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Wills and Trusts

Gerry W. Beyer

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WILLS AND TRUSTS

Gerry W. Beyer*

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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 October 1, 2005 through September 30, 2006. The reader is warned that not all cases decided during the Survey period are presented, nor does this Article analyze all aspects of each cited case. Each case must be read and studied before relying on it or using it as precedent. The discussion of most cases includes an 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. WILLS

A. TESTAMENTARY CAPACITY

*Long v. Long*¹ demonstrates that a will contestant will have a difficult time overturning a trial court’s finding that a testator had the testamentary capacity to execute a will. The testator’s will was contested on the grounds that he lacked testamentary capacity when he executed his will. The Dallas Court of Appeals held that there was sufficient evidence to support the trial court’s finding that he indeed had testamentary capacity.² The court of appeals reviewed the evidence, which showed that, even though the testator was undergoing cancer treatment, he was aware of what he was doing, knew the extent of his property, identified his family members, and recognized how he wanted his property distributed. In fact, he drafted the will himself on his computer.

1. 196 S.W.3d 460 (Tex. App.—Dallas 2006, no pet.).

2. *Id.* at 466.

B. CONTRACTUAL WILLS

Texas courts view claims of contractual wills cautiously, thus the requirements for a valid contractual will are strictly construed.³ For example, in *In re Estate of Friesenhahn*,⁴ a husband and his wife executed wills on the same day. After the husband died, his will was admitted to probate. A dispute arose between his wife and the husband's children from a prior marriage. The wife claimed that the husband's will devised certain land to her in fee simple, while the children asserted that the wills were contractual. The trial court granted summary judgment holding that the wills were contractual.⁵

The San Antonio Court of Appeals reversed.⁶ The court of appeals recognized that the husband's will stated that it was "executed in accordance with a contract between" the spouses.⁷ However, the gift of land to the wife was devised to her without any restrictions and thus was an absolute and unconditional gift in fee simple. Thus, the requirement that property subject to a contractual will must not be conveyed to the survivor as an absolute and unconditional gift was not satisfied.⁸ Likewise, the other requirement of a contractual will, that it treat the estates of both parties as a single estate following the survivor's death, which is jointly disposed of by both testators in the contingent dispositive provisions of the will, was not satisfied.⁹ Instead, the husband's will merely provided alternative beneficiaries when it provided to whom the property would pass if his wife predeceased him.¹⁰

C. CONDITIONAL GIFT

*Mangrum v. Conrad*¹¹ reminds will drafters that conditions on testamentary gifts must be carefully stated to have the desired effect. In *Mangrum*, the husband died and was survived by his wife and children from a prior marriage. The husband's will provided a significant gift to his wife that was conditioned on her waiving her homestead rights and any other rights that she might have as a surviving spouse. If she failed to waive these rights, the husband gave this property to his children instead. A dispute arose regarding whether the wife had waived her rights because she lived in the home for several years after her husband's death. The trial court granted the wife's request for a summary judgment that she had not waived her right to claim under the will by remaining in the home, and the Dallas Court of Appeals agreed.¹²

3. See TEX. PROB. CODE ANN. § 59A (Vernon 2003).

4. 185 S.W.3d 16 (Tex. App.—San Antonio 2005, pet. denied).

5. *Id.* at 18.

6. *Id.* at 21.

7. *Id.* at 20.

8. *Id.*

9. *Id.*

10. *Id.*

11. 185 S.W.3d 602 (Tex. App.—Dallas 2006, pet. denied).

12. *Id.* at 603.

The court of appeals recognized that the wife remained in the home for many years, changed the utilities into her name, planted flowers, and did other things inconsistent with a waiver of her right to the home.¹³ However, the husband's will conditioned his wife's gift on her expressly waiving her rights, which she did in a written document filed with the court. There was also evidence that the wife had told others that she was electing to take under the will and waive any rights that she might have as a surviving spouse. The court determined that the election was timely because the will did not specify a time, and the wife had arguably valid reasons for remaining on the property after her husband died.¹⁴ This evidence was not controverted, thus the trial court's grant of a summary judgment was proper.¹⁵

D. TAX APPORTIONMENT

In *Patrick v. Patrick*,¹⁶ the testatrix's will provided that "[a]ll taxes . . . which may be payable by reason of my death . . . shall be charged against and paid out of my estate."¹⁷ The named beneficiary on non-probate IRAs claimed that the testatrix's estate was responsible for the estate taxes triggered by inclusion of the IRAs in the taxable estate while the will beneficiaries claimed that the apportionment rules of Probate Code section 322A would apply. The Austin Court of Appeals held that the apportionment rules applied, and the appellate court affirmed.¹⁸

The court of appeals rejected the IRA beneficiary's claim that the testatrix's will expressly provided otherwise, as authorized under Probate Code section 322A(b)(2).¹⁹ The court determined that the testatrix's use of the word "taxes" was not sufficiently specific and that she did not expressly provide for estate taxes to be paid without apportionment.²⁰ The court also gave a broad interpretation to the term "estate" as not being limited to the "probate estate" but instead encompassing the "total property" that the testatrix owned when she died.²¹ The court also took note of a will provision expressly exempting life insurance proceeds from apportionment. This language would have been unnecessary if the testatrix had intended all non-probate assets to be exempt from apportionment.²²

This case demonstrates that a testator who does not desire estate taxes to be apportioned must clearly express that intent.²³ Prudent practice would be for the testator to state, "I direct that all taxes, including (but

13. *Id.* at 606.

14. *Id.* at 607.

15. *Id.*

16. 182 S.W.3d 433 (Tex. App.—Austin 2005, no pet.).

17. *Id.* at 435.

18. *Id.*

19. *Id.* at 437-38.

20. *Id.* at 437.

21. *Id.*

22. *Id.* at 438.

23. Compare *id.* at 437-38, with *Peterson v. Mayse*, 993 S.W.2d 217, 222 (Tex. App.—Tyler 1999, pet. denied) (holding on arguably similar facts that the will's language clearly

not limited to) the federal estate and generation-skipping transfer taxes, payable by reason of my death be charged against my estate regardless of whether the asset subject to tax is or is not included in my probate estate. I do not want these taxes apportioned under Texas Probate Code section 322A or any other statute or judicial decision that provides for tax apportionment.”

E. UNDUE INFLUENCE

*Long v. Long*²⁴ serves as a reminder that a will contestant will have a difficult time overturning a trial court’s finding that a testator was not subject to undue influence. The testator’s will was contested on the ground that his new wife exercised undue influence over him when he executed his will. The Dallas Court of Appeals held that there was sufficient evidence to support the trial court’s finding that the testator was not unduly influenced.²⁵ The court of appeals rejected the contestants’ assertion that the testator’s new wife was a “black widow” and was exploiting the testator’s medical condition (cancer treatment) to her advantage.²⁶ The evidence showed that the testator was not isolated from his family members and friends and that he had strained relationships with the will contestants.

