MORALS FROM THE COURTHOUSE:

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

DR. GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
1802 Hartford St.
Lubbock, TX 79409-0004

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

ESTATE PLANNING AND COMMUNITY PROPERTY LAW JOURNAL CLE & EXPO

TEXAS TECH UNIVERSITY SCHOOL OF LAW

March 2, 2018
Lubbock, Texas

Revised February 13, 2018

GERRY W. BEYER

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

EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (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 (6th ed. 2015); 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 2016); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3rd ed. 2007); *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).

TABLE OF CONTENTS

TABLE OF CASES

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 February 13, 2018 (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. Ademption

Boothe v. Green, No. 13-15-00267-CV, 2017 WL 2705470 (Tex. App.—Corpus Christi-Edinburg June 22, 2017, pet. filed).

Testatrix devised all of her "farm lands" and "pasture lands" to her three grandchildren. The remainder of her estate was to pass to one of these grandchildren. Testatrix then sold the land and at the same time received back from the purchaser an undivided one-half interest in the property's mineral interests. A dispute arose between the heirs of the original devisees whether the mineral interests passed under the grant of farm and pasture land or the original devise adeemed so that the minerals belonged solely the heirs of the remainder grandchild. The trial court held ademption occurred.

The appellate court reversed holding that total ademption did not occur. Instead, ademption operated only pro tanto. The mineral interest was part of the original devise which included both surface and mineral rights of the farm and pasture land. Thus, the heirs of the three specific devisees are entitled to the mineral interest which was "leftover" from the original devise.

Moral: A Testatrix making a specific devise should expressly explain the testatrix's intent if a division of surface and subsurface rights later occurs.

B. Interpretation & Construction

1. Dispositive Provisions

Jinkins v. Jinkins, 522 S.W.3d 771 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.).

A dispute arose between full and half siblings over the ownership of certain land. The full siblings claimed that upon their mother's death, the property passed into a trust which was solely for their benefit. The half siblings (children of the step-mother) claimed that the property was owned by their father (the father of all the siblings) until his death fifty years later and passed to all siblings equally under the terms of his will. The trial court examined the documents and the complex transactions that occurred for over half a century and concluded that the disputed property passed under the father's will to all four of his children equally. The full siblings appealed.

The appellate court reversed. The court explained that the property indeed passed into the trust when the full siblings' mother died and thus the property belonged solely to them. To reach this

result, the court had to engage in some very sophisticated estate and future interest discussion which will demonstrate to my students that the time we spend on these issues in class is important and not merely an academic exercise.

The disputed property was originally held in the paternal grandparents' trust. The father was the remainder beneficiary of this trust. The joint will of the full siblings' mother allegedly transferred this property into the trust *before* the last grandparent died. The court determined that the remainder interest was vested (father was born, ascertained, and no conditions precedent existed to his taking other than the natural expiration of the life estate) and thus was transferable.

The court next examined the joint will to determine if it transferred the remainder interest of the surviving spouse (father) into the trust. The plain language of the joint will provided that upon the death of the first to die (the mother of the full siblings), all property subject to disposition by the surviving spouse (father) would pass into the trust. Since the father's remainder interest was transferable, it passed into the trust solely for the benefit of the full siblings.

The court also rejected other more tenuous arguments of the half siblings such as that the father's will revoked the irrevocable trust, the father had transferred property out of the trust so that it was no longer governed by the trust's terms, the half siblings were entitled to share as pretermitted children despite being express beneficiaries of the father's will, and the applicability of the two-year will contest statute of limitations barred the action.

Moral: More straightforward estate planning strategies may reduce the need for resolving cases that use archaic techniques such as joint wills.

2. Precatory Language

Estate of Rodriguez, 04-17-00005-CV, 2018 WL 340137 (Tex. App.—San Antonio Jan. 10, 2018, no pet. h.).

The testator's will provided that it was the testator's "desire" that his ranch stay "intact as long as it is reasonable." Using the power of sale granted under the will, the executor entered into a contract to sell the land. One of the beneficiaries objected to no avail at the trial court.

