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Wills & Trusts

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WILLS & TRUSTS

Gerry W. Beyer*

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This article discusses judicial and legislative developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of December 1, 2018, through November 30, 2019. The reader is warned that not all newly enacted statutes or decided cases during the Survey period are presented, and not all aspects of each statute or case are analyzed. You must read and study the full text of each statute or 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. INTESTATE SUCCESSION

The 2019 Texas Legislature clarified the computation of the surviving spouse's intestate share when there is at least one non-marital descendant to prevent a misreading of the statute.¹ Incorrectly, several attorneys and judges argued that the statute gave the surviving spouse one-half of the deceased spouse's half of community property rather than providing that the surviving spouse receives none of the deceased spouse's half of community property.

II. WILLS

A. TESTAMENTARY INTENT

In re Estate of Silverman demonstrates that a document that names an executor may be deemed a valid will even if the document does not make a property disposition.² The decedent handwrote and signed a document that provided, "Karen Grenrod is my executor, administrator, [and] has all legal rights to my estate in the case of my untimely or timely death."³ The contestants claimed that this document lacked testamentary intent and thus is not a will that is admissible to probate.⁴ The trial court agreed.⁵

The Fourteenth Houston Court of Appeals reversed.⁶ Consistent with the Texas Supreme Court case of *Boyles v. Gresham*,⁷ the court of appeals held that a document that appoints an executor can be a will even if it does not make an effective disposition of the testator's property.⁸ The court also quoted the Texas Estates Code provision, which defines the term "will" as including an instrument that merely appoints an executor.⁹ In addition, the court held that the decedent's document is ambiguous and could dispose of the entire estate to Karen by stating that she has "all legal rights" to his estate.¹⁰ The court did not, however, order the document admitted to probate because the contestants also alleged undue influence, an issue the trial court had yet to resolve.¹¹

B. INTERPRETATION AND CONSTRUCTION

The most commonly appealed case during the Survey period involved will interpretation and construction issues indicating that will drafters, be

1. TEX. EST. CODE ANN. § 201.003(c).

2. *In re Estate of Silverman*, 579 S.W.3d 732, 741 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

3. *Id.* at 734.

4. *Id.* at 735.

5. *Id.*

6. *Id.* at 741.

7. 263 S.W.2d 935, 939 (Tex. 1954).

8. *In re Estate of Silverman*, 579 S.W.3d at 740.

9. *Id.*

10. *Id.* at 739–40.

11. *Id.* at 741.

they attorneys or lay individuals, need to be precise about the language used in their wills.

1. “Personal Effects”

The testatrix’s self-prepared will in *In re Estate of Ethridge* left her “personal effects” to her nephew-in-law and did not contain a residuary clause.¹² Her nephew-in-law asserted that “personal effects” included cash, receivables, and oil and gas interests and royalties.¹³ Instead, the testatrix’s heirs asserted that this property passed to them via intestacy, and the trial court agreed.¹⁴ The trial court also found that the nephew-in-law, who was serving as the independent executor, misapplied estate property and removed him.¹⁵ The nephew-in-law appealed.¹⁶

The Eleventh Eastland Court of Appeals affirmed.¹⁷ After concluding that the will was not ambiguous, the court of appeals explained that extrinsic evidence is unnecessary and that her intent must be found within the four corners of the will.¹⁸ The court rejected the nephew-in-law’s assertion that the phrase “personal effects” was meant to encompass her entire estate except for the devise of her homestead, which had adeemed.¹⁹ The court explained that “personal effects” is a narrow subset of personal property, including “articles bearing intimate relation or association to the person of the testator” such as clothing, jewelry, eyeglasses, luggage, and similar items.²⁰ The term would not encompass real property, including mineral interests.²¹

2. Right of First Refusal

A testator granting a right of first refusal, which may be exercised over only a portion of a tract of real property, needs to anticipate that the person may select property which has the effect of reducing the value of the remaining property. The testator should then indicate whether a reappraisal of the selected property is needed to determine the purchase price. Failure to do so may raise issues such as those in *Brewer v. Fountain*.²² The testator’s will and codicil provided that named individuals would have the right of first refusal to purchase real property from the estate at a “sales price equal to the Appraised value of the Real Property” at the date of the testator’s death.²³ These individuals exercised the right to purchase some, but not all, of the real property using the value of

12. *In re Estate of Ethridge*, 594 S.W.3d 611, 616 (Tex. App.—Eastland 2019, no pet.).

13. *Id.* at 613.

14. *Id.* at 614.

15. *Id.*

16. *Id.*

17. *Id.* at 617.

18. *Id.* at 615.

19. *Id.*

20. *Id.* at 615–16.

21. *Id.* at 616.

22. 583 S.W.3d 871 (Tex. App.—Houston [1st. Dist.] 2019, no pet.).

23. *Id.* at 874.

the homestead plus a prorated amount for additional acreage.²⁴ The part they wanted to purchase was “better” than the remaining acreage because it included a lake and access road, which arguably would make the remaining property less valuable.²⁵ The trial court ordered a reappraisal of just the property the individuals wanted to purchase, which resulted in a price of more than 350% higher.²⁶ The named individuals objected to the new appraised value.²⁷ The trial court ruled that the named individuals had the right to purchase all the real property at its appraised value, but because they were purchasing less than the whole, they were entitled to an offset reimbursement.²⁸ However, no provision of the testator’s will authorized this result.²⁹

The First Houston Court of Appeals examined the testator’s will and codicil and found them to be unambiguous.³⁰ The court of appeals explained that the trial court’s resolution effectively required the named individuals to purchase all of the land despite the clear language granting them the right to purchase “any or all” of the property based on the value at the date of the testator’s death.³¹ The court then held that the named individuals may purchase any portion of the property based on the date of death value “without regard to any diminution in value to the remainder of the property.”³²

3. *Partial Intestacy*

A will drafter must carefully consider as many contingencies as possible when drafting dispositive provisions, as *Sullivan v. Hatchett* teaches.³³ The testator’s will gave his surviving spouse a life estate in his property.³⁴ However, he did not provide clear instructions as to what was to happen after her death.³⁵ One provision did provide for the disposition of 60% of his estate, but only if certain conditions were satisfied, such as his wife dying first, both dying at the same time, or his wife not surviving by ninety days.³⁶ The residual clause disposed of only 40% of the estate.³⁷ Nonetheless, the trial court allowed 60% of the estate to pass under the conditional provision even though none of the conditions actually occurred.³⁸

24. *Id.* at 875.

25. *See id.*

26. *See id.*

27. *Id.* at 875–76.

28. *Id.* at 875.

29. *Id.* at 876.

30. *Id.* at 877.

31. *Id.*

32. *Id.* at 878.

33. *Sullivan v. Hatchett*, No. 07-17-00296-CV, 2019 WL 545578 (Tex. App.—Amarillo Feb. 11, 2019, no pet.) (mem. op.).

34. *Id.* at *1.

35. *See id.* at *2.

36. *Id.* at *1.

37. *Id.*

38. *Id.* at *2–3.

