

CASE LAW UPDATE

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18th ANNUAL ESTATE PLANNING, GUARDIANSHIP AND ELDER LAW CONFERENCE

**THE UNIVERSITY OF TEXAS SCHOOL OF LAW
CONTINUING LEGAL EDUCATION**

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EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
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 (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; 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 Regent's 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, Boston University School of Law (2014)

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)
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 (2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech University) (2015) (2013) (2010) (2009) (2007) (2006)
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)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

Author and co-author of numerous law review articles, books, and book supplements including WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (6th ed. 2015); 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 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (7th ed. 2015); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3rd ed. 2007); *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

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 twenty cases which were decided after the cut-off date for *Case Law Update*, in STATE BAR OF TEXAS, 39TH ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE ch. 1 (2015). 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 April 15, 2016 (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, estate planners can 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 www.ProfessorBeyer.com and click on the “Texas Case Summaries” link.

II. INTESTATE SUCCESSION

No cases to report.

III. WILLS

A. Testamentary Capacity

In re Estate of Hemsley, 460 S.W.3d 629 (Tex. App.—El Paso 2014, pet. denied).

After the probate court determined that Testator had testamentary capacity, Contestants appealed. The appellate court affirmed. The court studied the evidence which included testimony of the attorney who drafted Testator’s power of attorney. This attorney declined to draft Testator’s will fearing a contest due to Testator’s celebrity status (e.g., the character of George Jefferson from *All in the Family* and *The Jeffersons*). The court also heard evidence from the attorney who eventually prepared the will. This attorney had no doubt that Testator had full testamentary capacity. The

two witnesses and a registered nurse caring for Testator testified in a similar manner. Nonetheless, Contestants claimed that this evidence was legally insufficient.

Moral: Regardless of how competent a person is at the time of will execution, family members dissatisfied with the terms of the will are likely to contest the will, especially if the estate has substantial value.

B. Interpretation – “Common Disaster”

Stephens v. Beard, Nos. 14-0406 & 14-0407, 2016 WL 1069089 (Tex. Mar. 18, 2016).

Husband murdered wife, immediately shot himself, but did not die until a few hours later. Each will provided for legacies to nine named individuals if they died in a common disaster or if their death order could not be determined. The trial court determined that the legacies were effective because the spouses died in a common disaster.

The appellate court affirmed in *Stephens v. Beard*, 428 S.W.3d 385 (Tex. App.—Tyler 2014). The court held that the murder-suicide was a common disaster because Husband fired both the murder and suicide gunshots in one episode. The court determined it was irrelevant to the classification of the event as a common disaster that Husband “did not successfully kill himself immediately” even though he lived almost two hours longer than Wife. *Id.* at 388.

On appeal to the Supreme Court of Texas, the court reversed without even giving the parties the opportunity to present oral arguments. The court focused on the well-recognized legal meaning of the term “common disaster” which means that the two parties “die at very nearly the same time, with no way of determining the order of their deaths.” The court held that Husband and Wife did not die in a common disaster because although their deaths were temporally close, the order of their deaths is known with certainty.

Moral: A murder-suicide will not be considered as a common disaster if the death orders can be determined.

C. Election Wills

Estate of Cole, No. 02-13-00417-CV, 2015 WL 392230 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.).

A dispute arose as to whether Husband's will put Wife to an election to either (1) assert rights to her one-half of the community estate or (2) give up these rights in exchange for her gifts under the will. The trial court determined as a matter of law that the will put Wife to an election. Wife appealed.

The appellate court reversed. The court focused on the clause of Husband's will which provided that he intended only to dispose of his property "including my one-half interest in the community property." Wife claimed that this clause means that a gift in the will of an investment account to Son would only include funds that were Husband's separate or his community one-half. The court conducted a careful review of Texas election will cases and concluded that Husband's will did not clearly and unequivocally put Wife to an election. Husband's mere statement in the will that the investment account was his separate property "does not mitigate his prior clear and specific language that he intended only to dispose of his separate property and his one-half of the community property." *Id.* at *6. At most, this created an ambiguity which precluded a holding that the will put Wife to an election.

Moral: A married testator should include an election provision in the will expressly stating whether the will is or is not intended to trigger an election by the surviving spouse.

D. No Contest Clause

1. Suit to Determine Ownership

Estate of Cole, No. 02-13-00417-CV, 2015 WL 392230 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.).

Husband's will contained a no contest clause which, among other things, provided that if Wife contested the "characterization of my property as my separate property" she would forfeit all gifts to her under the will. Wife made a claim for her community property interest against an investment account Husband classified as his separate property. The trial court determined that her claim did not trigger the no contest clause but yet submitted the issue of her good faith and just cause to the jury which subsequently decided she was lacking. Wife appealed.

The appellate court first agreed with the trial court that Wife was not contesting the will or any of its provisions. Instead, she was merely asserting a right to her own property which the will did not prevent her from doing because Husband stated he was only disposing of his separate property and his one-half of the community property. Although puzzled about why the trial court submitted the issue of Wife's good faith and probable cause to the jury, such action did not impact the judgment and thus was harmless error.

Moral: An beneficiary's action must first fall within the scope of a no contest clause before the beneficiary's good faith and just cause in bringing that action is relevant as a defense to forfeiture.

2. Suit for Breach of Duty

Ard v. Hudson, No. 02-13-00198-CV, 2015 WL 4967045 (Tex. App.—Fort Worth Aug. 20, 2015, pet. filed).

Testatrix's will contained the following *in terrorem* provision:

If any beneficiary hereunder shall contest the probate or validity of this Will or any provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits shall pass to the non-contesting residuary beneficiaries of this Will in the proportion that the share of each such non-contesting residuary beneficiary bears to the aggregate of the effective (non-contesting) shares of the residuary.... Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all provisions of this Will.

One of the beneficiaries, Mary, brought suit against the executors and trustees for breach of duty, sought temporary and permanent injunctive relief, and requested the appointment of a receiver. The fiduciaries claimed these actions triggered forfeiture of her benefits under the will. The trial court agreed and Mary appealed.

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