

ANNUAL CASELAW UPDATE

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ANNUAL CASELAW UPDATE

I. INTRODUCTION

This article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The article covers approximately forty cases which were decided after the cut-off date for the caselaw update article which accompanied your March 2006 presentation. The reader is warned that not all recent cases are presented and not all aspects of each cited case are analyzed. You must read and study the full text of each case before relying on it or using it as precedent. Writ histories were current as of March 18, 2007 (KeyCite service as provided on WESTLAW).

The discussion of each case concludes with a moral, i.e., the important lesson to be learned from the case. By recognizing situations which have led to time consuming and costly litigation in the past, estate planners may reduce the likelihood of the same situations arising with their clients.

For summaries of cases decided after the closing date for this article, please visit my website at <http://www.ProfessorBeyer.com> and click on the "Texas Case Summaries" link.

II. INTESTACY

Despite the fact that the vast majority of Texans die without a valid will, there are no recent appellate cases dealing with intestacy.

III. WILLS

A. Testamentary Capacity

Long v. Long, 196 S.W.3d 460 (Tex. App.—Dallas 2006, no pet. h.).

Testator's will was contested on the ground that he lacked testamentary capacity at the time he executed his will. The appellate court held that there was sufficient evidence to support the trial court's finding that he indeed had testamentary capacity. The court reviewed the evidence which showed that even though Testator was undergoing cancer treatment, he was aware of what he was doing, the extent of his property, the identity of his family members, and how he wanted his property distributed. In fact, he drafted the will himself on his computer.

Moral: A will contestant will have a difficult time overturning a trial court's finding that a testator had the testamentary capacity to execute a will.

B. Formalities

1. Publication

Brown v. Traylor, 210 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.).

Contestant complained that the trial court improperly rejected a jury instruction which stated that the will witnesses must know that the document being attested is a will. The appellate court, consistent with long-established Texas law (e.g., *Davis v. Davis*, 45 S.W.2d 240 (Tex. Civ. App.—Beaumont 1931, no writ)), held that the witnesses do not need to know they are witnessing a will. Probate Code § 59 does not require “that the testator publish to the subscribing witnesses that the document that they are witnessing is [the testator’s] will.” *Brown* at 663.

Moral: Although the witnesses do not need to know they are witnessing a will for the will to be valid, it is nonetheless a wise practice as it will enhance the testimony of the witnesses. In addition, the witnesses must swear that the testator “declared to them the said instrument is his last will and testament” as part of the self-proving affidavit under Probate Code § 59(a).

2. Interested Witness

Brown v. Traylor, 210 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.).

One of the witnesses to Testator’s will was also a beneficiary making that witness not a credible witness to establish the will. However, there were three other witnesses who were disinterested and thus the beneficiary status of this “unnecessary” witness was irrelevant.

Moral: A will beneficiary should not serve as an attesting witness.

C. Conditional Gift

Mangrum v. Conrad, 185 S.W.3d 602 (Tex. App.—Dallas 2006, pet. denied).

Husband died survived by Wife and Children from a prior marriage. Husband’s will provided a significant gift to Wife which was conditioned on her waiving her homestead rights and any other rights she may have as a surviving spouse. If she failed to waive these rights, Husband gave this property to Children instead. A dispute arose regarding whether Wife had waived her rights because she lived in the home for several years after Husband’s death. The trial court granted Wife’s request for a summary judgment that she had not waived her rights by remaining in the home and the appellate court agreed.

The court recognized that Wife remained in the home for many years, changed the utilities into her name, planted flowers, and did other things inconsistent with a waiver of her right to the home. However, Husband's will conditioned Wife's gift on her expressly waiving her rights which she did in a written document filed with the court. There was also other evidence that Wife had told others that she was electing to take under the will and waive any rights she may have as a surviving spouse. The court determined that the election was timely because the will did not specify a time and Wife had arguably valid reasons for remaining on the property after Husband died. This evidence was not controverted and thus the trial court's grant of a summary judgment was proper.

Moral: A testator who desires to make this type of conditional gift should state a time by which the election must be made.

D. Contractual Wills

In re Estate of Friesenhahn, 185 S.W.3d 16 (Tex. App.—San Antonio 2005, pet. denied).

Husband and Wife executed wills on the same day. After Husband died, his will was admitted to probate. A dispute arose between Wife and Husband's Children from a prior marriage. Wife claimed that Husband's will devised certain land to her in fee simple while Children asserted that the wills were contractual. The trial court granted summary judgment that the wills were contractual.

The appellate court reversed. The court recognized that Husband's will stated that it was "executed in accordance with a contract between" Husband and Wife. However, the gift of the land to Wife was devised to her without any restrictions and thus was an absolute and unconditional gift in fee simple. Thus, the requirement that property subject to a contractual will not be conveyed to the survivor as an absolute and unconditional gift was not satisfied. See *In re Estate of McFatter*, 94 S.W.3d 729, 733 (Tex. App.—San Antonio 2002, no pet.). Likewise, the other requirement of a contractual will that the will treat the estates of both parties as a single estate following the death of the survivor which is jointly disposed of by both testators in the contingent dispositive provisions of the will was not satisfied. Instead, Husband's will merely provided alternative beneficiaries when it provided to whom the property would pass if Wife predeceased Husband.

Moral: "Texas courts view claims of contractual wills cautiously" and thus the requirements of a contractual will are strictly construed. *In re Estate of McFatter* at 19.

E. Interpretation & Construction

In re Estate of Bean, 206 S.W.3d 749 (Tex. App.—Texarkana 2006, pet. filed).

Testatrix's will devised "the eighty (80) acres I own in the J. Bennett Survey" to Devisee. When Testatrix died, she owned two interests potentially covered by this devise:

a surface estate of 77.83 acres and an undivided mineral estate of 85.1 acres. Both of these interests were only partly contained within the Bennett Survey. A dispute arose whether these interests passed to Devisee or to Remainder Beneficiaries.

In a lengthy and highly procedurally grounded opinion, the appellate court determined that the devise unambiguously covered only the mineral estate because later language in the devise referred to a gas well, rather than a surface interest. Because the court determined the devise to be unambiguous, extrinsic evidence could not be used to ascertain Testatrix's intent. Accordingly, Devisee received the mineral estate and the surface estate passed to Remainder Beneficiaries.

Comment: The court's conclusion that the devisee was open to only one construction is problematic. In my opinion, the court easily could have determined that the language referring to the gas well was not an attempt on Testatrix's part to limit the conveyance to the mineral estate. The number of acres mentioned in the devise (80) is closer to the true size of the surface interest (77.83) than the mineral estate (85.1).

Moral: Specific gifts should be carefully and precisely described.

F. Will Contests Generally

In re Estate of Blevins, 202 S.W.3d 326 (Tex. App.—Tyler 2006, no pet. h.).