The Seventh Amarillo Court of Appeals reversed.³⁹ None of the conditions triggering disposition under the 60% provision applied, and the residuary clause covered only 40% of the estate.⁴⁰ Thus, 60% of the estate passed by intestacy. It is likely that the testator intended the disposition in the conditional provision to govern 60% of the estate after his wife's death. However, the unambiguous language of the provision prevented that from occurring.⁴¹

The dissenting justice argued that the conditional provision should apply even if none of the conditions occurred because when the provision disposing of 60% is combined with the residual clause disposing of 40%, the testator's estate is completely distributed without resorting to intestacy.⁴²

4. *Codicil*

If at all possible, avoid the use of codicils to prevent external integration issues, especially when modern computer technology makes it efficient and inexpensive to create a new will. If a codicil is nonetheless used, the testator must be certain to correctly reference the will which the testator is amending. Otherwise, problems such as those in *In re Estate of Hargrove* may arise.⁴³ The testatrix executed a will on February 13, 2017.⁴⁴ A month later on March 31, 2017, she executed a codicil to a will she executed "in the Summer of 2016."⁴⁵ The trial court refused to admit the codicil and its republication of the prior will, holding that the codicil did not make a sufficient reference to a prior will.⁴⁶

The Fourth San Antonio Court of Appeals affirmed.⁴⁷ The court of appeals explained that the codicil was not referencing the February 2017 will but rather one executed in the prior year.⁴⁸ No evidence was introduced with regard to the contents, or even existence, of the prior will.⁴⁹ The court concluded, "The Codicil purporting to modify that nonexistent will therefore has no validity or effect."⁵⁰

Even though the parties could not locate the prior will, this author thinks the codicil should have been effective to the extent it changed provisions of the February 2017 will. In effect, the codicil still revoked by inconsistency certain terms of the 2017 will. Alternatively, the parties

39. *Id.* at *6.

40. *Id.* at *4.

41. *Id.*

42. *Id.* at *6–7 (Campbell, J., dissenting).

43. *In re Estate of Hargrove*, No. 04-18-00355-CV, 2019 WL 1049293 (Tex. App.—San Antonio Mar. 6, 2019, pet. denied) (mem. op.).

44. *Id.* at *1.

45. *Id.*

46. *Id.*

47. *Id.* at *3.

48. *Id.* at *2.

49. *Id.* at *3.

50. *Id.*

could have sought reformation and attempted to prove the reference to the will as being executed in 2016 was a scrivener's error.⁵¹

C. WILL REFORMATION

If a personal representative petitions a constitutional county court for will reformation and the county does not have a statutory probate court or a county court at law exercising original probate jurisdiction, the judge may now on the judge's motion, and must on the motion of the party, (1) request the assignment of a statutory probate judge, or (2) transfer the proceeding to the district court.⁵² If a party requests the assignment of a statutory probate judge before the judge on the judge's motion transfers the case to the district court, the judge must grant the motion for the assignment of the statutory probate court judge.⁵³

If a personal representative petitions a constitutional county court for will reformation and the county does not have a statutory probate court but does have a county court at law exercising original probate jurisdiction, the judge may on the judge's motion, and must on the motion of a party, transfer the case to the county court at law.⁵⁴

In both situations, the constitutional county court continues to exercise jurisdiction over the management of the case other than the reformation proceeding. Once the reformation issue is resolved, the statutory probate court judge, district court, or county court at law returns the entire matter to the constitutional county court for further proceedings.⁵⁵

D. ANTI-LAPSE STATUTE AND CHARITABLE GIFTS

The 2019 legislature revised the anti-lapse statute to assure that it does not apply to charitable gifts unless the testator expressly so provides.⁵⁶ This revision removes a potential argument that the court could not use *cy pres* to find an alternative charitable beneficiary upon the lapse of a charitable gift.

E. UNDUE INFLUENCE

In re Estate of Russey demonstrates that it is difficult to overturn a trial court's determination of undue influence as long as there is sufficient evidence even if that evidence could be subject to other interpretations.⁵⁷ The trial court examined the evidence and determined that the testatrix's

51. See TEX. EST. CODE ANN. § 255.451.

52. *Id.* § 255.456.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* § 255.152(d).

57. *In re Estate of Russey*, No. 12-18-00079-CV, 2019 WL 968421, at *3 (Tex. App.—Tyler Feb. 28, 2019, no pet.) (mem. op.).

will was invalid because it was executed while she was under undue influence.⁵⁸ The Twelfth Tyler Court of Appeals affirmed.⁵⁹

The court of appeals reviewed the evidence and determined it was legally and factually sufficient to prove that the sole beneficiary, a non-family member, had exerted undue influence over the testatrix.⁶⁰ The court based its analysis on the non-exhaustive ten-factor list of considerations the Texas Supreme Court set forth in *Rothermel v. Duncan*.⁶¹ A few of the many factors the court discussed, which showed the undue influence and the testatrix's inability to resist, included: the beneficiary was subject to deferred adjudication for theft and needed to repay almost \$40,000 in restitution which she had not done; the beneficiary had accused the testatrix of stealing from the beneficiary's business for which the testatrix had worked; the testatrix relied on the beneficiary for her care and transportation during her last illness; the beneficiary worked to keep the testatrix, her children and grandchildren estranged; and the beneficiary printed the will, gave it to the testatrix to sign, and wrote the date of the will.⁶²

III. ESTATE ADMINISTRATION

A. DESIGNATION OF ADMINISTRATOR

A testator may now grant another person (e.g., the named executor, a specified person, or a person identified by office or function) “the authority to designate one or more persons to serve as administrator of the testator’s estate.”⁶³ Unless the testator otherwise provides, the designated person may serve only if all the executors named in the will are deceased, are disqualified to serve, or have filed affidavits stating their inability or unwillingness to serve.⁶⁴ To make the designation, the named person must do so in writing and have that writing acknowledged.⁶⁵ Of course, the designated person must not be disqualified from serving.⁶⁶ Unless the will or designation provides otherwise, the designated person has all the same rights, powers, and duties as an executor named in the will, including the right to serve independently and sell property without the consent of the distributees.⁶⁷

58. *Id.* at *2.

59. *Id.* at *7.

60. *Id.* at *5.

61. *Id.* at *3. See generally *Rothermel v. Duncan*, 369 S.W.2d 917, 923 (Tex. 1963).

62. *In re Estate of Russey*, 2019 WL 968421, at *4–6.

63. TEX. EST. CODE ANN. § 254.006.

64. *Id.*

65. *Id.*

66. *Id.*

67. See *id.*

B. CONVERSION OF MUNIMENT OF TITLE TO ESTATE ADMINISTRATION

The 2019 legislature provided that the fact that a will has already been admitted to probate as a muniment of title will not preclude a later estate administration as long as either (1) four years have not elapsed since the testator died, or (2) the court determines that estate administration is needed under Texas Estates Code § 301.002(b) (e.g., to recover property due a decedent's estate).⁶⁸ Certain time periods for the court or personal representative to take action will now run from the date the personal representative qualifies rather than when the court admitted the will to probate as a muniment of title (e.g., the giving of notice to the beneficiaries).⁶⁹

C. CUSTODY OF ORIGINAL WILL

The 2019 legislature clarified that the testator's original will must remain in the custody of the county clerk unless (1) a court order authorizes the temporary removal for inspection purposes, or (2) the entire case is transferred to another court.⁷⁰

D. DEFINITION OF "PROBATE PROCEEDING"

The 2019 legislature expanded the definition of "probate proceeding" to encompass will modification and reformation proceedings.⁷¹

E. PERSONAL REPRESENTATIVE'S ACCESS TO INFORMATION ABOUT NON-PROBATE ASSETS

The 2019 legislature granted the personal representative the ability to obtain information about non-probate assets such as multiple-party accounts, property subject to non-testamentary transfers, and insurance contracts even though these assets are not part of the probate estate.⁷² This access will make it easier for the personal representative to prepare estate tax returns and ascertain whether the personal representative should pursue these assets to pay debts and expenses.

