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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 November 2, 2003 through November 1, 2004. 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. The reader must 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 led to time consuming and costly litigation in the past, a practitioner may be able to reduce the likelihood of the same situations arising with his or her clients.

I. INTESTACY

Despite the fact that the vast majority of Texans die without a valid will, there are no reported appellate cases during the Survey period dealing with intestate succession issues.

II. WILLS

A. TESTAMENTARY CAPACITY

1. *Evidence Sufficient to Raise Fact Issue*

As exhibited in *In re Estate of Browne*, a will proponent will have a difficult time sustaining a summary judgment that testamentary capacity exists if the contestant supplies evidence with probative value of lack of capacity.¹ After the testator's death, his wife of twenty years (the proponent) attempted to probate his will. His children and stepchildren contested the will claiming that the testator lacked testamentary capacity.

1. *In re Estate of Browne*, 140 S.W.3d 436, 440 (Tex. App.—Beaumont 2004, no pet. h.).

The trial court granted summary judgment for the proponent.²

The Beaumont Court of Appeals reversed. The court began its analysis by explaining that the proponent has the burden of establishing capacity under Probate Code Section 88(b)(1).³ The proponent did submit sufficient evidence to meet this burden such as affidavits from family members, doctors, and the attorney who drafted the will. However, the proponents, several of whom were doctors, submitted evidence that the testator's medical condition and treatment (e.g., using a respirator and taking powerful drugs) prevented him from having testamentary capacity. This evidence was sufficient to raise a fact question with respect to the existence of testamentary capacity, which precluded a summary judgment in the proponent's favor.⁴

2. Evidence Sufficient to Support Jury Verdict of Lack of Capacity

*In re Estate of Robinson*⁵ provided an example of how difficult it is to convince an appellate court to set aside a jury finding that a testator lacked testamentary capacity. In *Robinson*, the testatrix executed Will 1 and Will 2. A jury found that Will 2 was invalid because the testatrix lacked testamentary capacity and had been unduly influenced. Accordingly, the court admitted Will 1 to probate. The proponents of Will 2 appealed.⁶

The Corpus Christi Court of Appeals affirmed. The court rejected the proponents' claim that the trial court improperly admitted the testimony of a doctor who testified as an expert witness because the testimony was unscientific and unreliable for failing to meet the standards of Texas case law.⁷ The proponents claimed there was an impermissible analytical gap between the medical records the doctor examined and the conclusion that the testatrix lacked capacity. After an extensive review of the doctor's testimony, the court determined that the trial court did not abuse its discretion by admitting the testimony.⁸

The appellate court also rejected the proponents' claim that there was insufficient evidence to support the jury's finding of lack of capacity.⁹ The court exhaustively reviewed the evidence presented to the jury and determined that it was sufficient to support its verdict.¹⁰

2. *Id.* at 437-38.

3. *Id.* at 439.

4. *Id.* at 439-40.

5. 140 S.W.3d 782 (Tex. App.—Corpus Christi 2004, no pet. h.).

6. *Id.* at 787-88.

7. *Id.* at 792.

8. *Id.* at 788-92.

9. *Id.* at 799.

10. *Id.* at 794-99.

B. FORMALITIES

1. *Attestation in Testator's Presence*

The case of *In re Estate of Browne*¹¹ serves as an important reminder that the witnesses to a will should always attest in close physical proximity to the testator so the testator may see them attesting.¹² In *Browne*, the Beaumont Court of Appeals agreed with the contestants' assertion that the trial court erred in granting summary judgment that the testator properly executed his will under Probate Code Section 59. The contestants presented an affidavit, which supplied facts that could lead to the conclusion that the witnesses did not attest to the will in the testator's presence, that is, they signed the will in a hospital waiting room while the testator was in his hospital room.¹³

2. *Testator Reading the Will*

The court in *Browne* also briefly discussed whether the testator actually read the will. Even though not legally required under Probate Code Section 59, it is good practice for the attorney supervising a will execution ceremony to make certain the testator has actually read the will and understands its contents. The attorney should establish that the testator read and understood the will in front of the witnesses. The appellate court in *Browne* agreed with the proponent that she was not required to prove that the testator actually read the will or had it read to him before signing it.¹⁴ These matters may, however, impact whether the testator had testamentary intent and capacity.¹⁵

C. CONSTRUCTION AND INTERPRETATION

1. *Independent Administration*

A court may construe a will even if the administration is independent, as evidenced by *In re Estate of Bean*.¹⁶ The beneficiaries brought an action to construe a will and the trial court heard the case. The independent executor asserted that the court had no jurisdiction to construe the will because the administration was independent. Both the trial and appellate courts rejected this argument.¹⁷ The Texarkana Court of Appeals based its holding on Civil Practice and Remedies Code Section 37.004(a) (part of the Texas version of the Uniform Declaratory Judgments Act), which provides that a person interested in a will may have any question of construction determined by the court.¹⁸

11. 140 S.W.3d 436 (Tex. App.—Beaumont 2004, no pet. h.).

12. *See id.* at 438.

13. *Id.* at 438-39.

14. *Id.* at 439.

15. *See id.*

16. 120 S.W.3d 914 (Tex. App.—Texarkana 2003, pet. denied).

17. *Id.* at 916.

18. *Id.* at 918-19 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (Vernon 1997)).

2. *Adopted Great-Grandchildren*

It is axiomatic that wills and trusts should be carefully drafted to carry out the client's intent. For example, if a client wishes to exclude non-blood descendants from benefiting, a clear unambiguous statement should be included in the will such as, "under no circumstances may a non-biologically related person receive property under this will as a child, grandchild, great-grandchild, or other descendant." Failure to do so may lead to the type of construction problems seen in *Parker v. Parker*,¹⁹ in which the key issue was whether the adopted great-grandchildren were eligible beneficiaries of certain testamentary trusts. Both the trial and appellate courts agreed that they were eligible beneficiaries.²⁰

The Fort Worth Court of Appeals recognized that it was bound by the law as it existed at the time the will was executed, which was the 1931 version of the Texas adoption statute containing the presumption that adopted children would not take under a will executed by a third person unless the testator provided otherwise in the will.²¹ The testator in *Parker* stated in his will that *grandchildren* had to be "born of [the child's] body" to qualify as beneficiaries.²² However, *great-grandchildren* were not subject to the same limitation. Instead, the will provided that "the children, and their heirs, of any deceased child of [the child's] body [are] entitled to their parent's portion per stirpes."²³ Because the testator omitted the "of the body" language from this gift over to great-grandchildren, the testator's express language shows an intent to include adopted great-grandchildren, and the otherwise applicable presumption against the inclusion of adopted individuals did not apply.²⁴ The court recognized that it might not be logical for the testator to exclude adopted grandchildren but include adopted great-grandchildren. However, the court was unwilling to redraft the will to carry out a presumed intent.²⁵

3. *Rights of Life Tenant*

Regardless of the clarity of language used in a will, the will may still be attacked on the ground that it should not be given effect as it is written. Any additional guidance that the testator provides in the will could reduce such claims. In the case of *Steger v. Muenster Drilling Co.*,²⁶ for example, the testator could have added the phrase, "including the entering into of leases which extend beyond the life tenant's lifetime" to clarify the authority of the life tenant.

