MORALS FROM THE COURTHOUSE:

A STUDY OF RECENT TEXAS CASES IMPACTING THE WILLS, PROBATE, AND TRUSTS PRACTICE

DR. GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
3311 18th Street
Lubbock, TX 79409-0004

(806) 834-4270
gwb@ProfessorBeyer.com
http://www.ProfessorBeyer.com
http://www.BeyerBlog.com

COLLIN COUNTY BAR ASSOCIATION

ESTATE PLANNING AND PROBATE SECTION

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GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
Lubbock, TX 79409-0004
(806) 834-4270
gwb@ProfessorBeyer.com – www.ProfessorBeyer.com

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)

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)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
Visiting Professor (virtual), University of Illinois College of Law (2017)

SELECTED HONORS

Order of the Coif
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 (7th ed. 2019); 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 2019); 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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MORALS FROM THE COURTHOUSE: A STUDY OF RECENT TEXAS CASES IMPACTING THE WILLS, PROBATE, AND TRUSTS PRACTICE

I. INTRODUCTION

This article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters since last year's presentation. 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 10, 2020 (KeyCite service as provided on WESTLAW). The discussion of each case concludes with a moral, i.e., the important lesson to be learned from the case. By recognizing situations that have led to time consuming and costly litigation in the past, estate planners can reduce the likelihood of the same situations arising with their clients.

II. INTESTATE SUCCESSION

No cases to report.

III. WILLS

A. Testamentary Intent

Estate of Silverman, 579 S.W.3d 732 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

The decedent handwrote and signed a document which provided, "Karen Grenrood is my executor, administrator, [and] has all legal rights to my estate in the case of my untimely or timely death." The contestants claimed that this document lacked testamentary intent and thus is not a will which is admissible to probate. The trial court agreed.

The appellate court reversed. Consistent with the Texas Supreme Court case of *Boyles v. Gresham*, 263 S.W.2d 935 (1954), the court held that a document which appoints an executor can be a will even if it does not make an effective disposition of the testator's property. The court also quoted Estates Code § 22.034(2)(A) which defines the term "will" as including an instrument which merely appoints an executor. In addition, the court held that the decedent's document is ambiguous and could actually dispose of the entire estate to Karen by stating that she has "all legal rights" to his estate. [The court did not, however, order the document admitted to probate because the contestants also alleged undue influence, an issue the trial court had yet to resolve.]

Moral: As case law and statutory provisions clearly provide, a document which names an executor may be deemed a valid will.

B. Interpretation and Construction

1. "Personal Effects"

Matter of Estate of Ethridge, 594 S.W.3d 611 (Tex. App.—Eastland 2019, no pet. h.).

Testatrix's self-prepared will left her "personal effects" to her nephew-in-law and did not contain a residuary clause. The nephew-in-law asserted that "personal effects" included cash, receivables, and oil and gas interests and royalties. Instead, testatrix's heirs asserted that this property passed to them via intestacy and the trial court agreed. The court also found that the nephew-in-law who was serving as the independent executor misapplied estate property and removed him under Estates Code § 404.003(2). Nephew-in-law appealed.

The appellate court affirmed. After concluding that the will was not ambiguous, the court explained that extrinsic evidence is unnecessary

and that her intent must be found within the four corners of the will. The court rejected the nephew-in-law's assertion that the phrase "personal effects" was meant to encompass her entire estate except for the devise of her homestead which had adeemed. The court explained that "personal effects" is a narrow subset of personal property including "articles bearing intimate relation or association to the person of the testator" such as clothing, jewelry, eyeglasses, luggage, and similar items. The term would not encompass real property including mineral interests.

Moral: Wills should contain residuary clauses to prevent intestacy. And, of course, wills should be prepared by attorneys skilled in estate planning and not by the testator him- or herself.

2. Right of First Refusal

Brewer v. Fountain, 583 S.W.3d 871 (Tex. App.—Houston [1st Dist.] 2019, no pet. h.).

Testator's will and codicil provided that named individuals would have the right of first refusal to purchase real property from the estate at a "sales price equal to the Appraised value of the Real Property" at the date of the testator's death. These individuals exercised the right to purchase some, but not all, of the real property using the value of the homestead plus a prorated amount for additional acreage. The part they wanted to purchase was "better" than the remaining acreage because it included a lake and access road which arguably would make the remaining property less valuable. The court ordered a reappraisal of just the property the individuals wanted to purchase which resulted in a price over 350% higher. The named individuals objected to the new appraised value. The trial court ruled that the named individuals had the right to purchase all the real property at its appraised value but because they were purchasing less than the whole, they were entitled to an offset reimbursement. No provision of the testator's will authorized this result.