F. PERSONAL REPRESENTATIVE PURSUANCE OF MULTIPLE-PARTY ACCOUNTS

The 2019 legislature made it clear that a personal representative has no duty to seek funds from multiple-party accounts that pass outside of probate to pay debts or expenses unless a surviving spouse, a creditor, or a person acting on behalf of the deceased party's minor child makes a written demand.⁷³

68. *Id.* § 257.151.

69. *Id.* § 257.152.

70. *Id.* § 256.053(b).

71. *Id.* § 31.001.

72. *Id.* §§ 111.101–.102.

73. *Id.* § 113.252(c).

G. PRO SE

In many counties, a non-attorney named as the independent executor and sole beneficiary of a will is precluded from proceeding pro se to administer the testator's estate. In *In re Estate of Maupin*, a husband appealed the trial court's sua sponte order admitting his wife's will to probate as a muniment of title rather than granting him letters testamentary as he had requested.⁷⁴ The Thirteenth Corpus Christi–Edinburg Court of Appeals agreed with the trial court's decision because the husband was a non-lawyer proceeding pro se.⁷⁵ The local court rules of Travis County preclude a non-lawyer from acting pro se from administering the estate of a decedent even if the person is the sole beneficiary of the decedent's will.⁷⁶

H. STANDING

In re Estate of Daniels makes it clear that a decedent's spouse, heirs, and devisees have standing regardless of whether they have a pecuniary interest in the decedent's estate.⁷⁷ After the intestate died, a heated dispute arose over whether his surviving spouse or his mother should serve as the independent administrator.⁷⁸ After the court determined heirship, appointed his surviving spouse as the temporary administrator, and distributed all estate property to the heirs, the surviving spouse moved to dismiss all actions of the other heirs on the ground that they lacked standing as they no longer had a property right in or claim against the intestate's estate.⁷⁹ The trial court granted the motion.⁸⁰

On appeal, the Sixth Texarkana Court of Appeals reversed.⁸¹ The court of appeals carefully read the applicable Estates Codes provisions.⁸² An "interested person" has standing to apply for and challenge an application for letters of administration.⁸³ The definition of "interested person" includes "an heir."⁸⁴ An heir is "a person who is entitled under the statutes of descent and distribution to a part of the estate of a decedent who dies intestate."⁸⁵

Accordingly, it was undisputed that originally the intestate's mother and the other heirs had standing.⁸⁶ The court of appeals rejected the

74. *In re Estate of Maupin*, No. 13-17-00555-CV, 2019 WL 3331463, at *1 (Tex. App.—Corpus Christi–Edinburg July 25, 2019, pet. denied) (mem. op.).

75. *Id.* at *2.

76. *Id.*

77. *In re Estate of Daniels*, 575 S.W.3d 841, 848 (Tex. App.—Texarkana 2019, pet. denied).

78. *Id.* at 843.

79. *Id.* at 844.

80. *Id.*

81. *Id.* at 848.

82. *Id.* at 845–46.

83. TEX. EST. CODE ANN. §§ 301.051(2)(B), 301.101.

84. *Id.* § 22.018(1).

85. *Id.* § 22.015.

86. *In re Estate of Daniels*, 575 S.W.3d at 845.

claim that when they lost a pecuniary interest in the estate that they lost standing.⁸⁷ The court of appeals explained that the language in Texas Estates Code § 22.108 that includes a person who has a “property right in” or a “claim against” does not restrict the standing of the other individuals listed in the definition, such as heirs and devisees.⁸⁸ The definition is in the disjunctive; the statute uses the word “or” between the named categories of interested persons.⁸⁹ Thus, the listed individuals do not need to have a pecuniary interest in the estate to have standing.⁹⁰

I. JURISDICTION

A party dissatisfied with a probate court order must take proper steps either to timely (1) file a motion under Texas Rule of Civil Procedure 329b, or (2) appeal. For example, in *In re Estate of Brazda*,⁹¹ the probate court ordered the administrator to distribute certain funds and held the administrator personally liable for damages resulting from the delay in distributing under Texas Estates Code § 360.301.⁹² Later the same day, the administrator moved to have the order reconsidered.⁹³ Two weeks later, the probate court granted the motion.⁹⁴ At a hearing on the motion several months later, the probate court entered orders reconsidering and removing damages against the administrator.⁹⁵ An heir appealed on the ground that the trial court lost plenary power over the order before it entered the reconsideration order.⁹⁶

The First Houston Court of Appeals agreed.⁹⁷ First, the court of appeals decided it had jurisdiction to hear an appeal from the reconsideration because the orders are to be treated as an “undivided whole” and thus final and appealable.⁹⁸ Likewise, the court of appeals explained that the original probate court order requiring the administrator to distribute property and holding the administrator liable was final and not an interlocutory one.⁹⁹ The order resolved all of the then-live claims, including the awarding of damages.¹⁰⁰ Accordingly, the probate court lost its plenary power to reconsider the order or enter further inconsistent orders.¹⁰¹ Instead, the administrator should have appealed. Note that the court engaged in a detailed discussion of how the time for the court to

87. *Id.* at 846.

88. *Id.*

89. TEX. EST. CODE ANN. § 22.018(1).

90. See *In re Estate of Daniels*, 575 S.W.3d at 848.

91. 582 S.W.3d 717 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

92. *Id.* at 720.

93. *Id.*

94. *Id.* at 720–21.

95. *Id.* at 721.

96. *Id.* at 721–22.

97. *Id.* at 732.

98. *Id.* at 729.

99. *Id.* at 730.

100. *Id.*

101. *Id.* at 731–32.

undo an order after entering it may be extended.¹⁰² However, the new trial court orders were entered even after the longest possible extension.¹⁰³

J. DETERMINATION OF HEIRSHIP

Under 2019 legislative revisions, a determination of heirship will now normally require “two disinterested and credible witnesses.”¹⁰⁴ However, the court can determine that one disinterested and credible witness is sufficient if a diligent search does not discover another witness.¹⁰⁵ Although it is typical that the witnesses knew the decedent and can thus explain the decedent’s family situation, the statute does not require that any witness personally knew the decedent, and thus, a genealogist’s or other researcher’s testimony may be sufficient.¹⁰⁶

In re Estate of Keener holds that a person claiming property as a trust beneficiary has standing to intervene in a proceeding to declare heirship when the heirs seek to inherit the same property.¹⁰⁷ The beneficiary of the decedent’s inter vivos trust filed a plea in intervention in an action to determine the decedent’s heirs.¹⁰⁸ The beneficiary claimed that he, as the trust beneficiary, was the owner of property the heirs sought to inherit.¹⁰⁹ The trial court said that the documents the decedent used to transfer property to the inter vivos trust lacked testamentary intent—making them ineffective—and that the trust was designed to transfer only a suppressor (a gun “silencer”).¹¹⁰ Thus, the trial court denied the plea, holding that the beneficiary lacked a justiciable interest.¹¹¹

The Thirteenth Corpus Christi–Edinburg Court of Appeals reversed because the trial court’s decision was an abuse of discretion that it made without reference to guiding rules and principles.¹¹² The court explained the fallacies with the trial court’s reasons for denying the plea.¹¹³ First, testamentary intent is not needed to transfer property to an inter vivos trust.¹¹⁴ Second, decedent could add property to the trust in any manner and at any time because no trust terms restricted adding property to the trust.¹¹⁵

102. *See id.* at 722–24.

