



2009

## Wills and Trusts

Gerry W. Beyer

Follow this and additional works at: <https://scholar.smu.edu/smulr>

---

### Recommended Citation

Gerry W. Beyer, *Wills and Trusts*, 62 SMU L. Rev. 1499 (2009)  
<https://scholar.smu.edu/smulr/vol62/iss3/29>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# WILLS AND TRUSTS

Gerry W. Beyer\*

I. INTESTACY .....	1500
II. WILLS.....	1500
A. FORMALITIES.....	1500
1. <i>Attested Will</i> .....	1500
2. <i>Nuncupative Will</i> .....	1501
B. LOST WILL .....	1502
C. ADEMPMENT .....	1503
D. UNDUE INFLUENCE.....	1503
E. DISCLAIMER.....	1504
1. <i>Knowledge of Property Disclaimed</i> .....	1504
2. <i>Validity of Disclaimer</i> .....	1505
F. SETTLEMENT AGREEMENTS.....	1505
III. ESTATE ADMINISTRATION .....	1506
A. VENUE .....	1506
B. REMOVAL OF EXECUTOR.....	1507
1. <i>Gross Mismanagement</i> .....	1507
2. <i>On Court's Own Motion</i> .....	1509
C. INVENTORY .....	1509
D. EXEMPT PROPERTY .....	1510
E. FAMILY ALLOWANCE.....	1511
1. <i>Determination of Amount</i> .....	1511
2. <i>Consideration of Surviving Spouse's Separate             Property</i> .....	1511
F. SPECIFIC PERFORMANCE.....	1512
G. ATTORNEY'S FEES—UNSUCCESSFUL ATTEMPT TO PROBATE WILL .....	1513
H. INDEPENDENT ADMINISTRATION.....	1513
1. <i>Appointment of Independent Executor</i> .....	1513
2. <i>Creditors</i> .....	1514
3. <i>Closing by Operation of Law</i> .....	1515
IV. TRUSTS .....	1516
A. CREATION OF TRUST .....	1516
1. <i>Intent</i> .....	1516
2. <i>Property Description</i> .....	1516

---

\* Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law. B.A., Eastern Michigan University; J.D., Ohio State University; L.L.M. & J.S.D., University of Illinois. The author gratefully acknowledges the excellent assistance of Kyle Wolf, J.D. Candidate, Texas Tech University School of Law, in the preparation of this article.

3. <i>Funding</i> .....	1517
B. TRUSTEE ACCEPTANCE .....	1517
C. SPENDTHRIFT PROVISION .....	1518
D. CONSTRUCTION AND INTERPRETATION .....	1518
1. " <i>Descendants</i> " Generally .....	1518
2. " <i>Descendants</i> " and Adoption .....	1519
E. MODIFICATION .....	1520
F. JURISDICTION .....	1521
1. <i>Generally</i> .....	1521
2. <i>County Court</i> .....	1522
G. DEVIATION.....	1522
H. ATTORNEYS' FEES.....	1523
V. OTHER ESTATE PLANNING MATTERS .....	1523
A. POWER OF ATTORNEY .....	1523
B. LIFE INSURANCE PROCEEDS .....	1524
VI. CONCLUSION .....	1524

THIS Article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of November 1, 2007, through October 31, 2008. The reader is warned that not all cases decided during the Survey period are presented, and not all aspects of each cited case are analyzed. Furthermore, the reader must read and study the full text of each case before relying on it or using it as precedent. The discussion of most cases includes a moral that is the important lesson to be learned from the case. By recognizing situations that have resulted in time consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

## I. INTESTACY

Although most Texans die intestate,<sup>1</sup> they did not generate significant appellate activity this Survey period. Thus, there are no opinions dealing with descent and distribution issues to report.

## II. WILLS

### A. FORMALITIES

#### 1. *Attested Will*

*In re Estate of Pruitt*<sup>2</sup> demonstrates that the will execution ceremony

---

1. See, e.g., *Isn't it time You Wrote a Will?*, 50 CONSUMER REP. 103, 103 (1985) ("more than two-thirds of all adult Americans die without wills"); see also EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENT'S ESTATES AND TRUSTS 13 (4th ed. 1987) ("Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate.")

2. 249 S.W.3d 654 (Tex. App.—Fort Worth 2008, no pet.).

should be conducted carefully to be sure events occur in the proper order. The testatrix left nominal amounts in her will to her estranged children and the bulk of her estate to other beneficiaries. The evidence revealed that the witnesses attested to the will *before* the testatrix signed the will. The trial court determined that this “backward” order was fatal to the validity of the will and granted summary judgment, finding that the testatrix died intestate. Thereafter, the beneficiaries appealed.<sup>3</sup>

The Fort Worth Court of Appeals reversed after examining Texas case law.<sup>4</sup> Older cases adopted a strict rule that required the witnesses to attest to the will after the testator signed the will because witnesses cannot attest to something that has not yet happened.<sup>5</sup> A modern case, however, adopted a contemporaneous transaction approach.<sup>6</sup> Under this approach, if the will execution and attestation occur at the same time and place, and form part of the same transaction, the order of events is immaterial.<sup>7</sup> The court adopted this latter approach.<sup>8</sup> 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.<sup>9</sup>

## 2. *Nuncupative Will*

As of September 1, 2007, Texans may no longer make nuncupative wills.<sup>10</sup> Nonetheless, cases may still arise where the decedent spoke the alleged testamentary words prior to September 1, 2007. For example, in the case of *In re Estate of Alexander*,<sup>11</sup> an alleged beneficiary claimed that the decedent made a nuncupative will after the probate court opened an intestate administration. Both the probate court and Waco Court of Appeals held that the decedent did not speak the alleged testamentary words while in his “last sickness” as required by Probate Code section 65.<sup>12</sup> The court of appeals explained that courts have consistently interpreted this statutory phrase as meaning that the testator must be “in extremis,” that is, on their deathbed, to make a valid nuncupative will.<sup>13</sup> The facts showed that although the decedent was hospitalized when he spoke the testamentary words, he was later released and did not die for more than two weeks.<sup>14</sup> Merely suffering from a chronic illness at the time of speaking the words is not sufficient to satisfy the “last sickness”

---

3. *Id.* at 654-55.

4. *Id.* at 654, 656-58.

5. *Id.* at 656.

6. *Id.* (referring to *James v. Haupt*, 573 S.W.2d 285, 289 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.)).

7. *Id.*

8. *Id.*

9. *Id.* 657-58.

10. Act of May 15, 2007, 80th Leg., R.S., ch. 1170, § 5.05, 2007 Tex. Gen. Laws 4000, 4005 (repealing TEX. PROB. CODE ANN. §§ 64 & 65).

11. 250 S.W.3d 461 (Tex. App.—Waco 2008, pet. denied).

12. *Id.* at 465-67.

13. *Id.* at 464-65.

