RECENT DEVELOPMENTS FROM THE TEXAS COURTS

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PROBATE SECTION

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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 (Regent and Academic Fellow); American Bar Foundation; Texas Bar Foundation; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)
Reporter, Uniform Electronic Estate Planning Documents Act (2022)

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 Regents 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

Order of the Coif
Distinguished Probate Attorney Lifetime Achievement Award, REPTL Section, State Bar of Texas (2022)
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (8th ed. 2022); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (5th ed. 2023); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2023); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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RECENT DEVELOPMENTS FROM THE TEXAS COURTS

I. INTRODUCTION

This article discusses recent judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters since the article I prepared for last year's program held on April 14, 2023. The reader is warned that not all recent cases are presented and not all aspects of each cited case are analyzed. You must read and study the full text of each case before relying on it or using it as precedent. Writ histories were current as of April 6, 2024 (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 may reduce the likelihood of the same situations arising with their clients and judges may increase the likelihood of their decisions being upheld on appeal.

II. INTESTATE SUCCESSION

Estate of Martin, No. 06-22-00061-CV, 2023 WL 3185811 (Tex. App.—Texarkana May 2, 2023, no pet.).

After the intestate died, an alleged common law spouse presented facts, including the intestate's death certificate stating they were married, to prove the marriage. After reviewing the evidence, the jury determined no common law marriage existed and that the intestate's son was the sole heir.

The Texarkana Court of Appeals affirmed. The court reviewed the conflicting evidence on the three elements of a common law marriage: (1) agreeing to be married, (2) living together in Texas as husband and wife, and (3) representing to others that they are married. The court determined that the jury's decision that they were not married, was not so against the great weight and preponderance of the evidence that it was clearly wrong and unjust.

Moral: A person alleging a common law marriage needs to present strong evidence at the trial level because it will be difficult to set aside a jury finding that a common law marriage did not exist.

III. WILLS

A. Testamentary Capacity

Estate of Martin, No. 06-23-00033-CV, 2024 WL 105593 (Tex. App.—Texarkana Jan. 10, 2024, no pet. h.).

Both the trial and appellate courts agreed that the testator lacked testamentary capacity to execute his will. Although there was no direct evidence of his capacity on the date he signed the will, evidence of the testator's state of mind at other nearby times was sufficient to support the finding of lack of capacity.

Moral: A jury finding that a testator lacked testamentary capacity is difficult to overturn on appeal.

B. Execution Formalities

1. Satisfied, Although Haphazard

Altice v. Hernandez, 668 S.W.3d 399 (Tex. App.—Houston [1st Dist.] 2022, no pet.).

The trial court admitted Testatrix's will to probate which named her granddaughter as executor and sole beneficiary. Thereafter, one of Testatrix's children claimed the will was invalid as not meeting Texas requirements, containing a forged signature of the Testatrix, or procured by undue influence. These claims were unsuccessful and the contesting child appealed.

The appellate court affirmed after examining the circumstances surrounding the will. The

witnesses to the will were one of Testatrix's children (father of the sole beneficiary) and the sole beneficiary's future (after Testatrix's death) husband. The notary testified that he notarized the self-proving affidavit's signatures of Testatrix and one of the witnesses (Testatrix's son), but not the second witness (future son-in-law). The witnesses testified that they signed the will in the Testatrix's presence, but not at the same time. A handwriting expert concluded that Testatrix's signature was genuine. The opinion contains extensive additional details about the execution of the will and the self-proving affidavit with somewhat conflicting testimony, which shows that a normal (proper) will execution ceremony did not take place.

The court rejected three claims that the will was invalid based on formalities. First, the contestant claimed that a valid will requires the testator to initial each page, especially if the will itself, as this one did, indicates an intent that the testator was to initial each page. Second, the court rejected the contestant's claim that Texas law requires the testator to sign in the witnesses' presence. The court explained that Texas law requires the opposite, that is, that the witnesses attest in the testator's presence and that there is no requirement that both witnesses attest at the same time. Again, it did not matter that the will itself stated that the testator signed it in the presence of both witnesses. Third, although the court did agree that the requirements for a valid self-proving affidavit were not satisfied, the court explained that the self-proving affidavit only deals with the manner of proving the will, not its validity.

Moral: A formal will execution ceremony should be conducted to avoid the issues raised in this case.

2. Holographic Will

Wilson v. Franks, No. 03-22-00718-CV, 2023 WL 6627522 (Tex. App.—Austin Oct. 12, 2023, no pet. h.).

A holographic document read, "If I Robert franks is found dead Alll I have Goes too to Valarie Wilsooon." The trial court held that the document did not meet the requirements of a holographic will.

The appellate court affirmed. Even though the instrument appears to have the testator's signature and indicate at-death property disposition desires, the court refused to overturn the trial court's decision because there was no reporter's record of the evidentiary hearing on the validity of the signature. Instead, the record showed that the signature did not match how the alleged testator signed another document. The appellate court explained that without a record, the court must presume that the evidence favored the judgment.

Moral: A reporter's record of a probate proceeding is important to preserve the evidence needed to support an appeal of an unfavorable judgment.

