. S. Ct. J. 462 (2005), affirming *Reliant Energy, Inc. v. Gonzalez*, 102 S.W.3d 868 (Tex. App.—Houston [1st Dist.] 2003).

Decedent was killed in a work-related accident in Fort Bend County. Decedent's residence at the time of his death was in Hidalgo County. Accordingly, under Probate Code § 6, administration of Decedent's estate was opened in Hidalgo County. The court held that the proper venue for Administrator's wrongful death claim was in Harris County, the county in which Decedent's employer had its principal place of business, because the venue provisions of Civil Practice & Remedies Code § 15.007 dealing with actions by or against a personal representative for personal injury, death or property damage trump the applicable venue provisions of the Probate Code.

The court engaged in an extensive analysis of the jurisdictional and venue provisions of the Probate Code. The court explained that the plain language of § 15.007 provides that its method of venue determination is superior to the Probate Code venue provisions. Accordingly, § 15.007 limits the statutory probate court's discretionary authority under Probate Code § 5B to transfer to itself a wrongful death, personal injury, or property damage case in which a personal representative of an estate pending in that court is a party unless the county in which the probate court is located would also be a county of proper venue under Civil Practice and Remedies Code § 15.002.

Note: The result in this case appears to have been codified by the 2003 Texas Legislature in H.B. 4 which amended Probate Code §§ 5A, 5B, and 607 to provide that venue of an action by or against a personal representative for personal injury, death, or property damage is determined under § 15.007.

Moral: Venue for wrongful death and survival actions is determined according to Civil Practice & Remedies Code § 15.007, not the Probate Code.

Note: On the same day, the Texas Supreme Court resolved a conflicting lower court case involving similar facts by conditionally granting mandamus directing a probate court to vacate its order granting a transfer motion under Probate Code § 5B. *In re Terex*, 48 Tex. S. Ct. J. 477 (2005), granting conditional mandamus to *In re Terex*, 123 S.W.3d 673 (Tex. App.—El Paso 2003).

2. Multiple Residences

In re Estate of Steed, 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. filed).

Probate Code § 6(a) provides that venue is in the county where the decedent resided, if the decedent had a domicile or fixed place of residence in Texas. In this case, the decedent had several residences. The appellate court following earlier Texas case law explained that the Probate Code section, although perhaps inartfully written, provides that venue is in the county of the decedent's domicile at the time of death. The court held that "venue is established based on the domicile of the decedent and that the multiple residence authorization for venue * * * does not apply to the probate venue statute." Id. at 804. The court also explained that a domicile determination requires that the decedent (1) made it an actual residence and (2) intended to make it a permanent home.

Moral: If a decedent is domiciled in Texas at the time of death, venue is solely in the county of domicile even if the decedent maintained residences in other Texas counties.

E. Appeal

1. Fee and Expense Awards

Roach v. Rowley, 135 S.W.3d 845 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Decedent's sole heir filed an application for letters of independent administration. Because there was an assertion that Decedent had a valid will, the court appointed Temporary Administrator. The probate court approved Temporary Administrator's nine applications for interim payment of fees and expenses. Devisee did not object to these applications. However, when Temporary Administrator filed an account for final settlement of Decedent's estate, Devisee objected to the fees. The probate court found that Devisee waived his objection to all the fee orders.

The appellate court agreed that Devisee had waived his objection by not filing a timely appeal. The probate court's orders approving Temporary Administrator's applications for the payment of fees and expenses were final and appealable orders.

Moral: A person dissatisfied with a probate court's approval of a personal representative's fees or expenses should file a timely appeal.

2. Bill of Review

In re Estate of Davidson, 153 S.W.3d 301 (Tex. App.—Beaumont 2004, pet. filed).