14. *Id.* at 465.

requirement.<sup>15</sup>

## B. LOST WILL

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. Failure to protect wills can cause problems as demonstrated by the following two cases.

First, in the case of *In re Estate of Turner*,<sup>16</sup> the probate court admitted a photocopy of the testator's will even though the original will could not be found after the beneficiary claimed she conducted a diligent search. The Eastland Court of Appeals affirmed.<sup>17</sup>

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."<sup>18</sup> The proponent of the will must overcome the revocation presumption by a preponderance of the evidence.<sup>19</sup> The court concluded that the evidence submitted was sufficient to rebut the presumption.<sup>20</sup> For example, the decedent's sister and sole beneficiary testified to seeing the will one week before the testator's death and his longtime girlfriend saw it on the day of his death.<sup>21</sup> The girlfriend testified that he 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.<sup>22</sup> The testator's disinherited siblings and many other people had access to the testator's house shortly after his death.<sup>23</sup> In addition, there was evidence of a close relationship between the testator and his sister and no evidence of recent discord.<sup>24</sup>

Second, in the case of *In re Estate of Wilson*,<sup>25</sup> a wife successfully probated her deceased husband's will after his death, despite the fact that she could not locate his original will. The testator's son (the 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.<sup>26</sup>

The Texarkana Court of Appeals agreed with the son.<sup>27</sup> 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

---

15. *See id.* at 465-67.

16. 265 S.W.3d 709 (Tex. App.—Eastland 2008, no pet.).

17. *Id.* at 715.

18. *Id.* at 712.

19. *Id.* at 712-13.

20. *Id.* at 714.

21. *Id.* at 713.

22. *Id.*

23. *Id.* at 713-14.

24. *Id.* at 714.

25. 252 S.W.3d 708 (Tex. App.—Texarkana 2008, no pet.).

26. *Id.* at 710-11.

27. *Id.* at 712-14.

of revocation arises that the proponent of the will must rebut by a preponderance of the evidence.<sup>28</sup> 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 original will.”<sup>29</sup>

Next, the court examined the record and found it lacked any direct evidence of why the wife could not locate the testator’s original will.<sup>30</sup> The wife’s mere statement that as far as she knew and believed, her husband had not revoked the will was not evidence of the asserted facts.<sup>31</sup> In addition, there was no evidence of the husband’s continued affection for his wife or evidence that he had continued to recognize the will’s validity.<sup>32</sup> Accordingly, the court held that the evidence was legally insufficient to rebut the revocation presumption and remanded the case to the trial court.<sup>33</sup>

### C. ADEMPMENT

*Mattlage v. Mattlage*<sup>34</sup> serves as a reminder that each testator who makes a specific gift of real property must be warned that the gift is likely to fail if he or she enters into a contract to sell the land even if the sale is not completed at the time of death. In *Mattlage*, the testator’s will devised property to the beneficiary. Later, the testator entered into a contract to sell the property; however, the testator died before closing. The trial court held that the devise adeemed and that the purchasers were entitled to specific performance of the contract.<sup>35</sup> The Waco Court of Appeals affirmed.<sup>36</sup>

The court explained that once the testator executed the contract to sell the home, equitable conversion occurred.<sup>37</sup> In other words, in equity, the testator no longer owned real property (the property) but instead owned personal property (the contract right to the proceeds of the sale because the sales contract was specifically enforceable). At the time of the testator’s death, he no longer owned the property and consequently the devise adeemed.

### D. UNDUE INFLUENCE

Strong evidence is needed to overturn a probate court’s finding that undue influence did not cause a testator to sign a will. For example, in

---

28. *Id.* at 712-13.

29. *Id.* at 713.

30. *Id.*

31. *Id.* at 713-14.

32. *Id.*

33. *Id.* at 713-15.

34. 243 S.W.3d 763 (Tex. App.—Waco 2007, pet. denied).

35. *Id.* at 767.

36. *Id.* at 767, 772.

37. *Id.* at 771.

the case of *In re Estate of Henry*,<sup>38</sup> the testatrix's first will left her property to an inter vivos trust that included both her children and her stepchildren as beneficiaries. Her second will, however, left her entire estate to her husband.<sup>39</sup> The probate court admitted her second will. The testatrix's children appealed the probate court's decision claiming that it was invalid because the testatrix executed her second will while under undue influence.<sup>40</sup>

The Dallas Court of Appeals affirmed, holding that there was insufficient evidence to show that the testatrix's second will was the result of undue influence.<sup>41</sup> The testatrix's children presented evidence that they claimed proved undue influence, such as statements that she 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. This evidence, however, was counterbalanced by testimony of the testatrix's attorneys that she never indicated she was being coerced and that the testatrix even sought the advice of another attorney. In addition, her husband was not present when she signed the new will.<sup>42</sup> The court of appeals then concluded that the probate court's finding was not "so against the great weight and preponderance of the evidence that it is clearly wrong and unjust."<sup>43</sup>

## E. DISCLAIMER

### 1. Knowledge of Property Disclaimed

In *McCuen v. Huey*,<sup>44</sup> the Waco Court of Appeals 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."<sup>45</sup> By noting the case of *Northwest National Casualty Co. v. Doucette*,<sup>46</sup> the court acknowledged that this case is significantly different from cases that hold that a disclaimer may be effective if the disclaimant is only mistaken about *to whom* the disclaimed property would pass as opposed to being mistaken about *what* property is being disclaimed. The court held that the alleged disclaimer in this case was ineffective because the disclaimant did not knowingly disclaim the property at issue (disputed royalty interests).<sup>47</sup> Accordingly, disclaimers should be carefully drafted to enumerate the property being disclaimed

---

38. 250 S.W.3d 518 (Tex. App.—Dallas 2008, no pet.).

39. *Id.* at 521. The testatrix's second will was executed nearly eight years after she executed her first will. *Id.*

40. *Id.* at 520.

41. *Id.* at 525.

42. *Id.* at 523-25.

43. *Id.* at 525 (quoting *In re Estate of Steed*, 125 S.W.3d 797, 806 (Tex. App.—Texarkana 2004, pet. denied)).

44. 255 S.W.3d 716 (Tex. App.—Waco 2008, no pet.).

45. *Id.* at 731.

46. 817 S.W.2d 396 (Tex. App.—Fort Worth 1991, writ denied).

47. *McCuen*, 255 S.W.3d at 731.

so as to avoid a later argument that the disclaimant did not understand exactly what property was being disclaimed.