103. *See id.* at 731–32.

104. TEX. EST. CODE ANN. § 202.151(b).

105. *Id.* § 202.151(c).

106. *See id.* § 202.151(b)–(c).

107. *In re Estate of Keener*, No. 13-18-00007-CV, 2019 WL 758872, at *6 (Tex. App.—Corpus Christi–Edinburg Feb. 21, 2019, no pet.) (mem. op.).

108. *Id.* at *1.

109. *Id.* at *2.

110. *Id.* at *3.

111. *Id.*

112. *See id.* at *6–7.

113. *Id.* at *7.

114. *Id.* at *6.

115. *Id.* at *7.

K. LATE PROBATE

In *Ferreira v. Butler*,¹¹⁶ the Texas Supreme Court held that a court might consider *only* the applicant's default in determining whether to probate a will after four years.¹¹⁷ The executrix of the decedent's estate attempted to probate the will of the decedent's wife nine years after her death.¹¹⁸ The wife's children from a previous relationship contested the application asserting that it was too late to probate the wife's will as more than four years had elapsed since the wife's death and that the applicant lacked a good reason for not timely probating his wife's will.¹¹⁹ The executrix responded that the four-year rule did not apply under Texas Estates Code § 256.003 because she was not in default; she applied to probate the will a mere one month after discovering the will.¹²⁰ The trial court denied probate, and the executrix appealed.¹²¹ The intermediate appellate court affirmed.¹²² The court of appeals explained that the executrix's timely conduct was irrelevant.¹²³ The important issue is whether the decedent acted timely, which he clearly did not.¹²⁴ The court explained that the executrix, both in her personal capacity and in her representative capacity, could have no greater right than the decedent had when he died.¹²⁵ The court of appeals did, however, recognize that there is a split in authority among the Texas appellate courts regarding whether a default by a will beneficiary is attributed to that beneficiary's successors in interest (heirs or will beneficiaries).¹²⁶

On appeal to the supreme court, the supreme court adopted the executrix's position that the statute clearly references whether "the applicant" was in default, not whether someone else, even the person through whom the applicant is claiming, was in default.¹²⁷ The supreme court expressly overruled *Faris v. Faris*, in which the Fifth Dallas Court of Appeals had imputed a devisee's default to that person's own devisee.¹²⁸ However, the supreme court did recognize that the executrix was "bound" by the decedent's default in her capacity as the decedent's executrix, but she would have her own standing as an interested person because, as a devisee under the decedent's will, she had a pecuniary interest that would be affected by the probate of the decedent's wife's will which left property to

116. 575 S.W.3d 331 (Tex. 2019).

117. *Id.* at 338.

118. *Id.* at 333.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Ferreira v. Butler*, 531 S.W.3d 337, 339 (Tex. App.—Houston [14th Dist.] 2017), *vacated*, 575 S.W.3d 331 (Tex. 2019).

123. *Id.* at 342.

124. *Id.*

125. *Id.* at 343–34.

126. *Id.* at 342–44.

127. *Ferreira v. Butler*, 575 S.W.3d 331, 337 (Tex. 2019).

128. *Id.* at 338; *see also* *Faris v. Faris*, 138 S.W.2d 830, 832 (Tex. App.—Dallas 1940, writ *ref'd*), *overruled by* *Ferreira v. Butler*, 575 S.W.3d 331 (Tex. 2019).

the decedent.¹²⁹ Accordingly, the supreme court vacated the appellate court's decision and remanded so the executrix could amend her pleadings to seek probate of the decedent's wife's will in her individual capacity.¹³⁰

L. TEMPORARY ADMINISTRATION

Chabot v. Estate of Sullivan makes it clear that the probating of a will as a muniment of title does not preclude a will contest within two years of probate and the appointment of a temporary administration to serve while the contest is pending.¹³¹ The testator's will was admitted to probate as a muniment of title.¹³² Subsequently, tort actions were filed against the testator's estate.¹³³ In addition, an unhappy heir filed a will contest along with a request for the appointment of a temporary administrator.¹³⁴ The trial court granted the request.¹³⁵ Later, the trial court approved the temporary administrator's settlement of the tort claims over the objection of one claimant who appealed.¹³⁶

The objecting tort claimant asserted that the court's appointment of a temporary administrator was void for want of jurisdiction, and thus, the approval of the settlement was likewise void.¹³⁷ The Third Austin Court of Appeals rejected this argument.¹³⁸ The court of appeals explained that an interested person may contest a will within two years after it is admitted to probate under Texas Estates Code § 256.204.¹³⁹ The testator's will was contested timely.¹⁴⁰ Thus, the court had authority under Texas Estates Code § 452.051 to appoint a temporary administrator to serve while the will contest was pending.¹⁴¹

M. COMMUNITY PROPERTY TRANSFER BY SURVIVING SPOUSE

In re Estate of Abraham serves as a reminder that a surviving spouse wishing to transfer a community asset prior to the conclusion of the administration must follow the procedures under Texas Estates Code § 360.253 to protect the rights of the deceased spouse's creditors.¹⁴² The decedent used a parcel of community property as collateral for a loan.¹⁴³

129. *Ferreira*, 575 S.W.3d at 334–35.

130. *Id.* at 338–39.

131. *Chabot v. Estate of Sullivan*, 583 S.W.3d 757, 761 (Tex. App.—Austin 2019, pet. denied).

132. *Id.* at 759.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 759–60.

137. *Id.* at 760.

138. *Id.* at 762.

139. *Id.* at 761.

140. *See id.*

141. *Id.*

142. *In re Estate of Abraham*, 583 S.W.3d 374, 378 (Tex. App.—El Paso 2019, pet. denied).

143. *Id.* at 375.

The decedent died before repaying the loan, and thus the creditor filed a claim in the probate proceeding for the unpaid balance of the loan.¹⁴⁴ Four months after the decedent's death, his son filed a deed which purported to transfer this property from the decedent to him.¹⁴⁵ The decedent signed the deed, but it was not notarized until after the decedent's death.¹⁴⁶ Two years later, the decedent's surviving spouse and sole beneficiary deeded her interest in this property to the son contingent on him paying the creditor's claim but without reference to the other debts of the estate.¹⁴⁷ The decedent's spouse did not seek the court's permission to execute the deed, nor did she post a bond.¹⁴⁸ The administrator sought to set aside this deed because the court did not grant permission, there was no partition order, and no bond was posted.¹⁴⁹ The probate court agreed, and the decedent's spouse appealed.¹⁵⁰

The Eighth El Paso Court of Appeals affirmed.¹⁵¹ The court of appeals explained that, although title to the property immediately vested in the spouse upon the decedent's death under Texas Estates Code § 101.001, it remained subject to the decedent's non-exempt debts.¹⁵² In addition, once a personal representative is appointed, the personal representative has a superior right to possession of all estate property under Texas Estates Code § 101.003.¹⁵³ The court described methods for a beneficiary to obtain property during the administration of an estate as well as for a spouse to get title to her share of a community property assets under Texas Estates Code § 360.253.¹⁵⁴ The spouse did not follow any of these procedures but claimed that the community property procedure in Texas Estates Code § 360.253 is optional.¹⁵⁵ The court explained that the procedure is optional in the sense that the surviving spouse could wait until the administration of the estate is complete to transfer the property and not need to comply with this section.¹⁵⁶ However, if the spouse wants to transfer the property prior to the conclusion of the administration, the formal procedure of partition and posting a bond is necessary to protect estate creditors.¹⁵⁷ Otherwise, the spouse could transfer the asset and shield it from estate creditors.¹⁵⁸

144. *Id.*

145. *Id.*

146. *Id.* at 375–76.

