



Recent Trends In Will Contest Litigation

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Table of Contents

I.	Introduction	1
II.	Recent Mental Incompetence And/Or Undue Influence Cases	1
A.	<i>In the Estate of Minton</i> : Court Affirmed Finding Of No Mental Competence To Create POD Account.....	1
B.	<i>In re Estate of Chapman</i> : Fact Issues Precluded Summary Judgment On Mental Competence and Undue Influence Claims	3
C.	<i>Pulido v. Gonzalez</i> : Summary Judgment Dismissing Undue Influence Claim Affirmed	5
D.	<i>Truitt v. Byars</i> : Finding of Undue Influence Was Affirmed	6
E.	<i>In re Pilkilton</i> : Court Affirmed Finding Of Mental Competence And No Undue Influence	7
F.	<i>Le v. Nguyen</i> : Court Affirmed Jury’s Determination That Will Was Void For Lack of Mental Competence	10
G.	<i>Estate of Sidransky</i> : Affirmed Summary Judgment Dismissing Undue Influence Claim.....	11
H.	<i>The Estate of Clifton</i> : Court Reversed A Jury Finding Of Undue Influence	12
I.	<i>In re Estate of Arrington</i> : Finding of Mental Competence Was Affirmed.....	14
J.	<i>In the Estate of Ross</i> : Finding Of Mental Competence Was Affirmed	15
K.	<i>In re Estate of Johnson</i> : Finding Of Undue Influence Was Affirmed	16
III.	Clauses That Impact Will-Contest Litigation.....	17
A.	Texas Supreme Court Issues Opinion Holding That Parties Can Enforce Arbitration Clauses In Trust Documents	17
B.	Court of Appeals Held That Jury Waiver Was Not Enforceable	20

C.	In Terrorem or No-Contest Clauses.....	23
IV.	Will Contest Procedural Issues	29
A.	Right To Interlocutory Appeal	29
B.	Court Must Give Notice To Will Contestant	30
C.	Sanctions For Improperly Opposing The Probate of A Will	31
D.	Mental Incompetence And Undue Influence May Not Be Alternative Claims.....	32
E.	Pattern Jury Charge	34
F.	Statute Of Limitations For Contests.....	34
G.	There Must Be A Will Before There Is A Will Contest.....	36
H.	Jurisdictional Issues	37
I.	Proper Parties For Will Contest	38
J.	Collateral Estoppel From Guardianship Proceedings	38
K.	Tortious Interference With Inheritance Claim	39
V.	Ethics Issue – The Lawyer Witness	40
VI.	Conclusion	44

I. Introduction¹

Every day, individuals change their wills, trusts, bank accounts, and other estate documents. These changes often impact beneficiaries and others who expect to receive benefits under these documents. When the changes result in an individual receiving fewer assets than before, litigation can arise. Claims of undue influence and mental incompetence are often alleged in an attempt to void the changes. This paper is intended to give an update on the law in Texas that impacts claims of undue influence and mental incompetence.

II. Recent Mental Incompetence And/Or Undue Influence Cases

A. *In the Estate of Minton: Court Affirmed Finding Of No Mental Competence To Create POD Account*

In *In the Estate of Minton*, the court of appeals 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). On December 2, 2010, Minton passed away, intestate, leaving a checking account and four C.D.s totaling \$430,000. On March 25, prior to his death, 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. After his death, the administrator of his estate and his heirs sued Garza for a declaration that the POD contract was void due to undue influence and mental incompetence. The court dismissed the undue influence claim due to a lack of evidence, and the mental competence claim went to a jury. The jury found that the decedent was not mentally competent.

Garza challenged the sufficiency of the evidence to support the jury's finding of mental incompetence. The court of appeals held that the burden of proof rests with the party seeking to set aside a contract for lack of mental capacity. It also 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.

The court held that to possess "mental capacity" to contract, the decedent, at the time of contracting, must have "appreciated the effect of what he was doing and understood the nature and consequences of his acts and the business he was transacting." *Id.* It also stated that mental capacity, or lack thereof, may

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be shown by “circumstantial evidence, including: (1) a person’s outward conduct, manifesting an inward and causing condition; (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person’s mental capacity (or incapacity) at the time in question may be inferred.” *Id.*

The court first dealt with an argument by Garza that evidence before or after the date that the POD agreement was signed was irrelevant. He 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. The court disagreed:

Garza cites no case precluding the jury from considering or giving weight to evidence under any circumstance, much less solely because the party seeking to uphold the contract presents its own testimony of competence. Accordingly, 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.

Id. at *19. Consistently, the court later held that the trial court did not err in admitting the evidence of competence from time periods before and after the execution of the POD agreement.

The court then held that sufficient evidence supported the jury’s determination that a decedent lacked mental capacity on the day he executed the POD agreement 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, sat for hours in his own feces and urine, and medical providers indicated he was confused and senile. This evidence came from medical records, care givers, former friends of the decedent, and a retained expert. The court held that the jury was entitled to infer that evidence of the decedent’s irrationality and dementia in the months preceding and following the signing of the contracts was probative of his capacity to contract on the date at issue. There was contradicting evidence that showed that the decedent was competent on the day that he signed the agreement, including evidence by the beneficiary, two bank representatives, a care giver, and a retained expert. The court held that this evidence merely created a fact question that was resolved by the jury: “while Garza elicited testimony from witnesses who claimed Minton was competent on the date the contract was signed, it was the jury’s responsibility to judge the credibility of the witnesses and determine the weight to be given their testimony.” *Id.* at *21.

One interesting aspect of this case is the holding 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. Historically, however, courts have held that less mental capacity is required to enable a testator to make a will than for him to make a contract. See, e.g., *Burk v. Mata*, 529 S.W.2d 591 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *Smith v. Welch*, 285 S.W.2d 823 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.); *Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex. Civ. App.—Galveston 1938, writ dismissed). But see *Bach v. Hudson*, 596 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1980, no writ).

B. *In re Estate of Chapman: Fact Issues Precluded Summary Judgment On Mental Competence and Undue Influence Claims*

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.). Barbara Chapman had a history of alcohol abuse, and was hospitalized for seizures in October 2009 and again in November 2009. She later divorced. In January of 2011, she signed a statutory power-of-attorney document appointing her sister Catherine as her attorney-in-fact. That same month, Cathy called an attorney and asked him to help Barbara with estate planning. Cathy said “Barbara has been depressed and on medication; but she is competent. She really does not want to address these issues, but she needs to because her health is not good.” *Id.* Barbara met with the attorney several times, and Cathy was always present. Cathy called the attorney with several changes to the will. The new will named Cathy as the sole beneficiary and expressly omitted Barbara’s only son. After Barbara died, her son challenged this new will, and the trial court granted summary judgment for Cathy on his claims for mental incompetence and undue influence.

The court of appeals reversed, holding that there were fact issues on both claims. Regarding mental incompetence, the court stated that testamentary capacity means possession of sufficient mental ability at the time of execution of the will, (1) to understand the business in which the testatrix is engaged, the effect of making the will, and the general nature and extent of her property, (2) to know the testatrix’s next of kin and the natural objects of her bounty, and (3) to have sufficient memory to assimilate the elements of the business to be transacted, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them.

In reviewing the evidence, the court was mindful that evidence of incompetency at other times has probative force only when it demonstrates that that condition persists and “has some probability of being the same condition which obtained at the time of the will’s making.” *Id.* The son produced evidence

that Barbara 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. However, the court noted that Barbara was hospitalized in March 2011 with “pleural effusion” and “had elevated pneumonia which affected her mental status.” *Id.* The doctor noted that she “[a]nswers simple questions at times,” and identified her as married, though in fact, the evidence was that she was divorced. *Id.* 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. There was evidence that before she signed the will that a doctor suspected the same diagnosis and listed her as stating that she was married. There was also evidence that after the will was signed that a doctor wrote a letter stating that Barbara had poor judgment and was unable to manage her routine daily activities. The attorney also testified that he did not know who had given him a list of assets, but Cathy’s husband’s information was on the form. Therefore, “taking all of this evidence together, and drawing all inferences in favor of the summary-judgment respondent, a reasonable fact-finder could infer that Barbara appointed an attorney-in-fact because her health had declined so far that she was no longer capable of consistently identifying her next of kin, listing her assets, or handling her own affairs in general.” *Id.* The court held that “there is at least a question of fact as to whether Barbara still possessed testamentary capacity at the time she executed the offered will.” *Id.*

Turning to undue influence, the court held that to establish that claim, a contestant must prove: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence. The court focused on evidence that Cathy told the attorney that “[Barbara] really does not want to address these issues, but she needs to because her health is not good.” *Id.* The court held that this statement indicates that Barbara did not wish to make a will at all. The court described the evidence as:

Despite Barbara’s desires, Cathy contacted an attorney of her own choosing, who had never met Barbara. Cathy made the initial appointment, transported Barbara to the attorney’s office, and was present throughout their conversation. After the meeting, Cathy left two phone messages concerning changes to be made to the documents that the attorney had prepared. Cathy later transported Barbara back to the attorney’s office to execute the will, and

Cathy's husband Scott Valby then signed the check paying the attorney with a check drawn from Scott and Cathy's joint checking account. Cathy was present for every conversation that the attorney had with Barbara about the documents he was preparing for her signature, but Barbara was not a party to all of the conversations that the attorney had with Cathy on the same subject.

Id. at *14-15. The court held that this was sufficient to create a fact issue on undue influence.

