TEXAS CASE LAW UPDATE

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ESTATE PLANNING & PROBATE LAW SECTION SEMINAR

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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)

PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: The American College of Trust and Estate Counsel (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; Texas State Bar Association

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)
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)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Classes taught include Estate Planning, Wills & Estates, Trusts, Property, U.C.C.

SELECTED HONORS AND ACTIVITIES

Order of the Coif
Hispanic Law Students Association and Black Law Students Association Professor of the Year Awards (2008)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech University Chapter) (2007) (2006)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (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)
Outstanding Faculty Member – Delta Theta Phi (St. Mary's University chapter) (1989)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Outstanding Professor Award – Phi Delta Phi (St. Mary's University chapter) (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

SELECTED PUBLICATIONS

Author and co-author of numerous law review articles, books, and book supplements including WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (4th ed. 2007); TEACHING MATERIALS ON ESTATE PLANNING (3d ed. 2005); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (5th ed. 2006); TEXAS WILL MANUAL SERVICE; 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (1996); 19-19A WEST'S LEGAL FORMS — REAL ESTATE TRANSACTIONS (2002); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Estate Plans: The Durable Power of Attorney For Property Management*, 59 TEX. B.J. 314 (1996); *Estate Plans: Enhancing Estate Plans with Multiple-Party Accounts*, 57 TEX. B.J. 360 (1994); *Enhancing Self-Determination Through Guardian Self-Declaration*, 23 IND. L. REV. 71 (1990); *Statutory Will Methodologies — Incorporated Forms vs. Fill-in Forms: Rivalry or Peaceful Co-Existence?*, 94 Dick. L. Rev. 231 (1990); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990); *The Will Execution Ceremony — History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1988); *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).

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Texas Case Law Update

I. INTRODUCTION

This article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The article reviews approximately twenty-five recent cases. The reader is warned that not all recent cases are presented and not all aspects of each cited case are analyzed. You must read and study the full text of each case before relying on it or using it as precedent. Writ histories were current as of March 5, 2009 (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 which 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.

For summaries of cases decided after the closing date for this article, please visit my website at http://www.ProfessorBeyer.com and click on the "Texas Case Summaries" link.

II. INTESTACY

No appellate cases to report.

III. WILLS

A. Formalities

1. Attested Will

In re Estate of Pruitt, 249 S.W.3d 654 (Tex. App.—Fort Worth 2008, no pet. h.).

Testatrix left nominal amounts in her will to her estranged children and the bulk of her estate to Beneficiaries. The evidence revealed that the witnesses attested to the will *before* Testatrix signed the will. The trial court determined that this "backward" order was fatal to the validity of the will and granted a summary judgment that Testatrix died intestate. Beneficiaries appealed.

The appellate court reversed. The court examined Texas cases. The older cases adopted a strict rule that the attestation must occur after the testator signs the will because witnesses cannot attest to something that has not yet happened. The modern cases, however, adopt a contemporaneous transaction approach so that if the execution and attestation occur at the same time and place and form part of the same transaction, it does not matter in which order the events occur. The court adopted this latter approach. After studying the evidence, the court determined that there was a genuine issue of material fact and thus held that the trial court erroneously granted summary judgment.

Moral: The testator should execute the will before the witnesses attest to avoid disputes based on the temporal order of these events.

2. Nuncupative Will

In re Estate of Alexander, 250 S.W.3d 461 (Tex. App.—Waco 2008, pet. denied).

After the probate court opened an intestate administration of Decedent's estate, Beneficiary alleged that Decedent made a nuncupative will. Both the probate and appellate courts held that Decedent did not speak the alleged testamentary words while in his "last sickness" as required by Probate Code § 65. The court explained that the courts have consistently interpreted this statutory phrase as meaning that the testator must be "in extremis," that is, on one's deathbed, to make a valid nuncupative will. The facts showed that although Decedent was hospitalized when he spoke the testamentary words, he was later released and did not die until over two weeks

later. Merely suffering from a chronic illness at the time of speaking the words is not enough.

Note: As of September 1, 2007, Texans may no longer make nuncupative wills. Acts 2007, 80th Leg., ch. 1170, § 5.05 (repealing Probate Code §§ 64 & 65).

Moral: Suffering from a chronic condition at the time of speaking testamentary words is insufficient to satisfy the "last sickness" requirement of a nuncupative will unless the decedent spoke the words at the very last stage of the illness.

B. Lost Will

1. Revocation Presumption Rebutted

In re Estate of Turner, 265 S.W.3d 709 (Tex. App.—Eastland 2008, no pet. h.).

The trial court admitted a photocopy of Testator's will to probate even though the original will could not be found after what Beneficiary claimed was a diligent search. The appellate court affirmed.

The court recognized that "[w]hen the original will cannot be located and the will was last seen in the testator's possession, a presumption arises that the testator destroyed the will with the intent of revoking it." *Id.* at 712. The proponent of the will must overcome the revocation presumption by a preponderance of the evidence. The court concluded that the evidence submitted was sufficient to rebut the presumption. For example, Sister (sole beneficiary) testified seeing the will one week before Testator's death and Girlfriend saw it on the day of Testator's death. Girlfriend testified that Testator showed her his will, returned it to its usual storage location, watched television for 1.5 hours, went to his bedroom, and fatally shot himself. Testator's disinherited siblings and many other people had access to Testator's house shortly after his death. In addition, there was evidence of a close relationship between Sister and Testator and no evidence of recent discord.

