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Wills & Trusts

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WILLS & TRUSTS

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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 December 1, 2015 through November 30, 2016. The reader is warned that not all newly decided cases during the Survey period are presented, and not all aspects of each case are analyzed. You must read and study the full text of each case before relying on it or using it as precedent. The discussion of most cases includes a moral, that is, the important lesson to be learned from the case. By recognizing situations that resulted in time-consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

I. INTESTACY

A. ADOPTION BY ESTOPPEL

The doctrine of adoption by estoppel, also called equitable adoption, gives the person a status of child under Texas law even though no formal adoption occurred.[1] However, this doctrine is applicable only if the child is a minor. As *Dampier v. Williams*[2] holds, an adult may not be adopted by estoppel. After the intestate died, Dampier, the appellant, claimed that he was the intestate's sole heir as his adopted-by-estoppel son.[3] The trial court rejected Dampier's claim because the alleged acts of estoppel occurred after Dampier reached age eighteen.[4] Dampier appealed.[5]

The First Houston Court of Appeals affirmed.[6] The court of appeals recognized Dampier and the intestate had a very close father-son relationship for over thirty years.[7] However, the relationship started when Dampier was an adult so there was never a legal impediment to a formal adoption.[8] And, of course, the intestate could have executed a will in Dampier's favor.[9] Accordingly, the intestate's unperformed oral promise to adopt Dampier did not operate to create a parent-child relationship by estoppel.[10] Every Texas case where adoption by estoppel was deemed to

1. *See, e.g.*, *In re* Marriage of Eilers, 205 S.W.3d 637, 641 (Tex. App.—Waco 2006, pet. denied); Spiers v. Maples, 970 S.W.2d 166, 170 (Tex. App.—Fort Worth 1998, no pet.); Pope v. First Nat'l Bank in Dallas, 658 S.W.2d 764, 765 (Tex. App.—Dallas 1983, no writ).
2. 493 S.W.3d 118, 120 (Tex. App.—Houston [1st Dist.] 2016, no pet.).
3. *Id.* at 120–21.
4. *Id.* at 121.
5. *Id.*
6. *Id.* at 125.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

exist involved a child who was a minor at the time the adoption-by-estoppel acts occurred.[11]

II. WILLS

A. Formalities

1. Overall Ceremony

In re Estate of Kam[12] demonstrates the importance of an attorney-supervised will execution ceremony. A sister sought to admit her father's will to probate.[13] Her brother objected, arguing that this will, which completely excluded him, was invalid for lack of proper execution.[14] The trial court agreed and denied the probate application.[15] The sister appealed.[16]

The El Paso Court of Appeals reversed and rendered judgment, admitting the will to probate.[17] The father prepared his will with the help of the sister's now ex-boyfriend, who was not an attorney, by using an Internet form.[18] At a UPS Store, the father executed the will in front of a notary who then notarized the will, which included her signature.[19] Later, two of the sister's friends witnessed the will.[20] Neither witness saw the father sign the will, and they did not see each other attest to the will.[21] The first witness was confident she attested in front of the father.[22] However, when the second witness attested, the father was not in the same room, and thus, she was not a valid witness.[23]

Consistent with prior cases, the court of appeals held that the notary could serve as the second witness to satisfy the two-witness requirement for non-holographic wills under Estates Code Section 251.051.[24] The court of appeals rejected the brother's claims that (1) witnesses need to be able to describe the contents of the will; (2) the testator must sign the will in the presence of the witnesses; and (3) the testator must speak at length with the witnesses before they attest.[25]

2. Holographic Wills

An unwitnessed holographic will must be entirely in the handwriting of the actual testator; a signature on a will handwritten by another person,

11. *Id.* at 122–23.
12. 484 S.W.3d 642 (Tex. App.—El Paso 2016, pet. denied).
13. *Id.* at 648.
14. *Id.* at 649.
15. *Id.*
16. *Id.*
17. *Id.* at 655.
18. *Id.* at 646.
19. *Id.* at 647.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* The court assumed without deciding that the second witness's attestation testimony was insufficient as a matter of law. *Id.* at 651.
24. *Id.* at 650–51.
25. *Id.* at 651.

even a co-testator, is insufficient, as *Lemus v. Aguilar*[26] demonstrates. Partner A and Partner B signed an unwitnessed document that they designated as a will.[27] Except for Partner B's signature, the document was wholly in Partner A's handwriting.[28] After Partner B died, both the trial court and the San Antonio Court of Appeals held that the document was not Partner B's valid will because it was unwitnessed and not wholly in the deceased partner's handwriting.[29]

B. Interpretation and Construction

1. Jurisdiction

Estate of Rhoades[30] taught that once a proponent presents a will to the court for probate, the court may construe the will even if it is not yet admitted to probate. After the probate court set aside an order admitting the testatrix's will to probate, the court granted a summary judgment construing the dispositive provisions of the will.[31] The Fort Worth Court of Appeals determined that the probate court nonetheless had jurisdiction to construe the will and that its judgment was not merely an advisory opinion.[32]

The court of appeals reported that there is "sparse case law" on whether a will must be currently admitted to probate before the court may construe it.[33] However, the court of appeals explained that "in practice, Texas courts have construed wills under the [Uniform Declaratory Judgments Act] before, during, and after admitting the will to probate."[34]

2. "Common Disaster"

Stephens v. Beard[35] addressed the issue of whether a murder-suicide would be considered as a common disaster even if the order of death can be determined. A husband murdered his wife and immediately shot himself, but he did not die until a few hours later.[36] Each of the spouse's wills provided for legacies to nine named individuals if they died in a common disaster or if their death order could not be determined.[37] The trial court determined that the legacies were effective because the spouses died in a common disaster.[38]