## 2. *Validity of Disclaimer*

The beneficiaries in the case of *In re Estate of Boren*<sup>48</sup> signed disclaimers of all property to which they would be entitled from the testatrix's estate prior to her death. On the same day that she died, the beneficiaries filed revocations of those disclaimers. The trial court held that the disclaimers remained effective despite the attempted revocation.<sup>49</sup>

The Texarkana Court of Appeals reversed.<sup>50</sup> The court explained that the disclaimers were not filed in accordance with Probate Code section 37A but, instead, were filed in the papers of the testatrix's spouse's guardianship.<sup>51</sup> 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.<sup>52</sup> Because the beneficiaries revoked their disclaimers before they were properly filed, their attempt to revoke them was deemed successful.<sup>53</sup>

## F. SETTLEMENT AGREEMENTS

The importance of determining the identity of all the parties necessary for a settlement agreement is demonstrated by the case of *In re Estate of Webb*.<sup>54</sup> In *Webb*, the beneficiaries of a will and testamentary trust reached a settlement with respect to various matters.<sup>55</sup> The beneficiaries then sought to modify the trust under section 112.054 of the Texas Trust Code to bring it into compliance with their settlement.<sup>56</sup> The trustee objected claiming that he was not a party to the settlement. The trial court held that the trustee was not a necessary party to the modification action and granted the beneficiaries' motion to strike the trustee's intervention in the case.<sup>57</sup>

The Fort Worth Court of Appeals reversed.<sup>58</sup> The court determined that the trustee was a necessary party to the settlement as well as a necessary party to any action to modify the trust.<sup>59</sup> Texas Trust Code section 115.011 provides that the trustee is a necessary party if the "trustee is serving at the time the action is filed."<sup>60</sup> The court explained that under Probate Code section 37, title to property vests in the beneficiary imme-

---

48. 268 S.W.3d 841 (Tex. App.—Texarkana 2008, pet. denied).

49. *Id.* at 843.

50. *Id.* at 851.

51. *See id.* at 849-50.

52. *Id.* at 850-51.

53. *Id.* at 850.

54. 266 S.W.3d 544 (Tex. App.—Fort Worth 2008, pet. denied).

55. *Id.* at 547.

56. *Id.*

57. *Id.* at 548.

58. *Id.* at 553.

59. *Id.* at 548.

60. *Id.* at 548.



diately upon a testator's death unless the will provides otherwise.<sup>61</sup> The testator's will did not provide otherwise; thus, when the testator died, the trustee, as a beneficiary of the property, albeit in trust, had title to the property.<sup>62</sup> Thereafter, the trustee accepted the trust, and consequently, he was serving as the trustee, which made him a necessary party to the action.<sup>63</sup> Likewise, because the trustee was a beneficiary of the will, a family settlement agreement would not be binding upon him without his consent.<sup>64</sup>

### III. ESTATE ADMINISTRATION

#### A. VENUE

The importance of selecting proper venue for an estate administration is demonstrated by the case of *In re Graham*.<sup>65</sup> The decedent was domiciled in Travis County at the time of her death. Probate Code section 6 provides that venue is mandatory in the county where the deceased resided "if the deceased had a domicile or fixed place of residence in Texas."<sup>66</sup> Nonetheless, the decedent's will was filed for probate in Tom Green County and the applicants swore that the decedent was domiciled in Tom Green County. The lower court believed the applicants and the will was admitted to probate in Tom Green County.<sup>67</sup> When subsequent litigation occurred, one of the applicants moved to transfer the case to Travis County because the decedent was domiciled there at the time of death.<sup>68</sup> The trial court denied the motion and the applicant who had requested the transfer sought a writ of mandamus to compel the transfer.<sup>69</sup>

The Austin Court of Appeals agreed with the applicant and conditionally granted the writ of mandamus.<sup>70</sup> The court rejected arguments that the motion to transfer was partial or was a collateral attack.<sup>71</sup> Instead, it was a motion to transfer the entire probate proceeding and thus, was a "direct challenge to the venue determination" that was made in the order admitting the will to probate.<sup>72</sup> The court also rejected the argument that, under Probate Code section 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."<sup>73</sup> The court explained that "final decree" is not defined in the probate code and that there is no support for the conten-

---

61. *Id.* at 549.

62. *Id.* at 550.

63. *Id.*

64. *Id.* at 550-51.

65. 251 S.W.3d 844 (Tex. App.—Austin 2008, no pet.).

66. *Id.* at 847.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 851.

71. *Id.* at 848.

72. *Id.*

73. *Id.* (quoting TEX. PROB. CODE ANN. § 8(c)(1) (Vernon 2003 & Supp. 2008)).

tion that an order admitting a will to probate is a “final decree.”<sup>74</sup>

The court noted that although one of applicants had originally signed the Proof of Death swearing that the decedent was domiciled in Travis County, such action did not act as a judicial admission because this applicant was not a party to the proceeding at the time he made the statement.<sup>75</sup> In addition, a statement about a person’s domicile is a legal conclusion which a non-attorney is unable to make and the applicant did not have legal counsel when he made the statement.<sup>76</sup>

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.”<sup>77</sup>

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.<sup>78</sup>

## B. REMOVAL OF EXECUTOR

### 1. *Gross Mismanagement*

Two cases show how an executor’s conduct can be deemed sufficiently objectionable to justify removal. First, in the case of *In re Roy*,<sup>79</sup> the testatrix’s will named one of her four children as the independent executor of her estate.<sup>80</sup> The trial court removed him from office for various breaches of duty.<sup>81</sup> For example, he signed leases for approximately half as much rent as the testatrix had been receiving. Once the other 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 his gross mismanagement of estate property.<sup>82</sup> Accordingly, the trial court removed him from office and appointed the successor as named in the testatrix’s will.<sup>83</sup> The independent executor appealed.<sup>84</sup>

The Waco Court of Appeals affirmed.<sup>85</sup> The court began its analysis by

---

74. *Id.*

75. *Id.* at 849.

76. *Id.*

77. *Id.* at 851.

78. *Id.* at 851-54 (Patterson, J., dissenting).

79. 249 S.W.3d 592 (Tex. App.—Waco 2008, pet. denied).

80. *Id.* at 594.

81. *Id.* at 595.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 594.

reviewing Probate Code section 149C which provides the grounds for removing an independent executor.<sup>86</sup> The court examined the evidence and determined that it was sufficient to support the trial court's finding that the independent executor was guilty of gross misconduct or gross mismanagement in the performance of his duties, which is a ground for removal under section 149C(a)(5).<sup>87</sup>

The court also upheld the trial court's denial of an award of the independent executor's fees in defending the removal action because he did not defend his action against removal in good faith.<sup>88</sup> The court agreed that it was proper for the trial court to appoint the successor executor as named in the testatrix's will because there was no evidence that the new executor was disqualified under Probate Code section 78.<sup>89</sup>

Second, in the case of *In re Estate of Miller*,<sup>90</sup> an attorney was named as the independent executor of his great-uncle's will.<sup>91</sup> Before the lower court appointed him, the attorney entered into a fee agreement with the beneficiary that included provisions for him to receive a contingency fee.<sup>92</sup> After being appointed, the attorney hired himself as the attorney for the estate. The attorney was not a beneficiary of the will nor was he entitled to a fee under the terms of the will. The attorney filed the inventory of the estate more than one year after the court appointed him executor. Later, he sold some of the estate property taking almost \$100,000 in "compensation."<sup>93</sup> Experts testified that the attorney's services were worth only about \$5,000.<sup>94</sup> The beneficiary filed an ancillary action to have the attorney removed as the executor alleging that the attorney grossly mismanaged the estate. For example, the attorney loaned estate money to one of his other clients and he did not pay property taxes, which caused the property to be scheduled for foreclosure. The trial court agreed with the sentencing, removed the attorney, and ordered him to reimburse the estate for the compensation he received.<sup>95</sup> The attorney appealed and the Dallas Court of Appeals affirmed.<sup>96</sup>

The court reviewed the attorney's actions and found that they amounted to gross mismanagement of the estate under Probate Code section 149C.<sup>97</sup> For example, he unnecessarily delayed performing the administration of the estate, improperly made excessive fee payments to himself, lent estate property to a client without receiving a promissory

---

86. *Id.* at 596.

