MORALS FROM THE COURTHOUSE:

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

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COLLIN COUNTY BAR ASSOCIATION

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 (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; 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 Regent's 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 2018); 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. 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 March 31, 2019 (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. Testator's Signature

1. Alleged Forgery

Matter of Estate of Zerboni, 556 S.W.3d 482 (Tex. App.—El Paso 2018, no pet.).

After Husband died, Wife probated his will. Daughter later intervened claiming that Husband's signature on the will was a forgery and thus she would be a beneficiary under a prior will. Daughter brought forth evidence of a handwriting expert who examined dozens of Husband's documents and who concluded that the signature on the will was a forgery. Nonetheless, the trial court granted Wife a no evidence motion for summary judgment dismissing Daughter's claim. Daughter appealed.

The appellate court affirmed holding that the expert's report did not raise a genuine issue of material fact regarding the authorship of the signature which would preclude summary judgment. The court explained that the dozens of samples were never proved up as admissible and that the expert's opinion was conclusory. The expert merely said he compared the exemplar signatures to the will signature and concluded that the signature on the will was a forgery. The expert failed to explain the perceived differences between the signatures.

Moral: A will contestant alleging forgery needs to bring forth clear evidence from an expert who explains the reasons for the conclusion that the will is forged to prevent losing to a no evidence summary judgment motion.

2. Proxy Signature

Estate of Luce, No. 02-17-00097-CV, 2018 WL 5993577 (Tex. App.—Fort Worth Nov. 15, 2018, no pet.).

Testator was severely injured in an accident rendering him a quadriplegic and unable to speak. However, he was able to communicate by responding to "yes" and "no" questions by blinking his eyes. Using this blinking system, Testator's attorney drafted a will and Testator directed a notary to sign the will for him.

After Testator died, his estranged wife attempted to probate an earlier will and his sister filed an application to probate the new will. The trial court admitted the new will to probate but also awarded the estranged wife $200,000 in attorney's fees although the jury had found that she did not act in good faith and with just cause in attempting to probate the earlier will. The

estranged wife appealed the probate of the new will and the sister appealed the award of fees.

The appellate court determined that the new will was valid. The new will was signed by a designated proxy in Testator's presence and by his direction as required by Estates Code § 251.051(2)(B). The court thought the blinking system was sufficient to establish Testator's directions. In addition, Government Code § 406.0165 authorizes a notary to sign a document when directed to do so by a person unable to sign. (The court also examined the evidence that supported the trial court's determination that Testator had testamentary capacity and was not subject to undue influence.)

[The attorney's fee issue is discussed on page 9.]

Moral: A will of someone with limited physical ability has an enhanced chance of being contested and thus the drafting attorney should take extra precautions to solidify testamentary capacity, testamentary intent, and compliance with will formalities.

B. Contractual Wills

Estate of Faccibene, No. 05-17-01072-CV, 2018 WL 5725324 (Tex. App.—Dallas Nov. 1, 2018, no pet.).

The testator and his wife executed a joint will leaving property to their four children. After the testator's wife died, the testator executed a new will leaving property to only two of the children. Later, the testator died and the new will was admitted to probate. The trial court granted a summary judgment that the testator's original will was a contractual will under Estates Code § 254.004.

The appellate court reversed. The court examined the testator's original will and found that it neither stated that a contract exists nor the material provisions of the contract as required by Estates Code § 254.004. In addition, there was no separate written agreement that the will was contractual. Instead, the will was merely a joint will, that is, one document containing the wills of both the testator and his wife. The Estates Code expressly states that the execution of a joint will "does not constitute by itself sufficient evidence of the existence of a contract." *Id.*

Moral: If a client desires to execute a contractual will, make certain that either (1) the will states that a contract exists and its material provisions, or (2) there is a written binding and enforceable agreement relating to the will.

C. Interpretation and Construction

1. Life Estate and Statute of Limitations

Gutierrez v. Stewart Title Co., 550 S.W.3d 304 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

The testatrix's will devised certain real property to two of her children and then provided that:

> None of the real property is to be sold or mortgaged, all property is to be kept in the Gutierrez family. When one of my children dies, that individual's property is to be divided among the survivors. When the last of my children is the only one remaining, then the property can be sold or do whatever that individual desires, without restrictions.

Id. at 308. Despite this provision, the two devisees conveyed the property. After one of the devisee's died, another sibling claimed an interest in the property asserting that the sales of the properties were void as the devisees did not have the authority to sell the property. This sibling then sued the title company asserting that the company misrepresented to the devisees that they could actually sell the properties despite the will provision. The trial court granted the title company's request for a summary judgment finding that the statute of limitations to raise a claim that the sale was void had elapsed.