The appellate court examined the testator's will and codicil and found them to be unambiguous. The court explained that the trial court's resolution effectively required the named individuals to purchase all of the land despite the clear language granting them the right to purchase "any or all" of the property based on the value at the date of the testator's death. The court then held that the named individuals may purchase any portion of the property based on the date of death value "without regard to any diminution in value to the remainder of the property." *Id.* at 878.

Moral: A testator granting a right of first refusal which may be exercised over only a portion of a tract of real property needs to anticipate that the person may select property which has the effect of reducing the value of the remaining property. The testator may then indicate whether a reappraisal of the selected property is needed to determine the purchase price.

3. Codicil

Estate of Hargrove, No. 04-18-00355-CV, 2019 WL 1049293 (Tex. App.—San Antonio Mar. 6, 2019, pet. denied).

Testatrix executed a will on February 13, 2017. The next month on March 31, 2017, she executed a codicil to a will she executed "in the Summer of 2016." The trial court refused to admit the codicil and its republication of the prior will holding that the codicil did not make a sufficient reference to a prior will.

The appellate court affirmed. The court explained that the codicil was not referencing the February 2017 will but rather one executed the prior year. No evidence was introduced with regard to the contents, or even existence, of the prior will. The court concludes, "The Codicil purporting to modify that nonexistent will therefore has no validity or effect."

Comments: Even though the parties could not locate the prior will, I think the codicil should have been effective to the extent it changed provisions of the February 2017 will. In effect, the codicil still revoked by inconsistency certain terms of the 2017 will. Alternatively, the parties could have sought reformation and attempted to prove the reference to the will as being executed

in 2016 was a scrivener's error. See Estates Code § 255.451.

Moral: If at all possible, avoid the use of codicils. If a codicil is nonetheless used, be certain to correctly reference the will which the testator is amending.

4. Devise of Named Property

ConocoPhillips Co. v. Ramirez, No. 17-0822, 2020 WL 399313 (Tex. Jan. 24, 2020).

A dispute arose whether a provision in the testatrix's will devised only the surface estate or both the surface and mineral estates. The trial and intermediate appellate courts held that the testatrix devised both estates. However, the Supreme Court of Texas reversed holding that the testatrix only devised the surface estate.

The provision in question provided the testator devised "all . . . right, title and interest in and to Ranch 'Las Piedras.'" The court summarized a complex series of land transactions over a period of approximately eighty years. The court then took notice of the fact that the testator placed the name of the ranch in quotes supporting the argument that the term had a specific meaning to the testatrix and her family. By examining extrinsic evidence of the surrounding circumstances such as prior partition agreements using the name of the ranch which expressly stated that mineral interests were not covered, the court determined that the testatrix's intent was to devise only the surface estate.

Moral: Devises should expressly state whether the surface estate, mineral estate, or both are included to make the exact scope of the devise clear.

C. Will Contests

1. Undue Influence

In re Estate of Scott, No. 08-19-00011-CV, 2020 WL 1685419 (Tex. App.—El Paso Apr. 7, 2020, no pet. h.).

Both the trial and appellate courts agreed that the testator's three alleged wills were executed as the result of undue influence. In addition, they agreed that the proponents of the wills did not act in good faith in defending the wills and accordingly were not entitled to attorney fees under Estates Code § 352.052.

The opinion is not significant from a legal point of view; the court applied the standard principals regarding the finding of undue influence providing an excellent summary of the key Texas cases. Instead, it is the detailed factual description of the testator's mental and physical condition and the conduct of the will beneficiaries that became the focus of the court's opinion. The outrageous conduct of the will proponents lead the appellate court to agree that the jury had sufficient evidence, both factually and legally, to support a finding that all three wills were the result of their exercise of undue influence over the testator.

The court also examined the will proponents' request for over $400,000 in attorney's fees for defending the contests of the wills. The court agreed that the jury had sufficient evidence to support its finding that the proponents did not act in good faith or with just cause.

Moral: Unless a jury finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias, an appellate court will uphold findings of undue influence and lack of good faith.