The trial court denied a bill of review under Probate Code § 31 but did not sever it from the underlying will contest. The moving party appealed. The appellate court dismissed the appeal holding that it lacked jurisdiction because the order denying the bill of review was not a final and appealable order. The court explained that the ultimate issue was whether the court's order admitting the will to probate should be set aside. In addition to the bill of review pleading, the will contestants also filed a traditional will contest under Probate Code § 93 which had not yet been decided. Because the issues overlap and the court had not yet ruled on all issues, the ruling on the bill of review was not a final and appealable order as required by *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995).

Moral: A party unhappy with a court order must make certain it is final and appealable before filing an appeal. Otherwise, a considerable waste of time and money will result.

F. Court/Judge Assignment

In re Denison, 145 S.W.3d 803 (Tex. App.—Eastland 2004, mandamus denied).

Beneficiary requested an accounting under Probate Code § 149A in county court and requested the assignment of a statutory probate court judge to hear the case under Probate Code § 5(b). The county court denied the motion. Beneficiary then brought a mandamus proceeding.

The appellate court denied the writ. Probate Code § 5(b-1) provides that the county court must grant a motion for the assignment of a statutory probate court judge to hear a contested case unless the county court judge has already transferred the matter to the district court. The county court judge had transferred the case to district court under Probate Code § 5(b) many years before Beneficiary requested the assignment of a statutory probate court judge. Consequently, mandamus was not appropriate.

Moral: Once a county court transfers a contested case to a district court, it is too late to request the assignment of a statutory probate court judge to hear the case.

G. Foreign Will

Ayala v. Brittingham, 131 S.W.3d 3 (Tex. App.—San Antonio 2003, pet. granted).

County court at law admitted a foreign will to probate and granted ancillary letters testamentary. Executrix then sued Heir claiming that she and other heirs wrongfully appropriated over $60 million in estate assets. Heirs moved to dismiss Executrix's action asserting that the county court at law had no subject matter jurisdiction. The court denied the motion and Heir appealed.

The court began its analysis by holding that the county court at law's order was final for the purposes of appeal citing the landmark Texas case of *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995).

The court then reviewed the operation of Probate Code § 95 which authorizes the admission of a foreign will to probate in Texas if it is properly established under the laws of another jurisdiction. Key to the application of this procedure is for there to be estate property in Texas. The court explained that the claim of the estate to recover possession of or collect damages for the conversion of estate property that may have been located in Texas at the time of the testator's death is a right of action which constitutes estate

property. Consequently, the county court at law had subject matter jurisdiction.

Moral: A potential claim that estate assets were removed from Texas is sufficient to give Texas courts the ability to conduct an ancillary probate.

H. Authority of Heir

1. No Administration Pending

Kenseth v. Dallas County, 126 S.W.3d 584 (Tex. App.—Dallas 2004, pet. denied).

Plaintiff died during the course of a highly complex case dealing with matters not relevant to estate planning. The issue arose whether Heir was a proper substitute plaintiff even though she was not appointed by the probate court as Plaintiff's personal representative. The court reviewed the applicable case law as well as Texas Rule of Civil Procedure 151 and concluded that "if no estate administration is pending and none is necessary, the plaintiff's heir may appear in the case on the plaintiff's behalf." Id. at 596. Accordingly, Heir was a proper appellant and had standing to represent Plaintiff's estate.

Moral: Problems may arise when the original parties to an action die and successors in interest take over. To avoid these problems, the status of the successors should be clearly documented and presented to the court.

2. Personal Representative Appointed

Mayhew v. Dealey, 143 S.W.3d 356 (Tex. App.—Dallas 2004, pet. denied).

After Father's death under suspicious circumstances, Daughter brought suit against Son (her brother) for damages resulting from allegedly causing Father's death. Daughter prevailed. Son appealed on many grounds including that Daughter lacked standing to bring a survival action on behalf of Father's estate because she was not the executor.

The appellate court held that Daughter had standing. The court agreed that normally only a duly appointed personal representative may bring suit to recover property belonging to a decedent's estate such as the survival action in this case. However, there are several exceptions to this rule with one of them being when the personal representative cannot or will not bring the suit or when the personal representative's interests are antagonistic to the estate. The executor testified and submitted an affidavit stating that he would not bring a lawsuit in connection with Daughter's claims on behalf of the estate. Thus, Daughter had standing to pursue the survival action. (There is also an exception when no administration is pending and none is necessary but this exception did not apply because Father's estate was still under administration.)