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26. 491 S.W.3d 51, 56 (Tex. App.—San Antonio 2016, no pet.).
27. *Id.* at 54.
28. *Id.*
29. *Id.* at 56, 62.
30. 502 S.W.3d 406, 411 (Tex. App.—Fort Worth 2016, pet. filed).
31. *Id.* at 409–10.
32. *Id.* at 415.
33. *Id.* at 410.
34. *Id.* at 411.
35. 485 S.W.3d 914, 915 (Tex. 2016).
36. *Id.*
37. *Id.*
38. *Id.*

The Tyler Court of Appeals affirmed.[39] The court of appeals held that the murder-suicide was a common disaster because the husband fired both the murder and suicide gunshots in one episode.[40] The court of appeals determined it was irrelevant to the classification of the event as a common disaster that the husband "did not successfully kill himself immediately" even though he lived almost two hours longer than his wife.[41]

On appeal, the Texas Supreme Court reversed without even giving the parties the opportunity to present oral arguments.[42] The supreme court focused on the well-recognized legal meaning of the term "common disaster," which means that the two parties "die at very nearly the same time, with no way of determining the order of their deaths."[43] The supreme court held that the spouses did not die in a common disaster because, although their deaths were temporally close, the order of their deaths was known with certainty.[44]

3. Ambiguity

Wills granting interests in oil and gas properties need to be carefully drafted to assure that the interests being conveyed comport with the testator's intent. Prudent practice is to consult with an oil and gas expert when phrasing the terms of the grant, and, when describing a specific gift, make certain the drafter describes what the testator really means; otherwise, problems may arise like those in the Texas Supreme Court case of *Hysaw v. Dawkins*.[45] In that case, the testatrix devised surface rights to tracts of land of different acreage to each of her three children.[46] The children also received the mineral rights, but the testatrix subjected those rights to royalty interests.[47] After all the children died, the grandchildren fought over one of the children's royalty interests described as "an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of [the tracts]."[48] One group of descendants argued that the will granted a fractional royalty to each child (1/24 fixed royalty each), and another group argued that the will required the children to share all royalties equally (1/3 floating royalty each).[49] In other words, the supreme court decided

> whether double fractions must be multiplied and the royalty interest fixed without regard to the royalty negotiated in a future mineral lease (fractional royalty) or whether 1/8 was intended as a synonym

39. Stephens v. Beard, 428 S.W.3d 385, 386 (Tex. App.—Tyler 2014), *rev'd*, 485 S.W.3d 914 (Tex. 2016).
40. *Id.* at 388.
41. *Id.*
42. *Stephens*, 485 S.W.3d at 918.
43. *Id.* at 916.
44. *Id.* at 917–18.
45. 483 S.W.3d 1 (Tex. 2016).
46. *Id.* at 4.
47. *Id.*
48. *Id.*
49. *Id.* at 6.

> for the landowner's royalty, meaning the interest conveyed varies depending on the royalty actually obtained in a future mineral lease (fraction of royalty).[50]

Was the testatrix trying to determine whether the fraction of 1/8th really meant 1/8th, or if it meant whatever royalty had been negotiated?[51] The trial court held that the royalties were to be shared equally.[52]

In *Dawkins v. Hysaw*, the San Antonio Court of Appeals reversed, holding that the will was unambiguous in giving one child a surface and mineral estate subject to a fixed-fraction royalty to each of the other two children.[53] The court of appeals engaged in an extensive discussion of the difference between fractional royalties (constant or fixed fraction of production) and fraction of royalty interests (floating fraction of whatever royalty interest is reserved in the lease).[54] The court of appeals determined that different children received different types of interests, thus rejecting the argument that the testatrix actually intended for all children to share all royalties equally.[55] The court of appeals explained that even if she may have intended the children to share equally, the court is bound by the unambiguous words of her devises.[56] An appeal to the Texas Supreme Court followed.

The supreme court reversed.[57] The supreme court focused on ascertaining the testatrix's intent from the four corners of the instrument "by a careful and detailed examination of the document in its entirety, rather than by application of mechanical rules of construction that offer certainty at the expense of effectuating intent."[58] Using this holistic approach, the supreme court then determined that the testatrix's will demonstrated her intent for each of her children to receive equal royalty interests.[59]

C. Exoneration

In re Estate of Heider[60] serves as a reminder that whenever a testator makes a specific gift of property, the will should expressly address the issue of exoneration. The testatrix's will made a specific devise of land to her son.[61] The land was subject to a secured debt.[62] A dispute arose between her son and the remainder beneficiary regarding whether the debt

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50. *Id.* at 4.
51. *Id.*
52. *Id.* at 6.
53. Dawkins v. Hysaw, 450 S.W.3d 147, 149 (Tex. App.—San Antonio 2014), *rev'd*, 483 S.W.3d 1 (Tex. 2016).
54. *Id.* at 153–57.
55. *Id.* at 157.
56. *Id.* at 156.
57. Hysaw v. Dawkins, 483 S.W.3d 1, 16 (Tex. 2016).
58. *Id.*
59. *Id.*
60. 496 S.W.3d 118 (Tex. App.—Dallas 2016, no pet.).
61. *Id.* at 120.
62. *Id.*

should be exonerated by other estate property not specifically devised.[63] The trial court ruled in favor of the son that a portion of the debt secured by specific devise is to be exonerated.[64] The remainder beneficiary appealed.[65]

The Dallas Court of Appeals reversed.[66] The court of appeals began its analysis by examining Estates Code Sections 255.301 and 255.302, which set forth a presumption that a specific gift passes subject to secured debts unless the will expressly provides otherwise.[67] The court of appeals rejected the son's claim that the devise, which made no mention of how a secured debt was to be handled, specifically stated that it should be exonerated.[68] The court of appeals also rejected the son's claim that a will provision granting the executor the ability to transfer property subject to debts meant that if the executor does not exercise discretion, the debt is exonerated.[69]

