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## Wills & Trusts

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# WILLS & TRUSTS

Gerry W. Beyer\*

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This Article discusses developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of December 1, 2019, through November 30, 2020. 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 each statute or case's full text 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

### A. EQUITABLE ADOPTION

If a step-child wants assurance that he or she will be treated as a legal child of a step-parent when adoption is not (or cannot be) done while the child is a minor, the step-child should be legally adopted upon reaching the age of majority. Taking this step will avoid the problem that arose in *In re Estate of Hines*.<sup>1</sup> The trial court conducted a determination of heirship and concluded that the intestate did not equitably adopt a step-son, and thus he was not an heir.<sup>2</sup> The step-son appealed.<sup>3</sup>

The Sixth Texarkana Court of Appeals affirmed.<sup>4</sup> The court examined evidence that showed that the step-son began living with the intestate when he was about ten years old.<sup>5</sup> Friends and neighbors described the interactions between the intestate and step-son.<sup>6</sup> They appeared to be how a step-father and a step-son would normally interact.<sup>7</sup> There was also evidence that the step-father had told the step-son and other family members that he agreed to adopt the step-son.<sup>8</sup> However, there was no evidence that the biological father agreed to terminate parental rights while the step-son was a minor, and the step-son took no legal steps to have his step-father adopt him upon reaching majority.<sup>9</sup> Importantly, all the step-son's legal documents used his own last name and not the step-father's name.<sup>10</sup>

The court then explained that much more evidence is needed to demonstrate an equitable adoption. Equitable adoption may exist “when

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1. See No. 06-20-00007-CV, 2020 WL 5948803, at \*1 (Tex. App.—Texarkana Oct. 8, 2020, no pet.) (mem. op.).

2. *Id.*

3. *Id.*

4. *Id.* at \*6.

5. *Id.* at \*1.

6. *Id.* at \*1–2.

7. *Id.*

8. *Id.* at \*3.

9. *Id.* at \*3–4.

10. *Id.* at \*3.

[a person's] efforts to adopt [a child] are ineffective because of failure to strictly comply with statutory procedures or because, out of neglect or design, agreements to adopt are not performed.”<sup>11</sup> The court upheld the trial court's finding that there was insufficient evidence of the type of agreement needed to trigger an adoption by estoppel.<sup>12</sup> Evidence of a close relationship similar to that of a parent and child itself is not enough.

## II. WILLS

### A. SELF-PROVING AFFIDAVIT

The validity of a self-proving affidavit was placed in doubt in *In re Estate of Flarity*, because the notary admitted that she did not give the testatrix and the witnesses an oral oath, just a written one.<sup>13</sup> Both the trial court and Ninth Beaumont Court of Appeals rejected this argument because Texas Estates Code § 251.104 does not require the oath to be oral.<sup>14</sup> Because the Estates Code does not define the term “oath,” the Code Construction Act provision applies, which provides that the term oath “includes the oath in an affidavit.”<sup>15</sup>

### B. INTERPRETATION

#### 1. Devise of Named Property

The importance of a testator expressly stating whether the surface estate, mineral estate, or both are included in a real property gift is demonstrated by the Texas Supreme Court case of *ConocoPhillips Co. v. Ramirez*.<sup>16</sup> A dispute arose whether a provision in the testatrix's will devised only the surface estate or both the surface and mineral estates.<sup>17</sup> Both the trial and appellate courts held that the testatrix devised both estates.<sup>18</sup> However, the supreme court reversed, holding that the testatrix only devised the surface estate.<sup>19</sup>

The provision in question provided the testator devised “all . . . right, title and interest in and to Ranch ‘Las Piedras.’”<sup>20</sup> The supreme court summarized a complex series of land transactions over a period of approximately eighty years.<sup>21</sup> The supreme court then took notice of the fact that the testator placed the name of the ranch in quotes, supporting the argument that the term had a specific meaning to the testatrix and her

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11. *Id.* at \*4.

12. *Id.* at \*6.

13. *In re Estate of Flarity*, No. 09-19-00089-CV, 2020 WL 5552140, at \*3 (Tex. App.—Beaumont Sept. 17, 2020, pet. denied) (mem. op.).

14. *Id.* at \*9.

15. *Id.*; TEX. GOV'T CODE ANN. § 602.001.

16. *See* 599 S.W.3d 296, 297 (Tex. 2020).

17. *Id.* at 300.

18. *Id.*

19. *Id.* at 297.