Moral: The presumption of revocation which arises when the original will cannot be found may be rebutted by a preponderance of the evidence.

2. Revocation Presumption Not Rebutted

In re Estate of Wilson, 252 S.W.3d 708 (Tex. App.—Texarkana 2008, no pet. h.).

After Husband died, Wife was successful in probating Husband's will even though she could not locate the original will. Son (Wife's step-son) contested the probate of the will claiming that the evidence was legally insufficient to rebut the presumption of revocation that arises when the original will cannot be located.

The appellate court agreed with Son. The court began its analysis by recognizing that when a will was last known to be in the testator's possession and cannot be located after death, a presumption of revocation arises which can be rebutted by a preponderance of the evidence. The court also explained that "the testator's continued affection for the chief beneficiary [of the will], without evidence tending to show the decedent's dissatisfaction with the will or any desire to cancel or change the will, is sufficient to rebut the presumption of revocation of a missing will." *Id.* at 713.

The court then examined the record and found it lacking of any direct evidence of why the original will could not be located. Wife's mere statement that as far as she knew and believed, Husband had not revoked the will is not evidence of the asserted facts. In addition, there was no evidence of Husband's continued affection for Wife or that Husband had continued to recognize the will's validity. Accordingly, the court held that the evidence was legally insufficient to rebut the revocation presumption and remanded the case to the trial court.

Note: This case also involved several procedural issues such as the requirements of a restricted appeal, when evidence is considered legally insufficient, and proper extent of a remedy (render or remand).

Moral: Original wills need to be protected so that they are available at the time of probate and

are not inadvertently lost, destroyed, or located by disgruntled heirs.

C. Undue Influence

In re Estate of Henry, 250 S.W.3d 518 (Tex. App.—Dallas 2008, no pet. h.).

Testatrix's first will left her property to an inter vivos trust which included both her children and her step-children as beneficiaries. Her second will, however, left her property outright to her husband. The probate court admitted the second will to probate. Testatrix's children appealed claiming this will was invalid because Testatrix executed it while under undue influence.

The appellate court affirmed holding that there was insufficient evidence to show that Testatrix's second will was the result of undue influence. Testatrix's children presented evidence which they claimed proved undue influence such as statements that Testatrix was uncomfortable with signing a new will and that her husband (now deceased) said he would divorce her if she did not sign the new will. However, this evidence was counterbalanced by testimony of Testatrix's attorneys that she never indicated that she was being coerced and that Testatrix even sought the advice of another attorney. In addition, Testatrix's husband was not present when she signed the new will. The appellate court then concluded that the probate court's finding was not against the great weight and preponderance of the evidence to be clearly wrong and unjust.

Moral: Strong evidence is needed to overturn a probate court's finding that undue influence did not cause a testator to sign a will.

D. Disclaimer

1. Knowledge of Property Disclaimed

McCuen v.Huey, 255 S.W.3d 716 (Tex. App.—Waco 2008, no pet. h.).

In an extremely complex fact pattern involving mineral royalty interests which is fortunately not particularly relevant for our purposes, the appellate court held that "to be effective, a disclaimer of an inheritance is enforceable against the maker only when it has been made with adequate knowledge of that which is being disclaimed." *McCuen*, at 731. By noting the case of *Nw. Nat'l Cas. Co. v. Doucette*, 817 S.W.2d 396 (Tex. App.—Fort Worth 1991, writ denied), the court acknowledged that this case is significantly different from cases which hold that a disclaimer may be effective even if the disclaimant is mistaken not about what property is being disclaimed, but rather about to whom the disclaimed property would pass. Accordingly, the court held that the alleged disclaimer in this case was ineffective because the disclaimant did not knowingly disclaim the disputed royalty interests.

Moral: Disclaimers should be carefully drafted to enumerate the property being disclaimed to avoid a later argument that the disclaimant did not understand what property was being disclaimed.

2. Validity of Disclaimer

In re Estate of Boren, 268 S.W.3d 841 (Tex. App. – Texarkana 2008, pet. denied).

Beneficiaries signed disclaimers of all property to which they would be entitled from Testatrix's estate *prior to* her death. On the same day that Testatrix died, Beneficiaries filed revocations of those disclaimers. The trial court held that the disclaimers were effective.

The appellate court reversed. The court explained that the disclaimers were not filed in accordance with Probate Code § 37A but instead were filed in the papers of Testatrix's spouse's guardianship. Filing in the wrong place is both against the letter of the law and the policy of the filing requirement which is to give notice to creditors and prospective purchasers. Because Beneficiaries revoked their disclaimers before they were properly filed, their attempt to revoke them was successful.

Moral: A disclaimer should be filed in the appropriate location as mandated by Probate Code § 37A.

E. Settlement Agreements

In re Estate of Webb, 266 S.W.3d 544 (Tex. App.—Fort Worth 2008, pet. filed).

Will and testamentary trust beneficiaries reached a settlement with respect to various will and trust matters. Beneficiaries then sought to modify the trust under Property Code § 112.054 to bring it into compliance with their settlement. Trustee objected claiming that he was not a party to the settlement. The trial court held that Trustee was not a necessary party to the modification action and granted Beneficiaries' motion to strike the Trustee's intervention in the case.