D. Will Contests

1. Testamentary Capacity

Estate of Koontz clarifies that a summary judgment that a testator had testamentary capacity is improper when there is "more than a scintilla of evidence to raise a genuine issue of material fact with regard to [the testator's] testamentary capacity."[70] The beneficiary of a prior will attempted to show that the testator lacked capacity when he executed a new will revoking the previous will that had named him as the beneficiary.[71] The trial court granted the executor of the new will a no-evidence motion for summary judgment and awarded attorney's fees against the beneficiary of the prior will.[72]

The appellate court reversed.[73] The San Antonio Court of Appeals examined the evidence, especially the affidavit of the beneficiary of the prior will and the testimony of the attorney who drafted the new will, and determined that there was enough evidence to raise a fact question regarding the testator's capacity.[74] For example, the testator believed his wife of over fifty years was having an affair, he attempted to lease property he no longer owned, he suffered from bipolar disorder, and he had attempted suicide.[75]

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63. *Id.* at 121.
64. *Id.*
65. *Id.*
66. *Id.* at 124.
67. *Id.* at 122–23.
68. *Id.* at 123.
69. *Id.*
70. Estate of Koontz, No. 04-15-00820-CV, 2016 WL 6775593, at *2 (Tex. App.—San Antonio Nov. 16, 2016, no pet.) (mem. op.).
71. *Id.* at *1.
72. *Id.*
73. *Id.* at *3.
74. *Id.* at *2.
75. *Id.*

2. Undue Influence

Evidence of undue influence must show that the testator's free will was supplanted by that of the influencer; mere opportunity to do so is insufficient, as shown in *In re Estate of Kam*,[76] in which a sister sought to admit her father's will to probate. Her brother objected, arguing that this will, which completely excluded him, was invalid because of undue influence.[77] The trial court agreed and denied the probate application.[78] The sister appealed.[79]

The El Paso Court of Appeals reversed, explaining that "means, motive, and opportunity are not enough to show undue influence as a matter of law."[80] The court of appeals explained that there was insufficient evidence to support a finding that the father was unable to make his own decisions about the passage of property upon his death.[81] The court of appeals recognized that the sister influenced her father to execute his will and that he was unlikely to have signed his new will without her influence.[82] However, the brother did not present legally or factually sufficient evidence to show that his sister overwhelmed their father's free agency.[83] The evidence showed that the father was a "strong-willed[,] . . . mentally 'sharp'" man who drove his own car and lived a mostly independent life.[84] Merely because the father excluded one child from the will is not evidence of undue influence.[85]

3. Suspect Surrounding Circumstances

In re Estate of Parrimore[86] teaches that a testator should consult with an attorney when executing a will rather than using a computer program and then throwing a will execution party. The testator and his wife worked together on the testator's will using a computer program that prepared his will according to his answers to questions generated by the software, which included an express provision that he was intentionally omitting his two children.[87] Sometime thereafter, the testator suffered a stroke and was hospitalized for three days.[88] Eleven days after being discharged, the testator had a will signing party at his home attended by family members and friends.[89] After socializing with the guests and

76. 484 S.W.3d 642, 652 (Tex. App.—El Paso 2016, pet. denied).
77. *Id.* at 645.
78. *Id.* at 649.
79. *Id.*
80. *Id.* at 652.
81. *Id.*
82. *Id.* at 653.
83. *Id.*
84. *Id.*
85. *Id.*
86. No. 14-14-00820-CV, 2016 WL 750293 (Tex. App.—Houston [14th Dist.] Feb. 25, 2016, no pet.) (mem. op.).
87. *Id.* at *2.
88. *Id.* at *1.
89. *Id.* at *2.

shooting pool, the will execution ceremony took place.[90] One of the guests, a notary, testified that the testator asked his wife to sign the will for him and that three witnesses attested to the will in the testator's presence.[91] During the months that followed, the testator continued his therapy, was able to drive, and even went back to work.[92] About a year after the will execution ceremony, the testator died.[93]

The testator's wife filed the will for probate and the testator's children contested, alleging that the testator lacked testamentary intent and testamentary capacity, in addition to being under his wife's undue influence.[94] The trial court heard the testimony of the people at the will party and admitted the will to probate.[95] The testator's children appealed.[96]

The Fourteenth Houston Court of Appeals affirmed.[97] First, the court of appeals examined the document itself, such as being labeled as a "last will and testament," providing for the disposition of his property, and naming an executor.[98] The court of appeals held this was sufficient to support the trial court's implied finding that the testator had testamentary intent.[99]

Second, the court of appeals examined the evidence that supposedly demonstrated that the testator lacked testamentary capacity.[100] The court of appeals recognized that the testator's stroke shortly before executing the will could raise a question about his capacity.[101] However, there was ample testimony from individuals present at the will execution party who swore that the testator appeared to be of sound mind and that he knew he was executing a will.[102]

Third, the court of appeals determined that there was insufficient evidence to set aside the will on the basis of undue influence.[103] Although there was circumstantial evidence that the wife could have exerted undue influence, such as being named as the sole beneficiary to the exclusion of his children and participating in the preparation and execution of the will, there was insufficient evidence that she actually exerted any undue influence.[104] Merely having the opportunity to exert such influence does not prove that his wife took advantage of that opportunity.[105]

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90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at *2–4.
96. *Id.* at *4.
97. *Id.* at *12.
98. *Id.* at *6.
99. *Id.* at *7.
100. *Id.*
101. *See id.* at *7–8
102. *Id.* at *8.
103. *Id.* at *10.
104. *Id.* at *9.
105. *Id.*