2. Undue Influence – Another Case

Estate of Russey, No. 12-18-00079-CV, 2019 WL 968421 (Tex. App.—Tyler Feb. 28, 2019, no pet.).

The trial court examined the evidence and determined that the testatrix's will was invalid because it was executed while she was being unduly influenced. The appellate court affirmed.

The court reviewed the evidence and determined it was legally and factually sufficient to prove that the sole beneficiary, a non-family member, had exerted undue influence over the testatrix. The court based its analysis on the non-exhaustive ten-factor list of considerations the Texas Supreme Court set forth in *Rothermel v.*

Duncan, 369 S.W.2d 917, 922 (Tex. 1963). A few of the many factors the court discussed which showed the undue influence and the testatrix's inability to resist included the beneficiary was subject to deferred adjudication for theft and needed to repay almost $40,000 in restitution which she had not done, the beneficiary had accused the testatrix of stealing from the beneficiary's business for which the testatrix had worked, the testatrix relied on the beneficiary for her care and transportation during her last illness, the beneficiary worked to keep the testatrix and her children and grandchildren estranged, and the beneficiary printed the will, gave it to the testatrix to sign, and wrote the date on the will.

Moral: It is difficult to overturn a trial court's determination of undue influence as long as there is sufficient evidence even if that evidence could be subject to other interpretations.

3. Undue Influence and Lack of Testamentary Capacity

Estate of Klutts, No. 02-18-00356-CV, 2019 WL 6904550 (Tex. App.—Fort Worth Dec. 19, 2019, no pet. h.)

Testatrix executed four wills. In the first two, she left her property equally to her one son and three step-daughters. In the last two, she favored her own son and, to a lesser extent, one step-daughter. After the testatrix died, a dispute arose regarding whether the last two wills were written as a result of lack of testamentary capacity and undue influence. The trial court granted summary judgment that the third will revoked the earlier will and that the testatrix had not been unduly influenced. On appeal, the step-daughters claim that there was a fact issue regarding undue influence and that the son failed to show that the testatrix had testamentary capacity when she signed the third will.

The court first decided that the trial court's grant of a summary judgment on the no-evidence motion on undue influence was incorrect. The son was the testatrix's agent under a power of attorney which turned him into a fiduciary. Thus, the burden of proof which is normally on the contestant to show undue influence shifted to him to show lack of undue influence. This precluded the trial court from granting the no-evidence summary judgment motion.

The court then examined the evidence and determined that it did not conclusively prove that the testatrix had testamentary capacity when she signed the third will revoking the will which treated all children equally. The son did offer four witnesses who testified that testatrix had capacity when she executed the will. The court explained, however, that a jury is not bound to believe any of the witnesses and thus the witnesses' testimony was not conclusive proof of capacity.

A dissenting opinion would have affirmed on the testamentary capacity issue because there appears to have been no evidence directly controverting the testimony of the four witnesses and no circumstantial evidence reasonably inferring a problem with capacity.

Morals: (1) A no-evidence motion of summary judgment is not available if the alleged undue influencer is a fiduciary. (2) A grant of a motion for summary judgment may be improper even if there is no evidence contrary to the movant's position because a jury could disregard all of the witnesses' testimony.

IV. ESTATE ADMINISTRATION

A. Pro Se

Estate of Maupin, No. 13-17-00555-CV, 2019 WL 3331463 (Tex. App.—Corpus Christi-Edinburg July 25, 2019, pet. denied).

Husband appealed the trial court's sua sponte order admitting Wife's will to probate as a muniment of title rather than granting him letters testamentary. The appellate court agreed with the trial court's decision because Husband was a non-lawyer proceeding pro se. The local court rules of Travis County preclude a non-lawyer from acting pro se from administering the estate of a decedent even if the person is the sole beneficiary of the decedent's will.

Moral: A non-attorney named as the independent executor and sole beneficiary of a will is precluded from proceeding pro se to administer the testator's estate.

B. Standing

Estate of Daniels, 575 S.W.3d 841 (Tex. App.—Texarkana 2019, pet. denied).

After Intestate died, a heated dispute arose over whether Surviving Spouse or Mother should serve as the independent administrator. After the court determined heirship and Surviving Spouse, as the temporary administrator, distributed all estate property to the heirs, Surviving Spouse moved to dismiss all actions of the other heirs on the ground that they lacked standing as they no longer had a property right in or claim against Intestate's estate. The trial court granted the motion.

