MORALS FROM THE COURTHOUSE:

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

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ESTATE PLANNING AND 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)

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 2020); 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 8, 2021 (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

A. Equitable Adoption

Estate of Hines, No. 06-20-00007-CV, 2020 WL 5948803 (Tex. App.—Texarkana Oct. 8, 2020, no pet. h.).

The trial court conducted a determination of heirship and concluded that the intestate did not equitably adopt a step-son and thus he was not an heir. The step-son appealed.

The appellate court affirmed. The court examined evidence which showed that the step-son began living with the intestate when he was about ten years old. Friends and neighbors described the interactions between the intestate and step-son. They appeared to be how a step-father and a step-son would normally interact. There was also evidence that step-father had told step-son and other family members that he agreed to adopt step-son. However, there was no evidence that the biological father agreed to terminate parental rights while step-son was a minor and step-son took no legal steps to be adopted upon reaching majority. All of step-son's legal documents used his own last name, not that of the step-father.

The court then explained that much more evidence is needed to demonstrate an equitable adoption. Equitable adoption may exist "when [a person's] efforts to adopt [a child] are ineffective because of failure to strictly comply with statutory procedures or because, out of neglect or design, agreements to adopt are not performed." The court held that there was sufficient evidence to support the trial court's finding that there was insufficient evidence of the type of agreement necessary to trigger an adoption by estoppel. Evidence of a close relationship similar to that of a parent and child itself is not enough.

Moral: If a step-child wants assurance that he or she will be treated as a legal child of a step-parent when an adoption is not (or cannot) be done while the child is a minor, the step-child should be legally adopted upon reaching the age of majority.

III. WILLS

A. Self-Proving Affidavit

Estate of Flarity, No. 09-19-00089-CV, 2020 WL 5552140 (Tex. App.—Beaumont Sept. 17, 2020, pet. denied).

The validity of a self-proving affidavit was placed in doubt because the notary admitted that she did not give the testatrix and the witnesses an oral oath, just a written one. Both the trial and appellate courts rejected this argument because Estates Code § 251.104 does not require the oath to be oral. Because the Estates Code does not define the term "oath," the Code Construction

Act provision, Government Code § 602.001, applies which provides that the term oath "includes the oath in an affidavit."

Moral: Despite the holding in this case, prudent practice is for the notary to orally administer an oath before having the testator and witnesses sign the self-proving affidavit.

B. Specific Gifts

Sklar v. Sklar, 598 S.W.3d 810 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

Testatrix specifically bequeathed a car and shares in a mutual fund to Sister. Instead of distributing these assets to Sister, Independent Executors sold the property without consulting Sister exercising the authority Testatrix gave them to sell any portion of the estate in any manner that they deemed best provided they give "due regard" for her specific bequests. Sister sued Executors alleging breach of fiduciary duties by selling the property, selling the car for too low of a price, and asking her to sign a release after Executors repurchased the mutual funds shares and offered them to Sister. The trial court rejected Sister's claims and she appealed.

The appellate court affirmed. The court recognized that Executors owed fiduciary duties to Sister. However, Sister's claim for breach of those duties failed because Sister did not "conclusively demonstrate that she was injured" by the alleged breach of duty. Thus, it was irrelevant whether selling the two specific bequests was or was not a breach of fiduciary duties. The court reviewed the evidence which showed that the proceeds of the assets sales were their fair market value and thus Sister could not show damage because of the alleged breach.

The appellate court also rejected Sister's argument that Testatrix's requirement that "due regard" be given to specific bequests precluded Executors from selling the property. The trial court found that Executors sold the car after "weighing factors such as age, condition, repairs, storage, insurance and other costs" and sold the mutual fund shares "to secure gains and avoid market fluctuations." The appellate agreed that this evidence was sufficient to show that Executors gave due regard to Testatrix's specific bequests.

Moral: A testator whose intent is for a beneficiary to receive a specific gift such as an heirloom or family home must make certain that any authority to sell granted to the executor be expressly limited so that these assets are sold only as a last resort to pay creditors.

C. Interpretation and Construction

1. "Personal Property"

In re Estate of Hunt, 597 S.W.3d 912 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

Testator's will made a gift of all of his "remaining household and personal property" to a specific beneficiary. Both this beneficiary and the remainder beneficiaries claimed that they are entitled to intangible personal property such as bank accounts and stocks. The trial court granted summary judgment that the specific beneficiary's gift included the intangible personal property. The remainder beneficiaries appealed.

The appellate court affirmed. The court explained that the term "personal property" is not ambiguous. Personal property refers to all property, tangible or intangible, that does not qualify as real property. "The legal definition of 'personal property' is so well established that it generally does not allow for an interpretation other than the one ascribed to it by the law." *Id*. at 916-17. The court also rejected the argument that the word "household" in the two-pronged bequest limited the gift of personal property.