Testator's will was admitted to probate as muniment of title almost nine years after Testator's death. Nine months later, several of the beneficiaries (Contestants) of Testator's will filed an application to set aside the probate. The trial court dismissed the application agreeing with Proponent that because Contestants were personally served with citation and did not appear to contest the order, they are barred by the doctrine of res judicata. Contestants appealed.

The appellate court reversed. The court looked at Probate Code § 93 which provides that a contestant has two years from the date a will is admitted to probate to contest the validity of the will. Because Contestants filed the contest well within the two year period (just nine months), Contestants are entitled to pursue the contest. The court explained that there is no basis for Proponent's argument that the two year period does not apply to interested persons who were personally served with a copy of the initial application to probate the will.

Moral: A will may be contested within two years of probate even if the contestant received notice of the original probate proceeding.

G. Undue Influence

Long v. Long, 196 S.W.3d 460 (Tex. App.—Dallas 2006, no pet. h.).

Testator's will was contested on the ground that his new wife exercised undue influence over him at the time he executed his will. The appellate court held that there was sufficient evidence to support the trial court's finding that Testator was not unduly influenced. The court rejected contestants' assertion that Testator's new wife was a "black widow" and was exploiting Testator's medical condition (cancer treatment) to her advantage. The evidence showed that Testator was not isolated from his family members and friends and that he had strained relationships with the will contestants.

Moral: A will contestant will have a difficult time overturning a trial court's finding that a testator was not subject to undue influence.

IV. ESTATE ADMINISTRATION

A. Jurisdiction

1. *Of District Court – Extent of Jurisdiction*

Hailey v. Siglar, 194 S.W.3d 74 (Tex. App.—Texarkana 2006, pet. denied).

Daughter transferred funds from Father's account to her own account one month before Father signed a durable power of attorney naming Daughter as her agent. After Father's death, a statutory county court exercising probate jurisdiction appointed Son as the independent executor of Father's estate. Shortly thereafter, Son filed suit in district court to recover the pre-power of attorney transferred funds from Daughter. Son prevailed in this action and Daughter appealed.

The appellate court vacated the district court's judgment and dismissed the case without prejudice because the district court lacked jurisdiction to hear the case. The court rejected Son's arguments that the district court had jurisdiction. Son asserted that the amount in controversy exceeded the amount over which the statutory county court would have jurisdiction. The court explained that the Texas Supreme Court had decided decades ago that "[t]he monetary limitations on a statutory county court's jurisdiction in civil cases do not limit its probate jurisdiction." See *English v. Cobb*, 593 S.W.2d 674, 675 (Tex. 1979).

The court then discussed the application of Probate Code § 5 as it was constituted at the time of this case. The county court at law had jurisdiction over Father's estate and all matters incident to the estate. Probate Code § 5A(a) includes "all claims by * * * an estate" within the definition of incident to the estate as it applies to county courts at law. Son's attempt to recover funds from Daughter was a claim by an estate and thus the county court at law had jurisdiction.

The court then examined former Probate Code § 5(a) (repealed in 2003) which provided that the district court has “original control and jurisdiction over executors * * * under such regulations as may be prescribed by law.” The court conducted a detailed analysis of the Texas Supreme Court case of *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581 (Tex. 1993), and lower court cases interpreting the opinion. The court recognized the confusion between whether a county court at law has exclusive or merely dominant jurisdiction in matters incident to an estate. The court held that the “sounder reading” of the *Bailey* opinion is that “the county court at law is vested with exclusive jurisdiction.” *Hailey* at 79.

Moral: The court provided its own recommendation: “We suggest that the Legislature look seriously at the complicated and overlapping trial court jurisdictional requirements in this state and enact reforms to make jurisdictional requirements uniform and understandable.” *Hailey* at 82.

2. Of Statutory Probate Court – Appointment of Receiver

In re Estate of Trevino, 195 S.W.3d 223 (Tex. App.—San Antonio 2006, no pet. h.).

Under a highly convoluted set of facts and court orders, Attorney for Executrix obtained an order from a statutory probate court for the appointment of a receiver to protect his contingency fee interest in a business constituting estate property he successfully recovered from a conflicting claimant. Executrix appealed.

The appellate court affirmed. The statutory probate court has jurisdiction over matters appertaining to or incident to an estate as well as pendant and ancillary jurisdiction necessary to promote judicial efficiency and economy. Probate Code § 5. Accordingly, the court had jurisdiction to appoint a receiver.

Moral: A statutory probate court has jurisdiction to appoint a receiver.

3. Of Statutory Probate Court – Extent of Jurisdiction

Schuchmann v. Schuchmann, 193 S.W.3d 598 (Tex. App.—Fort Worth 2006, pet. denied).

While divorce litigation was pending in a district court, Husband sued Wife in a statutory probate court with regard to inter vivos trusts Husband’s father had created naming Husband as a beneficiary. This triggered a variety of orders and settlement agreements resulting in a convoluted set of events which eventually lead to Wife filing a motion in probate court to enforce a settlement agreement and to transfer Husband’s post-divorce action to the probate court. Despite Husband’s argument that the probate court lacked jurisdiction, the probate court ordered the post-divorce action transferred from the district court. Husband appealed.

The appellate court reversed holding that the probate court lacked jurisdiction to transfer the post-divorce action. The court explained that the post-divorce action dealt with assets unrelated to the trusts at issue in the probate court litigation. The court examined Probate Code § 5 and found no basis to give the probate court jurisdiction. The suit did not involve (1) an inter vivos trust (§ 5(e)), (2) a matter appertaining or incident to the estate of a deceased person (§ 5(h)), or (3) a set of facts which would trigger the probate court's pendant and ancillary jurisdiction which exists when there is a close relationship between non-probate claims and the matter pending in the probate court so that the court's exercise of jurisdiction would aid in the efficient administration of a matter pending in probate court (§ 5(i)). Accordingly, the court ordered the probate court to transfer the case back to the district court.

Moral: Appellate courts appear unwilling to expand the jurisdiction of statutory probate courts to situations which have a tenuous, if any, connection to probate or trust matters.

4. Res Judicata and Collateral Estoppel

Dolenz v. Vail, 200 S.W.3d 338 (Tex. App.—Dallas 2006, no pet. h.).

Creditor asserted that Decedent had granted him a security interest under the U.C.C. in paintings held by Decedent's trust as collateral for the payment of legal fees. Creditor sought to take possession of the paintings and the probate court denied the motion finding that it had no jurisdiction to hear the case because the matters were decided in prior proceedings, both at the trial and appellate levels.

The appellate court reversed. The court held that the probate court has jurisdiction to hear Creditor's motion because "his claim is a matter relating to the distribution of [the] estate of a deceased person and thus a matter 'incident to an estate'" under Probate Code §§ 5(d), 5(f), & 5A(b). *Dolenz* at 341. The court explained that collateral estoppel and res judicata are not jurisdictional issues although they may affect the merits of Creditor's claim.

Moral: Assertions of res judicata and collateral estoppel do not negate a court's jurisdiction although they may impact the court's ultimate decision in the case.