On appeal, the appellate court reversed. The court carefully read the applicable Estates Codes provisions:

- An "interested person" has standing to apply for and challenge an application for letters of administration. § 301.051(2)(B).
- The definition of "interested person" includes "an heir." § 22.018(l).
- An heir is "a person who is entitled under the statutes of descent and distribution to a part of the estate of a decedent who dies intestate." § 22.015.

Accordingly, it was undisputed that originally, Mother and the other heirs had standing. The court rejected the claim that when they lost a pecuniary interest in the estate that they lost standing. The court explained that the language in § 22.108 that includes a person who has a "property right in" or a "claim against" does not restrict the standing of the other individuals listed in the definition such as heirs and devisees. The definition is in the disjunctive; the statute uses the word "or" between the named categories of interested persons. Thus, the listed individuals do not need to have a pecuniary interest in the estate to have standing.

Moral: A decedent's spouse, heirs, and devisees have standing regardless of whether they have a pecuniary interest in the decedent's estate.

C. Jurisdiction

Estate of Brazda, 582 S.W.3d 717 (Tex. App.—Houston [1st Dist.] 2019, no pet. h.).

The probate court ordered the administrator to distribute certain funds and held the administrator personally liable for damages resulting from the delay in distributing under Estates Code § 360.301. Later the same day, the administrator moved to have the order reconsidered. Two weeks later, the probate court granted the motion. At a hearing on the motion several months later, the probate court entered orders reconsidering and removing damages against the administrator. An heir appealed on the ground that the trial court lost plenary power over the order before it entered the reconsideration order.

The appellate court agreed. First, the court decided it had jurisdiction to hear an appeal from the reconsideration because the orders are to be treated as an "undivided whole" and thus final and appealable. Likewise, the court explained that the original probate court order requiring the administrator to distribute property and holding the administrator liable was a final order and not an interlocutory one. The order resolved all of the then-live claims including the awarding of damages. Accordingly, the probate court lost its plenary power to reconsider the order or enter further inconsistent orders. Instead, the administrator should have appealed. Note that the court engaged in a detailed discussion of how the time for the court to undo an order after entering it may be extended. However, the new trial court orders were entered even after the longest possible extension.

Moral: A party dissatisfied with a probate court order must take proper steps either to timely (1) file a motion under Texas Rule of Civil Procedure 329b or (2) appeal.

D. Determination of Heirship

Estate of Keener, No. 13-18-00007-CV, 2019 WL 758872 (Tex. App.—Corpus Christi-Edinburg, Feb. 21, 2019, no pet.).

Beneficiary of Decedent's inter vivos trust filed a plea in intervention in an action to determine Decedent's heirs. Beneficiary claimed that he, as the trust beneficiary, was the owner of property the heirs sought to inherit. The trial court said that the documents Decedent used to transfer property to the inter vivos trust lacked testamentary intent making them ineffective and that the trust was designed to transfer only a suppressor (a gun "silencer"). Thus, the trial court denied the plea holding that Beneficiary lacked a justiciable interest.

The appellate court reversed because the trial court's decision was an abuse of discretion having been made without reference to guiding rules and principles. The court explained the fallacies with the trial court's reasons for denying the plea. First, testamentary intent is not needed to transfer property to an inter vivos trust. Second, Decedent could add property to the trust in any manner and at any time because no trust terms restricted adding property to the trust.

Moral: A person claiming property as a trust beneficiary has standing to intervene in a proceeding to declare heirship when the heirs seek to inherit the same property.

E. Late Probate

Ferreira v. Butler, 575 S.W.3d 331 (Tex. 2019).

Executrix of Decedent's estate attempted to probate the will of Decedent's Wife nine years after her death. Wife's children from a previous relationship contested the application asserting that it was too late to probate Wife's will as more than four years had elapsed since Wife's death and that the applicant lacked a good reason for not timely probating his wife's will. Executrix responded that the four year rule did not apply under Estates Code § 256.003 because she was not in default; she applied to probate the will a mere one month after discovering the will. The trial court denied probate and Executrix appealed. The intermediate appellate court affirmed in *Ferreira v. Butler*, 531 S.W.3d 337 (Tex. App.—Houston [14th Dist.] 2017). The court explained that Executrix's timely conduct was irrelevant. The important issue is whether Decedent acted timely which he clearly did not. The court explained that Executrix, both in her personal capacity and in her representative capacity, could have no greater right than Decedent had when he died. The court did, however, recognize that there is a split in authority among the Texas appellate courts regarding whether a default by a will beneficiary is attributed to that beneficiary's successors in interest (heirs or will beneficiaries).