20. *Id.*

21. *Id.* at 297–300.

family.<sup>22</sup> By examining extrinsic evidence of the surrounding circumstances such as prior partition agreements using the ranch's name, which expressly stated that mineral interests were not covered, the supreme court determined that the testatrix intended to devise only the surface estate.<sup>23</sup>

## 2. *Personal Property*

*Estate of Hunt v. Vargas (In re Estate of Hunt)* makes it clear that the term "personal property" unambiguously encompasses both tangible and intangible personal property.<sup>24</sup> The testator's will made a gift of all of his "remaining household and personal property" to a specific beneficiary.<sup>25</sup> Both this beneficiary and the remainder beneficiaries claimed that they were entitled to intangible personal property such as bank accounts and stocks.<sup>26</sup> The trial court granted summary judgment that the specific beneficiary's gift included the intangible personal property.<sup>27</sup> The remainder beneficiaries appealed.<sup>28</sup>

The First Houston Court of Appeals affirmed.<sup>29</sup> The court explained that the term "personal property" is not ambiguous.<sup>30</sup> Personal property refers to all property, tangible or intangible, that does not qualify as real property.<sup>31</sup> "The legal definition of 'personal property' is so well established that it generally does not allow for an interpretation other than the one ascribed to it by the law."<sup>32</sup> The court also rejected the argument that the word "household" in the two-pronged bequest limited the gift of personal property.<sup>33</sup>

## C. WILL CONTESTS

### 1. *Undue Influence*

A person attempting to contest a will based on undue influence needs to raise a fact issue as to whether the will is valid to prevent summary judgment from being upheld. For example, in *In re Estate of Grogan*, the testator was single and had no descendants.<sup>34</sup> However, he had a lifetime companion with whom he had lived for decades.<sup>35</sup> The testator's will left substantially all of his estate to his companion to the exclusion of his sib-

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22. *Id.* at 301.

23. *Id.*

24. *See* *Estate of Hunt v. Vargas (In re Estate of Hunt)*, 597 S.W.3d 912, 917 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

25. *Id.* at 915.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 914.

30. *Id.* at 917.

31. *Id.*

32. *Id.* at 916–17.

33. *Id.* at 917–20.

34. *In re Estate of Grogan*, 595 S.W.3d 807, 811 (Tex. App.—Texarkana 2020, no pet.).

35. *Id.*

lings and their descendants.<sup>36</sup> The siblings contested the will on the ground of undue influence.<sup>37</sup> The trial court granted summary judgment in favor of the companion, determining that there was no evidence of undue influence.<sup>38</sup> One of the siblings appealed.<sup>39</sup>

The Sixth Texarkana Court of Appeals affirmed.<sup>40</sup> The court examined the evidence in tremendous detail, holding that there was no fact issue regarding undue influence or that the testator had revoked the will.<sup>41</sup> The court explained that not even a scintilla of probative evidence existed on these issues.<sup>42</sup> Instead, it appeared the siblings were merely upset that they were excluded from the will.<sup>43</sup>

## 2. *Standard of Review*

Unless a jury finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias, an appellate court will uphold findings of undue influence and lack of good faith. For example, in *In re Estate of Scott*, both the trial court and Eighth El Paso Court of Appeals agreed that the testator's three alleged wills were executed due to undue influence.<sup>44</sup> Also, they agreed that the proponents of the wills did not act in good faith in defending the wills and, accordingly, were not entitled to attorney's fees under Texas Estates Code § 352.052.<sup>45</sup>

The opinion is not significant from a legal point of view; the court applied the standard principles regarding the finding of undue influence, providing an excellent summary of the key Texas cases. Instead, it is the detailed factual description of the testator's mental and physical condition and the will beneficiaries' conduct that became the focus of the court's opinion.<sup>46</sup> The outrageous conduct of the will proponents led the appellate court to agree that the jury had sufficient evidence, both factually and legally, to support a finding that all three wills were the result of their exercise of undue influence over the testator.<sup>47</sup>

The court also examined the will proponents' request for over \$400,000.00 in attorney's fees for defending the contests of the wills. The court agreed that the jury had sufficient evidence to support its finding that the proponents did not act in good faith or with just cause.<sup>48</sup>

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36. *Id.*

37. *Id.* at 811–12.

38. *Id.*

39. *Id.* at 812.

40. *Id.*

41. *Id.* at 813–21.

42. *Id.* at 821.

43. *See id.*

44. *In re Estate of Scott*, 601 S.W.3d 77, 82 (Tex. App.—El Paso 2020, no pet.).