Moral: The term "personal property" unambiguously encompasses both tangible and intangible personal property.

2. Reformation to Correct Scrivener's Error

Odom v. Coleman, 615 S.W.3d 613 (Tex. App.—Houston [1st Dist.] 2020, no pet. h.).

The testator's will stated that he intended to dispose of all of his property. However, the will's residuary clause covered only personal property which passed to Son but if Son predeceased the testator, then to Daughter. A dispute arose as to

the disposition of residuary real property. Daughter claimed that the testator died intestate with regard to the real property so she would inherit one-half. Son argued that even though the will is unambiguous, he can establish with clear and convincing evidence that reformation is appropriate to correct a scrivener's error under Estates Code § 255.451. The court was impressed with the testimony of the drafting attorney who admitted that he used a former client's will as a template for the testator's will and neglected to delete the word "personal" from the residuary clause when he cut-and-pasted the form language. Accordingly, the court reformed the will by deleting the word "personal" in the residuary clause resulting in all property passing under the will. Daughter appealed.

The appellate court reviewed the evidence and agreed with the trial court's reformation and that it was supported by clear and convincing evidence. For example, the court pointed to a prior holographic will in which all property was left to Son and then to Daughter only if Son had already died. The attorney's testimony made it clear that the testator intended all of his property to pass in this manner. The court also noted that it would set aside the trial court's determination only upon finding that the court abused its discretion in reforming the will.

Moral: A court may reform an unambiguous will because of a scrivener's error if there is clear and convincing evidence of the testator's intent.

3. Ripeness

Ackers v. Comerica Bank & Trust, N.A., Trustee of the Larry Ackers Generation Skipping Trust, No. 11-18-00352-CV, 2020 WL 7863332 (Tex. App.—Eastland Dec. 31, 2020, pet. filed).

A testamentary trust provided that upon termination, all remaining property passes to the beneficiary's "then-living descendants." The beneficiary sought to determine the identity of the remainder beneficiaries despite the fact that the beneficiary was still alive. The trustee claimed that the case was not ripe for review. Both the trial and appellate courts agreed.

The remainder gift is a class gift that is contingent on both the beneficiary dying and the descendants outliving the beneficiary. Thus, although there are foreseeable disputes regarding whether certain individuals would qualify as descendants if the beneficiary were to die today, the case was not ripe for judicial determination because it is based on an event, the beneficiary's death, which has yet to occur.

The beneficiary also claimed that a determination of who would be descendants now is needed so that they could agree to terminate the trust and distribute the assets prior to the beneficiary's death. The existence of a spendthrift clause in the trust would preclude them from assigning their beneficial interests even if the court determined the identity of the non-vested contingent beneficiaries.

Moral: The identity of contingent class gift beneficiaries is not ripe for judicial determination until the contingency is removed.

D. In Terrorem Provision

1. Scrivener Error Correction

Odom v. Coleman, 615 S.W.3d 613 (Tex. App.—Houston [1st Dist.] 2020, no pet. h.).

Both the trial and appellate courts agreed that bringing an action under Estates Code § 255.451 to modify or reform a will to correct a scrivener's error does not trigger forfeiture under a no-contest clause. The action is to carry out the testator's intent, not to thwart it.

Moral: Will modification and reformation actions are not will contests and thus do not result in forfeiture under an *in terrorem* provision.

2. Texas Citizens Participation Act

Marshall v. Marshall, No. 14-18-00094-CV, 2021 WL 208459 (Tex. App.—Houston [14th Dist.] Jan. 21, 2021, no pet. h.).

Appellee claimed that Appellants violated an *in terrorem* clause because they brought proceedings to change trustees, change the state which governs the trust, and introduce a different *in terrorem* clause. Appellant demonstrated that

disputing conduct as violating the *in terrorem* provisions triggered the Texas Citizens Participation Act because it is based on filing a petition. Because there was no evidence that any of these actions affected the property to which Appellee may be entitled, the court concluded that Appellee did not establish a prima facie case that Appellants violated the *in terrorem* clause. Accordingly, the court held that the trial court erred in denying Appellants' motion to dismiss Appellee's claims based on the *in terrorem* clause.

Note: The court also determined that Appellee's breach of fiduciary duty claims were not covered by the Texas Citizens Participation Act.

Moral: Use of the Texas Citizens Participation Act in will and trust disputes adds a new dimension to litigation.

3. Seeking Funeral Expense Reimbursement

Isaac v. Burnside, 616 S.W.3d 609 (Tex. App.—Houston [14th Dist.] 2020, pet. filed).