B. Transfer

1. Priority to Conditional Filing

In re Lewis, 185 S.W.3d 615 (Tex. App.—Waco 2006, mandamus denied).

The judge of a constitutional county court in a county with no other court exercising probate jurisdiction transferred the lawsuit to district court. Executrix claims that the transfer was improper and that a statutory probate court judge should be assigned to hear the case because Executrix filed her request first. Probate Code § 5(b-1) provides that

once a party requests the assignment of a statutory probate court judge, the county judge may not transfer the case to district court. The other party admits that Executrix filed her request first, but she did not pay the filing fee until after the transfer motion was filed and signed.

The appellate court agreed with Executrix and conditionally granted a writ of mandamus. The court explained that although Executrix did not pay the filing fee until after the judge signed the transfer order, it was nonetheless “conditionally” filed first and thus has priority because once the clerk received the filing fee, Executrix’s motion was deemed to have been properly filed before the transfer motion.

Note: A dissenting justice explained that the court should not have granted mandamus because at the time the county judge signed the transfer order, Executrix had not paid the filing fee and thus the filing was not yet effective.

Moral: A person filing a pleading or other document should pay the filing fee at the time of filing.

2. To District Court When Statutory Probate Court Exists

In re Estate of Alexander, 188 S.W.3d 327 (Tex. App.—Waco 2006, no pet. h.).

Beneficiary filed suit to probate a nuncupative will in a constitutional county court. The court then granted Beneficiary’s motion to transfer the case to district court even though the county has a statutory county court with probate jurisdiction. The district court found that the decedent died intestate. Beneficiary appealed.

Although Beneficiary did not raise the issue, the appellate court determined that the county court had no legal basis to transfer the case to district court because the county had a statutory county court at law with probate jurisdiction. Probate Code § 5 permits transfer of a probate matter to district court only if the county has no statutory court with probate jurisdiction. Accordingly, “the transfer order is of no effect and any subsequent orders rendered by the district court are void.” *In re Estate of Alexander* at 331.

The appellate court recognized that if a probate court lacks authority to grant a claimant full relief, then the district court will have jurisdiction to grant these remedies. The court noted that Beneficiary was seeking a constructive trust remedy which neither the constitutional county court nor county court at law had jurisdiction to impose under Probate Code § 5A. In these situations, however, a plaintiff should file suit directly (an original action) in the district court seeking these remedies.

Note: A dissenting justice argued that the appellate court lacked jurisdiction of the case because of an allegedly untimely notice of appeal.

Moral: A party who wishes to seek a remedy in a probate matter which a constitutional or county court at law may not grant, should file an original action seeking that remedy in the district court.

C. Muniment of Title

In re Estate of Kuykendall, 206 S.W.3d 766 (Tex. App.—Texarkana 2006, no pet. h.).

Testatrix's will was admitted to probate as a muniment of title. Later, Contestants attempted to set aside the probate and recover against Proponents for fraud or tortious interference with inheritance rights. The trial court granted an instructed verdict against Contestants but did not grant attorney's fees in Proponents' favor. Accordingly, both sides appealed.

The appellate court affirmed the directed verdict against Contestants because there was no evidence of probative force raising facts questions on the material issues involved in the case. In determining that there was no breach of fiduciary duty, the court pointed out that when a will is probated as a muniment of title, the named executor is not appointed and thus never assumes a fiduciary role.

Likewise, the appellate court affirmed the denial of attorney's fees because the decision to award them under the Declaratory Judgments Act is totally discretionary with the court. Proponents' uncontroverted evidence that the attorney's fees were incurred and were both reasonable and necessary was irrelevant.

Moral: The named executor in a will which is admitted to probate as a muniment of title is not court appointed and thus does not assume fiduciary duties.

D. Lost Will

1. Contents Not Proved Properly

Garton v. Rockett, 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.).

Although Executor did not possess Testator's original will, Executor attempted to probate a copy of the will. The copy appeared to comply with the requirements of a valid will under Texas law. The key issue was whether Executor substantially proved the contents of the will through the testimony of a credible witness who either read the will or heard the will read as required by the lost will procedure provided in Probate Code § 85. The jury determined that Executor had supplied sufficient evidence of the contents but the judge granted Heirs a judgment notwithstanding the verdict. The appellate court affirmed.

The court examined the evidence and concluded that Executor "failed to offer any testimony concerning the contents of the original will by a credible witness who read the

will or heard it read.” *Garton* at 145. Although Executor put on the testimony of a witness and the notary, they admitted that they either did not read the original will or could not recall its contents. Reading a copy of the will is not a substitute for reading the original will.

Moral: A proponent of a lost will must prove the contents of the lost will through the testimony of a witness who read the original will or heard the original will read aloud.

2. *Contents Proved – Clearly*

Brown v. Traylor, 210 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.).

Testator’s original will was unavailable for probate. The trial court determined that the evidence was sufficient to establish the will under Probate Code § 85 and the appellate court agreed. There was testimony from a person who read the original will who attested that a copy of the will which was admitted into evidence was an accurate copy. The court also determined that the evidence adequately established the cause of non-production and that Testator had not revoked the will.

Moral: The original will should be carefully stored so that the original is available for probate.

3. *Contents Proved – Problematically*

In re Estate of Jones, 197 S.W.3d 894 (Tex. App.—Beaumont 2006, pet. filed).

Proponent filed a will for probate claiming it was Testator’s original will. After an anonymous caller tipped off the clerk’s office, it became apparent that the will was not an original but rather a copy. Although the court later withdrew the will from probate and revoked letters on procedural grounds, the court eventually admitted the will to probate even though there was no evidence as required by Probate Code § 85 that the contents of the will be proved by the testimony of a credible witness who had read it or heard it read when the original is not produced in court.

The appellate court affirmed after making the remarkable holding that Probate Code § 85 was inapplicable. The court discussed a long line of Texas cases, including the recent case of *Garton v. Rockett*, 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.), which provide that a proponent of a lost will must comply with the Probate Code and introduce evidence of the will’s contents from someone who read the original will or heard the original read. Nonetheless, the court stated that it does

not see the ‘read it or heard it read’ requirement in section 85 as intending to determine the accuracy of a photocopy of a written will. * * * The purpose of section 85, as we see it, is to establish the contents of a written

will not in the custody of the court and that can only be reproduced by a written order of the probate court based on testimony describing the will's contents. * * * If a writing is an accurate reproduction of the valid unrevoked written will of the testator, the probate court need not rely on or require the testimony of a credible witness who testifies from memory regarding the provisions of the testator's will, because the written terms of the will are before the court.

Based on this analysis, the court concluded that section 85 does not apply when a photocopy of a will is produced in court because the copy is a written will produced in court.

Moral: A photocopy of a lost will may act as an original will even without compliance with Probate Code § 85.

Comment: I personally believe that this opinion is directly contrary to established Texas statutory and case law. A photocopy of a will is not a will just as a photocopy of a \$100 bill is not a \$100 bill. The court was obviously attempting to carry out the decedent's intent by upholding the probate of the will. However, the protections of Section 85 are there to prevent fraud by assuring that there is independent evidence of the contents of the will which cannot be presented to the court for examination. If the rules are to be changed, it is the Texas Legislature that should make the change, not the courts.