In *Steger*, the husband's will granted his wife a life estate in all his property including extensive powers such as the authority to manage, control,

19. 131 S.W.3d 524, 525 (Tex. App.—Fort Worth 2004, pet. denied).

20. *Id.* at 535.

21. *Id.* at 531.

22. *Id.*

23. *Id.* at 531-32.

24. *Id.* at 532.

25. *Id.*

26. 134 S.W.3d 359 (Tex. App.—Fort Worth 2003, pet. denied).

and lease the property for all purposes. The wife entered into mineral leases with secondary terms extending for as long as oil or gas is produced in paying quantities. The wife died in 1960. One of the remainder beneficiaries received a secondary life estate. This remainder beneficiary also entered into mineral leases extending for as long as paying quantities of oil or gas were produced. In a similar manner to the devise to the wife, the husband's will granted this remainder beneficiary the power to enter into leases. This beneficiary died in 1993. In 1996, a child, the sole surviving remainder beneficiary, questioned the continued validity of some of these leases. This child asserts that the husband's will did not authorize his wife and the remainder beneficiary to execute oil and gas leases extending beyond their lifetimes.²⁷

The Fort Worth Court of Appeals agreed with the trial court that the express terms of the husband's will granted his wife and the remainder beneficiary the right to enter into these long-term leases.²⁸ The court studied the language of the husband's will, especially the phrases "for all purposes" and "whatever nature," which followed the grants to the life tenants of the power to lease the property.²⁹ Construing the language of the husband's will according to the ordinary meaning of the words used, the court held that the husband's will unambiguously authorized his wife and the remainder beneficiary to execute any type of oil and gas lease, including leases that extended beyond their lifetimes.³⁰ The court rejected the child's argument that because the wife and the remainder beneficiary could enter into leases only while they were alive, they could not create a lease that would remain effective after their deaths.³¹

D. ADEMPMENT & AMBIGUITY

A testator electing to make specific gifts in a will should carefully word the gifts to avoid ambiguity. In addition, the testator should contemplate possible ademption, and the will should be drafted to reflect the testator's intent should the gifted item not be in the estate when the testator dies. Failure to do so may raise problems such as those exhibited in *Harris v. Hines*.³² The testatrix's will devised specific real property owned jointly with her husband. Prior to her death, the testatrix and her husband sold this property and received a promissory note in exchange. A dispute arose as to whether the devise adeemed.³³ The trial court held that the gift was not ambiguous and did not adeem because the gift included the phrase "together with all additions thereto and substitutions therefor."³⁴ The Texarkana Court of Appeals determined that this language specifi-

27. *Id.* at 364-67.

28. *Id.* at 375.

29. *Id.* at 373-74.

30. *Id.* at 374-75.

31. *Id.* at 373-75.

32. 137 S.W.3d 898 (Tex. App.—Texarkana 2004, no pet. h.).

33. *Id.* at 902.

34. *Id.* at 905.

cally provided for the proceeds of the sale of the property to pass to the devisees, and thus, they were entitled to the testatrix's one-half interest in the promissory note.³⁵

On appeal, the court began its lengthy analysis by determining that the devise is reasonably susceptible to more than one meaning.³⁶ The court recognized that there are reasonable arguments for both inclusion and exclusion of the proceeds from the devise. The will did not provide a clear indication of whether the testatrix intended to include the proceeds from the possible future sale of the property in the devise. Accordingly, the court determined that this ambiguity was patent because the ambiguity was apparent from reading the will.³⁷ The court then examined extrinsic evidence to ascertain the testatrix's intent.³⁸

The court studied affidavits from the testatrix's husband and her attorney. These affidavits made it clear that the testatrix excluded her daughter from the specific devise because she did not want the daughter's husband to have any control over this real property. Her daughter, however, shared equally with the other children as residuary beneficiaries. Because the real property was no longer in the estate, the reason for excluding this child from the devise no longer existed. In addition, the attorney's testimony explained that the "substitution" language referred to replacement of personal property included with the devised realty. Consequently, the court held that the sale of the specifically devised property caused an ademption and that the proceeds would pass under the residuary clause of the testatrix's will.³⁹

III. ESTATE ADMINISTRATION

A. JURISDICTION

1. *Transfer from District Court to County Court at Law*

An action, such as one to impose a constructive trust or deal with tort claims against a trust, that might presumably be handled in district court in a county without a statutory probate court, may actually end up being decided in a county court at law. *In re Stark*⁴⁰ addressed this issue. In this case, the testatrix's estate was pending in a county court at law. The beneficiary brought an action in district court against a variety of persons, including the independent executors of the testatrix's estate. The district court granted a motion to transfer the beneficiary's action to the county court at law where the administration was pending. The beneficiary then brought this mandamus action to force the district court to withdraw the transfer order.⁴¹

35. *Id.* at 901-02.

36. *Id.* at 906.

37. *Id.* at 908.

38. *Id.* at 905-08.

39. *Id.* at 910.

40. 126 S.W.3d 635 (Tex. App.—Beaumont 2004, orig. proceeding [mand. denied]).

41. *Id.* at 638.

The Beaumont Court of Appeals denied mandamus. The court began by rejecting the beneficiary's claim that a district court lacks the authority to transfer a case to a statutory county court.⁴² The court continued, explaining that such a transfer is authorized under the Government Code when permitted by local rules as was true in the present case.⁴³

The court next addressed the beneficiary's claim that the transfer was improper because the beneficiary sought a constructive trust remedy that was not available in a county court at law. The court stated:

[T]he mere request for a constructive trust will not necessarily oust the dominant jurisdiction of a statutory county court sitting in probate. A district court properly declines to exercise its jurisdiction over matters incident to an estate when, although a constructive trust is requested, the statutory county court has the power to afford adequate relief.⁴⁴

In this case, the estate contained sufficient assets to pay the damages the beneficiary was seeking.⁴⁵

It is worth noting, however, that the dissent strongly argued that because the beneficiary sought a constructive trust over certain real property and because every parcel of real property is unique, the beneficiary would suffer irreparable injury if instead of recovering the property, the court awarded only monetary damages.⁴⁶

Lastly, the beneficiary argued that the district court should have retained the case because it also involved a charitable trust, and Texas Property Code Section 115.001 gives the district court exclusive jurisdiction over trusts when the county lacks a statutory probate court.⁴⁷ The court rejected this argument because the beneficiary's claims were tort claims and not within the meaning of the section because they are of a completely different nature than the enumerated actions.⁴⁸

2. Class Certification

Shell Cortez Pipeline Co. v. Shores explained that a statutory probate court does not have jurisdiction over a case merely because one of the parties is a trust.⁴⁹ In *Shell*, a statutory probate court certified a class in a complex case involving the alleged underpayment of carbon dioxide royalties. The defendants appealed.⁵⁰

42. *Id.* at 639.