Both the trial and appellate courts held that an *in terrorem* clause was not triggered when a beneficiary sought reimbursement for expenses incurred for the testator's funeral.

Moral: A beneficiary may seek reimbursement for funeral expenses without risking forfeiture under a standard *in terrorem* clause.

E. Will Contests

1. Discovery

Estate of Flarity, No. 09-19-00089-CV, 2020 WL 5552140 (Tex. App.—Beaumont Sept. 17, 2020, pet. denied).

In an attempt to delay or prevent the probate of a self-proved will, Testatrix's disfavored child requested discovery of 63 categories of documents covering a period of over 20 years. The will proponents were successful in having the trial court determine that the discovery request was overbroad and the appellate court agreed. The court explained that the discovery request did not deal with the matters relevant to admitting a self-proved will to probate under Estates Code §§ 256.251 & 256.252 ("(1) the testator is dead, (2) the testator died less than four years ago and Applicants filed the application within four years of the testator's death, (3) the probate court has jurisdiction and venue over the estate, (4) citation has been served and returned in the manner and for the period required by the Estates Code, (5) the proposed administrators of the estate have a right to letters of administrations and are not disqualified, and (6) the testator never revoked the will.").

Moral: A will contestant should carefully tailor discovery requests based on the issues which are relevant to the probate of the will.

2. Undue Influence – Another Case

Estate of Grogan, 595 S.W.3d 807 (Tex. App.—Texarkana 2020, no pet.).

Testator was single and had no descendants. However, he had a lifetime companion with whom he had lived for decades. Testator's will left substantially all of his estate to his companion to the exclusion of Testator's siblings and their descendants. The siblings contested the will on the ground of undue influence. The trial court granted a summary judgment in favor of the companion determining that there was no evidence of undue influence. One of the siblings appealed.

The appellate court affirmed. The court examined the evidence in tremendous detail holding that there was no fact issue regarding undue influence or that Testator had revoked the will. The court explained that not even a scintilla of probative evidence existed on these issues. Instead, it appeared the siblings were merely upset that they were excluded from the will.

Moral: A person attempting to contest a will on the basis of undue influence needs to raise a fact issue to prevent the court from upholding a summary judgment that the will is valid.

3. Lack of Capacity and Undue Influence

Estate of Flarity, No. 09-19-00089-CV, 2020 WL 5552140 (Tex. App.—Beaumont Sept. 17, 2020, pet. denied).

The appellate court agreed with the trial court that it was correct in holding that the testatrix had testamentary capacity and was free from undue influence at the time she executed her will. The contestant's accusation that the testatrix was suffering from depression was not supported by expert testimony or medical records. The fact that some children received larger shares of the estate because they spent more time with their mother did not show that they exerted undue influence over her.

Moral: A will contestant needs to present solid evidence of the testator's lack of capacity or that the testator's free will was overpowered to succeed in a will contest action.

IV. ESTATE ADMINISTRATION

A. Standing

1. Alleged Anti-Lapse Recipients

Estate of Burns, No. 04-19-00284-CV, 2020 WL 354940 (Tex. App.—San Antonio Jan. 22, 2020, pet. denied).

Testator's will devised the bulk of his estate to Cousin. Cousin predeceased Testator. The successors in interest to Cousin's estate asserted that the Texas anti-lapse statute would save the lapsed gift in their favor and thus they have standing to be involved in disputes involving Testator's estate. Because Cousin is not a descendent of Testator or of Testator's parents, the Texas anti-lapse statute, Estates Code § 255.153, would not prevent this gift from lapsing. Accordingly, the court held that Cousin's successors in interest did not qualify as interested persons under Estates Code § 22.018 and thus they lacked standing under Estates Code § 55.001 to assert a claim in Testator's probate proceeding. The court also refused to interpret the will to provide an alternate gift to Cousin's successors in interest merely because to do so would prevent the property from passing by intestacy.

Moral: A well-drafted will should provide for alternate beneficiaries if the primary residuary beneficiary predeceases the testator.

2. Settlement Remorse – Alleged Common Law Wife

Estate of Maberry, No. 11-18-00349-CV, 2020 WL 7863337 (Tex. App.—Eastland Dec. 31, 2020, no pet. h.).

Daughter and Alleged Common Law Wife (ACLW) mediated their dispute and resolved their claims. Later, ACLW filed an application to remove Daughter as the independent executor alleging misfeasance in the administration of the estate. Daughter successfully argued to the trial court that ACLW no longer had standing because of the settlement. ACLW appealed.