147. *Id.* at 376.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 379.

152. *Id.* at 378–79.

153. TEX. EST. CODE ANN. § 101.003.

154. *In re Estate of Abraham*, 583 S.W.3d at 377–78.

155. *Id.* at 378.

156. *Id.*

157. *Id.* at 378–79.

158. *Id.* at 379.

N. COMMUNITY PROPERTY TRANSFER BY DECEASED SPOUSE

A conveyance of community real property requires the signatures of both spouses. Failure to obtain both signatures may raise issues such as those in *In re Estate of Abraham*.¹⁵⁹ Four months after the decedent's death, his son, who was not a beneficiary of the will, filed a deed which purported to transfer a parcel of community property from the decedent to him.¹⁶⁰ The decedent signed the deed, but it was not notarized until after the decedent's death.¹⁶¹ Two years later, the decedent's surviving spouse and sole beneficiary deeded her interest in this property to the son.¹⁶² Accordingly, the son claimed that he was now the owner of the land, and the administrator sought to void the deed.¹⁶³ The probate court declared that the decedent's deed was "void, invalid, and of no legal effect."¹⁶⁴ The son appealed.¹⁶⁵

The Eighth El Paso Court of Appeals affirmed.¹⁶⁶ The son claimed that the late notarization would not make the deed invalid as notarization is not a deed requirement under Texas Property Code § 5.021.¹⁶⁷ Instead, notarization is merely a precondition to recording the deed in the public records under Texas Property Code § 12.001.¹⁶⁸ The court determined that it did not need to address this issue because the decedent's wife did not sign the deed and thus could not convey the property.¹⁶⁹ "[A]bsent a power of attorney or agreement, one spouse may not convey community property to a third party, so as to effectuate a partition by creating a tenancy-in-common between the remaining spouse and the third party."¹⁷⁰ In addition, as explained in the companion case of *In re Estate of Abraham* discussed above, the alleged transfer of the wife's interest to the son was also ineffective.¹⁷¹

O. BREACH OF FIDUCIARY DUTY

Lawsuits alleging breach of fiduciary duty need to be timely filed. Potential plaintiffs must recognize, as *Brown v. Arenson* emphasizes, that they are "charged with notice of the contents of the probate records" and that "[c]onstructive notice in law creates an irrebuttable presumption of

159. See 583 S.W.3d 890, 898 (Tex. App.—El Paso 2019, pet. denied).

160. *Id.* at 892.

161. *Id.*

162. *Id.* at 893.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 898.

167. *Id.* at 897. See generally TEX. PROP. CODE ANN. § 5.021 (requiring that a deed be in writing and be subscribed and delivered by the conveyor or conveyor's agent authorized in writing).

168. See TEX. PROP. CODE ANN. § 12.001(a).

169. *In re Estate of Abraham*, 583 S.W.3d at 898.

170. *Id.* at 896 (citing *Dalton v. Don J. Jackson, Inc.*, 691 S.W.2d 765, 768 (Tex. App.—Austin 1985, no writ)).

171. *In re Estate of Abraham*, 583 S.W.3d 374 (Tex. App.—El Paso 2019, pet. denied).

actual notice.”¹⁷² In *Brown*, the decedent died in 1982.¹⁷³ In 2014, the decedent’s children sued the independent executor for breach of fiduciary duty.¹⁷⁴ The trial court granted summary judgment in favor of the executor on the ground that the statute of limitations had run because the children were on inquiry notice of the alleged breaches in the early 1990s.¹⁷⁵ The children appealed.¹⁷⁶

The First Houston Court of Appeals affirmed.¹⁷⁷ The children claimed that the statute of limitations period should be tolled because of the executor’s alleged fraud and the application of the discovery rule.¹⁷⁸ The court of appeals explained that there are “two distinct doctrines that may delay accrual of a claim or toll limitations: the discovery rule and fraudulent concealment.”¹⁷⁹ The court examined the evidence and agreed with the trial court that the children should have discovered the potential claims by the exercise of reasonable diligence decades before bringing suit.¹⁸⁰ The court was unimpressed with arguments that the children lacked the knowledge and skills to understand their potential claims because they were raised in foster homes and that it would be unfair to deem them having constructive notice of probate records.¹⁸¹ Likewise, the court determined that the alleged fraudulent concealment could not bar the limitations period because the alleged wrongs could have been discovered by the children exercising reasonable diligence.¹⁸²

P. AFFIDAVIT IN LIEU OF INVENTORY, APPRAISEMENT, AND LIST OF CLAIMS

The 2019 legislature clarified that if the court grants an extension to file the inventory, appraisal, and list of claims, it acts as an extension to file the affidavit in lieu as well.¹⁸³

Q. DIGITAL ASSETS

Personal representatives, including those who are independent, may at any time prior to the closing of the estate request orders regarding access to digital assets as authorized under the Texas Revised Uniform Fiduciary Access to Digital Assets Act.¹⁸⁴

172. *Brown v. Arenson*, 571 S.W.3d 324, 334 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (quoting *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981)).

173. *Id.* at 327.

174. *Id.*

175. *Id.* at 327–28.

176. *Id.* at 328.

177. *Id.* at 336.

178. *Id.* at 330.

179. *Id.* at 332–33.

180. *Id.* at 334.

181. *Id.* at 333–34.

182. *Id.* at 336.

183. TEX. EST. CODE ANN. § 309.056(e).

184. *Id.* §§ 351.106 (dependent), § 402.003 (independent).

R. CONTINGENT ATTORNEY FEES

In a dependent administration, court approval of a contingent attorney fee is now required only if the fee exceeds one-third of the property sought to be recovered.¹⁸⁵

S. WILL CONTESTANT FEES

The court may now award costs, including attorney fees, to a successful will contestant even if the contestant does not attempt to probate another will.¹⁸⁶

T. FUNERAL AND LAST ILLNESS EXPENSES

The amount of funeral and last illness expenses given Class 1 priority treatment was doubled from a combined total of \$15,000 to a maximum of \$15,000 for each type of expense.¹⁸⁷

U. SALE OF REAL ESTATE

The 2019 legislature modernized the procedures for the sale of real estate in dependent administrations where the testator did not grant a power of sale in the will.¹⁸⁸

V. WAIVER OF BOND

The 2019 legislature authorized the distributees of an estate that is independently administered to waive bond unless the court finds that the waiver of bond would not be in the best interests of the estate.¹⁸⁹

W. NOTICE BY PUBLICATION

When notice by publication is required, the notice must now also be posted on the public information website maintained by the Office of Court Administration under the newly enacted Texas Government Code § 72.034.¹⁹⁰ The date of service is the earlier of the date posted on this website or published in a newspaper.¹⁹¹

X. RESIDENTIAL LEASES

If a decedent who enters into a residential lease on or after January 1, 2020, is the sole occupant, and later dies, the personal representative may now terminate the lease early and avoid liability for future rent.¹⁹² The personal representative must (1) give the landlord timely notice of the

185. *Id.* §§ 351.152(a)–(b).

186. *Id.* § 352.052(c).