The appellate court reversed. The court determined that Trustee was a necessary party to the settlement as well as a necessary party to any action to modify the trust. Property Code § 115.011 provides that the trustee is a necessary party if the "trustee is serving at the time the action is filed." The court explained that under Probate Code § 37, title to property vests in the beneficiary immediately upon a testator's death unless the will provides otherwise. The testator's will did not provide otherwise and thus when the testator died, the trustee, as a beneficiary of the property albeit it trust, had title to the property. Thereafter, Trustee accepted the trust and thus he was serving as a trustee making him a necessary party to the action. Likewise, because Trustee was a beneficiary of the will, a family settlement agreement would not be binding upon him without his consent.

Moral: A testamentary trustee is a necessary party to (1) family settlement agreements and (2) actions involving the trust.

IV. ESTATE ADMINISTRATION

A. Venue

In re Graham, 251 S.W.3d 844 (Tex. App.—Austin 2008, no pet. h.).

Decedent was domiciled in Travis County at the time of her death. Probate Code § 6 provides that venue is mandatory in the county where the deceased resided if the deceased has a domicile of fixed place of residence in Texas. Nonetheless, Decedent's will was filed for probate in Tom Green County and the applicants swore that Decedent was domiciled in Tom Green County. The court believed the applicants and the will was admitted to probate in Tom Green County. When subsequent litigation occurred, one of the applicants moved to transfer the case to Travis County because Decedent was domiciled there at the time of death. The trial court denied the motion and the applicant requesting the transfer sought a writ of mandamus to compel the transfer.

The appellate court agreed with the applicant and conditionally granted the writ of mandamus. The court rejected arguments that the motion to transfer was partial or was a collateral attack. Instead, it was a motion to transfer the entire probate case and thus was a direct challenge to the venue determination made in the order admitting the will to probate. The court also rejected the argument that under Probate Code § 8(c)(1), the court could not transfer the case for want of venue because the order admitting the will to probate was a final decree. The court explained that an order admitting a will to probate is not a final decree.

The court noted that although one of applicants had originally signed the Proof of Death swearing that Decedent was domiciled in Travis County, such action did not act as a judicial admission as this applicant was not a party to the proceeding at the time he made the statement. In addition, a statement about a person's domicile is a legal conclusion which a non-attorney is unskilled to make and he did not have legal counsel when he made the statement.

Finally, the court conducted a careful review of the evidence regarding domicile and determined that "[t]he evidence that [Decedent] slept, gardened, entertained guests, stored her personal possessions, and generally conducted day-to-day activities in Travis County conclusively establishes residence in fact and intent to the make the residence her home." *In re Graham* at 851.

A dissenting judge believed that there was sufficient evidence to support the trial court's determination that venue was in Tom Green County, especially because the applicant's motion came 1.5 years after the court admitted the will to probate and only because litigation had erupted between the original applicants.

Moral: Probate Code § 6 is a mandatory venue provision and thus it is essential to bring probate actions in the correct county to reduce the likelihood of later procedural disputes based on lack of venue.

B. Removal of Executor

1. Gross Mismanagement

In re Roy, 249 S.W.3d 592 (Tex. App.—Waco 2008, pet. filed).

Testatrix's will named one of her four children as the Independent Executor of her estate. The trial court removed him from office for various breaches of duty. For example, he signed leases for approximately half of the rent than Testatrix had been receiving. Once the children discovered this fact, they demanded an accounting and then objected to various items contained therein. The trial court reviewed the evidence and determined that he had violated his duties in a variety of ways including engaging in acts of self-dealing with regard to the rent-reduced leases and grossly mismanaging estate property. Accordingly, the trial court removed him from office and appointed the successor as named in Testatrix' will. Independent Executor appealed.

The appellate court affirmed. The court began its analysis by reviewing Probate Code § 149C which provides the grounds for removing an independent executor. The court examined the evidence and determined that it was sufficient to support the trial court's finding that Independent Executor was guilty of gross misconduct or gross mismanagement in the performance of his duties which is a ground for removal under § 149C(a)(5).

The court upheld the trial court's denial of an award of Independent Executor's fees in defending the removal action because he did not defend his action for removal in good faith. The court agreed that it was proper for the trial court to appoint the successor executor as named in Testatrix's will because there was no evidence that he was disqualified under the Probate Code § 78.

Moral: An independent executor should not breach fiduciary duties by self-dealing and mismanaging estate property.

2. On Court's Own Motion

In re Estate of Washington, 262 S.W.3d 903 (Tex. App.—Texarkana 2008, no pet. h.).

The trial court on its own motion removed the administrator for failing to file required accountings under Probate Code § 222(b)(2). The appellant did not allege that the trial court did not have sufficient evidence to support the removal. Instead, the appellant claimed that the petitioners lacked standing or that limitations prevented them from intervening in the action. The court explained that the trial court has the authority to remove the administrator sua sponte and thus the issues of standing and limitations were irrelevant.

Moral: The court has the ability to remove an administrator on its own motion. If the removed administrator appeals, evidence showing an abuse of discretion is needed to set aside the removal.

C. Inventory

In re Estate of Walker, 250 S.W.3d 212
(Tex. App.—Dallas 2008, pet. denied).