3. Codicil

Mynard v. Degenhardt, No. 14-22-00773-CV, 2023 WL 8943364 (Tex. App.—Houston [14th Dist.] Dec. 28, 2023, no pet. h.).

The proponent attempted to show that a handwritten and signed notation was a valid codicil. Both the trial and appellate courts held that the notation was not a codicil. Although specific property was referenced, the words "be given" were marked out with the words "have been sold" added. Thus, the notation lacked testamentary intent and merely stated information about the sale of the property. In dicta, the court opined that even if the words "be given" were granted effect, the notation still would not be a codicil because there was no indication that the transfer was to occur upon death.

Moral: Codicils must clearly provide for the transfer of property upon death.

C. Interpretation and Construction

1. Definition of "Children"

In re Estate of Mzyk, No. 04-21-00533-CV, 2023 WL 3214572 (Tex. App.—San Antonio May 3, 2023, no pet. h.).

Testatrix's will left the residuary of her estate "to my children" and then if a child predeceased, to that child's descendants. The will also contained a provision stating that all references to "children" include the two children (referenced by name) who were alive when Testatrix executed the will. One of Testatrix's children was already deceased when Testatrix executed her will. After Testatrix died, a dispute arose regarding whether the deceased child's child was included as a residuary beneficiary. The children asserted that the "reference" provision was exclusive while the grandchild asserted that it did not exclude his father as a child merely because he was already dead.

Both the trial court and San Antonio Court of Appeals agreed that the "reference" provision acted as a definition of the individuals intended to be included when Testatrix used the term children in the will. The court pointed out that Testatrix had already listed children, both living and deceased, in describing her family situation. Testatrix would have no reason to include another provision indicating the identity of her children and thus the "reference" provision acted as a definition of whom was encompassed when she used the term children in the will.

Moral: A definition of a term should be drafted with greater specificity to avoid interpretation issues. For example, instead of writing that the term children "includes" named individuals, state that the term children "means only" the named individuals unless the testator's intent is to leave the class of children open to include deceased or afterborn children.

2. Holographic Will

Estate of Martinez, No. 04-22-00707-CV, 2024 WL 697102 (Tex. App.—San Antonio Feb. 21, 2024, no pet. h.).

Both the trial and San Antonio Court of Appeals agreed that testatrix's inartfully drafted holographic will devised land to individuals she indicated were living there. The court considered that testatrix was not an attorney and had no legal advice. In addition, courts liberally construe holographic wills and doing so prevents a conclusion that testatrix did a useless thing when she listed the property she owned and its resident.

Moral: Courts will liberally construe holographic wills.

D. Power of Appointment

In re Wells, No. 12-23-00066-CV, 2023 WL 7399561 (Tex. App.—Tyler Nov. 8, 2023, pet. filed).

The appellate court held that the testatrix's will did not exercise a power of appointment created by her husband's will. Her will stated that she did not intend to exercise any power of appointment and the will contained no other indication of an intent to exercise the power. See Tex. Estates Code § 255.351. Merely because the testatrix was transferring all her estate via her will did not act to exercise the power of appointment.

Moral: A person desiring to exercise a power of appointment by will should do so in a clear and unambiguous manner.

E. Assignment or Disclaimer?

In re Wells, No. 12-23-00066-CV, 2023 WL 7399561 (Tex. App.—Tyler Nov. 8, 2023, pet. filed).

A will beneficiary signed a document in which he rejected property given to him by his mother's will and acknowledged that his sister would be treated as his mother's sole heir. A dispute arose whether this document was a disclaimer that would cause the property to pass to the beneficiary's son or an assignment of the property to his sister. The appellate court held that the document was ambiguous and thus summary judgment in favor of the sister was improper.

Moral: Disclaimers and assignments need to be clearly drafted to make certain which type of document the beneficiary is executing.

F. Will Contests

1. Time of Filing

Castello v. Estate of Castello, No. 03-22-00012-CV, 2023 WL 4139038 (Tex. App.—Austin June 23, 2023, no pet. h.).

The trial court granted summary judgment that there was no genuine issue of material fact regarding the testator's testamentary capacity. The appellate court reversed. A key fact was that the contestant disputed testamentary capacity before the will was admitted to probate, thus leaving the burden of proof on the will proponent, rather than with the contestant. Accordingly, merely because the will had a self-proving affidavit was insufficient to prove capacity. The contestant had evidence, which placed capacity in doubt, and thus a fact issue existed precluding summary judgment that the testator had testamentary capacity.

Moral: If possible, a will contestant should file a contest prior to the will being admitted to probate so that the burden of proof for all elements of a valid will remain on the proponent.

2. Statute of Limitations

Burns v. Burns, No. 12-22-00256-CV, 2023 WL 3033145 (Tex. App.—Tyler Apr. 20, 2023, pet. denied).

The testator died in 2008 with a will leaving his entire estate to his wife. About thirteen years later, the testator's son attempted to contest the will on a variety of grounds such as forgery, lack of testamentary capacity, undue influence, and lack of notice of the probate proceedings. Both the trial court and Tyler Court of Appeals determined that the statute of limitations to contest the will had run. Estates Code § 256.204 provides a two-year period from date the will is admitted to probate and two years from the discovery of forgery or fraud. The court explained that the son had constructive notice of the probate proceedings and there was no evidence that the testator's wife or attorney committed any fraudulent act.

