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Wills & Trusts

Gerry W. Beyer

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WILLS & TRUSTS

Gerry W. Beyer*

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THIS article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of November 1, 2011 through October 31, 2012. The reader is warned that not all newly decided cases during the Survey period are presented, and not all aspects of each cited case are analyzed. You must read and study the full text of each opinion before relying on it or using it as precedent. The discussion of most cases includes a moral—that is, an important lesson—to be learned from the case. By recognizing situations that have resulted in time consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

Although the Texas Legislature was not in session during the Survey period, it is important to mention a significant change on the horizon. The 2009 legislature began the process of codifying the current Probate Code into the new Estates Code. It is interesting to note that although called a “code,” the Probate Code is *not* a true “code” because it was enacted in 1955, which was before the 1963 Legislature began the process of codifying Texas law into 27 codes. The codification process is supposed to be nonsubstantive.

The portion of the Estates Code passed by the 2009 legislature focuses on intestacy, wills, and estate administration.¹ The guardianship and durable power of attorney provisions were added in 2011.² The 2011 legislature also made changes to the previously enacted portions of the Estates Code to be consistent with amendments it made to the existing Probate Code.³ The 2013 Legislature made both nonsubstantive corrections and substantive changes to the Estates Code.⁴ The entire Estates Code is

1. *See, e.g.*, Act of May 26, 2009, 81st Leg., R.S., ch. 680, 2009 Tex. Gen. Laws 1512; Act of May 31, 2009, 81st Leg., R.S., ch. 1351, 2009 Tex. Gen. Laws 4273.

2. *See, e.g.*, Act of May 19, 2011, 82d Leg., R.S., ch. 823, 2011 Tex. Gen. Laws 1901, 1901; Act of May 29, 2011, 82d Leg., R.S., ch. 1338, 2011 Tex. Gen. Laws 3882, 3882–83.

3. Act of April 30, 2013, 83d Leg., R.S., ch. 42, 2013 Tex. Sess. Law Serv. 54, 84–88; Act of May 9, 2013, 83d Leg., R.S., ch. 161, 2013 Tex. Sess. Law Serv. 623, 623–57; Act of May 17, 2013, 83d Leg., R.S., ch. 351, 2013 Tex. Sess. Law Serv. 1123, 1123–24; Act of May 17, 2013, 83d Leg., R.S., ch. 780, 2013 Tex. Sess. Law Serv. 1995, 1995–96; Act of May 21, 2013, 83d Leg., R.S., ch. 647, 2013 Tex. Sess. Law Serv. 1733, 1734; Act of May 22, 2013, 83d Leg., R.S., ch. 684, 2013 Tex. Sess. Law Serv. 1784, 1784–85; Act of May 22, 2013, 83d Leg., R.S., ch. 671, 2013 Tex. Sess. Law Serv. 1764, 1764–68; Act of May 22, 2013, 83d Leg., R.S., ch. 689, 2013 Tex. Sess. Law Serv. 1793, 1793; Act of May 22, 2013, 83d Leg., R.S., ch. 700, 2013 Tex. Sess. Law Serv. 1819, 1819–22; Act of May 24, 2013, 83d Leg., R.S., ch. 982, 2013 Tex. Sess. Law Serv. 2388, 2388–99; Act of May 24, 2013, 83d Leg., R.S., ch. 1136, 2013 Tex. Sess. Law Serv. 2740, 2740–56. *See generally* Act of May 5, 2011, 82d Leg., R.S., ch. 91, §§ 8.001–26, 2011 Tex. Gen. Laws 448, 457; Act of May 19, 2011, 82d Leg., R.S., ch. 823, 2011 Tex. Gen. Laws 1901; Act of May 25, 2011, 82d Leg., R.S., ch. 810, 2011 Tex. Gen. Laws 1875; Act of May 29, 2011, 82d Leg., R.S., ch. 1338, § 2.54, 2011 Tex. Gen. Laws 3882, 3933.

4. Act of April 30, 2013, 83d Leg., R.S., ch. 42, 2013 Tex. Sess. Law Serv. 54, 84–88; Act of May 9, 2013, 83d Leg., R.S., ch. 161, 2013 Tex. Sess. Law Serv. 623, 623–57; Act of May 17, 2013, 83d Leg., R.S., ch. 351, 2013 Tex. Sess. Law Serv. 1123, 1123–24; Act of May 17, 2013, 83d Leg., R.S., ch. 780, 2013 Tex. Sess. Law Serv. 1995, 1995–96; Act of May 21, 2013, 83d Leg., R.S., ch. 647, 2013 Tex. Sess. Law Serv. 1733, 1734; Act of May 22, 2013, 83d Leg., R.S., ch. 684, 2013 Tex. Sess. Law Serv. 1784, 1784–85; Act of May 22, 2013, 83d

slated to become effective on January 1, 2014.⁵

I. INTESTACY

Although most Texans die intestate,⁶ intestacy issues do not generate significant appellate activity. Thus, there are no opinions dealing with descent and distribution issues to report.