C. *Pulido v. Gonzalez*: Summary Judgment Dismissing Undue Influence Claim Affirmed

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 contended that at the time she allegedly signed the warranty deed that she was elderly, in poor health, and living with Gonzalez. She also alleged that Gonzalez, who was responsible for her care, mistreating her. Pulido, who denies signing the warranty deed, testified that she believes that Gonzalez forged her signature on the document. Pulido also argued, in the alternative, that if she did sign the deed, that she only did so because Gonzalez misrepresented the purpose of the document and tricked her into signing it. Gonzalez filed a dual motion for summary judgment alleging both traditional and no-evidence grounds, which the trial court granted.

The court of appeals affirmed the summary judgment on the issue of undue influence. The court noted that proof of undue influence may be established by circumstantial evidence, but must be probative of the issue and not merely create a surmise or suspicion that such influence existed at the time the document was executed. Moreover, the court held that undue influence cannot be inferred by opportunity alone because “[t]here must be some evidence to show that the influence was not only present, but [that it was] in fact exerted with respect to the [execution of the document] itself.” *Id.*

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 raises, 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. *Id.*

The court of appeals then reversed the summary judgment on the forgery claim and remanded for further proceedings.

There was a dissenting justice who would have reversed the summary judgment on undue influence. The dissenting justice argued that the majority completely discounted as “no proof” evidence of (1) the circumstances surrounding the drafting and execution of the deed of Pulido’s homestead to Gonzalez; (2) the relationship between Pulido, the grantor, and Gonzalez, the grantee; (3) the motive, character, and conduct of Gonzalez, who benefitted by the instrument; (4) Gonzalez’s participation in the preparation or execution of the instrument; (5) the words and acts of the parties; (6) the interest in and opportunity for the exercise of undue influence by Gonzalez; (7) Pulido’s physical and mental condition at the time of the instrument’s execution, including the extent to which she was dependent upon and subject to Gonzalez’s control; and (6) the improvidence of the deeding of Pulido’s homestead to a woman she met at church and who, as shown by more than a scintilla of evidence, was keeping Pulido captive and isolated at the time of executive of the deed of her homestead over to her causing an unjust, unreasonable, or unnatural disposition of the property.

D. *Truitt v. Byars*: Finding of Undue Influence Was Affirmed

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). The mother had dementia and other serious health problems. The family had been in multiple litigation fights in the past over trusts. The mother had executed a will in 2009 naming certain children as executors and giving the majority of her property to her grand-children and great grand-children. There had been a guardianship proceeding started, and there was an attorney ad litem appointed. A different child, Truitt, then moved into town and started taking “care” of the mother. 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. After the mother died, other children attempted to probate the 2009 will, and Truitt attempted to probate the 2010 will. The trial court found that the 2010 will was procured via undue influence and probated the 2009 will. Truitt appealed and claimed the trial court erred in admitting a 2009 will to probate instead of the mother’s 2010 will.

The court of appeals noted that lack of mental capacity and undue influence are two separate and distinct grounds for avoiding an instrument or contract. However, weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in determining whether or not a person was in the condition to be susceptible to undue influence. The court held that to prevail on an undue influence claim, the

contestant has the burden to prove (1) the existence and exertion of an influence, (2) that subverted or overpowered the testatrix's mind at the time she executed the instrument, (3) so that the testatrix executed an instrument she would not otherwise have executed but for such influence. Further, the court held that there must be some tangible and satisfactory proof of the existence of each of the three elements.

The court stated that the exertion of undue influence is usually a subtle thing, and by its very nature typically involves an extended course of dealings and circumstances. Thus, its elements may be proven by circumstantial or direct evidence. The court stated: "All of the circumstances shown or established by the evidence should be considered; and even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together they produce a reasonable belief that an influence was exerted that subverted or overpowered the mind of the testatrix and resulted in the execution of the testament in controversy, the evidence is sufficient to sustain such conclusion." *Id.*

The court held that legally and factually sufficient evidence supported a finding that undue influence was exerted by Truitt. Truitt had ousted the mother's existing doctors in favor of new ones, who did not have prior involvement, and she hired an attorney to draft a new will with no input from the mother's family or attorney ad litem. The 2010 will's provisions were a complete departure from the 2009 will's provisions. Furthermore, 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 finding that Truitt overpowered the mother's mind and the 2010 will expressed not the mother's desires, but Truitt's will.

E. *In re Pilkilton*: Court Affirmed Finding Of Mental Competence And No Undue Influence

In *In re Pilkilton*, the court of appeals affirmed a trial court's finding that a subsequently executed will should be admitted to probate as the testator had mental competence and there was no undue influence. No. 05-11000246-CV, 2013 Tex. App. LEXIS 1080 (Tex. App.—Dallas February 6, 2013, no pet.). The decedent executed a will in 2006, which the contestants sought to probate over a 2007 will. The contestants argued that the 2007 will was void due to the decedent not having sufficient mental capacity and that it was the product of undue influence. After a bench trial, the trial court admitted the 2007 will to probate.

The contestants first challenged the 2007 as being not properly executed. They alleged that after the will was executed, the attorney made corrections to the will and replaced pages without getting it re-executed. The court stated that

in probate proceedings, it is the court's duty to determine that the instrument offered for probate meets the statutory requisites of a will before admitting the will to probate. The requirements include that two or more credible witnesses must attest to it and subscribe their names to the will in their own handwriting in the presence of the testator. Any changes made in an original, properly-executed will are ineffective unless the changes were made with the formalities required to make a will. One who offers a will with a self-proving certificate executed and attached makes out a prima facie case that the will has been properly executed and may have the will admitted to probate if the other requirements of section 88 of the Probate Code are fulfilled. The opponent to the probate of the will must put on proof to rebut the proponent's prima facie case. The proponent may then chose to stand on the prima facie case or may choose to go forward with evidence.

The court cited to the attorney's deposition wherein he testified that he made corrections and came back to the decedent so that the decedent signed the final copy of the will. There was other conflicting testimony about the corrections, but all of the witnesses agreed that the decedent signed the final copy. The court held that this was sufficient evidence to support the trial court's finding that the 2007 will was properly executed.

The court turned to the contestants' argument that the decedent did not have mental capacity to execute the 2007 will. The court stated that a testator has testamentary capacity when the testator has sufficient mental ability to understand that he is making a will, the effect of making a will, and the general nature and extent of his property. He must know his next of kin and the natural objects of his bounty and the claims upon them. He must also have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to form a reasonable judgment about them. The court held that proponents of a will have the burden to prove testamentary capacity. In determining whether a testator had testamentary capacity, the pivotal issue is whether the testator had testamentary capacity on the day the will was executed. But evidence of the testator's state of mind at other times can be used to prove the testator's state of mind on the day the will was executed if the evidence demonstrates that condition affecting his testamentary capacity was persistent and was likely present at the time the will was executed.

The contestants claimed that medical records reflected that the decedent was suffering from dementia that was exacerbated by a closed-head injury, which left him confused, disoriented, and unable to comprehend his business, including the business of making and executing a will. The contestants had an expert review medical records and other evidence and opine that the decedent did not have capacity on the day he signed the will. The contestants also had a treating physician testify about the decedent's condition and opine that he did not think that the decedent had capacity. The contestants also had other witnesses testify about the decedent's incapacity. None of these witnesses, however, were present on the day that the decedent executed the will.

The applicants of the 2007 will had testimony from multiple people who witnessed the execution of the 2007 will, and they all stated that decedent knew who he was, where he was, and what he was doing. 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. We conclude that the evidence is legally sufficient to support the finding that Pilkilton had testamentary capacity at the time that he executed the 2007 will.” *Id.*

The court turned to the undue influence allegation. The court held that the contestant must prove the (1) existence and exertion of an influence (2) that subverted or overpowered the testator’s mind at the time he executed the testament (3) so that the testator executed a testament that he would not otherwise have executed but for such influence. The court held that evidence of a fiduciary relationship between the testator and a proponent of the will, however, raises a presumption of undue influence and, in that circumstance, the proponent has the burden to produce evidence to show an absence of undue influence. The court held that this presumption is not evidence of something to be weighed along with the evidence.

The contestants argued that the following evidence proved undue influence: (1) decedent’s weakened physical and mental condition made him susceptible to undue influence; (2) an applicant arranged a meeting with decedent and an attorney, applicants were present while decedent and the attorney discussed preparation of the will, and applicants were present and exerted control over decedent during the execution of the 2007 will; (3) applicants were involved in the planning, preparation, and execution of various estate planning documents; (4) there were earlier wills in which decedent left his property primarily to contestants, totally to the exclusion of applicants, which contestants assert was evidence that the decedent’s real desires were different from those expressed in the 2007 will; and (5) decedent was easily persuaded or influenced to change the terms of his will to comply with applicants suggestions or the suggestions of their agents acting in concert with them as shown by the attorney’s deposition testimony.

The court of appeals held that there was evidence to support the trial court’s finding of no undue influence. There was evidence that it was the decedent’s idea to create a new will. That decedent was mad at the contestants for taking his property after the earlier will was executed. There was evidence that the decedent was very strong willed and not easily influenced into doing something that he did not want to do. The court concluded: “A finding of undue influence cannot be inferred from Appellees’ opportunity to exert undue influence alone. And there was no evidence that Appellees’ influence was not only present but was in fact exerted with respect to the making of the testament itself. In this

case, the judge as fact-finder heard all of the evidence, resolved conflicts in the evidence, and found against Appellants.” *Id.*

F. *Le v. Nguyen*: Court Affirmed Jury’s Determination That Will Was Void For Lack of Mental Competence

In *Le v. Nguyen*, a decedent’s niece filed a will contest alleging that the will offered for probate was void due to the testator lacking mental competence. No. 14-11-00910-CV, 2012 Tex. App. LEXIS 8857 (Tex. App.—Houston [14th Dist.] October 25, 2012, no pet.). The jury found that the decedent was not mentally competent, and the trial court refused to probate the will. The decedent’s fiancée, who was the proponent of the will, appealed.