II. ESTATE ADMINISTRATION

A. JURISDICTION

1. District Court

The Texarkana Court of Appeals in *Hailey v. Siglar*²⁷ made an urgent plea when it stated, “We suggest that the Legislature look seriously at the complicated and overlapping trial court jurisdictional requirements in this state and enact reforms to make jurisdictional requirements uniform and understandable.”²⁸ In this case, a daughter transferred funds from her father’s account to her own account one month before her father signed a durable power of attorney naming the daughter as his agent. After the father’s death, a statutory county court exercising probate jurisdiction appointed his son as the independent executor of his father’s estate. Shortly thereafter, the son filed suit in district court to recover the pre-power-of-attorney transferred funds from the daughter. The son prevailed in this action, and the daughter appealed.²⁹

The court of appeals vacated the district court’s judgment and dismissed the case without prejudice explaining that the district court lacked

and unambiguously provided that death taxes should first be paid from the assets described in the residuary clause of the testator’s will).

24. 196 S.W.3d 460 (Tex. App.—Dallas 2006, no pet.).

25. *Id.* at 467.

26. *Id.*

27. 194 S.W.3d 74 (Tex. App.—Texarkana 2006, pet. denied).

28. *Id.* at 82.

29. *Id.* at 76.

jurisdiction to hear the case.³⁰ The court rejected the son's arguments that the district court had jurisdiction. The son asserted that the amount in controversy exceeded the amount over which the statutory county court would have jurisdiction. The court explained that the Texas Supreme Court had decided decades ago that "[t]he monetary limitations on a statutory county court's jurisdiction in civil cases do not limit its probate jurisdiction."³¹

The court then discussed the application of Probate Code section 5.³² The county court at law had jurisdiction over the father's estate and all matters incident to the estate. Probate Code section 5A(a) includes "all claims by . . . an estate" within the definition of incident to the estate as it applies to county courts at law.³³ The son's attempt to recover funds from the daughter was a claim by an estate, thus the county court at law had jurisdiction.³⁴

The court then examined former Probate Code section 5(a) (repealed in 2003), which provided that the district court has "original control and jurisdiction over executors . . . under such regulations as may be prescribed by law."³⁵ The court conducted a detailed analysis of the Texas Supreme Court case of *Bailey v. Cherokee County Appraisal District*³⁶ and lower court cases interpreting the opinion.³⁷ The court recognized the confusion over whether a county court at law has exclusive or merely dominant jurisdiction in matters incident to an estate. The court held that the "sounder reading" of the *Bailey* opinion is that "the county court at law is vested with exclusive jurisdiction."³⁸

2. Statutory Probate Court

*Schuchmann v. Schuchmann*³⁹ shows that appellate courts appear unwilling to expand the jurisdiction of statutory probate courts to situations that have a tenuous, if any, connection to probate or trust matters. While divorce litigation was pending in a district court, a husband sued his wife in a statutory probate court with regard to inter vivos trusts the husband's father had created naming the husband as a beneficiary. This triggered a variety of orders and settlement agreements resulting in a convoluted set of events that eventually led to the wife filing a motion in probate court to enforce a settlement agreement and to transfer the husband's post-divorce action to the probate court. Despite the husband's argument that the probate court lacked jurisdiction, the probate court ordered the post-

30. *Id.* at 82.

31. *Id.* at 76 (citing *English v. Cobb*, 593 S.W.2d 674, 675 (Tex. 1979)).

32. *Id.* at 77.

33. *Id.* at 78.

34. *Id.* at 80.

35. *Id.*

36. 862 S.W.2d 581 (Tex. 1993).

37. *Id.* at 978-80 (citing *Bailey*, 862 S.W.2d at 585-86).

38. *Id.* at 79.

39. 193 S.W.3d 598 (Tex. App.—Fort Worth 2006, pet. denied).

divorce action transferred from the district court.⁴⁰ The husband appealed.

The Fort Worth Court of Appeals reversed, holding that the probate court lacked jurisdiction to transfer the post-divorce action.⁴¹ The court of appeals explained that the post-divorce action dealt with assets unrelated to the trusts at issue in the probate court litigation. The court examined Probate Code section 5 and found no basis to give the probate court jurisdiction.⁴² The suit did not involve (1) an inter vivos trust (section 5(e)); (2) a matter appertaining or incident to the estate of a deceased person (section 5(h)); or (3) a set of facts that would trigger the probate court's pendant and ancillary jurisdiction, which exists when there is a close relationship between non-probate claims and the matter pending in the probate court so that the court's exercise of jurisdiction would aid in the efficient administration of a matter pending in probate court (section 5(i)).⁴³ Accordingly, the court of appeals ordered the probate court to transfer the case back to the district court.⁴⁴

3. *Statutory Probate Court—Appointment of Receiver*

*In re Estate of Treviño*⁴⁵ serves as a reminder that a statutory probate court has jurisdiction to appoint a receiver. Under a highly convoluted set of facts and court orders, the attorney for the executrix obtained an order from a statutory probate court for the appointment of a receiver to protect his contingency-fee interest in a business constituting estate property that he successfully recovered from a conflicting claimant. The executrix appealed.

The San Antonio Court of Appeals affirmed.⁴⁶ The statutory probate court has jurisdiction over matters appertaining or incident to an estate, as well as pendant and ancillary jurisdiction necessary to promote judicial efficiency and economy under Probate Code section 5.⁴⁷ Accordingly, the statutory probate court had jurisdiction to appoint a receiver.⁴⁸

4. *Res Judicata and Collateral Estoppel*

*Dolenz v. Vail*⁴⁹ demonstrates that assertions of res judicata and collateral estoppel do not negate a court's jurisdiction, although they may impact the court's ultimate decision in the case. A creditor asserted that the decedent had granted him a security interest under the Uniform Commercial Code ("UCC") in paintings held by the decedent's trust as collat-

40. *Id.* at 600-01.

41. *Id.* at 605.

42. *Id.* at 603.

43. *Id.* at 602-03.

44. *Id.* at 605.

45. 195 S.W.3d 223 (Tex. App.—San Antonio 2006, no pet.).

46. *Id.* at 232.

47. *Id.* at 228.

48. *Id.* at 232.