On appeal to the Supreme Court of Texas, the court adopted Executrix's position that the statute clearly references whether "the applicant" was in default, not whether someone else, even the person through whom the applicant is claiming, was in default. The court expressly overruled *Faris v. Faris*, 138 S.W.2d 830 (Tex. App.—Dallas 1940, writ ref'd), in which the court had imputed a devisee's default to that person's own devisee. However, the court did recognize that Executrix was "bound" by Decedent's default in her capacity as Decedent's executrix but she would have her own standing as an interested person because, as a devisee under Decedent's will, she had a pecuniary interest that would be affected by the probate of Decedent's Wife's will which left property to Decedent. Accordingly, the court vacated the appellate court's decision and remanded so Executrix could amend her pleadings to seek probate of Decedent's Wife's will in her individual capacity.

Moral: The court may consider *only* the applicant's default in determining whether to probate a will after four years.

F. Temporary Administration

Chabot v. Estate of Sullivan, 583 S.W.3d 757 (Tex. App.—Austin 2019, pet. denied).

The testator's will was admitted to probate as a muniment of title. Subsequently, tort actions were filed against the testator's estate. In

addition, an unhappy heir filed a will contest along with a request for the appointment of a temporary administrator. The court granted the request. Later, the court approved the temporary administrator's settlement of the tort claims over the objection of one claimant who appealed.

The objecting tort claimant asserted that the court's appointment of a temporary administrator was void for want of jurisdiction and thus the approval of the settlement was likewise void. The appellate court rejected this argument. The court explained that an interested person may contest a will within two years after it is admitted to probate under Estates Code § 256.204. The testator's will was contested timely. Thus, the court had authority under Estates Code § 452.051 to appoint a temporary administrator to serve while the will contest is pending.

Moral: The probating of a will as a muniment of title does not preclude a will contest within two years of probate and the appointment of a temporary administrator to serve while the contest is pending.

G. Community Property Transfer by Surviving Spouse

Matter of Estate of Abraham [1], 583 S.W.3d 374 (Tex. App.—El Paso 2019, pet. denied).

Decedent used a parcel of community property as collateral for a loan. Decedent died before repaying the loan and thus the creditor filed a claim in the probate proceeding for the unpaid balance of the loan. Four months after Decedent's death, his son filed a deed which purported to transfer this property from Decedent to him. Decedent signed the deed but it was not notarized until after Decedent's death. Two years later, Decedent's surviving spouse and sole beneficiary deeded her interest in this property to the son contingent on him paying the creditor's claim but without reference to the other debts of the estate. Decedent's spouse did not seek the court's permission to execute the deed nor did she post a bond. The administrator sought to set aside this deed because the court did not grant permission, there was no partition order, and no bond posted. The probate court agreed and Decedent's spouse appealed.

The appellate court affirmed. The court explained that although title to the property immediately vested in the spouse upon Decedent's death under Estates Code § 101.001, it remains subject to Decedent's non-exempt debts. In addition, once a personal representative is appointed, the personal representative has a superior right to possession of all estate property under Estates Code § 101.003. The court described methods for a beneficiary to obtain property during the administration of an estate as well as for a spouse to get title to his or her share of a community property asset under Estates Code § 360.253. The spouse did not follow any of these procedures but claims that the community property procedure in Estates Code § 360.253 is optional. The court explained that the procedure is optional in the sense that the surviving spouse could wait until the administration of the estate is complete to transfer the property and not need to comply with this section. However, if the spouse wants to transfer the property prior to the conclusion of the administration, the formal procedure of partition and posting a bond is necessary to protect estate creditors. Otherwise, the spouse could transfer the asset and shield it from estate creditors.

Moral: A surviving spouse wishing to transfer a community asset prior to the conclusion of the administration must follow the procedures under Estates Code § 360.253 to protect the rights of the deceased spouse's creditors.

H. Estate Property

Matter of Estate of Abraham [2], 583 S.W.3d 890 (Tex. App.—El Paso 2019, pet. denied, rehearing filed).