45. *Id.* at 98–99.

46. *See id.* at 92–93.

47. *See id.* at 98.

48. *Id.* at 99.

### 3. *Discovery*

*In re Estate of Flarity* serves as a reminder that a will contestant should carefully tailor discovery requests based on the issues relevant to the probate of the will.<sup>49</sup> In an attempt to delay or prevent the probate of a self-proved will, the testatrix's disfavored child requested discovery of sixty-three categories of documents covering a period of over twenty years.<sup>50</sup> The will proponents successfully persuaded the trial court that the discovery request was overbroad, and the Ninth Beaumont Court of Appeals agreed.<sup>51</sup> The court explained that the discovery request did not deal with the matters relevant to admitting a self-proved will to probate under Texas Estates Code §§ 256.151 and 256.152.<sup>52</sup>

## III. ESTATE ADMINISTRATION

### A. STANDING

In *In re Estate of Burns*, the testator's will devised the bulk of his estate to his cousin who predeceased the testator.<sup>53</sup> The successors in interest to the cousin's estate asserted that the Texas anti-lapse statute would save the lapsed gift in their favor, and thus they have standing to be involved in disputes involving the testator's estate.<sup>54</sup> However, because the cousin is not a descendent of the testator or of the testator's parents, the anti-lapse statute would not prevent this gift from lapsing.<sup>55</sup> Accordingly, the court held that the cousin's successors in interest did not qualify as interested persons under Texas Estates Code § 22.018, and thus they lacked standing under Texas Estates Code § 55.001 to assert a claim in the testator's probate proceeding.<sup>56</sup> The court also refused to interpret the will to provide an alternate gift to the cousin's successors in interest because to do so would prevent the property from passing by intestacy.<sup>57</sup>

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49. See *In re Estate of Flarity*, No. 09-19-00089-CV, 2020 WL 5552140, at \*1 (Tex. App.—Beaumont Sept. 17, 2020, pet. denied) (mem. op.).

50. *Id.*

51. *Id.* at \*1, \*7.

52. *Id.* at \*5 (explaining that relevant matters include whether “(1) the testator is dead, (2) the testator died less than four years ago and the Applicants filed the application within four years of the testator's death, (3) the probate court has jurisdiction and venue over the estate, (4) citation has been served and returned in the manner and for the period required by the Estates Code, (5) the proposed administrators of the estate have a right to letters of administrations and are not disqualified, and (6) the testator never revoked the will”); see also TEX. EST. CODE ANN. §§ 256.151–.152.

53. *In re Estate of Burns*, No. 04-19-00284-CV, 2020 WL 354940, at \*1 (Tex. App.—San Antonio Jan. 22, 2020, pet. denied).

54. *Id.*; see TEX. EST. CODE § 255.153.

55. *In re Estate of Burns*, 2020 WL 354940, at \*3.

56. *Id.*

57. *Id.* at \*4.

## B. APPEAL

1. *No Final Judgment*

A probate judgment must dispose of all parties or issues in a particular phase of a probate proceeding before it is appealable. For example, in *Bethany v. Bethany*, a disgruntled successor executor unsuccessfully attempted to remove the primary independent executor.<sup>58</sup> On appeal, the Third Austin Court of Appeals held it lacked jurisdiction to hear the appeal because the trial court's judgment was not final.<sup>59</sup> The court explained that the disgruntled successor executor's motion for removal also included claims for attorney's fees, costs, and expenses.<sup>60</sup> The trial court did not address these claims, and thus, the order refusing to remove the executor did not dispose of all the issues in that phase of the probate proceedings.<sup>61</sup>

2. *Pro Se*

*Kankonde v. Mankan* clarifies that only licensed attorneys may represent a decedent's estate at trial or on appeal.<sup>62</sup> The Eighth El Paso Court of Appeals dismissed an appeal for want of prosecution because the appellants, the decedent's estate and a corporation, did not obtain an attorney to pursue the appeal.<sup>63</sup> The court explained that "a non-attorney cannot litigate an appeal on behalf of an estate or a corporate entity."<sup>64</sup> The decedent's wife was not an attorney, and thus the appellate brief she filed had no legal effect.<sup>65</sup>

## C. CREDITORS

*West Texas LTC Partners, Inc. v. Collier* demonstrates that once a claim is barred in a guardianship proceeding, that claim cannot rise again like the Phoenix in an estate proceeding.<sup>66</sup> Both the trial court and Fourteenth Houston Court of Appeals agreed that a creditor was barred from recovering its claim from the decedent's estate.<sup>67</sup> The decedent accrued a debt while under guardianship.<sup>68</sup> The guardian properly notified the creditor that it had 120 days to file a claim against the guardianship or otherwise be barred as authorized under Texas Estates Code § 1153.003.<sup>69</sup> The

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58. *Bethany v. Bethany*, No. 03-19-00532-CV, 2020 WL 1327398, at \*1 (Tex. App.—Austin Mar. 20, 2020, no pet.) (mem. op.).

