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

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 (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2022); 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 seminar held on February 25, 2022. 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 February 19, 2023 (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

Gill v. Vordokas, 656 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.).

During an heirship proceeding, the witnesses testified that they believed Intestate died unmarried with four children. However, the attorney ad litem for the unknown heirs did not question the witnesses about the possibility that Intestate had a common law wife. Thirty days after the judgment determining that the four children were Intestate's sole heirs, the alleged common law wife (ACLW) filed a motion for a new trial saying she did not receive timely notice of the heirship proceeding and that she had been Intestate's common law wife for over two decades. The motion was not set for a hearing and thus was deemed overruled by operation of law. ACLW did not appeal but instead filed a petition for a statutory bill of review seventeen months thereafter. The trial court granted a summary judgment that ACLW's claims were barred by res judicata. ACLW appealed.

The appellate court reversed and remanded. The court explained that res judicata is not normally a defense to a bill of review because a bill of review's purpose is to change a prior judgment. The court explained that ACLW's filing of a bill of review under Estates Code § 55.251 was timely (within two years) and alleged "error." The elements needed for an equitable bill of review are irrelevant such as the proper exercise of diligence.

Moral: An heirship judgment is subject to modification via a timely statutory bill of review if error is shown.

III. WILLS

A. Execution Formalities

Jones v. Jones, 649 S.W.3d 577 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

About six months after his first wife died, the testator married his second wife. On the same day as the wedding, he executed a will leaving his estate to his second wife but if she predeceased, to his three children with his first wife. The testator initialed and dated each of the first six pages of his seven page typewritten will. The seventh page contained only locations for the testator's signature and for the witnesses to attest; no substantive or administrative provisions. Although four witnesses attested on the page seven, the testator neglected to sign this page. The testator also did not sign the self-proving affidavit.

Twenty-two years later, the testator died. His second wife offered the will for probate and one of the testator's children contested the will

claiming it was invalid because it was not executed with the formalities required by Texas law. Testimony of two of the witnesses clearly reflected the will ceremony and the testator's initialing of the first six pages of the will. Nonetheless, the trial court denied probate because the testator did not initial page seven's attestation clause and did not sign the self-proving affidavit. The second wife appealed.

The First District Houston Court of Appeals reversed. The court explained that long-established Texas law recognizes that initials may constitute a signature and that the location of the signature is not specified by statute. Thus, the testator properly signed his will. The court rejected the child's claim that the document was incomplete and lacked testamentary intent because the testator drafted it and knew that he did not sign the last page and the self-proving affidavit. [In my opinion, the failure to sign the last page and self-proving affidavit was because of the excitement of the wedding being the same day and the couple's honeymoon starting the next day.]

The court also rejected the child's claim that the will was not properly witnessed because the witnesses testified they saw the testator sign the will rather than initial the will. The court reviewed the testimony of the witnesses which showed that they signed their names in the testator's presence. There is no requirement under Texas law that the witnesses actually see the testator sign the will. The witnesses don't even need to know that the document they are witnessing is a will. And, initialing is a method of signing.

Moral: A will execution ceremony should be meticulously conducted to prevent claims that something went amiss with the required formalities.

B. Interpretation and Construction

Prather v. Callon Petroleum Operating Co., Inc., 648 S.W.3d 618 (Tex. App.—Eastland 2022, no pet. h.).

The testatrix devised property to her two children but if a child predeceased the testatrix, the property would pass "to the survivor(s) thereof." One child predeceased the testator. The litigants advanced two interpretations of this language. First, that the surviving child was the sole beneficiary of the devised property being the survivor of the two beneficiaries. Second, that the successors in interest to the predeceased child's estate owned the share that would have passed to the predeceased child because they were the survivors (children) of the deceased beneficiary.

Both the trial and appellate courts agreed the surviving child was the sole beneficiary of the property because the surviving child was the survivor of the two named beneficiaries. The appellate court began its analysis by holding the will was unambiguous and thus is construed as a matter of law. Then, the court determined that the phrase "to the survivor(s) thereof" constitutes words of survivorship and does not mean heirs of a predeceased beneficiary. "Common sense dictates that a 'survivor' is one who remains alive or survives an event; we cannot conceive of a contrary interpretation." *Id.* at *6.