The appellate court affirmed. The court explained that the term "desire" is normally precatory and non-binding absent other circumstances. No special circumstances existed in this case and, in fact, the will and trust used mandatory language granting the executor/trustee the power to sell the property.

The court also rejected the beneficiary's claim that she had a right of first refusal to purchase the property. Although the trust provided that a beneficiary could only sell the property to co-beneficiaries, there was no requirement that the trustee offer the beneficiaries the opportunity to purchase the property.

Moral: If a client wishes to include non-binding directions in a will or trust, those directions should expressly state that they are non-binding to avoid claims that they are mandatory. Better yet, consider omitting precatory instructions completely.

C. Contractual Wills

Estate of Gilbert, 513 S.W.3d 767 (Tex. App.—San Antonio 2017, no pet. h.).

After two romantic partners broke up, Man changed his will, which previously left his estate to Woman, by naming Son as his sole beneficiary. After Man died and his will was admitted to probate, Woman claimed that Man breached his contract to make a will naming her as the sole beneficiary and was promissorily estopped from changing his will. The trial court concluded that as a matter of law she had no viable cause of action. Woman appealed.

The appellate court affirmed. Man's oral promise to name Woman as his sole beneficiary is not enforceable. Estates Code § 254.004 provides that to establish a contract to make a will, there must first be a written binding agreement or terms of a will stating that a contract exists and its provisions. Because no writing exists, no contractual will could be established. Likewise,

the court rejected Woman's promissory estoppel claim explaining that "section 254.004 bars a claim for promissory estoppel on an oral promise to devise property that is disposed of in a will." *Gilbert* at 772.

Moral: A contract to make a will must be memorialized in a writing by either an enforceable contract or the will itself.

D. Will Contest

1. Arbitration

Lawson v. Collins, No. 03-17-00003-CV, 2017 WL 4228728 (Tex. App.—Austin Sept. 20, 2017, no pet. h.).

The eleven children of the decedent had differing opinions regarding the validity of their mother's will with some asserting that the will was valid while others claimed that the mother lacked capacity or that she was subject to fraud or undue influence when she executed the will. The children actively involved in the litigation signed a Rule 11 Mediated Settlement Agreement. This Agreement provided for binding arbitration if disputes under the Agreement later arose. Disputes did arise and the arbitration concluded. One of the children who was not previously involved with the litigation or settlement agreement then filed suit to contest the will. After the court granted a summary judgment against her, one of the children who agreed to the settlement opposed confirmation of the award and was joined by her unsuccessful sibling. The court rejected the opposition and signed an order confirming the award and ordering that it be enforced according to its terms. The child who initially agreed to the settlement appealed.

The appellate court affirmed. The court first addressed the child's claim that she was coerced by the mediator to agree to the settlement. The court agreed that the trial court was not in error for not allowing a hearsay affidavit in support of her coercion claim. The court also agreed that it was permissible for the trial court to exclude a hearsay medical report showing that the child lacked the mental capacity to enter into the agreement. The court held that it did not matter that she did not sign the settlement agreement because the arbitration award is final once the arbitrator signs it; there is no requirement that the parties sign it as well. The court also rejected a multitude of other creative but ineffective arguments.

Moral: Once a litigant agrees to settle a case, the litigant should not try to interfere with its later enforcement of the settlement merely because of "settlement remorse."

2. Forgery

Lawson v. Collins, No. 03-17-00003-CV, 2017 WL 4228728 (Tex. App.—Austin Sept. 20, 2017, no pet. h.).

The trial court refused to admit testimony of a handwriting expert that would show a will was a forgery because the expert was not timely designated as a testifying expert. The appellate court rejected that claim that designation was not needed because the hearing was on merits of the case; it was not a preliminary hearing not on the merits where designation may not be a basis for excluding an expert's testimony.

Moral: A will contestant should timely designate testifying experts.

E. Tortious Interference With Inheritance Rights

1. The Texas Supreme Court Speaks

Kinsel v. Lindsey, 526 S.W.3d 411 (Tex. 2017).

A jury found that Defendants were liable for tortiously interfering with their inheritance rights. The trial court then awarded damages as well as other remedies in an attempt to undo the interference. Defendants appealed not on the ground that their conduct was not tortious, but rather that the tort is not recognized as a cause of action.