Moral: An heir may have standing to bring a survival action on behalf of the estate even though a personal representative is currently serving if the representative (1) cannot bring the suit, (2) will not bring the suit, or (3) has interests which are antagonistic to those of the estate.

I. Disqualification of Executor

In re Estate of Robinson, 140 S.W.3d 801 (Tex. App.—Corpus Christi-Edinburg 2004, pet. dism'd).

Testatrix named three co-executors in her will, Mary, Garland, and Bank. Bank declined to serve and Mary convinced the trial court that Garland was unsuitable under Probate Code § 78(e). The basis of the unsuitability centered around Garland's involvement with the attempted probate of a later will which the court found was invalid because Testatrix lacked testamentary capacity. The court appointed Mary as the sole executor and Garland appealed.

The appellate court reversed holding that that the trial court acted without reference to any guiding rules and principles when it found that Garland was unsuitable. The court began its analysis by explaining that because Garland was named in Testatrix's will as a co-executor, Mary had the burden of establishing Garland's disqualification. Because there is no statutory or judicial definition of "unsuitable," the court reviewed Texas cases in which the appellate courts have concluded that a person was unsuitable to serve as an executor. Although the court recognized that the trial court has broad discretion in finding a proposed executor to be unsuitable, the court held that the trial court abused its discretion, that is, it acted in an arbitrary and unreasonable manner when it denied Garland's application.

The court reviewed the facts which the trial court deemed sufficient to conclude that Garland had a conflict of interest, an adversary relationship, hostility, an inability to perform his duties, or a duty to contest (rather than advocate) Testatrix's later will. Some of the facts the court cited as showing the unreasonableness of the trial court's holding included that Garland was not a beneficiary under the will, did

not have a claim against the estate, was not in conflict merely he provided accounting services for various of the involved parties and their businesses, did not takes sides with respect to the validity of the later will, and was willing to do what ever was legally required of him as executor even if it meant suing his own accounting clients.

Moral: Although appellate courts are usually reluctant to overturn a trial court's finding that a person is unsuitable to be an executor, the disqualified person may nonetheless be able to show that the trial court's decision was an abuse of discretion.

J. Removal of Personal Representative

Ayala v. Brittingham, 131 S.W.3d 3 (Tex. App.—San Antonio 2003, pet. granted).

County court at law admitted a foreign will to probate and granted ancillary letters testamentary. Executrix then sued Heir claiming that she and other heirs wrongfully appropriated over $60 million in estate assets. Heirs moved to remove Executrix from office. The court denied the motion and Heir appealed.

The appellate court reversed. The court began its analysis by examining Probate Code § 222(b)(5) which permits the court to remove a personal representative when the person becomes incapable of properly performing his or her duties. Although great deference is given to the county court at law's decision, the appellate court held that the lower court abused its discretion in not removing Executrix because its decision was arbitrary, unreasonable, and without reference to any guiding rules and principles. The court enumerates an extensive list of factors to support its finding that the discord and conflicts between the family members and the conflicting interests of the estate, the beneficiaries, creditors, and Executrix were such that it was unreasonable for the court to keep Executrix in office. For example, Executrix filed in Mexico an action to set aside her marital agreement and claim part of the estate as her community property.

Moral: The court will consider a wide range of factors in determining whether an individual is unsuitable to be a personal representative. Conflict between the interests of the personal representative and the estate is one of these factors.

K. Final Accounting

Roach v. Rowley, 135 S.W.3d 845 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Decedent's sole heir filed an application for letters of independent administration. Because there was an assertion that Decedent had a valid will, the court appointed Temporary Administrator. The probate court approved Temporary Administrator's nine applications for interim payment of fees and expenses. Devisee did not object to these applications. However, when Temporary Administrator filed an account for final settlement of Decedent's estate, Devisee objected to the fees. The probate court found that Devisee lacked standing to object to the final accounting.