II. WILLS

A. FORMALITIES

In *In re Estate of Arrington*, the Houston First Court of Appeals determined that it lacks the power to require that the witnesses read a will and that the testator sign each page of the will.⁷ In this case, the testator executed a will two days after being diagnosed with an inoperable brain tumor.⁸ His will left his entire estate to one of his daughters to the exclusion of his other children and his wife from whom he was in the process of getting a divorce. The trial court admitted the will to probate.⁹ The testator's wife appealed claiming that there was no evidence to support the jury's findings that the testator properly executed the will and had testamentary capacity.¹⁰

The court of appeals rejected the wife's claim that the testator did not properly execute his will.¹¹ She argued that the will was invalid because the testator did not sign each page and because the witnesses did not read the will.¹² The court explained that neither of these two steps are re-

Leg., R.S., ch. 671, 2013 Tex. Sess. Law Serv. 1764, 1764–68; Act of May 22, 2013, 83d Leg., R.S., ch. 689, 2013 Tex. Sess. Law Serv. 1793, 1793; Act of May 22, 2013, 83d Leg., R.S., ch. 700, 2013 Tex. Sess. Law Serv. 1819, 1819–22; Act of May 24, 2013, 83d Leg., R.S., ch. 982, 2013 Tex. Sess. Law Serv. 2388, 2388–99; Act of May 24, 2013, 83d Leg., R.S., ch. 1136, 2013 Tex. Sess. Law Serv. 2740, 2740–56.

5. Act of May 26, 2009, 81st Leg., R.S., ch. 680, § 12, 2009 Tex. Gen. Laws 1512, 1732; Act of May 31, 2009, 81st Leg., R.S., ch. 1351, §§ 13–14, 2009 Tex. Gen. Laws 1473; Act of May 5, 2011, 82d Leg., R.S., ch. 91, § 8.026, 2011 Tex. Gen. Laws 445, 463; Act of May 19, 2011, 82d Leg., R.S., ch. 823, § 4.03, 2011 Tex. Gen. Laws 1901, 2095; Act of May 23, 2011, 82d Leg., R.S., ch. 1338, § 2.55, 2011 Tex. Gen. Laws 3882, 3939; Act of May 25, 2011, 82d Leg., R.S., ch. 810, § 2.18, 2011 Tex. Gen. Laws 1875, 1882.

6. See, e.g., Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882 (2012) (“[M]ost individuals allow the default rules of intestacy to govern the disposition of their property at death.”); ABA, *Where There's a Will, There's a Way*, YOUR LAW, Spring 1988, at 3 (stating seventy percent of individuals do not have wills); *Isn't it Time You Wrote a Will?*, CONSUMER REP., Feb. 1985, at 103 (“[M]ore than two-thirds of all adult Americans die without wills.”); EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 13 (4th ed. 1987) (“Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate.”).

7. *In re Estate of Arrington*, 365 S.W.3d 463, 467 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

8. *Id.* at 465.

9. *Id.* at 466.

10. For a discussion of the testamentary capacity issues raised by this case, see *infra* Part II.C.3.

11. *In re Estate of Arrington*, 365 S.W.3d at 467.

12. *Id.*

quired under Probate Code § 59 and that it was powerless to add to the requirements set forth by the Texas legislature.¹³

B. INTERPRETATION AND CONSTRUCTION

1. Debts “Paid Out of My Estate”

In *In re Estate of Anderegg*, both the trial court and the El Paso Court of Appeals held that the statement “all of my just debts and all expenses of my last illness, funeral, and the administration of my estate shall be paid out of my estate” was sufficient to alter the statutory abatement order provided in Texas Probate Code § 322B.¹⁴ Thus, the testator’s debts are to be paid pro rata from all estate property.

The first section of the testator’s will contained the statement requiring debts to be paid by the estate.¹⁵ The second section of the testator’s will contained the dispositive provisions and opened with the words “[s]ubject to the provisions of the foregoing paragraph hereof, I do hereby give and bequeath”¹⁶ The last paragraph in section two gave “[a]ll the rest and residue” to two beneficiaries. The last paragraph in the section specifically mentioned 115 acres of real property in Kimble County, Texas.¹⁷ The court of appeals explained that the will expressed an intent to deviate from the statutory abatement order based on the language in the first section alone because Probate Code § 3(1) “defines ‘estate’ as the real and personal property of the decedent.”¹⁸ The court of appeals stated in footnote 2 that “[i]t could be argued that the instruction to pay debts and expenses out of the estate is too general to alter the statutory abatement order”; however, the two beneficiaries erroneously believed that they would fare better under the statutory order because they were given the residuary estate rather than a specific devise of real property.¹⁹

The holding in this case may lead to unexpected results because many wills contain boilerplate language requiring debts and expenses to be paid out of the estate. This case now acts as authority that this language is sufficient to trump the normal abatement order. Accordingly, every will should contain an express statement describing how the testator wants debts and expenses to be paid, for example, via the statutory order, pro rata, or in some other way.

