

# **MORALS FROM THE COURTHOUSE:**

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

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**19<sup>th</sup> 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)  
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## 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 (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)  
State Bar College – Member since 1986

## SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (6<sup>th</sup> ed. 2015); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4<sup>th</sup> ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2016); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (7<sup>th</sup> ed. 2015); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3<sup>rd</sup> 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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# MORALS FROM THE COURTHOUSE:

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

### I. INTRODUCTION

This article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. 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 12, 2017 (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.

### II. INTESTATE SUCCESSION

#### A. Adoption by Estoppel

*Dampier v. Williams*, 493 S.W.3d 118  
(Tex. App. – Houston [1<sup>st</sup> Dist.] 2016, no  
pet.).

After Intestate died, Tracy claimed that he was Intestate's sole heir as his adopted by estoppel son. The trial court rejected Tracy's claim because the alleged acts of estoppel occurred after Tracy reached age eighteen. Tracy appealed.

The appellate court affirmed. The court recognized that Tracy and Intestate had a very close father-son relationship for over thirty years. However, the relationship started when Tracy was an adult so there was never a legal impediment to a formal adoption. And, of course, Intestate could have executed a will in Tracy's favor. Accordingly, Intestate's unperformed oral promise to adopt Tracy did not operate to create a parent-child relationship by estoppel. Every

Texas case where adoption by estoppel was deemed to exist involved a child who was a minor at the time the adoption by estoppel acts occurred.

**Moral:** An adult may not be adopted by estoppel.

### III. WILLS

#### A. Testamentary Capacity

##### 1. Summary Judgment Improper

*Estate of Koontz*, No. 04-15-00820-CV,  
2016 WL 6775593 (Tex. App.—San  
Antonio Nov. 16, 2016, no pet. h.).

The beneficiary of a prior will attempted to show that Testator lacked capacity when he executed a new will revoking the will that had named him as the beneficiary. The trial court granted the executor of the new will a no-evidence motion for summary judgment and awarded attorney's fees against the beneficiary of the prior will.

The appellate court reversed. The court examined the evidence, especially the affidavit of the beneficiary of the prior will and the testimony of the attorney who drafted the new will, and determined that there was enough evidence to raise a fact question regarding Testator's capacity. For example, Testator believed his wife of over 50 years was having an affair, he attempted to lease property he no longer owned, he was suffering from bipolar disorder, and he had attempted suicide.

**Moral:** A summary judgment that a testator had testamentary capacity is improper when there is "more than a scintilla of evidence to raise a genuine issue of material fact with regard to [the testator's] testamentary capacity." *Koontz* at \*5.

## 2. Jury Verdict Upheld

*Texas Capital Bank v. Asche*, No. 05-15-00102-CV, 2017 WL 655923 (Tex. App.—Dallas Feb. 17, 2017, no pet. h.).

The trial court determined that the testator lacked capacity to execute multiple estate planning documents spanning over a decade. In addition, the trial court found that the testator was subjected to undue influence.

The appellate court made an exhaustive review of the evidence which included both medical and lay testimony. Although there was “unquestionably conflicting evidence” about the testator’s capacity, the court explained that it may not substitute its judgment for that of the jury. The court then concluded that the evidence was legally and factually sufficient to support the jury’s finding that the testator lacked capacity. Accordingly, the court did not need to address the undue influence issue.

**Moral:** Once a jury determines a testator’s capacity to execute a will, it will be difficult to have that finding overturned on appeal unless the jury’s finding is against the great weight of the evidence.

## B. Formalities

### 1. Witnesses Attesting in Testator’s Presence

*In Estate of Romo*, 503 S.W.3d 672 (Tex. App.—El Paso 2016, no pet. h.).

Contestants claimed that a will previously admitted to probate was invalid because the testator lacked testamentary capacity or executed the will when subjected to undue influence. After testimony at the trial that the witnesses did not attest in the testator’s presence as required by Estates Code § 251.051(3), the court granted the contestant’s motion for a directed verdict that the will was invalid.

The appellate court affirmed. The court explained that only a will which meets all Texas requirements may be admitted to probate. It was irrelevant that the trial was centered around two other grounds for finding the will to be invalid.

**Moral:** A court may set aside a will for failure to comply with the requirements of a valid will even if the contestant does not raise that ground in the pleadings.

### 2. Holographic Will

*Lemus v. Aguilar*, 491 S.W.3d 51 (Tex. App.—San Antonio 2016, no pet.).

Partner A and Partner B signed an unwitnessed document which they designated as a will. Except for Partner B’s signature, the document was wholly in Partner A’s handwriting. After Partner B died, both the trial and appellate courts held that the document was not a valid will because it was unwitnessed and not wholly in the deceased partner’s handwriting.

**Moral:** An unwitnessed holographic will must be entirely in the handwriting of the actual testator; a signature on a will handwritten by another person, even a co-testator, is insufficient.

### 3. Non-Statutory Requirements

*Matter of Kam*, 484 S.W.3d 642 (Tex. App.—El Paso 2016, pet. denied).

Sister sought to admit Father’s will to probate. Brother objected arguing that the will which completely excluded him was invalid for lack of proper execution. The trial court agreed and denied the probate application. Sister appealed.

The appellate court reversed and rendered judgment admitting the will to probate. Father prepared his will by using an Internet form with the help of Sister’s now ex-boyfriend who was not an attorney. At a UPS Store, Father executed the will in front of Notary who then notarized the will which included Notary’s signature. Later, two of Sister’s friends witnessed the will. Neither witnesses saw Father sign the will and they did not see each other attest to the will. Witness One was confident she attested in front of Father. However, when Witness Two attested, Father was not in the same room and thus was not a valid witness.

Consistent with prior cases, the court held that Notary could serve as the second witness to

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