The appellate court affirmed. ACLW argued that the settlement agreement could not bar her claim because the alleged misfeasance occurred after they signed the agreement and thus she would have standing to pursue her claim. The court explained that ACLW released all claims and demands that "were or could have been asserted" and that included her claim to share in the decedent's estate as a surviving spouse. In fact, ACLW already received personal property and cash from Daughter in consideration of ACLW's release of all claims to the decedent's estate.

The court also rejected ACLW's claim that she was an interested person under Estates Code § 22.018. The court recognized that there is a division of authority in Texas regarding whether a "devisee, heir, spouse, or creditor" must also have a pecuniary interest in the estate to have standing. After reviewing the conflicting cases, the court determined that standing was lost because she agreed to release all of her potential rights and interests in the estate.

Moral: A person who enters into a settlement agreement will lack standing to pursue claims already settled if the person later has "settlement remorse."

B. Appeal

1. Pro Se

Kankonde v. Mankan, No. 08-20-00052-CV, 2020 WL 5105806 (Tex. App.—El Paso Aug. 31, 2020, no pet. h.).

The appellate court dismissed an appeal for want of prosecution because the appellants, a decedent's estate and a corporation, did not obtain an attorney to pursue the appeal. The court explained that "a non-attorney cannot litigate an appeal on behalf of an estate or a corporate entity." The decedent's wife was not an attorney and thus the appellate brief she filed was of no legal effect.

Moral: Only licensed attorneys may represent a decedent's estate at trial or on appeal.

2. Jurisdiction

Bethany v. Bethany, No. 03-19-00532-CV, 2020 WL 1327398 (Tex. App.—Austin Mar. 30, 2020, no pet.).

A disgruntled successor executor unsuccessfully attempted to remove the primary independent executor. On appeal, the court held it lacked jurisdiction to hear the appeal because the trial court's judgment was not final. The court explained that the disgruntled successor executor's motion for removal also included claims for attorney's fees, costs, and expenses. The trial court did not address these claims and thus the order refusing to remove the executor did not dispose of all the issues in this phase of the probate proceedings.

Moral: A probate judgment must dispose of all parties or issues in a particular phase of a probate proceeding before it is appealable.

3. Bond

Wheatley v. Farley, 610 S.W.3d 507 (Tex. App.—El Paso 2019, no pet.).

Estates Code § 351.001 exempts personal representatives from giving an appeal bond unless the appeal personally concerns the personal representative. The court held that the exemption also applies to supersedeas bonds.

Moral: Although the Estates Code does not expressly exempt a personal representative from giving an appeal bond, the Code's use of "appeal" bond is read broadly to include a "supersedeas" bond.

C. 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.

D. Small Estate Affidavit

Gomez Acosta v. Falvey, 594 S.W.3d 386 (Tex. App.—El Paso 2019, no pet.).

In 1984, Attorney filed a small estate affidavit stating that the sole heir was the decedent's spouse. In 2015, the decedent's descendants sued Attorney for filing a false small estate affidavit alleging that Attorney knew that the decedent had children who would also be heirs to his estate. The trial and appellate courts agreed that the claim of the decedent's descendants was barred by the statute of limitations. The court explained that the evidence showed that the small estate was on public record and that several of the descendants had examined it decades previously.

The court rejected the descendants' claims that limitations was tolled by the doctrine of fraudulent concealment or the discovery rule. The evidence showed that a descendant was aware of the contents of the small estate affidavit back in 1986 and thought that something was not right about it. Had the descendant exercised reasonable diligence, such as by consulting with a lawyer with estate expertise, the error would have been readily discovered. The fact that she did consult with attorneys who were unable to assist her was not enough to show she exercised due diligence. The evidence also revealed that none of the other descendants exercised any diligence at all in pursing any claim they might have had. The court next determined that the discovery rule could not, even at its most liberal application, extend the accrual of the cause of action beyond 1994.

Moral: When an error in a small estate affidavit is discovered, an action to correct it needs to be brought in a timely fashion.

E. Executor Qualification

Estate of Flarity, No. 09-19-00089-CV, 2020 WL 5552140 (Tex. App.—Beaumont Sept. 17, 2020, pet. denied).

The appellate court agreed with the trial court that it was appropriate to appoint the executors the testatrix named in her will. The contestant was unable to show any ground enumerated in Estates Code § 304.003 which would disqualify them from being appointed. The court explained that there was no evidence to support even the open-ended "unsuitable" disqualification. For example, merely because one of the executrix's allowed her son to live in the testatrix's house for three months while personally paying the utilities did not make her unsuitable. Instead, it was beneficial to preserving the house as an estate asset.

Moral: A person claiming that the court should not have appointed a named executor needs to provide solid evidence to demonstrate a viable reason to overturn the appointment.