2. “All Monies”

The testator’s will being litigated in *In re Estate of Anderegg* stated that the beneficiary was to receive “all monies I may have at the time of my death, be they in the form of cash, checking accounts or savings accounts,

13. *Id.*

14. *In re Estate of Anderegg*, 360 S.W.3d 677, 678 (Tex. App.—El Paso 2012, no pet.).

15. *Id.*

16. *Id.*

17. *Id.* at 679.

18. *Id.* (quoting TEX. PROB. CODE ANN. § 3(1) (West Supp. 2011)).

19. *Id.* at 679 n.2.

all stocks, bonds, annuities, etc., and any accounts I may have with [named institutions] or others.”²⁰ Both the trial court and the El Paso Court of Appeals held that the beneficiary was entitled to a lump sum death benefit and an income tax refund.²¹ The court of appeals explained that the death benefit and tax refund were relatively liquid financial assets of the same basic type described.²² The court found it significant that the testator included the abbreviation “etc.” in the list, meaning that additional, unspecified similar items were to be included in the gift, and that the list was not meant to be exclusive (*expressio unius est exclusio alterius*).²³ The court based its reasoning on a 1971 Texas Supreme Court case and stated “‘money’ is a word ‘of flexible meaning that ordinarily refers to cash or coin, but it has often been construed in will cases to mean wealth or property.’”²⁴ Because attempts to define a gift of money and similar items are fraught with interpretation problems, the drafting attorney must exercise great care or consider a different way of achieving the client’s goal, such as naming pay on death payees.

3. Distribution Provisions

In *Nash v. Beckett*, the parents created two trusts, one for each of their children.²⁵ Upon the death of the last child, the property was to be distributed to their descendants equally.²⁶ The trial court held that the remainder of each child’s trust passed only to that child’s descendants.²⁷ The Texarkana Court of Appeals reversed, holding that each descendant is entitled to an equal share of both trusts.²⁸

The court of appeals focused on the unambiguous language of the trusts, which said that upon termination, the trust is to “be divided into as many equal shares as there are children of my two sons surviving, together with an equal share per stirpes for the surviving child or children of any deceased grandchild.”²⁹ The court found additional support for this argument in that the trusts did not terminate until the last child died.³⁰ If the balance of each trust would pass only to the descendants of the child for whom the trust was created, there would be no reason to delay distribution until the other child died.³¹ Accordingly, the trust’s terms could not logically be read to give the balance of each trust only to the descendants of the child for whom that trust was originally created.³²

20. *Id.* at 678–79.

21. *Id.* at 680.

22. *Id.*

23. *Id.* at 681.

24. *Id.* at 680 (quoting *Stewart v. Selder*, 473 S.W.2d 3, 9 (Tex. 1971)).

25. *Nash v. Beckett*, 365 S.W.3d 131, 133–34 (Tex. App.—Texarkana 2012, pet. denied).

26. *Id.* at 134.

27. *Id.* at 136 & n.8.

28. *Id.* at 141.

29. *Id.* at 138.

30. *Id.* at 139.

31. *Id.*

32. *Id.*

The court recognized that the rule against perpetuities' savings clause would have yielded this result, but this clause was not the cause of the trusts terminating.³³ Also, the fact that a child could exercise a power of appointment over trust property that would pass to his descendants did not mean that the entire trust corpus would pass only to his descendants.³⁴

The provisions under dispute in this case appear to have been expertly drafted. Thus, the lesson to be learned is that no matter how well-drafted a provision may be, someone who is unhappy with the resulting disposition may assert that the provision does not mean what it clearly states.

C. CONTESTS

1. *Sufficiency of General Denial*

A general denial of a will-proponent's application to probate a will may qualify as a contest of the will, as demonstrated by *In re Estate of Hudson*.³⁵ The testator's son filed a general denial when his mother applied to probate his father's will.³⁶ The Dallas Court of Appeals held that this general denial was sufficient as a contest under Probate Code § 10, and thus the son was entitled to be heard during the probate of the will and have his request for a jury trial honored under Probate Code § 21.³⁷ The court noted that Probate Code § 10 does not require that a will contestant identify with specificity the grounds on which the contestant is opposing the will.³⁸

2. *Discovery*

*In re Chesses*³⁹ shows that courts are willing to permit access to certain confidential material if necessary to administer justice. The contestant of the testator's will sought disclosure of the testator's Adult Protective Services (APS) file and the right to depose the APS caseworker.⁴⁰ The trial court denied the request and the contestant sought a writ of mandamus.⁴¹ The El Paso Court of Appeals conditionally granted the writ, determining that the APS file and caseworker testimony were essential to the administration of justice.⁴²

33. *Id.* at 141.

34. *Id.* at 139–40.

35. *In re Estate of Hudson*, No. 05-11-00008-CV, 2011 WL 5433689, at *4 (Tex. App.—Dallas Nov. 10, 2011, no pet.) (mem. op.).