The appellate court agreed and reversed. *Jackson Walker v. Kinsel*, No. 07-13-00130-CV, 2015 WL 2085220 (Tex. App.—Amarillo, Apr. 10, 2015). The court based its holding on the fact that

neither the Supreme Court of Texas nor the Fort Worth Court of Appeals have expressly recognized the tort. [The case was transferred from the Fort Worth Court to the Amarillo Court by the Supreme Court of Texas as part of its docket equalization efforts.]

A strong dissent pointed out that six of the Texas intermediate appellate courts have recognized the tort including the Amarillo court. In addition, six other courts, including the Fort Worth court, have discussed the tort without rejecting it.

The Supreme Court of Texas affirmed. The court reviewed the prior cases and explained that they did not show that the court had previously recognized the tort. Admitting some lower courts have recognized the tort, the court declined to recognize the tort because the plaintiffs already had an adequate remedy, a constructive trust, imposed on the disputed inheritance, and thus the court was "not persuaded to consider it *here*." (emphasis added). Accordingly, the issue remains open.

Moral: Litigators in Texas will need to wait for another case to reach the Supreme Court of Texas to ascertain whether tortious interference with inheritance rights is a viable cause of action.

2. A Houston Court of Appeals Reacts

Rice v. Rice, 533 S.W.3d 58 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.).

The court, following the Texas Supreme Court's opinion in *Kinsel v Lindsey*, 526 S.W.3d 411 (Tex. 2017), refused to recognize a cause of action for tortious interference with inheritance rights. The court noted that it had previously recognized the tort but realized under principles of vertical stare decisis, it is bound by the Texas Supreme Court decision.

The court explained that the viability of this cause of action was left open by the Texas Supreme Court. After studying the facts of this case, the court pointed out that the parties seeking relief for tortious interference had briefed none of the factors which a court must consider in determining whether to recognize a new cause of action. Accordingly, the court refused to recognize the tort. The court also noted out that the parties already had an adequate remedy as the will was declared invalid for lack of testamentary capacity and undue influence. It appeared that the reason the parties wanted the tort recognized was so that they could seek exemplary damages.

Moral: Whether Texas recognizes a cause of action for tortious interference with inheritance rights remains an open question.

IV. ESTATE ADMINISTRATION

A. Family Allowance

Estate of Nielsen, 533 S.W.3d 39 (Tex. App.—Texarkana 2017, no pet. h.).

The trial court awarded the decedent's surviving spouse a family allowance of $137,100 to be charged against the entire community property estate. The surviving spouse appealed asserting that the family allowance should only be charged against the decedent's share of community.

The appellate court affirmed. The court began its analysis by recognizing that it may set aside a family allowance order only if the trial court abused its discretion by acting "without reference to any guiding rules and principles or reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Estate of Nielsen* at 40.

The surviving spouse claimed that the Estates Code does not specifically authorize payment of the family allowance from the entire community estate. Neither the surviving spouse nor the court could locate any case authority supporting this argument. However, the court discussed two cases which held that the family allowance is chargeable against the full community estate. *Pace v. Eoff*, 48 S.W.2d 956, 963 (Tex. Comm'n App. 1932, judgm't adopted) and *Miller v. Miller*, 235 S.W.2d 624, 628-29 (Tex. 1951). The court then compared the statute construed in these cases with the equivalent Probate Code and Estates Code sections and determined they are substantially similar. Thus, "the Legislature is presumed to have intended that courts construe the Estates Code regarding the family allowance

consistently with those decisions." *Estate of Nielsen* at 44.

Moral: If the community estate is sufficient to pay the family allowance, the court may properly order it to be paid out of the full community rather than just the deceased spouse's half.

B. E-mail Access

In re Cokinos, Boisien & Young, 523 S.W.3d 901 (Tex. App.—Dallas 2017, no pet. h.).

The court ordered a law firm to turn over to an attorney's executor e-mails between the attorney and the firm concerning a lawsuit that may be relevant to a fee-sharing dispute between the attorney and the law firm. The order included a protective order to preserve potentially confidential and privileged communications. The law firm petitioned for a writ of mandamus to prevent enforcement of the judge's disclosure order.