49. 200 S.W.3d 338 (Tex. App.—Dallas 2006, no pet.).

eral for the payment of legal fees. The creditor sought to take possession of the paintings, and the probate court denied the motion finding that it had no jurisdiction to hear the case because the matters were decided in prior proceedings, both at the trial and appellate levels.⁵⁰

The Dallas Court of Appeals reversed.⁵¹ The court held that the probate court had jurisdiction to hear the creditor's motion because "his claim is a matter relating to the distribution of [the] estate of a deceased person and thus a matter 'incident to an estate'" under Probate Code sections 5(d), 5(f), and 5A(b).⁵² The court explained that collateral estoppel and res judicata are not jurisdictional issues, although they may affect the merits of the creditor's claim.⁵³

B. TRANSFER

1. Conditional Filing

The case of *In re Lewis*⁵⁴ applies the concept of conditional filing to a case dealing with the transfer of a probate action. The judge of a constitutional county court in a county with no other court exercising probate jurisdiction transferred the lawsuit to district court. The executrix claimed that the transfer was improper and that a statutory probate court judge should be assigned to hear the case because the executrix filed her request first. Probate Code section 5(b-1) provides that once a party requests the assignment of a statutory probate court judge, the county judge may not transfer the case to district court.⁵⁵ The other party admitted that the executrix filed her request first, but she did not pay the filing fee until after the transfer motion was filed and signed.

The Waco Court of Appeals agreed with the executrix and conditionally granted a writ of mandamus.⁵⁶ The court explained that although the executrix did not pay the filing fee until after the judge signed the transfer order, it was nonetheless "conditionally" filed first and thus had priority because once the clerk received the filing fee, the executrix's motion was deemed to have been properly filed before the transfer motion.⁵⁷

A dissenting justice explained that the court of appeals should not have granted mandamus, because when the county judge signed the transfer order, the executrix had not paid the filing fee, thus the filing was not yet effective.⁵⁸

50. *Id.* at 339-40.

51. *Id.* at 341.

52. *Id.*

53. *Id.*

54. 185 S.W.3d 615 (Tex. App.—Waco 2006, orig. proceeding [mand. denied]).

55. *Id.* at 617.

56. *Id.* at 618-19.

57. *Id.* at 617.

58. *Id.* at 619-20 (Gray, J., dissenting).

2. Jurisdictional Interface

The case *In re Estate of Alexander*⁵⁹ shows that a party who wishes to seek a remedy in a probate matter that a constitutional or county court at law may not grant should file an original action seeking that remedy in the district court. The beneficiary filed suit to probate a nuncupative will in a constitutional county court. The court then granted the beneficiary's motion to transfer the case to district court even though the county had a statutory county court with probate jurisdiction. The district court found that the decedent died intestate, and the beneficiary appealed.⁶⁰

Although the beneficiary did not raise the issue, the Waco Court of Appeals determined that the county court had no legal basis to transfer the case to district court because the county had a statutory county court at law with probate jurisdiction.⁶¹ Probate Code section 5 permits transfer of a probate matter to district court only if the county has no statutory court with probate jurisdiction.⁶² Accordingly, "the transfer order is of no effect and any subsequent orders rendered by the district court are void."⁶³

The a court recognized that if a probate court lacks authority to grant a claimant full relief, the district court will have jurisdiction to grant these remedies.⁶⁴ The court noted that the beneficiary was seeking a constructive trust remedy, which neither the constitutional county court nor county court at law had jurisdiction to impose under Probate Code section 5A. In these situations, however, a plaintiff should file suit directly in an original action in the district court to seek these remedies. A dissenting justice argued that the court of appeals lacked jurisdiction of the case because of an allegedly untimely notice of appeal.⁶⁵

C. APPELLATE JURISDICTION

A party appealing a lower court's probate order must make certain that the order is appealable. If in doubt, the party wishing to appeal should take some action such as seeking a severance order or asking the court for a permissive interlocutory appeal. For example, in *Ayala v. Mackie*,⁶⁶ a county court at law admitted a foreign will to probate and granted ancillary letters of testamentary. The executrix then sued an heir, claiming that she and other heirs wrongfully appropriated over \$60 million in estate assets. The heir moved to dismiss the executrix's action, asserting that the county court at law had no subject-matter jurisdiction. The county court at law denied the motion, and the heir appealed.⁶⁷ The

59. 188 S.W.3d 327 (Tex. App.—Waco 2006, no pet.).

60. *Id.* at 329.

61. *Id.* at 332.

62. *Id.*

63. *Id.* at 331.

64. *Id.*

65. *Id.* at 332-33 (Gray, J., dissenting).

66. 193 S.W.3d 575 (Tex. 2006).

67. *Id.* at 577.

court of appeals began its analysis by holding that the county court at law's order was final for the purposes of appeal, citing the landmark Texas case of *Crowson v. Wakeham*.⁶⁸

The Texas Supreme Court agreed with the executrix that the county court's order was merely interlocutory, and hence unappealable, because numerous pleadings and issues were still pending in the county court at law.⁶⁹ The Texas Supreme Court pointed out that the appealing parties did not seek a severance order as it had urged in its *Crowson* opinion.⁷⁰ In addition, "[b]ecause an order denying a plea to the jurisdiction and refusing to remove an executor does not end a phase of the proceedings, but sets the stage for the resolution of all proceedings, the order is interlocutory."⁷¹ The supreme court also rejected an argument that Texas Civil Practice and Remedies Code section 51.014(a)(2) permits an interlocutory appeal.⁷²

D. POWERS OF TEMPORARY ADMINISTRATOR

A dispute over the powers that a temporary administrator may properly exercise formed the basis of the controversy in *Hill v. Bartlette*.⁷³ The temporary administrator of the decedent's estate signed a settlement agreement releasing a tortfeasor from all claims arising out of an accident that caused the decedent's death. Several years later, the decedent's mother sued the tortfeasor, asserting wrongful-death and survival claims. The trial court granted summary judgment in favor of the tortfeasor, and the decedent's mother appealed.⁷⁴

The Texarkana Court of Appeals affirmed on two grounds.⁷⁵ First, the court held that the statute of limitations had run and that there was insufficient evidence to prove that the tortfeasor was equitably estopped from raising the defense.⁷⁶ Second, and more importantly from a probate perspective, the court agreed that the settlement agreement operated as an accord and satisfaction of both the wrongful-death and survival claims.⁷⁷ The mother made several unsuccessful arguments that the settlement agreement was not binding.

- The mother claimed that the temporary administrator did not have the authority to settle the wrongful-death claim because the claim belonged to the statutory beneficiaries and did not benefit the es-

68. *Ayala v. Brittingham*, 131 S.W.3d 3, 6-7 (Tex. App.—San Antonio 2003) (citing *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995)), *rev'd sub nom.*, *Ayala v. Mackie*, 193 S.W.3d 575 (Tex. 2006).