36. *Id.* at *1.

37. *Id.* at *4.

38. *Id.* at *3–4.

39. *In re Chesses*, 388 S.W.3d 330 (Tex. App.—El Paso 2012, no pet.).

40. *Id.* at 331.

41. *Id.*

42. *Id.* at 343.

3. Lack of Testamentary Capacity

In the case of *In re Estate of Arrington*,⁴³ two days after being diagnosed with an inoperable brain tumor, the testator declared a will that left his entire estate to his daughter to the exclusion of his other children and his wife, from whom he was in the process of getting a divorce.⁴⁴ The trial court admitted the will to probate.⁴⁵ The testator's wife appealed claiming that there was no evidence to support the jury's findings that the testator properly executed the will and had testamentary capacity.⁴⁶

The Houston First Court of Appeals rejected the wife's claim that the testator lacked testamentary capacity.⁴⁷ The court explained that the jury heard direct evidence of the testator's capacity on the date of will execution from the subscribing witnesses, one of whom had known the testator for twenty years.⁴⁸ The court rejected the wife's claim that the testator lacked capacity because the will named a person as a child who was never legally adopted and omitted an alleged additional child.⁴⁹ As the court stated, "a finding of testamentary capacity does not hinge entirely on direct evidence that the testator discussed the details of his children, wealth, or disposition at the time he signed his will."⁵⁰ As a practical matter, of course, family descriptions in wills should be accurate to help prevent attacks on the will based on lack of testamentary capacity.

*Le v. Nguyen*⁵¹ shows that a will proponent will have a difficult time overturning a jury finding that a testator lacked testamentary capacity and that, accordingly, a proponent needs to present the jury with convincing evidence that the testator possessed testamentary capacity. The testator executed a will on December 1, 2009, at which time his capacity was not challenged.⁵² The testator's condition deteriorated rapidly, and later in the month an attorney met with the testator to discuss the changes he wanted to make to his will.⁵³ The attorney returned several times to have the testator sign the new will, but the testator was unable to sign.⁵⁴ At the end of his last visit on December 31, the attorney left the will with the testator's fiancée.⁵⁵ Later that evening, the testator executed the will in front of two witnesses.⁵⁶

43. *In re Estate of Arrington*, 365 S.W.3d 463 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

44. *Id.* at 465.

45. *Id.* at 466.

46. For a discussion of the issues relating to the proper execution of the will, see *supra* Part II.A.

47. *In re Estate of Arrington*, 365 S.W.3d at 469.

48. *Id.* at 468.

49. *Id.* at 468–69.

50. *Id.* at 468.

51. *Le v. Nguyen*, No. 14-11-00910-CV, 2012 WL 5266388 (Tex. App.—Houston [14th Dist.] Oct. 25, 2012, no pet.) (mem. op.).

52. *Id.* at *1.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at *3.

The trial court first admitted the December 1 will to probate but later set aside the order and probated the December 31 will.⁵⁷ The proponent of the December 1 will then contested the December 31 will.⁵⁸ After a jury trial, the court found that the testator lacked testamentary capacity when he executed the new will.⁵⁹ The proponent of the December 31 will appealed.⁶⁰

The Houston Fourteenth Court of Appeals affirmed.⁶¹ The court made a careful review of the conflicting evidence presented to the jury.⁶² The court explained that there was “more than a scintilla of evidence supporting the jury’s finding that [the testator] did not have testamentary capacity,” and that “the finding [was] not so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust.”⁶³

4. *Undue Influence*

*In re Estate of Sidransky*⁶⁴ shows the importance for a contestant who claims that a will was the product of undue influence to present evidence at trial showing that the influence was actually exerted, because evidence showing only susceptibility is insufficient to prevent a summary judgment. The trial court conducted a bench trial and found that the testatrix had testamentary capacity.⁶⁵ The court then granted a summary judgment motion that the testatrix was not subject to undue influence when she executed her will.⁶⁶

On appeal, the El Paso Court of Appeals conducted a careful review of the evidence and found that it did not raise “a genuine issue of material fact on the existence and exertion of influence.”⁶⁷ The court stressed that evidence showing that the testatrix was susceptible to undue influence because of a weakened physical and mental condition did not constitute evidence that any undue influence was actually exerted.⁶⁸ Accordingly, the court of appeals affirmed the trial court’s judgment, concluding its opinion with the phrase “[m]ay she rest in peace.”⁶⁹

57. *Id.* at *1.

58. *Id.*

59. *Id.* at *5.

60. *Id.*

61. *Id.*

62. *See id.* at *7–8.

63. *Id.* at *8.

64. *In re Estate of Sidransky*, No. 08-10-00361-CV, 2012 WL 3363710 (Tex. App.—El Paso Aug. 15, 2012, pet. denied).

65. *Id.* at *2.

66. *Id.*

67. *Id.* at *5–7.

68. *Id.* at *6–7.

69. *Id.* at *7.