59. *Id.*

60. *Id.*

61. *Id.*

62. *See Kankonde v. Mankan*, No. 08-20-00052-CV, 2020 WL 5105806, at \*2 (Tex. App.—El Paso Aug. 31, 2020, no pet.) (mem. op.).

63. *Id.*

64. *Id.*

65. *Id.*

66. *See W. Tex. LTC Partners, Inc. v. Collier*, 595 S.W.3d 308, 313 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

67. *Id.*

68. *Id.* at 309.

69. *Id.*; *see* TEX. EST. CODE ANN. § 1153.003.



creditor did not file a claim in the guardianship proceeding.<sup>70</sup> After the decedent died, the creditor submitted an authenticated claim for the same debt.<sup>71</sup>

The courts agreed with the independent administratrix that the claim was barred because the creditor did not timely file the claim in the guardianship proceeding after receiving a proper § 1153.003 notice.<sup>72</sup> The court rejected the creditor's argument that it could recover on its claim because it timely filed its claim in the estate proceeding under Texas Estates Code § 355.001 and that § 1153.003 applies exclusively to claims in a guardianship.<sup>73</sup> The appellate court explained that § 1153.004 barred the claim because the creditor did not timely file its claim in the guardianship proceeding.<sup>74</sup>

#### D. DISCHARGEABILITY OF JUDGMENT AGAINST INDEPENDENT EXECUTOR

*Harrison v. Reiner* explains that only a bankruptcy court can determine whether a debt owed by an estate's personal representative is dischargeable if the representative files for bankruptcy.<sup>75</sup> The trial court order provided that a judgment against an administratrix would not be dischargeable in bankruptcy.<sup>76</sup> The Fourteenth Houston Court of Appeals explained that bankruptcy courts have exclusive jurisdiction to determine whether a debt is dischargeable.<sup>77</sup> Accordingly, the court modified the judgment to remove the improper language.<sup>78</sup>

### IV. TRUSTS

#### A. CONSTRUCTION AND INTERPRETATION

##### 1. Ability to Amend

In *Younger v. Younger*, a husband and his wife established a revocable trust that excluded one of their three children.<sup>79</sup> After the husband died, his wife amended the trust to disinherit another child.<sup>80</sup> This child sued, claiming that the wife's amendment was contrary to the terms of the trust or, at least, that the trust's terms were ambiguous.<sup>81</sup> The trial court held that the trust was unambiguous, becoming irrevocable upon the hus-

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70. *W. Tex. LTC Partners, Inc.*, 595 S.W.3d at 309.

71. *Id.* at 310.

72. *Id.* at 312.

73. *Id.* at 311–12.

74. *Id.* at 312.

75. *See Harrison v. Reiner*, 607 S.W.3d 450, 454 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

76. *Id.* at 457.

77. *Id.* at 461.

78. *Id.*

79. *Younger v. Younger*, No. 07-19-00039-CV, 2020 WL 6253237, at \*1 (Tex. App.—Amarillo Oct. 22, 2020, no pet.) (mem. op.).

80. *Id.* at \*2.

81. *Id.*

band's death, and thus awarded the child a share of the trust property.<sup>82</sup>

The Seventh Amarillo Court of Appeals first agreed with the trial court that the trust amendment was ineffective, although the trust authorized the surviving settlor to amend the trust "by restating [the provisions] in full."<sup>83</sup> While alive, amendments had to be made jointly except as to each person's separate property.<sup>84</sup> The trust also provided that the terms of the trust regarding administration and distribution became irrevocable upon the first settlor's death.<sup>85</sup>

However, the appellate court disagreed with how the trust terms applied to a specific parcel of property.<sup>86</sup> Under one provision, the trustee appeared to have the power to distribute the husband's property to the wife notwithstanding the child's remainder interest.<sup>87</sup> However, this conflicted with another provision that appeared to make property distribution irrevocable upon the husband's death.<sup>88</sup> Thus, this ambiguity required a trier of fact to resolve the issue.