4. Improper Reason for Disinheritance

A will contestant attempting to set aside a will or gift in the will on public policy grounds needs to point to express terms of the will which violate public policy. For example, in *Merrick v. Helter*,[106] the testator's will expressly disinherited a daughter. After the probate court admitted the will to probate, the daughter contested the will, claiming that the testator's motive for excluding her violated public policy, thus making the will invalid.[107] She claimed that the testator had abused her sexually and that disinheriting her was his vengeance when she confronted him about the abuse many decades later.[108] The executor responded that these claims against the testator were unsubstantiated and brought only in an attempt to obtain property from the estate.[109] The probate court dismissed the daughter's claim without reaching the merits of the claim because even if true, it would not provide her with a viable basis for setting aside the will.[110] The daughter appealed.[111]

The Austin Court of Appeals affirmed.[112] The court of appeals examined the daughter's claim that terms in a will may be unenforceable on public policy grounds.[113] For example (this author's, not the court's), if a testator stated, "I leave Daughter $10,000 if you cut off my ex-wife's right hand," such a provision would not be enforceable. Agreeing, of course, that Texas public policy condemns sexual abuse and related conduct, the court of appeals explained that nothing in the will addressed this topic.[114] The daughter's "challenge is grounded entirely in asserted conditions or limitations that appear nowhere in the will's text."[115] The court of appeals also emphasized that the daughter had no right or entitlement to an inheritance.[116] A testator may disinherit an heir for any reason, be it just or unjust.[117]

E. Lost Wills

Woods v. Kenner[118] demonstrated some of the problems that may arise when the decedent's will is not timely located. After the decedent's death, his two children were declared to be his sole heirs.[119] Thereafter, they sold certain property to a purchaser.[120] Later, a copy of the decedent's

106. 500 S.W.3d 671 (Tex. App.—Austin 2016, pet. denied).
107. *Id.* at 672.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 676.
113. *Id.* at 673–75.
114. *Id.* at 674.
115. *Id.*
116. *Id.* at 675.
117. *Id.* at 675–76.
118. 501 S.W.3d 185 (Tex. App.—Houston [1st Dist.] 2016, pet. withdrawn).
119. *Id.* at 188.
120. *Id.*

will, which devised his property to his two children *and* his two step-children, was located.[121] The probate court admitted the will to probate as a muniment of title, accepting the explanation that the original could not be found because it was destroyed by Hurricane Ike.[122] The probate court also granted a bill of review setting aside the previous heirship determination.[123]

The First Houston Court of Appeals affirmed.[124] First, the court of appeals determined that the probate court's granting of the bill of review was proper, rejecting a claim that a petition for a bill of review must make "a prima facie showing of a meritorious claim or defense."[125] Instead, all that is necessary is to show "substantial error" in the prior decision.[126] This was the case here because the original order stated that the decedent died intestate, which was not true.[127]

Second, the court of appeals determined there was sufficient evidence to support the probate court's determination that the decedent did not revoke his will and instead that the original was destroyed by the massive flooding of his house that the hurricane caused.[128]

Interestingly, the case does not address the purchaser's unfortunate situation, even though the purchaser was the unsuccessful appellant.[129] Is the purchaser a bona fide purchaser from sellers who, at the time of the sale, were the legal title holders to the property? If not, would title insurance cover the purchaser's loss of fifty percent of the property? Will title insurance companies now refuse to insure sales from heirs, at least until the time to file a bill of review has run, fearing that a later will may be found?

F. Tortious Interference with Inheritance Rights

At least since the 1987 case of *King v. Acker*,[130] Texas lawyers have conducted themselves as if Texas recognizes a cause of action for tortious inference with inheritance rights. Two recent cases, *Jackson Walker, LLP v. Kinsel*[131] and *Anderson v. Archer*,[132] have shocked Texas estate litigators by holding that Texas has yet to recognize the tort because there is no Texas Supreme Court case or legislation that expressly so provides. On May 26, 2017, the Texas Supreme Court issued its opinion affirming

121. *Id.* at 189.
122. *Id.* at 190.
123. *Id.*
124. *Id.* at 199.
125. *Id.* at 191.
126. *Id.* at 193.
127. *Id.* at 194.
128. *Id.* at 197–98.
129. *See id.* at 199
130. 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ).
131. No. 07-13-00130-CV, 2015 WL 2085220, at *3 (Tex. App.—Amarillo Apr. 10, 2015, pet. granted) (mem. op.).
132. 490 S.W.3d 175, 176 (Tex. App.—Austin 2016, pet. filed).

the Amarillo Court of Appeals in *Jackson Walker*.[133] The supreme court refused to recognize a cause of action for tortious interference with inheritance rights but left open the issue for later cases as the court stated, "we are not persuaded to consider it *here*."[134]

In *Jackson Walker LLP v. Kinsel*, a jury found that the defendants were liable for tortiously interfering with the Kinsels' inheritance rights.[135] The trial court then awarded damages as well as other remedies in an attempt to undo the interference.[136] The defendants appealed not on the ground that their conduct was not tortious, but rather that the tort is not recognized as a cause of action.[137]

The appellate court agreed and reversed.[138] The court of appeals based its holding on the fact that neither the Texas Supreme Court nor the Fort Worth Court of Appeals have expressly recognized the tort.[139]

The strong dissent pointed out that six of the Texas intermediate appellate courts have previously recognized the tort, including the Amarillo Court of Appeals.[140] Additionally, six other courts, including the Fort Worth Court of Appeals, discussed the tort, assuming it was a valid cause of action.[141]

Surprisingly, neither opinion cited to Estates Code Section 54.001, which, in this author's opinion, impliedly provides legislative recognition of the tort. In relevant part, this section states, "[t]he filing or contesting in probate court of a pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate."[142] Why would the legislature say something cannot be tortious interference if Texas does not recognize the tort in the first place?