III. ESTATE ADMINISTRATION

A. STANDING AND CAPACITY

The Houston First Court of Appeals has made it clear that a beneficiary has standing to intervene in an action if the petitioner's action would result in a lessening of the beneficiary's share of the estate. In *In re O'Quinn*, an alleged common-law wife claimed that the sole beneficiary of the decedent's will lacked standing to assert claims for declaratory relief, which included a request for a finding that no common law marriage existed.⁷⁰ The court of appeals disagreed, explaining that the beneficiary had a justiciable interest.⁷¹ If the alleged common law wife was successful in proving a marriage, then the size of the estate passing to the beneficiary would be reduced.⁷² In addition, Civil Practice & Remedies Code § 37.005(3) gives the court the ability to determine any question arising in the administration of an estate.⁷³

B. APPEAL

Each of the cases dealing with the ability of a losing party to appeal during the Survey period applied the *Crowson v. Wakeham* test from the 1995 Texas Supreme Court opinion, which held that a lower court order is appealable if the applicable statute (e.g., the Probate Code) declares the order to be final, or is not appealable, but is rather interlocutory, "if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties [that are] not disposed of."⁷⁴

1. Summary Judgment

The El Paso Court of Appeals held in *In re Estate of Coleman* that an order admitting a will to probate and opening an independent administration "is a final order that ended a phase of the probate proceedings."⁷⁵ Accordingly, the court had jurisdiction to hear the appeal.⁷⁶ The court of appeals explained that although the executor named in the will had been awarded summary judgment on all of the contestant's claims, and the summary judgment eliminated all of the contestant's substantive challenges, "the summary judgment was not a final order because it left unresolved [the named executor's] requests to admit the will to probate, issue letters testamentary, and appoint him as executor."⁷⁷

70. *In re O'Quinn*, 355 S.W.3d 857, 860–61 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

71. *Id.* at 865.

72. *Id.* at 864–65.

73. *Id.* at 866 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 37.005(3) (West 2008)).

74. *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995).

75. *In re Estate of Coleman*, 360 S.W.3d 606, 610 (Tex. App.—El Paso 2011, no pet.).

76. *Id.*

77. *Id.*

2. Order Approving Account for Final Settlement and Authorizing Distribution

In *In re Estate of Scott*, the trial court issued an order approving an account for final settlement and authorizing the distribution of the estate.⁷⁸ The order also specified that additional steps were required before the estate could be closed, such as distributing the estate pursuant to a determination of heirship.⁷⁹ The Dallas Court of Appeals held that this order was not final, and thus not appealable because the “order merely set[] the stage for a further resolution of the proceeding.”⁸⁰

C. PAYMENT OF TAXES

An instrument must make a specific reference to the payment of the generation-skipping transfer tax (GST tax); otherwise, the beneficiary of a gift subject to the GST tax will be liable for it.⁸¹ The use of the term “transfer taxes” is not specific enough.⁸² When a dispute arose regarding whether the GST tax should be allocated against the residuary or against the generation-skipping transfer, both the trial court and the San Antonio Court of Appeals in *In re Estate of Denman* agreed that the GST tax should be charged against the transfer itself.⁸³

The beneficiary of the generation-skipping transfer claimed that a will provision providing that “[a]ny transfer, estate, inheritance, succession and other death taxes which shall become payable by reason of my death . . . shall be paid out of my residuary estate” clearly expressed the testator’s intent that the gift pass without reduction for the GST tax triggered by the gift.⁸⁴ However, the residuary beneficiary pointed to Internal Revenue Code § 2603(b), which mandates that a generation-skipping transfer bear the burden of the tax unless otherwise directed by a “specific reference to the [generation-skipping transfer]” in the will.⁸⁵ The court of appeals held that the will’s reference to “transfer, estate, inheritance, succession and other death taxes” was not a specific reference to the GST tax, and thus the tax was allocated against the generation-skipping transfer.⁸⁶

In *In re Estate of Denman*, the beneficiary of the generation-skipping transfer sought reimbursement of the GST tax paid from the estate, noting that the court in the original case stated in a footnote that the issue of reimbursement was not before the court.⁸⁷ Both the trial court and the

78. *In re Estate of Scott*, 364 S.W.3d 926, 926 (Tex. App.—Dallas 2012, no pet.).

79. *Id.* at 927.

80. *Id.* at 928.

81. *In re Estate of Denman*, 270 S.W.3d 639, 646 (Tex. App.—San Antonio 2008, pet. denied) (citing 26 U.S.C. § 2603(b) (2006)).

82. *Id.* at 649.

83. *Id.* at 642, 649.

84. *Id.* at 645–46.

85. *Id.* at 647.

86. *Id.* at 645, 648.

87. *In re Estate of Denman*, 362 S.W.3d 134, 137 (Tex. App.—San Antonio 2011, no pet.).