Moral: A person who wishes to contest a will should do so in a timely manner.

3. Testamentary Capacity

In re Walzel, No. 07-23-00037-CV, 2023 WL 6447350 (Tex. App.—Amarillo Oct. 2, 2023, no pet. h.).

Contestants attempted to show that the testatrix lacked testamentary capacity. The appellate court upheld a summary judgment that testatrix had capacity. The evidence the contestants submitted was too temporally removed from the date of will execution to raise a genuine issue of material fact. The evidence was either years before or at least seven months after she executed the will. This evidence did not show a persistent condition that impacted testamentary capacity on the date of will execution.

Moral: To raise a fact issue of lack of capacity, the evidence should be as close as possible to the date of will execution.

4. Undue Influence

Altice v. Hernandez, 668 S.W.3d 399 (Tex. App.—Houston [1st Dist.] 2022, no pet.).

Both the trial and appellate courts agreed that the testatrix's will was not the product of undue influence. The opinion is notable for its comprehensive listing of the elements of undue influence which, citations omitted, is set forth below:

> We may consider ten non-exhaustive factors when determining whether undue influence exists. The first five factors concern whether the proponent exerted any influence over the testator, considering:
>
> (1) the nature and type of relationship between the testator, contestant, and proponent;
>
> (2) the opportunities existing for the exertion of the type of influence or deception possessed or employed;
>
> (3) the circumstances surrounding the drafting and execution of the will;
>
> (4) the existence of a fraudulent motive;
>
> (5) whether there has been habitual subjection of the testator to the control of another.

The next four factors are used to determine whether the testator's will was subverted or overpowered by any influence exerted by the proponent, considering:

> (6) the state of the testator's mind at the time he executed the will;
>
> (7) the testator's mental or physical incapacity to resist such influence or the susceptibility of the testator's mind to the type and extent of influence exerted;
>
> (8) the words and acts of the testator;
>
> (9) the testator's weakness of mind and body, whether a result of age, disease, or otherwise.

Finally, the tenth factor is relevant to determining whether the will would have been executed in the absence of the influence exerted by the proponent, considering:

> (10) whether the will executed is unnatural in its disposition of the testator's property.

After reviewing the evidence, the court concluded that the jury's finding that undue influence did not exist (the first five factors) was not against the great weight and preponderance of the evidence.

Moral: A will contestant alleging undue influence needs to have proof that such influence was actually exerted and not just mere opportunity or a reason that exerting influence would be beneficial to a will beneficiary.

Note: For another case providing a thorough discussion of the evidence needed to prove undue influence (not just mere opportunity) as well as lack of testamentary capacity, see *In re Estate of Bristow*, No. 11-22-00035-CV, 2023 WL 7198344 (Tex. App.—Eastland Nov. 2, 2023, pet. filed).

5. In Terrorem Provision

In re Walzel, No. 07-23-00037-CV, 2023 WL 6447350 (Tex. App.—Amarillo Oct. 2, 2023, no pet. h.).

Will beneficiaries sought to enforce an in terrorem clause against a beneficiary who unsuccessfully contested the testatrix's will on the ground that she lacked testamentary capacity. The contesting beneficiary claimed that there was sufficient evidence showing that she had good faith and just cause and thus the summary judgment against her was improper. Estates Code § 254.005. The court viewed the contestant's evidence and determined that she had more than a scintilla of evidence to raise a genuine issue of material fact and thus the summary judgment was improper.

Moral: It will be difficult to sustain a summary judgment that a will contestant lacked good faith and just cause in contesting a will which would trigger forfeiture under an in terrorem clause.

6. Settlement Agreement

In re Estate of Renz, 662 S.W.3d 531 (Tex. App.—El Paso 2022, pet. denied).

During the pendency of a will contest, the trial court approved a settlement resolving all issues and claims. Six years later, the will contestants filed new litigation involving estate property. The trial court granted a motion enjoining the contestants from proceeding with the litigation. The El Paso Court of Appeals affirmed.

The court rejected the will contestants' claim that the trial court lacked jurisdiction to hear a motion to enforce the settlement agreement because more than thirty days had elapsed since the court signed the final judgment. The court held that "[a] court with jurisdiction to render a judgment also has the inherent authority to enforce its judgments" and that the "enforcement powers can last until the judgment is satisfied." *Id.* at 536. The court also explained that the trial court's order clearly showed the court's intent to incorporate the settlement agreement into its final order. The court stated that the words in the judgment "approves and accepts" were sufficient and that the use of the word "incorporated" was not necessary.

Moral: A party to a settlement agreement must realize that issues covered by the agreement cannot be relitigated after settlement remorse sets in.

IV. ESTATE ADMINISTRATION

A. Appellate Jurisdiction

1. Lapse of Residue

Estate of Long, No. 06-23-00025-CV, 2023 WL 4240230 (Tex. App.—Texarkana June 19, 2023, pet. filed).