In *Anderson v. Archer*,[143] the jury determined that the defendant tortiously interfered with the plaintiffs' rights to inherit from their uncle, and the trial court awarded over $2.5 million in damages. The defendant appealed.[144]

The Austin Court of Appeals reversed, holding that Texas does not recognize a cause of action for tortious interference with inheritance.[145] The court of appeals conducted a detailed review of the numerous Texas cases

133. Kinsel v. Lindsey, No. 15-0403, 2017 Tex. LEXIS 477 (Tex. May 26, 2017).
134. *Id.* at *3 (emphasis added).
135. *Jackson Walker*, 2015 WL 2085220, at *3.
136. *Id.*
137. *Id.*
138. *Id.* at *19.
139. *Id.* at *3. The Texas Supreme Court transferred the case from the Fort Worth Court of Appeals to the Amarillo Court of Appeals as part of its docket equalization efforts. *Id.*
140. *Id.* at *20 (Pirtle, J., dissenting). The San Antonio, Amarillo, El Paso, Waco, and both Houston Courts of Appeals have recognized the tort. *Id.*
141. *Id.* at *21. The Fort Worth, Austin, Texarkana, Beaumont, Tyler, and Corpus Christi Courts of Appeals have not expressly rejected the tort. *Id.*
142. TEX. EST. CODE ANN. § 54.001(a) (West 2014).
143. 490 S.W.3d 175, 175–76 (Tex. App.—Austin 2016, pet. filed).
144. *Id.*
145. *Id.* at 176.

discussing tortious interference and determined that although they may have discussed the tort, they never actually recognized it.[146] The court of appeals also refused to interpret Estates Code Section 54.001[147] as a legislative admission that the tort exists merely because this provision provides that filing or contesting a will is not tortious interference.[148] The court of appeals then explained that express legislative action or a decision of the Texas Supreme Court is needed to recognize the tort.[149]

The court of appeals also noted that the plaintiffs had already received the property with which they alleged the defendant tortiously interfered.[150] The main component of their damages was not the recovery of the uncle's property, but rather attorneys' fees incurred to receive their inheritance.[151] Thus, the plaintiffs were actually using the tort "as a fee-shifting mechanism" to recover fees otherwise unrecoverable because Texas follows the American Rule that the winning party cannot recover attorneys' fees unless authorized by statute.[152]

III. ESTATE ADMINISTRATION

A. VENUE

An estate debtor lacks standing to request a court to transfer a probate proceeding from a county of improper venue to a county of proper venue. For example, in *In re Davidson*,[153] the executor sued a debtor of the decedent who was in default on a real estate lien note in Anderson County after the decedent's death but prior to being appointed. Shortly thereafter, the executor was successful in obtaining an order in Anderson County admitting the will to probate and appointing him as the executor, even though the decedent was domiciled in San Augustine County at the time of his death.[154] The debtor filed a motion to transfer the probate proceeding to San Augustine County.[155] The trial court refused, and the debtor sought mandamus.[156]

The Tyler Court of Appeals denied mandamus relief.[157] The court of appeals acknowledged that mandatory venue was in San Augustine County, the decedent's domicile at death under Estates Code Section 33.001(1).[158] However, only an "interested person" has standing to request a transfer of venue under Estates Code Section 33.102(a).[159] The

146. *Id.* at 176–79.
147. § 54.001.
148. *Anderson*, 490 S.W.3d at 178.
149. *Id.* at 177.
150. *Id.* at 178.
151. *Id.*
152. *Id.* at 179.
153. 485 S.W.3d 927, 929 (Tex. App.—Tyler 2016, orig. proceeding).
154. *Id.*
155. *Id.*
156. *Id.* at 929–30.
157. *Id.* at 932.
158. *Id.* at 930.
159. *Id.*

court of appeals held that the debtor was not an interested person as defined by Estates Code Section 22.018(1).[160] First, the debtor was not a creditor of the estate; the debtor owed money to the estate rather than being entitled to money from the estate.[161] Second, the debtor's claim that the executor violated the Deceptive Trade Practices-Consumer Protection Act by filing in the wrong county did not make her a creditor of the decedent's estate, but instead, merely a potential creditor of the executor.[162] Thus, the court of appeals denied mandamus and held that the trial court did not abuse its discretion when it denied the debtor's motion to transfer venue.[163]

B. Muniment of Title

A person dissatisfied with a court admitting a will to probate as a muniment of title must either timely appeal or file a bill of review if the person wishes to have a personal representative appointed to administer the estate. For example, in *In re Jacky*, the probate court admitted the testator's will to probate as a muniment of title.[164] After three and a half years elapsed, the probate court reopened the estate and appointed an independent executor so the executor could pursue potential claims due to the testator's estate.[165] A writ of mandamus was sought on the basis that the order admitting the will to probate as a muniment of title was a final order, and thus, the probate court lacked plenary power to reopen the estate.[166]

The First Houston Court of Appeals conditionally granted mandamus, stating that the probate court's order was void, as its plenary power had already expired.[167] The court of appeals explained that the muniment of title order was final and that the two-year period to file a bill of review under Estates Code Section 55.251 elapsed prior to the probate court's appointment of an executor.[168] The court of appeals rejected the argument that the estate did not actually close because of the potential claim, because to accept that proposition would mean "no estate in which a will is admitted to probate as a muniment of title could ever close because there always exists the possibility that an unknown claim needing administration might remain and might not come to light until later."[169]

160. *Id.*at 930–32.

161. *Id.*at 932.

162. *Id.* at 931.

163. *Id.* at 932.

164. *In re* Jacky, 506 S.W.3d 550, 552 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

165. *Id.*

166. *Id.* at 554.

167. *Id.* at 558.

168. *Id.* at 555–56.

169. *Id.* at 557.