69. *Ayala*, 193 S.W.3d at 579-80.

70. *Id.* at 578-79.

71. *Id.* at 579.

72. *Id.* at 579-80.

73. 181 S.W.3d 541 (Tex. App.—Texarkana 2005, no pet.).

74. *Id.* at 544.

75. *Id.*

76. *Id.*

77. *Id.* at 550.

tate.⁷⁸ However, Texas Civil Practice and Remedies Code section 71.004(c) gives an administrator the authority to pursue wrongful-death actions on behalf of the statutory beneficiaries if they do not take action on their own within three months after a decedent's death.⁷⁹

- The mother asserted that the temporary administrator lacked authority to settle claims on behalf of the estate.⁸⁰ The court quickly dismissed this argument by pointing to Probate Code section 234(a)(4), which gives the personal representative the power to make compromises and settlements.⁸¹

- The order appointing the temporary administrator did not expressly grant authority to settle the survival and wrongful-death claims. Thus, the mother claimed that the settlement agreement was not binding under Probate Code section 133. The court rejected this argument by quoting the order, which provided that the temporary administrator had the authority to represent the estate and the heirs "in all necessary respects regarding any and all claims . . . against [the tortfeasor] . . . arising from [the accident that caused the decedent's death]."⁸²

- The mother claimed that the probate court lacked jurisdiction over wrongful-death and survival claims. The court of appeals recognized that the case law that the mother cited to support her claim was out-of-date and that the Probate Code now gives probate courts such jurisdiction.⁸³

- The mother did not sign the settlement agreement and had not received its proceeds. The court explained that the mother's signature was not necessary and that the proper distribution of the proceeds by the temporary administrator was not the tortfeasor's responsibility.⁸⁴

A concurring opinion points out that, although the temporary administrator had the authority to represent the estate, Probate Code section 234(a)(4) requires the personal representative to make a written application to the court and obtain an order specifically authorizing the settlement.⁸⁵

E. APPOINTMENT OF ADMINISTRATOR

*In re Estate of Stanton*⁸⁶ makes it clear that if a personal representative takes actions requiring court authorization without obtaining that authorization, such conduct is sufficient grounds for a court to determine that the person is unsuitable to serve as a personal representative. After the

78. *Id.* at 549.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 550.

83. *Id.*

84. *Id.*

85. *Id.* at 550-51 (Carter, J., concurring).

86. 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

temporary administrator's appointment expired under Probate Code section 131A, he filed a request for payment of legal services that he performed while serving as the temporary administrator. He also served as the attorney for several parties asking for appointment as the permanent administrator and sought to have himself reappointed as the temporary administrator. The duly appointed attorney ad litem for the decedent's unknown heirs under Probate Code section 34A opposed these applications and asked the court to appoint an independent party as the administrator.⁸⁷ The probate court agreed, appointed a third party as the administrator, and denied the temporary administrator's request for attorney's fees. The temporary administrator appealed.

The Tyler Court of Appeals rejected the temporary administrator's argument that the probate court abused its discretion in appointing a third party as the administrator because the applicants had higher priority under Probate Code section 77.⁸⁸ The court of appeals explained that all of the other applicants had demonstrated a history of exceeding their authority in this case, thus the probate court could reasonably conclude that they were unsuitable to serve.⁸⁹ For example, the temporary administrator filed an application to determine heirship without obtaining court permission, and the other applicants continued to manage estate property without court authorization even after the temporary administration had ended.

F. WILL CONTEST

According to *In re Estate of Blevins*,⁹⁰ a will may be contested within two years of probate even if the contestant received notice of the original probate proceeding. The testator's will was admitted to probate as muniment of title almost nine years after the testator's death. Nine months later, several of the beneficiaries filed an application to set aside the probate. The trial court dismissed the application, agreeing with the will proponent that, because the contestants were personally served with citation and did not appear to contest the order, they were barred by the doctrine of res judicata.⁹¹ The contestants appealed.

The Tyler Court of Appeals reversed.⁹² The court looked at Probate Code section 93, which provides that a contestant has two years from the date that a will is admitted to probate to contest its validity.⁹³ Because the contestants filed the contest well within the two-year period (just nine months), they were entitled to pursue the contest.⁹⁴ The court explained that there was no basis for the will proponent's argument that the two-

87. *Id.* at 208.

88. *Id.* at 208-09.

89. *Id.* at 209.

90. 202 S.W.3d 326 (Tex. App.—Tyler 2006, no pet.).

91. *Id.* at 327.

92. *Id.* at 329.

93. *Id.* at 328.

94. *Id.* at 329.

year period does not apply to interested persons who were personally served with a copy of the initial application to probate the will.⁹⁵

G. REMOVAL OF EXECUTOR

*In re Estate of Clark*⁹⁶ reminds executors that they should timely obey court orders or risk removal from office. The Dallas Court of Appeals held that the trial court did not abuse its discretion in removing the executor from office.⁹⁷ The estate had been under dependent administration for over two decades, and the executor had been in office since 2000. The court reviewed the executor's conduct and determined that removal was appropriate under Probate Code section 222(b)(3) for failing to obey a valid court order.⁹⁸ The trial court had ordered the executor to sell the estate's remaining assets, and almost three years later, the sales were not completed. There was also evidence that the executor had overstated his progress by claiming in court reports that purchase contracts existed when in reality they did not.

H. LOST WILLS

Two cases decided during the Survey period took different approaches as to how to prove the contents of a lost will.

1. Contents Not Proved

In *Garton v. Rockett*,⁹⁹ the executor attempted to probate a copy of the will. The copy appeared to comply with the requirements of a valid will under Texas law. The key issue was whether the executor substantially proved the contents of the will through the testimony of a credible witness who either read the will or heard the will read as required by the lost-will procedure provided in Probate Code section 85. The jury determined that the executor had supplied sufficient evidence of the contents, but the judge granted the heirs a judgment notwithstanding the verdict. The appellate court affirmed.¹⁰⁰

The Houston Court of Appeals examined the evidence and concluded that the executor "failed to offer any testimony concerning the contents of the original will by a credible witness who read the will or heard it read."¹⁰¹ Although the executor put on the testimony of a witness and the notary, they admitted that they either did not read the original will or could not recall its contents. Reading a copy of the will is not a substitute for reading the original will.

95. *Id.* at 328.

96. 198 S.W.3d 273 (Tex. App.—Dallas 2006, pet. denied).

97. *Id.* at 273.

98. *Id.* at 275-76.

99. 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

100. *Id.* at 149.

