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ARBITRATION

***Nw. Constr. Co. v. The Oak Partners L.P.*, 248 S.W.3d 837 (Tex. App.—Fort Worth 2008, pet. denied)**

In 2004, Oak Partners L.P. ("Oak Partners") entered into a construction contract ("General Contract") with Northwest Construction Company, Inc. ("Northwest") to design and construct an assisted living facility. The General Contract required the facility to be constructed as "more particularly described in the design development plans and specifications and design criteria identified in Exhibit 'B'" to the General Contract. In turn, Exhibit "B" to the General Contract provided that the project specifications were in a project manual that incorporated the " 'General Conditions for the Contract for Construction,' AIA Document A201, Fourteenth Edition, 1997, Articles 1 through 14 inclusive." ("AIA Document"). The AIA Document contained a mandatory arbitration clause that applied to virtually all claims relating to the General Contract. After entering into the contract with Oak Partners, Northwest entered into subcontract agreements with other entities; those subcontracts contained terms that incorporated the dispute resolution provisions in the General Contract.

On August 30, 2005, after Northwest constructed the facility, Oak Partners sued Northwest for breach of contract, claiming that the facility failed inspections by the Texas Department of Aging and Disability Services ("Department") because certain parts of the design and construction did not comply with Department rules and regulations. Northwest counterclaimed for breach of contract and quantum meruit, promissory estoppel, and foreclosure of statutory and constitutional liens. In January and February 2006, several subcontractors sued Oak Partners and Northwest for money owed on the project. Northwest filed motions to consolidate the cases, engaged in discovery, filed several motions and sought summary judgment. Northwest also responded to a subcontractor's summary judgment motion. The cases were eventually consolidated and additional subcontractors intervened. Thereafter, Northwest filed a motion to compel arbitration, which the trial court denied on the basis that Northwest had waived its right to arbitration by substantially invoking the judicial process to the detriment of the opposing parties. Oak Partners was the only party to oppose Northwest's request for arbitration on appeal.

The court of appeals affirmed in part and reversed in part, remanding the case to the trial court with instructions to compel arbitration of the subcontractors' claims only. The court of appeals ruled that Oak Partners was prejudiced by Northwest's substantial invocation of the judicial process; however, because none of the subcontractors presented evidence to the trial court regarding prejudice, Northwest's request for arbitration with respect to their claims was appropriate.

INSURANCE

***Brown & Brown of Tex., Inc. v. Omni Metals, Inc*, No. 01-05-01190-CV, 2008 WL 746522 (Tex. App.—Houston [1st Dist.] March 20, 2008, no pet.)**

This case involves the issue of whether a person who is not a party to an insurance policy can sue an insurance company or its agent due to the defendants' providing the plaintiff with incorrect information regarding the scope of coverage. The plaintiff sued the insurance company and its agent on negligence and Texas Deceptive Trade Practices Act ("DTPA") theories based on the insurance agent's oral statement and written certificate of insurance that both erroneously

represented that coverage existed for the plaintiff's property.

After a jury trial, which found in favor of the plaintiff, the insurer and its agent appealed. The defendants argued that the plaintiff could not have detrimentally relied on either the certificate of insurance or the statements from the agent.

The court of appeals noted that both negligent misrepresentation and DTPA required detrimental reliance. The court further noted that a party to an arms-length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and the failure to do so is not excused by mere confidence in the honesty and integrity of the other party. The court noted Texas Supreme Court precedent that those who take certificates of insurance at face value did so at their own risk. The court noted that the plaintiff chose to rely on oral representations, something even a party to a contract cannot do when the oral representation directly contradicts the express, unambiguous terms of a written contract. The court held, as a matter of law, that the plaintiff could not detrimentally rely on either the certificate of insurance or the oral representations, and reversed the jury's award.

The dissent disagreed that the plaintiff was precluded from relying on the insurance company's certificate of insurance or oral statements simply because he could have requested and obtained a policy that would have fully disclosed the terms of coverage. The dissent concluded: "Because I believe the majority opinion is unprecedented, contrary to the established law of the case upon which the case was tried below, contrary to the established law of this State, sweeping in its consequences, and profoundly damaging to the fabric of the law, I respectfully dissent."