The trial court issued a summary judgment construing the decedent's will regarding the residue of the estate. The court dismissed an appeal of the summary judgment because this trial court order was not final and did not end a discrete phase of the probate proceeding. The court explained that the order only determined that the residuary clause lapsed but did not determine the identity of the testator's heirs or to whom the residuary would pass. Thus, because the order did "not dispose of all parties and issues at this stage of the proceeding, it is not a final, appealable order." *Id.* at *4.

Moral: Before appealing a trial court's order, be certain that it is a final order or one that is otherwise appealable.

2. Standing

In re Crapps, No. 04-23-00761-CV, 2023 WL 7006289 (Tex. App.—San Antonio Oct. 25, 2023, no pet. h.).

The trial court denied a motion to dismiss a party's will contest claims for lack of standing. The appellate court held it did not have jurisdiction over an appeal of this order because it did not dispose of all parties or issues involving the will contest. Instead it set the stage for further proceedings. Accordingly, the order was interlocutory and not appealable.

Moral: Orders dealing with standing in a will contest are unlikely to be appealable.

3. Partial Distribution

Estate of Gaddy v. Fenenbock, No. 08-23-00146-CV, 2024 WL 1340564 (Tex. App.—El Paso Mar. 28, 2024, no pet. h.).

The El Paso Court of Appeals held that a probate court's order directing the independent executor to make a partial distribution of estate assets to a family trust under the residuary clause of a will was not an appealable order and thus it dismissed the appeal for want of jurisdiction. The probate court's order did not dispose of all parties or issues in a phase of the proceedings and the Estates Code does not make it a final order.

Moral: Before appealing, be sure the appellate court will have jurisdiction over the appeal to avoid wasting time and money on a dismissed appeal.

B. Venue

In re Estate of Bristow, No. 11-22-00035-CV, 2023 WL 7198344 (Tex. App.—Eastland Nov. 2, 2023, pet. denied).

The court held that a motion to transfer venue is waived if it is made after any written motion, including the original answer, is filed (other than a special appearance). See Tex. R. Civ. P. 86(1). Because the will contest action was filed many months before the filing of the motion to transfer venue, the trial court was correct in denying the motion.

Moral: Motions to transfer venue need to be filed before any other written motion is filed.

C. Late Probate

1. Late Probate as Muniment of Title

In re Butts, No. 09-21-00269-CV, 2023 WL 8630965 (Tex. App.—Beaumont Dec. 14, 2023, no pet. h.).

Will proponent filed a will for probate as a muniment of title more than four years after the testatrix's death. The trial court admitted the will holding that the proponent was "not in default" as Estates Code § 256.003 requires for a late probate. However, Estates Code § 257.054 addressing probating a will as a muniment of title does not contain this exception to probating a will more than four years after a decedent's death. The court held that this language difference would not preclude a late probate.

The court relied on the Supreme Court of Texas case of *Ferreira v. Butler*, 575 S.W.3d 331 (Tex. 2019), which made it clear that as long as the applicant is not in default it does not matter that another person who could have probated the will was in default. The *Ferreira* case involved a muniment of title action and the court permitted the proponent to replead her case to show that she was not in default. With this key fact and after reviewing other cases and the structure of the Estates Code, the court held that the "not in default" language in Estates Code § 256.003 "also applies to the admission of a will for probate as a muniment of title under Section 257.054." *Id.* at *16.

Moral: The "not in default" exception applies to the admission of a will to probate as a muniment of title.

Note: The court failed to mention that after four years, it is not possible to have an estate administration under Estates Code § 301.002 unless very limited exceptions apply. Most late probate cases do not involve one of the exceptions and thus are typically done as muniments of title. Perhaps that is what the court meant when it referenced the "overall structure of the Estates Code." *Id.* at *16.

2. Importance of Pleading "Not in Default"

Estate of Riley, No. 01-22-00504-CV, 2023 WL 5208046 (Tex. App.—Houston [1st Dist.] Aug. 15, 2023, no pet. h.).

The proponent of the will filed the will for probate a few weeks after the expiration of the normal four-year period under Estates Code § 256.003. The trial court denied probate and the appellate court affirmed. The proponent claimed not to be in default because although she knew probate was needed, she relied on non-lawyer's opinion that the time period was five years. The court reasoned that because the proponent "failed to challenge the trial court's ruling sustaining the [contestant's] objections based on limitations and default" that denial of probate was proper.

Moral: Failure to challenge a trial court's finding may preclude that issue from being considered on appeal.

3. Due Diligence Needed

In re Hartwell, No. 06-23-00054-CV, 2024 WL 105590 (Tex. App.—Texarkana Jan. 10, 2024, no pet. h.).

The will proponent attempted to probate the testator's will over ten years after the testator's death. The trial court determined that the proponent was in default for not probating the will within the four year period specified in Estates Code § 256.003 and granted summary judgment against the proponent.

On appeal, the Texarkana Court of Appeals affirmed. The court examined the evidence which demonstrated the proponent's lack of due diligence such as knowing the contents of the will and having continuous possession of a copy of the will starting eight years before the testator's death. The court did not agree that proponent's excuse that he thought his father was going to handle the probate was sufficient.

Moral: Although Texas courts are often willing to accept weak excuses for not timely filing a will for probate, courts also require evidence that a late probate proponent had a sufficiently justifiable reason for the delay.