## 2. Definition of "Spouse"

The settlor should designate a beneficiary by actual name, not just by relationship, because the relationship may change over time. For example, in *Ochse v. Ochse*, the settlor named her son's "spouse" as a beneficiary of an irrevocable trust.<sup>89</sup> A dispute arose whether the son's first wife, his spouse at the time the settlor created the trust, or his current wife is the actual beneficiary.<sup>90</sup> The trial court granted summary judgment, finding that the son's ex-spouse was the beneficiary because the settlor intended to benefit her daughter-in-law at the time of trust creation.<sup>91</sup>

The Fourth San Antonio Court of Appeals affirmed.<sup>92</sup> The court held that the trust designation of the settlor's spouse was unambiguous.<sup>93</sup> Her son had been married to his first wife for approximately thirty years at the time of trust creation.<sup>94</sup> The court rejected the claim that the settlor used the term "spouse" to refer to the status of being the son's wife and instead was used to refer specifically to the son's spouse at the time of trust creation.<sup>95</sup>

However, the court did not hold that the ex-wife had a vested interest

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82. *Id.*

83. *Id.* at \*3.

84. *Id.* at \*4.

85. *Id.*

86. *Id.* at \*6.

87. *Id.*

88. *Id.*

89. *Ochse v. Ochse*, No. 04-20-00035-CV, 2020 WL 6749044, at \*1 (Tex. App.—San Antonio Nov. 18, 2020, no pet.) (mem. op.).

90. *Id.*

91. *Id.* at \*3.

92. *Id.* at \*5.

93. *Id.*

94. *Id.* at \*4.

95. *Id.* at \*5.

in the trust by being the son's spouse at the time of trust creation.<sup>96</sup> The court claimed that the irrevocability of the trust did not make her interest vested.<sup>97</sup> However, this author believes that her interest was vested—she was born, ascertainable, and there were no conditions precedent on her interest, making her interest contingent.

#### B. STANDING

In *Berry v. Berry*, an unnamed contingent beneficiary of a trust attempted to bring various actions regarding the trust, such as to require an accounting, remove the trustee, and seek recovery for breach of fiduciary duty.<sup>98</sup> The Thirteenth Corpus Christi–Edinburg Court of Appeals determined that she lacked standing despite Texas Property Code § 111.004(6), which includes someone with a “contingent” interest within the scope of an interested person.<sup>99</sup> The court said her interest was no greater than that of an heir apparent or beneficiary of a living person.<sup>100</sup> It is this author's opinion that this case was incorrectly decided. Unlike an heir apparent or beneficiary of a living person, a contingent beneficiary of a trust currently owns a contingent interest in the trust.

#### C. TRUST PROTECTORS

*Ron v. Ron* serves as a reminder that unless the terms of the trust provide otherwise, a trust protector does not owe fiduciary duties to the settlor of an irrevocable trust who is not also a beneficiary.<sup>101</sup> An ex-wife claimed that the ex-husband, the trustee, improperly transferred community property into an irrevocable trust she created and that the trust protector assisted him in making the transfers during marriage.<sup>102</sup> Also, the trust protector, using the authority granted to him as the protector, appointed the ex-husband as a beneficiary of the trust.<sup>103</sup> The ex-wife claimed, among other things, that the trust protector breached his fiduciary duties to her.<sup>104</sup>

The U.S. District Court for the Southern District of Texas examined the ex-wife's claim that a formal fiduciary relationship existed between her in her capacity as the trust's settlor and the trust protector.<sup>105</sup> The court agreed that the protector was a fiduciary because of the express language in the trust so providing.<sup>106</sup> However, those fiduciary duties are

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96. *Id.* at \*5 n.1.

97. *Id.*

98. *Berry v. Berry*, No. 13-18-00169-CV, 2020 WL 1060576, at \*3 (Tex. App.—Corpus Christi–Edinburg Mar. 5, 2020, pet. filed) (mem. op.).

99. *Id.* at \*4; TEX. PROP. CODE ANN. § 111.004(6).

100. *Berry*, 2020 WL 1060576, at \*4.

101. *See Ron v. Ron*, No. 3:19-CV-00211, 2020 WL 1426392, at \*6 (S.D. Tex. Feb. 4, 2020).

102. *Id.* at \*1.

103. *Id.*

104. *Id.* at \*2.

105. *Id.* at \*5–8.

