Recent Trends In Will-Contest Litigation In Texas

By

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Introduction

- This presentation will address recent issues in will-contest litigation:
- Clauses that impact will-contest litigation;
- Will-contest procedural issues;
- Recent undue influence and mental competence precedent; and
- Ethics issue – the lawyer witness.

Arbitration Rights

- Is an arbitration clause in a trust document enforceable?
- In *Rachal v. Reitz,* the court held that arbitration is a matter of contract law and that the trustee had the burden to establish the existence of an enforceable arbitration agreement.
- The court of appeals held that a trust document was not a contract between a trustee and a beneficiary and did not enforce the arbitration clause.

Arbitration Rights

- The trustee filed petition for review with the Texas Supreme Court.
- On June 8, 2012, the Texas Supreme Court granted the petition and held oral argument on November 7, 2012.
- The Supreme Court reversed the court of appeals.

Arbitration Rights

- The Court did so for two primary reasons: 1) the settlor determines the conditions attached to her gifts, which should be enforced on the basis of the settlor's intent; and
- 2) the issue of mutual assent can be satisfied by the theory of direct-benefits estoppel, so that a beneficiary's acceptance of the benefits of a trust constitutes the assent required to form an enforceable agreement to arbitrate.

Arbitration Rights

- The Texas Arbitration Act provides that a “written agreement to arbitrate is valid and enforceable …"
- Agreement can be something less than a contract.
- The Court defined it as “a mutual assent by two or more persons.”

Arbitration Rights

- Because the plaintiff had accepted the benefits of the trust for years and affirmatively sued to enforce certain provisions of the trust, the Court held that the plaintiff had accepted the benefits of the trust such that it indicated the plaintiff's assent to the arbitration agreement.
- What if a party contests a trust document and does not try to enforce any aspect of it? Arbitration may not be compelled. *See McArthur v. McArthur*, 224 Cal. App. 4th 651, 168 Cal. Rptr. 3d 785, 2014 Cal. App. LEXIS 222 (Cal. App. 1st Dist. 2014).
- Why would a party want an arbitration clause?

Arbitration Rights

- The reasoning of the Texas Supreme Court's opinion would seem to apply to estate disputes as well.
- A beneficiary of a will may be compelled to arbitrate disputes with an estate representative if the beneficiary accepts any benefits from the estate or sues to enforce a provision of the will where the will contains a sufficiently broad arbitration provision.

Arbitration Rights

- Whether a party has mental competence to execute a will is a threshold issue that may need to be decided by a court (or jury) before a party can be compelled to arbitration.
- In *In re Morgan Stanley & Co*., the Texas Supreme Court denied mandamus relief to a defendant attempting to compel arbitration where the plaintiff alleged that she was mentally incompetent to execute the contract. 293 S.W.3d 182 (Tex. 2008).

Arbitration Rights

- There is a split in courts in other jurisdictions on whether undue influence claims should be resolved by a court and not an arbitrator.
- Formation (like mental competence) but also like fraud (which goes to an arbitrator).

Jury Waiver

- In a contested probate proceeding, the parties are entitled to a jury trial as in other civil actions. *See* TEX. EST. CODE § 55.002.
- The issue, however, is whether a person can waive a right to a jury trial in a will contest.

Jury Waiver

- In *In re Go Colorado 2007 Revocable Trust*, the court of appeals granted mandamus relief to a trustee regarding the opponent's invocation of a contractual jury waiver. 319 S.W.3d 880 (Tex. App.—Fort Worth 2010, original proceeding).

Jury Waiver

- The Fort Worth Court of Appeals granted mandamus relief.
- It held that because the trust was not created when the trustee signed the document containing the waiver (in his individual capacity), that it was not a knowing and voluntary waiver as regards the trust.
- The court of appeals expressly refused to consider other theories that would allow a party to enforce such a provision as against a nonsignatory.

Jury Waiver

- In *In re Bank of America*, the Texas Supreme Court granted mandamus relief against the Fort Worth Court of Appeals and ordered it to enforce the trial court's order enforcing the contractual jury waiver. 278 S.W.3d 342, 346 (Tex. 2009).
- The Court expressly disagreed with the court of appeals regarding treating a jury waiver clause differently from an arbitration clause.