D. Determination of Heirship

In re Estate of Barnett, No. 05-22-00538, 2024 WL 260483 (Tex. App.—Dallas Jan. 24, 2024, no pet. h.).

The intestate's same-sex surviving spouse filed a determination of heirship application asserting that she was the intestate's surviving spouse. The attorney ad litem for unknown heirs claimed that the marriage was not valid that instead the heirs of the intestate's estate were the intestate's parents. The trial court rejected the attorney ad litem's report and held that the applicant was indeed the intestate's surviving spouse. The attorney ad litem appealed.

The Dallas Court of Appeals affirmed. The court reviewed the evidence which included testimony of individuals who attended the wedding of the intestate and the surviving spouse. However, the attorney ad litem claimed that the marriage was invalid because same-sex marriages were not yet authorized in New York where the marriage

occurred and that at the time, Texas did not recognize same-sex marriages regardless of where they occurred. The court did not evaluate these claims because they were inadequately briefed and thus relied on other evidence to show a valid marriage such as the New York marriage license and certificate of marriage.

The court also rejected the attorney ad litem's claim for additional fees for the work done in attempting to show an invalid marriage. The court explained that the ad litem's job is to locate unknown heirs and that the ad litem acted outside the scope of her duties and thus is not entitled to compensation of the additional work. In addition, she did not comply with Dallas rules which require excess fees need to be supported with affidavits from two other attorneys with probate experience who have evaluated the fee request.

Moral: The issue of the retroactivity of the validity of same-sex marriages was side-stepped by the court because the ad litem did not brief the issue and thus this issue remains unresolved. In addition, ad litems need to keep their job in mind, that is locating unknown heirs, and that if they go beyond that charge, they are unlikely to be compensated for their extra time.

E. Muniment of Title

In re Ledezma, No. 08-23-00019-CV, 2023 WL 6539823 (Tex. App.—El Paso Oct. 6, 2023, no pet. h.).

The trial court admitted the testatrix's will as a muniment of title. The court later granted a declaratory judgment that the probate was improper due to ambiguity in the will and that the testatrix actually died intestate. The appellate court first held that the court had jurisdiction to issue the declaratory judgment because both a bill of review and a will contest may be filed within two years of when a will is admitted to probate. Estates Code §§ 55.251 & 256.204. However, the court held that the potential ambiguity did not provide a reason to undo the will's admission to probate. Instead, the court explained that the ambiguities were merely scrivener's or clerical errors, and that the testatrix's intent can be ascertained from reading the will as a whole.

Moral: A will admitted to probate as a muniment of title may be contested in the same manner as a will subject to estate administration.

F. Removal of Independent Executor

Estate of Turpin, No. 04-22-00484-CV, 2023 WL 4610104 (Tex. App.—San Antonio July 19, 2023, no pet.).

After the trial court removed the independent executor from office, the executor appealed, asserting that the court lacked the power to remove because the party seeking the removal did not prove a statutory ground for removal under Estates Code § 404.0035. The appellate court reviewed the evidence and determined that the trial court abused its discretion because the executor was not incapable of properly performing fiduciary duties due to a material conflict of interest. The court examined facts which it admitted showed "family dysfunction," but they were insufficient to justify removal. For example, much of the alleged bad conduct occurred prior to the executor being appointed and involved non-probate assets. Although some conflict of interest could exist because the decedent and the executor had a shared interest in property, it was insufficient to show a material conflict of interest that would prevent the executor from performing her duties properly.

Moral: Despite questionable behavior and potential conflicts of interest, courts are reluctant to remove an independent executor.

G. Applicability of Uniform Partition of Heirs Property Act

1. Sale of Estate Property

Estate of Webb, No. 05-22-00673-CV, 2023 WL 7144639 (Tex. App.—Dallas Oct. 31, 2023, no pet. h.).

In a dependent administration, the trial court ordered that the intestate's real property be sold to pay the expenses of the estate. The court rejected the heir's claim that the sale needed to be conducted under Property Code Chapter 23A, the Texas version of the Uniform Partition of Heirs'

Property Act. Subsequently, the court approved a sale of the property and the heir appealed.

The Dallas Court of Appeals affirmed because there was no live pleading requesting relief under Chapter 23A.

Moral: Assertions that compliance with the Uniform Partition of Heirs' Property Act is needed should be kept "alive" to avoid having relief under the Act denied.

Note: The court reported that neither side located authority to answer the question of whether Chapter 23A applies when the sale is done during the course of an estate administration.

2. Partition of Estate Property

Estate of Phillips, No. 06-23-00017-CV, 2024 WL 484779 (Tex. App.—Texarkana Feb. 8, 2024, no pet. h.).

The court did not address the issue of whether the Uniform Partition of Heirs Property Act, Property Code Chapter 23A, applies to a partition under Estates Code § 360.001. The majority held that under the procedural facts of this case, the partition claims were abandoned. The dissent, however, argued that it is important for Texas courts to decide "whether Chapter 23A applies to the administration of an estate by an executor." *Id.* at *11.

Moral: The interface between Chapter 23A and the Estates Code with regard to partitions remains uncertain.