***Charida v. Allstate Indem. Co.*, No. 01-07-00278-CV, 2008 WL 1747784 (Tex. App.—Houston [1st Dist.] April 17, 2008, no pet.)**

This case involves the issue of whether an insurer had to provide coverage under an underinsured/uninsured policy to a daughter of the insured who was injured by the insured's negligence. The plaintiff was severely injured while riding in a car owned and driven by her father, who was insured by Allstate Indemnity Company. The father failed to stop at a red light and collided with another car. After exhausting the available liability coverage under her father's policy, the daughter sought to recover under the underinsured motorists provision of the policy. When Allstate refused coverage, the daughter sued for breach of contract and violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act ("DTPA").

Allstate's policy stated that the uninsured motor vehicle did not include any vehicle or equipment owned by or furnished to or available for the use of the policy holder. Allstate contended that because the vehicle in which the daughter was injured was owned by her father, the insured, it could not have been an underinsured/uninsured vehicle as defined by the policy. The trial court entered a summary judgment in favor of Allstate. The daughter appealed, contending that the definitional exclusion was invalid and enforceable under Texas Insurance Code section 5.06-1 in light of the circumstances of the case because it contravened public policy.

The court of appeals noted that Texas Supreme Court precedent obligated Allstate to pay the daughter the statutorily imposed minimum limit of liability insurance, which Allstate did. The court also noted, however, that the precedent did not support the conclusion that despite the definitional exclusion at issue, the daughter was entitled to uninsured motorists benefits in addition to the statutorily imposed minimum liability limit. The court concluded that underinsured/uninsured motorists coverage is intended to protect against the negligence of strangers to the policy, not family members. Therefore, the court affirmed the summary judgment in favor of Allstate.

***Ins. Network of Texas v. Kloesel,* No. 13-05-00680-CV, 2008 WL 907479 (Tex. App.—Corpus Christi-Edinburg, April 3, 2008, no pet.)**

In 1993, Harvey and Diana Kloesel (the "Kloesels") approached Gary Nitsche ("Nitsche"), an Insurance Network of Texas (INT) insurance agent, about purchasing a general liability policy for their restaurant. Nitsche secured a policy for the Kloesels from Providence Washington Insurance Company ("Providence") for the 1993-1994 term, which included coverage for communicable disease claims. During that same policy year, the Kloesels asked Providence to extend its coverage to the restaurant's horse-and-carriage operation. Providence subsequently opted not to renew the Kloesels' policy. As a result, INT advised the Kloesels to change carriers and subsequently procured for them a general liability policy from Burlington Insurance Company ("Burlington") for the 1994-1995 policy year. The Burlington policy covered claims arising from the horse-and-carriage operation but excluded communicable disease claims. The Kloesels paid their premiums and maintained coverage through Burlington from 1995 to 1998.

During the 1997-1998 policy year, approximately ninety customers contracted Hepatitis A at the Kloesels' restaurant. According to the Texas Department of Health, the hepatitis outbreak was attributed to an infected food handler. The Kloesels filed claims under the Burlington policy, which were denied based on the communicable disease exclusion.

Two separate lawsuits were subsequently filed against the Kloesels by customers who had contracted Hepatitis A. Burlington defended the Kloesels in both lawsuits under a reservation of rights. On December 13, 1999, one set of customers, the Simpsons, won a $242,625 judgment against the Kloesels ("*Simpson* Judgment"). Eight months later, on August 31, 2000, a second set of customers, the Lairds, obtained a judgment worth $323,441. ("*Laird* Judgment").

INT refused to indemnify the Kloesels with respect to the *Simpson* and *Laird* Judgments. The Simpsons and the Kloesels eventually entered into an "Assignment and Covenant not to Execute" in which the Kloesels assigned to the Simpsons all claims that the Kloesels may have had against INT.