101. *Id.* at 145.

2. *Contents Proved*

In the contrasting case *In re Estate of Jones*,¹⁰² the will proponent filed a will for probate claiming that it was the testator's original will. After an anonymous caller tipped off the clerk's office, it became apparent that the will was not an original but a copy. Although the Beaumont Court of Appeals later withdrew the will from probate and revoked letters on procedural grounds, the court eventually admitted the will to probate even though there was no evidence as required by Probate Code section 85 that the contents of the will be proved by the testimony of a credible witness who had read it or heard it read when the original is not produced in court.¹⁰³

The court affirmed after making the remarkable holding that Probate Code section 85 was inapplicable.¹⁰⁴ The court discussed a long line of Texas cases, including *Garton v. Rockett*.¹⁰⁵ Nonetheless, the court stated:

We do not see the "read it or heard it read" requirement in section 85 as intending to determine the accuracy of a photocopy of a written will The purpose of section 85, as we see it, is to establish the contents of a written will not in the custody of the court and that can only be reproduced by a written order of the probate court based on testimony describing the will's contents If a writing is an accurate reproduction of the valid unrevoked written will of the testator, the probate court need not rely on or require the testimony of a credible witness who testifies from memory regarding the provisions of the testator's will, because the written terms of the will are before the court.¹⁰⁶

Based on this analysis, the court concluded that section 85 does not apply when a photocopy of a will is produced in court because the copy is a written will produced in court.¹⁰⁷

This opinion is directly contrary to established Texas statutory and case law. A photocopy of a will is not a will, just as a photocopy of a \$100 bill is not a \$100 bill—passing a \$100 bill to a cashier gets you \$100 worth of merchandise, while passing a photocopy gets you a federal prison term. The court was obviously attempting to carry out the decedent's intent by upholding the probate of the will. However, the protections of section 85 are there to prevent fraud by assuring that independent evidence of the will's contents exists, but the original cannot be presented to the court for examination. If the rules are to be changed, the Texas Legislature should make the change, not the courts.

102. 197 S.W.3d 894 (Tex. App.—Beaumont 2006, pet. filed).

103. *Id.* at 897.

104. *Id.* at 902.

105. *Id.* at 902-03 (citing *Garton v. Rockett*, 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet.)).

106. *Id.* at 903.

107. *Id.*

I. INDEPENDENT ADMINISTRATION

A receivership may be a useful technique to resolve complex or extended litigation involving estate property. For example, in *In re Estate of Treviño*,¹⁰⁸ under a highly convoluted set of facts and court orders, the attorney for the executrix obtained an order from a statutory probate court for the appointment of a receiver to protect his contingency-fee interest in a business constituting estate property that he successfully recovered from a conflicting claimant. The executrix appealed.

The San Antonio Court of Appeals affirmed.¹⁰⁹ First, the appellate court rejected the executrix's claim that the appointment of a receiver usurped her authority and interfered with the estate's independent administration.¹¹⁰ The court noted that the probate court had pendant and ancillary jurisdiction even if those matters were not appertaining or incident to an estate under Probate Code section 5(i).¹¹¹

Second, the court determined that the probate court did not abuse its discretion by appointing a receiver.¹¹² The court engaged in a detailed review of the facts, which showed that the appointment of a receiver was justified as a means of resolving years of litigation regarding the property.¹¹³

J. SURVIVAL ACTION

Normally, survival actions are brought by the decedent's personal representative. However, as discussed in *Ferrer v. Guevara*,¹¹⁴ an heir may bring a survival action if (1) an administration of the decedent's estate is not pending, and (2) no administration is necessary.¹¹⁵ In *Ferrer*, a daughter brought a survival action to recover medical expenses and other damages incurred by her father before his death that allegedly stemmed from a car accident. The defendant appealed, claiming that the daughter lacked standing to bring the survival action.¹¹⁶

The El Paso Court of Appeals held that the daughter had standing for two distinct reasons.¹¹⁷ First, she received an assignment of all her father's rights arising out of the car accident.¹¹⁸ Second, as her father's heir, she had standing because she proved that no administration hearing regarding her father's estate was pending and that an administration was not necessary.¹¹⁹

108. 195 S.W.3d 223 (Tex. App.—San Antonio 2006, no pet.).

109. *Id.* at 232.

110. *Id.* at 228-29.

111. *Id.* at 229.

112. *Id.* at 229-32.

113. *Id.* at 231-32.

114. 192 S.W.3d 39 (Tex. App.—El Paso 2005, pet. granted).

115. *Id.* at 45.

116. *Id.* at 43.

117. *Id.* at 44.

118. *Id.* at 44-45.

119. *Id.* at 45.

K. ATTORNEYS' FEES

1. *To Beneficiaries*

*Paul v. Merrill Lynch Trust Co. of Texas*¹²⁰ reflects how difficult it is for a beneficiary to overturn a probate court's denial of attorneys' fees on appeal. The beneficiaries sued the executor asserting assorted breaches of duty. The trial court denied the beneficiaries' request for attorneys' fees under Probate Code section 245, and the Waco Court of Appeals affirmed.¹²¹ The court reviewed the probate court's findings that, although the executor's conduct had sometimes deviated from the ordinary standard of care, the executor's acts were not willful, malicious, or in bad faith.¹²² Thus, the probate court's denial of attorneys' fees was not an abuse of discretion.

2. *To Executor*

The *Paul* case also shows that a probate court's award of attorneys' fees will be hard to overturn on appeal.¹²³ The trial court awarded the executor attorneys' fees for its defense of a removal action brought by the beneficiaries. The court of appeals found that the executor's defense was in good faith, thus the executor was entitled to recover its attorneys' fees from the decedent's estate under Probate Code section 149C(c).¹²⁴

3. *By Unsuccessful Will Contestant*

*In re Estate of Arndt*¹²⁵ shows that when seeking attorneys' fees, a party should present sufficient evidence to prove the amount of those fees. Both the trial and court of appeals agreed that an unsuccessful will contestant was not entitled to attorneys' fees under Probate Code section 243.¹²⁶ Although the jury did determine that the will contestant acted in good faith and with just cause, the amount of fees was not submitted. Because the trial court did not award attorneys' fees, there is an implied finding that the trial court found against the contestant on the issue of the amount of fees under Texas Rule of Civil Procedure 279.¹²⁷ The court of appeals explained that there was no evidence of the contestant's employment arrangement with her attorneys.¹²⁸ For example, the parties may have agreed to a contingency fee, and hence no fees would be owed because the contest action failed.¹²⁹

120. 183 S.W.3d 805 (Tex. App.—Waco 2005, no pet.).

121. *Id.* at 810, 813.