106. *Id.* at \*5.

owed to the trustee and beneficiaries, not the settlor. The court was not swayed by the terms of the trust, which indicated that the protector's duties were to achieve her "objectives as expressed by the other provisions of [her] estate plan."<sup>107</sup>

#### D. TRUSTEE POWERS

*Pense v. Bennett* demonstrates that the determination of whether the trustee had the power to make a transfer of property is distinct from whether the exercise of that power was proper.<sup>108</sup> The trial court granted summary judgment, finding that the trustee had the power under the trust instrument and the Trust Code to convey certain real property.<sup>109</sup> On appeal, the beneficiary claimed that the summary judgment was improper because of his allegation that the transfer was in breach of the trustee's fiduciary duty.<sup>110</sup> The Sixth Texarkana Court of Appeals rejected this claim because the trial court did not consider the issue of whether the transfer was in breach.<sup>111</sup> In fact, the judgment clearly provided that the "[c]ourt makes no findings or determinations" on that issue because it is being litigated in a case pending in another court.<sup>112</sup>

#### E. CO-TRUSTEE POWERS

Absent trust language to the contrary, a majority of co-trustees may administer trust property over the objection of a minority of the co-trustees. For example, in *Duncan v. O'Shea*, the majority of the co-trustees agreed to sell several parcels of trust real property.<sup>113</sup> They successfully obtained a declaratory judgment under the Texas Uniform Declaratory Judgment Act declaring that they had the power to do so under the terms of the trust and Texas Property Code § 113.085(a).<sup>114</sup> The trustee who opposed the sale appealed.<sup>115</sup> The Seventh Amarillo Court of Appeals affirmed.<sup>116</sup> The court first rejected the dissenting trustee's claim that a declaratory judgment must resolve all issues in dispute.<sup>117</sup> The court stated that there was no legal authority to support this claim.<sup>118</sup> In addition, Texas Civil Practice & Remedies Code § 37.003 expressly states that the court has the jurisdiction to declare rights "whether or not further relief is or could be claimed."<sup>119</sup>

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107. *Id.*

108. *See Pense v. Bennett*, No. 06-20-00030-CV, 2020 WL 5948801, at \*7 (Tex. App.—Texarkana Oct. 8, 2020, no pet.) (mem. op.).

109. *Id.* at \*2.

110. *Id.* at \*3.

111. *Id.* at \*7.

112. *Id.*

113. *Duncan v. O'Shea*, No. 07-19-00085-CV, 2020 WL 4773058, at \*1 (Tex. App.—Amarillo Aug. 17, 2020, no pet.) (mem. op.).

114. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011.

115. *Duncan*, 2020 WL 4773058, at \*1.

116. *Id.* at \*6.

117. *Id.* at \*2.

118. *Id.*

119. TEX. CIV. PRAC. & REM. CODE § 37.003(a); *Duncan*, 2020 WL 4773058, at \*3.

The court also rejected the dissenting trustee's claim that the district court lacked jurisdiction to decide whether a majority of the trustees could sell the trust property.<sup>120</sup> The court pointed to Texas Property Code § 115.001(a), which grants the district court jurisdiction over a wide variety of trust matters, including "a question arising in the administration . . . of a trust."<sup>121</sup>

The court also recognized that the trust instrument did impose certain restrictions on the sale of trust assets.<sup>122</sup> However, the declaratory judgment did not involve the approval of any particular sale.<sup>123</sup> Instead, it was merely a determination that the majority of the trustees had the power to sell.<sup>124</sup>

#### F. FORMER TRUSTEE LIABILITY

*Benge v. Roberts* demonstrates that a properly drafted exculpatory clause may remove a successor's duty to sue prior trustees for breaches of trust.<sup>125</sup> A beneficiary sued the successor trustee for alleged breaches of trust committed by the former trustee.<sup>126</sup> The trial court granted summary judgment in favor of the successor trustee based on the exculpatory provision of the trust, which provided:

No successor Trustee shall have, or ever have, any duty, responsibility, obligation, or liability whatever for acts, defaults, or omissions of any predecessor Trustee, but such successor Trustee shall be liable only for its own acts and defaults with respect to the trust funds actually received by it as Trustee.<sup>127</sup>

The beneficiary appealed.<sup>128</sup>

The Third Austin Court of Appeals affirmed.<sup>129</sup> The court first cited Texas Property Code § 114.007(c), which allows the settlor, with some exceptions not relevant to this case, to relieve the trustee from a duty or restriction imposed by the Trust Code or common law.<sup>130</sup> The court explained that this provision relieved the successor trustee of the normal duty under Texas Property Code § 114.002(3) to "make a reasonable effort to compel a redress" of breaches the predecessor trustee committed.<sup>131</sup>

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120. *Duncan*, 2020 WL 4773058, at \*3-4.