The court of appeals noted that a testator has testamentary capacity when he has sufficient mental ability to understand that he is making a will, as well as the general nature and extent of his property. He also must know the natural objects of his bounty and the claims on them, and have sufficient memory to collect in his mind the elements of a business transaction and hold them long enough to form a reasonable judgment about them. In a will contest, the pivotal issue is whether the testator has testamentary capacity on the date the will was executed. However, evidence of the testator’s state of mind at other times can be used to prove his state of mind on the day the will was executed provided the evidence demonstrates a condition affecting his testamentary capacity was persistent and likely present at the time the will was executed. The court stated that the capacity to make a will is a subtle thing and must be established to a great extent, at least so far as laymen are concerned, by circumstantial evidence.

It was uncontested that the decedent was in the hospital for terminal gastric cancer at the time that he executed his will. The fiancée testified that the decedent recognized her, could speak occasionally, and otherwise communicated by moving his head to agree or disagree. She testified that the decedent was awake when the will was read to him, did not appear confused, recognized mistakes in the will by nodding his head, and nodded his head indicating he wanted to sign the will, which he did unaided by anyone.

In opposition to the above testimony, the jury also heard evidence that the decedent did not have capacity on the date the will was executed. This evidence included the fact that the decedent was in the final stages of cancer, suffering great amounts of pain, received medication to relieve the pain, and that his condition was worsening. Several witnesses testified that he could not talk and communicated his wishes by nodding his head. There was also testimony that in the Vietnamese culture nodding a head can signify agreement with the speaker or merely recognition that the speaker was talking. The daughter testified that the decedent did not have testamentary capacity.

The court of appeals stated that 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. The jury could have discounted her testimony for that reason. The jury could also consider that the decedent failed to recognize factual mistakes in the will, including his incorrect marital status and the fact that his deceased sister had been named a substitute guardian of his minor children. The court found there was sufficient evidence to support the jury's verdict and the trial court's refusal to admit the will to probate.

G. *Estate of Sidransky: Affirmed Summary Judgment Dismissing Undue Influence Claim*

In the *Estate of Sidransky*, Sidransky had twelve children during her marriage, one of whom was disabled. 420 S.W.3d 90 (Tex. App.—El Paso August 15, 2012, pet. denied). The disabled daughter, Miriam, suffered from mental disability that required specialized care and attention. After Sidransky's husband died, she cared for Miriam by herself. Sometime thereafter, another daughter, Graciela, became the primary caretaker for both Miriam and Sidransky. Sidransky then passed away and left a trust and a will executed in 1999 and amended in 2003, both of which named Graciela as executor of her estate. Overall, Miriam was to receive 50%, Graciela would receive 20%, and another daughter and her children were to receive 26%. Sidransky expressly excluded certain other children from the will calling them "disfavored children."

Just a few weeks after she executed the 1999 Will and Trust, Sidransky underwent heart surgery. In February 2001, one daughter sought temporary guardianship for her mother. Following an independent psychiatric evaluation that determined that Sidransky was of sound mind and capable of her own decisions, the trial court declined to establish a guardianship. In 2003, Sidransky met with her attorney and asked her to prepare a new power of attorney and an amendment to the will and that she wanted to exclude additional children. Her attorney stated that he felt that Sidransky was of sound mind in 1999 and in 2003.

After Sidransky's death, Graciela attempted to probate the 2003 will, and several other children opposed the application arguing that Sidransky lacked testamentary capacity and was unduly influenced by Graciela. The trial court held a bench trial on the issue of mental capacity and found that Sidransky did have mental capacity to execute both the 1999 and the 2003 instruments. The court then granted Graciela's motion for summary judgment on her sibling's undue influence claim.

The court noted that to set aside a will because of undue influence the contestant must prove the following three elements: (1) the existence and exertion of an influence; (2) the effective operation of that influence so as to subvert or overpower the testator's mind at the time of the execution of the testament; and (3) the execution of a testament which the maker would not have executed but for such influence. Accordingly, the party claiming undue influence must introduce some tangible and satisfactory proof of the existence of each of

these elements. The court noted that an influence is not "undue" unless it destroys the free agency of the testatrix and the will produced expresses the wishes of the one exerting the influence. The court noted that "one may request, importune, or entreat another to create a favorable dispositive instrument, but unless the importunities or entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument." *Id.* The exertion of undue influence cannot be inferred by opportunity alone. Instead, there must be some evidence to show that the influence was not only present, but that it was in fact exerted with respect to the making of the testament itself.

The court then reviewed at the evidence submitted by Graciela's siblings. They offered an affidavit from an expert, but the court found that that expert merely stated that Sidransky's weakened physical and mental condition made her susceptible to influence. That was no evidence that such influence existed. The siblings' argument that Sidransky's mental condition and the fact that Graciela was always in close contact with Sidransky (she managed all of Sidransky's money and paid her bills) was sufficient to establish a fact issue on undue influence. The court disagreed and held that these facts only illustrated that Graciela had the opportunity to unduly influence Sidransky, not that she actually exerted influence over her.

Moreover, the fact that Graciela was actively involved in the planning, preparation, and execution of Sidransky's will was not sufficient to create a fact issue as to undue influence. The siblings also contended that Sidransky's decision to exclude certain children was unnatural and was some evidence of undue influence. The court disagreed and stated that the fact that a testatrix chooses to distribute her estate among a number of children or relatives making one bequest larger than another or the fact that she chooses to exclude certain children from a will while providing for others is not evidence of undue influence. The court found that a person of sound mind has the right to dispose of his or her property in the manner he or she wishes. The court noted that Sidransky clearly believed that certain children were stealing from her and described her children as two camps. Accordingly, the court affirmed the trial court's judgment for Graciela.

H. *The Estate of Clifton*: Court Reversed A Jury Finding Of Undue Influence

In *The Estate of Clifton*, testator, Margaret Clifton, executed a number of wills throughout the years that included her half niece, Elizabeth, as a beneficiary. No. 13-11-00462-CV, 2012 Tex. App. LEXIS 6400 (Tex. App.—Corpus Christi August 2, 2012, no pet.). In June 2004, she executed a new will that omitted Elizabeth as a beneficiary. After Margaret's death, Elizabeth filed an action to hold the new will void due to undue influence. The jury returned a verdict favorable to Elizabeth, and the trial court granted a judgment notwithstanding the verdict and held that the will was valid.

To establish undue influence, the contestant must show: (1) the existence and exertion of influence; (2) the operation of that influence so as to subvert the will or overpower the mind of the grantor at the time of the execution; and (3) the execution of an instrument the maker would not have executed but for such influence. Undue influence may be proven by circumstantial, as well as direct, evidence. When determining a claim of undue influence, it is proper to consider all evidence of relevant matters that occurred within a reasonable time before or after the will's execution. In particular, the court looked to the following factors when determining the existence of undue influence:

- (1) the nature and type of relationship existing between the testator, the contestants, and the party accused of exerting such influence;
- (2) the opportunities existing for the exertion of deception;
- (3) the circumstances surrounding the drafting and execution of the testament;
- (4) the existence of a fraudulent motive;
- (5) whether there had been a habitual subjection of the testator to the control of another;
- (6) the state of the testator's mind at the time of the execution of the testament;
- (7) the testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted;
- (8) words and acts of the testator;
- (9) weakness of mind and body of the testator, whether produced by infirmities of age or by disease or otherwise; and
- (10) whether the testament executed is unnatural in its terms of disposition of property.

The court noted that the first five factors addressed the first element of undue influence, the next four factors concerned the second element, and the tenth factor was relevant to the third element.

The court looked at the nature and type of relationship between the testator, the contestants, and the party accused of undue influence. The evidence showed that Margie enjoyed a close relationship with Elizabeth and Elizabeth's immediate family for many years. It showed that the relationship had been warm as recently as 2003. In May 2004, Margie sent a letter to her attorney stating that "a lot of changes have happened concerning my two nieces"

and gave instructions to omit them as will beneficiaries. *Id.* At that time period, Elizabeth's parents were going through a contentious divorce proceeding. In addition to the divorce, Elizabeth's mother had been estranged from her family and had sued her husband and a bank asserting claims of breach of fiduciary duty. Elizabeth was brought into that suit as a party, and she had obtained a \$30,000 attorney's fees award against her mother. The evidence showed that Margie, who was Elizabeth's mother's half-sister, found her half-sister lovable and disliked the way Elizabeth and her father were treating Elizabeth's mother. On the other hand, there was evidence that Linda, the party accused of undue influence, had told Margie that Elizabeth was not treating Elizabeth's mother well.

Regarding opportunities for the exertion of deception, there was no dispute that Linda was the only relative of Margie that lived nearby to her in the years preceding her death and that there was an opportunity for undue influence. Regarding the circumstances of the drafting of the testament, the evidence showed that Margie used Linda's attorney, but that Margie went to the attorney's office by herself and had independent conversations with the attorney for the drafting of the testament. The attorney testified that she had no reason to believe that Linda or anyone else had exerted any undue influence on Margie with respect to the will.

