CASE LAW UPDATE:

INTESTACY, WILLS, PROBATE, AND TRUSTS

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E-TEXAS ADVANCED PARALEGAL SEMINAR

PARALEGAL DIVISION, STATE BAR OF TEXAS

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EDUCATION

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

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Regent and Academic Fellow); American Bar Foundation; Texas Bar Foundation; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
Visiting Professor (virtual), University of Illinois College of Law (2017)

SELECTED HONORS

Order of the Coif
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7th ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2020); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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I. INTRODUCTION

This article discusses recent 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 September 7, 2020 (KeyCite service as provided on WESTLAW). The discussion of each case concludes with a moral, i.e., the important lesson to be learned from the case. By recognizing situations that have led to time consuming and costly litigation in the past, judges may increase the likelihood of their decisions being upheld on appeal.

II. INTESTATE SUCCESSION

No cases to report.

III. WILLS

A. Specific Gifts

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

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

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

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

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

B. Interpretation and Construction

1. "Personal Effects"

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

Testatrix's self-prepared will left her "personal effects" to her nephew-in-law and did not contain

a residuary clause. The nephew-in-law asserted that "personal effects" included cash, receivables, and oil and gas interests and royalties. Instead, testatrix's heirs asserted that this property passed to them via intestacy and the trial court agreed. The court also found that the nephew-in-law who was serving as the independent executor misapplied estate property and removed him under Estates Code § 404.003(2). Nephew-in-law appealed.

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

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

2. "Personal Property"

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

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

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

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

3. Right of First Refusal

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

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

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

diminution in value to the remainder of the property." *Id.* at 878.

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

4. Devise of Named Property

ConocoPhillips Co. v. Ramirez, 599 S.W.3d 296 (Tex. 2020).

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

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

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

C. Will Contests

1. Undue Influence

In re Estate of Scott, 601 S.W.3d 77 (Tex. App.—El Paso 2020, no pet. h.).

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

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

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

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

2. Undue Influence – Another Case

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

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

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

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

IV. ESTATE ADMINISTRATION

A. Standing

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

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

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

B. Jurisdiction

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

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

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

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

C. Appeal

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

A disgruntled successor executor unsuccessfully attempted to remove the primary independent executor. On appeal, the court held it lacked jurisdiction to hear the appeal because the trial court's judgment was not final. The court explained that the disgruntled successor executor's motion for removal also included

claims for attorney's fees, costs, and expenses. The trial court did not address these claims and thus the order refusing to remove the executor did not dispose of all the issues in this phase of the probate proceedings.

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

D. Determination of Heirship

1. Standing

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

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

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

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

2. Statute of Limitations

Estate of Trickett, No. 13-19-00154-CV, 2020 WL 2487564 (Tex. App.—Corpus Christi-Edinburg May 14, 2020, no pet. h.).

Intestate died in 1972. When disputes arose over the ownership of Intestate's property, the trial court examined the evidence and the report of the attorney ad litem. Thereafter, the court issued a judgment declaring Intestate's heirs.

On appeal, the claim was made that the statute of limitations prevented the court from determining heirship. The appellate court began its analysis by explaining that Estates Code § 202.0025 which provides that there is no statute of limitations for heirship determinations applies only if the intestate died on or after January 1, 2014. The court next examined Texas caselaw which had previously indicated that there is no express limitations period for heirship determinations. But, that caselaw was not determinative because the conclusion was that heirship determinations are governed by the default four year period. The court also rejected the argument that the heirship action was to recover real property, that is, non-participating royalty interests. Instead, the court explained that the lawsuit was to "declare the identity of Decedent's heirs and the respective shares and interest of each in the Decedent's estate" rather than to recover any specific real property.

The court focused on a technical difference between a trespass to try title action in which the plaintiff seeks to recover specified real property by showing the superiority of the plaintiff's title which is not covered by the four year statute of limitations period and a quiet title suit in which the plaintiff relies on the weakness of the defendant's title. Because the alleged heirs in this case were seeking to set aside allegedly voidable deeds, the action was subject to the four year limitations period.

The court also held that the cause of action accrued in 1972 because the plaintiffs were aware that Intestate was married and should have known that upon her death, the property would vest in her putative spouse. And, even if they were unaware of the existence of the royalty interests, deeds filed in 1964 provided constructive notice of Intestate's real property ownership.

Comment: The court did not discuss elements of the legislative history of Estates Code § 202.0025 which provided that the section is "intended to

clarify current law" and that "an inference may not be made regarding the statute of limitations for a proceeding to declare heirship filed before the effective date." Thus, the effective date of statute providing for no statute of limitations was may be debatable based on date of filing but perhaps not based on date of death.

Moral: If an heir wishes to establish heirship for an intestate who died prior to January 1, 2014, the heir should couch the lawsuit as a trespass to try title action to avoid being barred by the four year statute of limitations period.

E. Small Estate Affidavit

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

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

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

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

F. Temporary Administration

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

The testator's will was admitted to probate as a muniment of title. Subsequently, tort actions were filed against the testator's estate. In addition, an unhappy heir filed a will contest along with a request for the appointment of a temporary administrator. The court granted the request. Later, the court approved the temporary administrator's settlement of the tort claims over the objection of one claimant who appealed.

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

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

G. Creditors

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

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

the guardianship proceeding. After decedent died, the creditor submitted an authenticated claim for the same debt.