Originally, Executrix filed an inventory valuing Testatrix's estate at over $5 million. Thereafter, Executrix filed an amended inventory showing the assets of the estate as being only approximately $180,000 because Testatrix had placed assets originally shown on the inventory into an inter vivos trust over a decade prior to her death. A group of Testatrix's family members then filed suit under Probate Code § 258 claiming that the amended inventory was erroneous asserting that Testatrix's trust was invalid for failure to identify the trust property and thus the amended inventory omitted property that was actually still in Testatrix's probate estate. After reviewing the evidence, the probate court ruled that the amended inventory was neither erroneous nor unjust. The family members appealed.

The appellate court affirmed. First, the court recognized that there was no Texas case stating the standard of review the appellate court should apply when reviewing an appeal of a complaint under Probate Code § 258. The court analogized this situation to that of removal of a personal representative and determining whether a person is unsuitable to serve as a personal representative. Accordingly, the court held that the probate court's order would be reviewed under an abuse of discretion standard and would be overturned only if the court acted "in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Walker* at 214. Second, the court reviewed the evidence and determined that the property description in the trust was reasonably certain and thus the probate court did not abuse its discretion.

Moral: The appellate court will review an appeal of a court's finding of the correctness of an inventory under Probate Code § 258 using the abuse of discretion standard.

D. Exempt Property

In re Estate of Rhea, 257 S.W.3d 787
(Tex. App.—Fort Worth 2008, no pet. h.).

After Wife died, Executors removed virtually all of the personal property from the marital home including their bed, bedding, towels, dishes, cooking utensils, the refrigerator, toilet paper, boxes of tissue, and used bars of soap. Thereafter, Husband requested the return of some of the personal property as exempt under Probate Code § 271 or $5,000 in lieu thereof under § 273. The trial court granted Husband's request and also allowed him to keep Wife's wedding ring for the rest of his life as part of the exempt property. Executors appealed stating that Husband could not get both the allowance and keep the ring as exempt property.

The appellate court rejected Executor's argument. The court explained that if any exempt property is not found among the decedent's effects, the trial court is required to make a reasonable allowance in lieu thereof not exceeding $5,000. "In other words, the trial court must make an allowance for those exempt items that it cannot set aide because they are not on hand. If some exempt items are on hand, it must set those aside for the surviving spouse and award an allowance in lieu of those exempt items that are not on hand." *Rhea* at 792.

With regard to the wedding ring, the court recognized when an estate is solvent as in this case, the exempt personal property passes to the rightful heirs or beneficiaries when the administration terminates. Probate Code § 278. Thus, the court lacked authority to grant Husband a life estate in the ring. Husband may retain the ring until the estate is closed. (Note that Husband also claimed ownership to the ring as community property but the trial court did not rule on the ring's ownership. Thus the appellate court declined to rule on this issue.)

Moral: A court may award both exempt personal property and, if the value of this property does not reach the monetary limits, an allowance in lieu thereof up to $5,000.

E. Family Allowance

1. Determination of Amount

In re Estate of Rhea, 257 S.W.3d 787 (Tex. App.—Fort Worth 2008, no pet. h.).

The lower court granted Husband a family allowance of $20,000 after Wife's death under Probate Code § 286. The executors of Wife's estate appealed claiming that Husband had separate property sufficient for his own support and thus was not entitled to a family allowance.

The appellate court affirmed. The court explained that the family allowance is determined by considering "the whole condition of the estate during the first year after the spouse's death, the necessities of the surviving spouse, and the circumstances to which he or she has been accustomed." *Rhea* at 791. In this case, Wife's estate was valued at over $800,000 and the executors had removed virtually all personal property from the marital home, much of which was necessary for everyday life such as a bed, bedding, furniture, dishes, and the refrigerator. Husband's income was expected to exceed his expenses by $1,136 per month but this difference would not be enough to replace the removed items to bring him back to the circumstances he had in the year before Wife's death.

Moral: The family allowance is available not just to provide necessities but to provide the standard of living to which the surviving spouse was accustomed while both spouses were alive.

2. Consideration of Surviving Spouse's Separate Property

Estate of Wolfe, 268 S.W.3d 780 (Tex. App.—Fort Worth 2008, no pet. h.).

Surviving Spouse requested a family allowance of $132,444. Executor and Beneficiary objected claiming that she had sufficient separate property and thus was not entitled to a family allowance under Probate Code § 288. They explained that Surviving Spouse received life insurance proceeds of almost $300,000 as well as $120,000 as the beneficiary of IRA accounts and $85,000 in income. Nonetheless, the trial court approved a family allowance of $126,840.

The appellate court held that the trial court's award was justifiable and not an abuse of discretion. With regard to the life insurance proceeds, the court explained that because the policy was the couple's community property prior to Deceased Spouse's death, the proceeds are not to be considered as the Surviving Spouse's separate property for family allowance calculation purposes. The court then indicated that the same logic applied to the IRA benefits and Surviving Spouse's income.

Moral: A surviving spouse may successfully claim a family allowance even if the surviving spouse actually has sufficient property on hand to cover one year of maintenance as long as that property was not the surviving spouse's separate property *prior* to the deceased spouse's death. Note that this result has the effect of sacrificing the deceased spouse's intent to provide for will beneficiaries in favor of a surviving spouse who does not actually need the funds for his or her maintenance.

F. Specific Performance

Wells v. Dotson, 261 S.W.3d 275 (Tex. App.—Tyler 2008, no pet. h.).