San Antonio Court of Appeals held that the beneficiary of the generation-skipping transfer was not entitled to a reimbursement, or “grossing up,” of his devise to account for the GST tax.⁸⁸ The court of appeals, however, did not actually reach the merits of the beneficiary’s claim and instead determined that the statute of limitations had run.⁸⁹ Thus, the primary lesson to be learned from this case may be that failure to bring an action within the statute of limitations period precludes a claim even if that claim may be meritorious.

D. ATTORNEY’S FEES

The El Paso Court of Appeals case of *In re Estate of Anderegg*⁹⁰ explains that an executor who acts inappropriately and with notice that his or her actions are wrong cannot later defend a removal action and expect the estate to cover his or her attorney’s fees. The executors were removed from office for gross misconduct under Probate Code § 149C(a)(2), (5).⁹¹ The trial court refused to charge the estate for their attorney’s fees in defending the removal action.⁹² The court of appeals affirmed because the executors did not defend the action in good faith as is required before the court can burden the estate with their attorney’s fees under Probate Code § 149C(c).⁹³

The court reviewed the evidence and found that it was more than sufficient to support a finding that the defense was in bad faith.⁹⁴ For example, the executors used a credit card they found in the decedent’s safe to charge their personal expenses even though they signed the court’s written instructions for executors, which specifically prohibited them from “borrowing” money from the estate.⁹⁵ In addition, they continued to make personal charges even after their attorney told them not to.⁹⁶ One of the executors even admitted that she knew her actions were wrong.⁹⁷

IV. TRUSTS

A. MANDATORY ARBITRATION PROVISION

The Texas Supreme Court held that arbitration clauses in trusts are enforceable. In *Rachal v. Reitz*,⁹⁸ a beneficiary brought suit asserting that the trustee misappropriated trust property and failed to provide a proper accounting.⁹⁹ Because the settlor included a provision in his *inter vivos*

88. *Id.* at 147.

89. *Id.*

90. *In re Estate of Anderegg*, 360 S.W.3d 677 (Tex. App.—El Paso 2012, no pet.).

91. *Id.* at 678; see TEX. PROB. CODE ANN. § 149C(a)(2), (5) (West Supp. 2011).

92. *In re Estate of Anderegg*, 360 S.W.3d at 681.

93. *Id.* at 682–83 (citing TEX. PROB. CODE ANN. § 149C(a)(2), (5)).

94. *Id.* at 681–83.

95. *Id.* at 682.

96. *Id.*

97. *Id.*

98. *Rachal v. Reitz*, No. 11-0708, 2013 WL 1859249 (Tex. May 3, 2013).

99. *Id.* at *1.

trust requiring the beneficiaries to arbitrate any dispute with the trustees, the trustee moved to compel arbitration.¹⁰⁰

Both the trial and intermediate appellate courts held that this provision was unenforceable.¹⁰¹ The appellate court explained that a person cannot be compelled to arbitrate a dispute if the person did not agree to relinquish the person's ordinary right to litigate.¹⁰² The beneficiary is merely a recipient of equitable title to property and not a party to the trust instrument.¹⁰³ A trust is a conveyance of property coupled with a split of legal and equitable title and the imposition of fiduciary duties on the trustee. A trust is not an agreement or contract.

The Texas Supreme Court reversed, holding that the arbitration provision is enforceable against the beneficiaries for two reasons.¹⁰⁴ First, the court will enforce conditions the settlor attached to the gifts to carry out the settlor's intent.¹⁰⁵ The settlor included a clear statement that he wanted all disputes to be arbitrated and thus the court will give effect to that provision.¹⁰⁶ Second, the Texas Arbitration Act requires the enforcement of agreements to arbitrate.¹⁰⁷ Even though the beneficiaries did not expressly agree, they are deemed to have agreed through the doctrine of "direct benefits estoppel" because they accepted benefits of the trust and filed suit to enforce the terms of the trust.¹⁰⁸ These actions are the assent required to form an enforceable arbitration agreement.¹⁰⁹ If a beneficiary is unhappy with the arbitration provision, the beneficiary may disclaim under Trust Code § 112.010.¹¹⁰ The supreme court stated that "it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms."¹¹¹

The opinion leaves open several issues. Although this was a trust case, it would seem likely the supreme court would reach the same result if the arbitration provision was contained in a will. The supreme court does not discuss how to handle the situation where the beneficiaries are minors or incompetent individuals. Arbitration provisions may become boilerplate so that the justification that the settlor intentionally imposed the requirement may be problematic. Although beneficiaries do have the ability to disclaim before accepting benefits, it is unlikely that beneficiaries read the trust and seek legal advice about the consequences of accepting benefits. Instead, beneficiaries just collect the benefits and study the trust instrument in detail only when something goes wrong. Perhaps a trustee

100. *Id.*

101. *Id.* at *2.

102. *Id.*

103. *Id.*

104. *Id.* at *10.

105. *Id.* at *4.

106. *Id.*

107. *Id.*

108. *Id.* at *5.

109. *Id.*

110. *Id.* at *6 (citing TEX. PROP. CODE ANN. § 112.010 (West 2011)).