The appellate court determined that Devisee did have standing to object to the final accounting. Temporary Administrator argued that Devisee was attempting to recover property belonging to the state by objecting to the final account and thus lacked standing under *Frazier v. Wynn*, 472 S.W.2d 750 (Tex. 1971) (holding that before heirs could sue to recover estate property, they must prove that no administration is pending and that none is necessary). The court rejected this argument explaining that Devisee was not attempting to recover estate property but rather was objecting to the final accounting as an interested person under Prob. Code § 10.

Moral: An interested person has standing to object to a final accounting.

V. TRUSTS

A. Jurisdiction

1. Generally

Dolenz v. Vail, 143 S.W.3d 515 (Tex. App.—Dallas 2004, pet. denied).

In an earlier action, Beneficiary, who was also the successor trustee, brought suit in a statutory probate court to recover property belonging to the trust. The court determined that the trust did not own any property and thus ordered that Beneficiary take nothing. In this case, Beneficiary sued in a district court claiming that the statutory probate court had no jurisdiction to rule on the existence of trust property. Beneficiary asserted that only a district court under Trust Code § 115.001 could rule on trust disputes. Beneficiary also claimed that the judgment was defective because he was sued only in his individual capacity, not as a successor trustee. The district court

dismissed Beneficiary's claims for lack of jurisdiction. Beneficiary appealed.

The appellate court affirmed. The court explained that a statutory probate court has concurrent jurisdiction with the district court with regard to all actions involving an inter vivos trust and thus it had jurisdiction. [The court applied the 1998 version of Probate Code § 5(A)(c); the equivalent authority is now found in Probate Code § 5(e).] The court also found that Beneficiary's failure to be served in a representative capacity to be irrelevant because Beneficiary waived the objection by making a general appearance before the court.

Moral: There may be unstated morals not reflected in the relatively simple legal points discussed in this case. Beneficiary was also the attorney who argued the appeal. State Bar of Texas records reflect that he was suspended from the practice of law in 1999 during the pendancy of the original case.

2. Trustee as Plaintiff

Mobil Oil Corp. v. Shores, 128 S.W.3d 718 (Tex. App.—Fort Worth 2004, no pet.).

Trustees sued Defendant to recover under-paid carbon dioxide royalties arising from interests held in trust in statutory probate court. The issue arose whether the statutory probate court had subject matter jurisdiction of Trustees' claims. The appellate court examined the applicable (1999) versions of Probate Code §§ 5 & 5A and concluded that the statutory probate court lacked jurisdiction.

The court explained that Trustees' claims did not fall within any of the enumerations in the Probate Code and thus before the statutory probate court had jurisdiction, it must first be established that the district court had jurisdiction under Trust Code § 115.001. Trustee's cause of action is not expressly listed in this section. However, Trustees argued that the proceeding was nonetheless one "concerning" a trust under § 115.001(a)(6) or (a)(7) because the Trust Code grants trustees the ability to enter into mineral leases and to contest claims by or against a trust.

The court rejected this argument stating that "[t]he mere fact that a plaintiff happens to be a trustee, however, does not transfer a case into one 'concerning trusts.'" Id. at 725. Accordingly, because the District Court did not have jurisdiction over this case under the Trust Code, the co-extensive jurisdiction of the statutory probate court was not triggered.

Moral: As stated by the court, "[t]he mere fact that a plaintiff happens to be a trustee * * * does not transfer a case into one 'concerning trusts.'" Thus, a statutory probate court does not have jurisdiction over a case merely because the plaintiff is a trustee.

B. Revocation

McClure v. JPMorgan Chase Bank, 147 S.W.3d 648 (Tex. App.—Fort Worth 2004, pet. denied).