87. *Id.* at 596-97.

88. *Id.* at 598-99.

89. *Id.* at 599.

90. 243 S.W.3d 831 (Tex. App.—Dallas 2008, no pet.).

91. *Id.* at 835.

92. *Id.*

93. *Id.*

94. *Id.* at 836.

95. *Id.* at 843.

96. *Id.* at 835.

97. *Id.* at 841-43.

note or collateral, and did not make property tax payments.<sup>98</sup>

## 2. *On Court's Own Motion*

As *In re Estate of Washington*<sup>99</sup> made clear, the trial court has the ability to remove an administrator on its own motion.<sup>100</sup> The trial court removed the administrator for failing to file required accountings under Probate Code section 222(b)(2).<sup>101</sup> 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 Texarkana Court of Appeals explained that the trial court has the authority to remove the administrator *sua sponte* and thus, the issues of standing and limitations were irrelevant.<sup>102</sup>

### C. INVENTORY

In a case of first impression, *In re Estate of Walker*,<sup>103</sup> the Dallas Court of Appeals held that the abuse of discretion standard would apply to the review of a court's finding regarding the correctness of an inventory under Probate Code section 258.<sup>104</sup> Originally, the executrix filed an inventory valuing the testatrix's estate at over five million dollars. Thereafter, the executrix filed an amended inventory showing the assets of the estate as being approximately \$180,000 because the testatrix had placed assets originally shown on the inventory into an *inter vivos* trust over a decade prior to her death.<sup>105</sup> A group of the testatrix's family members then filed suit under Probate Code section 258 claiming that the amended inventory was erroneous. The family members asserted that the testatrix's trust was invalid for failure to identify the trust property and thus, the amended inventory omitted property that was actually still in her probate estate. After reviewing the evidence, the probate court ruled that the amended inventory was neither erroneous nor unjust.<sup>106</sup> The family members appealed.<sup>107</sup>

The court of appeals affirmed.<sup>108</sup> 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 section 258.<sup>109</sup> The court analogized this situation to that of removal of a personal representative and determining whether a person is

---

98. *Id.* at 841.

99. 262 S.W.3d 903 (Tex. App.—Texarkana 2008, no pet.).

100. *Id.* at 906 n.2.

101. *Id.* at 906-07.

102. *Id.* at 907.

103. 250 S.W.3d 212 (Tex. App.—Dallas 2008, pet. denied).

104. *Id.* at 214.

105. *Id.* at 213.

106. *Id.* at 213-14.

107. *Id.* at 214.

108. *Id.* at 216.

109. *Id.* at 214.

unsuitable to serve as a personal representative.<sup>110</sup> 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."<sup>111</sup> Second, the court reviewed the evidence and determined that the property description in the trust was reasonably certain and, thus, held that the probate court did not abuse its discretion.<sup>112</sup>

#### D. EXEMPT PROPERTY

*In re Estate of Rhea*<sup>113</sup> shows that 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.<sup>114</sup> After the wife died, the executors removed virtually all of the personal property from the marital home including the bed, bedding, towels, dishes, cooking utensils, refrigerator, toilet paper, boxes of tissue, and used bars of soap.<sup>115</sup> Thereafter, the husband requested the return of some of the personal property as exempt under Probate Code section 271 or \$5,000 in lieu thereof under section 273.<sup>116</sup> The trial court granted the husband \$5,000 and also allowed him to keep his wife's wedding ring for the rest of his life as part of the exempt property.<sup>117</sup> The executors appealed stating that he could not get both the allowance and keep the ring as exempt property.<sup>118</sup>

The Fort Worth Court of Appeals rejected the executor's argument with regard to the allowance.<sup>119</sup> 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.<sup>120</sup>

In other words, the trial court must make an allowance for those exempt items that it cannot set aside 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.<sup>121</sup>

With regard to the wedding ring, the court recognized that when an estate is solvent, as in this case, the exempt personal property passes to the rightful heirs or beneficiaries when the administration terminates

---

110. *Id.*

111. *Id.*

112. *Id.* at 215-16.

113. 257 S.W.3d 787 (Tex. App.—Fort Worth 2008, no pet.).

114. *Id.* at 792-93.

115. *Id.* at 789.

116. *Id.* at 790.

117. *Id.*

118. *Id.*

119. *Id.* at 792-93.

120. *Id.* at 792.

121. *Id.*

under Probate Code section 278.<sup>122</sup> Thus, the trial court lacked authority to grant the husband a life estate in the ring.<sup>123</sup> He may, however, retain the ring until the estate is closed.<sup>124</sup>

## E. FAMILY ALLOWANCE

### 1. Determination of Amount

*In re Estate of Rhea* also shows that the family allowance is available not just to provide necessities, but also to provide the standard of living to which the surviving spouse was accustomed while both spouses were alive.<sup>125</sup> Under Probate Code section 286, the lower court granted the husband a family allowance of \$20,000 after his wife's death.<sup>126</sup> The executors of the wife's estate appealed claiming that he had separate property sufficient for his own support and, thus, was not entitled to a family allowance.

The Fort Worth Court of Appeals 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."<sup>127</sup> In this case, the 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 living such as a bed, bedding, furniture, dishes, and the refrigerator.<sup>128</sup> The husband's income was expected to exceed his expenses by \$1,136 per month; however, this difference would not be enough to replace the removed items such that the husband would be placed in the same circumstances he lived in during the year before his wife's death.<sup>129</sup>

### 2. Consideration of Surviving Spouse's Separate Property

In the case of *In re Estate of Wolfe*,<sup>130</sup> the surviving spouse requested a family allowance of \$132,444.<sup>131</sup> The executor and a beneficiary objected claiming that she had sufficient separate property and, thus, was not entitled to a family allowance under Probate Code section 288. They explained that she 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 probate court approved a family allowance of

---

122. *Id.* at 793.

123. *Id.*

124. The 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. *Id.* at 793-94.

125. *Id.* at 790-91.

126. *Id.* at 789.