F. Creditors

West Texas LTC Partners, Inc. v. Collier, 595 S.W.3d 308 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

Both the trial and appellate court agreed that a creditor was barred from recovering its claim from the decedent's estate. The decedent accrued a debt while under guardianship. The guardian properly notified the creditor that it had 120 days to file a claim against the guardianship or otherwise be barred as authorized under Estates Code § 1153.003. The creditor did not file a claim in the guardianship proceeding. After decedent died, the creditor submitted an authenticated claim for the same debt.

The courts agreed with the independent administratrix that claim was barred because the creditor did not timely file the claim in the guardianship proceeding after receiving a proper § 1153.003 notice. The court rejected the creditor's argument that it could recover on its claim because it timely filed its claim in the estate proceeding under Estates Code § 355.001 and that § 1153.003 applies exclusively to claims in a guardianship. The appellate court explained that § 1153.004 barred the claim because the creditor did not timely file its claim in the guardianship proceeding.

Moral: Once a claim is barred in a guardianship proceeding, that claim cannot rise again like the Phoenix in an estate proceeding.

G. Dischargeability of Judgment Against Independent Executor

Harrison v. Reiner, 607 S.W.3d 450 (Tex. App.—Houston [14th Dist.] 2020, pet. denied, rehearing filed).

The trial court order provided that a judgment against an administratrix would not be dischargeable in bankruptcy. The appellate court explained that bankruptcy courts have exclusive jurisdiction to determine whether a debt is dischargeable. Accordingly, the court modified the judgment to remove the improper language.

Moral: Only a bankruptcy court can determine whether a debt owed by an estate's personal

representative is dischargeable if the representative files for bankruptcy.

V. TRUSTS

A. Standing

Berry v. Berry, No. 13-18-00169-CV, 2020 WL 1060576 (Tex. App.—Corpus Christi-Edinburg Mar. 5, 2020, pet. filed).

An unnamed contingent beneficiary of a trust attempted to bring various actions regarding the trust such as to require an accounting, remove the trustee, and seek recovery for breach of fiduciary duty. The court determined that the beneficiary lacked standing despite Property Code § 111.006(4) which includes within the scope of an interested person someone who has a "contingent" interest. The court said her interest was no greater than that of an heir apparent or beneficiary of a person who is still alive.

Comment: It is this author's opinion that this case may have been incorrectly decided. Unlike an heir apparent or beneficiary of a person who is still alive, a contingent beneficiary of a trust currently owns a contingent interest in the trust.

Moral: A contingent beneficiary may lack standing to pursue claims against the trustee.

B. Homestead and "Qualifying Trust"

Cyr v. SNH NS Mtg Properties 2 Trust, No SA:19-CV-0911-JKP, 2020 WL 7048603 (W.D. Tex. Nov. 30, 2020).

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. The Bankruptcy Court for the Western District of Texas in *In re Cyr*, 605 B.R. 784 (W.D. Tex. 2019), held that 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, the Property Code requires that the debtor must be able to live in the home "at no cost" but the trust merely provided that they could live there "rent free and without charge" (the language used in Tax Code § 11.13(j)(3)(A)).

The District Court for the Western District of Texas reversed. The court explained that finding a distinction between the terms "cost" and "charge" elevated form over substance. The court explained that "[w]hat matters is whether the trust instrument expresses intent to preserve the homestead designation." The court held that the trust language reflected this intent and that doing so is consistent with the purpose of the statute to allow a homestead to be transferred into an inter vivos trust without losing homestead protection.

Moral: To avoid issues such as those in this case, a settlor should include *both* phrases ("at no cost" and "rent free without charge") to eliminate any possibility of losing homestead protection.

C. Construction and Interpretation

1. "Spouse"

Ochse v. Ochse, No. 04-20-00035-CV, 2020 WL 6749044 (Tex. App.—San Antonio Nov. 18, 2020, pet. filed).

The settlor named her son's "spouse" as a beneficiary of an irrevocable trust. A dispute arose whether the son's first wife, his spouse at the time the settlor created the trust, or his current wife is the actual beneficiary. The trial court granted summary judgment that the son's ex-spouse was the beneficiary because the settlor intended to benefit her daughter-in-law at the time of trust creation.

The appellate court affirmed. The court held that the trust designation of the settlor's spouse was unambiguous. Her son had been married to his first wife for approximately 30 years at the time of trust creation. The court rejected the claim that the settlor used the term "spouse" to refer to the

status of being son's wife and instead was used to refer specifically to the son's spouse at the time of trust creation.

The court, however, did not hold that ex-wife had a vested interest in the trust by being the son's spouse at the time of trust creation. The court claimed that the irrevocability of the trust did not make her interest vested.