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

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

H. Community Property Transfer by Surviving Spouse

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

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

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

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

I. Estate Property

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

Four months after Decedent's death, his son who is not a beneficiary of the will, filed a deed which purported to transfer a parcel of community property from Decedent to him. Decedent signed the deed but it was not notarized until after Decedent's death. Two years later, Decedent's surviving spouse and sole beneficiary deeded her interest in this property to the son. Accordingly, the son claimed that he was now the owner of the land and the administrator sought to void the deed. The probate court declared that the Decedent's deed was "void, invalid, and of no legal effect." The son appealed.

The appellate court affirmed. Son claimed that the late notarization would not make the deed

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

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

V. TRUSTS

A. Standing

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

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

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

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

B. Trust Intent

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

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

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

C. Beneficiaries

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

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

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

D. Modification

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

The settlor expressly required the trustees to agree on all decisions. Unfortunately, they were combatants in other litigation and were unable to agree on several trust matters. One trustee

obtained an order from the probate court to make various modifications to the trust. The other trustee appealed.

The appellate court reversed. The court explained that the trial court improperly rejected the other trustee's request for a jury trial because the question of whether the trust needed to be modified was a fact question. Trust Code § 115.012 provides that normal civil procedure rules and statutes apply to trust actions. These rules and statutes, along with the Texas Constitution, guarantee the right to a jury trial. The trustee made a timely request for a jury trial (the court held the failure to pay the jury fee did not forfeit the right to claim error). The court rejected the claim that Trust Code § 112.054 precludes a jury trial on modification issues because it provides that the "court shall exercise its discretion" in determining the modifications. The court examined the statute and found no reasonable argument that jury trials were precluded on fact issues. Instead, the court is to use those factual findings in framing trust modifications. The court also rejected arguments that (1) the grounds for modification were established as a matter of law so that the lack of a jury was a harmless error and (2) the trustee lacks standing as the trustee was not a beneficiary of the trust. The court then held that the probate court abused its discretion in denying the trustee's demand for a jury trial and reversed. Accordingly, the court did not determine whether the probate court's modifications were proper under Trust Code § 112.054.

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

E. Homestead and "Qualifying Trust"

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

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

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

F. Fiduciary Duties

1. Statute of Limitations

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

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

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

2. To Contingent Beneficiary

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

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

The court also held that the contingent beneficiaries did have standing to complain about the non-settlor co-trustee's conduct under Property Code § 115.011 because they are interested persons as defined by Property Code § 111.004(7). However, the contingent beneficiaries lack standing to complain about the settlor's decisions made in his capacity as the settlor of the trust not to place property in the trust. The property subject to dispute was never transferred into the trust and thus the co-trustee could not have fiduciary duties with regard to that property.

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

G. Trust Protectors

Ron v. Ron, No. 3:19-CV-00211, 2020 WL 1426392 (S.D. Tex. Feb. 4, 2020), adopted by *Ron v. Ron*, 3:19-CV-00211, 2020 WL 1700320 (S.D. Tex. Mar. 23, 2020).

Ex-wife claims that during marriage, the ex-husband, the trustee, improperly transferred community property into an irrevocable trust she created and that the trust protector assisted him in making the transfers. In addition, the trust protector, using the authority granted to him as the protector, appointed the ex-husband as a beneficiary of the trust. Ex-wife claims, among other things, that the trust protector breached his fiduciary duties to her.

The court examined the ex-wife's claim that a formal fiduciary relationship existed between her in her capacity as the trust's settlor and the trust protector. The court agreed that the protector was a fiduciary because of express language in the trust so providing. However, those fiduciary duties are owed to the trustee and beneficiaries, not the settlor. The court was not swayed by the terms of the trust which indicated that the protector's duties were to achieve her "objectives as expressed by the other provisions of my estate plan."

Moral: Unless the terms of the trust provide otherwise, a trust protector does not owe fiduciary duties to the settlor of an irrevocable trust who is not also a beneficiary.

H. Trustee Removal

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

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

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

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

I. Successor Trustee

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

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

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

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

J. Attorney's Fees

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

The trial court ordered Beneficiary to reimburse the trust for over one-half million dollars in attorney's fees Trustee expended in successfully defending Beneficiary's claims of breach of fiduciary duty. The appellate court agreed with Beneficiary that it was not just and equitable for her to be required to reimburse the trust for these fees. Trustee had repeatedly engaged in self-dealing which lead to Beneficiary's lawsuit. "[A] trustee is not entitled to expenses related to litigation resulting from the fault of the trustee." Note that Trustee prevailed on the breach duty claims not because the court found Trustee did not breach any duties but rather because Beneficiary did not timely bring her claim causing it to be barred by the statute of limitations.

VI. OTHER ESTATE PLANNING MATTERS

A. Tenancy in Common vs. Joint Tenancy

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

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

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

Does "survivor" refer to which of the seven grantors outlives the other grantors or does it

refer to the grantor's heirs as being the beneficiaries of the reservation?

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

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

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

B. Community Property Survivorship Agreement

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

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

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

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

C. Annuities

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

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

The appellate court reversed. The court explained that although the annuity contract clearly explained that upon the death of the first spouse, payments would be reduced, there was no express provision requiring that a surviving spouse notify the annuity company about the deceased spouse's death. Although it would have been reasonable to imply this obligation, the

court refused to do so. The court explained that implied covenants are not implied even if doing so would make the contract fair or that the contract would operate in an unjust manner without the implication. Likewise, the court refused to imply an obligation to repay amounts received in excess of the contract amounts. Basically, the court blamed the annuity company for not including an express provision requiring notification. Plus, the court explained, the annuity company should monitor death records to ascertain on its own if an annuitant has died.

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

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