The appellate court affirmed. The court began its analysis by recognizing that the testatrix's grant potentially created a (1) fee simple, (2) determinable fee subject to an executory limitation, or (3) life estate. Using the logic of the 2018 Texas Supreme Court case of *Knopf v. Gray*, 545 S.W.3d 542 (Tex. 2018), the court

held that the grant created a life estate in the devisees with a remainder interest in the other siblings regardless of whether they were named devisees.

The court then examined whether the complaining sibling's claim was barred by the statute of limitations. The statutory period for the misrepresentation claim was two years. Tex. Civ. Prac. & Rem. Code § 16.003(a). The alleged misrepresentation occurred in 2000 and suit was filed in 2015 well beyond the two-year period. The sibling, however, claimed that the discovery rule should apply to give her two years from when she discovered the conveyance. The court did not have to resolve this issue because even if the discovery rule did apply, the sibling's suit was brought more than two years after the discovery.

Note: The court did not discuss the sibling's claim against the purchasers of the properties as that issue was severed into a separate case which was not the subject of this appeal.

Moral: First, grants of property that have restrictions or other conditions should be clearly stated using well-established language to avoid interpretation and construction issues. Second, lawsuits should be brought before the applicable statute of limitations expires.

2. Partial Intestacy

Sullivan v. Hatchett, No. 07-17-00296-CV, 2019 WL 545578 (Feb. 22, 2019, no pet. h.).

Testator's will gave his surviving spouse a life estate in his property. However, he did not provide clear instructions as to what was to happen after her death. One provision did provide for the disposition of 60% of his estate but only if certain conditions were satisfied such as his wife dying first, both dying at the same time, or wife not surviving by 90 days. The residual clause disposed of only 40% of the estate. Nonetheless, the trial court allowed 60% of the estate to pass under the conditional provision even though none of the conditions actually occurred.

The appellate court reversed. None of the conditions triggering disposition under the 60% provision applied and the residuary clause covered only 40% of the estate. Thus, 60% of the estate passed by intestacy.

The dissenting justice argued that the conditional provision should apply even if none of the conditions occurred because when that provision disposing of 60% is combined with the residual clause disposing of 40%, Testator's estate is completely distributed without resorting to intestacy.

Moral: A will drafter must carefully consider as many contingencies as possible when drafting dispositive provisions. It is likely that Testator intended the disposition in the conditional provision to govern 60% of the estate after his wife's death. However, the unambiguous language of the provision prevented that from occurring.

D. Will Contest

1. Testamentary Capacity and Undue Influence

Estate of Danford, 550 S.W.3d 275 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Contestants claimed that Decedent's will was invalid on the grounds of lack of testamentary capacity and undue influence. The trial court granted summary judgment in favor of Proponent and Contestants appealed.

The appellate court reversed. The court examined the record and determined that there were fact issues making the summary judgment improper that Decedent had testamentary capacity. For example, none of the people with Decedent at the time of will execution indicated that Decedent knew she was signing a will, understood the effect of making a will, was aware of the general nature of her property, or knew the identity of her next of kin.

With regard to the undue influence claim, the court focused on the fact that Proponent of the will who was a beneficiary thereunder was also named as Decedent's agent under a durable power of attorney. This caused the burden of

proof to shift to Proponent to show the fairness of the transaction and lack of undue influence.

Moral: Summary judgment of testamentary capacity or lack of undue influence is hard to uphold on appeal as any fact issue is likely to cause the appellate court to reverse.

2. Standing

Estate of Lee, 551 S.W.3d 802 (Tex. App.—Texarkana 2018, no pet.).

Beneficiary of a trust created in Testatrix's will that was subsequently amended by two codicils under which he does not benefit attempted to contest the latter codicil. The trial court held that Beneficiary lacked standing because even if the contest were successful, he would not receive property under the earlier codicil. Beneficiary appealed.

The appellate court affirmed. The court determined that merely because Beneficiary was a beneficiary of a revoked testamentary trust does not give him standing to contest the latter codicil. First, Beneficiary is not an "interested person" under Estates Code § 22.018(1) because he has no property right or claim against Testatrix's estate. Instead, he only has a potential right because he would need to successfully contest both codicils to be entitled to estate property. Second, Beneficiary does not have standing under case law because his alleged pecuniary interest is too far removed.

The court also rejected Beneficiary's claim that he has standing because he and a beneficiary under the earlier codicil and original will entered into an agreement under which Beneficiary agreed to contest the latter codicil in exchange for 40% of what the other beneficiary recovers. The trial court determined that this agreement was invalid because the other beneficiary's interest, if obtained, would be controlled by a spendthrift provisions in both the will and earlier codicil preventing her from conveying any interest in the property. Thus, Beneficiary could not rely on this agreement to provide standing to contest the latter codicil.

Moral: A party to a will contest must be certain to have a pecuniary interest in the outcome of the litigation which is not too far removed. In other words, a successful contest should put property in the contestant's pocket.

E. Tortious Interference with Inheritance Rights

Archer v. Anderson, 556 S.W3d 228 (Tex. 2018).