The appellate court denied the petition. The court explained that the executor had a duty to collect all debts due the estate and the e-mails were relevant to the claim for fees against the law firm. If the attorney were alive, the attorney would have had access to the e-mails and thus so does the executor. Note that the court did not address whether any specific document might be privileged or subject to the attorney-client work product doctrine.

[The court decided this case without reference to the newly enacted Texas Revised Uniform Fiduciary Access to Digital Assets Act as it was decided prior to the Act's effective date.]

Moral: An attorney may find it prudent to keep paper copies of documents relating to fees so that the attorney's executor can have unfettered access to them.

C. Late Probate

1. Default

Ferreira v. Butler, 531 S.W.3d 337 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

Executrix of Decedent's estate attempted to probate the will of Decedent's Wife nine years after her death. Wife's children from a previous relationship contested the application asserting that it was too late to probate Wife's will as more than four years had elapsed since Wife's death. Executrix responded that the four-year rule did not apply under Estates Code § 256.003 because she was not in default; she applied to probate the will a mere one month after discovering the will. The trial court denied probate and Executrix appealed.

The appellate court affirmed. The court explained that Executrix's timely conduct was irrelevant. The important issue is whether Decedent acted timely which he clearly did not. The court explained that Executrix, both in her personal capacity and in her representative capacity, could have no greater right than Decedent had when he died.

The court did, however, recognize that there is a split in authority in Texas regarding whether a default by a will beneficiary is attributed to that beneficiary's successors in interest (heirs or will beneficiaries). Compare *In re Estate of Campbell*, 343 S.W.3d 899, 905-08 (Tex. App.—Amarillo 2011, no pet.) (default of beneficiary did not bar successors in interest) with *Schindler v. Schindler*, 119 S.W.3d 923, 929 (Tex. App.—Dallas 2003, pet. denied) (default of beneficiary barred successors in interest). In determining which position to follow, the court followed *Faris v. Faris*, 138 S.W.2d 830 (Tex. Civ. App.—Dallas 1940, writ ref'd), which barred successors in interest "because the Supreme Court of Texas adopted that opinion and judgment by refusing a writ of error." *Ferreira* at 343.

Moral: Probate a will within four years of the testator's death.

2. Not in Default

Ramirez v. Galvan, No. 03-17-00101-CV, 2018 WL 454733 (Tex. App.—Austin Jan. 10, 2018, no pet. h.).

The trial court refused to admit the testatrix's will to probate as a muniment of title because the proponent (her surviving husband) filed it more than four years after her death. The appellate court reversed.

The court explained that a will may be admitted to probate after the four year period if the proponent is "not in default." Estates Code § 256.003(a). In this case, the proponent did not think it was necessary to probate the will. It was only when he later wanted to sell the marital home that he realized that probate was needed to establish the chain of title. The court reviewed the case law and concluded that "Texas law is quite liberal in permitting a will to offered as a muniment of title after the four-year limitation period has expired." The court even found several cases in which the court held that the proponent's belief that probate was not needed was an adequate excuse.

Although the court did not think a not-in-default status was achieved as a matter of law, the court reviewed the proponent's actions to determine that he "did not offer the will for probate, not through any lack of diligence, but because he did not realize any further act was necessary." Thus, the court held that the trial court's finding of default was "so against the great weight and preponderance of the evidence as to be clearly wrong and unjust."

Moral: As the court stated, Texas courts are willing to admit a will to probate after the four year period on a relatively weak showing of lack of default.

D. Receiver Appointment

Estate of Price, 528 S.W.3d 591 (Tex. App.—Texarkana 2017, no pet.).

After the death of the famous country music legend Ray Price, his wife and son filed competing motions to probate wills and to contest each other's proposed will. The court appointed a receiver to take possession of the property subject to the will contests. Wife asserted that the court abused its discretion in so doing and appealed.