187. *Id.* § 355.102(b).

188. *Id.* §§ 356.401–.558.

189. *Id.* § 401.005(a-1).

190. *Id.* § 51.054(a); *see also* TEX. GOV'T CODE ANN. § 72.034.

191. TEX. EST. CODE ANN. § 51.054(b).

192. TEX. PROP. CODE ANN. § 92.0162(a).

termination of the lease; (2) remove the tenant's property before the next rent payment is due; and (3) provide an inventory of the removed property if the landlord or the landlord's agent makes a request for an inventory.¹⁹³ Regardless of the terms of the lease, the lease will be deemed terminated on the later of (1) the thirtieth day following the notice to the landlord, or (2) the date on which the statutory conditions were met.¹⁹⁴ The estate remains liable for delinquent rent and damages to the premises up to the effective date of termination.¹⁹⁵

IV. TRUSTS

A. TRUST INTENT

In *ETC Texas Pipeline v. Addison Exploration*, the Eleventh Eastland Court of Appeals held that designating someone as a trustee does not necessarily make the person a trustee unless the elements of a real trust are satisfied.¹⁹⁶ In a complex oil and gas case, one of the parties contended that because another party was designated as a "trustee" in a confidentiality agreement, it created a trust relationship that imposed fiduciary duties on that party.¹⁹⁷ The appellate court explained that merely designating a party as a trustee does not create a trust.¹⁹⁸ "For there to be a valid trust, the beneficiary, the *res*, and the trust purpose must be identified."¹⁹⁹ The court reviewed the provision in the agreement and quickly determined that it did not identify any specific property to be held in trust.²⁰⁰

B. MODIFICATION

In re Troy S. Poe Trust makes it clear that jury trials are available to ascertain disputed facts in a trust modification action.²⁰¹ The settlor expressly required the trustees to agree on all decisions.²⁰² Unfortunately, they were combatants in other litigation and were unable to agree on several trust matters.²⁰³ One trustee obtained an order from the probate court to make various modifications to the trust.²⁰⁴ The other trustee appealed.²⁰⁵

193. *Id.*

194. *Id.* § 92.0162(b).

195. *Id.* § 92.0162(d).

196. *ETC Tex. Pipeline v. Addison Exploration*, 582 S.W.3d 823 (Tex. App.—Eastland 2019, pet. filed).

197. *Id.* at 830–31.

198. *Id.* at 840 (citing *Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 249 (Tex. 1984)).

199. *Id.* (citing *Perfect Union Lodge v. Interfirst Bank of San Antonio, N.A.*, 748 S.W.2d 218, 220 (Tex. 1988)).

200. *Id.*

201. *In re Troy S. Poe Tr.*, 591 S.W.3d 168, 172 (Tex. App.—El Paso 2019, pet. filed).

202. *Id.*

203. *Id.* at 172–74.

204. *Id.* at 174–75.

205. *Id.* at 176.

The Eighth El Paso Court of Appeals reversed.²⁰⁶ The court explained that the trial court improperly rejected the other trustee's request for a jury trial because the question of whether the trust needed to be modified was a fact question.²⁰⁷ Texas Property Code § 115.012 provides that the normal civil procedure rules and statutes apply to trust actions.²⁰⁸ These rules and statutes, along with the Texas Constitution, guarantee the right to a jury trial.²⁰⁹ The trustee made a timely request for a jury trial (the court held the failure to pay the jury fee did not forfeit the right to claim error).²¹⁰ The court rejected the claim that Texas Property Code § 112.054 precludes a jury trial on modification issues because it provides that the "court shall exercise its discretion" in determining the modifications.²¹¹ The court examined the statute and found no reasonable argument that jury trials were precluded on fact issues.²¹² Instead, the court is to use those factual findings in framing trust modifications.²¹³ The court also rejected arguments that (1) the grounds for modification were established as a matter of law so that the lack of a jury was a harmless error, and (2) the trustee lacks standing as the trustee was not a beneficiary of the trust.²¹⁴ The court then held that the probate court abused its discretion in denying the trustee's demand for a jury trial and reversed.²¹⁵ Accordingly, the court did not determine whether the probate court's modifications were proper under Texas Property Code § 112.054.²¹⁶

C. REFORMATION

1. Summary Judgment

A husband and his wife in *In re Ignacio G. & Myra A. Gonzales Revocable Living Trust* created a trust naming their two children together as beneficiaries.²¹⁷ The summary section of the trust provided that each would receive 50% of the trust when the last parent died.²¹⁸ The wife's child from another partner, whom the husband adopted, attempted to claim she was also a beneficiary of the trust because a later trust provision indicated that "the remaining trust property shall be distributed to the Grantors' [_____]." ²¹⁹ The trust then provided an alternate gift "[i]f none of the Grantors' descendants survives the surviving Grantor."²²⁰

206. *Id.* at 182.

207. *Id.* at 181–82.

208. *Id.* at 178.

209. *Id.* at 181.

210. *Id.* at 180.

211. *Id.* at 178.

212. *Id.*

213. *Id.*

214. *Id.* at 180–82.

215. *Id.* at 182.

216. *Id.*

217. *In re Ignacio G. & Myra A. Gonzales Revocable Living Tr.*, 580 S.W.3d 322, 324 (Tex. App.—Texarkana 2019, pet. denied).

218. *Id.* at 324–25.

219. *Id.* at 325.

220. *Id.*

The trustee, one of the two mutual children, asserted that the drafter meant for the word “descendants” to be inserted into the blank to be consistent with the alternate gift.²²¹ The other mutual child claimed that only the two mutual children were beneficiaries based on the summary of the trust.²²² Testimony of the drafter of the trust, an attorney who was disbarred a few years after drafting the trust, tended to show that the settlors only intended their mutual children to be beneficiaries.²²³ The trial court granted summary judgment reforming the trust by inserting the word “children” into the blank and reforming later references to “descendants” to “children.”²²⁴ The adopted child appealed.²²⁵

The Sixth Texarkana Court of Appeals reversed.²²⁶ Because the trial court granted summary judgment, the appellate court began its analysis under the assumption that the trial court determined the trust was unambiguous.²²⁷ While the court of appeals also recognized that although Texas Property Code § 112.054(b-1)(3) allowing the reformation of unambiguous provisions to correct a scrivener’s error was inapplicable, prior Texas law would allow reformation nonetheless to correct a scrivener’s error.²²⁸ The court explained that the trust obviously contained scrivener’s errors but that the evidence was insufficiently strong to support a summary judgment.²²⁹ The evidence raised issues as to how the trust was supposed to read, and thus a determination of the settlors’ intent was a question of fact for a jury.²³⁰

2. *Effective Date of Reformation*

The 2019 legislature provided that a judicial reformation of a trust is now deemed effective as of the date the settlor created the trust.²³¹

D. HOMESTEAD AND “QUALIFYING TRUST”

An inter vivos trust into which homestead property is transferred must strictly satisfy the requirements of a “qualifying trust” under Texas Property Code § 41.0021(a) to retain homestead protection.²³² This protection allows a settlor or beneficiary to revoke the trust unilaterally, exercise an inter vivos general power of appointment over the homestead property, or use and occupy of the property as the settlor’s or beneficiary’s principal residence at no cost to the settlor or beneficiary (other than payment of taxes and other specified expenses) for a permitted time period such as

221. *Id.*

222. *Id.* at 326.

223. *Id.*

224. *Id.* at 327.

225. *Id.*

226. *Id.* at 331.