Note that this author is of the opinion that her interest may have been vested – she was born, ascertainable, and there were no conditions precedent on her interest which would make her interest contingent.

Moral: The settlor should designate a beneficiary by actual name, not just by relationship, because the relationship may change over time.

2. Ambiguity

Younger v. Younger, No. 07-19-00039-CV, 2020 WL 6253237 (Tex. App.—Amarillo Oct. 22, 2020, no pet. h.).

Husband and Wife established a revocable trust which excluded one of their three children. After Husband died, Wife amended the trust to disinherit another child. This child sued claiming that Wife's amendment was contrary to the terms of the trust or, at least, that the trust's terms were ambiguous. The trial court held that the trust was unambiguous, becoming irrevocable upon Husband's death, and thus awarded the child a share of the trust property.

The appellate court first agreed with the trial court that the trust amendment was ineffective although the trust authorized the surviving settlor to amend the trust "by restating [the provisions] in full." While alive, amendments had to be made jointly except as to each person's separate property. The trust also provided that the terms of the trust regarding administration and distribution became irrevocable upon the death of the first settlor.

However, the appellate court disagreed with how the trust terms applied to a specific parcel of property. Under one provision, the trustee appears to have the power to distribute Husband's property to Wife notwithstanding the child's remainder interest. However, this conflicts with another provision which appears to make the distribution of property irrevocable upon Husband's death. Thus, this ambiguity requires a trier of fact to resolve the issue.

Moral: Trusts created by co-settlors should clearly state the exact power the surviving settlor has to amend the terms of the trust.

D. Beneficiaries

Neal v. George E. Neal, Jr. Irrevocable Trust, No. 05-19-00364-CV, 2020 WL 3263433 (Tex. App.—Dallas June 17, 2020, no pet. h.).

The settlor created a trust and amended it several times. The provisions of the trust led to disputes which were resolved with an agreed judgment. When an issue arose later regarding the remainder beneficiaries of a trust, the appellate court determined that the agreed judgment unambiguously determined the remainder beneficiaries.

Moral: Before agreeing to a judgment, parties must be certain that they are actually content with its provisions.

E. Trustee Powers

1. Existence of Power

Pense v. Bennett, No. 06-20-00030-CV, 2020 WL 5948801 (Tex. App.—Texarkana Oct. 8, 2020, no pet. h.).

The trial court granted summary judgment that the trustee had the power under the trust instrument and the Trust Code to convey certain real property. On appeal, the beneficiary claimed that the summary judgment was improper because of his allegation that the transfer was in breach of the trustee's fiduciary duty. The appellate court rejected this claim because the trial court did not have before it the issue of whether the transfer was in breach. In fact, the judgment clearly provided that the "court makes no findings or determinations" on that issue because it is being litigated in a case pending in another court.

Moral: The determination of whether a trustee has the power to make a transfer of property is distinct from whether the exercise of that power was proper.

2. Co-trustee Powers

Duncan v. O'Shea, No. 07-19-00085, 2020 WL 4773058 (Tex. App.—Amarillo Aug. 17, 2020, no pet. h.).

The majority of the co-trustees agreed to sell several parcels of trust real property. They successfully obtained a declaratory judgment under the Texas Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code §§ 37.001-37.011, declaring that they had the power to do so under the terms of the trust and Texas Property Code § 113.085(a). The trustee who opposed the sale appealed.

The appellate court affirmed. The court first rejected the dissenting trustee's claim that a declaratory judgment must resolve all issues in dispute. The court stated that there was no legal authority to support this claim. In addition, § 37.003 expressly states that the court has the jurisdiction to declare rights "whether or not further relief is or could be claimed."

The court also rejected the dissenting trustee's claim that district court lacked jurisdiction to decide whether a majority of the trustees could sell the trust property. The court pointed to Property Code § 115.001(a) which grants the district court jurisdiction over a wide variety of trust matters including "a question arising in the administration . . . of a trust."

The court also recognized that the trust instrument does impose certain restrictions on the sale of trust assets. However, the declaratory judgment did not involve the approval of any particular sale. Instead, it was merely a determination that the majority of the trustees have the power to sell.

Moral: Absent trust language to the contrary, a majority of co-trustees may administer trust property over the objection of a minority of the co-trustees.

F. Fiduciary Duties

1. Statute of Limitations

Goughnour v. Patterson, Trustee of Deborah Patterson, No. 12-17-00234-CV, 2019 WL 1031575 (Tex. App.—Tyler Mar. 27, 2019, pet. denied).

The appellate court agreed with the trial court that it was proper to render a summary judgment in favor of the trustee on the beneficiary's claim for breach of fiduciary duty. The beneficiary did not timely bring her action within the statute of limitations period even with the application of the discovery rule. The court carefully reviewed the facts which showed she had sufficient knowledge about the actions she alleged constituted breaches of fiduciary duty many years prior to filing her lawsuit.