C. Impact of Survivor's Homestead on Property Value

Estate of Sloan[170] restates the principle that a surviving spouse's homestead right reduces the fair market value of the homestead property. A husband and his wife established a homestead on property that was the wife's separate property.[171] Upon the wife's death, her husband was appointed as the independent executor of her will, which gave him the right to purchase property in his wife's estate at fair market value. He later did so by conveying his interest in $222,000 of property in his wife's estate.[172] After the husband's death, an attempt was made to show that he had violated his fiduciary duty by purchasing the property for less than its fair market value.[173] The trial court agreed, finding that the husband's homestead interest had no effect on the fair market value of the property.[174]

On appeal, the Fort Worth Court of Appeals reversed.[175] The court of appeals explained that the husband's right as a surviving spouse to occupy the homestead for the rest of his life (unless he abandons the property) under Article XVI, Section 52 of the Texas Constitution reduces the amount a willing seller would pay for the remainder interest "left over" after the husband's homestead right, which is akin to a life estate.[176]

D. Attorney's Fees

1. Successful Admission to Probate

In re Estate of Kam[177] explains that a successful will applicant is entitled to reasonable attorney's fees and whether the applicant acted in good faith or with just cause is irrelevant. In this case, a sister sought to admit her father's will to probate.[178] Her brother objected, arguing that this will, which completely excluded him, was invalid, either for lack of proper execution or undue influence.[179] The trial court agreed and denied the probate application.[180] In addition, the trial court denied the sister's attorney's fees, determining that she did not act in good faith or with just cause.[181] The sister appealed.[182]

The El Paso Court of Appeals reversed.[183] Because the court of appeals ordered that the father's will be admitted to probate, the sister

170. 496 S.W.3d 299 (Tex. App.—Fort Worth 2016, pet. denied).
171. *Id.* at 301.
172. *Id.*
173. *Id.* at 302.
174. *Id.* at 304.
175. *Id.* at 311.
176. *Id.* at 305–07. The court of appeals did not need to determine the amount of the decrease in value because the parties agreed that if the husband's homestead right lowered the value of the property, then the husband's estate was not liable. *Id.* at 308–09.
177. 484 S.W.3d 642, 655 (Tex. App.—El Paso 2016, pet. denied).
178. *Id.* at 648.
179. *Id.* at 649.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 655.

"conclusively established that her application was brought in good faith and with just cause."[184] In fact, the good faith and just cause analysis is irrelevant when the will is actually admitted to probate.[185] Accordingly, the sister was entitled to her attorney's fees under Estates Code Section 352.052.[186]

2. Unsuccessful Admission to Probate

A party alleging entitlement to attorney fees should consistently request them in all pleadings. Failure to do so may cause issues, such as those in *Estate of Wright*.[187] After the probate court admitted the testator's will to probate, a contestant attempted to probate a different document as the testator's will.[188] Although the contestant's attempt failed, the trial court allowed the contestant to recover attorney's fees from the testator's estate for attempting to probate the alternate will.[189] The independent executor appealed.[190]

The Fourteenth Houston Court of Appeals affirmed.[191] The court of appeals determined that there was sufficient evidence to support the trial court's holding that the contestant's attempt to probate the alternate will was in good faith, and thus, the contestant was entitled to attorney's fees under what is now Estates Code Section 352.052.[192] The court of appeals rejected the independent executor's assertion (accepted by the dissent)[193] that the award was not supported by proper pleadings or tried by consent.[194] Instead, the court of appeals stated that, although the contestant did not request attorney's fees in live pleadings at the time of the trial, he did present evidence of those fees at the end of the trial and filed a motion for entry of a judgment awarding the fees.[195] The court of appeals also explained that the independent executor was not surprised by the request, and in fact, the independent executor had the opportunity to cross-examine the attorney about her fees.[196]

E. Appeals

1. Removal of Personal Representative

A judgment removing a personal representative from office is a final judgment for appellate purposes. Failure to recognize this basic principle

184. *Id.*
185. *Id.* (citing Miller v. Anderson, 651 S.W.2d 726, 728 (Tex. 1983)).
186. *Id.* at 654–55.
187. 482 S.W.3d 650 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).
188. *Id.* at 652.
189. *Id.* at 655.
190. *Id.*
191. *Id.* at 661.
192. *Id.* at 659.
193. *Id.* at 661 (Frost, J., dissenting).
194. *Id.* at 660–61.
195. *Id.*
196. *Id.*

may cause problems such as those found in *Estate of Davidson*.[197] The probate court appointed co-executors of the testator's estate.[198] Later, a beneficiary of the will petitioned the court to remove the co-executors from office and to recover damages, costs, and attorney's fees.[199] The probate court granted the motion to remove the co-executors and thereafter appointed the beneficiary as the dependent administrator with the will annexed.[200] Over one year later, one of the removed co-executors challenged the court's order removing him from office.[201] The removed co-executor then moved for a new trial, and the probate court denied the motion.[202] An appeal followed.[203]

The Dallas Court of Appeals instructed the parties to address the issue of whether the original removal order was appealable.[204] The court of appeals then held that the order was final[205] and rejected the removed co-executor's claim that it was not final because there were still related claims pending in the underlying probate action.[206] The court of appeals explained that the Texas law is clear that an order removing a personal representative is appealable, as it adjudicates a substantial right.[207]

IV. TRUSTS

A. Jurisdiction

When suing a foreign corporate fiduciary, the plaintiff must be certain to recite the applicable jurisdictional facts and carefully proofread citations to the Estates Code, as reflected in *U.S. Bank v. TFHSP LLC Series 6481*.[208] A beneficiary sued the trustee, a foreign corporation, and received a no-answer default judgment.[209] The trustee appealed.[210] The Fort Worth Court of Appeals examined the pleadings and determined that the trial court lacked personal jurisdiction over the trustee because the beneficiary's service of process was invalid.[211]

The court of appeals focused on Estates Code Sections 505.001–.006, which govern service of process on foreign corporate fiduciaries.[212] The beneficiary's petition did not cite the proper Estates Code section, nor did it sufficiently allege "jurisdictional facts," such as the trustee's status