43. *Id.* (applying TEX. GOV'T CODE ANN. §74.093(a)-(d) (Vernon 1998) in deciding whether it was proper to transfer a case).

44. *Id.* at 640 (internal citations omitted).

45. *Id.*

46. *Id.* at 642-43.

47. *Id.* at 642 (citing TEX. PROP. CODE ANN. § 115.001 (Vernon Supp. 2004)).

48. *Id.* at 641-42.

49. *Shell Cortez Pipeline Co. v. Shores*, 127 S.W.3d 286 (Tex. App.—Fort Worth 2004, no pet. h.); see *infra* note 79 and accompanying text .

50. *Shell Cortez Pipeline Co.*, 127 S.W.3d at 288.

The Fort Worth Court of Appeals first determined that it had jurisdiction to address the issue of whether the statutory probate court had subject matter jurisdiction over the class claims.⁵¹ The court then found that the statutory probate court lacked jurisdiction.⁵² The court rejected the plaintiff's claim that the statutory probate court had jurisdiction under Probate Code Section 5A(c) (1999 version) because one of the named plaintiffs was an inter vivos trust.⁵³ The court explained that for Section 5A(c) to grant jurisdiction to the statutory probate court, the district court must first have jurisdiction over the case under Texas Property Code Section 115.001. The court examined the lengthy list of claims that included actions such as breach of contract and conspiracy and determined that none of these actions actually involved an inter vivos trust.⁵⁴ "[T]he mere fact that an inter vivos trust has the same or similar claims as the members of the class does not transform the class claims into actions that involved the trust."⁵⁵

The court also rejected the claim that the probate court had jurisdiction under Texas Probate Code section 5A(d) (1999 version) which conferred ancillary or pendent jurisdiction over claims that bear some relationship to the estate pending before the court.⁵⁶ In this case, there was no estate pending in probate court, no close relationship between non-probate class claims and pending probate matters, and the resolution of the class claims would not aid in the efficient administration of anything related to the trust.⁵⁷

3. Appellate Jurisdiction

*In re Estate of Robinson*⁵⁸ reminded appellants that they should always clearly explain the basis for the court's jurisdiction to hear the appeal so that the appellants may argue before the court. Sometimes appellants are lucky even if they fail to do so. In *Robinson*, the appellate court determined, sua sponte, that it had jurisdiction to hear the appeal of a case that found a named co-executor disqualified for being unsuitable.⁵⁹ The court, applying the *Crowson v. Wakeham*⁶⁰ test, held that the order disqualifying the named co-executor from serving was a final order and thus appealable.⁶¹

51. *Id.* at 292.

52. *Id.* at 294.

53. *Id.* (citing TEX. PROB. CODE ANN. § 5A(c) (Vernon 2002), *repealed* by Act of June 20, 2003, 78th Leg., R.S. ch. 1060, § 16, 2003 Tex. Sess. Law Serv. 1060).

54. *Id.* at 293-94.

55. *Id.* at 294.

56. *Id.* at 295 (citing TEX. PROB. CODE ANN. § 5A(d) (Vernon 2002), *repealed* by Act of June 20, 2003, 78th Leg., R.S., ch. 1060, § 16, 2003 Tex. Sess. Law Serv. 1060).

57. *Id.* at 292-95.

58. 140 S.W.3d 801 (Tex. App.—Corpus Christi 2004, pet. dism'd).

59. *Id.*

60. 897 S.W.2d 779 (Tex. 1995).

61. *Robinson*, 140 S.W.3d at 805.

B. STANDING

A personal representative of a deceased party to a lawsuit may find it helpful to promptly file the oath, give any necessary bond, and obtain letters before filing a suggestion of death. A copy of the letters may then be filed along with the suggestion of death. Compliance with this procedure, although not legally necessary, may prevent arguments such as those in *Moore v. Johnson*.⁶² In *Moore*, a patient brought a medical malpractice claim against her doctor and subsequently died while the lawsuit was pending. The court admitted the patient's will to probate and appointed her children as independent executors. They filed a suggestion of death, requesting that they be named as plaintiffs and that the suit continue in their names. Without specifying any grounds, the trial judge granted the doctor summary judgment on all claims. The independent executors appealed.⁶³

The Dallas Court of Appeals reversed.⁶⁴ The court examined the doctor's claim that the independent executors lacked standing because they did not file letters testamentary when they made the request to be substituted as plaintiffs in the malpractice action.⁶⁵ The court also reviewed the doctor's claim that the substitution was inappropriate because one of the independent executors took the oath of office after filing the substitution request.⁶⁶ The court rejected these claims.⁶⁷ Both independent executors were duly qualified years before the doctor filed the summary judgment motion.⁶⁸ The court also explained that the issuance of letters is a ministerial act under Probate Code Section 182.⁶⁹ Texas law does not require that letters testamentary be filed along with the suggestion of death.⁷⁰

C. APPEAL

A person dissatisfied with a probate court's decision should file a timely appeal. Failure to do so may cause problems such as those confronted by the devisee in *Roach v. Rowley*.⁷¹ In this case, the decedent's sole heir filed an application for letters of independent administration. Because there was an assertion that the decedent had a valid will, the court appointed a temporary administrator. The probate court approved the temporary administrator's nine applications for interim payment of fees and expenses. The devisee did not object to these applications. However, when the temporary administrator filed an account for final settlement of the decedent's estate, the devisee objected to the fees. The

62. 143 S.W.3d 339 (Tex. App.—Dallas 2004, no pet. h.).

63. *Id.* at 340-41.

64. *Id.* at 344.

65. *Id.* at 342.

66. *Id.*

67. *Id.* at 341-43.

68. *Id.* at 342.

69. *Id.* (citing TEX. PROB. CODE ANN. § 182 (Vernon 2003)).

70. *Id.* at 342-44.