111. *Id.*

will have a fiduciary duty to inform a beneficiary about an arbitration provision before the beneficiary receives any benefits from the trust so that the beneficiary has ample opportunity to disclaim.

B. STATUTE OF FRAUDS

*Wolfe v. Devon Energy Production Co.*¹¹² serves as a reminder of the importance of properly documenting a trust in a written instrument that complies with the statute of frauds.¹¹³ In a highly complex set of facts regarding the ownership of oil and gas properties, one of the claimants attempted to demonstrate that the property was held in trust.¹¹⁴ Although there was neither a trust instrument nor any document setting out the terms of the trust, the claim was made that use of the word “trustee” in a deed was sufficient to establish the existence of a trust.¹¹⁵ The Waco Court of Appeals explained that when the term “trustee” is used in a deed without more, the term “is merely a description and of no legal effect.”¹¹⁶ The court likewise rejected a claim that a trust was nonetheless created because the alleged trustee did not actually comply with the terms of the alleged oral trust.¹¹⁷ However, the court recognized that there was a fact issue with regard to whether a purchase-money resulting trust existed.¹¹⁸

C. REVOCABILITY

In the San Antonio Court of Appeals case of *Vela v. CRC Land Holdings*, the settlor created an inter vivos trust, conveyed property to that trust by deed, and later removed one of the trust beneficiaries.¹¹⁹ After the settlor’s death, the remaining beneficiaries sought to partition the property, but the removed beneficiary claimed that the trust was made irrevocable when the settlor deeded property to the trust.¹²⁰ The trial court rejected this claim, and the appellate court affirmed.¹²¹

The court explained that under Texas law, an *inter vivos* trust is presumed revocable unless the trust expressly provides otherwise.¹²² Although the removed beneficiary agreed with this rule of law, he claimed that the settlor’s deed of the property to the trust made the trust irrevocable because it used the term “forever” in the granting language.¹²³ The

112. *Wolfe v. Devon Energy Prod. Co.*, 382 S.W.3d 434 (Tex. App.—Waco 2012, pet. denied).

113. See TEX. PROP. CODE ANN. § 112.001 (West 2007).

114. *Wolfe*, 382 S.W.3d at 443–44.

115. *Id.* at 445.

116. *Id.*

117. *Id.* at 446.

118. *Id.* at 453.

119. *Vela v. GRC Land Holdings, Ltd.*, 383 S.W.3d 248, 249–50 (Tex. App.—San Antonio 2012, no pet.).

120. *Id.* at 250.

121. *Id.* at 250, 253.

122. *Id.* at 252–53 (citing TEX. PROP. CODE ANN. § 112.051(a) (West 2007)).

123. *Id.* at 251.

court held that this type of standard form language in a warranty deed does not reflect an intent on the settlor's part to transform a revocable trust into an irrevocable one.¹²⁴

D. FUNDING WITH HOMESTEAD

*Martinek Grain & Bins, Inc. v. Bulldog Farms, Inc.*¹²⁵ shows that transfers to a trust of a homestead or other exempt property are unlikely to be set aside as fraudulent transfers. The Dallas Court of Appeals held that the transfer of property to a trust that was the settlors' undisputed homestead could not be set aside as a fraudulent conveyance because the homestead is generally exempt under nonbankruptcy law from the claims of creditors.¹²⁶

V. OTHER ISSUES

A. SOCIAL SECURITY BENEFITS FOR POSTHUMOUS CHILDREN

Under the United States Supreme Court opinion of *Astrue v. Capato*,¹²⁷ a posthumously conceived child of a Texas domiciliary has a good chance of qualifying for Social Security survivors benefits. In that case, a wife used her deceased husband's frozen sperm to create two children through in vitro fertilization.¹²⁸ The children were born eighteen months after the husband's death.¹²⁹ The wife then attempted to obtain Social Security survivors benefits for these children.¹³⁰

The Court focused on 42 U.S.C. § 416(h)(2)(A), which states that the determination of whether a person is a child for survivors benefits purposes depends on whether that person would be an heir under the intestacy law of the deceased parent's domiciliary state.¹³¹ Under the applicable law (Florida), a child must be conceived before the decedent's death to be an heir.¹³² Thus, the Court held in a unanimous opinion that these two children did not qualify for survivors benefits because conception occurred after the husband's death.¹³³ The Court did not address the issue of whether the use of frozen embryos, rather than frozen sperm, would allow the wife to successfully argue that conception occurred prior to her husband's death.¹³⁴

Texas Probate Code § 41(a) allows posthumous lineal descendants to

124. *Id.* at 252–53.

125. *Martinek Grain & Bins, Inc. v. Bulldog Farms, Inc.*, 366 S.W.3d 800 (Tex. App.—Dallas 2012, no pet.).

126. *Id.* at 805–06.

127. *Astrue v. Capato*, 132 S. Ct. 2021 (2012).

128. *Id.* at 2026.