Regarding the existence of fraudulent motive, Elizabeth argued that Margie's residuary estate (worth more than \$2 million) was evidence of a fraudulent motive to exercise undue influence. The court of appeals disagreed and found that there was no evidence of a fraudulent motive in the case. The court found that there was also no evidence of a habitual subjection of the testator to the control of another. The court held that Margie's statements that Linda had given her wrong information about Elizabeth's treatment of Elizabeth's mother was not sufficient to establish the exertion of undue influence. Viewing the evidence in the light most favorable to the jury's verdict, the court held that there was no evidence that Linda exerted undue influence on Margie and affirmed the trial court's judgment notwithstanding the verdict.

I. *In re Estate of Arrington*: Finding of Mental Competence Was Affirmed

In *In re Estate of Arrington*, the court of appeals affirmed a jury's verdict that a will was properly executed. 365 S.W.3d 463 (Tex. App.—Houston [1st Dist.] March 1, 2012, no pet.). The testator's wife challenged the trial court's judgment, rendered on a jury verdict, that admitted the will to probate and appointed the testator's daughter the executrix of the will. The jury found that the disputed will was validly executed and that the testator possessed testamentary capacity.

The jury heard direct evidence of the testator's mental condition on the date that the will was executed: both subscribing witnesses testified that he was of sound mind when he signed his will at the bank. The wife argued that this

evidence was legally insufficient because no evidence demonstrates that the testator discussed his children or the approximate nature of his property with the witnesses on the date he executed his will. The court disagreed:

But a finding of testamentary capacity does not hinge entirely on direct evidence that the testator discussed the details of his children, wealth, or disposition at the time he signed his will. The jury heard direct evidence of Pat's general mental condition on the day he executed his will and the attending months before and after: this evidence supports its determination that Pat knew that he was executing his will and that he had deliberately chosen Patricia to be his sole beneficiary. The evidence at trial "would enable reasonable and fair-minded people to reach the verdict under review."

Id. at *12.

J. *In the Estate of Ross: Finding Of Mental Competence Was Affirmed*

In *In the Estate of Ross*, a brother filed an opposition to the probate of his sister's will, which bequeathed the estate to the sister's companion and brother-in-law. No. 10-10-00189, 2011 Tex. App. LEXIS 9461 (Tex. App.—Waco November 30, 2011, no pet.). The sister was elderly and signed a new will shortly before she died and while she was in the hospital. After the companion and brother-in-law filed an application to probate the will, the brother filed an opposition and alleged that his sister did not have the mental competence to execute the will and that it was signed under undue influence. The trial court granted a summary judgment for the companion and brother-in-law because the brother had not produced any evidence that the sister was mentally incompetent or that she was unduly influenced.

The court of appeals provided the following standard for mental competence:

A testator has testamentary capacity when he has sufficient mental ability to understand he is making a will, the effect of making a will, and the general nature and extent of his property. He must also know his next of kin and the natural objects of his bounty, the claims upon them, and have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to form a reasonable judgment about them. The pivotal issue is whether the testator had testamentary capacity on the day the will was executed. However, evidence of the testator's state of mind at other times can be used to prove his state of mind on the day the will was executed provided the evidence demonstrates a condition affecting his testamentary capacity was persistent and likely was present at the time the will was executed.

Id. The brother did not present any direct evidence that his sister was not mentally competent when she executed the new will. “So the questions are (1) whether Luker’s evidence was the kind that would indicate lack of testamentary capacity; (2) if so, was that evidence probative of Frankie’s lack of testamentary capacity on May 22, 2009; and (3) whether the evidence provided is of a satisfactory and convincing character.” *Id.*

The brother offered medical records that showed that his sister was tired and forgetful, but otherwise indicated that she was alert, lucid, and oriented. The evidence also included deposition excerpts from nurses and others that stated that the sister was alert and mentally competent. The court of appeals affirmed the summary judgment on the mental competence finding.

The court turned to undue influence, and stated as follows:

To establish undue influence, a party must show: (1) the existence and exertion of influence; (2) the effective operation of an influence so as to subvert the will or overpower the mind of the grantor at the time of the execution; and (3) the execution of an instrument the maker would not have executed but for such influence. There must be some evidence to show that the influence was not only present, but was exerted with respect to making the instrument. But, the exertion of undue influence cannot be inferred by opportunity alone. Undue influence may be proved by circumstantial, as well as direct, evidence. “Although a contestant may prove undue influence by circumstantial evidence, the evidence must be probative of the issue and not merely create a surmise or suspicion that such influence existed at the time the will was executed.”

Id. at *14. The main evidence offered by the brother was that the companion and brother-in-law visited the sister in the nursing home on a daily basis. The court of appeals stated: “The evidence that Wilson and Don Ross visited Frankie every day in the nursing home, and that Frankie changed her will to leave her estate to only Wilson and Don Ross because they were the only ones to visit and care for her, is no evidence of the existence and exertion of influence by either of them.” *Id.*

K. *In re Estate of Johnson: Finding Of Undue Influence Was Affirmed*

In *In re Estate of Johnson*, the court of appeals affirmed a jury’s finding of undue influence. 340 S.W.3d 769 (Tex. App.—San Antonio 2011, pet. disp.). The court of appeals noted evidence showing that the testator was susceptible to undue influence: several experts testified about his alcohol abuse, personality features, and fear of abandonment. The court also noted that there was evidence of relationship poisoning that would support a finding that undue influence existed and was exerted. Finally, evidence that the new will was

contrary to other statements by the testator was sufficient to support a finding that the wills would not have been executed but for the undue influence.

III. Clauses That Impact Will-Contest Litigation

A. Texas Supreme Court Issues Opinion Holding That Parties Can Enforce Arbitration Clauses In Trust Documents

Parties may want to resolve estate disputes in arbitration. There are perceived cost savings associated with arbitration, and arbitration can be quicker than normal litigation. But one of the main benefits is that the proceeding is confidential. A settlor or testator may genuinely not want the world to know about the estate or trust, its assets, or the executor's or trustee's actions in administering the estate or trust. Should the testator's or settlor's desire that all disputes be resolved in arbitration be enforced?

Historically, other jurisdictions have not enforced these agreements. See *Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078, (Ariz. Ct. App. 2004), superseded by Arizona Revised Statutes section 14-10205. But recently, the Texas Supreme Court held that arbitration clauses in trust documents are enforceable in Texas.

In *Rachal v. Reitz*, a beneficiary sued a trustee for failing to provide an accounting and otherwise breaching fiduciary duties. 347 S.W.3d 305 (Tex. App.—Dallas 2011, pet. granted). The trustee filed a motion to compel arbitration of those claims due to an arbitration provision in the trust instrument. After the trial court denied that motion, the trustee appealed.

The court of appeals affirmed the trial court's refusal to compel arbitration. The court of appeals 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 noted that it was undisputed that neither the trustee nor the beneficiary signed the trust document. Further, the court held that the trust document solely expressed the settlor's intent and not the intent of the trustee or beneficiary. The court stated: "Rachal did not establish how the settlor's expression of intent satisfied all of the required elements of a contract or how this expression of the settlor's intent transformed the trust provision into an agreement to arbitrate between Rachal and Reitz." *Id.* at 309-10.

The Texas Supreme Court reversed the court of appeals and held that the arbitration clause was enforceable. See *Rachel v. Reitz*, No. 11-0708, 2013 Tex. LEXIS 348 (May 3, 2013). 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. See *id.*

The Court stated that generally in Texas courts strive to enforce trusts according to the settlor's intent, which courts should divine from the four corners of unambiguous trusts. The Court noted that the settlor intended for all disputes to be arbitrated via the following language: "Despite anything herein to the contrary, the sole and exclusive remedy" for "any dispute of any kind involving this Trust or any of the parties or persons connected herewith (e.g., beneficiaries, Trustees)" was arbitration. *Id.*

The Court then looked to the Texas Arbitration Act, which provides that a "written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement." *Id.* (citing TEX. CIV. PRAC. & REM. CODE 171.001(a)). The Court noted that the statute also uses the term "contract" in another provision, and that the Legislature intended for the terms to be different. As the statute does not define the term "agreement," the Court defined it as "a mutual assent by two or more persons." *Id.* Thus, a formal contract is not required to have a binding agreement to arbitrate.

The Court resolved the issue of mutual assent by looking to the theory of direct-benefits estoppel. 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. The Court ordered the trial court to grant the trustee's motion to compel arbitration.

Texas now takes the minority position that arbitration clauses in trust documents are enforceable. Recently, a California court held that a party's claims of undue influence and mental competence regarding the creation of a trust were not to be compelled to arbitration. See *McArthur v. McArthur*, 224 Cal. App. 4th 651, 168 Cal. Rptr. 3d 785, 2014 Cal. App. LEXIS 222 (Cal. App. 1st Dist. 2014). The court distinguished the *Rachal* opinion by holding that the party in *Rachal* could not attempt to enforce the trust document and challenge the arbitration clause, whereas the party in *McArthur* did not attempt to enforce any aspect of the trust document:

Here, Pamela has not accepted benefits under the 2011 Trust nor has she attempted to enforce rights under the amended trust instrument. Instead, Pamela argues the 2011 Trust is invalid and seeks to have it set aside. *Rachal* acknowledges that a "beneficiary may disclaim an interest in a trust. [Citations.] And a beneficiary is also free to challenge the validity of a trust: conduct that is incompatible with the idea that she has consented to the instrument. Thus, beneficiaries have the opportunity to opt out of the arrangement proposed by the settlor" and consequently to not be bound by the arbitration provision. We agree.

Id. at 658.

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.