No-Contest Clause

- Texas law permits a testator to include an in terrorem or “no-contest” clause in a will that triggers forfeiture of inheritance of any beneficiary that brings a will contest.
- In terrorem clauses are given a strict construction to avoid forfeiture.

No-Contest Clause

- In *Di Portanova v. Monroe*, grandparents set up eight trusts for a grandchild that had a mental disability.
- The grandchild's guardians filed suit to modify the terms of the trusts to consolidate them resulting in a savings of over $300,000 a year.
- Other members of the family argued that by seeking the consolidation of the trusts, the guardians had caused a forfeiture of the ward's interest under the will pursuant to a no-contest or *in terrorem* clause.

No-Contest Clause

- No-contest clauses are designed to dissuade beneficiaries from filing vexatious litigation, particularly as among family members, that may thwart the intent of the grantor.
- A violation of a no-contest clause will be found only when the acts of the parties clearly fall within the express terms.
- Courts construe no-contest clauses to avoid forfeiture, while also fulfilling the settlor's intent.

No-Contest Clause

- The trial court consolidated the trusts.
- The court held that filing suit for judicial modification of the administrative terms of the trusts was not an action that was intended to thwart the settlor's intent.
- The no-contest clause did not deprive the beneficiary of a statutory right related to trust administration when such changes are not prohibited by the will.

No-Contest Clause

- A provision in a will that would cause a forfeiture of or void a devise or provision in favor of a person for bringing any court action, including a will contest, is unenforceable if (1) there is just cause for bringing the action and (2) the action was brought and maintained in good faith. *See* TEX. EST. CODE § 254.005 (formerly TEX. PROB. CODE § 64)).
- The burden is on the party asserting the claim to prove just cause and good faith.

Procedural Issues

- *In re Estate of Fisher*, 421 S.W.3d 682 (Tex. App.—Texarkana 2014, no pet.): no right to permissive appeal on whether there was evidence of undue influence as it was not a controlling legal issue.
- *Estate of Neuman*, No. 09-13-00076-CV, 2013 Tex. App. LEXIS 8490 (Tex. App.—Beaumont July 11, 2013, no. pet.): court must give 45 days notice of trial for will contest case.

Procedural Issues

- *In the Estate of Wilbur Waldo Lynch*, 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied): testamentary incapacity and undue influence are not necessarily mutually exclusive and that one (incapacity) may be a factor in the existence of the other (undue influence) so that a person can both lack testamentary capacity and be unduly influenced.
- *In re Pilkilton*, No. 05-11000246-CV, 2013 Tex. App. LEXIS 1080 (Tex. App.—Dallas February 6, 2013, no pet.): a finding of incapacity in a guardianship proceeding is different from a finding of a lack of testamentary capacity in a will contest and one will not have collateral estoppel effect in the other.

Tortious Interference Claim

- *In re Estate of Valdez*, 406 S.W.3d 228 (Tex. App.—San Antonio 2013, pet. denied).
- The court of appeals held that a party cannot assert a tortious interference with inheritance claim solely based on filing a will contest.
- Suits against attorneys and other advisors?

New Pattern Jury Charges

- In 2014, there is now a Texas Pattern Jury Charges—Family & Probate. There is a section on will contests with the following forms: PJC 230.1 Burden of Proof (Comment); PJC 230.2 Testamentary Capacity to Execute Will; PJC 230.3 Requirements of Will; PJC 230.4 Holographic Will; PJC 230.5 Undue Influence; PJC 230.6 Fraud—Execution of Will; PJC 230.7 Proponent in Default; PJC 230.8 Alteration of Attested Will; PJC 230.9 Revocation of Will; PJC 230.10 Forfeiture Clause.

Recent Precedent: *In the Estate of Minton*

- In *In the Estate of Minton*, the court affirmed a jury's finding that the decedent did not have mental competence to execute a POD agreement with the bank naming a non-family member as a beneficiary. No. 13-12-00026-CV, 2014 Tex. App. LEXIS 1061 (Tex. App.—Corpus Christi, January 30, 2014, pet. denied).
- Minton entered into POD contracts where he designated Garza, a retired law enforcement officer who had been friends with Minton since February 2007, as the beneficiary.

Recent Precedent: *In the Estate of Minton*

- Garza challenged the sufficiency of the evidence to support the jury's finding of mental incompetence.
- The court of appeals held that the legal standards for determining the existence of mental capacity for the purposes of executing a will or deed are substantially the same as the standards for mental capacity to execute a contract.
- Garza argued that because there was evidence that the decedent was mentally competent on the day that he signed the POD agreement, that evidence from other time periods was not relevant.