Four months after Decedent's death, his son who is not a beneficiary of the will, filed a deed which purported to transfer a parcel of community property from Decedent to him. Decedent signed the deed but it was not notarized until after Decedent's death. Two years later, Decedent's surviving spouse and sole beneficiary deeded her interest in this property to the son. Accordingly,

the son claimed that he was now the owner of the land and the administrator sought to void the deed. The probate court declared that the Decedent's deed was "void, invalid, and of no legal effect." The son appealed.

The appellate court affirmed. Son claimed that the late notarization would not make the deed invalid as notarization is not a deed requirement under Property Code § 5.021. Instead, notarization is merely a precondition to recording the deed in the public records under Property Code § 12.001. The court determined that it did not need to address this issue because the deed was not signed by Decedent's wife and thus could not convey the property. "[A]bsent a power of attorney or agreement, one spouse may not convey community property to a third party, so as to effectuate a partition by creating a tenancy-in-common between the remaining spouse and the third party." *Id*. at 896. In addition, as explained in the companion case of *Matter of Estate of Abraham*, 583 S.W.3d 374 (Tex. App.—El Paso 2019, pet. filed), the alleged transfer of the wife's interest to the son was ineffective.

Moral: A conveyance of community real property requires the signatures of both spouses.

V. TRUSTS

A. Trust Intent

ETC Texas Pipeline v. Addison Exploration, 582 S.W.3d 823 (Tex. App.—Eastland 2019, pet. filed).

In a complex oil and gas case, one of the parties contended that because another party was designated as a "trustee" in a confidentiality agreement, that a trust relationship was created which would impose fiduciary duties on that party. The appellate court explained that merely designating a party as a trustee does not create a trust. "For there to be a valid trust, the beneficiary, the *res*, and the trust purpose must be identified." *Id.* at 840. The court reviewed the provision in the agreement and quickly determined that it did not identify any specific property to be held in trust.

Moral: Designating someone a trustee does not necessarily make the person a trustee unless the elements of a real trust are satisfied.

B. Modification

Matter of Troy S. Poe Trust, No. 08-18-00074-CV, 2019 WL 4058593 (Tex. App.—El Paso Aug. 28, 2019, no pet. h.).

The settlor expressly required the trustees to agree on all decisions. Unfortunately, they 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. The 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. Instead, the court is to use those factual findings in framing trust modifications. The court also rejected arguments that (1) the grounds for modification were established as a matter of law so that the lack of a jury was a harmless error and (2) the trustee lacks standing as the trustee was not a beneficiary of the trust. The court then held that the probate court abused its discretion in denying the trustee's demand for a jury trial and reversed. Accordingly, the court did not determine whether the probate court's modifications were proper under Trust Code § 112.054.

Moral: Jury trials are available to ascertain disputed facts in a trust modification action.

C. Reformation

In re Ignacio G., 580 S.W.3d 322 (Tex. App.—Texarkana 2019, pet. denied).

Husband and Wife created a trust naming their two children together as beneficiaries which provided in the summary section that each would receive 50% of the trust when the last parent died. Wife's child from another partner whom Husband adopted attempted to claim she was also a beneficiary of the trust because a later trust provision indicated that "the remaining trust property shall be distributed to the Grantors' [_____]." The trust then provided an alternate gift if "none of the Grantors' descendants survives the surviving Grantor." The trustee, one of the two mutual children, asserted that the word "descendants" was meant to be inserted into the blank to be consistent with the alternate gift. The other mutual child claimed that only the two mutual children were beneficiaries based on the summary of the trust. However, this child did not request the court to insert the word "children" into the blank. Testimony of the drafter of the trust, an attorney who was disbarred a few years after drafting the trust, tended to show that the settlors only intended their mutual children to be beneficiaries. The trial court granted summary judgment reforming the trust by inserting the word "children" into the blank and reforming later references to "descendants" to "children." The adopted child appealed.

The appellate court reversed. Because the trial court granted summary judgment, the appellate court began its analysis under the assumption that the trial court determined the trust was unambiguous. The court also recognized that although Property Code § 112.054(b-1)(3) allowing the reformation of unambiguous provisions to correct a scrivener's error was inapplicable, prior Texas law would allow reformation nonetheless to correct a scrivener's error. The court explained that the trust obviously contained scrivener's errors but that the evidence was insufficiently strong to support a summary judgment. The evidence raised issues as to how the trust was supposed to read and thus a determination of the settlors' intent is a question of fact for a jury.