However, 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. For example, in *Spahr v. Secco*, the plaintiff complained that he was mentally incompetent to enter into the contract, and thus that the contract and the arbitration clause contained therein were void. 330 F.3d 1266 (10th Cir. 2003). The court found that this was an issue which went to the "making" of the contract as referred to in 9 U.S.C. § 4, and was proper for resolution by the court, and not the arbitrator. *Id.* The court reasoned that there was a difference between challenging a contract on the basis of the party's status, (i.e., mental incapacity) and challenging a contract based on behavior/conduct of the party, (i.e., fraudulent inducement). *Id.* Most circuits have agreed with *Spahr* in holding that contracts which are void or nonexistent cannot be the basis for arbitration, and that the question of whether the contract exists or is void must be determined by the court. See *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590-91 (7th Cir. 2001); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000); *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136 (9th Cir. 1991); *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851, 855 (11th Cir. 1992); *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986); *Rhymer v. 21st Mortg. Corp.*, 2006 Tenn. App. LEXIS 800, 2006 WL 3731937 (Tenn. Ct. App. Dec. 19, 2006). One exception is the Fifth Circuit, where the court concluded that the arbitrator should decide a defense of mental incapacity because it is not a specific challenge to the arbitration clause but rather goes to the entire agreement. See *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) (which holds the issue of incompetency was for the arbitrator). The United States Supreme Court has not yet settled this conflict but rather expressly reserved the question in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).

The Texas Supreme Court agreed with the majority view expressed above and disagreed with the Fifth Circuit. In *In re Morgan Stanley & Co.*, the Court denied mandamus relief to a defendant attempting to compel arbitration where the plaintiff alleged that she was mentally incompetent. 293 S.W.3d 182 (Tex. 2008). The Court concluded: "it is apparent to us that the formation defenses identified in *Buckeye* are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator." *Id.*

Some courts have similarly held that undue influence claims should be resolved by a court and not an arbitrator because it goes to the formation of the agreement. See *Adkins v. Sogliuzzo*, 2010 U.S. Dist. LEXIS 11107, 2010 WL 502980 (D.N.J., Feb. 9, 2010); *Milon v. Duke Univ.*, 145 N.C. App. 609, 551

S.E.2d 561, 2001 N.C. App. LEXIS 738 (N.C. Ct. App. 2001), *rev'd on other grounds*, 559 S.E.2d 789 (N.C. S. Ct. 2002). See also *Tweedy v. GE Capital Retail Fin.*, 2014 U.S. Dist. LEXIS 1744 (S.D. Ohio Jan. 6, 2014) (resolved undue influence claim before compelling arbitration); *Fitzhugh v. Am. Income Life Ins. Co.*, 2011 U.S. Dist. LEXIS 156855 (N.D. Ohio Nov. 3, 2011) (same). But see *Lake Erie Towing v. Walter*, 2007 U.S. Dist. LEXIS 73982, 2007 WL 2907496 (N.D. Ohio Oct. 3, 2007) (“[I]t is for the arbitrator to decide whether the contract generally fails because of undue influence.”).

Finally, at least one court has held that parties can agree to binding arbitration of will contest claims after the claims have been raised. See *Petorovski v. Nestorovski (In re Estate of Nestorovski)*, 283 Mich. App. 177, 769 N.W.2d 720, 2009 Mich. App. LEXIS 725 (Mich. Ct. App. 2009) (arbitration award affirmed after both parties agreed to stipulated order requiring arbitration of will contest claims). See also *Estate of Fournoy v. Risner*, No. 06-13-00071-CV, 2014 Tex. App. LEXIS 189 (Tex. App.—Texarkana Jan. 9, 2014, pet. denied) (parties submitted mental competence claim to arbitration arising from execution of deed).

B. Court of Appeals Held That Jury Waiver Was Not Enforceable

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

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). The settlor created the trust in May 2007. Prior to the trust's creation, a company entered into a loan and security agreement that was guaranteed by various parties, including the settlor. The company later sued the guarantors for breach of their guaranties and later added the trust as a defendant. The settlor did not sign the guaranty in his capacity as trustee of the trust, but signed it in his individual capacity. The company sought enforcement of the guaranty's jury waiver provisions against the trust, and the trial court signed an order enforcing the jury waiver.

The court of appeals granted mandamus relief, ordering that the trial court should allow a jury trial on claims against the trust. 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:

As set forth above, the Trust did not exist in April 2006 when Gregory Obert and the other defendants executed the guaranties containing the jury waiver provisions. Obert signed a guaranty in his individual capacity, not in his capacity as trustee of the Trust. The

Trust is not a party to a guaranty and does not qualify as a "GUARANTOR [WHO] HEREBY WAIVES TRIAL BY JURY" under the guaranties. Obert's individual waiver of his right to a jury trial cannot, under any stretch of reasoning, be construed as a knowing and voluntary waiver on behalf of the subsequently-created Trust of the right to a jury trial. Obert could not have acted as trustee of a trust that had not yet been created. How can an individual who is not yet a trustee knowingly and voluntarily waive the constitutional right to a jury trial on behalf of a trust that does not yet exist?

Id. Importantly, unlike the Texas Supreme Court in the *Rachel* case, the court of appeals expressly refused to consider other theories that would allow a party to enforce such a provision as against a nonsignatory:

We need not address these arguments, however, because we hold that the fact that the Trust was not in existence when Gregory Obert and the other defendants executed the guaranties conclusively establishes as a matter of law that the Trust (which was not in existence) did not knowingly and voluntarily waive its constitutional right to a jury trial. If the Trust had existed prior to Gregory Obert's execution of the guaranty containing the jury waiver or if evidence established that the Trust had become an assignee of a Guarantor, CCC's three arguments may or may not have merit.

Id. In support of its refusal to consider equitable exceptions that would allow a nonsignatory to be bound to jury waiver, the court cited to *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, 257 S.W.3d 486, 493 (Tex. App.--Houston [14th Dist.] 2008, orig. proceeding). In *In re Credit Suisse*, the court held that a trial court did not abuse its discretion by refusing to enforce contractual jury waiver against a nonsignatory, that jury-waiver provisions are not on the same footing as arbitration agreements, and that equitable estoppel cannot be used as a vehicle to circumvent the required "knowing and voluntary" waiver standard. *Id.*

Interestingly, the court in *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, cited to *Mikey's Houses LLC v. Bank of America, N.A.*, 232 S.W.3d 145 (Tex. App.—Fort Worth 2007) for the proposition that jury waivers were different from and more scrutinized than arbitration agreements. 257 S.W.3d at 493. But this reasoning has since been rejected by the Texas Supreme Court.

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 Texas Supreme Court disagreed with the court of appeals' inference that a contractual jury waiver was not enforceable. The Court first held that a presumption against waiver would violate the parties' freedom to contract. The

Court held that “a presumption against contractual jury waivers wholly ignores the burden-shifting rule” previously found by the court that “a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it.” *Id.* at 344 (quoting *In re Gen. Elec.*, 203 S.W.3d 314, 316 (Tex. 2006) (per curiam) (orig. proceeding)). Courts presume that “a party who signs a contract knows its contents.” *Id.* Therefore, the Court concluded that “as long as there is a conspicuous waiver provision, Mikey's Houses is presumed to know what it is signing.” *Id.*

The Court then addressed what the test was for determining whether there was a conspicuous contractual jury waiver:

Section 1.201(b)(10) of the Texas Business and Commerce Code provides that “[c]onspicuous . . . means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.” In *Prudential*, we noted that the waiver provision was “crystal clear” because “it was not printed in small type or hidden in lengthy text” and “[t]he paragraph was captioned in bold type.”

Id. The Court reviewed the contract at issue and found that the contractual jury waiver was conspicuous:

In this case, the addendum is only two pages long, and each of the twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions included bolded introductory captions similar to the waiver provision in *Prudential*, and the “Waiver of Trial By Jury” caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word “waiver” and the words “trial by jury” within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers that we upheld in both *Prudential* and *General Electric*, and therefore serves as prima facie evidence that the representatives of Mikey’s Houses knowingly and voluntarily waived their constitutional right to trial by jury.

Id. at 345. Because the contractual jury waiver was conspicuous, the court found that the bank did not have the burden to establish a knowing-and-voluntary waiver. See *id.* at 346.

Importantly, the Court expressly disagreed with the court of appeals regarding treating a jury waiver clause differently from an arbitration clause:

We also note the similarity between arbitration clauses and jury-waiver provisions to clarify that a presumption against contractual jury waivers is antithetical to *Prudential*’s jurisprudence with regard

to private dispute resolution agreements. In *Prudential*, we agreed with the United States Supreme Court that “arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced, as long as the specific clauses were not themselves the product of fraud or coercion.” Since *Prudential* indicates that the same dispute resolution rule expressed by the United States Supreme Court in *Scherk* should apply to contractual jury-waiver provisions, the court of appeals’ analysis errs by distinguishing jury waivers from arbitration clauses, thereby imposing a stringent initial presumption against jury waivers. Statutes compel arbitration if an arbitration agreement exists, and more importantly, “Texas law has historically favored agreements to resolve such disputes by arbitration.” We see no reason why there should be a different rule for contractual jury waivers.

In re Bank of America, 278 S.W.3d at 346 (emph. added).