197. *See* No. 05-15-00432-CV, 2016 WL 4254487 (Tex. App.—Dallas Aug. 11, 2016, no pet.) (mem. op.).
198. *Id.* at *1.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at *3.
206. *Id.* at *2.
207. *Id.*
208. 487 S.W.3d 715, 720 (Tex. App.—Fort Worth 2016, no pet.).
209. *Id.* at 717.
210. *Id.*
211. *Id.* at 720.
212. *Id.* at 718.

as a foreign corporate fiduciary under the statute.[213] The court of appeals explained that jurisdictional facts cannot be inferred from the trustee's name as found in the petition.[214]

B. Lost Trust Instrument

The existence and terms of a trust may be proven with competent evidence when the original instrument has been lost or destroyed. For example, in *Gause v. Gause*,[215] the settlor created an inter vivos trust in the 1940s, but the trust instrument disappeared shortly after the settlor's death in 1998. The settlor's wife, a primary beneficiary of the trust, claimed that a non-beneficiary child intentionally destroyed or lost the trust instrument.[216] In 2000, this non-beneficiary child convinced her mother (the settlor's wife), "who was in poor health," to convey the trust property to her "for a nominal consideration."[217] A few months later, the settlor's wife successfully sued her daughter to cancel the deed.[218] Then, in 2002, the settlor's wife conveyed all of the trust property to another of the non-beneficiary children.[219] In 2007, one of the beneficiary children successfully sued to set aside this conveyance and the settlor's wife appealed.[220]

The Austin Court of Appeals affirmed, rejecting the settlor's wife's claim that the trial court "erred in determining the existence and terms of the Trust . . . based upon parol evidence."[221] The court of appeals explained that a trust instrument is not rendered ineffective merely because it is lost or destroyed, so long as there is sufficient evidence to prove its contents.[222] In this case, the settlor's wife swore to the terms of the trust when she successfully set aside her 2000 deed.[223] The court of appeals also determined that Trust Code Section 112.004's statute of frauds requirement of a written and signed document "does not remove trust instruments from the operation of general rules relating to the proof of lost documents."[224] In addition, the court of appeals explained that judicial estoppel prevents the settlor's wife from claiming she has no memory of the trust when she earlier gave detailed sworn testimony about the trust and its contents.[225]

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213. *Id.* at 719.
214. *Id.* A concurring opinion points out that the beneficiary's failure to reference the proper section of the Estates Code appeared to be a mere typographical error. *See id.* at 722 n.1.
215. 496 S.W.3d 913 (Tex. App.—Austin 2016, no pet.).
216. *Id.* at 916.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 916–17.
222. *Id.* at 917.
223. *Id.*
224. *Id.*
225. *Id.* at 918.

C. Revocation

An inter vivos trust is a non-probate asset, and the property transferred to the trust is governed by the terms of the trust, not a subsequent will, unless the will can serve as a presently effective trust revocation following the terms of the trust. For example, in *Gordon v. Gordon*,[226] a husband and his wife created a revocable trust, which required a revocation to be in a signed, acknowledged writing delivered to the trustee. Thereafter, they executed a joint will that provided that the will "override any prior allocations described in trust documents."[227] After the husband's death, a dispute arose as to whether the property the couple had transferred to the trust would be governed by the terms of the trust or the will.[228] The wife claimed that the trust controlled, and the executor of the husband's will contended that the will controlled.[229] The trial court held that the will provision did not act to revoke the trust, and thus, the trust assets pass under the terms of the trust.[230] The executor appealed.[231]

The Eastland Court of Appeals affirmed.[232] The court of appeals explained that the language of the will addressing the disposition of property was testamentary in nature, that is, it would take effect after death even though the language revoking previous wills was effective immediately.[233] The will did not contain a provision revoking the trust that complied with the requirements for revocation set forth in the trust.[234]

D. Conveyance by Trustee

To avoid confusion, a trustee who conveys a trust's interest in real property should clearly indicate the trustee's capacity. For example, in *West 17th Resources, LLC v. Pawelek*,[235] the trustee signed a deed without an express indication whether she was transferring the property in her capacity as an individual beneficiary, as the trustee, or both. Thus, the argument was made that the deed did not transfer the interest held in trust.[236] The San Antonio Court of Appeals concluded that no Texas authority has held "that a grantor's failure to specify her capacity either 'individually' or 'as trustee' nullifies a deed's purported conveyance of property that the grantor holds in trust."[237]

Because all parties agreed that the deed was unambiguous, the court of

226. No. 11-14-00086-CV, 2016 WL 1274076 (Tex. App.—Eastland Mar. 31, 2016, pet. denied) (mem. op.).
227. *Id.* at *1.
228. *Id.* at *2.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at *5.
233. *Id.* at *4.
234. *Id.*
235. 482 S.W.3d 690 (Tex. App.—San Antonio 2015, pet. denied).
236. *Id.* at 692.
237. *Id.* at 694.

appeals construed the deed as a matter of law.[238] The court of appeals examined the deed's granting clause, which stated that "all" of the subject property was being conveyed subject only to a utility easement.[239] The only possible evidence of the trustee's intent not to convey the trust's interest in the property was her failure to specify either an individual or trust capacity when she signed the deed.[240] The court of appeals refused to imply a reservation of the trust interest from the deed's coverage because doing so would conflict with the clear language of the deed conveying all of the property.[241]

V. OTHER ESTATE PLANNING MATTERS

A. Power of Attorney

In *Wise v. Mitchell*,[242] a grandmother (the principal) transferred land to her grandson—retaining a life estate, the authority to sell, and the power to change the remainder owners (a "Lady Bird" deed). Her agent, under a durable power of attorney, entered into a contract to sell the land; filed a revocation of the original deed; and alternatively, appointed different individuals as the remainder owners.[243] The agent was later appointed as the principal's guardian and requested court permission to sell the property.[244] Before the trial court could rule on the motion, the principal died.[245] The agent was then appointed as the principal's executor.[246] A protracted dispute arose between the grandson and the executor over the land.[247] After the executor prevailed, the grandson appealed.[248]