Decedent entered into a lease with an option to purchase with Lessee. After Decedent's death, Lessee notified Executor that he wanted to exercise the option to purchase. Decedent's heirs threatened to sue Executor if he deeded the property to Lessee and thus Lessee sued for specific performance of the option provision of the contract under Probate Code § 27. The trial court granted summary judgment in favor of Lessee.

The appellate court reversed. The court explained that § 27 applies only "to circumstances in which a person has sold property or has entered into a bond or other written agreement to make title to that property and dies without having conveyed title." *Id.* at 280. Because the granting of an option is not the sale of property or an agreement to sell, Lessee's

claim for specific performance did not fall within the purview of § 27.

Moral: Enforcement of an option contract after the death of one of the parties is not available under Probate Code § 27. However, enforcement of the option contract may be available on other grounds.

G. Attorney's Fees -- Unsuccessful Attempt to Probate Will

In re Estate of Henry, 250 S.W.3d 518 (Tex. App.—Dallas 2008, no pet. h.).

Proponents attempted to probate Testatrix's 1996 will. They were unsuccessful because the court decided to admit a will Testatrix executed in 2004 instead. The probate court awarded $12,000 as necessary and reasonable attorney's fees under Probate Code § 243 holding that Proponents presented the will in good faith. The proponent of the 2004 will appealed.

The appellate court affirmed. The court rejected the claim that the award was improper because Proponents did not timely file their amended pleading asking for fees and did not seek leave of court to file an amended pleading. The court determined that it was nonetheless not an abuse of discretion for the probate court to make a fee award under Probate Code § 243. Under the facts, there was adequate notice and opportunity to object to the request for fees.

Moral: A request for attorney's fees and costs under Probate Code § 243 should be made in the original pleadings or as promptly as possible thereafter to avoid a claim that the request was untimely.

H. Independent Administration

1. Appointment of Independent Executor

a. Named Executor Deemed Unsuitable

In re Estate of Gaines, 262 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.).

The person designated by Testatrix as her independent executrix probated Testatrix's will and asked to be appointed as the independent executrix. The trial court determined that she was not suitable to serve and appointed another person. The designated person appealed claiming that the court erred in disqualifying her because no motion to disqualify her or opposition to her appointment was pending before the trial court.

The appellate court affirmed. The court began its analysis with Probate Code § 78(e) which allows the court to disqualify a person from serving if the court finds that the person is "unsuitable." The court recognized that "[n]o comprehensive, discrete explanation exists delineating the attributes which make someone unsuitable." *Id.* at 56. The trial court has broad discretion to determine whether a person is unsuitable.

The court decided that the issue of the named executrix's qualifications was tried by consent when testimony on the issue was taken in court about her qualifications without objection. The court also recognized that the trial court could still have disqualified the named executrix even if an objection had been made because the Probate Code does not require the filing of a motion or opposition to disqualify an applicant before the court can find a person unsuitable.

The court then examined the evidence of the named executrix's suitability and found that the evidence was sufficient to support the trial court's decision. For example, she failed to probate the will for over three years, she attempted to get a subpoena on behalf of the estate before she was appointed as the executrix, she collected and distributed estate property without authority, and considered the interests of one beneficiary over the interests of the estate.

Moral: A court may decide a named executor is unsuitable sua sponte.

b. Named Executor Deemed Unsuitable – Another Case

In re Estate of Boren, 268 S.W.3d 841 (Tex. App. – Texarkana 2008, pet. denied).

The trial court determined that the named independent executor was unsuitable under Probate Code § 78(e). The appellate court reviewed the evidence and determined that the court did not abuse its discretion by acting in an arbitrary or unreasonable manner without reference to any guiding rules or principles. There was evidence that the named executor acted inappropriately when he was serving as the agent for the testatrix and her husband in a variety of ways such as using the principal's property, misappropriating funds, and not paying bills.

Moral: Strong evidence is needed to overturn a trial court's finding that a named executor is unsuitable.

2. <u>Creditors</u>

In re Estate of Gaines, 262 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.).

Creditor filed two authenticated unsecured claims with the Independent Executrix. Independent Executrix rejected the claims and the trial court entered orders recognizing the rejection. Creditor asserts that this was improper.

The appellate court decided that the order was merely interlocutory and thus the court lacked jurisdiction to decide the issue. Creditor could still file suit under Probate Code § 313 within 90 days of the rejection to establish her claims.

Comment: The significant part of the court's discussion is found in footnote 11. *Id.* at 62. The court decided that Probate Code § 313 *was* applicable even though this was an independent administration. The court stated that the Texas Supreme Court case of *Bunting v. Pearson*, 430 S.W.2d 470, 473 (Tex. 1968), which held that this section did not apply to an independent executor nonetheless would apply to an independent administrator. This distinction is, in my opinion, highly problematic. The *Bunting* court did not make such a distinction and the court cites no authority for its conclusion that *Bunting* does not apply to an independent administrator.

Moral: It is possible that Probate Code §§ 309, 310, and 313 still apply to independent administrators although they do not apply to independent executors.

3. <u>Closing by Operation of Law</u>

In re Estate of Teinert, 251 S.W.3d 66 (Tex. App.—Waco 2008, pet. denied).