More recently, in *In re Wild Oats Markets*, the court of appeals held that contractual jury waiver provisions are enforced like any other contractual clause, including an arbitration clause. 286 S.W.3d 499, 500 n.1 (Tex. App.—Beaumont 2009, orig. proceeding). The court stated: “In its response, Kuykendahl suggests arbitration cases are treated more favorably than other contractual jury waiver cases. We disagree.” *Id.* See also *In re J.W. Res. Exploration & Dev.*, No. 09-0189-CV, 2009 Tex. App. LEXIS 6676, at *6–10 (Tex. App.—Amarillo August 25, 2009, orig. proceeding). For a more detailed discussion of contractual jury waivers, see David F. Johnson, *Enforcing Contractual Jury Waiver Clauses In Texas*, 62 BAYLOR L. REV. 649 (2010).

Accordingly, due to subsequent Texas Supreme Court precedent, jury waivers should not be treated any differently from arbitration clauses. In that regard, there is a very good argument that they may be enforced regarding will and trust disputes to the extent that arbitration clauses are enforceable.

C. In Terrorem or 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. See e.g. *Stewart v. Republicbank, Dallas, N.A.*, 698 S.W.2d 786, 787 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.). In terrorem clauses are given a strict construction to avoid forfeiture. See *Ferguson v. Ferguson*, 111 S.W.3d 589, 599 (Tex. App.—Fort Worth 2003, no pet.); *Marion v. Davis*, 106 S.W.3d 860, 865 (Tex. App.—Dallas 2003, no pet.); *In re Estate of Schiwetz*, 102 S.W.3d 355, 365 (Tex. App.—Corpus Christi 2003, no pet.). An in terrorem clause is breached only when the acts of the parties come within the clause’s express terms. See *Badouh v. Hale*, 22 S.W.3d 392, 397 (Tex. 2000); *Ferguson v. Ferguson*, 111 S.W.3d at 599; see also *Di Portanova v. Monroe*, 229 S.W.3d

324, 332–333 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Strict construction has narrowly confined what types of actions may constitute a will contest so as to trigger an in terrorem clause. See *Ferguson v. Ferguson*, 111 S.W.3d at 599.

On one hand, courts have considered a variety of actions relating to the settlement of an estate and the following cases did not trigger forfeiture through an in terrorem clause: (1) to recover an interest in devised property; (2) to compel an executor to perform duties; (3) to ascertain a beneficiary's interest under a will; (4) to compel the probate of a will; (5) to recover damages for conversion of estate assets; (6) to construe a will's provisions; (7) to request an estate accounting or distribution; (8) to contest a deed conveying a beneficiary's interest; (9) to determine the effect of a settlement; (10) to challenge an executor appointment; (11) to seek redress from executors who breach fiduciary duties; and (12) presenting testimony in a will contest brought by other beneficiaries. See *Di Portanova v. Monroe*, 2012 Tex. App. LEXIS 9859, at *12-13 (citing Gerry Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries With In Terrorem Clauses*, 51 SMU L. REV. 255, 227 (1998)).

On the other hand, courts have invoked in terrorem clauses resulting in forfeiture in response to certain types of suits. See *In re Estate of Hamill*, 866 S.W.2d 339, 343 (Tex. App.—Amarillo 1993, no writ) (finding forfeiture when a challenge was brought for lack of mental capacity); *Gunter v. Pogue*, 672 S.W.2d 840, 841 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (finding that a challenge based on mental incapacity and undue influence triggered an in terrorem clause and resulted in forfeiture).

There has been a recent case discussing the impact of in terrorem clauses. In *Di Portanova v. Monroe*, grandparents set up eight trusts for a grandchild that had a mental disability. 402 S.W.3d 711 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). The grandchild's guardians filed suit to modify the terms of the trusts to consolidate them into one trust, which would have resulted in a savings of over \$300,000 a year in trustees' fees and other related expenses. 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. The grandparent's will contained the following no-contest clause:

Should any beneficiary hereunder, or anyone duly authorized to act for such beneficiary, institute or direct, or assist in the institution or prosecution of, any action or proceeding of any kind in any court, at any time, for the purpose of modifying, varying, setting aside or nullifying any provision hereof relating to my Louisiana estate on any ground whatsoever, all interest of such beneficiary, and the issue of such beneficiary, to my Louisiana estate shall cease, and the interest of such beneficiary, and such beneficiary's issue, in and to my Louisiana estate shall be paid, assigned, transferred,

conveyed, and delivered to, or for the benefit of, those persons who would take such beneficiary's interest in my Louisiana estate if such beneficiary died intestate, unmarried, and without issue on the date of the institution of the above described action or proceeding.

The trial court found that the guardians' suit to modify the trusts did not violate the no-contest clause, and the other family members appealed.

The court of appeals stated that a no-contest clause in a will or a trust typically makes the gifts in the instrument conditional on the beneficiary not challenging or disputing the validity of the instrument. 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. No-contest clauses allow the intent of the testator to be given full effect. If the intention of the suit is to thwart the settlor's intent, the no-contest clause should be enforced. A violation of a no-contest clause will be found only when the acts of the parties clearly fall within the express terms. Thus, courts construe no-contest clauses to avoid forfeiture, while also fulfilling the settlor's intent.

The guardians filed suit to modify the trust under the Texas Property Code, which provides that trustees and beneficiaries have the right to seek traditional modification of a trust and that a trust can be changed, the terms of the trust can be modified, the trustee can be allowed to do acts that are not authorized and/or forbidden by the terms of the trust, and the trustee can be prohibited from performing acts required by the terms of the trust, and the trust can be terminated in whole or in part if, because of circumstances not known or anticipated by the settlor, the order will further the purposes of the trust, or the modification of administrative, non-dispositive terms of a trust are necessary to prevent waste or avoid impairment of the trust's administration.

The trial court found that consolidating the trust was appropriate because of circumstances not known or anticipated by the settlor as the original terms of the trusts would substantially impair the accomplishment of the purposes of the trusts in ways that the settlors could not have anticipated. The settlors could not have anticipated the expense and professional fees needed to care for the beneficiary and to manage assets placed in trusts for his benefit. The other relatives agreed that the trial court had discretion to consolidate the trusts; they argued, however, that by doing so the guardians violated the no-contest clause in the will.

The court of appeals disagreed. It stated that Texas courts have addressed a myriad of different types of lawsuits with similarly expansive no-contest clauses to determine whether the purpose of the suit was to thwart the settlor's intent. Those courts concluded that the following suits do not trigger forfeitures: (1) to recover an interest in devised property; (2) to compel an executor to perform duties; (3) to ascertain a beneficiary's interest under a will; (4) to compel the probate of a will; (5) to recover damages for conversion of

estate assets; (6) to construe a will's provisions; (7) to request an estate accounting or distribution; (8) to contest a deed conveying a beneficiary's interest; (9) to determine the effect of a settlement; (10) to challenge an executor appointment; (11) to seek redress from executors who breach fiduciary duties; and (12) presenting testimony in a will contest brought by other beneficiaries.

The court agreed with this line of authority and held that filing the 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 court noted that no provision in the wills, or in the trusts they created, forbid consolidation of the trusts. The court also noted that to hold otherwise would deprive the beneficiary of his statutory right to modify the trusts provided by the Probate Code, and that the wills did not express an intent to deprive anyone of that right. The court agreed that the no-contest clause did not deprive a beneficiary of a right afforded by statute related to trust administration when such administrative changes are not prohibited by the settlor in the will and no party is challenging the changes as one that defeats settlor's intent. The court finally noted that the overarching purpose of all of these trusts is to provide for the needs of the current income beneficiary and that the suit for modification furthered that purpose. The court affirmed the trial court's order.

There is a statutory provision that gives a contestant an affirmative defense to invalidate a 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. See *id.* This bill went into effect on June 19, 2009 and only applies to deaths on or after that date. Acts 2009, 81st Leg., ch. 414 (H.B. 1969), § 4(a).

The intent of the act, however, was to clarify existing law. Acts 2009, 81st Leg., ch. 414 (H.B. 1969), § 4(c). Texas common law generally established prior to the enactment of Texas Probate Code Section 64 that courts should balance the wishes of the testator with the public policy of allowing Texans access to the courts for meritorious causes of action brought in good faith. See *Calvery v. Calvery*, 55 S.W.2d 527, 530 (1932); *Estate of Newbill*, 781 S.W.2d 727, 730 (Tex. App.—Amarillo 1989, no writ). Even before the enactment, “A forfeiture of rights under the terms of a will [would not] be enforced where the contest of the will was made in good faith and upon probable cause.” *Hammer v. Powers*, 819 S.W.2d 669, 673 (Tex. App.—Fort Worth 1991, no writ).

Even if a court finds that a claim triggers an in terrorem provision of a will, the parties may still avoid forfeiture by demonstrating that their actions were taken for just cause and in good faith. Before the enactment of Section 254.005, courts generally recognized that a claim brought for probable cause and in good faith would not trigger an in terrorem provision. See Kara Blanco and Rebecca E.

Whitacre, *The Carrot and Stick Approach: In Terrorem Clauses in Texas Jurisprudence*, 43 TEX. TECH L. REV. 1127, 1142 (2011). But no court of appeals had directly confronted the issue by invalidating an in terrorem provision on those grounds. See *id.* at 1147. This lack of a direct precedent created some ambiguity as to the validity of the affirmative defense of probable cause and good faith. See *id.* at 1142. The enactment of Section 254.005 eliminated this ambiguity. See *id.* at 1147.

Since its enactment, however, no case has interpreted this provision. Specifically, the question still remains as to what probable (today just) cause and good faith mean in the context of the provision.