H. Breach of Fiduciary Duty

In re Maun, No. 13-22-00576-CV, 2024 WL 49542 (Tex. App.—Corpus Christi-Edinburg Jan. 4, 2024, no pet. h.).

Over 30 years after being appointed as the independent executor of her father's estate, the independent executor died. As her brother was cleaning out her home, he discovered evidence showing that his sister failed to distribute over $200,000 to which he was entitled. He then filed suit against his sister's estate for breach of fiduciary duty. The independent executrix of the sister's estate asserted that the four-year statute of limitations had run, and that he had sufficient notice to prevent the application of the discovery and fraudulent concealment rules. Both the trial and appellate court agreed.

The court explained that the discovery rule normally does not apply to probate proceedings because the claimant has constructive notice. However, constructive notice may not negate the discovery rule if the conduct to be discovered would not be revealed by an inspection of the proceedings such as where an executor omits property from the inventory that is unknown to the claimant. In this case, however, the court detailed the conclusive evidence that the brother knew or otherwise should have known of his sister's misconduct in the distant past.

Moral: A beneficiary should take prompt action against a personal representative if "red flags" indicating misconduct exist.

I. Attorney's Fees

In re Rodgers, No. 13-22-00202-CV, 2023 WL 5282940 (Tex. App.—Corpus Christi-Edinburg Aug. 17, 2023, no. pet. h.).

The trial court awarded attorney's fees to the proponent of a will which was subject to an unsuccessful will contest action. The decedent's alleged biological daughter who was not a beneficiary of the will appealed the attorney's fee award. The appellate court dismissed the appeal for lack of jurisdiction because the alleged biological daughter had no standing. She was not a beneficiary of the will and thus is not an interested person who has standing. She did not have a "property right in or claim against" the estate as required by Estates Code § 22.018. She also could not qualify as an "heir" even if paternity could be established because the testator died testate.

Moral: A person without standing may not contest an award of attorney's fees.

V. TRUSTS

A. Jurisdiction

Harlow v. Harlow, No. 05-22-00585-CV, 2023 WL 3220919 (Tex. App. Dallas May 3, 2023, no pet. h.).

The Dallas Court of Appeals held that a county court at law lacked jurisdiction over a trust because it was not a matter related to a probate proceeding. The inter vivos trust was not created by a decedent whose will was admitted to probate as required by Estates Code § 31.002(b)(3) because the decedent died intestate.

Moral: It is essential to litigate trust issues in a court with subject matter jurisdiction because subject matter jurisdiction can neither be presumed nor waived.

B. Venue

Parker v. Filip, No. 14-23-00372-CV, 2023 WL 5627052 (Tex. App.—Houston [14th Dist.] Aug. 31, 2023, no pet. h.).

In a dispute over the proper venue for a trusts case, the court held that "section 15.016 of the Civil Practice and Remedies Code requires that the mandatory venue provisions in section 115.002 of the Property Code prevail over section 15.011 of Civil Practice and Remedies Code." *Id.* at *2.

Moral: The venue provisions of the Trust Code prevail over the general venue provisions of the Civil Practice and Remedies Code.

C. "Interested Person"

Herbig v. Welch, No. 01-22-00080-CV, 2023 WL 4188074 (Tex. App.—Houston [1st Dist.] June 27, 2023, no pet. h.).

Property Code § 115.001 authorizes the court to intervene in the administration of a trust if the court's jurisdiction is invoked by an interested person. On appeal, the trustee asserted that the plaintiff is not an interested person. The court held that because the trustee did not raise this issue of statutory interpretation at the trial level, the issue is waived on appeal. The determination of whether a plaintiff is an interested person is not "a jurisdictional question of constitutional standing that can be raised at any time, including for the first time on appeal." *Id.* at *13.

Moral: A trustee who claims a plaintiff is not an interested person statutorily authorized to enforce a trust should raise the issue at the trial level.

D. Oral Trust

Ahlgren v. Ahlgren, No. 13-22-00029-CV, 2022 WL 1260190 (Tex. App.—Corpus Christi-Edinburg, Apr. 25, 2022, no pet.).

Both the trial and appellate courts determined that the actions of the parties created an enforceable trust despite the lack of a writing by using the oral trust exception in Property Code § 112.004. The settlor transferred personal property to a trustee who was neither the settlor nor a beneficiary. The evidence showed that the settlor expressed trust intent simultaneously with or prior to the transfer, that is, that the property would be held for the settlor's benefit. The actual dealings between the parties were somewhat convoluted and not clearly documented. Nonetheless, the appellate court determined that reasonable and fair-minded people could conclude that the settlor had proper trust intent.

The court also explained that certain real property could also be subject to the oral trust because the trustee used trust personal property to acquire the real property. "If the settlor funds the oral trust with personal property, the trustee cannot render the entire trust unenforceable by later converting the trust assets to real property." *Id.* at *19.

Moral: Under proper circumstances, the courts will enforce an oral trust and hold the trustee liable for breach of fiduciary duties.

E. Texas Citizens Participation Act

McCoy v. McCoy, No. 08-23-00119-CV, 2023 WL 5508828 (Tex. App.—El Paso Aug. 25, 2023, no pet. h.).