The appellate court affirmed finding that the decision to appoint a receiver was not an abuse of discretion. The court began its analysis with Tex. Civ. Prac. & Rem. Code § 64.001 which allows a court to appoint a receiver in an action between two parties who are jointly interested in the same property. Although it is true that the appointment of a receiver is a harsh, drastic, and extraordinary remedy, the trial court did not abuse its discretion in appointing a receiver in this case. There was sufficient evidence that the son had an interest in the property and that it was in danger of being lost, removed, or materially injured.

Moral: In proper cases, the appointment of a receiver during a will contest is a prudent move to preserve the status quo of the testator's property until the merits of the case are resolved.

E. Settlement Agreements

Estate of Riefler, No. 07-06-00375-CV, 2017 WL 5778576 (Tex. App.—Amarillo Nov. 28, 2017, no pet. h.).

The testator died with a will leaving his entire estate to his spouse who had predeceased him. The will lacked a residuary clause and thus his estate passed by intestacy. The testator had no biological descendants. A dispute arose centered on whether his daughter-in-law was adopted by estoppel which would make her the sole heir. Before any trial court rulings, the parties reached a settlement after ten hours of mediation. Later, one of the parties to the agreement (appellant) objected claiming that (1) he was under the influence of prescription medication when he signed the agreement, (2) Dallas County Probate Court approval of the agreement is required before it could be approved by the County Court at Law where the estate was pending, and (3) he was misled regarding the value of the estate property. The trial court rejected all three claims.

The appellate court affirmed. The court explained that the language in the agreement about Dallas

County Probate Court approval only dealt with property to be distributed to an individual under guardianship, not the entire agreement. And, it was the appellant's fault that the Probate Court did not review the agreement as he failed to seek that approval.

The opinion contains a nice summary of basic family settlement agreement law. The agreement in the case fell squarely within the doctrine as all possible beneficiaries of the testator's estate entered in the agreement which resolved their disputes and it contained a comprehensive disposition plan for the testator's assets.

The court also held that the trial court's determination that the appellant had the capacity to enter into the settlement agreement was not against the great weight and preponderance of the evidence such that is was clearly wrong or unjust. In fact, the appellant admitted that he did not "cut a good deal" and wanted "to get out of it."

Moral: Family settlements are a good way of resolving estate disputes. However, there is always a fear of "settlement remorse" and a remorseful party making claims with little or no merit in an attempt to set aside the agreement.

V. TRUSTS

A. Jurisdiction

Lee v. Lee, 528 S.W.3d 201 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

Beneficiaries sued in a statutory probate court to remove Trustee. Trustee claims that the court lacked jurisdiction and that suit should have been brought in district court under Trust Code § 115.001. Trustee admitted that the statutory probate court has concurrent jurisdiction over testamentary trusts but asserted that this jurisdiction is restricted to when a probate proceeding is actually pending in the statutory probate court.

The appellate disagreed with Trustee. The court determined that the jurisdiction of statutory probate courts is independent of its probate jurisdiction. "[T]he absence of a pending probate proceeding does not deprive a statutory probate court of its independent jurisdiction over testamentary-trust actions." *Lee* at 213. The court also recognized that the statutory probate court also has jurisdiction over inter vivos trusts as provided in Estates Code § 32.006.

Moral: A statutory probate court has concurrent jurisdiction with the district court over both inter vivos and testamentary trusts irrespective of whether any probate matter regarding the trust is pending in the statutory probate court.

B. Venue

In re Green, 527 S.W.3d 277 (Tex. App.—El Paso 2016, mandamus denied).

Beneficiaries filed suit against Trustee, in both his personal and representative capacities, in Crane County. Trustee requested a transfer of venue under Trust Code § 115.002(b)(2) to Ector County. Trustee demonstrated that he handled all trust affairs from his office in Ector County. The trial court denied the motion because Trustee had many contacts with Crane County such as being a registered agent with a Crane County address for a business held in the trust and the settlor's will was probated in Crane County. Trustee sought a writ of mandamus.

The appellate court conditionally granted the writ. The court examined the evidence which showed that Trustee handled trust affairs from Ector County. Trustee's other contacts with Crane County were irrelevant. Because there was a solid basis for Trustee's transfer motion, the court also held that the trial court abused its discretion in awarding attorney's fees.

Moral: A trust litigant should file in a county with proper venue to avoid the delay and cost of venue litigation.