Settlor created an inter vivos trust. Settlor retained the power to revoke the trust provided the revocation was in writing and the writing was delivered to Trustee. Later, Settlor executed a will leaving the majority of her estate to this trust. After Settlor' death, a dispute arose as to whether a subsequent holographic will operated to revoke the trust so that trust property would pass under the terms of this will rather than the trust. The trial court granted a summary judgment holding that the holographic will did not revoke the trust.

The appellate court agreed. The court began its analysis by recognizing that if a settlor specifies the method of revocation, that method must be followed for an attempted revocation to be effective. The court explained that the key to deciding the case was whether this holographic will was delivered to Trustee prior to Settlor's death. After examining the evidence, the court found nothing to raise a fact issue about Trustee's lack of receipt of a notice of revocation. Accordingly, the court affirmed the summary judgment that Settlor had not effectively revoked the trust.

Moral: If a settlor specifies a method of trust revocation, the settlor must comply exactly with that method for a revocation to be effective.

C. Accountings

Faulkner v. Bost, 137 S.W.3d 254 (Tex. App.—Tyler 2004, no pet.).

Mother created a trust naming Daughter as the trustee. Mother then assigned to the trust any interest she might later acquire from her mother (Grandmother). Grandmother later created her own trust which would terminate at her death for the benefit of Mother and her siblings. After Grandmother died, Mother reaffirmed the assignment. Daughter (as trustee of Mother's trust) sought an accounting from the trustee of Grandmother's trust.

The appellate court determined that Daughter had standing to bring the accounting action as an interested person as defined by Prop. Code § 111.004(7). Although Daughter was not a named trustee or beneficiary of Grandmother's trust, she did have an interest by virtue of Mother's assignment. The court noted that the spendthrift provision in Grandmother's trust did not negate the assignment. The effectiveness of the spendthrift provision ended when Grandmother died and Mother reaffirmed the assignment after Grandmother's death.

Moral: An individual may be deemed to be an interested person even though the person is not a named beneficiary or trustee.

D. Attorney's Fees

Hachar v. Hachar, 153 S.W.3d 138 (Tex. App.—San Antonio 2004, no pet. h.).

In a case with a complex factual background, the trial court awarded attorney fees from the trust in favor of both Trustee and Beneficiaries who were involved in litigation against each other. Beneficiaries argued that the court's award in favor of Trustee was inappropriate because Trustee was not the prevailing party in the lawsuit. The appellate court agreed that the trial court could make the award because Trust Code § 114.064 permits the court to make an award which is "equitable and just." There is no limitation that an award of reasonable and necessary attorney's fees be made only in favor of a prevailing party.

The appellate court next had to determine whether the court's award of attorney's fees in favor of Beneficiaries was appropriate. The court explained that, "Unreasonable fees cannot be awarded, even if the court believes them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees." Id. at 142. Trustee contended that the amount awarded was neither (1) equitable and just nor (2) reasonable and necessary. The appellate court reviewed the evidence and found that the trial court's determination that the fees satisfied both conditions was not in error.

The appellate court also agreed with the trial court that it did not abuse its discretion in not awarding conditional appellate attorney's fees. The court explained that the awarding of appellate attorney's fees is not required and that the court may have decided against awarding such fees to discourage an appeal which given the "tortured history" of the case would be a reasonable thing to do.

Moral: Any party involved in trust litigation should seek an award of attorney's fees under Trust Code § 114.064 because the court has the authority to award fees even in favor of the losing party if the court believes it is equitable and just to make such an award.

E. Charitable Trusts

Marsh v. Frost National Bank, 129 S.W.3d 174 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied).

Testator's will contained a provision requiring the executor to sell certain property, invest the proceeds, and later to turn the property over to the United States President, Vice-President, and Speaker of the House as trustees. The money is be invested until it is sufficient to create a trust with $1,000,000 for every American who is 18 years old or older with no one being denied a share due to race, religion, marital status, sexual preference, or the amount of wealth. Testator anticipated this would take 346 years.

Executor filed this action to obtain a construction of this gift. Heirs argued that Testator attempted to create a private trust which failed because it violated the Rule Against Perpetuities. The Attorney General intervened under Property Code § 123.002 and argued that Testator established a charitable trust. The trial court found that the trust was charitable.