The jury determined that Defendant tortiously interfered with Plaintiffs' rights to inherit from their uncle and the court awarded over $2.5 million in damages. Defendant appealed.

The intermediate appellate court reversed holding that Texas does not recognize a cause of action for tortious interference with inheritance. *Anderson v. Archer*, 490 S.W.3d 175 (Tex. App.—Austin 2016). The court conducted a detailed review of the numerous Texas cases discussing tortious interference and determined that although they may have discussed the tort, they never actually recognized it. The court also refused to interpret Estates Code § 54.001 as a legislative admission that the tort exists merely because this provision provides that filing or contesting a will is not tortious interference. The court then explained that express legislative action or a decision of the Texas Supreme Court is needed to recognize the tort.

The court also noted that Plaintiffs had already received the property with which they alleged Defendant tortiously interfered. The main component of their damages was not the recovery of the uncle's property but rather attorneys' fees incurred to receive their inheritance. Thus, Plaintiffs were actually using the tort as a fee-shifting mechanism to recover fees otherwise unrecoverable due to Texas following the American Rule that the winning party cannot recover attorneys' fees unless authorized by statute.

On appeal to the Supreme Court of Texas, the court affirmed holding, "The tort of intentional interference with inheritance is not recognized in Texas." *Archer*, 556 S.W.3d at 239. The court reasoned that "existing law affords adequate

remedies for the wrongs the tort would redress" such as a constructive trust. *See id.* at 229. In addition, "the tort would conflict with Texas probate law." *Id.* The court closed the door on this issue which was left open by the court's opinion in *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017).

Note that the concurring and dissenting opinion agreed that in this case, the tort should not be recognized but would have left the issue open for a subsequent case with more appropriate facts.

Moral: A claim of tortious interference with inheritance rights will fail in Texas. It is up to the legislature to create this cause of action.

IV. ESTATE ADMINISTRATION

A. Serving as Executor and Attorney for Executor

Ethics Opinion No. 678 (Sept. 2018).

The Professional Ethics Committee for the State Bar of Texas has clarified the ethical rules which apply when the same person serves as both the executor and the attorney for the executor:

> Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is not prohibited from serving as both executor and as counsel for the executor; however, the lawyer must evaluate whether there are conflicts of interests before and during the representation including any arising from the lawyer serving in the dual roles. If the representation of the executor will be adversely affected by the lawyer's or law firm's own interests, then the lawyer may not serve as counsel for the executor unless the lawyer can obtain the consent required under the Texas Disciplinary Rules of Professional Conduct. If a lawyer cannot serve as counsel for the executor because of such a conflict, the other lawyers in the lawyer's law firm are also prohibited from representing the executor. Finally, additional limitations can arise if the lawyer, serving as executor, should or may be a witness in a probate or other legal proceeding related to the estate, which limitations may affect whether the lawyer can be both a fact witness and an advocate before a tribunal in the same proceeding.

Id.

Moral: Although this opinion authorizes the same person to serve as the executor and the attorney for the executor under proper circumstances, prudent practice would be, IMHO, to avoid dual roles.

B. Jurisdiction

Narvaez v. Powell, 564 S.W.3d 49 (Tex. App.—El Paso 2018, no pet. h.).

Attorneys involved in a contentious estate administration were sued in District Court for breach of fiduciary duties and legal malpractice. For example, Attorneys allegedly prepared unconscionable fee agreements and received unconscionable fees as well as using threats and intimidation to force various parties into signing a contract to sell estate property and committing barratry. Attorneys asserted that the District Court lacked jurisdiction over these claims and instead they belonged in the statutory probate court which was handling the estate administration.

Both the trial and appellate courts agreed with Attorneys that the District Court lacked jurisdiction over these claims. The court explained that the statutory probate court has exclusive jurisdiction over all probate proceedings whether or not contested under Texas Estates Code § 32.005(a). The court examined each of the claims against Attorneys and determined that were all related to a probate proceeding and thus the statutory probate court has exclusive jurisdiction over them.

Moral: A statutory probate court will typically have exclusive, or at least pendent or ancillary jurisdiction, over all matters related to the administration of a decedent's estate.

C. Determination of Heirship

Matter of Estate of Casares, 556 S.W.3d 913 (Tex. App.—El Paso 2018, no pet. h.).

The court granted a motion to determine heirship and that administration of the decedent's estate was unnecessary. The decedent's neighbor then filed a claim against the decedent's estate for damages incurred because the decedent' estate had not been administered in a timely fashion; the decedent had died over ten years prior. For example, the claimant had to remove trash and weeds from the property and was bothered by pigeons, bees, and hornets.

The court affirmed the determination of heirship because the decedent's neighbor lacked standing as he was not an "interested person" under Estates Code § 22.018. The decedent's neighbor did not have a claim that was against an estate being administered because the estate was not under administration. In addition, the neighbor's claim is not against the estate because the damage was alleged to occur after the decedent's death.