Burlington subsequently filed a declaratory judgment action in which a federal court held that "'Burlington [was] not required to indemnify [the Kloesels] for any damages recovered against [the Kloesels] based on [their] patrons contracting Hepatitis A, since the Burlington policy contained an enforceable 'communicable disease' exclusion.' "

The Kloesels subsequently sued INT. At trial, the Kloesels obtained a favorable jury verdict that found as follows: (1) INT's negligence proximately caused the Kloesels' damages; (2) the Kloesels did not commit negligence that proximately caused their damages; (3) INT was completely liable for the Kloesels' damages; (4) INT made certain misrepresentations relating to the Kloesels' insurance policy, thus causing their damages; (5) INT engaged in an unconscionable action that was the producing cause of damages to the Kloesels; (6) a $929,180.82 award could reasonably compensate the Kloesels for their damages; and (7) the attorney's fees awarded to Hall were reasonable.

The final judgment entered against INT awarded the Kloesels $ 929,180.82 in actual damages, plus prejudgment interest, attorney's fees, and court costs. INT filed motions for new trial and judgment notwithstanding the verdict. The motions were denied, but the trial court eventually denied recovery on the DTPA and Insurance Code claims, resulting in the elimination of the attorney's fees award.

On appeal, INT attacked the jury verdict and final judgment on multiple grounds, one of which challenged the sufficiency of the evidence supporting the jury's finding that the Kloesels were not negligent in failing to read the policy.

However, in rejecting INT's challenge, the court of appeals relied on testimony from the Kloesels that established the following: (1) the Kloesels did not read the Burlington policy for the 1997-1998 policy year, nor did they fully read the previous Burlington policies; (2) in the event that the Kloesels read the communicable disease exclusion in any of the binders or quotes provided by INT, they did not comprehend or investigate its import; and (3) the Kloesels' decision not to familiarize themselves with the exclusion was predicated upon their reliance on Nitsche's knowledge and the assumption that he had properly procured a policy. Based on this testimony, the court of appeals held that a jury could have concluded that it was reasonable for the Kloesels to not understand the policy exclusion regarding "communicable diseases" or otherwise comprehend the significance of the exclusion.

INT also challenged the jury's finding that it was negligent in the procurement of an appropriate insurance policy. In analyzing this finding, the court of appeals noted that "[A]n insurance [agent], in dealing with his clients, ordinarily invites them to rely upon his expertise in procuring insurance that best suits their requirements. It is not necessary for the client in order to establish a breach of duty to prove that he laid out for the [agent] the elements of a contract of insurance. It is sufficient to show that he authorized procurement of the insurance needed to cover the risks indicated and that the [agent] agreed to do so but failed or neglected to perform his duty."

Finally, the court of appeals upheld the negligence finding against INT on the basis that the jury was provided with evidence that Nitsche failed to purchase a policy in conformance with the Kloesels' request for a policy that provided coverage "if a customer got sick or if there was anything wrong with the food." The appellate court concluded the jury could have rationally determined that the Burlington policy's communicable disease exclusion specifically contravened this instruction and, therefore, Nitsche failed to procure a policy that a reasonably prudent agent would have procured.

In summary, the court of appeals held that (1) the evidence was legally and factually sufficient to find that INT's procurement of the Burlington policy was the proximate cause of the Kloesels' damages and (2) that the evidence was factually sufficient to support the jury's negative finding of contributory negligence on behalf of the Kloesels.

Medical Malpractice

***Dill v. Fowler*, No. 11-07-00227-CV, 2008 WL 1722249 (Tex. App.—Eastland April 10, 2008, no pet.)**

This case involves the constitutionality of a statute that lowers the standard of care for emergency room physicians. The decedent was taken to an emergency room suffering from internal bleeding and died shortly after surgery. The decedent's survivors sued the emergency room physicians for medical malpractice. The defendants filed a motion for summary judgment, arguing that Texas Civil Practice and Remedies Code section 74.153 lowered their standard of care to willful and wanton negligence and that the plaintiff had no evidence of a breach of that standard.