The trust beneficiaries provided written notice to the trustee that they opposed the trustee's assertion of a cause of action against a party who is not a beneficiary of the trust (the co-trustee who is the beneficiaries' mother and the trustee's ex-wife). Under Trust Code § 113.028, the trustee is then prohibited from prosecuting or asserting the claim. Nonetheless, the trustee continued to do so causing the beneficiaries to sue the trustee for damages including court costs and legal fees for continuing with the claim. The trustee then moved to dismiss this suit based on

the Texas Citizens Participation Act and the trustee's right to petition. Because the probate court did not timely rule on the trustee's motion, it was overruled by operation of law and the trustee appealed.

The El Paso Court of Appeals held that "the TCPA does not apply to claims brought by trust beneficiaries for violations of section 113.028 of the Texas Trust Code." *Id.* at*2. The court explained that the statute itself provides specific limitations on the trustee's petitioning rights. The Trust Code and the TCPA must be read together, and the court presumed that the TCPA was not designed to "undermine or override" the Trust Code. *Id.* at *8. Accordingly, the trustee's motion to dismiss was denied and the beneficiaries' suit was allowed to continue.

Moral: The TCPA does not apply to Trust Code § 113.028 claims. For another TCPA case, see *Estate of Cooper*, No. 02-23-00104-CV, 2024 WL 1100780 (Tex. App.—Fort Worth Mar. 14, 2024, no pet. h.).

F. Interpretation

Gutierrez v. Gutierrez, 662 S.W.3d 573 (Tex. App.—El Paso 2022, no pet.).

Mother devised her property equally to her four sons with two receiving their shares outright and two receiving their shares in trust. The trustees of the trusts were the sons who received their shares outright. All four sons executed a partition deed regarding the disposition of this property. The key issue in this case is whether after the partition deed one of the sons whose property was held in trust then owned a fee simple interest in the property or only a life estate interest with the remainder being controlled by the terms of the trust. Subsequently, this son executed a will leaving all his property to his wife as well as a warranty deed conveying the interest he received from the partition deed to his wife. After this son died, competing claims were made to the property by the surviving spouse and the remainder beneficiaries of the trust. Both the trial and El Paso Court of Appeals held that the surviving spouse was the owner of the property.

The appellate court focused on a provision of the son's trust that provided that the trustees could terminate the trust at any time by "paying over and delivering to such beneficiary all of such beneficiary's part of the trust estate." *Id.* at 584. Therefore, the issue is whether the partition deed acted to terminate the son's interest in the trust and give him the property outright. The trustees signed the deed in both their individual and trustee capacities. Thus, the trust terminated and the son owned the property in fee simple. Although the remainder beneficiaries alleged that the son's deed to his wife was forged, the issue was irrelevant because the son also had a valid will leaving all his property to his wife.

Moral: Remainder trust beneficiaries may lose their interests if the trust is properly terminated prior to the event which would cause their interests to vest.

G. Modification

Matter of Troy S. Poe Tr., 673 S.W.3d 395 (Tex. App.—El Paso 2023, pet. filed).

The Texas Supreme Court in *Matter of Troy S. Poe Tr.*, 646 S.W.3d 771 (Tex. 2022) held that Property Code § 112.054 did not create a statutory right to a jury trial for a trust modification proceeding. The court remanded to the El Paso court to determine whether the Texas Constitution provides a jury trial guarantee. The court held that neither the Bills of Rights nor the Judiciary Article provides a jury trial right in this situation.

The court explained that the Texas Constitution provides for jury trials in two situations. First, the Bill of Rights in Article I, § 15 states that the "right of trial by jury shall remain inviolate." The Texas Supreme Court clarified that this right only exists if a jury trial would have been allowed under the law as it existed in 1876. At that time, jury trial rights did not exist in equitable actions such as those involving trust deviation. Thus, no right to a jury trial exists under the Bill of Rights.

Second, the Judiciary Article, Article V, § 10, provides jury trial rights to all "causes" in both law and equity regardless of whether a jury trial was available in 1876. Thus, the key issue is whether a trust modification action qualifies as a "cause." The court conducted an extensive review of Texas court opinions explaining what

constitutes a "cause." The court rejected the argument that a "cause" includes any case with a factual dispute. Instead, the court adopted the view that a "cause" is an action where a plaintiff seeks a personal judgment against a defendant which, if successful, yields a remedy or judgment against the defendant for some wrong the defendant committed. A trust modification action does not result in an enforceable judgment against a defendant. Instead, it merely modifies the terms of the trust. Accordingly, it is not a "cause" for which a jury trial is available.

The court then reviewed the trial court's judgment and determined that it did not abuse its discretion when it modified the terms of the trust and that it was permissible for the court to consider extrinsic evidence when deciding which modifications to make.

Moral: A person seeking a trust modification is not entitled to a jury trial.

H. Termination

Herbig v. Welch, No. 01-22-00080-CV, 2023 WL 4188074 (Tex. App.—Houston [1st Dist.] June 27, 2023, no pet. h.).