Moral: A beneficiary must bring a timely action against the trustee for breach of duty, including violation of the prudent investor standard, once the beneficiary knows or should know by exercising reasonable diligence the facts giving rise to the breach of duty claim.

2. To Contingent Beneficiary

Estate of Little, No. 05-18-00704-CV, 2019 WL 3928755 (Tex. App.—Dallas Aug. 20, 2019, pet. denied).

Both the trial and appellate courts held that a revocable trust's non-settlor co-trustee does not owe fiduciary duties to the trust's contingent beneficiaries "regarding the settlor's decisions to exclude assets from the revocable trust and instead deposit those assets in a survivorship account favoring the co-trustee as the sole surviving party." The court justified its holding based on the settlor's retention of "the prerogative to dispose of the assets under his or control and he or she sees fit."

The court also held that the contingent beneficiaries did have standing to complain about the non-settlor co-trustee's conduct under Property Code § 115.011 because they are interested persons as defined by Property Code § 111.004(7). However, the contingent beneficiaries lack standing to complain about the

settlor's decisions made in his capacity as the settlor of the trust not to place property in the trust. The property subject to dispute was never transferred into the trust and thus the co-trustee could not have fiduciary duties with regard to that property.

Moral: Property must be transferred to a trust before a trustee owes fiduciary duties to the trust beneficiaries with respect to that property.

G. Former Trustee Liability

Benge v. Roberts, No. 03-19-00719-CV, 2020 WL 4726688 (Tex. App.—Austin Aug. 12, 2020, no pet. h.).

A beneficiary sued the successor trustee for alleged breaches of trust committed by the former trustee. The trial court granted summary judgment in favor of the successor trustee based on the exculpatory provision of the trust which provided:

> No successor Trustee shall have, or ever have, any duty, responsibility, obligation, or liability whatever for acts, defaults, or omissions of any predecessor Trustee, but such successor Trustee shall be liable only for its own acts and defaults with respect to the trust funds actually received by it as a Trustee.

The beneficiary appealed.

The appellate court affirmed. The court first cited Texas Property Code § 114.007(c) which allows the settlor, with some exceptions not relevant to this case, to relieve the trustee from a duty or restriction imposed by the Trust Code or common law. The court explained that this provision relieved the successor trustee of the normal duty under Texas Property Code § 114.002(3) to "make a reasonable effort to compel a redress" of breaches the predecessor trustee committed.

Moral: A properly drafted exculpatory clause can remove a successor's duty to sue prior trustees for breaches of trust.

H. Trustee Removal

Ramirez v. Rodriguez, No. 04-19-00618-CV, 2020 WL 806653 (Tex. App.—San Antonio Feb. 19, 2020, no pet.).

Three of four trustees sued to remove the fourth trustee for a laundry list of actions that allegedly constituted a breach of trust. This trustee then moved to dismiss the suit under the Texas Citizens Participation Act claiming that the real reason the three trustees filed for removal was based on his exercise of his right to free speech and to petition. The trial court failed to rule on the motion and thus it was denied by operation of law. The trustee then appealed.

The appellate court affirmed. The court began its analysis by assuming, without deciding, that the removal claim was indeed based on the trustee's exercise of free speech and right to petition. The court then examined whether the three trustees "established a prima facie case for their removal claim by clear and specific evidence." The evidence showed that the trustee had taken many hostile actions which impeded trust performance. Thus, the motion to dismiss under the TCPA was properly denied. The court then remanded so the trial court could determine whether filing a TCPA motion was frivolous or intended only to delay so that an award of court costs and attorney's fees would be possible.

Moral: Opposing a motion to be removed as a trustee by alleging that the motion is actually interfering with free speech or the right to petition is a clever technique but one which is, in my opinion, likely to fail and be deemed frivolous and intended only to delay the removal proceeding.

I. Attorney's Fees

Goughnour v. Patterson, Trustee of Deborah Patterson, No. 12-17-00234-CV, 2019 WL 1031575 (Tex. App.—Tyler Mar. 27, 2019, pet. denied).

The trial court ordered Beneficiary to reimburse the trust for over one-half million dollars in attorney's fees Trustee expended in successfully defending Beneficiary's claims of breach of fiduciary duty. The appellate court agreed with

Beneficiary that it was not just and equitable for her to be required to reimburse the trust for these fees. Trustee had repeatedly engaged in self-dealing which led to Beneficiary's lawsuit. "[A] trustee is not entitled to expenses related to litigation resulting from the fault of the trustee." Note that Trustee prevailed on the breach duty claims not because the court found Trustee did not breach any duties but rather because Beneficiary did not timely bring her claim causing it to be barred by the statute of limitations.