Moral: The phrase "survivor(s) thereof" will typically refer to people in a designated group who outlive the testator and not the heirs of a deceased group member.

C. Will Contests

Mittelsted v. Meriwether, No. 14-21-00755-CV, 2023 WL 2026761 (Tex. App.—Houston [14th Dist.] Feb. 16, 2023, no pet. h.).

Testator left his estate to Half-Brother as well as naming him as the beneficiary of six financial accounts. After Testator died, Testator's Sisters contest the validity of the will on the grounds that the Testator lacked testamentary and contractual capacity. The jury agreed with Sisters and thereafter Half-Brother appealed.

The appellate court affirmed holding that the trial court did not abuse its discretion in admitting the testimony of certain witnesses about Testator's lack of capacity and that the evidence of these and other witnesses was sufficient to support the jury findings of lack of capacity. The court's lengthy opinion details the testimony of approximately twenty witnesses who testified about Testator's capacity.

Moral: A jury's finding of lack of capacity will be difficult to overturn on appeal.

IV. ESTATE ADMINISTRATION

A. Validity of Marriage

Allebach v. Gollub, No. 14-22-00272-CV, 2023 WL 2169956 (Tex. App.—Houston [14th Dist.] Feb. 23, 2023, no pet. h.).

After the decedent's death, one of testator's daughters from a prior relationship discovered that her dad had secretly married his niece. The daughter successfully obtained a judgment from the trial court declaring the marriage void on the basis of consanguinity under Family Code § 6.201(4).

The alleged wife appealed claiming that the statute of limitations had run because Estates Code § 123.101(a) states that a post-death action to set aside a marriage is permissible only if the marriage occurred within three years before the decedent's death. In this case, the decedent married his niece more than four years prior to his death. The Houston Court of Appeals for the Fourteenth District examined the Estates Code provisions regarding setting aside a marriage after death and held that they apply only to invalidate a marriage on the grounds of mental incapacity. The limitations in the Estate Code have no application to an action to determine a marriage void on consanguinity grounds. Suits to declare a marriage void may be brought "by anyone, at any time, directly or collaterally." Id. at *3-4, quoting *Simpson v. Neely*, 221 S.W.2d 303, 308 (Tex. App.—Waco 1949, writ ref'd).

Moral: After a decedent dies, an action to set aside the decedent's marriage as void is not subject to the Estates Code limitations which only apply to setting aside a marriage because the decedent lacked mental capacity to enter into the marriage.

B. Standing

Allebach v. Gollub, No. 14-22-00272-CV, 2023 WL 2169956 (Tex. App.—Houston [14th Dist.] Feb. 23, 2023, no pet. h.).

The testator's daughter claimed that she had standing in a probate action even though she was not a named beneficiary in her dad's will. Both the trial and appellate courts agreed that she had standing because if all named beneficiaries died prior to full distribution of the estate, the will provided the estate would pass to the testator's heirs which would include his daughter. Because complete distribution of the estate had not yet occurred, the daughter had standing.

Moral: Even remote contingent beneficiaries have standing in probate actions if the possibility of them being entitled to estate property still exists.

C. Jurisdiction

1. Non-Probate Assets

Matter of Estate of Rushing, 644 S.W.3d 383 (Tex. App.—Tyler 2022, pet. denied).

Insured died without removing his Ex-wife as the beneficiary of a life insurance policy governed by the Servicemembers Group Life Insurance Act. However, Ex-wife disclaimed her interest in the policy in their divorce decree. After Insured died, the insurance company made a partial disbursement to Ex-wife. Administrator of Insured's estate asserted a claim in the county court for a constructive trust over the insurance proceeds. The court determined it had jurisdiction over Administrator's claim and imposed the constructive trust. Ex-wife appealed claiming the county court lacked subject matter jurisdiction.

The appellate court reversed. The court held that (1) Administrator's motion was neither a probate proceeding nor related to a probate proceeding, (2) the county court could not exercise pendant or ancillary jurisdiction over the claim, and (3) the county court lacked jurisdiction to enforce Ex-wife's waiver in the divorce decree. The court explained that the life insurance policy is a nonprobate asset and passes according to its contractual terms and not through the probate process. Administrator's claim may have lacked a sufficient close relationship to the probate of Insured's estate. However, the court did not have to reach that issue because the proceed value of

the policy exceeded the amount-in-controversy limits applicable to pendent and ancillary claims.