After a trust terminated by its express terms, the trustee accepted additional property into the trust. The appellate court held that the trustee lacked authority to do so. Once a trust terminates, the trustee's powers are restricted to those necessary to wind up the trust and distribute property to the remainder beneficiaries under Property Code § 112.052. Accordingly, the conveyances of property to the trust, which the trustee accepted, are void because the trust did not exist when the conveyances were made.

Moral: Once a trust terminates, the trustee may no longer accept new property into the trust.

I. Attorney Fees

Moody v. Herz, Trustee of Three R Trusts, 672 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2023, no pet.).

Appellees, the trustee and beneficiaries aligned with the trustee, sought attorney fees incurred during trust litigation. The appellate court held that an award of attorney fees would not be proper under Rule 91a because the appellees were not prevailing parties. However, they could still recover attorney fees under Property Code § 114.064 which allows the court to "make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just" in actions brought under the Trust Code. The court rejected the argument that the lawsuit was not brought under the Trust Code merely because it sought a declaratory judgment under the Uniform Declaratory Judgments Act (UDJA) found in the Civil Practice and Remedies Code. The court explained that the UDJA is procedural device and does not by itself create any cause of action. Thus, appellees are entitled to attorney fees for the trust litigation itself but not for fees incurred in attempting to recover fees under Rule 91a.

Moral: The court may award attorney's fees in trust actions even if the lawsuit involved a declaratory judgment under the UDJA.

VI. OTHER ESTATE PLANNING ISSUES

A. Agent Removal

In re Delp, No. 02-22-00300-CV, 2023 WL 3643668 (Tex. App.—Fort Worth May 25, 2023, no pet. h.).

The trial court removed the daughter who was serving as her mother's agent under both financial and healthcare powers of attorney. The Fort Worth Court of Appeals affirmed the removal holding that the trial court had sufficient evidence to support her removal for breach of fiduciary duty. The justifications for the removal included financial exploitation, living in mother's home rent free and without paying any upkeep and maintenance expenses, and neglecting her mother's health and wellbeing. The court also explained that only one ground was necessary to support removal. The daughter's failure to challenge the trial court's finding that she lived in the home without paying rent or expenses was in itself sufficient to justify removal.

Moral: An agent should act solely for the principal's benefit. Failure to do so is justification for removal.

B. Conveyance of Property Subject to Survivorship

Fogal v. Fogal, 671 S.W.3d 753 (Tex. App.—Beaumont 2023, no pet.).

A and B owned property "as joint owners with rights of survivorship." A conveyed A's interest to C reserving a life estate for herself and also stating that upon her death, title would vest in C. After A died, a dispute arose between B who claimed the property under the survivorship right and C who claimed that he owned one-half of the property under A's deed. Both the trial and Beaumont Court of Appeals held that C was the rightful owner of one-half of the property.

The court explained that when A conveyed her interest in the property, the joint tenancy with rights of survivorship was broken and that B and C hold as tenants in common. The court followed the English common law rule that "the sale of one joint tenant's interest in a property held by joint tenants cuts off the survivorship rights that the surviving joint tenant would have otherwise enjoyed had the property not been sold." *Id.* at 758. There is no longer the unity of title required for a joint tenancy.

Moral: A co-tenant's conveyance of property subject to a right of survivorship destroys the survivorship feature.

C. Lady Bird Deeds

Wright v. Jones, 674 S.W.3d 704 (Tex. App.—Waco 2023, no pet. h.).

Husband and Wife executed a Lady Bird deed reserving a life estate and the power to revoke. Husband died. Later, Wife executed a valid durable power of attorney, and her agent revoked the deed in two documents, one they both signed and one signed by only Wife's agent. When Grantee of the deed refused to leave the premises, they filed a trespass cause of action against Grantee. The trial court decided that Wife owned the entire premises to the exclusion of the grantee.

The appellate court studied the deed and determined that each spouse reserved a life estate in his or her community one-half of the property subject to the deed. Thus, when Husband died, his life estate ended and his interest in one-half of the property immediately vested in Grantee. The deed could have provided that Husband's interest would pass to Wife upon his death, but it did not. Instead, Husband's one-half interest belonged to Grantee and Wife's revocation of the deed only impacted her one-half interest. Accordingly, Wife and Grantee now own the property as tenants in common and Grantee did not trespass because each cotenant has the right to possess the property.

Moral: The share owned by a co-grantor of a Lady Bird deed passes to the grantee upon the co-grantor's death and is not subject to revocation by a surviving co-grantor unless the deed expressly provides otherwise.

D. Survival

In re Phillips, No. 09-21-00284-CV, 2023 WL 6156080 (Tex. App.—Beaumont Sept. 21, 2023, pet. denied).

The primary beneficiary survived the owner of a 401(k) plan, but by less than 120 hours. A dispute arose whether the plan proceeds pass through the primary beneficiary's estate or to the contingent beneficiary. The Beaumont Court of Appeals held that the normal 120-hour survival period imposed by Estates Code § 121.102 did not apply because the retirement plan expressly required only that a beneficiary survive with no mention of a time period. See Estates Code § 121.001 (Chapter 121 does not apply if a contract provides otherwise). Accordingly, the proceeds pass through the primary beneficiary's estate.

Moral: The default 120-hour survival period does not apply if the governing document provides otherwise.