The plaintiffs conceded that the statute applied and that they did not have evidence of willful and wanton negligence. However, they argued that the statute was unconstitutional as it violated the Texas Constitution's equal protection provision. After the trial court granted the defendants' motion for summary judgment, the plaintiffs appealed.

The court of appeals found that the dispositive question was whether a rational basis existed for imposing a lower standard of care when a patient receives emergency care versus non-emergency care. The court of appeals cited legislative history indicating that the bill supporters complained that emergency room physicians were required to treat anyone who walked in, but faced the possibility of having their actions compared to those of a physician in his or her office, and that emergency

care was often provided without medical history and under extreme time pressures. The legislative history also indicated that there was a medical malpractice crisis that existed and that it caused a material adverse affect on the delivery of healthcare in Texas.

The defendants argued that the statute had a legitimate interest in insuring the availability of emergency medical care. The plaintiff responded that the physicians' concern about unfair liability for providing emergency services was best addressed through jury instructions limiting any comparison of the defendant's conduct to a physician in the same or similar circumstances.

The court of appeals found that the Legislature could have rationally decided that the statute would help protect physicians from rising malpractice premiums and would make it easier for hospitals to recruit on-call physicians. The court noted that the Legislature could also have rationally determined that the advantage of increased availability of emergency care statewide would offset any detrimental impact on individual cases. The court concluded that because the statute was rationally related to a legitimate governmental purpose, it was constitutional. The court affirmed the trial court's summary judgment for the defendants.

***Rankin v. M Healthcare Sys. of San Antonio, Ltd.*, No. 04-07-00305-CV, 2008 WL 587444 (Tex. App.—San Antonio March 5, 2008, pet. filed)**

This case involved the issue of whether the ten-year statute of repose in section 74.251(b) of the Texas Civil Practices and Remedies Code violates the open-courts provisions of the Texas Constitution.

On November 9, 1995, physicians performed a hysterectomy on the plaintiff. In July of 2006, the plaintiff, after visiting a number of doctors, underwent exploratory surgery, during which a surgical sponge was found and removed from her abdomen. On October 27, 2006, the plaintiff filed suit against the previous hospital and on January 8, 2007, she filed a lawsuit against the original physicians who left the sponge in her. Each defendant successfully moved for summary judgment based on the ten-year statute of repose found in section 74.251(b) of the Civil Practice and Remedies Code. The plaintiff appealed.

The court of appeals stated that to establish an open-courts violation the plaintiff must satisfy two requirements: (1) a cognizable, common-law claim that is statutorily restricted, and (2) the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis.

Regarding the first requirement, the court noted that historically a patient could have brought a cause of action for negligent failure to remove a surgical sponge more than ten years after surgery, and therefore a well established common-law claim existed. Furthermore, the court said that because the event giving rise to the cause of action occurred within the ten-year repose period, the plaintiff had a vested right.

Regarding the second prong of the open-courts test, the court noted that there had to be a showing that the legislative basis for section 74.251(b) outweighed the denial of the plaintiff's constitutionally guaranteed right of redress. In making this determination, the court of appeals considered both the general purpose of the statute and the extent to which the litigant's right to redress was affected. The court found that the purpose of this section was legitimate and that it was created to address concerns over insurance rates and the cost of healthcare.

The court of appeals concluded that the Legislature was entitled to set a period of time within which claims may be brought, but that it may not deny a plaintiff a reasonable opportunity to discover the alleged wrong and bring suit. The court concluded that section 74.251(b) bared the plaintiff's claims against the defendants before there was a reasonable opportunity to discover the wrong and bring suit, and it therefore violated the Texas Constitution's open court's provision. The

court reversed the trial court's summary judgment and remanded for further proceedings.