71. 135 S.W.3d 845 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.).

probate court found that the devisee waived his objection to all the fee orders.⁷²

The Houston Court of Appeals agreed that the devisee had waived his objection by not filing a timely appeal.⁷³ The probate court's orders approving the temporary administrator's applications for the payment of fees and expenses were final and appealable orders.⁷⁴

D. TRANSFER

In the case of *In re Terex Corp.*,⁷⁵ a district court transferred a wrongful death case to a probate court under Probate Code Section 5B and Civil Practice and Remedies Code Section 15.007.⁷⁶ The El Paso Court of Appeals reviewed prior cases and decided to follow the majority view that Section 5B is a jurisdictional statute and not a venue provision.⁷⁷ Accordingly, the court denied mandamus.⁷⁸

The Supreme Court of Texas heard this case and granted mandamus relief directing the district court to vacate its transfer order. The court explained that Civil Practice and Remedies Code Section 15.007 does not authorize a statutory probate court to transfer a wrongful death and survival case to itself under Probate Code Section 5B when venue is improper under Chapter 15 in the county where the probate is located and a party objects.⁷⁹

Proper venue for an action by or against a personal representative for personal injury, death, or property damages is now determined under Civil Practice & Remedies Code Section 15.007 according to Probate Code Section 5B(b), as amended in 2003, and which is applicable only to actions filed on or after September 1, 2003.⁸⁰ This change appears to be a codification of the holding in *Reliant Energy, Inc. v. Gonzalez*,⁸¹ which explained that Section 15.007 would be rendered meaningless if probate courts had the power to transfer these actions to themselves.⁸²

E. COURT-JUDGE ASSIGNMENT

*In re Denison*⁸³ served as a reminder than once a county court transfers a contested case to a district court, it is too late to request the assignment

72. *Id.* at 846.

73. *Id.* at 848.

74. *Id.*

75. 123 S.W.3d 673, 673-74 (Tex. App.—El Paso 2003, orig. proceeding), *mand. granted*, 159 S.W.3d 630 (Tex. 2005).

76. TEX. PROB. CODE ANN. § 5B (Vernon 2003 & Supp. 2004); TEX. CIV. PRAC. & REM. CODE ANN. § 15.007 (Vernon 2002).

77. *In re Terex Corp.*, 123 S.W.3d at 675.

78. *Id.* at 674-75.

79. *In re Terex Corp.*, 159 S.W.2d 630, 630-31 (Tex. 2005).

80. TEX. PROB. CODE ANN. § 5B(b) (Vernon 2004).

81. 102 S.W.3d 868, 874-75 (Tex. App.—Houston [1st Dist.] 2003), *aff'd*, 159 S.W.3d 615 (Tex. 2005).

82. TEX. CIV. PRAC. & REM. CODE ANN. § 15.007 (Vernon 2002).

83. 145 S.W.3d 803, 805 (Tex. App.—Eastland 2004, orig. proceeding [mand. denied]).

of a statutory probate court judge to hear the case. The beneficiary requested an accounting under Probate Code Section 149A in county court and requested the assignment of a statutory probate court judge to hear the case under Probate Code Section 5(b).⁸⁴ The county court denied the motion. The beneficiary then brought a mandamus proceeding.⁸⁵

The Eastland Court of Appeals denied the writ. Probate Code Section 5(b)(1) provides that the county court must grant a motion for the assignment of a statutory probate court judge to hear a contested case unless the county court judge has already transferred the matter to the district court.⁸⁶ The county court judge transferred the case to district court under Probate Code Section 5(b) many years before the beneficiary requested the assignment of a statutory probate court judge.⁸⁷ Consequently, mandamus was not appropriate.⁸⁸

F. LATE PROBATE

Although a will may not be admissible to probate because of a tardy filing, the will may still be used to show that earlier wills were revoked. For example, in *Schindler v. Schindler*,⁸⁹ the testatrix died in 1996; shortly thereafter her 1987 will was admitted to probate. In 2001, the proponents of the will attempted to probate the testatrix's 1995 will. Both the trial and appellate courts agreed that the proponents were in default for waiting longer than four years after the testatrix's death to probate the will and were, therefore, precluded from doing so.⁹⁰

The Dallas Court of Appeals focused on Probate Code Section 73(a), which provides that a will must be probated within four years of the date of death unless the proponent was not "in default."⁹¹ In this case, the proponents did not know of the will until after the four year period but the proponents were not beneficiaries of the will. Instead, they were beneficiaries of an estate that would have been enhanced by the terms of the testatrix's 1995 will. The court explained that the beneficiary of the 1995 will was clearly in default because he actually was present when the testatrix executed the will, and therefore, he obviously knew of its existence.⁹² The court also indicated that his death prior to the expiration of the four year period was irrelevant.⁹³ The court held that the proponents, as non-beneficiaries, could not be in a better position than the beneficiary of the will who was in default.⁹⁴

84. TEX. PROB. CODE ANN. §§ 149A, 5(b) (Vernon 2003 & Supp. 2005).

85. *In re Denison*, 145 S.W.3d at 804.

86. TEX. PROB. CODE ANN. § 5(b)(1) (Vernon 2003 & Supp. 2005).

87. *In re Denison*, 145 S.W.3d at 804-05 (discussing TEX. PROB. CODE ANN. § 5(b)).

88. *Id.* at 805.

89. 119 S.W.3d 923 (Tex. App.—Dallas 2003, pet. denied).

90. *Id.* at 928.

91. *Id.* at 929.

92. *Id.* at 927, 930.

93. *Id.* at 930.

94. *Id.* at 929-30.

The court determined that the 1995 will could nonetheless be used to show that the testatrix revoked her 1987 will. However, the court agreed that the trial court's conclusion that the testatrix lacked capacity to execute her will was supported by the facts.⁹⁵

G. DISQUALIFICATION OF EXECUTOR

Although appellate courts are usually reluctant to overturn a trial court's finding that a person is unsuitable to serve as executor, the disqualified person may nonetheless be able to show that the trial court's decision was an abuse of discretion. For example, in *In re Estate of Robinson*,⁹⁶ the testatrix named three co-executors in her will: Mary, Garland, and Bank. Bank declined to serve and Mary convinced the trial court that Garland was unsuitable under Probate Code Section 78(e). The basis of the unsuitability centered around Garland's involvement with the attempted probate of a later will that the court found invalid because the testatrix lacked testamentary capacity. The court appointed Mary as the sole executor and Garland appealed.⁹⁷

The Corpus Christi Court of Appeals reversed holding that the trial court acted without reference to any guiding rules and principles when it found that Garland was unsuitable.⁹⁸ The court explained that because Garland was named in the testatrix's will as a co-executor, Mary had the burden of establishing Garland's disqualification.⁹⁹ Because there was no statutory or judicial definition of "unsuitable," the court reviewed Texas cases in which the appellate courts concluded that a person was unsuitable to serve as an executor.¹⁰⁰ Although the court recognized that the trial court has broad discretion in finding a proposed executor to be unsuitable, the court held that the trial court abused its discretion because it acted in an arbitrary and unreasonable manner when it denied Garland's application.¹⁰¹

The court of appeals reviewed the facts that led the trial court to conclude that Garland had a conflict of interest, an adversary relationship, hostility, an inability to perform his duties, or a duty to contest (rather than advocate) the testatrix's later will.¹⁰² Some of the facts that showed the unreasonableness of the trial court's holding included that Garland was not a beneficiary under the will, did not have a claim against the estate, was not in conflict merely because he provided accounting services for some involved parties and their businesses, did not take sides with respect to the validity of the later will, and was willing to do whatever was legally required of him as executor, even if it meant suing his own ac-

95. *Id.* at 931-32.