127. *Id.* at 791.

128. *Id.*

129. *Id.*

130. 268 S.W.3d 780 (Tex. App.—Fort Worth 2008, no pet.).

131. *Id.* at 782.

\$126,840.<sup>132</sup>

The Fort Worth Court of Appeals held that the trial court's award was justifiable and not an abuse of discretion.<sup>133</sup> With regard to the life insurance proceeds, the court explained that, because the policy was the couple's community property prior to the deceased spouse's death, the proceeds were not to be considered as the surviving spouse's separate property for family allowance calculation purposes.<sup>134</sup> The court then indicated that the same logic applied to the IRA benefits and the surviving spouse's income.<sup>135</sup>

The *Wolfe* case shows that 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

Enforcement of an option contract after the death of one of the parties is not available under Probate Code section 27 according to *Wells v. Dotson*.<sup>136</sup> The decedent entered into a lease containing an option to purchase. After the decedent's death, the lessee notified the executor that he wanted to exercise the option to purchase. The decedent's heirs threatened to sue the executor if he deeded the property to the lessee and, thus, the lessee sued for specific performance of the option provision in the contract under Probate Code section 27.<sup>137</sup> The trial court granted summary judgment in favor of the lessee.<sup>138</sup>

The Tyler Court of Appeals reversed.<sup>139</sup> The court explained that section 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."<sup>140</sup> Because the granting of an option is not the sale of property or an agreement to sell, the lessee's claim for specific performance did not fall within the purview of section 27.<sup>141</sup>

---

132. *Id.*

133. *Id.* at 783-84.

134. *Id.* at 783.

135. *Id.* at 784.

136. 261 S.W.3d 275, 280, 285 (Tex. App.—Tyler 2008, no pet.).

137. *Id.* at 279.

138. *Id.*

139. *Id.* at 280, 285.

140. *Id.* at 280.

141. *Id.*

### G. ATTORNEY'S FEES—UNSUCCESSFUL ATTEMPT TO PROBATE WILL

A request for attorney's fees and costs under Probate Code section 243 should be made in the original pleadings or as promptly as possible thereafter to avoid a claim that the request was untimely. Otherwise, a situation like that in the case of *In re Estate of Henry*<sup>142</sup> may arise. In *Henry*, the will proponents attempted to probate the testatrix's 1996 will.<sup>143</sup> They were unsuccessful because the court decided to admit a will the testatrix executed in 2004 instead.<sup>144</sup> The probate court awarded \$12,000 as necessary and reasonable attorney's fees under Probate Code section 243 holding that the proponents presented the 1996 will in good faith.<sup>145</sup> The proponent of the 2004 will appealed.<sup>146</sup>

The Dallas Court of Appeals affirmed.<sup>147</sup> The court rejected the claim that the award was improper because the proponents did not timely file their amended pleading asking for fees and did not seek leave of court to file an amended pleading.<sup>148</sup> Further, the court determined that it was not an abuse of discretion for the probate court to make a fee award under Probate Code section 243.<sup>149</sup> Under the facts, there was adequate notice and opportunity to object to the request for fees.<sup>150</sup>

### H. INDEPENDENT ADMINISTRATION

#### I. Appointment of Independent Executor

In two cases, the named executor was deemed unsuitable to serve for a variety of reasons.

In the case of *In re Estate of Gaines*,<sup>151</sup> the person designated by the testatrix as her independent executrix probated her 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.<sup>152</sup> The designated person appealed claiming that the trial court erred in disqualifying her because no motion to disqualify her or opposition to her appointment was pending before the trial court.

The Fourteenth Court of Appeals in Houston affirmed.<sup>153</sup> The court began its analysis with Probate Code section 78(e), which allows the court to disqualify a person from serving if the court finds that the person is "unsuitable."<sup>154</sup> The court recognized that "[n]o comprehensive, discrete

142. 250 S.W.3d 518 (Tex. App.—Dallas 2008, no pet.).

143. *Id.* at 521.

144. *Id.* at 522.

145. *Id.*

146. *Id.*

147. *Id.* at 520, 527.

148. *Id.* at 525-27.

149. *Id.* at 527.

150. *Id.*

151. 262 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

152. *Id.* at 54-55.

153. *Id.* at 57.

154. *Id.* at 56.



explanation exists delineating the attributes which make someone unsuitable<sup>155</sup> and, therefore, the trial court has broad discretion in determining the suitability of an executor.<sup>156</sup>

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.<sup>157</sup> In addition, the court also recognized that the trial court could still have disqualified the named executor 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.<sup>158</sup>

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.<sup>159</sup> For example, she failed to probate the will for more than three years, attempted to get a subpoena on behalf of the estate before she was appointed as the executrix, collected and distributed estate property without authority, and considered the interests of a beneficiary over the estate's.<sup>160</sup>

In the case of *In re Estate of Boren*,<sup>161</sup> the trial court determined that the named independent executor was unsuitable under Probate Code section 78(e).<sup>162</sup> The Texarkana Court of Appeals reviewed the evidence and determined that the trial court did not abuse its discretion by acting in an arbitrary or unreasonable manner without reference to any guiding rules or principles.<sup>163</sup> 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.<sup>164</sup>

## 2. Creditors

In the case of *In re Estate of Gaines*,<sup>165</sup> a creditor filed two authenticated unsecured claims with the independent executrix. The independent executrix rejected the claims and the trial court entered orders recognizing the rejection.<sup>166</sup> The creditor asserted that this was improper.

The Fourteenth Court of Appeals in Houston decided that the order was merely interlocutory and thus, the court lacked jurisdiction to decide the issue.<sup>167</sup> The creditor could still file suit under Probate Code section

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 56-57.

159. *Id.* at 57.

160. *Id.*

161. 268 S.W.3d 841 (Tex. App.—Texarkana 2008, pet. denied).

162. *Id.* at 844-45.

163. *Id.* at 848.

164. *Id.* at 847-48.

165. 262 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

166. *Id.* at 61.

167. *Id.* at 62.

313 within ninety days of the rejection to establish her claims.<sup>168</sup>

The significant part of the court's discussion is found in footnote eleven.<sup>169</sup> The court decided that Probate Code section 313 was applicable even though this was an independent administration.<sup>170</sup> The court stated that the Texas Supreme Court case of *Bunting v. Pearson*<sup>171</sup> held that this section did not apply to an independent executor, but nonetheless would apply to an independent administrator.<sup>172</sup> This distinction is, in this author's 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.

### 3. Closing by Operation of Law

An independent administration may be closed by operation of law as reflected by *In re Estate of Teinert*.<sup>173</sup> The testator died in 1977 and an independent administration handled his estate in 1978.<sup>174</sup> 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 section 151.<sup>175</sup> About thirty years later, a beneficiary petitioned the lower court to be appointed as the executor to resolve a dispute regarding royalty interests held by several devisees. The trial court refused his request, closed the estate under Probate Code section 152, and recommended that he seek resolution of this issue in a separate legal proceeding.<sup>176</sup> The beneficiary appealed.