Moral: A litigant must be certain the court has subject matter jurisdiction over the claim. Disputes over non-probate assets are unlikely to within the purview of a probate case.

2. Appellate

In re Crapps, No. 04-21-00300-CV, 2023 WL 378673 (Tex. App.—San Antonio Jan. 25, 2023, no pet. h.).

The appellate court dismissed an appeal of a trial court's admission of a will to probate because the contestant's "claims may logically be considered part of the phase to admit the will, and trial court has not disposed of all the [contestant's] issues." *Id.* at 1. In addition, there is no statute authorizing an interlocutory appeal of this type of case.

Moral: Until the trial court disposes of all of a will contestant's issues, the trial court's order admitting a will to probate is not appealable.

D. Venue

In re Estate of Foust, 659 S.W.3d 487 (Tex. App.—Texarkana 2022, no pet. h.).

The decedent's son filed his father's will for probate in Hopkins County where he claimed his dad was domiciled and where he died. Estates Code § 33.001(1) would provide that this county has proper venue. However, the decedent's wife claimed that venue was in Dallas County because the decedent did not have a fixed place of residence in Hopkins County. Instead, he was in an assisted living center and the majority of his property was in Dallas County. Thus, the trial court concluded that under Estates Code § 33.001(2), venue was proper in both Hopkins and Dallas counties. The trial court then transferred the case rejecting the son's claim that venue should remain in Hopkins County because he filed first. The court also explained that under Estates Code § 33.103(a), transfer is permitted if it is in the best interest of the estate.

The son sought a writ of mandamus which the Texarkana Court of Appeals declined to grant. The son claimed that the trial court abused its discretion in transferring the case for a variety of reasons. The appellate court determined that this was not a proper case for mandamus relief. Mandamus relief is available only if there is a "clear abuse of discretion when there is no adequate remedy by appeal." *Id.* at 489, quoting *In re Christus Santa Rosa Health Sys.,* 492 S.W.3d 276,279 (Tex. 2016). The court held that no extraordinary circumstances existed "which might render an ordinary appeal an inadequate remedy." *Id.* at 491

Moral: As the court stated when it quoted *In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex. 1999), "'[m]andamus is an extraordinary remedy available only when there is an abuse of discretion and no adequate appellate remedy,' 'venue determinations as a rule are not reviewable by mandamus.'"

E. Transfer of Case

Aguilar v. Morales, 658 S.W.3d 702 (Tex. App.—El Paso 2022, pet. denied).

After their parents died, their children engaged in protracted litigation involving a variety of issues in courts in both Bexar and El Paso counties. Eventually, the Bexar County probate court issued a transfer order so the El Paso action would be consolidated and heard in Bexar County. Some of the parties challenged this order claiming that the lawsuit pending in El Paso County was unrelated to the Bexar County proceedings. The El Paso Court of Appeals determined that it lacked "any appellate or original jurisdiction to determine the legality of an order entered by a Bexar County court." Id. at 711. Likewise, the El Paso court lacked authority to rule on the issue of "whether a Bexar County judge was disqualified from hearing a matter in his or her court." Id. at 713.

Moral: Appellate courts lack jurisdiction over actions taken by courts in other appellate court districts.

F. Administrator Appointment

In re Tovar, No. 08-22-00028-CV, 2023 WL 2373496 (Tex. App.—El Paso Mar. 6, 2023, no pet. h.).

After the intestate died, the court appointed his mother as the administrator. The intestate's "baby momma" claimed she had priority. The El Paso Court of Appeals affirmed because an intestate's parent has priority over an unrelated partner who is the other parent of an intestate's child under Estates Code § 304.001. The court rejected the claim that because she was the next of kin of the minor child who is the intestate's sole heir, she had priority over the intestate's mother. The statute gives priority to the "decedent's next of kin and not the next of kin of the decedent's next of kin." *Id*. at *5.

Moral: A non-marital partner lacks priority over an intestate's next of kin to be appointed as the administrator of an intestate's estate.

G. Late Probate

1. Applicant in Default

Marshall v. Estate of Freeman, No. 03-20-00449-CV, 2022 WL 1273305 (Tex. App.—Austin Apr. 29, 2022, no pet. h.).