96. 140 S.W.3d 801 (Tex. App.—Corpus Christi 2004, pet. dismiss'd).

97. *Id.* at 804-05.

98. *Id.* at 812-13.

99. *Id.*

100. *Id.* at 805-06.

101. *Id.* at 810-13.

102. *Id.* at 808-11.

counting clients.¹⁰³

H. INDEPENDENT ADMINISTRATION

A person may not ignore statutory time prerequisites, even if the person is anxious for the administration to proceed. For example, in *In re Estate of Bean*,¹⁰⁴ the trial court ordered the independent executor to partition and distribute the estate approximately thirteen months after the estate was opened. The executor appealed claiming that the court lacked jurisdiction to issue this order because Probate Code Section 149B(a) prohibits an interested person from demanding a distribution until two years have elapsed from the date the independent administration was created.¹⁰⁵

The Texarkana Court of Appeals agreed. It did not matter that the independent executor did not raise this issue at the trial court level because the issue involved subject matter jurisdiction, which may be raised for the first time on appeal.¹⁰⁶ In addition, subject matter jurisdiction may not be waived by the parties.¹⁰⁷

I. AUTHORITY OF HEIR

1. *No Administration Pending*

Problems may arise when the original parties to an action die and successors-in-interest take over. To avoid these problems, the status of the successors should be clearly documented and presented to the court. In *Kenseth v. Dallas County*,¹⁰⁸ the plaintiff died during the course of a highly complex case dealing with matters not relevant to estate planning. The issue arose whether an heir was a proper substitute plaintiff even though she was not appointed by the probate court as the plaintiff's personal representative.¹⁰⁹ The Dallas Court of Appeals reviewed the applicable case law as well as Texas Rule of Civil Procedure 151 and concluded that "if no estate administration is pending and none is necessary, the plaintiff's heir may appear in the case on the plaintiff's behalf."¹¹⁰ Accordingly, the heir was a proper appellant and had standing to represent the plaintiff's estate.¹¹¹

2. *Personal Representative Appointed*

An heir may have standing to bring a survival action on behalf of the estate even though a personal representative is currently serving, if the

103. *Id.*

104. 120 S.W.3d 914 (Tex. App.—Dallas 2004, pet. denied).

105. *Id.* at 916 (discussing TEX. PROB. CODE ANN. § 149B(a) (Vernon 2003)).

106. *Id.* at 919.

107. *Id.*

108. 126 S.W.3d 584 (Tex. App.—Dallas 2004, pet. denied).

109. *Id.* at 595.

110. *Id.* at 596.

111. *Id.* at 595.

representative (1) cannot bring the suit, (2) will not bring the suit, or (3) has interests that are antagonistic to those of the estate.¹¹² The operation of this principle formed the basis of the court's decision in *Mayhew v. Dealey*.¹¹³ After her father's death under suspicious circumstances, the daughter brought suit against her brother (the father's son) for damages resulting from allegedly causing their father's death. The daughter prevailed. The son appealed on many grounds including that the daughter lacked standing to bring a survival action on behalf of her father's estate because she was not the executor.¹¹⁴

The Dallas Court of Appeals held that the daughter had standing. The court agreed that usually only a duly appointed personal representative may bring a survival action to recover property belonging to a decedent's estate.¹¹⁵ However, there are several exceptions to this rule with one of them being that the personal representative cannot or will not bring the suit or the personal representative's interests are antagonistic to the estate.¹¹⁶ The executor testified and submitted an affidavit stating that he would not bring a lawsuit in connection with the daughter's claims on behalf of the estate. Thus, the daughter had standing to pursue the survival action.¹¹⁷

J. FINAL ACCOUNTING

An interested person has standing to object to a final accounting. For example, in *Roach v. Rowley*, the decedent's sole heir filed an application for letters of independent administration.¹¹⁸ Because there was an assertion that the decedent had a valid will, the court appointed a temporary administrator. The probate court approved the temporary administrator's nine applications for interim payment of fees and expenses. The devisee did not object to these applications. However, when the temporary administrator filed an account for final settlement of the decedent's estate, the devisee objected to the fees. The probate court found that the devisee lacked standing to object to the final accounting.¹¹⁹

The Houston Court of Appeals determined that the devisee did have standing to object to the final accounting.¹²⁰ The temporary administrator argued that the devisee was attempting to recover property belonging to the state by objecting to the final account and therefore lacked standing under *Frazier v. Wynn*.¹²¹ The court rejected this argument and explained that the devisee was not attempting to recover estate property,

112. See *Mayhew v. Dealey*, 143 S.W.3d 356 (Tex. App.—Dallas 2004, pet. denied).

113. *Id.* at 356.

114. *Id.* at 359.

115. *Id.* at 370.

116. *Id.* at 370-71.

117. *Id.* at 371.

118. 135 S.W.3d 845 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.).

119. *Id.* at 846.

120. *Id.* at 847.

121. 472 S.W.2d 750 (Tex. 1971) (holding that before heirs could sue to recover estate property, they must prove that no administration is pending and that none is necessary).

but rather was objecting to the final accounting as an interested person under Probate Code Section 10.¹²²

K. STATUTE OF LIMITATIONS

As demonstrated by *In re Estate of Robinson*,¹²³ a party may join a timely filed will contest even after the normal statute of limitations has expired. In *Robinson*, a will was properly contested within two years after its admission to probate as required by Probate Code Section 93. After the two years elapsed, additional parties joined the contest. Both the trial and Corpus Christi Court of Appeals agreed that these parties were not barred by the two-year statute of limitations because they *intervened* as plaintiffs even though they would have been barred if they had instituted their suit in a separate action.¹²⁴

IV. TRUSTS

A. JURISDICTION

1. Generally

The case of *Dolenz v. Vail* discussed relatively fundamental issues regarding trust jurisdiction.¹²⁵ However, there may be unstated lessons not reflected in the relatively simple legal points discussed in this case. The beneficiary was also the attorney who argued the appeal.¹²⁶ State Bar of Texas records reflected that he was suspended from the practice of law in 1999 during the pendency of the original case.¹²⁷ The controversy began in an earlier action in which the beneficiary, who was also the successor trustee, brought suit in a statutory probate court to recover property belonging to the trust. The court determined that the trust did not own any property and ordered that the beneficiary take nothing. In this case, the beneficiary sued in a district court claiming that the statutory probate court had no jurisdiction to rule on the existence of trust property. The beneficiary asserted that only a district court under Property Code Section 115.001 could rule on trust disputes.¹²⁸ The beneficiary also claimed that the judgment was defective because he was sued only in his individual capacity, not as a successor trustee. The district court dismissed the beneficiary's claims for lack of jurisdiction, and the beneficiary appealed.¹²⁹

122. *Roach*, 135 S.W.3d at 847 (discussing TEX. PROB. CODE ANN. § 10 (Vernon 2003)).