The Waco Court of Appeals dismissed his appeal.<sup>177</sup> The court explained that the closing methods of Probate Code sections 151 and 152 are not exclusive.<sup>178</sup> 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.<sup>179</sup> Thus, the trial court lacked jurisdiction to take further action with regard to the testator's estate.<sup>180</sup> 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.<sup>181</sup>

---

168. *Id.*

169. *See generally id.* at 62 n.11.

170. *Id.*

171. 430 S.W.2d 470, 473 (Tex. 1968).

172. *Gaines*, 262 S.W.3d at 62 n.11.

173. 251 S.W.3d 66, 67 (Tex. App.—Waco 2008, pet. denied).

174. *Id.* at 66.

175. *Id.*

176. *Id.* at 67.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 68 (Gray, J., dissenting).

## IV. TRUSTS

## A. CREATION OF TRUST

1. *Intent*

*Sarah v. Primarily Primates, Inc.*<sup>182</sup> shows that a court will not turn a contractual arrangement between parties into a trust just because there may be a socially valuable reason in doing so (e.g., to grant non-parties to the contract standing to enforce the contract). In *Sarah*, 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.<sup>183</sup> 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 section 112.037.<sup>184</sup>

Both the trial court and the San Antonio Court of Appeals concluded that the contract did not create a trust.<sup>185</sup> While construing the contract in connection with Property Code sections 111.003 (types of trusts covered by Trust Code), 112.001 (methods of trust creation), and 112.002 (requirement of trust intent),<sup>186</sup> the court emphasized that a contract that is devoid of trust intent cannot be transformed into a trust.<sup>187</sup> In *Sarah*, the contract was replete with contract language and did not contain trust language such as "trust," "trustee," or "beneficiary."<sup>188</sup> 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.<sup>189</sup>

2. *Property Description*

As demonstrated by the case of *In re Estate of Walker*,<sup>190</sup> trust property needs to be carefully described in the trust instrument to avoid disputes over what is and is not included. An inter vivos trust described trust property as:

[A]ll 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 and other personal property with or without titles except that which we each maintain separately

---

182. 255 S.W.3d 132 (Tex. App.—San Antonio 2008, pet. denied).

183. *Id.* at 135.

184. *Id.*

185. *Id.* at 146.

186. *Id.* at 144.

187. *Id.* at 146.

188. *Id.*

189. *Id.* at 145-46.

190. 250 S.W.3d 212 (Tex. App.—Dallas 2008, pet. denied).

on our books and records . . . .<sup>191</sup>

Both the probate court and the Dallas Court of Appeals held that this was an adequate description of trust property.<sup>192</sup> The court of appeals explained that there was sufficient testimony by a CPA and an attorney that the precise property referenced by this description was ascertainable by consulting property and tax records.<sup>193</sup> It seems, however, 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.

### 3. Funding

*In re Estate of Kappus*<sup>194</sup> shows that, unless the will provides otherwise, a testamentary trust is created on the date of the testator's death. The trial court held that a testamentary trust was not created because no steps had been taken to fund the trust.<sup>195</sup> The Tyler Court of Appeals reversed.<sup>196</sup> The court explained that the will left the residue of the testator's estate to a trust, the provisions of which were set forth in the will.<sup>197</sup> Under Probate Code section 37, title to property devised in a will vests immediately in the beneficiaries upon the testator's death.<sup>198</sup> The will contained nothing that would delay this vesting.<sup>199</sup> Thus, the property vested immediately in the trustee.<sup>200</sup>

## B. TRUSTEE ACCEPTANCE

An executor who is also named as the trustee of a testamentary trust must take clear action to reject the trusteeship if the executor does not wish to serve in that capacity. For example, in the case of *In re Estate of Kappus*,<sup>201</sup> the Tyler Court of Appeals explained that “[w]hen the same person is named as independent executor and as trustee of a testamentary trust, acceptance of the position of trustee will be presumed from his or her having acted as executor.”<sup>202</sup> It appears that the court is engrafting

---

191. *Id.* at 215.

192. *Id.* at 214, 216.

193. *Id.* at 215-16.

194. 242 S.W.3d 182 (Tex. App.—Tyler 2007), *rev'd on other grounds*, 284 S.W.3d 831 (Tex. 2009).

195. *Id.* at 190.

196. *Id.* at 190-91.

197. *Id.* at 190.

198. *Id.*

199. *Id.* at 190-91.

200. *Id.* at 191. The court went on to explain that although the trial court did not reach the issue of removing the trustee from office under Property Code section 113.082, since the trust was actually created, it was an abuse of discretion for the court not to remove the trustee from office for having a conflict of interest (the trustee was personally claiming ownership to a portion of the property claimed by the trust). *Id.*

201. *Id.*

202. *Id.*

this as either an additional method of acceptance or as coming within the acceptance methods specified in Probate Code section 112.009.

### C. SPENDTHRIFT PROVISION

In the case of *In re Townley Bypass Unified Credit Trust*,<sup>203</sup> the settlor's will created a trust for his wife with the remainder to his two sons upon her death.<sup>204</sup> Before the wife died, one of his sons died. When the wife died, the issue arose as to whether the predeceased son's share would pass to his successors in interest or to the 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.<sup>205</sup>

Both the trial court and the Texarkana Court of Appeals held that the deceased son's interest passed to his successors in interest.<sup>206</sup> The court began its analysis by examining the remainder interest granted to each son by their father's will.<sup>207</sup> Because the interest was in an ascertainable person and there was no condition precedent other than the termination of the life estate, upon the wife's death.<sup>208</sup>

The court next determined as a matter of first impression in Texas, that the predeceased son's vested remainder interest passed under his will, in spite of the existence of a spendthrift provision restricting the transfer of the son's interest prior to his receiving the property.<sup>209</sup> The court was impressed with the reasoning of Restatement (Third) of Trusts section 58, reporter's notes, comment g, which provides that "[a] continuing income or remainder interest in the trust, despite the spendthrift provision, is transferable by will or intestacy . . ."<sup>210</sup> 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."<sup>211</sup>

### D. CONSTRUCTION AND INTERPRETATION

#### 1. "Descendants" Generally

The settlor in *Paschall v. Bank of America, N.A.*<sup>212</sup> authorized the trustee to distribute trust principal, income, or both to her grandchildren "or the descendants of a grandchild."<sup>213</sup> The trustee distributed trust property to a grandchild's daughters under the belief that the great-grandchildren were the current beneficiaries of the trust. The grandchild objected

---

203. 252 S.W.3d 715 (Tex. App.—Texarkana 2008, pet. denied).

204. *Id.* at 717.

205. *Id.*

206. *Id.*

207. *See id.* at 717-18.

208. *Id.*

209. *Id.* at 719-21.

210. *Id.* at 720.