Testator died in 1977 and his estate was handled through an independent administration in 1978. Although the executor paid creditors and distributed estate assets promptly to the beneficiaries, he never filed an affidavit to close the estate under Probate Code § 151. About thirty years later, a beneficiary petitioned the court to be appointed as the executor to resolve a dispute regarding royalty interests held by several devisees. The court refused his request, closed the estate under Probate Code § 152, and recommended that he could seek resolution of this issue in a separate legal proceeding. The beneficiary appealed.

The appellate court dismissed the appeal. The court explained that the closing methods of Probate Code §§ 151 and 152 are not exclusive. Prior cases have held that final distribution of the estate after creditors are paid results in the closing of the estate by operation of law. Thus, the trial court lacked jurisdiction to take further action with regard to Testator's estate.

A dissenting judge pointed out that no court has ever determined that all estate assets were distributed and thus the conclusion that the estate was closed as a matter of law was incorrect.

Moral: Even though not required, it would be prudent to close all independent administrations by affidavit to avoid the possibility of renewed estate administration decades later.

V. TRUSTS

A. Creation of Trust

1. Intent

Sarah v. Primarily Primates, Inc., 255 S.W.3d 132 (Tex. App.—San Antonio 2008, pet. denied).

A simian care center and a university entered into a contract under which the university transferred to the care center several monkeys and chimpanzees in exchange for the center's agreement to provide the animals with lifetime care. Considerable litigation regarding the animals' care ensued with an argument being made that the contract acted to create a trust which would then be governed by Property Code § 112.037.

Both the trial and appellate courts agreed that the contract did not create a trust. The court studied the contract in connection with Property Code §§ 111.003 (types of trusts covered by Trust Code) 112.001 (methods of trust creation), and 112.002 (requirement of trust intent). A contract which is devoid of trust intent cannot be transformed into a trust. The contract was replete with contract language and did not contain trust language such as "trust," "trustee," or "beneficiary." The court recognized that technical words are not necessary to the creation of a trust but that nonetheless this contract reflected no evidence that the original parties intended to create a trust for the care of the animals.

Moral: A court will not turn a contractual arrangement between parties into a trust just because there may be a socially valuable reason in so doing (e.g., to grant non-parties to the contract standing to enforce).

2. Property Description

In re Estate of Walker, 250 S.W.3d 212 (Tex. App.—Dallas 2008, pet. denied).

An inter vivos trust described trust property as:

> All properties whether real or personal or mixed we [the two settlors] now own or will own in our names individually or in the name of B & W investments. * * *
>
> We include all real or personal or mixed properties such as land, buildings, houses, stock, other securities, insurance policies, art, coin collections, automobiles, our companies other personal property with or without titles except that which we each maintain separately on our books and records * * *.

Both the probate and appellate courts held that this was an adequate description of trust property. The appellate court explained that there was sufficient testimony by a CPA and attorney that the precise property referenced by this description was ascertainable by consulting property and tax records.

Comment: It seems that a better argument against the validity of trust may have been whether the settlors had actually conveyed the property into the trust. Even if the property is clearly described in the trust instrument, it still must be conveyed into the trust for the trust to be effective.

Moral: Trust property needs to be carefully described in the trust instrument to avoid disputes over what is and is not included.

B. Spendthrift Provision

In re Townley Bypass Unified Credit Trust, 252 S.W.3d 715 (Tex. App.—Texarkana 2008, pet. denied).

Settlor's will created a trust for Wife with the remainder to his two sons upon her death. Before Wife died, one of the son's died. When Wife died, the issue arose as to whether the predeceased son's share would pass to his successors in interest or to Settlor's heirs via intestacy. The trust did not expressly require a son to survive to receive his interest and the trust contained a standard spendthrift provision.

Both the trial and appellate courts held that the deceased son's interest passed to his

successors in interest. The court began its analysis by examining the remainder interest granted to each son by their father's will. Because the interest was in ascertainable persons and there was no condition precedent other than the termination of the prior estate (Wife's death ending her life estate), then the remainder was vested.

The court next determined as a matter of first impression in Texas that the spendthrift clause did not prevent the predeceased son's vested remainder interest from passing under his will despite the existence of a spendthrift provision restricting the transfer of the son's interest prior to his receiving the property. The court was impressed with the reasoning of RESTATEMENT (THIRD) OF TRUSTS § 58, reporter's notes, cmt. g (2003), which provides that "[a] continuing income or remainder interest in the trust, despite the spendthrift provision, is transferable by will or intestacy." *Townley*, at 720. The court stressed that a spendthrift provision is designed "to protect the beneficiary from his or her own folly, a purpose that cannot be promoted after the beneficiary's death." *Townley,* at 721.

Moral: A trust should expressly state the disposition of trust property if a remainder beneficiary predeceases the life beneficiaries.

C. Construction and Interpretation

1. "Descendants" Generally

Paschall v. Bank of America, N.A., 260 S.W.3d 707 (Tex. App.—Dallas 2008, no pet. h.).

Settlor authorized Trustee to distribute trust principal and/or income to her grandchildren "or the descendants of a grandchild." Trustee distributed trust property to a grandchild's daughters under the belief that the great-grandchildren are current beneficiaries of the trust. The grandchild objected claiming that Trustee could make distributions to his daughters only after he dies. The trial court granted summary judgment that the great-grandchildren are eligible distributes even though their parent is still alive.