121. *Id.* at \*4; *see* TEX. PROP. CODE § 115.001(a).

122. *Duncan*, 2020 WL 4773058, at \*5.

123. *Id.*

124. *Id.*

125. *See Benge v. Roberts*, No. 03-19-00719-CV, 2020 WL 4726688, at \*3 (Tex. App.—Austin Aug. 12, 2020, no pet.) (mem. op.).

126. *Id.* at \*1-2.

127. *Id.* at \*3.

128. *Id.* at \*2.

129. *Id.* at \*4.

130. *Id.* at \*3; *see* TEX. PROP. CODE ANN. § 114.007(c).

131. *Benge*, 2020 WL 4726688, at \*3; *see* TEX. PROP. CODE § 114.002(3).

## V. OTHER ESTATE PLANNING MATTERS

### A. REMOTE NOTARIZATION OF WET SIGNATURES

Many documents require the client's wet signature because the Texas version of the Uniform Electronic Transactions Act, which authorizes electronic signatures on a wide variety of documents, does not apply to most estate planning documents.<sup>132</sup> Accordingly, notaries commissioned as Online Notary Publics cannot perform online notarizations of these documents. As a temporary solution to this problem, considering stay-at-home orders and the imposition of social distancing due to COVID-19, Governor Abbott temporarily suspended the requirement that a client must physically appear in front of a notary for self-proving affidavits, durable powers of attorney, medical powers of attorney, directives to a physician, and oaths of executors, administrators, and guardians.<sup>133</sup> A notary must comply with the following requirements to remotely notarize a wet signature:

- A notary public shall verify the identity of a person signing a document at the time the signature is taken by using two-way video and audio conference technology.
- A notary public may verify identity by personal knowledge of the signing person, or by analysis based on the signing person's remote presentation of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the person.
- The signing person shall transmit by fax or electronic means a legible copy of the signed document to the notary public, who may notarize the transmitted copy and then transmit the notarized copy back to the signing person by fax or electronic means, at which point the notarization is valid.<sup>134</sup>

The order remains in effect until the Governor's office terminates the order or the March 13, 2020, disaster declaration is lifted or expires.<sup>135</sup> Documents properly executed during the suspension period remain valid thereafter.

However, several important estate planning documents that may require notarization are not covered, such as mental health treatment declarations and agents for body disposition.

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132. See TEX. BUS. & COM. CODE ANN. § 322.003(b)(1).

133. Press Release, Greg Abbott, Governor, State of Texas, Governor Abbott Temporarily Suspends Certain Statutes to Allow for Appearance Before Notary Public via Videoconference, Off. of the Tex. Governor (Apr. 8, 2020), <https://gov.texas.gov/news/post/governor-abbott-temporarily-suspends-certain-statutes-to-allow-for-appearance-before-notary-public-via-videoconference> [<https://perma.cc/97G3-FH9B>].

134. *Id.*

135. *Id.*

## B. ANNUITY PROCEEDS

*In re Estate of Scott* demonstrates the importance of annuity companies to make certain they include express provisions in their contracts requiring a joint annuitant to notify the company when the other joint annuitant dies.<sup>136</sup> A husband and his wife invested in an annuity that would make payments for their joint lives.<sup>137</sup> However, upon the death of the first to die, each payment amount would be approximately 50% less.<sup>138</sup> After the wife died, the husband continued to receive payments as if the wife were still alive because he did not give the annuity company notice that his wife had died.<sup>139</sup> After the husband died, the fact that his wife had died ten years prior came to light, and the annuity company made a claim against the estate for reimbursement of the overpayments.<sup>140</sup> The husband's independent executor rejected the claim.<sup>141</sup> The annuity company then sued alleging breach of contract and fraud.<sup>142</sup> The trial court found in favor of the annuity company, and the independent executor appealed.<sup>143</sup>

The Fourth San Antonio Court of Appeals reversed.<sup>144</sup> The court explained that although the annuity contract clearly explained that upon the death of the first spouse, payments would be reduced, there was no express provision requiring that a surviving spouse notify the annuity company about the deceased spouse's death.<sup>145</sup> Although it would have been reasonable to imply this obligation, the court refused to do so.<sup>146</sup> The court explained that implied covenants are not recognized even if doing so would make the contract fair or that the contract would operate in an unjust manner without the implication.<sup>147</sup> Likewise, the court refused to imply an obligation to repay amounts received in excess of the contractual amounts.<sup>148</sup> Basically, the court blamed the annuity company for not including an express provision requiring notification.<sup>149</sup> Plus, the court explained, the annuity company should monitor death records to ascertain if an annuitant has died.<sup>150</sup>

The court justified its decision on two other grounds. First, the statute of limitations had run on the annuity company's equitable claim for

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136. See *In re Estate of Scott*, No. 04-19-00592-CV, 2020 WL 2736466, at \*4 (Tex. App.—San Antonio May 27, 2020, no pet.) (mem. op.).