The trial court admitted the testator's will to probate as a muniment of title forty-one years after his death after finding that the applicant as not in default as Estates Code § 256.003 requires if the applicant files the application more than four years after the testator's death.

The appellate court reversed holding that no evidence supported the trial court's conclusion that the applicant was not in default. Evidence showed that the applicant discovered the existence of the testator's will more than four years before filing the application to probate the will. Evidence also showed that an attorney told the applicant that the will needed to be probate over one year before the filing of the application. The court recognized that Texas courts are lenient in excusing the applicant's delay in probating a will. However, in this case, the applicant knew he should probate the will but his excessive delay in filing the application meant that he actually was in default. The court also noted that the applicant waited seven months after an heir filed a determination of heirship action.

Moral: Although Texas courts are lenient in finding that an applicant to probate a will was not in default it failing to file the will within four years after the testator's death, the applicant still must act timely after discovering the will and learning that probate is necessary.

2. Applicant in Default – Another Case

Matter of Estate of Masters, No. 08-20-00156-CV, 2022 WL 2827022 (Tex. App.—El Paso July 20, 2022, no pet. h.).

The applicant attempted to probate the testator's will as a muniment of title six years after the testator's death. The heirs filed a small estate affidavit and argued that the applicant was in default under Estates Code § 256.003 and thus the application should be denied. The trial court agreed and the applicant appealed.

The appellate court affirmed holding that the applicant was in default in probating the will more than four years after the testator's death. The court explained that the applicant had possession of the will within days of the testator's death but took no action to probate the will until six years later. In addition, an attorney advised the applicant that probate was needed several months before the applicant filed the will. The court conducted an extensive analysis of Texas not-in-default cases and concluded that the trial court's implied finding of default was "not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust." *Id*. at *7.

Moral: An applicant who presents a will for probate after the testator has been dead for more than four years, should present a strong case of not being in default to the trial court because it will be difficult to have a finding of default set aside on appeal.

H. Family Allowance

In re Estate of Wetzel, No. 05-20-01104-CV, 2022 WL 1183294 (Tex. App.—Dallas Apr. 21, 2022, no pet. h.).

Surviving Spouse requested a family allowance for $166,728 asserting that she needed that sum for her maintenance for one year after her husband's death and that she did not have sufficient separate property of her own. The trustee of a trust which was the beneficiary of the husband's estate objected asserting the Surviving Spouse has sufficient separate property and thus did not need a family allowance. The trial court agreed and denied the request. Surviving Spouse appealed.

The appellate court first rejected Surviving Spouse's claim that the trial court lacked subject matter jurisdiction because the administration was independent citing Estates Code § 402.001. The court explained that "although section 402.002 limits the probate court's supervision of the independent administration, it does not deprive the probate court of jurisdiction over matters relating to the estate." *Id.* at *4.

The court then affirmed the trial court holding that it did not abuse its discretion in denying Surviving Spouse's family allowance claim. Estates Code § 353.101 prohibits a family allowance for a surviving spouse if the spouse has adequate separate property. The trial court considered Surviving Spouse's separate property interest in the homestead. The court recognized that she had rights to the homestead but she had already sold the homestead thus the prohibition on partition was inapplicable. In addition, Surviving Spouse did not apply for a family allowance until after her spouse was deceased for over one year. Thus, the allowance was not needed for her support during the one year after the deceased spouse's death.

Moral: A surviving spouse seeking a family allowance should make the claim before one year has elapsed to strengthen the argument that the allowance is actually needed for maintenance and is not just an attempt to secure a greater share of the deceased spouse's estate.

I. Claims of Estate

Henry v. Brooks, 651 S.W.3d 657 (Tex. App.—Tyler 2022, no pet. h.).

Surviving Spouse and Step-Daughter owned the spouse's homestead in equal undivided shares upon Deceased Spouse's death. Surviving Spouse exercised his right to continued to occupy the homestead. At the time of Deceased Spouse's death, the homestead was subject to a loan. Surviving Spouse quickly remarried and died five years later leaving his estate to New Spouse. Thus, New Spouse and Step-Daughter owned the property in equal undivided shares. New Spouse continued to live in the home. Step-Daughter then brought a partition action seeking to sell the property to the highest bidder. New Spouse, both individually and as executor of Surviving Spouse's estate, counterclaimed seeking reimbursement for funds Surviving Spouse and New Spouse had spent on the property which benefited Step-Daughter. The trial court denied the claim and New Spouse appealed.