PERSONAL INJURY / ARCHITECTS & ENGINEERS LIABILITY

***Dukes v. Philip Johnson / Alan Ritchie Architects, P.C.*, 252 S.W.3d 586 (Tex. App.—Fort Worth 2008, pet. denied)**

This case involved the June 16, 2004 drowning deaths of four people in the Fort Worth Water Gardens (the "Water Gardens"), an outdoor park and water sculpture that is a popular Fort Worth tourist attraction. The Water Gardens were designed by architects Philip Johnson and John Burgee. In the 1990s, the City restored and renovated the Water Gardens in conjunction with the Fort Worth Convention Center Renovation Project (the "Project"). The City hired Huitt-Zollars, Inc. and Emile Keller ("Huitt/Keller") to perform an architectural assessment of the Water Gardens in 1994. Five years later, the City contracted with Philip Johnson/Alan Ritchie Architects ("Johnson/Ritchie") and Peter Johantgen ("Johantgen") as consulting architects. In 2001, the City hired Austin Commercial, Inc. ("Austin") to act as the project manager for the Project, which was adjacent to the Water Gardens.

Shortly after the accident in question, the Dukes filed suit against the City, several architectural and engineering firms, and individual architects, engineers, and contractors, seeking to recover damages under the Texas wrongful death and survival statutes. The Dukes settled with the city in 2005 but continued to prosecute their claims against the remaining parties, which comprised architectural firms, engineering firms and individual architects and engineers (collectively "Architects and Engineers") who were involved with the design or restoration of the Water Gardens.

The Architects and Engineers filed motions for summary judgment. Each defendant alleged that it owed no duty to the Dukes. In addition, Johnson/Ritchie claimed there was no proximate cause between their actions and the drowning deaths and that the Dukes' claims were barred by limitations. The trial court granted summary judgment to all of the moving parties without specifying the grounds.

The court of appeals upheld the trial court's judgment in its entirety based primarily on the absence of any legal duty owed to the decedents. For example, with respect to Johnson/Ritchie, Johantgen, and Huitt/Keller, the Dukes alleged that the Architects and Engineers owed a duty to the decedents because, "as professionals, they were under an ethical obligation to report any unsafe or hazardous conditions that they observed during their review of the Water Gardens." However, the court of appeals held that, under Texas law, there is no binding authority to support the Dukes' contention that a court is required to consider professional codes of ethics when conducting a duty analysis.

The Dukes also alleged that the Architects and Engineers owed a duty of care arising from their contractual relationships with the city. In that regard, the court of appeals acknowledged that a contract for professional services may create a duty by the professional to exercise the degree of care, skill, and competence that reasonably competent members of the profession would exercise under similar circumstances, but the scope of such duty depends on the terms of the governing agreement. However, the court of appeals held that, contrary to the Dukes' assertion, the Architects' and Engineers' contracts with the city did not require them to address safety issues. Therefore, because the imposition of any duty on the Architects and Engineers depends on the contract entered into with the city, and because there is no evidence that the contracts required the Architects and Engineers to report or make safe any hazards detected, the court of appeals rejected the Dukes' assertion that a duty arose from a contractual relationship with the city.

With respect to Austin, the Dukes alleged that Austin was responsible for the negligence of the Architects and Engineers whose work it supervised and coordinated because the original and amended contracts with the city conferred a

right on Austin to control the work of the individuals whom it coordinated. Thus, because Austin retained control of the work of the Architects and Engineers, the Dukes claimed that Austin was responsible for the errors and omissions of the Architects and Engineers as its subcontractors. The court of appeals held that, "[e]ven if Austin's contract with the City imposed a duty upon it, Austin still could not be held liable for the negligence of its subcontractors simply because the Dukes failed to present evidence demonstrating that these subcontractors owed a duty to decedents." By failing to establish a duty, the court held, the issue of whether the subcontractors were negligent could not be reached. Therefore, Austin's potential liability for work performed by its subcontractors was a nonissue.

PERSONAL INJURY / DRAM SHOP ACT

***Sheffield v. Drake*, No. 11-06-00236-CV, 2008 WL 2133056 (Tex. App.—Eastland May 22, 2008, no pet.)**

This case involves a claim under the Dram Shop Act for the death of a teenager after an automobile collision. The plaintiffs were survivors of the decedent, who died in a motor vehicle accident. The plaintiffs sued IGA, a local grocery store, for providing alcohol at the party where the decedent and others were intoxicated and underage. Specifically, there was evidence that an employee of the IGA grocery store sold beer to an individual with the knowledge that the individual would offer the beer at a party. IGA filed a no-evidence motion for summary judgment based on the Dram Shop Act, asserting there was no evidence that it violated the act and no evidence of proximate cause.