211. *Id.* at 721.

212. 260 S.W.3d 707 (Tex. App.—Dallas 2008, no pet.).

213. *Id.* at 709.

claiming that the trustee could make distributions to his daughters only after he dies. The trial court granted summary judgment that the great-grandchildren were eligible distributees even though their parent was still alive.<sup>214</sup>

The Dallas Court of Appeals affirmed.<sup>215</sup> The court first agreed with both sides that the trust instrument was unambiguous and thus, the construction of the trust was a matter of law.<sup>216</sup> The court then examined the trust to determine the way in which the 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.<sup>217</sup> The settlor did not include a definition of “descendants” in the trust instrument so the court examined all of the provisions of the trust.<sup>218</sup> The court found it significant that in some provisions of the trust, the settlor specified whether a grandchild or descendant needed to be “living” or “dead.”<sup>219</sup> In the provision at issue, the settlor did not include clarifying language and thus, it made sense that she used the term “descendants” in its popular sense.<sup>220</sup>

## 2. “Descendants” and Adoption

When making gifts to classes such as “children,” “grandchildren,” and “descendants,” *In re Ray Ellison Grandchildren Trust*<sup>221</sup> brought home the importance of indicating whether adopted children are included in such classes, and if adopted children are included, the age by which they need to be adopted to be included in the class. The 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 court and the San Antonio Court of Appeals agreed that these individuals were not within the class of individuals who would qualify as descendants.<sup>222</sup>

The court of appeals 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.<sup>223</sup> The court also determined that merely because the settlor listed his descendants at the time he created the trust did not act to limit class membership to the listed individuals.<sup>224</sup>

The court then turned its attention to whether adopted adults would be considered heirs under the intestacy statutes as they existed on the date

---

214. *Id.* at 708.

215. *Id.* at 713.

216. *Id.* at 711.

217. *Id.* at 710-11.

218. *Id.*

219. *Id.* at 711.

220. *Id.*

221. 261 S.W.3d 111 (Tex. App.—San Antonio 2008, pet. denied).

222. *Id.* at 116, 126-27.

223. *Id.* at 118-20.

224. *Id.* at 119.

the settlor executed the trust.<sup>225</sup> The court determined that although it was not bound by these statutes, they nevertheless provided evidence of the meaning of the term “descendants.”<sup>226</sup> 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.<sup>227</sup>

The court’s opinion is puzzling and appears to distort the law to reach a decision that 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.”<sup>228</sup> 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, “control or defeat” the plain meaning of the terms of the trust.<sup>229</sup> 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.”<sup>230</sup>

The well-reasoned dissenting opinion of Justice Rebecca Simmons explained 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.<sup>231</sup> Justice Simmons recognized that even under the statute in effect in 1982, adopted adults were considered children for all purposes.<sup>232</sup>

#### E. MODIFICATION

The case of *In re Estate of Webb*<sup>233</sup> shows that a testamentary trustee is a necessary party to: (1) family settlement agreements, and (2) actions involving the trust. Will and testamentary trust beneficiaries reached a settlement with respect to various will and trust matters.<sup>234</sup> The beneficiaries then sought to modify the trust under section 112.054 of the Texas

225. *Id.* at 121-26.

226. *Id.* at 121.

227. *Id.* at 123-24. This statement is in direct contravention of a prior ruling of the Texas Supreme Court in *Lehman v. Corpus Christi National Bank*, 668 S.W.2d 687 (Tex. 1984).

228. *Id.* at 118.

229. *Id.* at 121.

230. *Id.* at 117.

231. *Id.* at 127-28 (Simmons, J., dissenting).

232. *Id.* at 128.

233. 266 S.W.3d 544 (Tex. App.—Fort Worth 2008, pet. denied).

234. *Id.* at 547.

Trust Code to bring it into compliance with their settlement.<sup>235</sup> The trustee objected claiming that he was not a party to the settlement. The trial court held that the trustee was not a necessary party to the modification action<sup>236</sup> and granted the beneficiaries' motion to strike the trustee's intervention in the case.

The Fort Worth Court of Appeals reversed.<sup>237</sup> The court determined that the trustee was a necessary party to the settlement as well as a necessary party to any action to modify the trust.<sup>238</sup> Texas Trust Code section 115.011 provides that the trustee is a necessary party if the "trustee is serving at the time the action is filed."<sup>239</sup> The court explained that under Probate Code section 37, title to property vests in the beneficiary immediately upon a testator's death unless the will provides otherwise.<sup>240</sup> The testator's will did not provide otherwise, and thus, when the testator died, the trustee, as a beneficiary of the property, albeit a trust, had title to the property.<sup>241</sup> Thereafter, the trustee accepted the trust, and thus, he was serving as a trustee, making him a necessary party to the action.<sup>242</sup> Likewise, because the trustee was a beneficiary of the will, a family settlement agreement would not be binding upon him without his consent.<sup>243</sup>

## F. JURISDICTION

### 1. Generally

When seeking relief against a trust, the trustee must be joined in its representative capacity as a party to the action. For example, in the case of *In re Ashton*,<sup>244</sup> the trial court awarded relief against a trust. The Dallas Court of Appeals granted mandamus relief because neither the trust nor the trustee had been made a party to the action.<sup>245</sup> A suit against a trust must be brought against the trustee, that is, the legal representative of the trust.<sup>246</sup> 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."<sup>247</sup> The fact that the trustee in his individual capacity was a party to the lawsuit did not cure the defect.<sup>248</sup>

---

235. *Id.*

236. *Id.* at 548.

237. *Id.* at 553.

238. *Id.* at 548.

239. *Id.*

240. *Id.* at 549.

241. *Id.* at 550.

242. *Id.*

243. *Id.* at 550-51.

244. 266 S.W.3d 602 (Tex. App.—Dallas 2008, no pet.).

245. *Id.* at 604.

246. *Id.*

247. *Id.*

248. *Id.*



## 2. County Court

The case of *In re Estate of Gaines*<sup>249</sup> shows that 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. The testatrix's will created a testamentary trust. The county court ordered a person holding property that potentially belonged to the trust to place that property in the registry of the county court. This person appealed claiming that the county court lacked jurisdiction to issue this order because Property Code section 115.001 grants exclusive jurisdiction to the district court for all proceedings concerning trusts.<sup>250</sup>

The Fourteenth Court of Appeals in Houston rejected this argument because the case was not one concerning trusts.<sup>251</sup> Instead, it involved a matter incident to the administration of an estate over which the county court had jurisdiction under Probate Code section five.<sup>252</sup> The property the trial court ordered to be turned over to the registry was estate property although the property could later become trust property.