Moral: A person in the decedent's neighbor's position needs to seek other remedies for problems caused by estate property not being maintained properly.

D. Power of Sale

Graff v. 2920 Park Grove Venture, Ltd., No. 05-16-01411-CV, 2018 WL 2949158 (Tex. App.—Dallas June 13, 2018, pet. filed).

Independent Executor contracted to sell some of the testator's real property to pay the estate's debts. Beneficiary objected asserting that the Independent Executor lacked the authority to sell the property. Nonetheless, the sale was completed and Beneficiary brought suit on a variety of grounds, including lack of authority to sell, all of which the trial court rejected. Beneficiary appealed.

The appellate court affirmed. The court first held that claims based on fraud and conspiracy were barred by the statute of limitations. The court then focused on Beneficiary's argument that Independent Executor lacked the power to sell. The court examined the will and noted that there was no express "power of sale" clause. However, the will did not restrict the sale and an independent executor has the authority to do any act which a dependent executor could do under court order. The existence of estate debts provided the independent executor with the needed authorization to sell estate property.

Moral: To avoid a claim that an independent executor lacks the authority to sell estate assets, the testator should include a power of sale clause in the will.

E. Application to Compel Distribution

Estate of Nunu, 542 S.W.3d 67 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

Brother and Sister battled over Mother's estate. Brother petitioned the court two times for an accounting and distribution of the estate from Sister who was Mother's independent executrix. *See* Estates Code § 405.001. The trial court denied Brother's request and he appealed.

The appellate court affirmed with regard to the first petition. The court held that the trial court's denial of the petition was not an abuse of discretion. The trial court had a sufficient basis for its determination that a necessity for the continuation of the administration of Mother's estate existed.

However, the appellate court reversed with regard to Brother's second petition. After reviewing the pleadings, the court determined that no necessity for administration existed after Brother had nonsuited his claims against Sister. Thus, the court reversed and remanded to the trial court to resolve remaining issues regarding the amount of expenses and attorneys' fees and then to order distribution of the estate. The court pointed out that Brother could specify neither how the estate assets are to be divided nor the date on which estate composition is to be determined.

Moral: A personal representative should distribute estate property as soon as possible and

be careful about asserting creative excuses for not doing so.

F. Arbitration Provision

Ali v. Smith, 554 S.W.3d 755 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Testator's will contained a provision requiring arbitration of all disputes which read as follows:

> If a dispute arises between or among any of the beneficiaries of my estate, the beneficiaries of a trust created under my Will, the Executor of my estate, or the Trustee of a trust created hereunder, or any combination thereof, such dispute shall be resolved by submitting the dispute to binding arbitration. It is my desire that all disputes between such parties be resolved amicably and without the necessity of litigation.

Id. at 758 Successor Administrator sued Former Executor for several alleged breaches of fiduciary duty. Former Executor moved to compel arbitration. The trial court denied the motion and Former Executor appealed.

The appellate court affirmed. The court recognized that the Texas Supreme Court in *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013), enforced an arbitration clause in a trust against the beneficiaries because although they did not affirmatively consent to the clause, they were deemed to do so based on the theory of direct-benefits estoppel. The court rejected the argument that Successor Administrator's actions of attempting to enforce the will by suing him for breach of duty and accepting payment of attorney fees triggered direct-benefits estoppel. The court explained that Successor Administrator's claims are not based on allegations that Former Executor violated the terms of the will. Instead, the breach of fiduciary duty claims against Former Executor were derived from statutes and common law, irrespective of the will itself. In addition, Successor Administrator's entitlement to fees is based on Texas Estates Code § 352.051, not the will.

A dissenting judge would enforce the arbitration provision believing that by accepting the appointment as a personal representative of the estate, each party should be deemed to have assented to the arbitration provision. This result would also be consistent with Testator's intent that all disputes be resolved without litigation.

Moral: The enforcement of a mandatory arbitration clause in a will is problematic.

G. Settlement Agreements

Estate of Mathis, 543 S.W.3d 927 (Tex. App.—Eastland 2018, no pet.).

The parties to a contested probate proceeding solved their issues by entering into a family settlement agreement. This agreement provided for the disposition of the decedent's estate and released all claims and causes of action between them involving the decedent "from the beginning of time through the date of the execution of this Agreement." Subsequently, one of the parties attempted to bring claims based on conduct which occurred prior to the date of the agreement. The trial court dismissed the claims and the unhappy party appealed.

The appellate court affirmed. The court explained that the agreement barred claims which predated the agreement especially because the party did not even seek revocation of the agreement in the first place. However, the appellate court reversed the trial court's determination that the party was not responsible for reasonable attorney's fees because Texas Rule of Civil Procedure 91a mandates that the prevailing party recover attorney fees unless a governmental entity or public official is involved. Thus, the case was remanded to the trial court to determine the amount of the reasonable and necessary attorney fees.