E. Appeal

1. Interlocutory Order

Ayala v. Mackie, 193 S.W.3d 575 (Tex. 2006).

County court at law admitted a foreign will to probate and granted ancillary letters testamentary. Executrix then sued Heir claiming that she and other heirs wrongfully appropriated over \$60 million in estate assets. Heirs moved to dismiss Executrix's action asserting that the county court at law had no subject matter jurisdiction. The court denied the motion and Heir appealed. The lower appellate court began its analysis by holding that the county court at law's order was final for the purposes of appeal citing the landmark Texas case of *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995). *Ayala v. Brittingham*, 131 S.W.3d 3 (Tex. App.—San Antonio 2003). The Supreme Court of Texas reversed.

The court agreed with Executrix that the county court's order was merely interlocutory and hence unappealable because numerous pleadings and issues were still pending in the county court at law. The court pointed out that the appealing parties did not seek a severance order as the court had urged in its *Crowson* opinion. In addition, "[b]ecause an order denying a plea to the jurisdiction and refusing to remove an executor does not end a phase of the proceedings, but sets the stage for the resolution of all proceedings, the order is interlocutory." The court also rejected an argument that Civil Practice & Remedies Code § 51.014(a)(2) permits an interlocutory appeal.

Moral: A party appealing a lower court's probate order must make certain the order is appealable. If in doubt, the party wishing to appeal should take some action such as seeking a severance order or asking the court for a permissive interlocutory appeal.

2. *Partial Summary Judgment*

In re Estate of Willett, 211 S.W.3d 364 (Tex. App.—San Antonio 2006, no pet. h.).

The appellate court held that it lacked jurisdiction to hear an appeal of a partial summary judgment. Probate Code § 5(g) provides that “final orders” may be appealed. The Texas Supreme Court in *Crowson v. Wakeham*, 897 S.W.3d 779 (Tex. 1995), set forth the following test to determine whether an order is final:

If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, 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 not disposed of, then the probate order is interlocutory.

There is no statute declaring a trial court's partial summary judgment to be final and appealable. Likewise, by its very terms, the partial summary judgment did not dispose of certain issues in the case. Thus, the trial court's partial summary judgment was not appealable.

Moral: A partial summary judgment is not an appealable final order. If an appeal is desired, the court may make the judgment final by a severance order, assuming it meets the criteria for severance.

F. **Bond**

In re Estate of Stanton, 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

After Temporary Administrator's appointment expired under Probate Code § 131A, he filed a request for payment of legal services he performed while serving as the temporary administrator. He also served as the attorney for several parties asking for appointment as the permanent administrator and sought to have himself reappointed as the temporary administrator. The duly appointed Attorney Ad Litem for the decedent's unknown heirs under Probate Code § 34A opposed these applications and asked the court to appoint an independent party as the administrator. The probate court agreed, appointed a third-party as the administrator, and denied Temporary Administrator's request for attorney's fees. Temporary Administrator appealed.

The appellate court determined that the amount of bond set for the administrator was proper because it exceeded the value of the property except for the property that had already been placed in safekeeping. Probate Code § 194(6).

Moral: Bond may be reduced by the amount of estate property placed in safekeeping.

G. Independent Administration

1. Appointment of Receiver

In re Estate of Trevino, 195 S.W.3d 223 (Tex. App.—San Antonio 2006, no pet. h.).

Under a highly convoluted set of facts and court orders, Attorney for Executrix obtained a order from a statutory probate court for the appointment of a receiver to protect his contingency fee interest in a business constituting estate property he successfully recovered from a conflicting claimant. Executrix appealed.

The appellate court affirmed. First, the court rejected Executrix’s claim that the appointment of a receiver usurped her authority and interfered with the independent administration of the estate. The court noted that the probate court had pendant and ancillary jurisdiction even if those matters were not appertaining or incident to an estate under Probate Code § 5(i).

Second, the court determined that the probate court did not abuse its discretion by appointing a receiver. The court engaged in a detailed review of the facts which showed that the appointment of a receiver was justified as a means of resolving years of litigation regarding the property.

Moral: A receivership may be a useful technique to resolve complex or extended litigation involving estate property.

2. Ability of Court to Construe Will

In re Estate of Bean, 206 S.W.3d 749 (Tex. App.—Texarkana 2006, pet. filed).

A dispute arose over the proper construction of Testatrix’s will. The appellate court held that the trial court had jurisdiction to construe the will even though the estate was being independently administered. The court rejected the assertion that the court lacked jurisdiction under Probate Code § 145(h) because the code does not “specifically and explicitly” provide for a court to have jurisdiction over will construction actions in an independent administration. “Where * * * the meaning of the will itself is unclear, a court must invoke its jurisdiction under Sections 5 and 5A of the Texas Probate Code to determine the proper construction of the will. * * * Once the court construes the will, the

independent administrator may then faithfully execute the will, free of judicial supervision, to effect distribution of the estate.” *Bean* at 757-58.

Moral: A court may construe a will even if the administration is independent.

H. Removal of Executor

In re Estate of Clark, 198 S.W.3d 273 (Tex. App.—Dallas 2006, pet. denied).

The appellate court agreed that the trial court did not abuse its discretion in removing Executor from office. The estate has been under dependent administration for over two decades and Executor had been in office since 2000. The court reviewed Executor’s conduct and determined that removal was appropriate under Probate Code § 222(b)(3) for failing to obey a valid court order. The trial court had ordered Executor to sell the estate’s remaining assets and almost three years later the sales were not completed. There was also evidence that Executor had overstated his progress by claiming in court reports that purchase contracts existed when in reality they did not.

Moral: Executors should timely obey court orders or else risk removal from office.

I. Appointment of Administrator – Unsuitability

In re Estate of Stanton, 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

After Temporary Administrator’s appointment expired under Probate Code § 131A, he filed a request for payment of legal services he performed while serving as the temporary administrator. He also served as the attorney for several parties asking for appointment as the permanent administrator and sought to have himself reappointed as the temporary administrator. The duly appointed Attorney Ad Litem for the decedent’s unknown heirs under Probate Code § 34A opposed these applications and asked the court to appoint an independent party as the administrator. The probate court agreed, appointed a third-party as the administrator, and denied Temporary Administrator’s request for attorney’s fees. Temporary Administrator appealed.

The court rejected Temporary Administrator’s argument that the probate court abused its discretion in appointing a third party as the administrator because the applicants had higher priority under Probate Code § 77. The court explained that all of the other applicants had a demonstrated history of exceeding their authority in this case and thus the probate court could reasonably conclude that they were unsuitable to serve. For example, Temporary Administrator filed an application to determine heirship without obtaining court permission and the other applicants continued to manage estate property without court authorization even after the temporary administration had ended.

