

# CHANGING (PROBATE) SHIPS MID-STREAM

Presented by:

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18<sup>th</sup> Annual Estate Planning, Probate, Guardianship and Elder Law  
Conference

The University of Texas School of Law  
Continuing Legal Education

August 11-12, 2016  
Galveston, Texas

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## **Kelley M. Bentley - *Senior Associate***

Ms. Bentley focuses her practice on elder law, estate planning, trust administration, probate and guardianship. Ms. Bentley is board certified in estate planning and probate law by the Texas Board of Legal Specialization, in addition to being a Certified Elder Law Attorney by the National Elder Law Foundation. Ms. Bentley is a VA accredited claims attorney.

Ms. Bentley regularly advises clients on the preparation of estate planning documents, with an emphasis on the special needs of the elderly and individuals with disabilities. Ms. Bentley assists individuals with the preparation and administration of special needs trusts, as well as advises individuals on long-term care planning needs, including qualification for Medicaid benefits and VA benefits. Ms. Bentley advises individuals regarding all issues surrounding estate and trust administration, including representation before the Medicaid Estate Recovery Program, as well as coordination of assets and lifetime gifts to reduce income and transfer tax liability.

Ms. Bentley frequently speaks to professional organizations, as well as community groups, on elder law, estate planning and probate issues. Ms. Bentley seeks to educate and assist individuals on options for financing long-term care, as well as on estate planning techniques to mitigate tax liability.

### **Practice Areas**

Elder Law  
Estate Planning  
Trust and Estate Administration  
Special Needs Planning, including Medicaid planning  
Guardianship  
VA Benefits Planning

### **Education**

University of Houston Law Center, Houston, Texas  
LL.M in Taxation, 2010

South Texas College of Law, Houston, Texas  
Juris Doctorate, 2005  
Assistant Note & Comment Editor, South Texas Law Review

University of Houston, Houston, Texas  
B A. in Music, minor in French, 2001

### **Honors and Awards**

Listed, Thomson Reuters *Super Lawyers* "Rising Stars" (2013, 2014, 2015, 2016)  
Listed, *H Texas Magazine* "Top Lawyer" for Elder Law (2014, 2015)

### **Admissions**

State Bar of Texas, 2005

**Kelley M. Bentley**

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**Affiliations**

Member, National Academy of Elder Law Attorneys, Texas Chapter  
Member, Fort Bend County Bar Association  
Member, Real Estate, Probate and Trust Law Section, State Bar of Texas  
Member, Probate, Trust and Estates Section, Houston Bar Association  
Member, Attorneys in Tax and Probate  
Member, Disability and Elder Law Attorneys Association (Board Member)  
Member, Houston Business and Estate Planning Council  
Member, Planned Giving Council of Houston

**Professional Publications and Presentations**

State Bar of Texas, Intermediate Estate Planning & Probate, "Planning for Beneficiaries with Special Needs: How Public Benefits Affect Planning, Guardianship and Litigation," San Antonio, June 2016

Disability and Elder Law Attorneys Association, "Financing Long-Term Care Without Breaking the Bank," Houston, May 2016

Fort Bend County Bar Association, Co-Presenter, "Corporate Trustees: Not Just for Probate Anymore," Richmond, March 2016

State Bar of Texas, How to Handle Your First (or Next) Medicaid Case, "Medicaid Estate Recovery Program," Austin, December 2015

Disability and Elder Law Attorneys Association, Co-Presenter, "Guardianship for the Medicaid Recipient," Houston, December 2015

University of Texas Probate, Elder Law and Guardianship Conference, Co-Presenter, "Guardianship for the Medicaid Recipient," Galveston, August 2015

Attorneys in Tax and Probate Law, "Hot Topics in Elder Law," Houston, March 2015

University of Texas Probate, Elder Law and Guardianship Conference, Co-Presenter, "Dealing With Non-US Applicants for Medicaid Benefits," Galveston, August 2014

Attorneys in Tax and Probate Law, "Top Ten Mistakes in Drafting and Administering Special Needs Trusts," Houston, March 2014