122. *Id.* at 812-13.

123. *See id.* at 814.

124. *Id.* at 813.

125. 187 S.W.3d 84 (Tex. App.—Beaumont 2005, no pet.).

126. *Id.* at 86.

127. *Id.* at 90.

128. *Id.* at 91.

129. *Id.*

4. *Against Personal Representative Who Neglects Duty*

The court may award attorneys' fees anytime a personal representative fails to perform a required duty. For example, in *In re Estate of Hawkins*,¹³⁰ the probate court determined that the administrator did not timely distribute the intestate's estate to the heir and ordered the administrator to pay the heir's attorneys' fees under Probate Code section 245. The administrator appealed.

The Fort Worth Court of Appeals affirmed.¹³¹ The court rejected the administrator's argument that section 245 authorizes an award of attorneys' fees only for an action seeking the removal of a personal representative.¹³² Instead, the court pointed out that the statute expressly permits an award of attorneys' fees "[w]hen a personal representative neglects to perform a required duty," which in this case was the failure to make a timely distribution of estate property to the heir.¹³³ The court also rejected the administrator's argument that attorneys' fees may be awarded only after the estate is closed.¹³⁴ The court explained that costs and attorneys' fees may be awarded at any time.¹³⁵

5. *To Unsuccessful Will Proponent*

*Garton v. Rockett*¹³⁶ discusses how a named executor who attempts to probate a will may recover reasonable attorneys' fees even if the attempt fails as long as the executor acted in good faith and with just cause. The named executor attempted to probate the will. The jury found that the will was valid and that the executor filed the probate proceeding in good faith and with just cause. The judge ignored these findings and granted a judgment notwithstanding the verdict. The Houston Court of Appeals agreed with the trial judge that the evidence did not support the jury's finding that the will was valid.¹³⁷ However, the court agreed with the executor that he filed the application in good faith and with just cause and thus was entitled to a reasonable attorneys' fee under Probate Code section 243.¹³⁸ The court explained that the executor had presented sufficient evidence to justify the jury's finding.¹³⁹ The court also pointed out that section 243 does not require that an executor be successful in probating the will to be entitled to a reasonable attorneys' fee.¹⁴⁰

130. 187 S.W.3d 182 (Tex. App.—Fort Worth 2006, no pet.).

131. *Id.* at 183.

132. *Id.* at 185.

133. *Id.*

134. *Id.* at 186.

135. *Id.*

136. 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

137. *Id.* at 147.

138. *Id.* at 149.

139. *Id.*

140. *Id.* at 148.

6. *Beneficiary's Defense of Conduct*

A beneficiary who defends herself against accusations of personal wrongdoing relating to a testator's estate is unlikely to recover attorneys' fees for the defense under Probate Code section 243. In the case of *In re Estate of Wilcox*,¹⁴¹ a mother's will named certain of her children as beneficiaries and executors. One of the children (Mary) sued her siblings, alleging a variety of misdeeds. One of the defendant brothers (Peter), who was not serving as an executor, filed a motion seeking a summary judgment. After winning the summary-judgment action, Peter obtained an order granting him attorneys' fees under Probate Code section 243. Mary appealed.

The Beaumont Court of Appeals reversed, holding that Probate Code section 243 did not give the court the power to award Peter his attorneys' fees.¹⁴² Peter was not attempting to have his mother's will admitted to probate or defending the validity of the will. Instead, Peter was defending himself against Mary's assertions of personal wrongdoing.

7. *To Attorney Who is Also the Executor*

In the case of *In re Estate of Stanton*,¹⁴³ the probate court denied a temporary administrator's request for attorneys' fees because it could not distinguish the fees for work he performed as a temporary administrator from the legal fees for his services, some of which were for services not authorized by the probate court. However, the probate court indicated that the temporary administrator could refile his application. The Tyler Court of Appeals determined that the probate court's refusal was justified, and that the temporary administrator still had the possibility of recovering a portion of the requested fees upon making an appropriate application.¹⁴⁴

L. DETERMINATION OF HEIRSHIP—AUTHORITY OF ATTORNEY AD LITEM

The attorney ad litem for unknown heirs may take all actions for the unknown clients as the attorney ad litem could take for actual known clients. For example, in the case of *In re Estate of Stanton*,¹⁴⁵ the duly appointed attorney ad litem for the decedent's unknown heirs under Probate Court section 34A opposed various applications and asked the court to appoint an independent party as the administrator. The probate court agreed and appointed a third party as the administrator. The temporary administrator appealed.

The court of appeals explained that the attorney ad litem had standing to oppose the applications and request the appointment of an indepen-

141. 193 S.W.3d 701 (Tex. App.—Beaumont 2006, no pet.).

142. *Id.* at 704.

143. 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

144. *Id.* at 209-10.

145. *Id.* at 208.

dent third-party administrator.¹⁴⁶ The attorney ad litem owes the same duty to the unknown heirs as he would owe to clients who expressly employ him. If the unknown heirs had been present, they could have opposed the applications and requested the appointment of an independent third-party administrator, thus the attorney ad litem had both the standing and the authority to do so as well.¹⁴⁷

III. TRUSTS

A. CREATION

1. *Trust Intent*

Courts are reluctant to transform non-trust relationships into trust relationships. For example, in *Jones v. Blum*,¹⁴⁸ several attorneys entered into a fee-sharing agreement and, after a settlement was reached, litigated the amounts to which each was entitled. One of the attorneys claimed that a trust relationship existed between himself and one of the other attorneys. Both the trial and appellate courts rejected this claim.¹⁴⁹ The Dallas Court of Appeals explained that the record contained no evidence that the parties intended to create a trust with respect to the settlement proceeds, and without trust intent, no trust exists under Trust Code section 112.002.¹⁵⁰

B. BENEFICIARIES

*In re Weekley Homes, L.P.*¹⁵¹ shows that arbitration clauses contained in contracts signed by the trustee may impact beneficiaries' rights. The settlor signed a contract for the purchase of a home that contained an arbitration clause. After closing, the settlor transferred the house to a previously existing revocable inter vivos trust for the benefit of his daughter. The settlor and his daughter were co-trustees of this trust. The settlor explained that the only reason that he signed the purchase contract individually was that he had forgotten to place the home into the trust. Problems later arose with the house. The settlor, his daughter, and the trust sued the builder, who then moved to compel arbitration. The lower court compelled the settlor and the trust to arbitrate but not the daughter under the theory that she was not bound by the arbitration clause because she did not sign the contract.¹⁵²

The Supreme Court of Texas decided that the daughter was bound.¹⁵³ Included in its discussion of the arbitration issue, the supreme court explained that "a suit involving a trust generally must be brought by or

146. *Id.*

147. *Id.*

148. 196 S.W.3d 440 (Tex. App.—Dallas 2006, pet. denied).