Moral: Taking actions that require court authorization without obtaining that authorization is sufficient grounds for a court to determine that the person is unsuitable to serve as a personal representative.

J. Determination of Heirship – Authority of Attorney ad Litem

In re Estate of Stanton, 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

After Temporary Administrator’s appointment expired under Probate Code § 131A, he filed a request for payment of legal services he performed while serving as the temporary administrator. He also served as the attorney for several parties asking for appointment as the permanent administrator and sought to have himself reappointed as the temporary administrator. The duly appointed Attorney Ad Litem for the decedent’s unknown heirs under Probate Court § 34A opposed these applications and asked the court to appoint an independent party as the administrator. The probate court agreed, appointed a third-party as the administrator, and denied Temporary Administrator’s request for attorney’s fees. Temporary Administrator appealed.

The court explained the Attorney Ad Litem had standing to oppose the applications and request the appointment of an independent third-party administrator. The Attorney Ad Litem owes the same duty to the unknown heirs as he would owe to clients who expressly employ him. If the unknown heirs had been present, they could have opposed the applications and requested the appointment of an independent third-party administrator and thus Attorney Ad Litem had both the standing and the authority to do so as well.

Moral: The attorney ad litem for unknown heirs may take all actions for the unknown clients as the attorney ad litem could take for actual known clients.

K. Homestead

Norris v. Thomas, 50 Tex. Sup. Ct. J. 398 (2007).

In a certified question from a bankruptcy case pending in the United States Court of Appeals for the Fifth Circuit, the Texas Supreme Court in a 5-4 decision determined in a case of first impression that a boat does not qualify as a homestead under Texas Constitution, Article XVI, §§ 50 & 51. Although the boat was used as the claimant’s primary residence and otherwise satisfied the requirements of a homestead, it could not qualify for homestead protection because it was not attached to land. In the court’s words, “In order to qualify as a homestead, a residence must rest on the land and have a requisite degree of physical permanency, immobility, and attachment to fixed realty. A dock-based umbilical cord providing water, electricity, and phone service may help make a boat habitable, but the attachment to land is too slight to warrant homestead protection.” *Norris* at 403.

Moral: The surviving spouse and minor children of a decedent whose primary residence is a boat will not be able to claim homestead rights such as the right to occupy the homestead until death, reaching age of majority, or abandonment. Likewise, the floating home will not be protected from the estate's general creditors.

L. Attorney's Fees

1. To Beneficiaries

Paul v. Merrill Lynch Trust Co. of Texas, 183 S.W.3d 805 (Tex. App.—Waco 2005, no pet.).

Beneficiaries sued Executor asserting assorted breaches of duty. The trial court denied Beneficiaries' request for attorney's fees under Probate Code § 245 and the appellate court affirmed. The court reviewed the probate court's findings that although Executor's conduct had sometimes deviated from the ordinary standard of care, Executor's acts were not willful, malicious, or in bad faith. Thus, the probate court's denial of attorney's fees was not an abuse of discretion.

Moral: A probate court's denial of attorney fees will be hard to overturn on appeal.

2. To Executor

Paul v. Merrill Lynch Trust Co. of Texas, 183 S.W.3d 805 (Tex. App.—Waco 2005, no pet.).

The trial court awarded Executor attorney's fees for its defense of a removal action brought by Beneficiaries. The appellate court found that Executor's defense was in good faith and thus Executor was entitled to recover its attorney's fees from the decedent's estate under Probate Code § 149C(c).

Moral: A probate court's award of attorney's fees will be hard to overturn on appeal.

3. To Will Contestant

In re Estate of Arndt, 187 S.W.3d 84 (Tex. App.—Beaumont 2005, no pet.).

Both the trial and appellate court agreed that an unsuccessful will contestant was not entitled to attorney's fees under Probate Code § 243. Although the jury did determine that the will contestant acted in good faith and with just cause, the amount of fees was not submitted. Because the court did not award attorney's fees, there is an implied finding that the trial court found against the contestant on the issue of the amount of fees. Texas Rule of Civil Procedure 279. The court explained that there was no evidence of the contestant's employment arrangement with her attorneys. For example, the parties may have agreed to a contingency fee and hence no fees would be owed because the contest action failed.

Moral: When seeking attorney’s fees, a party should present sufficient evidence to prove the amount of those fees.

4. Against Personal Representative Who Neglects Duty

In re Estate of Hawkins, 187 S.W.3d 182 (Tex. App.—Fort Worth 2006, no pet. h.).

The probate court determined that Administrator did not timely distribute Intestate’s estate to Heir and ordered Administrator to pay Heir’s attorney’s fees under Probate Code § 245. Administrator appealed.

The appellate court affirmed. The court rejected Administrator’s argument that § 245 authorizes an award of attorney’s fees only for an action seeking the removal of a personal representative. Instead, the court pointed out that the statute expressly permits an award of attorney’s fees “[w]hen a personal representative neglects to perform a required duty” which in this case was the failure to make a timely distribution of estate property to Heir. The court also rejected Administrator’s argument that attorney’s fees may be awarded only after the estate is closed. The court explained that costs and attorney’s fees may be awarded at any time.

Moral: The court may award attorney’s fees anytime a personal representative fails to perform a required duty.

5. To Unsuccessful Will Proponent

Garton v. Rockett, 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.).

The named Executor attempted to probate the will. The jury found that the will was valid and that Executor filed the probate proceeding in good faith and with just cause. The judge ignored these findings and granted a judgment notwithstanding the verdict. The appellate court agreed with the trial judge that the evidence did not support the jury’s finding that the will was valid. However, the court agreed with Executor that he filed the application in good faith and with just cause and thus was entitled to a reasonable attorney’s fee under Probate Code § 243. The court explained that Executor had presented sufficient evidence to justify the jury’s finding. The court also pointed out that § 243 does not require that an executor be successful in probating the will to be entitled to a reasonable attorney’s fee.

Moral: A named executor who attempts to probate a will may recover reasonable attorney’s fees even if the attempt fails as long as the executor acted in good faith and with just cause.

6. *Beneficiary's Defense of Conduct*

In re Estate of Wilcox, 193 S.W.3d 701 (Tex. App.—Beaumont 2006, no pet. h.).

Mother's will named certain of her children as beneficiaries and executors. One of the children (Mary) sued her siblings alleging a variety of misdeeds. One of the defendant brothers (Peter) who was not serving as an executor filed a motion seeking a summary judgment. After winning the summary judgment action, Peter obtained an order granting him attorney's fees under Probate Code § 243. Mary appealed.

The appellate court reversed, holding that Probate Code § 243 did not give the court the power to award Peter his attorney fees. Peter was not attempting to have Mother's will admitted to probate or defending the validity of the will. Instead, Peter was defending himself against Mary's assertions of personal wrongdoing.

Moral: A beneficiary who defends him- or herself against accusations of personal wrongdoing relating to a testator's estate is unlikely to recover attorney fees for the defense under Probate Code § 243.