The Dallas Court of Appeals affirmed.[249] The court of appeals explained that the agent's failure to file the durable power of attorney before entering into the real property transaction did not impact the validity of the revocation.[250] In addition, the statutory provision allegedly violated by the agent was not part of Texas law, although it was part of the model Uniform Power of Attorney Act, which Texas has not adopted.[251] The court of appeals also explained that the power of attorney form did not comply with the statute, and thus, the agent's powers are fixed by the document's own terms.[252] The court of appeals deter-

238. *Id.* at 695.
239. *Id.*
240. *Id.*
241. *Id.* As an alternate ground for its decision, the court of appeals determined that the grantees would have acquired title by adverse possession. *Id.* at 696.
242. No. 05-15-00610-CV, 2016 WL 3398447 (Tex. App.—Dallas June 20, 2016, pet. denied) (mem. op.).
243. *Id.* at *2.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at *2–4.
248. *Id.* at *4.
249. *Id.* at *10.
250. *Id.* at *7.
251. *Id.*
252. *Id.* at *8.

mined that the language granting the agent the power to "perform any and all acts in my stead and to do and perform all such other matters as may be necessary and expedient for the purpose of carrying out the objects above mentioned" was sufficient to authorize the agent to revoke the deed.[253]

The facts in the case occurred prior to the enactment of the Texas Real Property Transfer on Death Act.[254] Although Estates Code Section 114.054(b) precludes the creation of a transfer on death deed by an agent, it does not speak to whether an agent may revoke an already-existing transfer on death deed.[255] To avoid controversy, prudent practice may be to expressly address this issue in the durable power of attorney.

B. Oral Gift of Real Property

After the probate court admitted the testator's will to probate in *Estate of Wright*,[256] the purported beneficiary claimed certain property under two theories. First, the beneficiary claimed that the testator gave him the property as a gift.[257] Second, the beneficiary asserted that the will was invalid and that he should receive the property under the terms of a different will.[258] The trial court held that the testator made "a completed oral gift" to the purported beneficiary, imposed a constructive trust on the house, and ordered the trust transferred by a special warranty deed to the beneficiary.[259] The independent executor appealed.[260]

The Fourteenth Houston Court of Appeals affirmed.[261] The court of appeals agreed that the testator had gifted the property to the beneficiary despite the fact that the testator never deeded the property to him.[262] The court of appeals first addressed whether the "Dead Man's Rule," Texas Rule of Evidence 601(b), should have excluded the beneficiary's testimony about the alleged gift as being the testator's uncorroborated oral statements not solicited by an opposing party.[263] The court of appeals determined that the independent executor did not properly object to the testimony, and thus, regardless of the Rule, the trial court could consider the evidence.[264]

The court of appeals next determined that there was sufficient evidence to prove an oral gift of real property.[265] Although it acknowledged that conveyances of real property should be in writing and signed, the court of

253. *Id.* at *7.
254. Tex. Est. Code Ann. ch. 114 (West 2015).
255. *See* § 114.054(b).
256. 482 S.W.3d 650 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).
257. *Id.* at 652–53.
258. *Id.* at 652.
259. *Id.* at 655.
260. *Id.*
261. *Id.*at 661.
262. *Id.* at 657–58.
263. *Id.* at 655.
264. *Id.* at 656.
265. *Id.* at 658.

appeals recognized that, in equity, an oral gift is possible.[266] The elements necessary to prove an oral gift include (1) "a present gift"; (2) the donee's possession of the property "with the donor's consent"; and (3) the donee's "permanent and valuable improvements . . . with the donor's consent or other facts [that show] the donee would be defrauded if the gift were not enforced."[267] The court of appeals believed that evidence that Leroy lived in the house, paid property insurance, and handled mold remediation matters with the insurance company was sufficient to support the finding of an inter vivos gift.[268] Despite a strong dissenting opinion, the court rejected the argument that the will showed a future intent to transfer, which would prevent the oral gift from being effective.[269]

VI. CONCLUSION

The new cases address a wide array of issues, some are very narrow, and some have potentially broad impact. This article has already discussed the practical application of the cases. It is also important to understand some overarching principles that transcend individual cases and form a pattern. Here are some examples of patterns this author detected:

- In terms of wills, courts continue to interpret narrowly issues surrounding capacity and undue influence and disfavor the use of circumstantial evidence.[270] Courts seem reluctant to consider broader interpretations due to the potential complications and possible destruction of intended autonomy.
- Courts also continue to interpret strictly questions involving Texas statutes.[271]

266. *Id.* at 657.
267. *Id.*
268. *Id.* at 658.
269. *Id.* at 657.
270. *See, e.g.*, Estate of Koontz, No. 04-15-00820-CV, 2016 WL 6775593, at *2 (Tex. App.—San Antonio Nov. 16, 2016, no pet.) (mem. op.); *In re* Estate of Kam, 484 S.W.3d 642, 652 (Tex. App.—El Paso 2016, pet. filed); *In re* Estate of Parrimore, No. 14-14-00820-CV, 2016 WL 750293, at *7 (Tex. App.—Houston [14th Dist.] Feb. 25, 2016, no pet.) (mem. op.).
271. *See, e.g.*, *In re* Jacky, 506 S.W.3d 550, 555–56 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding); *In re* Davidson, 485 S.W.3d 927, 930–31 (Tex. App.—Tyler 2016, orig. proceeding); Anderson v. Archer, 490 S.W.3d 175, 178 (Tex. App.—Austin 2016, pet. filed).