Recent Precedent: *In the Estate of Minton*

- "We hold that the jury was entitled to consider evidence of Minton's mental capacity prior and subsequent to the execution of the P.O.D. contracts if the trial court could have considered it probative and relevant to his mental state on March 25, 2010."
- The court then held that sufficient evidence supported the jury's determination because in the month of, and the months before and after, he signed the POD agreement, the decedent refused medical treatment even though he was bed-ridden and needed it, spoke to people who were not there, voluntarily sat for hours in his own feces and urine, and medical providers indicated he was confused and senile.
- Interesting Issue: other courts have held that mental competence to execute a will is a lower standard than what is required to sign a contract.

Recent Precedent: *In re Estate of Chapman*

- In *In re Estate of Chapman*, the court reversed a summary judgment on claims of mental incompetence and undue influence. No. 14-13-00041-CV, 2014 Tex. App. LEXIS 735 (Tex. App.—Houston [14th Dist.] January 23, 2014, no pet.).
- The court of appeals reversed summary judgment for defendant, holding that there were fact issues on both claims.

Recent Precedent: *In re Estate of Chapman*

- The son produced evidence that testator had a history of alcoholism, but the court held that alcoholism by itself is not synonymous with a lack of testamentary capacity and does not create a presumption of incapacity.
- Doctor's notes showed that she identified herself as married, but was divorced.
- The court held that this suggested that she could not correctly identify her next of kin.
- There was evidence that the same condition existed when the will was executed.

Recent Precedent: *In re Estate of Chapman*

- Regarding undue influence, the court focused on evidence that the proponent told the attorney that "[Testator] really does not want to address these issues, but she needs to because her health is not good."
- The court held that this statement indicates that testator did not wish to make a will at all.
- Also, the proponent selected the attorney to draft the new will, paid for same, transported the testator to the attorney's office, was there through all meetings, and took control of all changes and edits to the will.

Recent Precedent: *Pulido v. Gonzalez*

- In *Pulido v. Gonzalez*, the court affirmed the trial court's summary judgment dismissing a contestants' undue influence claim. No. 01-12-00100-CV, 2013 Tex. App. LEXIS 11096 (Tex. App.—Houston [1st Dist.] August 29, 2013, no pet.).
- Pulido sued Gonzalez for undue influence and other claims based on a deed that Pulido signed, transferring her house to Gonzalez.
- Pulido, who denied signing the warranty deed, testified that she believes that Gonzalez forged her signature on the document.

Recent Precedent: *Pulido v. Gonzalez*

- According to Pulido, Gonzalez mistreated her during the year she was in her care and kept Pulido isolated from her family.
- The court held that this evidence raised, at most, a fact issue as to whether Gonzalez had an opportunity to exert influence over Pulido.
- But, the court held that a mere opportunity to unduly influence someone is no proof that influence has actually been exerted.
- The court held that nothing in the summary judgment record raised a fact issue that Gonzalez actually "coerced, intimidated, or otherwise forced" Pulido to sign the warranty deed.
- A dissenting justice would have reversed the summary judgment on undue influence.

Recent Precedent: *Truitt v. Byars*

- In *Truitt v. Byars*, the court of appeals affirmed a trial court's finding of undue influence. No. 07-11-00348-CV, 2013 Tex. App. LEXIS 6705 (Tex. App.—Amarillo May 30, 2013, pet. denied).
- In 2009, mother executed a will, giving the majority of her property to grandchildren and great-grandchildren.
- The mother had dementia and other serious health problems.
- Truitt then moved into town and starting "caring" for her mother.

Recent Precedent: *Truitt v. Byars*

- Truitt had a new power of attorney signed naming her as her mother's representative for health care and financial decisions.
- Truitt hired completely new doctors, changed medications, hired new attorneys, and had a new will executed in 2010 with completely new terms and providing for a substantial devise to herself and no devise to grand-children and great grand-children.
- A doctor believed the mother was minimally competent, and Truitt could have been exerting undue influence over her.
- Given the mother's poor physical and mental health, along with the events surrounding the execution of a new power of attorney and the 2010 will, the court held that there was sufficient evidence to support the undue influence finding.