Moral: If a party to a settlement agreement seeks to pursue matters already settled, the party must first set aside the agreement.

H. Fee Awards Generally

In Estate of Larson, 541 S.W.3d 368 (Tex. App. – Houston [14th Dist.] 2017, no pet.).

Husband's Executor, while Husband was still alive, opened a guardianship on Wife with the assistance of Lawyers. Wife died and then Husband died. Husband's Executor and Lawyers requested fee payments from Wife's estate for various expenses, including those relating to Wife's guardianship. The trial court granted the requests. Beneficiaries of Wife's estate then challenged these awards on appeal.

The appellate court reversed. The court first addressed Lawyers' claims which were for payment for services rendered to someone other than Wife in a different proceeding. Lawyers claimed that Estates Code § 1155.054 authorizes the court to award reasonable and necessary attorney fees relating to Wife's guardianship. This authorization is, however for the "court that creates a guardianship." The probate court handling Wife's estate is not the court that created the Wife's guardianship and thus it had no authority to approve those fees as valid claims against Wife's estate. The court rejected Lawyers' claim that the statute does not prevent other courts from making the award. Lawyers could have presented their fee requests when Wife's guardianship was closed but they failed to do so.

The court next agreed with Beneficiaries' claim that the trial court erred in ordering payment of Executor's claim. Executor did not timely file suit contesting the rejection of the claim by Wife's Administrator under Estates Code § 355.064 which imposes a ninety day period from the date of rejection and thus the claim was barred.

Morals: A perfectly "valid" claim may go unpaid if the claimant does not follow proper procedures: (1) An attorney seeking fees for work on a guardianship of a ward who has died should have those fees approved by the court that created the guardianship. (2) A claimant whose claim is rejected in a dependent administration should file suit contesting that rejection within ninety days of the rejection.

I. Attorney Fees

1. Reasonable and Necessary Finding

Estate of Nunu, 542 S.W.3d 67 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

Brother and Sister battled over Mother's estate. Sister, the independent executor, used estate funds to pay her attorneys using the authority in Estates Code § 404.0037. Brother claimed Sister is not entitled to the fees because her attorneys committed malpractice and breached duties owed to Sister and the estate. See *Burrow v. Arce*, 997 S.W.3d 229 (Tex. 1999). The trial court held that this fee payment was proper, and Brother appealed.

The appellate court first addressed whether Brother could assert a fee forfeiture claim. The record did not show that Brother pled for a fee forfeiture against Sister's attorneys. Even if Brother had so pled, he lacked standing to assert the claim because Brother was not the attorneys' client. The court also rejected Brother's assertion that as a beneficiary of the estate, he could seek fee forfeiture under Texas Civil Practice and Remedies Code § 37.005. Brother has no claim against the attorneys who represented Sister.

Brother also argued that Sister should not be allowed to use estate funds to pay the fees because she did not plead for fees, defend the lawsuit to remove her as executrix in good faith, and the fees were not reasonable and necessary. The court held that Sister's amended answer prayed for the legal fees and that Sister was in good faith. However, Sister paid the fees without a court finding that the fees were both necessary and reasonable. Estates Code § 404.0037 does not permit the executor to pay the fees without a proper court finding. Thus, the court remanded to the trial court for a determination of the amount of the reasonable attorneys' fees.

Moral: Before an executor pays attorney fees from estate funds for fees incurred for estate litigation to which the executor is a party, a finding that the fees are reasonable and necessary is first needed.

2. Good Faith and Just Cause

Estate of Luce, No. 02-17-00097-CV, 2018 WL 5993577 (Tex. App.—Fort Worth Nov. 15, 2018, no pet.).

Testator was severely injured in an accident rendering him a quadriplegic and unable to speak. However, he was able to communicate by responding to "yes" and "no" questions by blinking his eyes. Using this blinking system, Testator's attorney drafted a will and Testator directed a notary to sign the will for him.

After Testator died, his estranged wife attempted to probate an earlier will and his sister filed an application to probate the new will. The trial court admitted the new will to probate but also awarded the estranged wife $200,000 in attorney's fees although the jury had found that she did not act in good faith and with just cause in attempting to probate the earlier will. The estranged wife appealed the probate of the new will and the sister appealed the award of fees.

[The validity of the will is discussed on page 1.]

The court examined the award of attorney's fees despite the jury finding that the estranged wife did not act in good faith with just cause. The court agreed that the trial court has the power to overturn a jury verdict but that in this case, it was improper to do so because the evidence did not establish estranged wife's good faith and just cause as a matter of law.

Moral: It will be difficult to uphold a judgment notwithstanding the verdict unless the issue can be established as a matter of law.

J. Bill of Review

Thomas v. 462 Thomas Family Properties, LP, 559 S.W.3d 634 (Tex. App.—Dallas 2018, pet. denied.).