137. *Id.* at \*1.

138. See *id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at \*6.

145. *Id.* at \*3.

146. See *id.*

147. *Id.* at \*3–4.

148. *Id.* at \*4.

149. *Id.*

150. See *id.* at \*5.

money had and received.<sup>151</sup> Second, the husband did not commit a fraudulent act by not revealing his wife's death because he had no legal duty to tell the annuity company that she had died.<sup>152</sup> The fact that he may have had a moral duty to do so was irrelevant.

## VI. CONCLUSION

The new cases 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:

(1) 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. For example, while "personal property" has an obvious legal meaning, that did not stop (presumably costly) litigation about what it means.<sup>153</sup> Just the appearance of ambiguity can lead to expensive and unnecessary litigation;

(2) As with most estate planning matters, formalizing an intimate, family-like relationship is essential so the person in the relationship has the opportunity to receive any kind of inheritance.<sup>154</sup> For example, many people only know and treat one of their stepparents like a biological parent. However, if that stepparent does not properly plan his or her estate, the stepparent may leave the stepchild nothing upon death, and this situation may be extremely painful and unfair to the stepchild;

(3) Long-shot lawsuits to recover from estates and litigation tactics that show an intent to harass or unnecessarily prolong an unadvisable lawsuit will usually lead to summary disposition and large attorney's fees.<sup>155</sup> The effort will have expended large sums of money to no party's advantage, and the plaintiffs will probably not recover any attorney's fees or court costs;

(4) Especially for rural and familial estates of real property, the attorney should keep in mind the possible severance (or lack thereof) of the surface and mineral estate. An ancestor's fifty-acre estate could be divided among hundreds of persons, and a subsequent decedent may not have any right to the mineral estate. As seen in *ConocoPhillips Co. v. Ramirez*, a gift of real property only conveyed the surface estate as the family ranch name had a specific meaning<sup>156</sup>;

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151. *Id.*

152. *See id.*

153. *See* Estate of Hunt v. Vargas (*In re* Estate of Hunt), 597 S.W.3d 912, 917 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

154. *See, e.g., In re* Estate of Hines, No. 06-20-00007-CV, 2020 WL 5948803, at \*6 (Tex. App.—Texarkana Oct. 8, 2020, no pet.) (mem. op.).

155. *See, e.g.,* Bethany v. Bethany, No. 03-19-00532-CV, 2020 WL 1327398, at \*1 (Tex. App.—Austin Mar. 20, 2020, no pet.) (mem. op.); *In re* Estate of Hunt, 597 S.W.3d at 912.

156. *See* ConocoPhillips Co. v. Ramirez, 599 S.W.3d 296, 301 (Tex. 2020).



(5) Even though many lay persons serve as an estate's executor, and there is an increasing number of pro se litigants in the court system (even outside of probate matters), only a licensed attorney can represent an estate on an appeal<sup>157</sup>;

(6) Creditors and other interested parties to an estate or a living person entering a guardianship proceeding should timely seek claims against the estate or guardianship proceeding when given notice and at first opportunity.<sup>158</sup> There may be a later and alternative method for a creditor to recover, but the creditor should seek recovery at the first opportunity or face the potential of a non-recovery; and

(7) Adding to the importance of good drafting, when drafting a will or trust document, the attorney should avoid using some generic familial terms like "spouse," and should include the specific beneficiary by name or a family term that would not cause debate as to its meaning such as "father."<sup>159</sup>

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157. *See* Kankonde v. Mankan, No. 08-20-00052-CV, 2020 WL 5105806, at \*2 (Tex. App.—El Paso Aug. 31, 2020, no pet.) (mem. op.).

158. *See* W. Tex. LTC Partners, Inc. v. Collier, 595 S.W.3d 308, 313 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

159. *See* Ochse v. Ochse, No. 04-20-00035-CV, 2020 WL 6749044, at \*5 (Tex. App.—San Antonio Nov. 18, 2020, no pet.) (mem. op.).