

MORALS FROM THE COURTHOUSE:

A STUDY OF RECENT TEXAS CASES IMPACTING THE WILLS, PROBATE, AND TRUST PRACTICE

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22nd ANNUAL ESTATE PLANNING, GUARDIANSHIP AND ELDER LAW CONFERENCE

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EDUCATION

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J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Regent and Academic Fellow); American Bar Foundation; Texas Bar Foundation; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
Visiting Professor (virtual), University of Illinois College of Law (2017)

SELECTED HONORS

Order of the Coif
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
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SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7th ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2019); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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CASE LAW UPDATE:

INTESTACY, WILLS, PROBATE, AND TRUSTS

I. INTRODUCTION

This article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters since last year's 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 June 24, 2020 (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 that have led to time consuming and costly litigation in the past, judges may increase the likelihood of their decisions being upheld on appeal.

II. INTESTATE SUCCESSION

No cases to report.

III. WILLS

A. Interpretation and Construction

1. "Personal Effects"

Matter of Estate of Ethridge, 594 S.W.3d 611
(Tex. App.—Eastland 2019, no pet. h.).

Testatrix's self-prepared will left her "personal effects" to her nephew-in-law and did not contain a residuary clause. The nephew-in-law asserted that "personal effects" included cash, receivables, and oil and gas interests and royalties. Instead, testatrix's heirs asserted that this property passed to them via intestacy and the trial court agreed. The court also found that the nephew-in-law who was serving as the independent executor misapplied estate property and removed him

under Estates Code § 404.003(2). Nephew-in-law appealed.

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

Moral: Wills should contain residuary clauses to prevent intestacy. And, of course, wills should be prepared by attorneys skilled in estate planning and not by the testator him- or herself.

2. "Personal Property"

In re Estate of Hunt, 597 S.W.3d 912
(Tex. App.—Houston [1st Dist.] 2020, no pet. h.).

Testator's will made a gift of all of his "remaining household and personal property" to a specific beneficiary. Both this beneficiary and the remainder beneficiaries claimed that they are entitled to intangible personal property such as bank accounts and stocks. The trial court granted summary judgment that the specific beneficiary's gift included the intangible personal property. The remainder beneficiaries appealed.

The appellate court affirmed. The court explained that the term "personal property" is not ambiguous. Personal property refers to all property, tangible or intangible, that does not qualify as real property. "The legal definition of

‘personal property’ is so well established that it generally does not allow for an interpretation other than the one ascribed to it by the law.” *Id.* at 916-17. The court also reject the argument that the word “household” in the two-pronged bequest limited the gift of personal property.

Moral: The term “personal property” unambiguously encompasses both tangible and intangible person property.

3. Right of First Refusal

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

Testator’s will and codicil provided that named individuals would have the right of first refusal to purchase real property from the estate at a “sales price equal to the Appraised value of the Real Property” at the date of the testator’s death. These individuals exercised the right to purchase some, but not all, of the real property using the value of the homestead plus a prorated amount for additional acreage. The part they wanted to purchase was “better” than the remaining acreage because it included a lake and access road which arguably would make the remaining property less valuable. The court ordered a reappraisal of just the property the individuals wanted to purchase which resulted in a price over 350% higher. The named individuals objected to the new appraised value. The trial court ruled that the named individuals had the right to purchase all the real property at its appraised value but because they were purchasing less than the whole, they were entitled to an offset reimbursement. No provision of the testator’s will authorized this result.

The appellate court examined the testator’s will and codicil and found them to be unambiguous. The court explained that the trial court’s resolution effectively required the named individuals to purchase all of the land despite the clear language granting them the right to purchase “any or all” of the property based on the value at the date of the testator’s death. The court then held that the named individuals may purchase any portion of the property based on the date of death value “without regard to any diminution in value to the remainder of the property.” *Id.* at 878.

Moral: A testator granting a right of first refusal which may be exercised over only a portion of a tract of real property needs to anticipate that the person may select property which has the effect of reducing the value of the remaining property. The testator may then indicate whether a reappraisal of the selected property is needed to determine the purchase price.

4. Devise of Named Property

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

A dispute arose whether a provision in the testatrix’s will devised only the surface estate or both the surface and mineral estates. The trial and intermediate appellate courts held that the testatrix devised both estates. However, the Supreme Court of Texas reversed holding that the testatrix only devised the surface estate.

The provision in question provided the testator devised “all . . . right, title and interest in and to Ranch ‘Las Piedras.’” The court summarized a complex series of land transactions over a period of approximately eighty years. The court then took notice of the fact that the testator placed the name of the ranch in quotes supporting the argument that the term had a specific meaning to the testatrix and her family. By examining extrinsic evidence of the surrounding circumstances such as prior partition agreements using the name of the ranch which expressly stated that mineral interests were not covered, the court determined that the testatrix’s intent was to devise only the surface estate.

Moral: Devises should expressly state whether the surface estate, mineral estate, or both are included to make the exact scope of the devise clear.

B. Will Contests

1. Undue Influence

In re Estate of Scott, No. 08-19-00011-CV, 2020 WL 1685419 (Tex. App.—El Paso Apr. 7, 2020, no pet. h.).

Both the trial and appellate courts agreed that the

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