Other Recent Precedent

- *In re Pilkilton*, No. 05-11000246-CV, 2013 Tex. App. LEXIS 1080 (Tex. App.—Dallas February 6, 2013, no pet.). Affirmed finding of mental competence to execute new will.
- The court concluded that "although evidence was presented that tended to show that he had dementia, Alzheimer's disease, and other conditions that might affect his mental capacity, the only testimony from people who actually saw him and talked to him that day supported the court's finding that he had the necessary testamentary capacity that day."

Other Recent Precedent

- *Le v. Nguyen*, No. 14-11-00910-CV, 2012 Tex. App. LEXIS 8857 (Tex. App.—Houston [14th Dist.] October 25, 2012, no pet.). Affirmed finding of no mental competence.
- Decedent was in the hospital for terminal gastric cancer at the time that he executed his will.
- The jury could consider the fact that the fiancée was a named beneficiary under the new will and therefore was an interested witness at trial to discredit her testimony that the decedent knew what he was doing.

Other Recent Precedent

- *In the Estate of Sidransky*, 420 S.W.3d 90 (Tex. App.—El Paso August 15, 2012, pet. denied). Dismissed undue influence claim.
- Fact that daughter was close with testator, took care of testator's financial matters, and was involved in planning and execution of will only established an opportunity to unduly influence, not that she actually did so.
- Interesting Issue: If daughter took care of financial matters, was she a fiduciary? Did she have burden to prove no undue influence?

Other Recent Precedent

- *The Estate of Clifton*, No. 13-11-00462-CV, 2012 Tex. App. LEXIS 6400 (Tex. App.—Corpus Christi August 2, 2012, no pet.). Reversed jury's undue influence finding.
- There was evidence that the party accused of undue influence had told testatrix that niece (who was cut out of new will) was not treating testatrix's sister well.
- The court held that the testimony was not sufficient to establish the exertion of undue influence.

Other Recent Precedent

- *In re Estate of Arrington*, 365 S.W.3d 463 (Tex. App.—Houston [1st Dist.] March 1, 2012, no pet.). Affirmed finding of mental competence.
- No evidence demonstrated that the testator discussed his children or the approximate nature of his property with the witnesses on the date he executed his will.
- Court held that evidence of general mental condition on the day he executed his will and the attending months before and after was sufficient to support a finding of mental competence.

LAWYER AS WITNESS

- Scenario: Lawyer drafting will or trust instrument represents Estate/Executor/Trustee after death.

- Challenge filed alleging incompetence.

- Question: Can lawyer ethically continue representation if he/she is likely witness?

TRDC 3.08 Prohibits a lawyer from accepting or continuing representation if:

- appearing as advocate, when
- knows or believes his/her testimony is necessary to establish essential fact on client's behalf, UNLESS

Testimony is on:

- uncontested issue
- relates to formality and no opposition testimony
- testimony relates to fees
- lawyer is *pro se* party
- lawyer has promptly notified opponent of fact that lawyer will be witness AND disqualification would work hardship on lawyer's client

Rule 3.08(c): Another lawyer in firm cannot be advocate if testifying lawyer prohibited UNLESS client gives informed consent.

Cmt. 2: "One important variable is the anticipated tenor of lawyer's testimony"

- if testimony adverse, to client, lawyer is OUT (3.08(b)
- otherwise, 3.08(a) and (c) govern

Rationale:
- To avoid confusion (Cmt. 4)
- To avoid prejudice to client's case (Cmt. 3)

LAWYER CAN BE ADVOCATE AND WITNESS
IF CLIENT GIVES INFORMED CONSENT

Ask yourself: Will it hurt client's case?

Risk: Attorney/Client privilege could be waived

Opponent's strategy call: Better not to challenge testifying lawyer?

WHERE RULE 3.08 INAPPLICABLE

- Disqualification on other grounds
  e.g., Rule 1.09 [former client, substantially related matter]

- Lawyer implicated as actor whether named as party or as unnamed conspirator (claims of undue influence, tortious interference)

SUMMARY

Make early assessment of whether lawyer is:

- necessary witness for case
- materiality of testimony
- assessment of prejudicial effect
- assurance of client getting impartial advice

Usually not a problem, since there are other means of providing or corroborating testimony

Conclusion

- The Authors hope that this presentation was helpful in pointing out many of the important and recent issues that arise in the area of will-contest litigation.