The Tyler Court of Appeals began its discussion by explaining the general rights of life tenants and of tenants in common. The court then applied those principles to the various expenses for which New Spouse sought reimbursement. With regard to the principal portion of loan payments Surviving Spouse paid, New Spouse was entitled to be reimbursed for one-half of that amount, that is, the amount by which Step-Daughter was unjustly enriched. Step-Daughter was unsuccessful in claiming that the right to reimbursement did not survive Surviving Spouse's death. The court held that a reimbursement claim is a vested right which survives the death of the life tenant. However, the court held that New Spouse was not entitled to reimbursement for the payments she made after Surviving Spouse died because she continued to live in the property without interference from the co-tenant Step-Daughter and thus received a quid pro quo for the payments. [The court also looked at a reimbursement claim for an access easement and found the trial court was within its discretion to deny the claim based on the facts and surrounding circumstances.]

Moral: If a life tenant pays expenses that a co-tenant or owner of a remainder interest should

pay such as the principal of a loan, the reimbursement right survives to the life tenant's estate.

J. Claims Against Estate

Estate of Banta, No. 02-21-00327-CV, 2022 WL 2526940 (Tex. App.—Fort Worth July 7, 2022, pet. denied).

Temporary Administrator applied to sell a parcel of Decedent's real property. Occupants of the property claimed that they had entered into an oral contract with Decedent to purchase the property. Occupants claimed that the contract was enforceable, even though oral, because of the part performance exception – they made a sizeable down payment, made regular monthly payments, paid property taxes, carried insurance, and made repairs and improvements to the property. At trial, Occupants provided no proof of their part performance assertions. Accordingly, the trial court rejected their claim and granted Temporary Administrator's application to sell the property. Occupants appealed.

The appellate court affirmed. The court explained that for a contract for the sale of real property to be exempted from the statute of frauds, the purchaser must pay consideration, take possession, and make valuable and permanent improvements with the seller's consent, or even without improvements, the facts show it would be a fraud on the purchaser if the contract were not enforced. The court explained there was no proof in the record to substantiate Occupants' claims of making payments and improvements. Mere affidavits attached to pleadings and not admitted into evidence and arguments made by their attorney at the trial were insufficient.

Moral: Courts are reluctant to exempt parties to a real estate transaction from compliance with the statute of frauds. Thus, a party desiring to use the part performance exception must have definitive evidence admitted at the hearing of all the elements needed to qualify for the exception.

Reimbursement of Community Funds Used on

K. Successor Independent Executor

Estate of Allen, 658 S.W.3d 772 (Tex. App.—El Paso 2022, no pet. h.).

The named primary and first alternate independent executors of the testator's will were unable to serve because they both predeceased the testator. Accordingly, the trial court appointed the second alternate as the independent executor. Later, this executor along with the only beneficiary of the will asked the court to permit the executor to resign and appoint the beneficiary (the testator's son) as the successor independent administrator. They also asked the court to allow the resignation without requiring a final accounting and without notice and a hearing because of a claimed necessity under Estates Code § 361.002, that is, his advanced aged and inability to perform adequately his duties. The trial judge signed an order authorizing the resignation and appointment.

The testator's surviving wife appeals claiming that she was entitled to notice, a hearing, and that a successor could not be appointed without her consent. The El Paso Court of Appeals agreed because the requirements of Estates Code § 404.005(a) were not followed. The trial court incorrectly followed Estates Code § 361.002 which is designed for dependent administrations. Section 404.005 requires all distributees to agree to the appointment of a independent personal representative not named in the testator's will.

The court then decided that the surviving wife who was not a named beneficiary of the will was nonetheless a distributee whose consent was needed. See Estates Code § 22.010. The court rejected the sole beneficiary's claim that the surviving spouse was not a distributee because she was neither an heir nor a beneficiary. Instead, the court held that because the surviving wife had a homestead interest in the family home, she qualified as a distributee. The court justified its decision by holding that a homestead interest is a life estate created by law which under Estates Code § 404.005(d) makes her a distributee. The court recognized that a homestead right is not a true life estate. However, the court said it was close enough to a life estate given that courts often state that the right to occupy the homestead "is in the nature of a life estate created by law."