7. *Determining Work Performed*

In re Estate of Stanton, 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

After Temporary Administrator's appointment expired under Probate Code § 131A, he filed a request for payment of legal services he performed while serving as the temporary administrator. He also served as the attorney for several parties asking for appointment as the permanent administrator and sought to have himself reappointed as the temporary administrator. The duly appointed Attorney Ad Litem for the decedent's unknown heirs under Probate Court § 34A opposed these applications and asked the court to appoint an independent party as the administrator. The probate court agreed, appointed a third-party as the administrator, and denied Temporary Administrator's request for attorney's fees. Temporary Administrator appealed.

The probate court denied Temporary Administrator's request for attorney's fees because it could not distinguish the fees for work he performed as a temporary administrator from the legal fees for his services, some of which were for services not authorized by the probate court. However, the probate court indicated that he could refile his application. The appellate court determined that the refusal was justified and that Temporary Administrator still had the possibility of recovering a portion of the requested fees upon making an appropriate application.

Moral: A temporary administrator should perform only those actions authorized by the court. A temporary administrator who is also an attorney should separately identify the services performed in each capacity.

8. *Necessity of Expert Testimony to Establish*

Brown v. Traylor, 210 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.).

The jury found that Executrix acted in good faith and with just cause in defending Testator's will and determined the amount which would fairly and reasonably compensate her for the necessary and reasonable attorney's fees. Accordingly, the trial court awarded attorney's fees under Probate Code § 243.

The appellate court reviewed the evidence and found that it did not support the reasonableness or necessity of the fees. There was no expert testimony regarding the time and labor required, the skill required to perform the legal services, the customary fee for similar services, the results obtained, the experience, reputation, and ability of the attorney, and so forth. Instead, the evidence merely established what legal services were performed and how much the Executrix's attorney charged for those services. Accordingly, the court determined that the evidence was legally insufficient to support the jury's award of attorney's fees.

Moral: A person seeking attorney's fees must present expert testimony regarding the reasonableness and necessity of the fees which addresses relevant factors such as those detailed in Texas Disciplinary Rule of Professional Conduct 1.04. Evidence of the fees charged and services rendered is insufficient to support an award of attorney's fees.

9. *Award of Fees Via a Judgment Notwithstanding the Verdict*

In re Estate of Longron, 211 S.W.3d 434 (Tex. App.—Beaumont 2006, pet. filed).

The jury determined that unsuccessful will Proponent did not act in good faith and with just cause in attempting to probate a lost will. Nonetheless, the trial court granted a judgment notwithstanding the verdict and awarded Proponent his attorney's fees under Probate Code § 243.

The appellate court determined that the trial court acted improperly. The court conducted an extensive review of the evidence and concluded that Proponent did not establish as a matter of law that he acted in good faith and with just cause. Consequently, the lower court's judgment notwithstanding the verdict was erroneous.

Moral: A judgment notwithstanding the verdict is difficult to sustain on appeal.

M. Expenses of Attorney ad Litem

In re Estate of Stanton, 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

After Temporary Administrator's appointment expired under Probate Code § 131A, he filed a request for payment of legal services he performed while serving as the temporary administrator. He also served as the attorney for several parties asking for appointment as the permanent administrator and sought to have himself reappointed as the temporary administrator. The duly appointed Attorney Ad Litem for the decedent's unknown heirs under Probate Code § 34A opposed these applications and asked the court to appoint an independent party as the administrator. The probate court agreed, appointed a third-party as the administrator, and denied Temporary Administrator's request for attorney's fees. Temporary Administrator appealed.

The appellate court agreed that the probate court had the power to order a deposit from estate funds to be paid to the attorney ad litem for expenses which would be incurred in investigating the large number of potential heirs. Probate Code § 12(a). The court also stated that the attorney ad litem is entitled to reasonable attorney's fees and expenses on appeal.

Moral: A personal representative needs to be prepared to make a deposit for the expenses of the attorney ad litem.

N. Survival Action

1. *Standing of Heir*

Cooper v. Coe, 188 S.W.3d 223 (Tex. App.—Tyler 2005, pet. denied).

Plaintiff filed a survival action against Defendant, a doctor whose malpractice allegedly caused Decedent's death. Plaintiff claimed to be the "representative" of the estate of Decedent but she had not been formally appointed by a court. Instead, she was bringing the action based on her determination that no administration of Decedent's intestate estate was necessary because a family settlement agreement resolved all issues relating to the distribution of the estate and the payment of debts. Defendant claimed that she lacked authority to bring the action because she was not a legally appointed personal representative and that administration of the estate was necessary because of the outstanding debts. Accordingly, Defendant claimed that the action was now barred by the statute of limitations. The trial court agreed.

The appellate court reversed. Citing *Austin Nursing Center, Inc v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005), the court explained that in a survival action, a decedent's estate has a justiciable interest in the controversy sufficient to confer standing. Although a court-appointed personal representative normally has the capacity to bring the survival action, the heirs may bring the action if they prove that there is no administration pending and that none is necessary. In this case, there was no administration pending and none was

necessary because of the family settlement agreement. Because Plaintiff's original petition was filed within the statutory period, Plaintiff's claim was not barred by limitations.

Moral: A family settlement agreement may act to show that no administration is necessary allowing heirs to bring a survival action directly without the necessity of the appointment of a personal representative.

2. *Standing of Heir – Another Case*

Ferrer v. Guevara, 192 S.W.3d 39 (Tex. App.—El Paso 2005, pet. granted).

Daughter brought a survival action to recover medical expenses and other damages incurred by her Father prior to his death which were allegedly caused by a car accident. The defendant appealed claiming that Daughter lacked standing to bring the survival action.

The appellate court held that Daughter had standing for two distinct reasons. First, Daughter received an assignment of all Father's rights arising out of the car accident. Second, as Father's heir, Daughter had standing because she proved that no administration hearing on Father's estate was pending and that an administration was not necessary.

Moral: An heir may bring a survival action if (1) an administration of the decedent's estate is not pending and (2) no administration is necessary.

O. Injunction

Wilson N. Jones Memorial Hosp. v. Huff, 188 S.W.3d 215 (Tex. App.—Dallas 2003, pet. denied).

[Note that although this case was decided in October 2003, it did not appear in the Southwest Reporter until May 2006.]

The underlying problem in this case concerned the proper venue for a wrongful death and survival action under prior statutory provisions. One of the parties moved for a temporary injunction to prevent a district clerk from transferring the case back to a probate court. The lower court denied the motion and the appellate court agreed. The court concluded that the lower court did not abuse its discretion when it found that the movant failed to prove irreparable harm which is a prerequisite for a temporary injunction.

Moral: A party seeking a temporary injunction must be certain to establish irreparable harm and that there is no adequate remedy at law for damages.

P. Federal Probate Exception

Marshall v. Marshall, 126 S. Ct. 1735 (2006).