TPC Section 64 went into effect in 2009. Ryann Lamb, *Will Contests in Texas: Did the Codification of the Good Faith and Probable Cause Exception Render In Terrorem Clauses Meaningless?*, 63 BAYLOR L. REV. 906, 917 (2011). Just two years later, in 2011, the Texas Legislature amended the language of TPC Section 64. *Id.* at 929-930. Originally, Section 64 created an affirmative defense to an in terrorem clause for probable cause and good faith. *Id.* at 929-30. The amendments changed the words “probable cause” to “just cause.” *Id.* at 930. Some scholars suggest this lexical change may have been made at the bequest of the Real Estate, Probate, and Trust Law Section of the State Bar of Texas so that Section 64 would mirror the language in Probate Code Section 243. See Blanco and Whitacre, 43 TEX. TECH L. REV. at 1149. Section 243 allows a court to require an estate to pay the attorney’s fees of any person that defends or prosecutes the admission of a will into probate “in good faith and with just cause.” *Id.* This would to allow one jury charge to cover both issues. *Id.*

Texas courts have on multiple occasions instructed juries under Probate Code Section 243 that “just cause” means “the action must be based on reasonable grounds and there must have been a fair and honest cause or reason for said action.” *Id.* Likewise Texas courts have instructed juries that “good faith” is defined as “an action which [sic] is prompted by honesty of intention, or a reasonable belief that the action was probably correct.” *Id.*

It is unclear from the legislative history if the lexical shift was the result of the State Bar’s efforts. The legislative history only shows that the change was designed to be “nonsubstantive.” See Lamb, 63 BAYLOR L. REV. at 930 (2011). But the change furnishes a strong argument, and at least some indication of how a court may treat the affirmative defense before a case decides definitely how the Section 254.005 will be treated.

One Texas case suggests that just cause and good faith may be shown when an action is not brought with fraudulent intentions. See *In the Estate of Kremer*, No. 09-10-00066-CV, 2011 Tex. App. LEXIS 1726, 2011 WL 846137 (Tex. App.—Beaumont Mar. 10, 2011, pet. denied). In that case, a testator created a will in 1989 that left the majority of her estate to her sister. See *id.* at 1. The testator then came under the control of a caregiver, and executed a second

will just before her death in 2004. See *id.* at 2. The testator's sister admitted the 1989 will to probate. See *id.* Although the caregiver knew of the 2004 will, he waited until after the sister's death, some twenty months after the 1989 will was offered for probate, to attempt to probate the 2004 will. See *id.* The sister's executor challenged the caregiver's attempt to probate the 2004, and a jury found undue influence in its execution, further finding that the caregiver had pursued the probate of the 2004 will in bad faith. See *id.* at 3. He was, therefore, unable to obtain attorney's fees for the attempted probate. The caregiver challenged the sufficiency for the jury's findings on appeal. See *id.* at 3.

The court of appeals found that the evidence, when viewed in the light most favorable to the jury's verdict, was more than sufficient to support a finding that the caregiver's behavior was fraudulent towards the testator; the caregiver had exercised undue influence over the testator when the 2004 will was executed. See *id.* The court went on to state that "under the circumstances of this case, evidence of Smith's silence when he had a duty to speak constitutes evidence relevant to the issue of fraudulent intent." *Id.* With no further analysis, and because the caregiver provided no alternative argument than his innocence, the court found the evidence supported the jury's finding of lack of just cause and good faith in the attempt to probate the 2004 will. *Id.* at 33.

The case is an extreme one, but it does suggest that a showing of fraud should overcome a will contestor's affirmative defense that the contest was brought for just cause and in good faith, just as fraud prevented a showing that an action was brought for just cause and in good faith to probate an improperly procured will.

A contestor's response that a will contest does not trigger an in terrorem provision because the contest was brought for just cause and in good faith is an affirmative defense. See *Hammer v. Powers*, 819 S.W.2d 669, 672-673 (Tex. App.—Fort Worth 1991, no writ). As such, failure to plead the defense results in waiver. See *id.*; *Gunter*, 672 S.W.2d at 844. The burden will also be on the contestants to prove that the affirmative defense applies. *Id.* Case law further supports that whether the affirmative defense applies is a question of fact and may be submitted to a jury. See *Lawrence v. Latch*, 424 S.W.2d 260, 266 (Tex. Civ. App.—Fort Worth 1968), rev'd on other grounds, *Lawrence v. Latch*, 431 S.W.2d 307 (Tex. 1968). The determination cannot be made by the court of appeals for the first time on appeal. See *Gunter*, 672 S.W.2d at 844.

Additionally TPC 64 requires that an action not only be brought, but also maintained for just cause and in good faith. The inclusion of the word "maintained" in the statute suggests that an in terrorem clause may still be upheld if an action was originally brought for just cause and in good faith, but loses its just cause and good faith basis before a resolution is reached.

IV. Will Contest Procedural Issues

A. Right To Interlocutory Appeal

In *In re Estate of Fisher*, a court of appeals denied a party's request for a permissive appeal of an order granting a summary judgment on an undue influence claim. 421 S.W.3d 682 (Tex. App.—Texarkana 2014, no pet.). Sheila N. Fisher and her husband, Carlos Garcia, III, contested the application to probate the will of her adopted father James W. Fisher on the ground that he had been unduly influenced by his biological nephew, James Umberger, to bequeath the majority of his estate to Umberger. She also challenged several other transactions including bank accounts, insurance proceeds, and other assets. Finding no evidence of undue influence regarding the will, the trial court granted a partial no-evidence summary judgment motion in favor of Umberger. Sheila and Garcia then filed an accelerated permissive appeal from this order pursuant to Section 51.014(d) of the Texas Civil Practice and Remedies Code.

The statutory language provides that on a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if: (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. The trial court entered a finding: "The Court further finds that an immediate appeal of this Order granting a no evidence motion for summary judgment on the issue of undue influence, may materially advance the ultimate termination of this litigation, as the remaining issues in the case will, in all probability, be controlled by the determination of the issue on undue influence on the Will Dated March 30, 2011." *Id.* at 684.

The court of appeals denied the petition for interlocutory appeal as the case did not involve a controlling issue of law: "we are convinced that this appeal involves a controlling fact issue, not a legal one. The ruling appealed from is the finding that there was no evidence of undue influence at the time of the execution of Fisher's will on March 30, 2011. Instead of complaining of a ruling on a 'pivotal issue of law' as contemplated in the enactment of Section 51.014(d), the parties' briefs argue disputed facts." *Id.*

Finally, the court noted that probate proceedings are an exception to the one final judgment rule, and that multiple judgments final for purposes of appeal can be rendered on certain discrete issues. "In the absence of a specific statute providing for the appeal of a probate matter, an order may be appealed if it disposes of all issues in a phase of the probate proceeding." *Id.* Accordingly, the court noted that:

Here, judicial economy will not be served if permissive appeal is allowed at this stage, since an unhappy party is free to appeal the order which would be expected to result soon from the court's

summary judgment ruling—an order admitting the will to probate and issuing letters testamentary. The parties may also have the opportunity to appeal other future orders that adjudicate a substantial right and end various phases of the probate proceeding.

Id.

B. Court Must Give Notice To Will Contestant

In *Estate of Neuman*, the decedent's daughter, Nancy, filed an application for probate of the decedent's will, which the trial court admitted to probate on July 10, 2012. No. 09-13-00076-CV, 2013 Tex. App. LEXIS 8490 (Tex. App.—Beaumont July 11, 2013, no. pet.). On October 19, 2012, Kenneth, a son, filed a motion to compel production of the decedent's original will. On January 1, 2013, Kenneth filed a pro se motion to contest the will and alleged that the decedent was not of sound mind. Nancy filed a response to Kenneth's motion, in which she asserted that the letters that the son attached to his motion did not prove the decedent was of unsound mind when he signed the will. Nancy's response was filed on January 10, 2013. On January 31, 2013, the trial court signed an order and determined that the decedent was of sound mind when he executed his will and ordered that the contest of the decedent's will was dismissed due to lack of evidence by petitioner and because the petitioner's motion was not filed in a timely manner. The son appealed.

The court of appeals first determined that the son's contest was timely filed. Section 93 of the Texas Probate Code provides that an interested person may contest a will within two years after the will is admitted to probate. Kenneth met this deadline. The court also held that the trial court erred in dismissing the son's contest because the trial court had not given Kenneth adequate notice. Section 21 of Texas Probate Code provides that in all contested probate proceedings the parties shall be entitled to a trial by a jury as in other civil actions. The record indicated that the case had never been set for trial. Texas Probate Code Section 10 states that any person interested in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be heard upon such opposition as in other suits.

The trial court may set contested cases for trial on the request of any party or on its own motion, but it must give not less than forty-five days' notice to the parties of the first setting. The court held that because this was a contested case, the trial court was required to give the parties not less than forty-five days' notice, which it did not do. Moreover, had Nancy's response of the motion been filed as a no-evidence motion for summary judgment, Kenneth would have been entitled to twenty-one days' notice of the hearing. The court held the trial court erred in determining that Kenneth lacked evidence to support his motion when the time for him to produce his evidence had not yet arrived. The court therefore reversed and remanded for further proceedings.

C. Sanctions For Improperly Opposing The Probate of A Will

In *Vickery v. Gordon*, a trial court declined to impose sanctions against a son and his attorneys regarding his opposition to the probate of a will. No. 14-11-00812-CV, 2012 Tex. App. LEXIS 6239 (Tex. App.—Houston [14th Dist.] July 31, 2012, no pet.). The testator's fiancé argued that the opposition was groundless, brought in bad faith, and made solely for the purpose of harassment.