Id. at 782, quoting *Thompson v Thompson*, 236 S.W.2d 779, 786 (Tex. 1951). Thus, the court reversed the appointment of the sole beneficiary as the successor independent representative because the surviving spouse did not consent.

Moral: The homestead right of a surviving spouse is sufficient to make the spouse come within the definition of "distributee" under Estates Code § 22.010.

Comment: The court ignored the fact that a homestead right is not a life estate. Instead, a homestead merely has some similar rights and liabilities to a life estate. For example, a homestead interest ends if the surviving spouse elects not to reside on the property. However, a life estate does not end merely because the holder of the life estate elects to cease residing on the property. A life estate owner *never* has to occupy the property for any reason. In this case, allowing a step-mother to interfere with the sole beneficiary of his father's estate is not, in my opinion, in accord with the law and is not good public policy.

V. TRUSTS

A. Standing

Berry v. Berry, 646 S.W.3d 516 (Tex. 2022).

A trust beneficiary sued the trustees for breach of duty, an accounting and to remove the trustees. Both the trial and lower appellate court agreed that she lacked the ability to bring her claims. The Supreme Court of Texas reversed.

The court explained that because she was not expressly designated by name but only by a class designation (issue of a named beneficiary), she was not automatically an interested person under Trust Code § 111.004(6) who could bring her claims under Trust Code § 115.011. Thus, a court must determine if the unnamed beneficiary is an interested person by using the Code's standard that the person's status as an interested person "may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding."

The court then examined the facts to determine that her interest in the trust was sufficient to support her claim that she is an interested person. For example, she has a present financial interest in the trust (the right to withdrawal a proportionate share of any trust contribution) which would be affected by the suit as well as a contingent interest in trust distributions which would occur when the named beneficiary (her father) dies.

Moral: A trust beneficiary designated only by a class designation does not automatically have standing to bring a claim against the trustee for misconduct. Instead, this beneficiary must bring forward evidence showing that the court should grant the beneficiary interested person status.

B. Breach of Fiduciary Duty

1. Statute of Limitations

Berry v. Berry, 646 S.W.3d 516 (Tex. 2022).

A highly complex serious of transactions and decades of litigation among family members lead to the Supreme Court of Texas engaging in a detailed discussion of limitations for breach of fiduciary duty. The court begin its analysis by stating that the statute of limitations for breach of fiduciary duty is four years which "accrues when the defendant's wrongful conduct causes the claimant to suffer a legal injury." However, the accrual time may be extended by the discovery rule, that is, "the statute of limitations does not begin to run until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the wrongful act." The court then explains that the discovery rule is "narrow exception" reserved for "exceptional" cases where the injury is "inherently undiscoverable."

The court then addressed whether constructive notice from recording in public records would preclude the operation of the discovery rule. The court "recognized that the constructive notice conveyed by deed records does not always bar application of the discovery rule." The court then confines the exception "to cases where the plaintiff had no 'reason to monitor' the deed

records because he had 'no reason' to 'believe' or 'suspect' that a legal injury had occurred.

In this case, the court determined that the facts demonstrate that he had actual notice of facts that would have altered him to the wrongful act if he had exercised reasonable diligence. Even though fiduciary duties were owed to the plaintiff, the plaintiff sill had the "responsibility to ascertain when an injury occurs." This was especially true in this case as the plaintiff was both a beneficiary and co-trustee of the trust and the suit was against the co-trustee who were his brothers.

Moral: A person seeking recovery for breach of fiduciary duty should take action promptly upon even an inkling of a fact giving rise to the claim.

2. Necessary Parties

Matter of Trust A and Trust C, 651 S.W.3d 588 (Tex. App.—El Paso 2022, pet. filed).

This complex case involved an alleged breach of duty by a trustee selling trust property (stock). The lower court issued a declaratory judgment voiding the transfer. Without reaching the merits, the El Paso Court of Appeals explained that it was setting aside the lower court's judgment because the transferees of the stock were not made parties to the action. The transferees could not be bound by a judgment adversely impacting their interest without being joined as parties as the Declaratory Judgment Act mandates. TEX. CIV. PRAC. & REM. CODE § 37.006.

Moral: When attempting to set aside an improper transfer of trust property, it is essential to join the transferees of that property.