C. Spendthrift Provisions

Bradley v. Shaffer, No. 11-15-00247-CV, 2017 WL 5907319 (Tex. App.—Eastland Nov. 30, 2017, no pet. h.)

A trust beneficiary attempted to convey his interest in a trust contrary to a spendthrift provision which precluded beneficiaries from

assigning their trust interests. The trial court granted the trustees' request for a summary judgment declaring the deeds to be ineffective. The grantee of the deeds appealed.

The appellate court affirmed. The court focused on the spendthrift provision applicable at the time the trust beneficiary attempted to convey his trust interest. The clause clearly precluded the beneficiary from transferring the interest and the court explained the assignment was invalid at the time it occurred.

The court next had to determine whether the invalid conveyance could become valid at a later time. First, the court rejected a claim that the trust violated the Rule Against Perpetuities because if permitted an extension of the trust's duration beyond a life in being plus twenty-one years. The court explained that the duration of a trust is irrelevant to a RAP analysis. Instead, the key determination is whether the interest vests within the RAP period. The court studied the trust and determined that vesting occurred immediately upon creation of the trust – not one second of the RAP period was "used."

In addition, the court rejected the argument that the after-acquired title doctrine could fix the conveyance because the grantor later acquired title to the conveyed property free of trust. Because the initial attempt transfer was void, it could not be cured by the grantor later acquiring the title which he attempted to transfer.

Moral: A conveyance of property ineffective because of a spendthrift provision cannot be cured by the beneficiary later acquiring that property free of trust.

D. Property

Dutcher v. Dutcher-Phipps Crane & Rigging, Inc., 510 S.W.3d 592 (Tex. App.—El Paso 2016, pet. denied).

Husband died owning shares of stock issued to him individually. Wife claimed the stock passed to her under the residuary clause of Husband's will. However, Children asserted that the shares passed to them as beneficiaries of trusts claiming that, due to a mistake, the shares were issued to him personally rather than in his capacity as the trustee of the trusts. The trial court agreed with Children.

The appellate court affirmed. The court explained that merely because the shares did not indicate that Husband held them in his capacity as a trustee did not mean that the facts and circumstances could not show that he actually held them in a representative capacity. The court carefully examined written documents which bolstered Children's claim that the shares were supposed to have been issued to Husband in his capacity as a trustee. For example, Husband amended and restated the trusts after the alleged transfer. There would have been no reason to amend the trusts if the trusts were not receiving the shares as new trust property.

Moral: Property held in a seemingly personal capacity can later be shown to be held in the capacity as a trustee if there are sufficient facts and circumstances showing that the property was actually intended to be held in a representative capacity.

E. Fiduciary Duty

Jones v. Wells Fargo Bank, N.A., 858 F.3d 927 (5th Cir. 2017).

Beneficiary sued Trustee for breach of fiduciary duty in state court and Trustee removed the case to federal court. The district court dismissed all of Beneficiary's claims except for one which arose out of the trustee's nonsuiting a case against an inspector for not competently performing a pre-purchase inspection of a house which the trust was purchasing for Beneficiary. The jury found that a breach occurred but determined that the lawsuit had no value. However, the jury awarded damages on a theory not pleaded, that is, that the trustee should have nonsuited the case sooner once it became clear that the trustee would not prevail against the inspector. The jury then awarded damages and the trustees appealed.

The court reversed finding in favor of the trustees. The court explained that because Beneficiary did not plead the claim and Trustee never consented to try the unpleaded claim, it

was improper for the court to award damages on the theory that Trustee breached for not non-suiting the case earlier. The court also affirmed the district court's rejection of Beneficiary's other claims because they were barred by the Texas statute of limitations on breach of fiduciary duty claims.

Moral: A beneficiary should ascertain the theories behind a claim for breach of duty and plead them in a timely manner.

F. Trustee Removal

Aubrey v. Aubrey, 523 S.W.3d 299 (Tex. App.—Dallas 2017, no pet. h.).