227. *Id.* at 329.

228. *Id.*

229. *Id.* at 330.

230. *Id.* at 331.

231. TEX. PROP. CODE ANN. § 112.054(c).

232. *Id.* § 41.0021(b).

the life of the settlor or beneficiary.²³³ In *In re Cyr*, a bankruptcy case from the Western District of Texas, the settlors' trust did not meet these requirements, and thus the property that otherwise would have been a homestead had it not been transferred to the trust was not protected when one of the settlors went bankrupt.²³⁴ For example, both settlors had to act jointly to revoke the trust; the debtor (bankrupt) settlor could not do so unilaterally.²³⁵

E. SUCCESSOR TRUSTEE

In *Waldron v. Susan R. Winking Trust*, the trustee resigned, and the alternate trustee declined to serve.²³⁶ The settlors anticipated this possibility by providing a method for the beneficiary to fill the vacancy with a bank or trust company.²³⁷ A problem arose because the beneficiary could not locate a bank or trust company willing to serve as the trustee.²³⁸ Accordingly, the beneficiary acting pro se asked the court to appoint a specified individual as the trustee, and the court agreed.²³⁹ Approximately one year later, the beneficiary asked the court to remove this trustee and appoint the beneficiary herself as the trustee.²⁴⁰ The trustee responded that he was willing to resign as long as the court appointed a qualified trustee and discharged him from liability by finding that he complied with the terms of the trust.²⁴¹ The court agreed with the trustee but refused to appoint the beneficiary as the trustee and instead gave the beneficiary a month to locate a qualified successor.²⁴² The beneficiary located such a person and asked the court to appoint her.²⁴³ Three days later, the beneficiary filed a motion for a new trial contending that the court erred in, among other things, ignoring the trust language stating that a trustee can be terminated immediately.²⁴⁴ After additional court judgments, the appellate court's determination that the court judgments were not final appealable orders, and an additional trial, the beneficiary again appealed asserting that the court ignored the trust language regarding the beneficiary's right to terminate a trustee immediately.²⁴⁵

The Twelfth Tyler Court of Appeals affirmed.²⁴⁶ The court of appeals explained that because the trust did not provide for the eventuality that no bank or trust company would accept the trust, the provisions of the

233. *Id.* § 41.0021(a).

234. *In re Cyr*, 605 B.R. 784, 806 (Bankr. W.D. Tex. 2019).

235. *Id.* at 800.

236. *Waldron v. Susan R. Winking Tr.*, No. 12-18-00026-CV, 2019 WL 3024767, at *1 (Tex. App.—Tyler July 10, 2019, no pet.) (mem. op.).

237. *See id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at *2.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at *4.

Texas Trust Code apply, which allow the court to appoint a successor on the petition of any interested person.²⁴⁷ The beneficiary could not appoint a non-bank, non-corporate successor trustee.²⁴⁸

F. NON-WAIVABLE PROVISIONS

The 2019 legislature added to the list of items that the settlor cannot alter the court's ability to make an award of costs and attorney fees under Texas Property Code § 114.064.²⁴⁹

G. WILL CONSTRUCTION AND INTERPRETATION RULES APPLICABLE TO REVOCABLE TRUSTS

“[I]f a trust is created and amendable or revocable by the settlor, or by the settlor and the settlor's spouse,” the construction and interpretation rules of Texas Estates Code Chapter 255 will now apply as if the settlor is the testator and the beneficiaries upon the settlor's death are devisees unless the settlor provided otherwise.²⁵⁰ These rules apply only if the settlor died on or after September 1, 2019.²⁵¹ Settlers will need to consider these issues when drafting trusts and include appropriate provisions addressing these issues in the same manner as they do in their wills. These rules include:

- Contents of specific gifts;
- Pretermitted children;
- Satisfaction;
- Anti-lapse;
- Security gifts;
- Exoneration of specific gifts;
- Exercise of power of appointment;
- Class gifts;
- Judicial modification or reformation; and
- Texas Estates Code § 355.109 dealing with abatement.

H. DECANTING

In a new provision often described as “cryptic,”²⁵² the 2019 legislature codified what it states to be the common law of Texas “that the second trust to which trust assets are decanted may be created under the same trust instrument as the first trust” from which the property comes.²⁵³ The

247. *Id.* at *3; *see also* TEX. PROP. CODE ANN. § 113.083(a).

248. TEX. PROP. CODE ANN. § 113.083(a).

249. *Id.* § 111.0035(b).

250. *Id.* § 112.0335(a).

251. *Id.* (effective Sept. 1, 2019).

252. *See* William D. Pargaman & Craig Hopper, *Is There Meat in Those Beans? The 2019 Texas Estate & Trust Legislative Update*, SAUNDERS, NORVAL, PARGAMAN & ATKINS, LLP <http://www.snpalaw.com/resources/2019LegislativeUpdate> [perma.cc/R8GY-6EAC] (last updated Jan. 20, 2020).

253. TEX. PROP. CODE ANN. § 112.0715.

purpose of the amendment is to reduce the likelihood that trust assets need to be retitled and perhaps allow the new trust to have the same tax identification number as the original trust.²⁵⁴

I. DIVORCE

The 2005 legislature added Subchapter B to Chapter 123 of the Texas Estates Code to address the situation of what happens if the settlor and beneficiary of a revocable trust are divorced, and the settlor fails to amend the trust to address this change in circumstance. The 2019 legislature copied these provisions into the Texas Property Code but did not remove them from the Estates Code.²⁵⁵ The Property Code provisions apply if the divorce occurred on or after September 1, 2019, but the Estates Code provisions will apply if the divorce occurred on or after September 1, 2005. It did not matter when the settlor created the trust.

J. MANAGEMENT TRUSTS

The 2019 legislature enacted extensive provisions authorizing pooled trust subaccounts for Chapter 142 Management Trusts.²⁵⁶

K. DIRECTED TRUSTS

The 2019 legislature clarified the status of trust protectors.²⁵⁷ By default, a trust protector is a fiduciary.²⁵⁸ However, the settlor may provide that a protector acts in a nonfiduciary capacity if the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors provided the advisor does not use the power to appoint the advisor's self.²⁵⁹ Nonetheless, the protector may exercise a "power in a nonfiduciary capacity as required by the Internal Revenue Code for a grantor or other person to be treated as the owner of any portion of the trust for federal income tax purposes."²⁶⁰

V. OTHER ESTATE PLANNING MATTERS

A. "BAD SPOUSE" STATUTE

After the decedent's death in *In re Estate of Durrill*, his children used Estates Code Chapter 123 to void their father's marriage based on his lack of capacity to enter into the marriage.²⁶¹ Accordingly, the purported spouse would not be treated as the decedent's surviving spouse for any

254. *See id.*

255. *See id.* §§ 112.101–106; *see also* TEX. EST. CODE ANN. § 123.056.

256. *See* TEX. PROP. CODE ANN. §§ 142.010, 143.001–.007.

257. *See id.* § 114.0031(d).

258. *Id.* § 114.0031(e).

259. *Id.*

260. *Id.* § 114.0031(e-1).