149. *Id.* at 448.

150. *Id.*

151. 180 S.W.3d 127 (Tex. 2005).

152. *Id.* at 129-30.

153. *Id.* at 135.

against the trustee, and can be binding on the beneficiaries whether they join it or not.”¹⁵⁴ Even though the daughter did not purport to sue either as a trustee or as a beneficiary of the trust, she was in reality both. Thus, any recovery will directly benefit her as the sole beneficiary of the trust. The supreme court noted that “if a trustee’s agreement to arbitrate can be avoided by simply having the beneficiaries bring suit, ‘the strong state policy favoring arbitration would be effectively thwarted.’”¹⁵⁵

IV. OTHER ESTATE-PLANNING MATTERS

A. MALPRACTICE

1. *The Belt Opinion*

In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*,¹⁵⁶ the executors sued the attorneys who prepared the testator’s will, asserting that the attorneys provided negligent advice and drafting services. The executors believed that the testator’s estate incurred over \$1.5 million in unnecessary federal estate taxes because of the malpractice. Both the trial and court of appeals agreed that the executors had no standing to pursue the claim because of lack of privity.¹⁵⁷ The appellate court explained that privity was mandated by *Barcelo v. Elliott*, thus the appellate court had no choice but to affirm the trial court’s grant of a summary judgment in favor of the attorneys.¹⁵⁸

The Supreme Court of Texas reversed and held, “there is no legal bar preventing an estate’s personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent’s estate planners.”¹⁵⁹ The supreme court did not express an opinion as to whether the attorney’s conduct actually amounted to malpractice.

Here are the key points that the supreme court made:

- ***Barcelo* remains good law.** The supreme court did not overrule *Barcelo*. The supreme court explained that an attorney owes no duty to a non-client, such as a will beneficiary or an intended will beneficiary, even if the individual is damaged by the attorney’s malpractice.¹⁶⁰ The supreme court reiterated the policy considerations supporting *Barcelo*:

[T]he threat of suits by disappointed heirs after a client’s death could create conflicts during the estate-planning process and divide the attorney’s loyalty between the client and potential beneficiaries, generally compromising the quality of the attorney’s representation [S]uits brought by bickering beneficiaries

154. *Id.* at 133-34.

155. *Id.* (quoting *Merrill Lynch v. Eddings*, 838 S.W.2d 874, 879 (Tex. App.—Waco 1992, writ denied)).

156. 192 S.W.3d 780 (Tex. 2006).

157. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 141 S.W.3d 706, 706 (Tex. App.—San Antonio 2004), *rev’d*, 192 S.W.3d 780 (Tex. 2006).

158. *Id.* at 708-09 (citing *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996)).

159. *Belt*, 192 S.W.3d at 782.

160. *Id.* at 783.

would necessarily require extrinsic evidence to prove how a decedent intended to distribute the estate, creating a “host of difficulties.” . . . [B]arring a cause of action for estate-planning malpractice by beneficiaries would help ensure that estate planners “zealously represent[ed]” their clients.¹⁶¹

• **Policies are different regarding suits by personal representatives.**

The policy considerations discussed above do not apply to suits by personal representatives.¹⁶² The supreme court explained that, unlike cases in which “disappointed heirs seek to dispute the size of their bequest or their omission from an estate plan,” these policy considerations do not apply “when an estate’s personal representative seeks to recover damages incurred by the estate itself.”¹⁶³ The supreme court also pointed out that “while the interests of the decedent and a potential beneficiary may conflict, a decedent’s interests should mirror those of his estate.”¹⁶⁴ The supreme court wrapped up its opinion by concluding that “[l]imiting estate-planning malpractice suits to those brought by either the client or the client’s personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship.”¹⁶⁵

• **Possible “recasting” is possible.** The supreme court recognized the problem that may arise because a beneficiary is often appointed as the estate’s personal representative. The supreme court’s holding creates “an opportunity for some disappointed beneficiaries to recast a malpractice claim for their own ‘lost’ inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate.”¹⁶⁶ The supreme court minimized this possibility by stating that “[t]he temptation to bring such claims will likely be tempered, however, by the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position.”¹⁶⁷ The supreme court also pointed out that any recovery goes to the estate, not the beneficiary, unless recovery flows through to the beneficiary under the terms of the will.¹⁶⁸

• **The decedent’s personal representative has capacity and standing.**

The supreme court explained that it is well-accepted law that a decedent’s personal representative has the capacity to bring a survival action on behalf of the decedent’s estate.¹⁶⁹ The supreme court then addressed an issue of first impression in Texas; that is, does a legal malpractice claim in the estate-planning context survive a deceased client? The supreme court explained that the common law allows survival of actions for acts affecting property rights and that estate-planning negligence that results in “the improper depletion of a cli-

161. *Id.*

162. *See id.* at 788.

163. *Id.* at 787.

164. *Id.*

165. *Id.* at 789.

166. *Id.* at 788.

167. *Id.*

168. *Id.*

169. *Id.* at 784.

ent's estate involves injury to the decedent's property."¹⁷⁰ Thus, the supreme court held that "legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate."¹⁷¹ Consequently, the executors had standing to bring the malpractice claim.

• **A malpractice claim accrues during the decedent's lifetime.** The supreme court explained that the alleged malpractice occurred during the testator's lifetime even though the alleged damage (increased estate-tax liability) did not occur until after the decedent's death.¹⁷² Thus, the supreme court disapproved a contrary holding in the lower court case of *Estate of Arlitt v. Paterson*.¹⁷³ The supreme court pointed out that the testator could have brought the claim himself if he had discovered the malpractice before his death and recovered his attorney's fees and the costs incurred to restructure his estate plan.¹⁷⁴

• **Discovery rule applies running of statute of limitations.** In a footnote, the supreme court addressed the issue of when the statute of limitations begins to run. The supreme court stated:

[W]hile an injury occurred during the decedent's lifetime for purposes of determining survival, the statute of limitations for such a malpractice action does not begin to run until the claimant "discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of [the] cause of action." . . . In this case, the "claimant" may be either the decedent or the personal representative of the decedent's estate.¹⁷⁵

Accordingly, estate planners are subject to potential malpractice actions brought by the personal representative of their client's estate. Whether a practitioner may achieve protection from this liability is problematic. For example, must an estate planner review a detailed check-list of all estate-planning strategies (if such a list can be created) with each client and have the client affirmatively indicate that he or she understands the potential benefits of each technique but does not wish to use it?