Texas Society of CPAs CPE Expo, "Financing Long Term Care," Houston, December 2013

South Texas College of Law, 28<sup>th</sup> Annual Wills and Probate Institute, "Medicaid: All You Need to Know," Houston, September 2013

Texas Chapter of the National Academy of Elder Law Attorneys, Elder Law 101 Course, "ABCs of Medicaid Planning," Austin, September 2013

Houston Bar Association, Ethics & Elder Law, July 2011

Houston Bar Association, All Day Ethics Institute - Ethics & Elder Law, February 2011

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## I. INTRODUCTION

As the great American singer (and sausage maker) Jimmy Dean once said, “I can’t change the direction of the wind, but I can adjust my sails to always reach my destination,” Probate and the administration of estates often steer the attorney, and the family, in many different directions. Even the most seemingly straightforward of estates may contain unwanted detours and pitfalls to the unwary attorney.

Many times during the course of a probate administration, new facts come to the attention of the family and/or friend handling the affairs of the Decedent that necessitate a different approach to administering the estate. The purpose of this paper is to explore the different options of probating an estate, as well as what happens when you must change course and pursue another channel.

Section II of this paper discusses probate of a will as a muniment of title and then subsequently having to open an administration. Section III of this paper discusses options for administering the estate of an intestate decedent, as well as what happens when a will is discovered. Section IV of this paper discusses the options associated with an independent versus a dependent administration and how to convert one to the other.

A special thanks to Joy Eckelkamp for her assistance and contribution to this paper. Another special thanks to Aaron Dobbs of Roberts Markel Weinberg Butler Hailey for his assistance and contribution to this paper.

## II. MUNIMENT OF TITLE TO ADMINISTRATION

### THE ROBINSONS

Mr. and Mrs. Robinson have been married for fifty years. They own a tree house on its own island and a car. All of their other assets have a beneficiary or payable on death designation. Mr. Robinson dies (trying to fight off those pesky pirates) and Mrs. Robinson wants the easiest (and cheapest) way to settle his estate.

#### A. Muniment of Title Overview

Unique to Texas, probating a will as a muniment of title streamlines the process of admitting a will to probate and avoids the costs associated with a formal administration. A muniment of title works to transfer title to the Decedent’s real and personal property and provides a link in the chain of title ultimately transferring the property to the devisees named in the will.

### 1. Requirements for Admitting Will as a Muniment of Title

In order for a will to be admitted as a muniment of title, the following requirements must be met:<sup>1</sup>

1. The Decedent's estate must not have any creditors other than debt secured by a lien on real estate; and
2. There is no other necessity for the administration of the Estate,

Additionally, the Court admitting the will to probate must be satisfied that the Will was properly executed to qualify as a valid will.<sup>2</sup>

In order to probate a will as a muniment of title, the Applicant must file an Application with the Court that meets the requirements of the Texas Estates Code, which includes the following information:<sup>3</sup>

- Each applicant's name and domicile;
- The testator's name, domicile and, if known, age, on the date of the testator's death;
- The fact, date and place of testator's death;
- Facts evidencing that the court has proper venue;
- That the testator owned property, including a statement regarding the general nature of the property and probable value;
- The date of the will;
- The name, state of residence and physical address where service can be had on the named executor;
- The name of each subscribing witness to the will;
- Whether one or more children were born to or adopted by the testator after the date of the will, and if so, the names of the children;
- That the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate;
- Whether a marriage of the testator was ever dissolved after the making of the will; and
- Whether a state, governmental agency of the state or charity is named in the will as a devisee.

Additionally, the original will must be filed with the county clerk.<sup>4</sup> Both the Application and proof required to admit the will to probate as a muniment of title must include a statement evidencing that the testator did not have any unpaid debts.

<sup>1</sup> Tex, Estates Code §257.001(1)-(2),

<sup>2</sup> Tex. Hstates Code §251.001 ctseq,

<sup>3</sup> See Tex. Estates Code §257.05

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## Title search: Changing (Probate) Ships Midstream

First appeared as part of the conference materials for the  
18<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"Changing the Probate "Ship" Midstream: Possibilities and Limitations"