The Dram Shop Act creates a statutory cause of action for:

> Providing, selling, or serving an alcohol beverage . . . upon proof that: (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

The plaintiffs argued that this provision did not apply because the decedent was under the age of eighteen. The court of appeals affirmed the trial court's granting of IGA's summary judgment motion. The court of appeals held that under either common law or the Dram Shop Act, the defendant would not be liable to the plaintiffs. The court stated:

> The [decedent's] consumption of alcohol is too remote from [IGA's employee's] and IGA's actions to impose liability. The mere fact that an IGA employee purchased beer from the store and gave the beer to his wife, who then gave the beer to her brother-in-law, who then shared the beer with his friends, one of whom subsequently drove while intoxicated, does not make [IGA's employee] or IGA liable as a provider.

PERSONAL INJURY / PRODUCTS LIABILITY

***Merck and Co., Inc. v. Garzy*, No. 04-07-00234-CV, 2008 WL 2037350 (Tex. App.—San Antonio May 14, 2008, no pet. h.)**

This case involves whether a plaintiff's evidence was sufficient to support a jury's finding of causation. A decedent who had been taking the prescription drug Vioxx died of a heart attack. The decedent's survivors sued the drug manufacturer, claiming the drug caused the decedent's death under design and marketing defect strict liability claims. After a jury verdict for the plaintiffs, the drug company appealed.

The court of appeals reversed the jury's verdict because there was no evidence of causation. The court of appeals noted that under either a design or marketing defect claim, the plaintiffs were

required to prove both general and specific causation. The court defined general causation as whether a substance is capable of causing a particular injury in the general population, and defined specific causation as whether the substance caused the particular individual's injury. The defendant argued that the plaintiffs' evidence on specific causation was insufficient because they did not rule out with reasonable certainty the most plausible cause of the decedent's heart attack—the decedent's existing cardiovascular disease.

The decedent was a man in his seventies who was diagnosed as a high-risk patient for cardiac problems and had already had one prior heart attack. The plaintiffs' expert testified that despite the decedent's previous heart condition, that the drug was the cause of the heart attack. The expert opined that stress tests that the decedent had taken before he went on the drug revealed a stable cardiac status. He noted that the decedent's death was caused by two fresh clots that occurred after the decedent began taking the drug. He testified that the formation of two clots was a rare incident without the introduction of a causative agent like the drug, and that the formation of clots was the type of problem that was caused by the drug in question.

The court of appeals stated that although the plaintiffs were not required to establish specific causation in terms of medical certainty, nor to conclusively exclude every other reasonable hypothesis, because the decedent's pre-existing cardiovascular disease was another plausible cause of the heart attack, the plaintiffs were required to offer evidence excluding that cause with reasonable certainty. The court held that the plaintiffs failed to satisfy their burden.

The court found that there was no specific evidence to support the plaintiff's expert's opinion that the two clots were rare for someone with the decedent's risk factors. The court also noted that the plaintiff's expert provided no scientific connection between exposure to the drug in question for less than twenty-five days and the simultaneous formation of two clots. The court concluded that even viewing the evidence in the light most favorable to the plaintiffs, the evidence was legally insufficient to support a finding that the plaintiff's negated, with reasonable certainty, the decedent's previous heart condition as a plausible cause of his death. The court then rendered a take-nothing judgment in favor of the manufacturer. A similar finding that causation evidence was not legally sufficient occurred in the recent opinion of *Merck & Co. v. Ernst*, No. 14-06-00835, 2008 WL 2201769 (Tex. App.—Houston [14th Dist.] May 29, 2008, no pet. h.).