123. 140 S.W.3d 782 (Tex. App.—Corpus Christi 2004, no pet. h.).

124. *Id.* at 800-01.

125. 143 S.W.3d 515 (Tex. App.—Dallas 2004, pet. denied).

126. *See id.* at 516-17.

127. *See Dolenz v. State Bar of Texas*, 72 S.W.3d 385 (Tex. App.—Dallas 2001, no pet.) (affirming trial court's judgment of disbarment).

128. *See* TEX. PROP. CODE ANN. § 115.001 (Vernon 1995 & Supp. 2004).

129. *Dolenz*, 143 S.W.3d at 516-17.

The Dallas Court of Appeals affirmed. The court explained that a statutory probate court has concurrent jurisdiction with the district court with regard to all actions involving an inter vivos trust and therefore, it had jurisdiction.¹³⁰ The court also found that the beneficiary's failure to be served in a representative capacity was irrelevant because the beneficiary waived the objection by making a general appearance before the court.¹³¹

2. Trustee as Plaintiff

*Mobil Oil Corp. v. Shores*¹³² explained that a statutory probate court does not have jurisdiction over a case merely because the plaintiff is a trustee. In this case, the trustees sued the defendant to recover underpaid carbon dioxide royalties arising from interests held in trust in statutory probate court. The issue arose whether the statutory probate court had subject matter jurisdiction over the trustees' claims. The Fort Worth Court of Appeals examined the applicable (1999) versions of Probate Code Sections 5 and 5A and concluded that the statutory probate court lacked jurisdiction.¹³³

The court explained that the trustees' claims did not fall within any of the enumerations in the Probate Code. Therefore, before the statutory probate court had jurisdiction, it must first have been established that the district court had jurisdiction under Property Code Section 115.001. The trustee's cause of action was not expressly listed in this section. The trustees, however, argued that the proceeding was nonetheless one "concerning" a trust under Section 115.001(a)(6) or (a)(7) because the Property Code grants trustees the ability to enter into mineral leases and to contest claims by or against a trust.¹³⁴

The court rejected this argument stating, "[t]he mere fact that a plaintiff happens to be a trustee, however, does not transfer a case into one 'concerning trusts.'"¹³⁵ Accordingly, because the district court did not have jurisdiction over this case under the Property Code, the co-extensive jurisdiction of the statutory probate court was not triggered.¹³⁶

B. TRUST INTENT

Hubbard v. Shankle showed that even a clear, unambiguous designation of a person as a beneficiary of a life insurance policy may be contested if the relationship between the beneficiary and the insured is

130. The court applied the 1998 version of Probate Code Section 5(A)(c) (the equivalent authority is now found in TEX. PROB. CODE ANN. § 5(e) (Vernon 2003)).

131. *Dolenz*, 143 S.W.3d at 517-18.

132. 128 S.W.3d 718 (Tex. App.—Fort Worth 2004, no pet.); see *supra* note 32 and accompanying text.

133. *Mobil Oil Corp.*, 128 S.W.3d at 720-21 (discussing TEX. PROB. CODE ANN. §§ 5, 5A (Vernon Supp. 2004)).

134. *Id.* at 723-25 (discussing TEX. PROB. CODE ANN. § 115.0016 (Vernon Supp. 2004)).

135. *Id.* at 725.

136. *Id.*

upsetting to the insured's family members.¹³⁷ In this case, the insured removed his ex-wife as the beneficiary of his life insurance policy and replaced her with a woman whom he had been dating for about three months after meeting her on the Internet. The insured told her that he wanted her to have the money and that he wanted her take care of his toddler's college expenses in the future. Later, the insured died during sexual activities with this woman. The insurance company paid her the proceeds of the life-insurance policy. The administratrix of the insured's estate sued her to recover the proceeds.¹³⁸ The trial court determined that the insured voluntarily named her as the recipient of his life insurance proceeds, and that she had no legal obligation to use any of the proceeds for the toddler's future college expenses.¹³⁹ The administratrix appealed.¹⁴⁰

The Fort Worth Court of Appeals affirmed. The court examined the facts and determined that there was no evidence to support any of the administratrix's claims which included breach of contract, promissory estoppel, actual fraud, constructive fraud, express trust, resulting trust, constructive trust, money had and received, unjust enrichment, and quasi-contract.¹⁴¹

With regard to the administratrix's argument that the insured created an express trust for the toddler, the court noted that the insured's conduct was inconsistent with having trust intent.¹⁴² For example, the insured did not clearly place the proceeds in trust. When he changed the beneficiary designation on the policy, he did not include any type of trust designation. Rather, the beneficiary was named individually.¹⁴³

Although not actually stated by the court, all that really existed was a daughter, the administratrix, who was very upset because her father (the insured) removed his ex-wife (the administratrix's mother) as the beneficiary of a policy with a face value of over \$100,000 and named a woman as the beneficiary with whom he had a very short-term relationship and who "triggered" his death via sexual activity.

C. REVOCATION

McClure v. JPMorgan Chase Bank reinforced the rule that if a settlor specifies a method of trust revocation, the settlor must comply exactly with that method for a revocation to be effective.¹⁴⁴ In *McClure*, the settlor created an inter vivos trust. The settlor retained the power to revoke the trust, provided the revocation was in writing and the writing was delivered to the trustee. Later, the settlor executed a will leaving the major-

137. 138 S.W.3d 474 (Tex. App.—Fort Worth 2004, pet. denied).

138. *Id.* at 479.

139. *Id.* at 479-80.

140. *Id.*

141. *Id.* at 480-87.

142. *Id.* at 483-85.

143. *Id.* at 484-85.