2. Belt "Always" Texas Law?

*O'Donnell v. Smith*¹⁷⁶ examined whether an estate's personal representative could sue the decedent's former attorneys for malpractice in advising the decedent in his capacity as the executor of his wife's estate. The lower court ruled in favor of the attorneys, basing its judgment on the fact that the decedent's executor and the estate lacked privity of con-

170. *Id.*

171. *Id.* at 785.

172. *Id.*

173. *Id.* at 785-86 (citing *Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 720 (Tex. App.—San Antonio 1999, pet. denied)).

174. *Id.* at 786.

175. *Id.* at 786 n.5 (quoting *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 121 (Tex. 2001)).

176. 197 S.W.3d 394 (Tex. 2006).

tract with the attorneys.¹⁷⁷

The Supreme Court of Texas granted a petition for review without reference to the merits, vacated the lower court's judgment, and remanded so that the lower court could take into account the holding in *Belt*.¹⁷⁸

It seems that the Texas Supreme Court is willing to apply the *Belt* holding retroactively to causes of action that accrued and decisions rendered before the date of the supreme court's decision. Accordingly, the supreme court appears to be saying that *Belt* is a statement of the way that the law is and has always been, rather than a declaration of a new legal rule.

B. FEDERAL PROBATE EXCEPTION

The United States Supreme Court clarified the extent of the "probate exception" to federal jurisdiction in *Marshall v. Marshall*¹⁷⁹ by allowing a claim for tortious interference with an expectancy to go forward in federal court. The Court explained:

[T]he Ninth Circuit . . . read the probate exception broadly to exclude from the federal courts' adjudicatory authority "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." . . . The Court of Appeals further held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting "tax liability, debt, gift, [or] tort."¹⁸⁰

The Court then reversed, holding that "the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception."¹⁸¹

C. GIFTS

As *Decker v. Decker*¹⁸² shows, an appellant will have a difficult time setting aside a jury verdict that a transfer was due to undue influence or made while the donor lacked capacity. In *Decker*, the son and daughter-in-law moved in with the son's father to care for him. The father made several inter vivos transfers of real property and a motor home to his son. After the son's death, his father was successful in setting aside the inter vivos transfers on the grounds that he was unduly influenced and that he lacked the mental capacity to make the transfers. The daughter-in-law appealed.

177. *Id.* at 394.

178. *Id.*

179. 126 S. Ct. 1735 (2006).

180. *Id.* at 1741 (quoting *In re Estate of Marshall*, 392 F.3d 1118, 1136 (9th Cir. 2004)).

181. *Id.*

182. 192 S.W.3d 648 (Tex. App.—Fort Worth 2006, no pet.).

The Fort Worth Court of Appeals affirmed.¹⁸³ The court engaged in a careful review of the evidence and determined that it was sufficient to support the jury's determination that the father was unduly influenced and lacked the mental capacity to transfer the real property.¹⁸⁴ Accordingly, the father still owns the real property.

With regard to the motor home, the situation was a bit more complex because the daughter-in-law had already sold the motor home to her uncle, and the trial court's judgment did not award the motor home to either the daughter-in-law or the father. The court found that the evidence was sufficient to support the jury's finding that the father was unduly influenced to transfer the motor home, thus the transaction should be set aside.¹⁸⁵ The uncle did not obtain a finding that he was a bona fide purchaser, thus the motor home still belongs to the father.¹⁸⁶

D. FROZEN EMBRYO DISPOSITION UPON DIVORCE

Individuals contemplating assisted reproduction must carefully anticipate the impact of changed circumstances such as divorce. For example, in *Roman v. Roman*,¹⁸⁷ a husband and his wife underwent medical procedures that resulted in three embryos that were frozen for later implantation. In writing, they agreed to discard the embryos if they divorced. When a divorce action ensued, however, the wife was successful in obtaining a court order permitting her to take possession of and use the embryos. The trial court explained that the embryos were community property and that awarding them to the wife was "just and right and a fair and equitable division" of the property.¹⁸⁸ The husband appealed.

In this case of first impression in Texas, the Houston Court of Appeals reversed, holding that the agreement to discard the embryos upon divorce was binding on the parties.¹⁸⁹ The court conducted an extensive review of cases from other jurisdictions that have addressed the validity and enforceability of this type of agreement. The court also studied the Texas statutes governing assisted reproduction and recognized that "[n]oticeably absent from [the statutes] is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce."¹⁹⁰ The court also determined that case law contained nothing "incompatible with the recognition of the parties' agreement as controlling."¹⁹¹ Accordingly, the court concluded that "the public policy of [Texas] would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an

183. *Id.* at 658.

184. *Id.* at 656.

185. *Id.* at 657.

186. *Id.* at 658.

187. 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. filed).

188. *Id.* at 43.

189. *Id.* at 54-55.

190. *Id.* at 49.

191. *Id.*

embryo's disposition in the event of a contingency, such as divorce."¹⁹² The court then analyzed the agreement and determined that it was an enforceable contract because it "manifests a voluntary unchanged mutual intention of the parties regarding disposition of the embryos upon divorce."¹⁹³

E. MARRIAGE-LIKE RELATIONSHIP DOCTRINE

Texas does not recognize the marriage-like relationship doctrine, thus unmarried partners must use other legal techniques to achieve their estate-planning desires. For example, in *Ross v. Goldstein*,¹⁹⁴ as the independent administrator of his father's estate, a son brought suit against his father's partner to recover estate assets. The partner claimed that he was entitled to the assets under the marriage-like relationship doctrine. Both the trial and Houston Court of Appeals rejected the partner's claim and refused to recognize this doctrine. The partner asserted that the doctrine is an equitable remedy that is not against the public policy of Texas, and would "aid the courts in addressing the growing reality of same-sex relationships."¹⁹⁵ The court of appeals explained that it was unwilling to recognize the marriage-like relationship doctrine, and that "same-sex couples must address their particular desires through other legal vehicles such as contracts or testamentary transfers."¹⁹⁶

The court examined two provisions of Texas law—first, article 1, section 32 of the Texas Constitution, which provides that no state or political subdivision may create or recognize any legal status identical or similar to marriage for same-sex partners, and, second, Texas Family Code section 6.204, which states that it is contrary to Texas public policy to recognize or give effect to a same-sex marriage or civil union.¹⁹⁷ Accordingly, the court held that it lacked the power to create an equitable remedy akin to marriage.¹⁹⁸

192. *Id.* at 49-50.

193. *Id.* at 50, 54-55.

194. 203 S.W.3d 508 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

195. *Id.* at 514.

196. *Id.*

197. *Id.*

198. *Id.*