PROBATE / TRUST

***In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 715 (Tex. App.—Texarkana 2008, pet. filed)**

This case addressed the issue of whether a spend thrift provision in a trust precluded the remainder beneficiary from devising by a will his interest in the assets of the trust estate. W.D. Townley's will contained a trust leaving a life estate to Josie Townley ("Josie"), his wife. After Josie's death, the trust was to terminate and the remainder of the assets was to be split between his W.D. Townley's children, Billy Ray Townley ("Billy Ray") and Jimmy LaRue Wilson. The will contained a spendthrift provision that prohibited any beneficiary from assigning or transferring any income or principal before receiving it.

W.D. Townley's will made no provision for the possibility that either child would predeceased him or Josie. Billy Ray died before Josie. Several years after Josie died, a trial court was asked to decide where Billy Ray's interest in the estate should be distributed. The trial court determined that Billy Ray's interest was vested and should be transferred through his will to his widow rather than by intestacy.

The court of appeals first reviewed whether Billy Ray's interest was vested. It stated that if the remainder interest was in an ascertainable person, and no condition precedent existed other than the termination of the prior estates, then it was a

vested remainder. Furthermore, the court stated that a remainder was vested when there was a person in being at the creation of the interest who would have a right to immediate possession on termination of the intermediate estate. The court found that Billy Ray met this criteria and his remainder interest was vested. The court noted that under normal circumstances, Billy Ray's interest could be transferred from its owner to another person.

The court then addressed the spendthrift provision in W.D. Townley's will. The language of the spendthrift provision stated that the beneficiary had no right or power to "anticipate" any principal given under the trust agreement, or in advance of actually receiving it, have the right or power to transfer any principal given under the trust agreement. The clause prevented creditors from reaching the trust. The appellant argued that Billy Ray's will leaving his property to his wife was necessarily a transfer and fell within the spendthrift trust restriction.

The court noted that neither of the parties had cited any Texas precedent on this issue and that the court had found none. The court cited to comment (g) of Section 58(2) of the Restatement (Third) of Trusts, which indicated that a continuing income or remainder interest in a trust, despite the spendthrift provision, was transferable by will or intestacy. The court agreed that the purpose of the spendthrift trust provision is to protect the beneficiary from his or her own folly. However, the court found that such a purpose could not be promoted after the beneficiary's death. The court stated that Texas law recognizes that a person of sound mind has a legal right to dispose of his or her property as that person wishes. Therefore, the court affirmed the trial court's judgment finding that Billy Ray's interest could be transferred through his will to his wife.

REAL ESTATE/ADVERSE POSSESSION

***Moore v. Stone*, No. 10-06-00382-CV, 2008 WL 880212 (Tex. App.—Waco April 2, 2008, pet. filed)**

This case arises out of an adverse possession claim due to the existence of a fence and the grazing of cattle. Stone and Wolf claimed that they had adversely possessed approximately nineteen acres of land that were contained in Moore's deed. After a jury trial, the jury found that Stone and Wolf had adversely possessed the property under the three-, five-, ten-, and twenty-five-year adverse possession statutes. Moore appealed.

Stone's and Wolf's predecessors owned property boarded by a creek from Moore's predecessor, Seamans. In the 1960s, Stone's predecessor and Seamans built a fence on Seamans' land that encroached on approximately nineteen acres. There was no testimony to the purpose of the fence or why it was built at that location. In 2003, Moore tore down the fence, and Stone and Wolf filed a trespass to try title action against Moore.

Stone and Wolf argued that their possession of the nineteen acres was sufficient to meet the ten-year limitations statute. The court of appeals defined adverse possession as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person" throughout the statutory period. Specifically, the ten-year statute requires that a person bring suit not later than ten years after the day the cause of action accrued to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property. TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(a) (Vernon 2002).

Stone and Wolf argued that they cultivated, used and enjoyed the disputed land for a ten- year period. The evidence was that Stone had used the disputed land for grazing cattle and for cutting hay and that there may have been one crop planted on the property shortly after the fence was built. The court of appeals found that a claimant who relies on grazing as evidence of adverse use and enjoyment must show that the land in dispute was designedly enclosed. In that regard, if a fence existed before the claimant took possession

of the land, and the claimant failed to demonstrate the purpose for which it was erected, the fence is merely a "casual fence" and is not a designed enclosure. The court noted that repairing or maintaining a casual fence, even for the express purpose of keeping the claimants animals within the enclosed area, generally does not change a casual fence into a designed enclosure.