129. *Id.*

130. *Id.*

131. *Id.* at 2028 (citing 42 U.S.C. § 416(h)(2)(A) (2006)).

132. *Id.* at 2026.

133. *Id.* at 2033–34.

134. *See id.*

qualify as heirs.¹³⁵ There is no express requirement of conception prior to a parent's death.¹³⁶ It is arguable that if this case had arisen in Texas, the Texas courts would determine that these children were heirs and thus would qualify for Social Security survivors benefits. Note, however, that when the Texas statute was originally enacted in 1955,¹³⁷ the possibility of postmortem conception did not exist.

B. ANATOMICAL MATTERS

*Evanston Ins. Co. v. Legacy of Life, Inc.*¹³⁸ demonstrates that a family member unhappy with how a donee handles an anatomical gift will have difficulty recovering on property-based claims. A daughter allowed an organ donation charity to harvest her mother's tissues.¹³⁹ The daughter asserts that the charity told her it would distribute the tissues on a nonprofit basis.¹⁴⁰ She claimed that her mother's estate was entitled to restitution damages and that she suffered mental anguish because the charity transferred her mother's tissues to companies that sold them at a profit.¹⁴¹ After litigation with the charity's insurance carrier arose, the Texas Supreme Court accepted certified questions relating to the insurance coverage.¹⁴² In deciding that no coverage existed, the court made two significant holdings.

First, the supreme court held that the daughter had at most a quasi-property interest in her mother's tissues.¹⁴³ The supreme court stated, "we cannot say that tissues have attained the status of property of the next of kin."¹⁴⁴ It is true that the next of kin may donate a decedent's organs, but they have no right to use those tissues unless the decedent named one or more of them as donees.¹⁴⁵

Second, the supreme court concluded that the mother's tissues were not the property of her estate.¹⁴⁶ A person's estate cannot designate a donee under the Texas Anatomical Gift Act.¹⁴⁷ Because the supreme court "held that tissues are not the property of next of kin, [the supreme court] necessarily conclude[d] that tissues are also not the property of the estate."¹⁴⁸

135. TEX. PROB. CODE ANN. § 41(a) (West 2007).

136. *See id.*

137. Act of March 16, 1955, 54th Leg., R.S., ch. 55, § 88, 1955 Tex. Gen. Laws 117.

138. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377 (Tex. 2012).

139. *Id.* at 379.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 385.

144. *Id.*

145. *Id.*

146. *Id.* at 387.

147. *Id.* at 386 (citing TEX. HEALTH & SAFETY CODE § 692A.009(a) (West 2009)).

148. *Id.* at 387.

VI. CONCLUSION

The cases discussed in this article 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. 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:

Texas courts require strict compliance with will and trust formalities and defer to the Texas legislature to establish such formalities.¹⁴⁹

The issues of whether a testator had testamentary capacity or was unduly influenced continue to be the subjects of a significant number of will contests. Because these issues are questions of fact, the appellate courts give great deference to the trial court's determination.¹⁵⁰

Novel situations and cases of first impression are potentially of utmost significance.¹⁵¹

A lawyer can avoid will and trust litigation with careful drafting, but some disputes will arise simply because family members of the testator are unhappy with the results.¹⁵²

149. *In re Estate of Arrington*, 365 S.W.3d 463, 466–67 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (court unwilling to add to statutory list of will requirements); *Wolfe v. Devon Energy Prod. Co.*, 382 S.W.3d 434, 444–45 (Tex. App.—Waco 2012, pet. denied) (compliance with statute of frauds needed to create a trust).

150. *See Arrington*, 365 S.W.3d at 467 (upholding trial court's determination that testator had testamentary capacity); *see also Le v. Nguyen*, No. 14-11-00910-CV, 2012 WL 5266388, at *6, *8 (Tex. App.—Houston [14th Dist.] Oct. 25, 2012, no pet.) (upholding trial court's determination that testator lacked testamentary capacity); *In re Estate of Sidranksy*, No. 08-10-00361-CV, 2012 WL 3363710, at *7 (Tex. App.—El Paso Aug. 15, 2012, pet. denied) (affirming trial court's judgment that testatrix was not subjected to undue influence).

151. *Rachal v. Reitz*, 347 S.W.3d 305, 311 (Tex. App.—Dallas 2011, pet. granted) (en banc) (whether beneficiaries are bound by a mandatory arbitration provision in a trust); *Astrue v. Capato*, 132 S. Ct. 2021, 2026–27 (2012) (whether a posthumously conceived child is entitled to Social Security survivor benefits); *In re Estate of Anderegg*, 360 S.W.3d 677, 679 (Tex. App.—El Paso 2012, no pet.) (whether a generic debt payment provision is sufficient to alter the normal statutory abatement order).

152. *Anderegg*, 360 S.W.3d at 679–80 (inartful use of payment of debts provision altered statutory abatement order); *Nash v. Beckett*, 365 S.W.3d 131, 133–36 (Tex. App.—Texarkana 2012, pet. denied) (expertly drafted provisions subject to litigation).