144. 147 S.W.3d 648, 455 (Tex. App.—Fort Worth 2004, pet. denied).

ity of her estate to this trust. After the settlor's death, a dispute arose as to whether a subsequent holographic will operated to revoke the trust so that trust property would pass under the terms of this will rather than the trust. The trial court granted summary judgment, holding that the holographic will did not revoke the trust.¹⁴⁵

The Fort Worth Court of Appeals agreed. The court began its analysis by recognizing that if a settlor specifies the method of revocation, that method must be followed for an attempted revocation to be effective.¹⁴⁶ The court explained that the key to deciding the case was whether this holographic will was delivered to the trustee prior to the settlor's death. After examining the evidence, the court found nothing to raise a fact issue regarding the trustee's lack of receipt of a notice of revocation. Accordingly, the court affirmed the summary judgment that the settlor did not effectively revoke the trust.¹⁴⁷

D. CHARITABLE TRUST

A person desiring to establish a charitable trust must make certain that his or her purpose will be deemed charitable by a court. The person's belief that the purpose is charitable is not sufficient; the court in *Marsh v. Frost National Bank* made this clear.¹⁴⁸ In the case, the testator's will contained a provision requiring the executor to sell certain property, invest the proceeds, and later turn the property over to the United States President, Vice-President, and Speaker of the House as trustees. The money was to be invested until it was sufficient to create a trust with \$1,000,000 for every American who is eighteen years old or older with no one being denied a share due to race, religion, marital status, sexual preference, or the amount of wealth. Testator anticipated this would take 346 years.¹⁴⁹

The executor filed this action to obtain a construction of this gift. The heirs argued that the testator attempted to create a private trust, which failed because it violated the Rule Against Perpetuities. The Texas Attorney General intervened under Property Code Section 123.002 and argued that the testator established a charitable trust.¹⁵⁰ The trial court found that the trust was charitable.¹⁵¹

The Corpus Christi Court of Appeals reversed. After recognizing that whether a given purpose is charitable is a question of law for the court to decide, the court began its analysis by looking at the traditional categories of charitable purposes as set out in Section 368 of the Restatement (Second) of Trusts that include:

145. *Id.* at 649-51.

146. *Id.* at 649.

147. *Id.* at 653-56.

148. 129 S.W.3d 174 (Tex. App.—Corpus Christi 2004, pet. denied).

149. *Id.* at 177.

150. *Id.*; see TEX. PROP. CODE ANN. § 123.002 (Vernon 1995).

151. *Marsh*, 129 S.W.3d at 176-77.

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the promotion of health;
- (e) governmental or municipal purposes;
- (f) other purposes the accomplishment of which is beneficial to the community.¹⁵²

The court reasoned that the only category in which the testator's purpose potentially might fall is the last category.¹⁵³

The court concluded that the testator's purpose was not charitable because it did not go beyond merely providing financial enrichment to individual members of the community.¹⁵⁴ The court explained that the purpose must promote the social interest of the community as a whole. A trust to distribute money without regard to the donees' financial needs or how the donees must use the money did not show that the testator had the requisite intent to benefit the public despite the testator's generosity and benevolence.¹⁵⁵

The court recognized that there is a strong presumption in favor of charitable trusts and that they should be construed liberally to uphold their validity.¹⁵⁶ But, in this case, there was no charitable intent, and it would have been inappropriate to apply liberal construction rules to create a charitable intent where none existed.¹⁵⁷

Because the trust was not charitable, the court agreed that it violated the Rule Against Perpetuities as stated in Property Code Section 112.036.¹⁵⁸ Accordingly, Property Code Section 5.043 was triggered and authorized the court to reform or construe the trust according to the doctrine of cy pres to give effect to the general intent of the testator within the limits of the Rule Against Perpetuities.¹⁵⁹ The testator's general intent was to create a trust to financially enrich the American public. The court remanded the case to the trial court to determine the feasibility of reforming the testator's bequest.¹⁶⁰

E. STANDING TO REQUEST ACCOUNTING

Faulkner v. Bost demonstrated that an individual may be deemed an interested person in a trust even though the person is not a named beneficiary or trustee.¹⁶¹ In *Faulkner*, a mother created a trust naming her daughter as the trustee. The mother assigned to the trust any interest she might later acquire from her mother (grandmother). The grandmother

152. *Id.* at 177-78 (citing the RESTATEMENT (SECOND) OF TRUSTS § 368 (1959)).

153. *Id.* at 178.

154. *Id.* at 179.

155. *Id.*

156. *Id.*

157. *Id.*

158. See TEX. PROP. CODE ANN. § 112.036 (Vernon 1995).

159. See TEX. PROP. CODE ANN. § 5.043 (Vernon Supp. 2004).

160. *Marsh*, 129 S.W.3d at 179-80.

161. 137 S.W.3d 254 (Tex. App.—Tyler 2004, no pet. h.).

later created her own trust for the benefit of the mother and her siblings that would terminate at her death. After the grandmother died, the mother reaffirmed the assignment. The daughter (as trustee of the mother's trust) sought an accounting from the trustee of the grandmother's trust.¹⁶²

The Tyler Court of Appeals determined that the daughter had standing to bring the accounting action as an interested person as defined by Property Code Section 111.004(7).¹⁶³ Although the daughter was not a named trustee or beneficiary of the grandmother's trust, she did have an interest by virtue of her mother's assignment. The court noted the spendthrift provision in the grandmother's trust did not negate the assignment. The effectiveness of the spendthrift provision ended when the grandmother died and the mother reaffirmed the assignment after the grandmother's death.¹⁶⁴

F. SECTION 867 MANAGEMENT TRUSTS

Despite unclear statutory language, the court in *Bank of Texas, N.A., Trustee v. Mexia*¹⁶⁵ explained that the court may terminate a Probate Code Section 867 management trust if doing so is in the ward's best interest, regardless of whether the ward is a minor or an incompetent.¹⁶⁶ In this case, a court created a guardianship management trust for a minor under Probate Code Section 867. Less than one year later, the guardian filed an application to terminate the trust. The court examined the investments and found that they had lost approximately \$300,000. Accordingly, the court terminated the trust because doing so would be in the minor's best interest.¹⁶⁷

The trustee appealed arguing that the standard to terminate a trust is whether the settlor's intent has been met, not whether termination is in the minor's best interest as described in Texas Property Code Section 112.054. The trustee then pointed to Probate Code Section 870, which permits the court to terminate a management trust for an *incompetent* ward if doing so is in the ward's best-interest, but which does not include a best interest standard if the beneficiary is a minor.¹⁶⁸

The Dallas Court of Appeals rejected the trustee's argument. The court focused on Probate Code Section 867, which authorized the court to create a trust if it is in the minor's best interest, and Probate Code Section 869, which allowed the court to terminate a management trust at any time. Accordingly, the trial court could terminate the management trust because doing so was in the minor's best interest.¹⁶⁹

162. *Id.* at 256-57.

163. *See* TEX. PROP. CODE ANN. § 111.004(7) (Vernon Supp. 2004).