Moral: Although a trial court's decision on an award of attorney's fees is reviewed using an abuse of discretion standard, the award is subject to reversal if appropriate facts that the award was not reasonable or just can be proven.

J. Settlement Agreement

Austin Trust Company as Trustee of the Bob and Elizabeth Lanier Decendants[sic] Trusts v. Houren, No. 14-19-00387-CV, 2021 WL 970819 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, no pet. h.).

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 appellate court affirmed. The court analyzed the settlement agreement. First, the court recognized that because all parties agreed that the agreement was unambiguous, the court would construe it as a matter of law. The court then examined the language of the agreement concluding that it "specifically and unambiguously released" the trustee's alleged claims. The court explained that its "decision adheres to the public policy in favor of Texas courts upholding contracts negotiated at arms-length by knowledgeable and sophisticated business players represented by highly competent and able legal 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.

VI. OTHER ESTATE PLANNING MATTERS

A. Challenging Marital Property Agreement Using Estates Code

Moody v. Moody, 613 S.W.3d 707 (Tex. App.—Houston [14th Dist.] 2020, pet. filed).

One of the decedent's children successfully challenged the validity of the decedent's marital property agreement for lack of capacity. Executor appealed asserting this child lacked standing and the appellate court agreed.

The court examined, among other statutes, Estates Code § 22.012 which grants standing in estate matters to "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered." The court explained that the child was (1) not an heir because the decedent was testate and the will was uncontested, (2) not a beneficiary because she was not named as beneficiary in the will, (3) not the decedent's spouse because she was his daughter, (3) not a creditor as the decedent did not owe her money, and (4) she did not have a right or claim against the decedent's property. Accordingly, the child lacked standing to assert the invalidity of the marital property agreement using the Estates Code.

Moral: A litigant cannot bootstrap "together several statutory definitions without more" to obtain standing.

B. Annuities

Estate of Scott, No. 04-19-00592-CV, 2020 WL 2736466 (Tex. App.—San Antonio May 27, 2020, no pet. h.).

Husband and Wife invested in an annuity which would make payments for their joint lives. However, upon the death of the first to die, the amount of each payment would be approximately 50% less. After Wife died, Husband continued to receive payments as if Wife were still alive because he did not give the annuity company notice that Wife had died. After Husband died, the fact that Wife had died ten years previously came to light and the annuity company made a claim against the estate for reimbursement of the overpayments. Husband's independent executor rejected the claim. The annuity company then sued alleging breach of contract and fraud. The trial court found in favor of the annuity company and the independent executor appealed.

The appellate court reversed. The court explained that although the annuity contract clearly explained that upon the death of the first spouse, payments would be reduced, there was no express provision requiring that a surviving spouse notify the annuity company about the deceased spouse's death. Although it would have been reasonable to imply this obligation, the court refused to do so. The court explained that implied covenants are not implied even if doing so would make the contract fair or that the contract would operate in an unjust manner without the implication. Likewise, the court refused to imply an obligation to repay amounts received in excess of the contract amounts. Basically, the court blamed the annuity company for not including an express provision requiring notification. Plus, the court explained, the annuity company should monitor death records to ascertain on its own if an annuitant has died.

The court justified its decision on two other grounds. First, the statute of limitations had run on the annuity company's equitable claim for money had and received. Second, Husband did not commit a fraudulent act by not revealing Wife's death because he had no legal duty to tell the annuity company that she had died. The fact that he may have a moral duty to do so was irrelevant.

Moral: Annuity companies need to make certain they include express provisions in their contracts requiring a joint annuitant to notify the company when the other joint annuitant dies.

C. Disposition of Remains

Isaac v. Burnside, 616 S.W.3d 609 (Tex. App.—Houston [14th Dist.] 2020, pet. filed).

Beneficiary sued Independent Executor alleging breach of fiduciary duty for not reimbursing for Decedent's funeral expenses. The trial court rendered judgment in favor of Beneficiary and Executor appealed.

The appellate court affirmed. The court studied Health & Safety Code § 711.002 which provides that Decedent's instructions in a will have priority to govern the disposition of remains. Decedent's will directed Executor to "make all arrangements for my funeral in keeping with my beliefs and station in life." Decedent also precluded Beneficiary from making funeral or other arrangements. These instructions, however, did not address the disposition of remains and thus the court held that this section was inapplicable and did not bar Beneficiary's reimbursement claim.

Moral: Granting a person authority to make "arrangements" for a funeral does not encompass the disposition of the remains. Thus, a person must explain his or her intent for arrangements and remains disposition separately.