Moral: A trust instrument should be carefully proofread to be certain all blanks are filled in and that terms are consistent.

D. Homestead and "Qualifying Trust"

In re Cyr, 605 B.R. 784 (W.D. Tex. 2019).

Property Code § 41.0021 allows a person to transfer his or her homestead into an inter vivos trust and have that property retain its homestead protections provided it meets the requirements of a "qualifying trust" such as allowing a settlor or beneficiary to unilaterally revoke the trust, exercise an inter vivos general power of appointment over the homestead property, or use and occupy the property as the settlor's or beneficiary's principal residence at no cost to the settlor or beneficiary (other than payment of taxes and other specified expenses) for a permitted time period such as the life of the settlor or beneficiary. In this case, the settlors' trust did not meet these requirements and thus the property that otherwise would have been homestead had it not been transferred to the trust was not protected when one of the settlors went bankrupt. For example, both settlors had to act jointly to revoke the trust; the debtor (bankrupt) settlor could not do so unilaterally.

Moral: An inter vivos trust into which homestead property is transferred must strictly satisfy the requirements of a "qualifying trust" under Property Code § 41.0021(a) to retain homestead protection.

E. Successor Trustee

Waldron v. Susan R. Winking Trust, No. 12-18-00026-CV, 2019 WL 3024767 (Tex. App.—Tyler July 10, 2019, no pet. h.).

The trustee resigned and the alternate declined to serve. The settlors anticipated this possibility by providing a method for the beneficiary to fill the vacancy with a bank or trust company. A problem arose because the beneficiary could not

locate a bank or trust company willing to serve as the trustee. Accordingly, the beneficiary acting pro se asked the court to appoint a specified individual as the trustee and the court agreed. Approximately one year later, the beneficiary asked the court to remove this trustee and appoint the beneficiary herself as the trustee. The trustee responded that he was willing to resign as long as the court appointed a qualified trustee and discharged him from liability by finding that he complied with the terms of the trust. The court agreed with the trustee but refused to appoint the beneficiary as the trustee and instead gave the beneficiary a month to locate a qualified successor. The beneficiary located such a person and asked the court to appoint her. Three days later, the beneficiary filed a motion for a new trial contending that the court erred in, among other things, ignoring the trust language stating that a trustee can be terminated immediately. After additional court judgments, the appellate court's determination that the court judgments were not final appealable orders, and an additional trial, the beneficiary again appealed asserting that the court ignored the trust language regarding the beneficiary's right to terminate a trustee immediately.

The appellate court affirmed. The court explained that because the trust did not provide for the eventuality that no bank or trust company would accept the trust, the provisions of the Texas Trust Code apply which allow the court to appoint a successor on petition of any interested person. Prop. Code § 113.083(a). The beneficiary did not have the ability to appoint a non-bank, non-corporate successor trustee.

Morals: (1) A settlor who wants a successor trustee to be an unnamed bank or trust company should anticipate that no such entity will accept the position and provide an alternate trustee or method for selecting the trustee. (2) Proceeding pro se in a trust action is not prudent.

F. Taxation

North Carolina Dept. of Rev. v. Kimberly Rice Kaestner 1995 Family Trust, 139 S. Ct. 2213 (2019).

The Supreme Court of the United States decided by a 9-0 margin (6 joining the majority opinion and 3 concurring), that North Carolina cannot tax nonresident trust payments. Here is an excerpt from the opinion:

> This case is about the limits of a State's power to tax a trust. North Carolina imposes a tax on any trust income that "is for the benefit of " a North Carolina resident. N. C. Gen. Stat. Ann. §105–160.2 (2017). The North Carolina courts interpret this law to mean that a trust owes income tax to North Carolina whenever the trust's beneficiaries live in the State, even if—as is the case here—those beneficiaries received no income from the trust in the relevant tax year, had no right to demand income from the trust in that year, and could not count on ever receiving income from the trust. The North Carolina courts held the tax to be unconstitutional when assessed in such a case because the State lacks the minimum connection with the object of its tax that the Constitution requires. We agree and affirm. As applied in these circumstances, the State's tax violates the Due Process Clause of the Fourteenth Amendment.