The United States Supreme Court clarified the extent of the “probate exception” to federal jurisdiction by allowing a claim for tortious interference with an expectancy to go forward in federal court. The Court explained that “the Ninth Circuit * * * read the probate exception broadly to exclude from the federal courts’ adjudicatory authority ‘not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent’s estate planning instrument.’ * * * The Court of Appeals further held that a State’s vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any ‘probate related matter,’ including claims respecting ‘tax liability, debt, gift, [or] tort.’” The Court then reversed holding that “the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception.”

Moral: A litigator must be prepared to argue probate matters in federal courts.

Q. Tortious Interference With Inheritance Rights

In re Estate of Kuykendall, 206 S.W.3d 766 (Tex. App.—Texarkana 2006, no pet. h.).

Testatrix’s will was admitted to probate as a muniment of title. Later, Contestants attempted to recover for tortious interference with inheritance rights. The trial court granted an instructed verdict against Contestants.

The appellate court affirmed the directed verdict against Contestants because there was no evidence of probative force showing that Proponent took action to prevent anyone from receiving a gift under the will. The court explained that the will was probated as a muniment of title and thus the beneficiaries received their legal title immediately when the will was admitted. The court discussed the leading Texas case on tortious interference with inheritance rights, *King v. Acker*, 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ), as an example of the type of conduct which needs to be proved to substantiate a claim for tortious interference.

Moral: Evidence is needed to support a claim for tortious interference with inheritance rights.

R. Pro Se

Steele v. McDonald, 202 S.W.3d 926 (Tex. App.—Waco 2006, no pet. h.).

Independent Executor decided to discharge his attorney and proceed pro se. The court determined the Independent Executor is precluded from doing so because he is not a

licensed attorney. The court explained that only a licensed attorney may appear in court because the executor is litigating rights in a representative capacity.

A well-reasoned dissent strongly disagrees. Generally, an independent executor may do anything the decedent could have done if he were still alive. Thus, it should follow that the executor should be able to appear pro se with respect to estate matters. The judge explained that “[a]ll over Texas estates are being probated, inventories prepared and filed, and estates being closed without an attorney being involved.” *Steele* dissent at 930. If the majority’s opinion is correct, all of this conduct must cease which would drastically reduce the effectiveness and efficiency of the independent administration system.

Moral: Under this case, all court appearances and filings by an independent personal representative require a licensed attorney.

Comment: Should this case be left to stand, October 18, 2006 may well be remembered as the day the Texas independent administration system began to die.

V. TRUSTS

A. Creation

Jones v. Blume, 196 S.W.3d 440 (Tex. App.—Dallas 2006, pet. denied).

Several attorneys entered into a fee sharing agreement and after a settlement was reached, litigated the amounts to which each was entitled. One of the attorneys claimed that a trust relationship existed between himself and one of the other attorneys. Both the trial and appellate courts rejected this claim. The appellate court explained that the record contained no evidence that the parties intended to create a trust with respect to the settlement proceeds and without trust intent, no trust exists. Trust Code § 112.002.

Moral: Courts are unwilling to transform non-trust relationships into trust relationships.

B. Determination of Class Gift Membership

Armstrong v. Hixon, 206 S.W.3d 175 (Tex. App. – Corpus Christi 2006, pet. filed).

Settlor created a testamentary trust with the remainder beneficiaries being the “descendants” of his brother’s children. Before the trust terminated, some of the brother’s descendants brought a declaratory judgment action to disqualify a person adopted as an adult by one of the brother’s children. The appellate court affirmed the trial court’s determination that the adopted adult did not qualify as a descendant.

The court based its decision on the law as it existed in 1964 when Settlor executed his will. The court said that under that law, an adopted adult could not inherit through adopted parents, only from them, and thus the adopted adult was not a “descendant” for purposes of the trust.

Comment: Several aspects of this case are, in my opinion, highly problematic.

1. The court discusses a second codicil to the Settlor’s will which was written in 1997, eleven years *after* Settlor’s death in 1986.
2. The court recognizes, but then ignores, the principle of republication. The court acknowledges that a codicil causes the will to be treated as one instrument speaking from the date of the codicil but then continues to apply the law as it existed on the date Settlor executed the original will (1964), not the codicil. The court does note that it believed the law as of the date of the codicil (1977) was the same.
3. The court relies heavily on intestate statutes which indicate when an adopted adult may be considered an heir and from whom this person may inherit. The court confuses how to define the word “descendant” when used in a will or trust with the term “heir” as found in intestate statutes. The court quotes and then ignores the Texas Supreme Court case of *Lehman v. Corpus Christi Nat’l Bank*, 668 S.W.2d 687, 688 (Tex. 1984), in which the court explained that “an adopted adult was ‘for every purpose, the child of his parent or parents by adoption as fully as though born of them in lawful wedlock.’”

Moral: A testator or settlor should expressly state whether adopted individuals are within a class gift such as “children” or “descendants,” and whether there are any conditions to qualify as a class member such as being adopted while a minor.

VI. OTHER ESTATE PLANNING MATTERS

A. Gifts

Decker v. Decker, 192 S.W.3d 648 (Tex. App.—Fort Worth 2006, no pet. h.).

Son and Daughter-in-law moved in with Father to care for him. Father made several inter vivos transfers of real property and a motor home to Son. Son died. After Son’s death, Father was successful in setting aside the inter vivos transfers on the grounds that he was unduly influenced and that he lacked the mental capacity to make the transfers. Daughter-in-law appealed.

The appellate court affirmed. The court engaged in a careful review of the evidence

and determined that it was sufficient to support the jury's determination that Father was unduly influenced and lacked the mental capacity to transfer the real property. Accordingly, Father still owns the real property.

With regard to the motor home, the situation was a bit more complex because Daughter-in-law had already sold the motor home to her uncle and the trial court's judgment did not award the motor home to either Daughter-in-law or Father. The appellate court found that the evidence was sufficient to support the jury's finding that Father was unduly influenced to transfer the motor home and thus the transaction should be set aside. Uncle did not obtain a finding that he was a bona fide purchaser and thus the motor home still belongs to Father.

Moral: An appellant will have a difficult time setting aside a jury verdict that a transfer was due to undue influence or made while the donor lacked capacity.

B. Malpractice

1. The Belt Opinion

Belt v. Oppenheimer, Blend, Harrison & Tate, Inc. 192 S.W.3d 780 (Tex. 2006).

Executors sued Attorneys who prepared Testator's will asserting that Attorneys provided negligent advice and drafting services. Executors believed that Testator's estate incurred over \$1.5 million in unnecessary federal estate taxes because of the malpractice. Both the trial and appellate courts agreed that Executors had no standing to pursue the claim because of lack of privity. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 141 S.W.3d 706 (Tex. App.—San Antonio 2004). The appellate court explained that privity was mandated by *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), and thus the court had no choice but to affirm the trial court's grant of a summary judgment in favor of Attorneys.

The Supreme Court of Texas reversed and held that "there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners." The court did not express an opinion as to whether Attorney's conduct actually amounted to malpractice.