The appellate court reversed. After recognizing that whether a given purpose is charitable is a question of law for the court to decide, the court began its analysis by looking at the traditional categories of charitable purposes as set out in Restatement Second of Trusts § 368:

- the relief of poverty;
- the advancement of education;
- the advancement of religion;
- the promotion of health;
- governmental or municipal purposes;
- other purposes the accomplishment of which is beneficial to the community.

The court reasoned that the only category in which Testator's purpose potentially might fall is the last category.

The court concluded that Testator's purpose was not charitable because it did not go beyond merely providing financial enrichment to individual members of the community. The court explained that the

purpose must promote the social interest of the community as a whole. A trust to distribute money without regard to the donees' financial needs or how the donees must use the money does not show that Testator had the requisite intent to benefit the public despite Testator's generosity and benevolence.

The court recognized that there is a strong presumption in favor of charitable trusts and that they should be construed liberally to uphold their validity. But, in this case, there was no charitable intent and thus it would be inappropriate to apply liberal construction rules to *create* a charitable intent where none exists.

Because the trust is not charitable, the court agreed that it violated the Rule Against Perpetuities as stated in Trust Code § 112.036. Accordingly, Property Code § 5.043 is triggered which authorizes the court to reform or construe the trust according to the doctrine of cy pres to give effect to the general intent of Testator within the limits of RAP. Testator's general intent was to create a trust to financially enrich the American public. The court remanded the case to the trial court to determine the feasibility of reforming Testator's bequest.

Moral: A person desiring to establish a charitable trust must make certain that his or her purpose will be deemed charitable by a court. The person's belief that the purpose is charitable is not sufficient.

F. Section 867 Management Trusts

Bank of Texas, N.A., Trustee v. Mexia, 135 S.W.3d 356 (Tex. App.—Dallas 2004, pet. denied).

The court created a guardianship management trust for Minor under Prob. Code § 867. Less than one year later, Guardian filed an application to terminate the trust. The court examined the investments and found that they had lost approximately $300,000. Accordingly, the court terminated the trust because doing so would be in Minor's best interest.

Trustee appealed arguing that the standard to terminate a trust is whether the settlor's intent has been met, not whether termination is in Minor's best interest. Prop. Code § 112.054. Trustee pointed to Prob. Code § 870 which permits the court to terminate a management trust for an *incompetent* ward if doing so is in the ward's best interest but which does not include a best interest standard if the beneficiary is a minor.

The court rejected Trustee's argument. The court focused on Prob. Code § 867 which authorizes the court to create a trust if it is in the minor's best interest and Prob. Code § 869 which allows the court to terminate a management trust at any time. Accordingly, the trial court could terminate the management trust because doing so was in Minor's best interest.

Moral: Despite unclear statutory language, the court may terminate a Section 867 management trust if doing so is in the ward's best interest, regardless of whether the ward is a minor or an incompetent.

VI. OTHER ESTATE PLANNING MATTERS

A. Malpractice

Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 141 S.W.3d 706 (Tex. App.—San Antonio 2004, pet. granted).

Beneficiaries sued Attorneys who prepared Testator's will asserting that Attorneys provided negligent advise and drafting services. Beneficiaries asserted that Testator's estate incurred over $1.5 million in unnecessary federal estate taxes because of the malpractice. The trial court granted Attorneys' motion for a summary judgment on the basis that Beneficiaries could not establish that Attorneys owed them a duty because Beneficiaries were not in privity with Attorneys. Beneficiaries appealed.

The appellate court affirmed. The court explained that privity between Beneficiaries and Attorneys is mandated by *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), and thus the court had no choice but to affirm. The court stated that it was bound to follow the holding of the Supreme Court of Texas even though this court "may entertain a contrary opinion." Id. at 709.

Moral: The Supreme Court of Texas has granted petition. This may reflect the court's decision to revisit (that is, reverse) its holding in *Barcelo* requiring privity. Practitioners should monitor the progress of this case closely.