The losing party at trial sought, among other things, a statutory bill of review under Estates Code § 55.251. The underlying issue was whether an undisclosed personal relationship between the judge and the opposing party's attorney influenced the decision. The trial court dismissed the petition for a bill or review.

The appellate court affirmed the dismissal. The court explained that the appellant's brief failed to reference the Estates Code bill of review provision and failed to cite any legal authority applicable to the Estates Code. Thus, the court held that the appellant did not present "any error with respect to the petition for a statutory bill of review for our consideration." *Id*. at 644.

Moral: A party appealing the dismissal of a statutory bill of review should reference the applicable Estates Code section and demonstrate how each of the elements to obtain a bill of review were satisfied.

V. TRUSTS

A. Standing

Mayfield v. Peek, 546 S.W.3d 253 (Tex. App.—El Paso 2017, no pet.).

Beneficiary alleged that Trustee violated his fiduciary duty when he convinced his mentally impaired mother to transfer assets out of the trust and into another trust for his benefit. The trial court determined that because the trust was revocable, Beneficiary did not have a vested interest to give her standing. Beneficiary appealed.

The appellate court reversed. The court explained that Property Code § 115.001(a) provides that any interested person may bring an action and "interested person" is defined in Property Code § 111.004(7) to include a beneficiary. The definition of "beneficiary" includes a person for whose benefit the property is held in trust regardless of the nature of the interest. Property Code 111.004(2). "Interest" is defined in Property Code § 111.004(6) to include both vested and contingent interests. Accordingly, Beneficiary had standing even though her interest was subject to defeasement by a trust revocation or modification. However, the court pointed out that the contingent nature of her interest could make it difficult to prevail on the merits of her claim.

Moral: A contingent beneficiary of a revocable trust has standing to bring an action against the trustee for breach of fiduciary duty.

B. Interpretation & Construction

Archer v. Moody, 544 S.W.3d 413 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

Upon death of his last grandchild, the settlor provided for the property to be distributed "in equal shares per stirpes" to the settlor's then living great-grandchildren and surviving issue of his deceased great-grandchildren. When the last of the three grandchildren died and the trust terminated, a dispute arose regarding how to distribute the property – does each great-grandchild receive an equal share (per capita) or do the great-grandchildren divide the share his or her parent would have received (per stirpes)? This difference is important because the grandchildren had different numbers of children (two had two and one had four). The trial court held that each great-grandchild received an equal share (1/8). The great-grandchildren who came from the two children families appealed claiming that they were each entitled to 1/6.

The appellate court reversed. The court determined that the trust instrument was not ambiguous and thus it may ascertain its meaning as a matter of law. The court explained that "per stirpes" contemplates a distribution to the great-grandchildren based on the share of their deceased ancestor. The trial court erred in giving no meaning to the per stirpes language and only focusing on the per capita phrase. The court stated, "We presume the settlor placed nothing superfluous or meaningless in the trust instrument and that the settlor 'intended every part, sentence, clause, and word to have a meaning and to play a part in the disposition of his property.'" *Id.* at 417.

Moral: To avoid confusion, a will or trust should not combine terms that could arguably lead to different distributions. Instead, use only one phrase, such as "per capita," "per stirpes," "per capita with representation," or "per capita at each generation." To further reduce potential problems, provide a definition of the term used which explains in a step-by-step format how to make the distribution.

C. Legal Fees

In re Cousins, 551 S.W.3d 913 (Tex. App.—Tyler 2018, orig. proceeding [mand. denied]).

Beneficiary (also a co-trustee) sued Trustee for breach of fiduciary duties. Beneficiary requested that the court order payment of his legal fees and litigation expenses from the trusts under Property Code § 114.063. The court denied the request. Beneficiary then brought a mandamus action against the judge.

The appellate court denied mandamus relief. The court explained that mandamus is an "extraordinary remedy" and is not warranted in this case. Mandamus is neither "essential to preserve important substantive and procedural rights from impairment or loss" nor it is needed to give direction on how Property Code § 114.063 operates that would "otherwise prove elusive in an appeal from a final judgment." Accordingly, the court concluded that "an ordinary appeal of the order denying [Beneficiary's] motion for court ordered litigation expenses from the Trust estates serves as a plain, adequate, and complete remedy." *Id.* at 920.

Moral: Without clear facts showing the mandamus relief is vital, the court is unlikely to grant the writ.

D. Breach of Duty

Gilmore v. Rotan, No. 11-16-00253-CV, 2018 WL 4496232 (Tex. App.—Eastland Sept. 20, 2018, no pet.).

Residual trust beneficiaries filed suit alleging that the trustees breached their fiduciary duties when they transferred real property to themselves thereby depleting trust assets. The deed was dated in 2003 and recorded in 2010. The appellate court upheld summary judgment in favor of the trustees because the statute of

limitations had run prior to the beneficiaries filing suit in 2015.