Below are some of the key points made by the court:

- ***Barcelo* remains good law.** The court did not overturn *Barcelo*. The court explained that an attorney owes no duty to a non-client, such as a will beneficiary or an intended will beneficiary, even if the individual is damaged by the attorney's malpractice. The court reiterated the policy considerations supporting *Barcelo*:

[T]he threat of suits by disappointed heirs after a client's death could create conflicts during the estate-planning process and divide the attorney's loyalty between the client and potential beneficiaries, generally compromising the

quality of the attorney's representation. * * * [S]uits brought by bickering beneficiaries would necessarily require extrinsic evidence to prove how a decedent intended to distribute the estate, creating a "host of difficulties." * * * [B]arring a cause of action for estate-planning malpractice by beneficiaries would help ensure that estate planners "zealously represent[ed]" their clients.

- **Policies are different regarding suits by personal representatives.** The policy considerations discussed above do not apply to suits by personal representatives. The court explained that unlike cases "when disappointed heirs seek to dispute the size of their bequest or their omission from an estate plan," these policy considerations do not apply "when an estate's personal representative seeks to recover damages incurred by the estate itself." The court also pointed out that "while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate." The court wrapped up its opinion by concluding that "[l]imiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship."
- **Possible "recasting" is possible.** The court recognized the problem which may arise because a beneficiary is often appointed as the estate's personal representative. The court's holding creates "an opportunity for some disappointed beneficiaries to recast a malpractice claim for their own 'lost' inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate." The court minimized this possibility by stating that "[t]he temptation to bring such claims will likely be tempered, however, by the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position." The court also pointed out that any recovery goes to the estate, not the beneficiary, unless recovery flows through to the beneficiary under the terms of the will.
- **The decedent's personal representative has capacity and standing.** The court explained that it is well-accepted law that a decedent's personal representative has the capacity to bring a survival action on behalf of the decedent's estate. The court then had to address an issue of first impression in Texas, that is, does a legal malpractice claim in the estate-planning context survive a deceased client. The court explained that the common law allowed causes of action for acts affecting property rights to survive and that estate-planning negligence that results in "the improper depletion of a client's estate involves injury to the decedent's property." Thus, the court held that "legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate." Consequently, Executors had standing to bring the malpractice claim.
- **Malpractice claim accrues during the decedent's lifetime.** The court explained that the alleged malpractice occurred during the testator's lifetime even though the alleged damage (increased estate tax liability) did not occur until after the decedent's death. Thus, the court disapproved a contrary holding in the lower

court case of *Estate of Arlitt v. Patterson*, 995 S.W.2d 713, 720 (Tex. App.—San Antonio 1999, pet. denied). The court pointed out that the testator could have brought the claim himself if he had discovered the malpractice prior to his death and recovered his attorney’s fees and the costs incurred to restructure his estate plan.

- **Discovery rule applies running of statute of limitations.** In a footnote, the court addressed the issue of when the statute of limitations begins to run. The court stated that

while an injury occurred during the decedent’s lifetime for purposes of determining survival, the statute of limitations for such a malpractice action does not begin to run until the claimant “discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of [the] cause of action.” * * * In this case, the “claimant” may be either the decedent or the personal representative of the decedent’s estate.

Moral: Estate planners are now subject to potential malpractice actions brought by the personal representative of their client’s estate. Whether a practitioner may achieve protection from this liability is problematic. For example, must an estate planner review a detailed check-list of all estate planning strategies (if such a list is possible of creation) with each client and have the client affirmatively indicate that he or she understands the potential benefits of each technique but does not wish to use it?

2. ***Belt to Apply Retroactively***

O’Donnell v. Smith, 197 S.W.3d 394 (Tex. 2006).

One of the issues in this case involved whether an estate’s personal representative can sue the decedent’s former attorneys for malpractice in advising the decedent in his capacity as the executor of his wife’s estate. The lower court ruled in favor of attorneys basing its judgment on the fact that the decedent’s executor and the estate lacked privity of contract with the attorneys.

The Supreme Court of Texas granted a petition for review without reference to the merits, vacated the lower court’s judgment, and remanded so the lower court could take into account the holding in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

Moral: The *Belt* holding will be applied retroactively to causes of action that accrued and decisions rendered prior to the date of the Supreme Court’s decision. Thus, many actions thought to be concluded and subject to res judicata may be reopened.

C. Frozen Embryo Disposition Upon Divorce

Roman v. Roman, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. filed).

Husband and Wife underwent medical procedures which resulted in three embryos which were frozen for later implantation. In writing, they agreed to discard the embryos in case of divorce. When a divorce action ensued, however, Wife was successful in obtaining a court order permitting her to take possession of and use the embryos. The trial court explained that the embryos were community property and that awarding them to Wife was a “just and right and a fair and equitable division” of the property. *Roman* at 43. Husband appealed.

In this case of first impression in Texas, the appellate court reversed holding that the agreement to discard the embryos upon divorce was binding on the parties. The court conducted an extensive review of cases from other jurisdictions which have addressed the validity and enforceability of this type of agreement. The court also studied the Texas statutes governing assisted reproduction and recognized that “[n]oticeably absent from [the statutes] is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce.” *Roman* at 49. The court also determined that case law contained nothing “incompatible with the recognition of the parties’ agreement as controlling. *Id.* Accordingly, the court concluded that “the public policy of [Texas] would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo’s disposition in the event of a contingency, such as divorce.” *Roman* at 49-50.

The court then analyzed the agreement and determined that it was an enforceable contract because it “manifests a voluntary unchanged mutual intention of the parties regarding disposition of the embryos upon divorce.” *Roman* at 50.

Moral: Individuals contemplating assisted reproduction must carefully anticipate the impact of changed circumstances such as divorce.

D. Marriage-Like Relationship Doctrine

Ross v. Goldstein, 203 S.W.3d 508 (Tex. App. – Houston [14th Dist.] 2006, no pet. h.).

Son, as the independent administrator of Father’s estate, brought suit against Partner to recover estate assets. Partner claimed that he was entitled to the assets under the marriage-like relationship doctrine. Both the trial and appellate court rejected Partner’s claim and refused to recognize this doctrine. Partner asserted that the doctrine is an equitable remedy which is not against the public policy of Texas and that it would “aid the courts in addressing the growing reality of same-sex relationships.” *Ross* at 514. The appellate court explained that it was unwilling to recognize the marriage-like relationship doctrine and that “same-sex couples must address their particular desires through other legal vehicles such as contracts or testamentary transfers.” *Id.*

The court examined two provisions of Texas law; first, Article 1, § 32 of the Texas Constitution which provides that no state or political subdivision may create or recognize any legal status identical or similar to marriage for same-sex partners and second, Texas Family Code § 6.204 which states that it is contrary to Texas public policy to recognize or give effect to a same-sex marriage or civil union. Accordingly, the court held that it lacked the power to create an equitable remedy akin to marriage.

Moral: Texas does not recognize the marriage-like relationship doctrine and thus unmarried partners must use other legal techniques to achieve their estate planning desires.