B. P.O.D. Accounts

Punts v. Wilson, 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet. h.).

Decedent opened several P.O.D. accounts and designated Beneficiary as the person entitled to the

funds upon his death. Decedent's will left the remainder of his estate in equal shares to Beneficiary and Friend. Beneficiary was named as the independent executor of Decedent's will. After Decedent died, Beneficiary made withdrawals from the P.O.D. accounts in excess of one-half of a million dollars. Beneficiary did not include these accounts in the estate inventory. Friend sued Beneficiary for breach of fiduciary duty and conversion claiming that Beneficiary's actions deprived Friend of one-half of the funds in the accounts. The trial court granted Beneficiary's motion for a summary judgment and Friend appealed.

The appellate court affirmed. The court explained that although Beneficiary owed fiduciary duties to Friend by virtue of being the executor of Decedent's estate, Beneficiary owed no duties to Friend with respect to assets that are not includable in Decedent's probate estate. Decedent properly created the P.O.D. accounts and properly named Beneficiary as the P.O.D. payee. The funds belonged to Beneficiary immediately upon Decedent's death and were not part of Decedent's probate estate. Prob. Code §§ 439(b) & 439A(b)(2). Consequently, Beneficiary owed no duty to Friend with respect to these funds.

The court also rejected Friend's attempt to use extrinsic evidence to prove Decedent's intent that Beneficiary and Friend share the funds equally. Likewise, the court deemed it insignificant that Beneficiary obtained checks payable to Beneficiary as the executor of Decedent's estate when he withdrew the funds. Following a long line of Texas cases, the court explained that if the P.O.D. agreement is complete and unambiguous, then parol evidence is inadmissible to vary, add to, or contradict its term.

Moral: Clients must remember that multiple-party accounts such as P.O.D. accounts, trust accounts, and joint accounts with survivorship rights pass under the terms of the account contracts and not under their wills. The estate planner should carefully questions each client about the existence of multiple-party accounts, determine if they were created correctly, and whether the client actually intends the property to pass outside of the probate estate.

C. Life Insurance

Hubbard v. Shankle, 138 S.W.3d 474 (Tex. App.—Fort Worth 2004, pet. denied).

Insured removed his ex-wife as the beneficiary of his life insurance policy replacing her with Beneficiary, a woman whom he had been dating for about three months after meeting her on the Internet. Insured told Beneficiary that he wanted her to have the money and that he wanted her take care of his toddler's college expenses in the future. Insured died during sexual activities with Beneficiary. The insurance company paid the proceeds of the life insurance policy to Beneficiary. Administratrix of Insured's estate sued Beneficiary to recover the proceeds. The trial court determined that Insured voluntarily named Beneficiary as the recipient of his life insurance proceeds and that Beneficiary had no legal obligation to use any of the proceeds for the toddler's future college expenses. Administratrix appealed.

The appellate court affirmed. The court examined the facts and determined that there was no evidence to support any of Administratrix's claims which included breach of contract, promissory estoppel, actual fraud, constructive fraud, express trust, resulting trust, constructive trust, money had and received, unjust enrichment, and quasi-contract.

With regard to Administratrix's argument that Insured created an express trust for the toddler, the court noted that Insured's conduct was inconsistent with having trust intent. For example, Insured did not clearly place the proceeds in trust. When he changed the beneficiary designation on the policy, he did not include any type of trust designation. Rather, Beneficiary was named individually.

Although not actually stated so by the court, all that really existed was a daughter, (Administratrix), who was very upset because her father (Insured) removed his ex-wife (Administratrix's mother) as the beneficiary a policy with a face value of over $100,000 naming a woman as the beneficiary with whom he had a very short-term relationship and whom "triggered" his death via sexual activity.

Moral: Even a clear, unambiguous designation of a person as a beneficiary of a life insurance policy may be contested if the relationship between the beneficiary and the insured is upsetting to the insured's family members.