C. Modification

Matter of Troy S. Poe Trust, 646 S.W.3d 771 (Tex. 2022).

The settlor expressly required the trustees to agree on all decisions. Unfortunately, the trustees were combatants in other litigation and were unable to agree on several trust matters. One trustee obtained an order from the probate court to make various modifications to the trust. The other trustee appealed.

The appellate court reversed in *Matter of Troy S. Poe Trust*, 591 S.W.3d 168 (Tex. App.—El Paso 2019). The El Paso court explained that the trial court improperly rejected the other trustee's request for a jury trial because the question of whether the trust needed to be modified was a fact question. Trust Code § 115.012 provides that normal civil procedure rules and statutes apply to trust actions. These rules and statutes, along with the Texas Constitution, guarantee the right to a jury trial. The trustee made a timely request for a jury trial (the court held the failure to pay the jury fee did not forfeit the right to claim error). The court rejected the claim that Trust Code § 112.054 precludes a jury trial on modification issues because it provides that the "court shall exercise its discretion" in determining the modifications. The court examined the statute and found no reasonable argument that jury trials were precluded on fact issues.

The Supreme Court of Texas reversed holding that § 112.054 "does not confer a right to a jury trial in a judicial trust modification proceeding." The court explained that the section discusses the court making the decision to modify in its discretion – no mention of a jury.

However, the court remanded the case for the appellate court to consider whether there may be a right under the Texas Constitution to a jury trial. The appellate court explained that a determination needs to be made whether "a Section 112.054 judicial trust-modification proceeding is not a 'cause' within the meaning of Article V, Section 10 of the Texas Constitution but, rather, a 'special proceeding' falling outside its purview." *Id.* at 772-73. The Texas Supreme Court refused to address the issue because it was not raised until the motion for rehearing in the court of appeals.

Moral: Jury trials appear to be unavailable to ascertain disputed facts in a trust modification action. However, because the Texas Supreme Court did not address the constitutional argument, it may be several years before the issue is conclusively resolved.

D. Settlement Agreement

Austin Trust Co. as Trustee of the Bob and Elizabeth Lanier Descendants Trusts v. Houren, No. 21-0355, 2023 WL 2618534 (Tex. Mar. 24, 2023).

Wife established a marital trust for Husband. Husband's will exercised a power of appointment Wife granted him in the trust to give all remaining assets to trusts in favor of their children. After Husband died, claims were made that Husband violated his fiduciary duties by distributing excessive funds ($37+ million) to himself. All parties signed a family settlement agreement resolving all issues. Nonetheless, the trustee of trusts to which Husband appointed the remainder of the trust property asserted that it was entitled to these funds. The trial court agreed with the executor of Husband's estate that the settlement agreement barred the trustee's claim. The trustee appealed.

The Supreme Court of Texas affirmed the Houston Fourteenth Court of Appeals affirmance in *Austin Trust Co. as Trustee of the Bob and Elizabeth Lanier Decendants[sic] Trusts v. Houren*, 647 S.W.3d 913 (Tex. App.—Houston [14th Dist.] 2021, no pet. h.).

The court recognized that trustees and executors owe "a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiaries' rights." *Id*. at *14 and Property Code § 114.005.

The court first examined the release of a debt and whether the alleged creditors are also entitled to full disclosure. The court explained that these parties were not estate beneficiaries and thus the executor did not owe them fiduciary duties. In addition, even if these parties were to be considered creditors of the estate, the executor would not owe them fiduciary duties. Thus, the release was effective with regard to the alleged debt claim.

Second, the court reviewed the release with respect to a release of fiduciary duty. The court side-stepped having to resolve the issue of how factors from prior cases with regard to releases of fiduciary interact because Property Code § 114.005 expressly allows beneficiaries to release the trustee from liability if they have full information. After an extensive examination of the facts, the court concluded that the beneficiaries had full information, that is, "full knowledge of all the material facts which the trustee knew" and thus the release was effective. *Id.* at *26, quoting *Slay v. Burnett Trust*, 187 S.W.2d 377, 390 (Tex. 1945). In addition, all parties were represented by independent counsel.

Moral: Before signing a settlement agreement, be sure you are in agreement with all of the terms. It is difficult to bring a claim when settlement remorse sets in.