Remainder Beneficiary sought to remove Trustee for breach of fiduciary duty and self-dealing. Trustee responded that Remainder Beneficiary had previously brought many lawsuits unsuccessfully against Trustee and requested that the court deem Remainder Beneficiary a vexatious litigant under Tex. Civ. Prac. & Rem. Code §§ 11.001-.104 and award sanctions. The trial court granted both requests. Remainder Beneficiary appealed.

The appellate court first rejected Trustee's assertion that Remainder Beneficiary lacked standing to seek removal. The court explained that a remainder beneficiary *is* a beneficiary and thus has standing to seek Trustee's removal as an interested person under Trust Code § 111.004 defining "interested person" and Trust Code § 113.082 granting interested persons that right to petition for the removal of a trustee.

Nonetheless, the facts were sufficient to support the trial court's determination that Remainder Beneficiary was a vexatious litigant. The court agreed with Trustee that the trial court did not abuse its discretion when it concluded that there was no reasonable probability that Remainder Beneficiary could prevail and that the other requirements for vexatious litigant status were satisfied. Although the court agreed that sanctions against Remainder Beneficiary were warranted, the court held that the trial court abused its discretion in determining the amount of the award and thus remanded the determination of the amount of sanctions to the trial court.

Moral: Both current and remainder beneficiaries have standing to seek a trustee's removal. However, a beneficiary should not use removal actions as a means of hassling the trustee when the trustee has not actually breached fiduciary duties.

VI. OTHER ESTATE PLANNING MATTERS

A. Voiding Marriage After Death

Estate of Matthews III, 510 S.W.3d 106 (Tex. App.—San Antonio 2016, pet. denied).

Husband and Wife were married. Approximately two months later, Husband committed suicide. Although Husband did not leave Wife any property in his will, instead leaving his estate to his Father, Wife claimed homestead rights. Originally, the dispute was resolved by a Rule 11 Settlement Agreement but the court later set it aside as Wife was not in compliance with the Agreement. Father then succeeded in convincing the jury to void the marriage on the ground that Husband lacked the capacity to consent to the marriage due to his physical and mental health issues, especially given the fact that Wife was Husband's former in-home health aide.

The appellate court affirmed. The court first explained that there was sufficient evidence to set aside the settlement agreement because Wife intentionally made deceptive and fraudulent promises to Father to induce him into signing the agreement.

The court next addressed Wife's claim that Father lacked standing to set aside the marriage because he was not an interested person as Estates Code § 123.102 requires for a person to have standing to set aside a marriage after one of the spouses has died. Although Father brought the action in his capacity as the executor of Husband's will (a non-interested capacity under Estates Code § 22.018), Wife failed to raise the issue timely and thus it was deemed waived.

The court next reviewed the evidence which showed that Husband had multiple sclerosis, depression, post-traumatic stress disorder, and attention deficit hyperactivity disorder. In addition, Husband was a frequent abuser of marijuana and alcohol. Although there was also evidence showing that Husband had capacity, the jury's verdict was supported by legally sufficient evidence and the jury's determination was not clearly wrong or manifestly unjust.

Moral: A person using the "bad spouse" statute (Estates Code § 123.102) to annul a marriage after a spouse's death should bring the action in a capacity that clearly makes the person qualify as an "interested person" to avoid having litigation focused around procedural issues rather than the issue of whether the person actually had capacity to enter into the marriage.

B. Joint Accounts

Hare v. Longstreet, 531 S.W.3d 922 (Tex. App.—Tyler 2017, no pet. h.).

The signature card contained an "X" in a box labeled "MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP" and both the deceased and surviving joint parties initialed on the blank next the box. Both the trial and appellate courts held that this indication was insufficient to create survivorship rights in the surviving party.

The Tyler Court of Appeals explained that the signature card lacked language substantially similar to the language required by Estates Code § 113.151(b) ("On the death of one party to a joint account, all sums in the account the date of the death vest in and belong to the surviving party as his or her separate property and estate."). Merely stating that the account has the right of survivorship is insufficient to make it so.

Moral: I think that most people would assume that checking the box next to a phrase that said "with right of survivorship" would be sufficient to create survivorship rights. Thus, estate attorneys must have "eyes-on" all signature cards and account contracts to ascertain whether the accounts of both their living and deceased clients actually have the survivorship feature.