A claim for breach of fiduciary duty is normally governed by a four-year limitation period which begins to run from the date "the claimant knows or in the exercise or ordinary diligence should know the wrongful act and resulting injury." *Id.* at *3. The court agreed that the beneficiaries had both constructive and actual notice of the alleged self-dealing conveyance when the deed was filed in 2010.

Moral: Lawsuits need to be filed before the statute of limitations expires.

E. Trustee Removal

Matter of Estate of Moore, 553 S.W.3d 533 (Tex. App.—El Paso 2018, no pet.).

The alternate trustee, rather than the primary trustee, began administering a trust in 1993. The alternate trustee had authority to do so because the primary trustee failed to act as the trustee. Over two decades later, the primary trustee filed an action to remove the alternate trustee from office. The alternate trustee did not receive notice of this proceeding. A trustee is a necessary party to a proceeding involving a trust under Property Code § 115.011(b)(4). Accordingly, the appellate court held that the lower court's order removing the alternate trustee and appointing the primary trustee was void.

Moral: In all trust actions, the trustee must be given proper notice.

VI. OTHER ESTATE PLANNING MATTERS

A. Attorney-Client Privilege

In re Rittenmeyer, 558 S.W.3d 789 (Tex. App.—Dallas 2018, no pet.).

After Husband's death, Widow claimed that a pre-nuptial agreement was not enforceable. To acquire evidence to prove her claim that the agreement is unenforceable because Husband failed to make a fair and reasonable disclosure of his property, she sought discover of will drafts, trust documents, and communications reflecting on Husband's intent to provide for her. Husband's independent executrix objected claiming that this information was privileged. The trial court rejected the privilege argument holding that the exception in Rule 503(d)(2) of the Texas Rules of Evidence applied, that is, the attorney-client privilege does not apply "if the communication is relevant to an issue between parties claiming through the same deceased client."

The appellate court conditionally granted the independent executrix's request for a writ of mandamus holding that the Rule 503(d)(2) exception does not apply. For example, the court explained that the existence of will drafts is not relevant to whether Husband executed a new will or that the independent executrix destroyed a later will.

Moral: Although certain evidence involving a decedent could be very relevant to resolving estate litigation, the attorney-client privilege may prevent that material from being discovered.

B. Durable Power of Attorney

Fletcher v. Whitaker, No. 02-17-00138-CV, 2018 WL 4924944 (Tex. App.—Fort Worth Oct. 11, 2018, no pet.).

Three individuals, Bob, Toby, and Geneva, opened a joint account with right of survivorship. Bob provided all the funds for the account. Toby died, and Geneva used some of the funds for his funeral. Bob executed a durable power of attorney which, among other things, permitted Gary to deal with banking transactions. Gary withdrew $25,000 via a cashier's check. Before it was cashed, both Gary and Bob signed the check. A few months later, Bob died. Bob's executors then attempted to recover the funds Geneva used for Toby's funeral and Geneva sought the funds Gary withdrew using Bob's power of attorney. The trial court held that the Geneva did not have to repay the funeral withdrawal but that Gary along with the person to whom Gary gave some of the money, were responsible for paying Geneva the $25,000.

The appellate court agreed that Geneva's conversion judgment for $25,000 was correct. Gary did not dispute that he breached his fiduciary by withdrawing the money, depositing it in his account, and using those funds for things other than Bob's care. The court explained that Gary was not acting in Bob's interest when he made the withdrawal and, despite Bob signing the check, he had "wrongfully exercise[d] dominion and control over the money to the exclusion of, or inconsistent with, Geneva's rights." *Id.* at *4.

Moral: An agent may not withdraw funds from the principal's account and then use them for the agent's own purposes.

C. Life Insurance

Sveen v. Melin, 138 S. Ct. 1815 (2018).

Mark Sveen married Kaye Melin in 1998. Sveen had previously purchased a revocable life insurance policy from Metropolitan Life Insurance Company (MetLife). Sveen named Melin as the primary beneficiary and his children, Ashley Sveen and Antone Sveen, from a previous relationship, as contingent beneficiaries if Melin were to die first. Sveen and Melin divorced in 2007. Sveen never updated the Metlife policy to reflect Sveen and Melin's divorce so Melin remained as the designated beneficiary when Sveen died in 2011.

After Sveen purchased the insurance contract but before he died, Minnesota enacted a revocation upon divorce statute in 2002. Minnesota Statute § 524.2-804 operates to automatically revoke an ex-spouse as the beneficiary. The ex-spouse is treated as if he or she predeceased the insured. This remains true unless the policyholder redesignates the ex-spouse as the beneficiary or reaffirms the ex-spouse as the beneficiary after the divorce.

After Sveen died, Melin filed a claim with MetLife for the insurance proceeds as she was still named as the primary beneficiary on the policy. MetLife filed an interpleader to determine the identity of the proper beneficiary: Melin, the originally-named beneficiary, or Antone and Ashley Sveen, the contingent beneficiaries.