The appellate court affirmed. The court first agreed with both sides that the trust instrument was unambiguous and thus the construction of the trust is a matter of law. The court then examined the trust to determine the way in which Settlor used the word "descendants," that is, did she use the term (1) in its strict legal sense of issue of a deceased person or (2) in its popular sense as including the issue of a living person. Settlor did not include a definition of "descendants" in the trust instrument so the court examined all of the provisions of the trust. The court found it significant that in some provisions of the trust, Settlor specified whether a grandchild or descendant needed to be "living" or "dead." In the provision at issue, Settlor did not include clarifying language and thus it makes sense that she used the term "descendants" in its popular sense.

Moral: Trust instruments need to be carefully worded to anticipate as many future scenarios as are reasonably possible to avoid disputes regarding the settlor's intent.

2. "Descendants" and Adoption

In re Ray Ellison Grandchildren Trust, 261 S.W.3d 111 (Tex. App.—San Antonio 2008, pet. denied).

Settlor established a trust for the "descendants" of his children. A dispute arose as to whether descendants included the adopted children of his son who were adopted after reaching adulthood. The trial and appellate courts agreed that these individuals were not within the class of individuals who would qualify as descendants.

The appellate court began its analysis by holding that "descendants" is not an ambiguous term and recognizing that it is well established under Texas law that extrinsic evidence is not admissible when a term is unambiguous. The court also determined that merely because Settlor listed his descendants at the time he created the trust did not act to limit class membership to the listed individuals.

The court then turned its attention to whether adopted adults would be considered heirs under the intestacy statutes as they existed on the date Settlor executed the trust. The court determined that although it was not bound by these statutes, that they provided evidence of the meaning of the term "descendants." Despite the fact that the statute provided that an adopted adult is the "son or daughter of the adoptive parents for all purposes," the court held that this did not abrogate the "stranger to the adoption rule" because it lacked similar language contained in the statute governing the adoption of minors which stated that the term "descendant" includes adopted minors. (Note that this statement is in direct contravention of a prior ruling of the Texas Supreme Court in *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687 (Tex. 1984).)

Comment: The court's opinion is puzzling and appears to distort the law to reach a decision which it thinks is "morally" correct. The settlor used a term, "descendants," which has a well-established legal meaning and is, as stated by the court, "not an ambiguous term." *Id.* at 118. Accordingly, the adopted children are part of the class gift. The court's strained reading of historical statutes does exactly what the court states consideration of statutes cannot do, that is, to "control or defeat" the plain meaning of the terms of the trust. *Id.* at 121. However, because of allegations that the adoptions were done merely to give the adopted adults standing to demand an accounting, the court twists the law to exclude the children. The court should not rewrite a trust merely because the settlor did not address the issue of adult adoptions and the court "thinks" the settlor would have excluded them. As the court explained, but then did so nonetheless, "we must not redraft a trust instrument to vary or add provisions 'under the guise of construction of the language' of the trust to reach a presumed intent." *Id.* at 117.

Dissent: The well-reasoned dissenting opinion of Justice Rebecca Simmons explains that this case is one where "bad facts make bad law" and that a court should not "neglect established precedent and impose [its] own intent" just because the adopted beneficiaries appear unworthy. *Id.* at 128. Justice Simmons recognized that even under the 1975 statute effective in 1982, adopted adults were considered children for all purposes.

Moral: When making gifts to classes such as "children," "grandchildren," and "descendants," settlors and testators should indicate whether adopted children are included and if adopted children are included, the age by which they need to be adopted to be included in the class.

D. Modification

In re Estate of Webb, 266 S.W.3d 544 (Tex. App.—Fort Worth 2008, pet. filed).

Will and testamentary trust beneficiaries reached a settlement with respect to various will and trust matters. Beneficiaries then sought to modify the trust under Property Code § 112.054 to bring it into compliance with their settlement. Trustee objected claiming that he was not a party to the settlement. The trial court held that Trustee was not a necessary party to the modification action and granted Beneficiaries' motion to strike the Trustee's intervention in the case.

The appellate court reversed. The court determined that Trustee was a necessary party to the settlement as well as a necessary party to any action to modify the trust. Property Code § 115.011 provides that the trustee is a necessary party if the "trustee is serving at the time the action is filed." The court explained that under Probate Code § 37, title to property vests in the beneficiary immediately upon a testator's death unless the will provides otherwise. The testator's will did not provide otherwise and thus when the testator died, the trustee, as a beneficiary of the property albeit it trust, had title to the property. Thereafter, Trustee accepted the trust and thus he was serving as a trustee making him a necessary party to the action. Likewise, because Trustee was a beneficiary of the will, a family settlement agreement would not be binding upon him without his consent.

Moral: A testamentary trustee is a necessary party to (1) family settlement agreements and (2) actions involving the trust.

E. Jurisdiction

1. Generally

In re Ashton, 266 S.W.3d 602 (Tex. App.—Dallas 2008, no pet. h.).

The trial court awarded relief against a trust. The appellate court granted mandamus relief because neither the trust nor the trustee had been made a party to the action. A suit against a trust must be brought against the trustee, that is, the legal representative of the trust. Accordingly, for a judgment to be rendered against a trust, "its trustee must be properly before the trial court as a result of service, acceptance, or waiver of process, or an appearance. * * * Stated differently, for relief to be granted against a trust, the trust—through its trustee—must be made a party to the action." *Id.* at 604. The fact that the trustee in his individual capacity was party to the lawsuit did not cure the defect.