164. *Faulkner*, 137 S.W.3d at 259-61.

165. 135 S.W.3d 356 (Tex. App.—Dallas 2004, pet. denied).

166. *See* TEX. PROP. CODE ANN. § 867 (Vernon 2003).

167. *Mexia*, 135 S.W.3d at 358.

168. *Id.* at 364 (discussing TEX. PROP. CODE ANN. § 870 (Vernon 2003)).

169. *Id.* at 364-65 (discussing TEX. PROP. CODE ANN. §§ 867, 869 (Vernon 2003)).

V. OTHER ESTATE PLANNING MATTERS

A. MALPRACTICE

In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*,¹⁷⁰ the beneficiaries sued the attorneys who prepared the testator's will, claiming that they provided negligent advice and drafting services. The beneficiaries asserted that the testator's estate incurred over \$1.5 million in unnecessary federal estate taxes because of the malpractice. The trial court granted the attorneys' motion for summary judgment on the basis that the beneficiaries could not establish that the attorneys owed them a duty because the beneficiaries were not in privity with the attorneys. The beneficiaries appealed.¹⁷¹

The San Antonio Court of Appeals affirmed. The court explained that privity between the beneficiaries and the attorneys is mandated by *Barcelo v. Elliott*,¹⁷² and thus, the court had no choice but to affirm. The court stated that it was bound to follow this holding of the Supreme Court of Texas even though this court "may entertain a contrary opinion."¹⁷³

The Supreme Court of Texas granted the beneficiaries' petition for review. Perhaps the court will decide to revisit its holding in *Barcelo*. Practitioners should monitor the progress of this case closely.

B. P.O.D. ACCOUNTS

Clients must understand that multiple-party accounts such as P.O.D. accounts, trust accounts, and joint accounts with survivorship rights pass under the terms of the account contracts and not under their wills. The estate planner should carefully question each client about the existence of multiple-party accounts, determine if they were created correctly, and determine whether the client actually intends the property to pass outside of the probate estate in an attempt to avoid litigation such as that which occurred in *Punts v. Wilson*.¹⁷⁴

In *Punts*, the decedent opened several P.O.D. accounts and designated a beneficiary as the person entitled to the funds upon his death. The decedent's will left the remainder of his estate in equal shares to the beneficiary and the decedent's friend. The beneficiary was named as the independent executor of the will. After the decedent died, the beneficiary made withdrawals from the P.O.D. accounts in excess of one-half million dollars. The beneficiary did not include these accounts in the estate inventory. The friend sued the beneficiary for breach of fiduciary duty and conversion, claiming that the beneficiary's actions deprived him of one-half of the funds in the accounts. The trial court granted the beneficiary's

170. 141 S.W.3d 706 (Tex. App.—San Antonio 2004, pet. granted).

171. *Id.* at 707.

172. 923 S.W.2d 575 (Tex. 1996).

173. *Belt*, 141 S.W.3d at 709.

174. 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet. h.).

motion for summary judgment, and the friend appealed.¹⁷⁵

The Texarkana Court of Appeals affirmed. The court explained that although the beneficiary owed fiduciary duties to the friend by virtue of being the executor of the decedent's estate, the beneficiary owed no duties to the friend with respect to assets that are not included in the decedent's probate estate.¹⁷⁶ The decedent properly created the P.O.D. accounts and properly named the beneficiary as the P.O.D. payee. The court applied Probate Code Sections 439(b) and 439A(b)(2) and held that the funds belonged to the beneficiary immediately upon the decedent's death and were not part of the decedent's probate estate.¹⁷⁷ Consequently, the beneficiary owed no duty to the friend with respect to these funds.¹⁷⁸

The court also rejected the friend's attempt to use extrinsic evidence to prove the decedent's intent that the beneficiary and the friend share the funds equally.¹⁷⁹ Likewise, the court deemed it insignificant that the beneficiary obtained checks payable to the beneficiary as the executor of the decedent's estate when he withdrew the funds. Following a long line of Texas cases, the court explained that if the P.O.D. agreement is complete and unambiguous, then parol evidence is inadmissible to vary, add to, or contradict its terms.¹⁸⁰

C. POWER OF ATTORNEY

1. Breach of Duty

Musquiz v. Marroquin held that a durable power of attorney, which names two or more agents, will be construed to create a joint agency unless the power affirmatively establishes a joint and several agency.¹⁸¹ In *Musquiz*, the principal signed a durable power of attorney giving broad powers to his son and daughter as co-agents. The power contained an exculpatory clause and authorized self-dealing. The daughter used the principal's funds to make improvements to the principal's home and then sold and deeded the house to herself and her husband. The daughter also engaged in other self-dealing transactions. Subsequently, the principal died with a valid will leaving her entire estate to her son. After the daughter's actions came to light, the son sued the daughter alleging breach of fiduciary duty as well as trespass to try title. The trial court agreed with the son and set aside the sale and related self-dealing transactions. This resulted in the son receiving the home, along with a damage award for the property's fair-rental value during the time the daughter occupied the home and attorney's fees. The daughter appealed the

175. *Id.* at 890.

176. *Id.* at 892.

177. *Id.*; see TEX. PROP. CODE ANN. §§ 439(b), 439A(b) (Vernon 2003).

178. *Punts*, 137 S.W.3d at 891-92.

179. *Id.* at 893.

180. *Id.*

181. 124 S.W.3d 906 (Tex. App.—Corpus Christi 2004, pet. denied).

decision.¹⁸²

The Corpus Christi Court of Appeals examined the power of attorney and determined that it established a joint agency because the principal named two agents, and there was no language supporting the creation of a joint and several agency.¹⁸³ Accordingly, all acts on behalf of the principal needed the joinder of both agents.¹⁸⁴ Because the son did not join, the daughter's actions were properly set aside as null and void. However, the award of attorney's fees was improper because attorney's fees are not recoverable in trespass to try title nor breach of fiduciary duty actions.¹⁸⁵

2. *Jurisdiction*

Musquiz also discussed jurisdiction as it relates to acts of agents. The case was filed and heard in the district court. The appellate court agreed that the district court had jurisdiction even though the probate of the principal's estate was pending in a statutory county court. The court rejected the agent's claim that the statutory county court had exclusive jurisdiction because the probate case was filed first. The court explained that although Probate Code Sections 5 and 5A provide that the probate court has jurisdiction over matters incident to estate, these sections do not remove the district court's jurisdiction.¹⁸⁶

182. *Id.* at 908-09.

183. *Id.* at 911-12.

184. *Id.* at 912.

185. *Id.* at 911-13.

186. *Id.* at 909-11 (discussing TEX. PROB. CODE ANN. §§ 5, 5A (Vernon 2003 & Supp. 2005)).