The court found that because there was no testimony about the purpose of the fence and because the fence existed before Stone or Wolf took possession of the property, the fence was a casual fence. Further, as Stone and Wolf only used the land for grazing and cutting hay, which does not constitute adverse possession, the court found that the jury's affirmative finding of adverse possession under the ten-year statute was in error.

The court then analyzed Moore's and Stone's claims under the three-, five-, and twenty-five-year statutes and found that those also did not apply. Finally, Stone and Wolf argued that the fence line was the correct boundary line under the theory of acquiescence. The court of appeals disagreed, finding that acquiescence did not apply because the boundary line was not in dispute. Accordingly, the court reversed and rendered judgment for the legal title holder.

TERMINATION OF PARENTAL RIGHTS/SEPARATION OF POWERS

***In re D.W.*, 249 S.W.3d 625 (Tex. App.—Fort Worth 2008, pet. filed)**

This is a case arising out of a Texas Department of Family and Protective Services (the "Department") lawsuit filed on June 6, 2005 to terminate the parent-child relationship between Betty and her three biological children, D.W., T.W., and S.G. The trial court set a final hearing in the case for April 3, 2006. On March 22, 2006, Betty filed a motion seeking to extend the final hearing deadline by 180 days or, in the alternative, to continue the trial date until a time closer to the June 6, 2006 dismissal deadline. The trial court's docket sheet reflected that the court rescheduled the final hearing on May 16, 2006, still within the existing one-year dismissal deadline. Prior to the beginning of the termination hearing on May 16, 2006, Betty's trial counsel re-urged her motion requesting a 180-day extension of the final hearing deadline. The trial court denied the motion.

After a hearing on the merits, the trial court held that terminating the parent-child relationship was in the best interest of the children because Betty "knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being" and "engaged in conduct or placed the children with persons who engaged in conduct which endangered their physical or emotional well-being." The trial court rendered its order terminating Betty's parental rights on May 16, 2006.

On May 31, 2006, fifteen days after the trial court entered its termination order, Betty's trial counsel filed a notice of appeal and statement of points for appeal that raised only insufficient-evidence points. On June 1, 2006, the trial court granted trial counsel's motion to substitute counsel and appointed appellate counsel to represent Betty.

On June 6, 2006, twenty-one days after the trial court signed its final order, Betty's appellate counsel filed a motion for new trial and supplemented the previously filed statement of points for appeal. The supplemental points asserted that the evidence was factually insufficient to support the trial court's order and that section 263.405(i) of the Texas Family Code violates the separation of powers provision of the Texas Constitution and the Due Process Clause of the United States Constitution.

The court of appeals affirmed the trial court's order terminating Betty's parental rights. However, in so holding, the court held that section 263.405 of the Family Code, which provides that a court of appeals may not consider any issue not specifically presented to the trial court in a timely-filed statement of points for appeal in a parental rights termination case, violates the separation-of-

powers clause in the Texas Constitution and is, therefore, void because the statute infringes on the appellate court's core substantive power to consider issues that were otherwise preserved for review under the rules of appellate procedure. Therefore, although Betty had failed to outline her complaints on appeal by filing a timely statement of points in the trial court, the court of appeals considered her sufficiency arguments because a statement of points was combined with a motion for new trial.

In a dissent authored by Chief Justice John Cayce, joined by Justice Dixon Holman, the chief justice concurred with the trial court's judgment but took issue with the majority opinion about the separation of powers issue on the basis that such a holding was dicta because the only complaint on appeal was whether the trial court abused its discretion on denying Betty's request for an extension of the dismissal deadline. The dissent further stated that section 263.405(i) does not violate the separations-of-power clause of the Texas Constitution because it does not interfere with the court's power to review civil cases, including termination proceedings, and it is within the Legislature's purview power to regulate and restrict such appeals.