### G. DEVIATION

The case of *In re White Intervivos Trusts*<sup>253</sup> demonstrates that the court will not order deviation to terminate an irrevocable trust just because the settlor has "a change of heart" many years later. The settlors created four irrevocable trusts naming their five grandchildren as beneficiaries.<sup>254</sup> The settlors' two children, the parents of the beneficiaries, were named as the trustees.<sup>255</sup> Over a decade later, trustees filed a petition to terminate these trusts claiming that the 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 section 112.054. One of the settlor's 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 therefore, terminated the trusts. The trial court then distributed the trust assets outright to the two trustees.<sup>256</sup>

The guardian ad litem appealed on behalf of the three minor grandchildren (the adult grandchildren did not appeal). The San Antonio Court of Appeals reversed with regard to the minor beneficiaries.<sup>257</sup> The court explained that the trusts named the grandchildren as beneficiaries and

---

249. 262 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

250. *Id.* at 58.

251. *Id.*

252. *Id.*

253. 248 S.W.3d 340 (Tex. App.—San Antonio 2007, no pet.).

254. *Id.* at 341.

255. *Id.*

256. *Id.*

257. *Id.*

were expressly stated to be irrevocable.<sup>258</sup> The settlor's children were clearly and unambiguously named as trustees, not beneficiaries.<sup>259</sup> 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.<sup>260</sup> The only evidence was one trustee's alleged confusion.<sup>261</sup> The court also noted that no one discovered this supposed mistake for almost fourteen years.<sup>262</sup>

#### H. ATTORNEY'S FEES

According to the case of *In re Ray Ellison Grandchildren Trust*,<sup>263</sup> the fact that attorney's fees are paid by a non-party to the case will not prevent the court from making an award of attorney's fees provided they are reasonable and necessary. The trial court awarded attorney's 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.<sup>264</sup>

The San Antonio Court of Appeals affirmed the award of fees under the Texas Trust Code and the Declaratory Judgments Act.<sup>265</sup> The trial court has the ability to award reasonable and necessary attorney's 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.<sup>266</sup> The court explained that the trustees had "no authority for the proposition that it is unequitable and unjust to award attorney's fees to parties who have had their fees paid up front by another party, subject to reimbursement."<sup>267</sup>

### V. OTHER ESTATE PLANNING MATTERS

#### A. POWER OF ATTORNEY

In *Citigroup Global Markets, Inc. v. Brown*,<sup>268</sup> the decedent signed a power of attorney naming his son as his agent.<sup>269</sup> The agent opened an account with a brokerage firm, thereby agreeing to arbitration. After the decedent's death, the administrators of his estate sued the firm. When the firm moved to compel arbitration, the administrators claimed that the

---

258. *Id.*

259. *Id.* at 341-42.

260. *Id.* at 342-43 (citing TEX. PROP. CODE ANN. § 112.054(a)(2) (Vernon 2007)).

261. *Id.* at 343.

262. *Id.*

263. 261 S.W.3d 111 (Tex. App.—San Antonio 2008, pet. denied).

264. *Id.* at 126.

265. *Id.* at 126-27.

266. *Id.*

267. *Id.*

268. 261 S.W.3d 394 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

269. *Id.* at 396.

decendent lacked capacity at the time he signed the power of attorney and thus, the administrators were not bound by the arbitration provision.<sup>270</sup> The trial court agreed.<sup>271</sup>

The Fourteenth Court of Appeals in Houston granted the firm's request for mandamus relief.<sup>272</sup> The court explained that the administrators did not present evidence to show the decendent lacked capacity at the time he signed the power of attorney.<sup>273</sup> Thus, the trial court abused its discretion by denying the motion to compel arbitration.<sup>274</sup>

## B. LIFE INSURANCE PROCEEDS

The case of *In re Estate of Stafford*<sup>275</sup> shows that a beneficiary accused of murdering the insured should put forth the best case possible at the trial level because forfeiture will occur even if the conviction is subsequently reversed on appeal. Here, the primary beneficiary was convicted of murdering the insured.<sup>276</sup> Accordingly, the proceeds of the policy were paid to the contingent beneficiary under Probate Code section 41(d) and Insurance Code section 1103.151.<sup>277</sup> The primary beneficiary appealed claiming that his conviction was not final because an appeal was pending. The Beaumont Court of Appeals affirmed.<sup>278</sup> The court explained that the Code provisions do not require that the conviction be final before forfeiture occurs.<sup>279</sup>

## VI. CONCLUSION

The cases decided in the past year encompass a wide array of issues, some very narrow and some with potentially broad impact. This Article has already discussed the practical application of each case and the specific lesson from each case. It is also important to understand some overarching principles that transcend individual cases and form a pattern. Here are some examples of patterns this author detected:

- \* Courts may ignore the law to do what they think yields a correct result in the case at bar even though doing so sets bad precedent.<sup>280</sup>
- \* Courts will follow strictly<sup>281</sup> or ignore<sup>282</sup> technicalities depending on the situation.

---

270. *Id.* at 396-97.

271. *Id.* at 399.

272. *Id.* at 402.

273. *Id.*

274. *Id.*

275. 244 S.W.3d 368 (Tex. App.—Beaumont 2008, no pet.).

276. *Id.* at 368.

277. *Id.* at 369.

278. *Id.* at 370.

279. *Id.*

280. *See, e.g., In re Ray Ellison Grandchildren Trust*, 261 S.W.3d 111, 126 (Tex. App.—San Antonio 2008, pet. denied) (holding the adopted adults were not descendants).

281. *See, e.g., In re Estate of Boren*, 268 S.W.3d 841, 851 (Tex. App.—Texarkana 2008, pet. denied) (applying disclaimer requirements strictly).

282. *See, e.g., In re Estate of Pruitt*, 249 S.W.3d 654, 658 (Tex. App.—Fort Worth 2008, no pet.) (relaxing will formalities).

- \* Fact-finder determinations are hard to overturn on appeal.<sup>283</sup>
- \* Estate planners need to advise clients regarding the impact of changed circumstances.<sup>284</sup>
- \* Fiduciary duties are too often not taken seriously.<sup>285</sup>

---

283. See, e.g., *In re Estate of Henry*, 250 S.W.3d 518, 526 (Tex. App.—Dallas 2008, no pet.) (finding lack of evidence of undue influence).

284. See, e.g., *Mattlage v. Mattlage*, 243 S.W.3d 763, 772 (Tex. App.—Waco 2008, pet. denied) (ademption); *Ray Ellison*, 261 S.W.3d at 126 (adult adoption); *Wells v. Dotson*, 261 S.W.3d 275, 280 (Tex. App.—Tyler 2008, no pet.) (finding specific performance under an option contract).

285. See, e.g., *In re Estate of Miller*, 243 S.W.3d 831, 841 (Tex. App.—Dallas 2008, no pet.) (finding executor grossly mismanaged estate); *In re Estate of Gaines*, 262 S.W.3d 50, 57 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (finding interest of beneficiary pre-empted the interest of the estate, over three year delay in probating will); *In re Roy*, 249 S.W.3d 592, 597 (Tex. App.—Waco 2008, pet. denied) (self-dealing).