The United States District Court for the District of Minnesota granted summary judgment and awarded the Sveen children the proceeds of the policy. *Sveen v. Melin*, Civ. No. 14-5015, 2016 WL 9000457 (D. Minn., Jan. 7, 2016). The Eighth Circuit reversed holding that the retroactive application of the revocation-upon-divorce statute violated the Contracts Clause of the U.S. Constitution Article 1, Section 10, Clause 1. *Sveen v. Melin*, 853 F.3d 410 (8th Cir. 2017). The Eighth Circuit explained that the Minnesota statute violated the Contracts Clause when applied retroactively because the policyholder's rights and expectations were violated by not allowing the policyholder to rely on the law at the time the contract—the insurance policy—was made.

The Eighth Circuit relied heavily on its earlier ruling involving a revocation-upon-divorce statute from Oklahoma that it found violated the Contracts Clause. In the Oklahoma case, the court held that the statute, when applied retroactively, would substantially impair a life insurance contract and would undermine the purpose of the contract itself—to provide for the financial needs of a person designated by the insured. The court explained that the statute would be a fundamental change to the very essence of the contract itself and could not be justified as a "reasonable way to advance a significant and legitimate purpose." *Sveen v. Melin*, 138 S. Ct. at 1822 (internal quotations omitted). The court also stated it would be possible that the policyholder would want his or her ex-spouse to remain as the beneficiary and would have taken steps to change the beneficiary designation if the insured no longer desired the ex-spouse to be the beneficiary.

The Supreme Court of the United States reversed in an 8-1 decision holding that the statute's automatic revocation on divorce feature did not substantially impair pre-existing contractual arrangements. Accordingly, applying the statute to void a pre-enactment life insurance beneficiary designation did not violate the Contracts Clause of the United States Constitution.

Moral: The Texas equivalent statutes, Family Code §§ 9.301 (life insurance) and 9.302

(retirement benefits), will be effective even if the designation of the ex-spouse as a beneficiary occurred prior to the effective dates of the statutes.

D. Beneficiary Designations on Non-Probate Assets

Fielding v. Tullos, No. 09-17-00203-CV, 2018 WL 4138971 (Tex. App.—Beaumont, Aug. 30, 2018, no pet.).

Decedent named Caregiver as a beneficiary on several non-probate accounts. After Decedent's death, Independent Executor claimed that Decedent lacked the capacity to name Caregiver as the beneficiary of these accounts and that if Decedent did have capacity, he was subject to Caregiver's undue influence. The trial court granted a Caregiver's request for a summary judgment finding that although Caregiver was in a position to exercise undue influence, there was no evidence that she did. In addition, the court held that a true fiduciary relationship did not exist between Decedent and Caregiver which would shift the burden of proof on Caregiver to show lack of undue influence. Independent Executor appealed.

The appellate court affirmed. The court reviewed the evidence and concluded there was no genuine issue of material fact. The record had "no indication of force, intimidation, duress, persistent requests or demands, or deceit by" Caregiver. Caregiver had assisted Decedent and his predeceased wife for seventeen years. In the later years of Decedent's life, Caregiver worked for Decedent seven days a week. They had a close relationship. For example, Decedent would spend holidays with Caregiver's family instead of his distant relatives (Decedent had no children). An employee of the one of the institutions holding a non-probate asset testified that she had never seen Caregiver exert any influence over Decedent or Decedent had any of the traits of a vulnerable client.

Moral: Mere opportunity to exert undue influence is insufficient to place the existence of undue influence into question. In this case, distant relatives (nieces and nephews) were upset that a long-time caregiver received over $1.5 million. To reduce the chance of litigation, the estate attorney should take steps during the planning process to prevent contests based on undue influence or lack of capacity.

E. Funerals

Rader Funeral Home, Inc. v. Chavira, 553 S.W.3d 10 (Tex. App.—El Paso 2018, no pet.).

A funeral home delivered the wrong body to the decedent's family. The mistake was noticed just before the service was to start when the decedent's widow and son were to preview the body. When the casket was opened, they were shocked to find the body of another man, an additional victim of the same car accident that killed the decedent. The widow and son filed suit against the funeral home for negligent infliction of emotional distress and prevailed at the trial court.

On appeal, the court rejected the claim that the funeral home did not have a contract or other relationship with the widow and son which would thus prevent them from recovering for mental anguish damages. After a detailed review of the Texas law regarding a cause of action mental anguish, the court followed the Texas Supreme Court case of *SCI Texas Funeral Services v. Nelson*, 540 S.W.3d 539 (Tex. 2018), which held that the "relationship between a person disposing of a decedent's remains and the next of kin is special, even without a contract." Accordingly, the widow and son did not need contract privity and could prevail based on the independent legal duty the funeral home had not to mishandle the decedent's remains.

Moral: A funeral home should have someone who knows the decedent, but who would not be upset upon seeing a different body, check the contents of the casket prior to allowing family members to view the casket's contents.