Moral: When seeking relief against a trust, be certain to join the trustee in its representative capacity as a party to the action.

2. County Court

In re Estate of Gaines, 262 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.).

Testatrix's will created a testamentary trust. The county court ordered a person holding property which potentially belonged to the trust to place that property in the registry of the court. This person appealed claiming that the county court lacked jurisdiction to issue this order because Property Code § 115.001 grants exclusive jurisdiction to the district court for all proceedings concerning trusts.

The appellate court rejected this argument because the case was not one concerning trusts. Instead, it involved a matter incident to the administration of an estate over which it had jurisdiction under Probate Code § 5. The property the trial court ordered to be turned over to the registry was estate property although the property could later become trust property.

Moral: A county court has jurisdiction over a decedent's property which is destined for a testamentary trust even though it would not have jurisdiction over the trust itself.

3. Statutory Probate Court

In re Guardianship of Gibbs, 253 S.W.3d 866 (Tex. App.—Fort Worth 2008, pet. dism'd).

A potential remainder beneficiary brought suit in a statutory probate court on behalf of his mother for restitution and breach of fiduciary duty against other beneficiaries. After the court awarded over $1 million in damages, a procedural dispute arose over whether the statutory probate court had jurisdiction to hear the case. The appellate court found that these actions did not fall within the scope of the court's jurisdiction and thus reversed the trial court's judgment. The court explained that the claims do not involve or concern a trust but rather the alleged tortuous conduct of other beneficiaries.

Note: The current version of Probate Code § 5(e) which provides that the statutory probate court has concurrent jurisdiction with the district court "in all actions by or against a trustee" was not applicable to this case because this case was filed many years before the effective date of the relevant amendment (September 1, 2005).

Moral: A plaintiff must make certain that the court in which an action is brought has jurisdiction to hear the case.

F. Deviation

In re White Intervivos Trusts, 248 S.W.3d 340 (Tex. App.—San Antonio 2007, no pet. h.).

Settlors created four irrevocable trusts naming their five grandchildren as beneficiaries. Settlors' two children (the parents of the beneficiaries) were named as the trustees. Over a

decade later, trustees filed a petition to terminate these trusts claiming that Settlors' intent was really to provide for them, not their grandchildren. Thus, deviation from the terms of the trusts would be appropriate under Trust Code § 112.054. One of the settlors testified that he did not understand the difference between being a beneficiary and a trustee and thus termination of the trusts would further the purpose of the trusts. Despite the lack of any additional evidence, the trial court found that a mistake was made in drafting the trusts and thus terminated the trusts. The trial court then distributed the trust assets outright to the two trustees.

The guardian ad litem appealed on behalf of the three minor grandchildren (the adult grandchildren did not appeal). The appellate court reversed with regard to the minor beneficiaries. The court explained that the trusts named the grandchildren as beneficiaries and were expressly stated to be irrevocable. The settlors' children were clearly and unambiguously named as trustees, not beneficiaries. The court explained that deviation from the terms of the trusts was not appropriate because there was no evidence of "circumstances not known to or anticipate by the settlor" as required by the Trust Code. The only evidence was one trustee's alleged confusion. The court also noted that no one discovered this supposed mistake for almost 14 years.

Moral: The court will not order deviation to terminate an irrevocable trust just because the settlor has "a change of heart" many years later.

G. Attorneys' Fees

In re Ray Ellison Grandchildren Trust, 261 S.W.3d 111 (Tex. App.—San Antonio 2008, pet. denied).

The trial court awarded attorney fees to the losing parties in a trust interpretation case. The trustees appealed claiming that the fee award was inequitable and unjust because the fees incurred by the losing parties were actually paid up front by a non-party who would later be reimbursed for the payment.

The appellate court affirmed the award of fees under both § 114.065 of the Texas Trust Code and the Declaratory Judgments Act. The trial court has the ability to award reasonable and necessary attorneys' fees "as may seem equitable and just" and there was no evidence that the trial court abused its discretion by acting without reference to guiding rules and principles. The court explained that the trustees had "no authority for the proposition that it is unequitable or unjust to award attorney's fees to parties who have had their fees paid up front by another party, subject to reimbursement." *Id.* at 127.

Moral: The fact that attorneys' fees are paid by a non-party to the case will not prevent the court from making an award of attorneys' provided they are reasonable and necessary.

VI. OTHER ESTATE PLANNING MATTERS

A. Power of Attorney

Citigroup Global Markets, Inc. v. Brown, 261 S.W.3d 394 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.).

Decedent signed a power of attorney naming his son as his agent. Agent opened an account with Brokerage which contained an arbitration provision. After Decedent's death, Administrators sued Brokerage. When Brokerage moved to compel arbitration, Administrators claimed that Decedent lacked capacity at the time he signed the power of attorney and thus Administrators were not bound by the arbitration provision. The trial court agreed.

The appellate court granted Brokerage's request for mandamus relief. The court explained that Administrators did not present evidence to show Decedent lacked capacity at the time he signed the power of attorney. Thus, the trial court abused its discretion by denying the motion to compel arbitration.

Moral: A party attempting to show that the principal lacked capacity at the time the principal signed a power of attorney must present evidence to show that the principal did not have capacity.