261. *In re Estate of Durrill*, 570 S.W.3d 945, 948 (Tex. App.—Corpus Christi–Edinburg 2019, no pet.).

purpose, such as being an intestate heir and having the right to the survivor's homestead.²⁶² The purported spouse appealed.²⁶³

The Thirteenth Corpus Christi–Edinburg Court of Appeals affirmed.²⁶⁴ The court found that all the statutory requirements were satisfied and that the evidence was sufficient to show the decedent's lack of mental capacity to enter into a marriage on the date of the ceremony.²⁶⁵ In addition, the court rejected the claim that the decedent and the purported spouse were common-law married before the ceremonial marriage, which would have placed the marriage outside of the three-year period where the spouses must enter into the marriage prior to death for the statute to operate.²⁶⁶

B. TENANCY IN COMMON VS. JOINT TENANCY

Careful drafting of granting documents is necessary to be consistent with how terms are used to eliminate any debate as to whether it creates a tenancy in common or a joint tenancy with survivorship rights. For example, a dispute arose in *Wagenschein v. Ehlinger* over the interpretation of a deed which contained the following language: “THERE IS HEREBY RESERVED AND EXCEPTED from this conveyance for Grantors and the survivor of Grantors, a reservation until the survivor's death The reservation contained in this paragraph will continue until the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed.”²⁶⁷ Does “survivor” refer to which of the seven grantors outlives the other grantors, or does it refer to the grantor's heirs as being the beneficiaries of the reservation?

Both the trial court and Thirteenth Corpus Christi–Edinburg Court of Appeals held that the deed referred to the survivor of the actual grantors and not to their surviving heirs.²⁶⁸ Although the deed also contained the phrase “grantor's successors,” reading the deed as a whole, this phrase referred to the surviving grantors and not the grantor's heirs.²⁶⁹ Accordingly, the deed reserved a joint tenancy with the right of survivorship in the seven original grantors.²⁷⁰ Note that although this case involved a deed, the same logic would apply to language in other granting documents such as wills and trusts.²⁷¹

262. TEX. EST. CODE ANN. § 123.104.

263. *In re Estate of Durrill*, 570 S.W.3d at 955.

264. *Id.* at 963.

265. *Id.* at 955.

266. *Id.* at 960.

267. *Wagenschein v. Ehlinger*, 581 S.W.3d 851, 853 (Tex. App.—Corpus Christi–Edinburg 2019, pet. denied).

268. *Id.* at 858.

269. *Id.* at 859.

270. *Id.*

271. *See* TEX. EST. CODE ANN. §§ 101.002, 111.001(a).

C. COMMUNITY PROPERTY SURVIVORSHIP AGREEMENT

A document labeled as one thing can be validated as a different type of instrument under appropriate facts such as in *In re Estate of Lovell*.²⁷² A husband and his wife signed a non-holographic joint and mutual will by using a form downloaded from the internet.²⁷³ However, they did not have the will witnessed.²⁷⁴ After the wife died, her husband attempted to probate the will.²⁷⁵ The wife's son from a prior marriage successfully contested the will because it was not witnessed.²⁷⁶ Thereafter, the husband applied to have the same document adjudicated as a community property survivorship agreement.²⁷⁷ The probate court determined that the document met the requirements for a valid community property survivorship agreement and declared that the husband was the owner of all of the wife's property.²⁷⁸ The wife's son appealed.²⁷⁹

The Fifth Dallas Court of Appeals affirmed.²⁸⁰ The wife's son contended that his mother and step-father intended to execute a will, and thus it lacked the meeting of the minds necessary to create a community property survivorship agreement under Texas Estates Code Chapter 112, especially after the husband testified he had never heard of such an agreement.²⁸¹ The court explained that the terms of the document were clear (each was to own all property of the other upon death) and it was signed by both spouses as required by Texas Estates Code § 112.052.²⁸² Although the precise language recommended in § 112.052(c) was not used, it was clear that the spouses intended to create a survivorship right in their community property.²⁸³ The court also rejected the wife's son's claim that a document labeled as a "joint and mutual will" could not be judicially turned into a community property survivorship agreement by refusing to elevate form over substance.²⁸⁴

D. TRANSFER ON DEATH DEEDS

1. Statutory Forms

The 2019 legislature repealed the statutory suggested forms for creating

272. No. 05-18-00690-CV, 2019 WL 3423280, at *6 (Tex. App.—Dallas July 30, 2019, no pet.) (mem. op.).

273. *Id.* at *1.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at *3.

281. *Id.* at *2.

282. *Id.*

283. *Id.*

284. *Id.*

and revoking transfer on death deeds.²⁸⁵ The Texas Supreme Court must promulgate new sample forms.²⁸⁶

2. *Conveyance Memorandum*

A memorandum of conveyance recorded prior to the grantor's death will now void an otherwise valid transfer on death deed.²⁸⁷

E. DISPOSITION OF REMAINS

The 2019 legislature clarified that the designation of an ex-spouse as an agent for the disposition of remains ends upon all types of marriage-ending events (e.g., divorce, annulment, or court declaration that the marriage is void) rather than only upon divorce.²⁸⁸ The statutory form was revised to account for this change.²⁸⁹ If a dispute arises with respect to the disposition of remains, the court with jurisdiction over the decedent's probate proceedings has jurisdiction to resolve the dispute even if probate proceedings have not already been commenced,²⁹⁰ which is normally the case.

VI. CONCLUSION

The new cases and statutes address a wide array of issues, some very narrow and some with potentially broad impact. This article has already discussed the practical application of many of the cases and statutes. 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:

Poor drafting of wills, by attorneys or the testators themselves, is a prominent cause for appellate litigation regarding the interpretation of a will in Texas.²⁹¹ Whether it be ambiguous or precatory language or the omission of particular provisions the testator intended, prudent drafting of an individual's will is crucial to ensure that his or her intent is recognized. When in doubt, the drafter should use well-established language or take the time to define terms that have the potential to bring the intent of the instrument into question.

285. Act of Apr. 11, 2019, 86th Leg., R.S., ch. 337, § 3, 2019 Tex. Sess. Law Serv.; Act of May 22, 2019, 86th Leg., R.S., ch. 1141, § 47, 2019 Tex. Sess. Law Serv. (repealing TEX. EST. CODE ANN. §§ 114.151, 114.152).

286. Act of Apr. 11, 2019, 86th Leg., R.S., ch. 337, § 2, 2019 Tex. Sess. Law Serv. (codified at TEX. GOV'T CODE ANN. § 22.020(b)(2-a)). Alternative forms are available at <https://texaslawhelp.org/form/transfer-death-deed> [perma.cc/65SZ-4FGA].

287. TEX. EST. CODE ANN. § 114.102.

288. TEX. HEALTH & SAFETY CODE ANN. § 711.002.

289. *Id.* § 711.002(b).

290. *Id.* § 711.002(k).

291. *See, e.g., In re Estate of Ethridge*, 594 S.W.3d 611, 614 (Tex. App.—Eastland 2019, no pet.); *In re Estate of Silverman*, 579 S.W.3d 732, 735 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Sullivan v. Hatchett*, No. 07-17-00296-CV, 2019 WL 545578, at *2 (Tex. App.—Amarillo Feb. 11, 2019, no pet.) (mem. op.).

Using forms from the internet (or print resources) still requires careful drafting and tailoring to the specific circumstances of the testator. This holds especially true for the existing text on the form.

The unambiguous intentions of the drafter in an instrument (e.g., trust, will, survivorship agreement) will have much weight even though the instrument is not in conformity with the appropriate law.²⁹²

292. See *In re Estate of Lovell*, No. 05-18-00690-CV, 2019 WL 3423280, at *2 (Tex. App.—Dallas July 30, 2019, no pet.) (mem. op.).