For an excellent discussion of the ramifications of this case under the laws of other states, see Mark A. Luscombe, *A Deep Dive Into Kaestner*, https://www.accountingtoday.com/opinion/a-deep-dive-into-kaestner, Accounting Today (Aug. 1, 2019).

Moral: Because Texas does not impose an income tax, this very important case is of lesser importance here. Nonetheless, Texas practitioners may have beneficiaries of Texas trusts who reside (or who might reside) outside of Texas. These trusts could have more contacts with the other states than the *Kaestner* trust and be potentially subject to taxation.

VI. OTHER ESTATE PLANNING MATTERS

A. "Bad Spouse" Statute

Estate of Durrill, 570 S.W.3d 945 (Tex. App.—Corpus Christi-Edinburg 2019, no pet.).

After the decedent's death, his children used Estates Code Chapter 123 to void their father's marriage based on his lack of capacity to enter into the marriage. Accordingly, the purported spouse will not be treated as the decedent's surviving spouse for any purpose such as being an intestate heir and having the right to a survivor's homestead. The purported spouse appealed.

The appellate court affirmed. The court found that all of the statutory requirements were satisfied and that the evidence was sufficient to show the decedent's lack of mental capacity to enter into a marriage on the date of the ceremony. In addition, the court rejected the claim that the decedent and the purported spouse were common law married even before the ceremonial marriage which would have placed the marriage outside of the three year period by which the marriage must be entered into prior to death for the statute to operate.

Moral: A marriage may be set aside even after a spouse's death and despite the fact that no divorce proceedings were pending at the time of death if the requirements of Estates Code Chapter 123 are satisfied.

B. Tenancy in Common vs. Joint Tenancy

Wagenschein v. Ehlinger, 581 S.W.3d 851 (Tex. App.—Corpus Christi-Edinburg 2019, pet. filed).

A dispute arose over the interpretation of a deed which contained the following language:

> THERE IS HEREBY RESERVED AND EXCEPTED from this conveyance for Grantors and the survivor of Grantors, a reservation until the survivor's death . . . . The reservation contained in this paragraph will continue until the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed.

Does "survivor" refer to which of the seven grantors outlives the other grantors or does it refer to the grantor's heirs as being the beneficiaries of the reservation?

Both the trial and appellate court held that the deed referred to the survivor of the actual grantors and not to their surviving heirs. Although the deed also contained the phrase "grantor's successors," reading the deed as a whole, this phrase referred to the surviving grantors and not the grantor's heirs. Accordingly, the deed reserved a joint tenancy with right of survivorship in the seven original grantors.

Note that although this case involved a deed, the same logic applies to language in other granting documents such as wills and trusts. *See* Tex. Est. Code §§ 101.002 & 111.001(a).

Moral: Careful drafting of granting documents is necessary to be consistent with how terms are used to eliminate any debate as to whether a tenancy in common or a joint tenancy with survivorship rights is created.

C. Community Property Survivorship Agreement

Estate of Lovell, No. 05-18-00690-CV, 2019 WL 3423280 (Tex. App.—Dallas July 30, 2019, no pet. h.).

Husband and wife signed a non-holographic joint and mutual will by using a form downloaded from the Internet. However, they did not have the will witnessed. After wife died, husband attempted to probate the will. Wife's son from a prior marriage successfully contested the will because it was not witnessed. Thereafter, husband applied to have the same document adjudicated as a community property survivorship agreement. The probate court determined that the document met the requirements for a valid community property survivorship agreement and declared that

husband was the owner of all of wife's property. Wife's son appealed.

The appellate court affirmed. Wife's son contended that his mother and step-father intended to execute a will and thus it lacked the meeting of the minds necessary to create a community property survivorship agreement under Texas Estates Code Chapter 112 especially after husband testified he had never heard of such an agreement. The court explained that the terms of the document were clear (each was to own all property of the other upon death) and it was signed by both spouses as required by Estates Code § 112.052. Although the precise language recommended in Estates Code § 112.052(c) was not used, it was clear that the spouses intended to create a survivorship right in their community property. The court also rejected wife's son's claim that a document labeled as a "joint and mutual will" could not be judicially turned into a community property survivorship agreement by refusing to elevate form over substance.

Moral: A document labeled as one thing can be validated as a different type of instrument under appropriate facts. And, of course, people should consult an attorney with estate planning expertise rather than downloading a form off the Internet.