The court of appeals initially determined that the order denying the sanctions was a final order for purposes of appeal. For a probate order to be appealable, it is unnecessary that the order be one that fully and finally disposes of an entire probate proceeding; rather, the order must be one that fully disposes of and is conclusive of a discrete issue for which that particular part of the proceeding was brought. The court determined all issues relating to the sanctions proceedings were finally disposed of when the trial court denied the motion for sanctions, admitted the will to probate, and severed any remaining issues and parties for later determination. The judgment was final and appealable.

The court then looked to the son's good faith basis for contesting the probate. The fiancé argued that the son failed to make an original inquiry and that certain records and witnesses were available but not consulted prior to his filing of the opposition to probate. She argued that if the son had consulted the available evidence, he would have unquestionably seen that testator possessed the requisite testamentary capacity, that the will's formalities were followed, and that the fiancé did not unduly influence the testator.

She focused on the evidence of the testator's testamentary capacity and noted that doctors provided letters to the attorney stating that the testator was mentally incompetent and able to make his own legal decisions. The court of appeals, however, determined that that evidence would only create a fact issue on mental capacity and did not prove mental capacity as a matter of law. The court found that the records did not necessarily foreclose a finding that the testator lacked testamentary capacity, nor did they establish that his son failed to reasonably inquire into the underlying facts. The court also looked at other evidence in the record that established the son's good-faith basis for making his challenges to the will. For example, the son had been contacted by someone who had been a witness to the will signing, and that person told the son that the whole episode was inappropriate and of great concern. The testator's friend and business partner also testified that the fiancé had imposed herself onto the testator and was attempting to influence, control, and impose herself on his business dealings. Other witnesses testified as to the fiancé's control and activities with regard to the testator. The court found that the trial court did not abuse its discretion in denying a motion for sanctions.

In *In re Whittingham*, the court of appeals reversed a sanctions award where a contestant filed a will contest against an executor who had been

discharged by the court under Section 149E of the Texas Probate Code. 409 S.W.3d 666 (Tex. App.—Eastland 2013, no pet.). The court found that there was no legal authority on the primary issue, and therefore, sanctions were not appropriate. See *id.*

D. Mental Incompetence And Undue Influence May Not Be Alternative Claims

In *In the Estate of Wilbur Waldo Lynch*, the court affirmed a judgment finding that a testator did not have mental capacity to execute a will and also held that the issues of mental competence and undue influence were not necessarily conflicting. 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied). This case involved a will dispute over a 2003 will of Wilbur Waldo Lynch. Wilbur had three daughters: Peggy, Patricia, and Tracy. Wilbur died in July in 2005, and Tracy filed an application to probate the 2003 will. After it was admitted to probate, Peggy and Patricia contested the will on the grounds that their father lacked testamentary capacity to execute the 2003 will and he allegedly executed it as a result of undue influence by Tracy. A jury returned a verdict in favor of Peggy and Patricia, and the trial court invalidated the 2003 will. Although the jury had found that Tracy incurred over \$600,000 in reasonable and necessary attorney's fees, the jury found that she did not act in good faith and with just cause in defending the 2003 will. The trial court did not allow Tracy her attorney's fees. Tracy appealed the trial court's judgment.

In answer to question number one, the jury found that Wilbur did not have testamentary capacity when he executed the 2003 will. In the answer to question number two, the jury found that at the time Wilbur executed the 2003 will, he was acting under the undue influence of Tracy. Tracy asserted that these two findings created an irreconcilable conflict because a person cannot both lack testamentary capacity and be duly influenced. She also argued that the trial court erred in admitting the evidence of Peggy's and Patricia's expert because that expert failed to recognize that a lack of testamentary capacity and undue influence are mutually exclusive.

The court of appeals noted that the lack of testamentary capacity and undue influence are two distinct grounds for avoiding a will. It also acknowledged that many courts have found that a finding of no testamentary capacity and a finding of undue influence are in conflict. Quoting a former Texas Supreme Court case, the court stated: "While testamentary incapacity implies the want of intelligent mental power, undue influence implies the existence of testamentary capacity subjected to and controlled by a dominant influence or power." The court of appeals acknowledged that the Supreme Court had recognized that a finding of undue influence implies the existence of a sound mind. However, it found that neither the Supreme Court nor it had held that a finding of undue influence requires the existence of sound mind. In fact, the court noted that a previous Supreme Court case had recognized: "weakness of mind and body, whether produced by infirmities of age or by disease or

otherwise, maybe be considered as a material circumstance in determining whether or not a person was in a condition to be susceptible to undue influence.”

The court of appeals concluded that 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). Accordingly, the court was unwilling to hold that in all cases a person cannot both lack testamentary capacity and be unduly influenced. Thus, the court held that the expert was not precluded from opining on both questions and also found that the jury’s affirmative findings on both questions were not an irreconcilable conflict.

The court next viewed the sufficiency of evidence to support the findings of lack of mental capacity. The court concluded that there was legally and factually sufficient evidence to support the jury’s finding that Wilbur lacked testamentary capacity to execute the 2003 will. The court found that an expert testified, after reviewing his medical records and multiple depositions, that Wilbur had dementia before and after the execution of the will and therefore had dementia when he executed the will. Furthermore, Wilbur’s answers to questions by another physician days before the will was executed supported an opinion that he lacked the ability to understand the complicated will that he executed. Finally, the court of appeals affirmed the jury’s finding that Tracy had not acted in good faith and the trial court’s denial of her attorney’s fees.

Interestingly, the Fourth Court of Appeals had previously recognized that a finding of lack of mental capacity and of undue influence presented a conflict. See *Lowery v. Saunders*, 666 S.W.2d 226, 229 n.2 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.) (“The holding of the trial court that the testatrix lacked testamentary capacity and that she was unduly influenced are in conflict.”). Other appellate courts have recognized that mental capacity is a necessary component of undue influence. See, e.g., *Shelton v. Shelton*, 281 S.W. 331, 334 (Tex. Civ. App.—Austin 1926, no writ) (noting “lack of mental capacity precludes the possibility of undue influence.”); *Stewart v. Miller*, 271 S.W. 311, 316 (Tex. Civ. App.—Waco 1925, writ ref’d); *Springer v. Strahan*, 180 S.W.2d 654, 657 (Tex. Civ. App.—Waco 1944, no writ); *Beckham v. Mayes*, 229 S.W.2d 636, 642 (Tex. App.—Fort Worth 1950, no writ); *Turner v. Hendon*, 269 S.W.3d 243, 252 (Tex. App.—El Paso 2008, pet. denied). Yet, other courts have held that there is no conflict between a finding of undue influence and a finding of mental incapacity. See *Board of Regents v. Yarbrough*, 470 S.W.2d 86 (Tex. Civ. App.—Waco 1971, writ ref’d n.r.e.); *Gunlock v. Greenwade*, 280 S.W.2d 610 (Tex. Civ. App.—Waco 1955, writ ref. n.r.e.); *DeBorde v. Bryan* 253 S.W.2d 63 (Tex. Civ. App.—Dallas 1952, writ ref. n.r.e.). Another court more recently held that any potential conflict in jury findings can be cured by the trial court disregarding one of the findings on a no-evidence ground. See *In re Estate of Arrendell*, 213 S.W.3d 496 (Tex. App.—Texarkana 2007, no pet.).

Where the pleadings and evidence raise a question of competency and also a question of undue influence, the latter issue may be submitted to the jury

conditionally, to be answered in the event that the testator is found to have been competent. See *Mills v. Kellahin*, 91 S.W.2d 1097 (Tex. Civ. App.—El Paso 1936, writ dism.).

E. Pattern Jury Charge

In 2014, the Texas Pattern Jury Charge has added a section for probate issues. 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

F. Statute Of Limitations For Contests

In *Omohundro v. Ramirez*, a relative sought a finding that an amendment to a trust was invalid due to undue influence, mental incapacity, breach of fiduciary duty, and other related causes of action. 392 S.W.3d 218 (Tex. App.—El Paso 2012, pet. denied). The trustee filed a motion for summary judgment based on multiple grounds, including a statute of limitations. The trial court found that the relative's suit was time barred under Texas Probate Code Section 93, given that the exceptions to the rule under the statute were not shown to be applicable and the relative did not file suit until more than two years after the will was probated. The court of appeals affirmed based upon the evidence in the record that the two-year statute of limitations had not been met.

In *Holloway v. Monroe*, children of a deceased father filed claims against their father's accountant and other employees regarding the looting of the father's estate. No. 14-12-01087-CV, 2014 Tex. App. LEXIS 2576 (Tex. App.—Houston [14th Dist.] March 6, 2014, pet. filed). The estate was contractually required to pay his children \$2.7 million under a previous divorce decree.

Toward the end of the decedent's life, he was extremely ill, both physically and mentally. His death certificate stated that he had severe dementia for fifteen years and advanced Parkinson's disease for seventeen years. During this time, the defendants assisted in creating trusts to divert assets, purchased the decedent's business for an alleged discounted price, received gifts, and took other actions to decrease the estate. Based on these facts, the children alleged causes of action for: (1) breach of fiduciary duty; (2) fraud; (3) money had and received; (4) unjust enrichment; (5) lack of capacity; (6) undue influence; (7) fraud by nondisclosure; (8) intentional interference with inheritance rights; (9) conversion; (10) conspiracy; and (11) fraudulent transfers. The defendants filed a motion for summary judgment on the statute of limitations, which was granted, and the children appealed.

The court of appeals reversed the summary judgment. The court held that the defendants, as movants for summary judgment on limitations grounds, had the burden of conclusively proving when the children's causes of action accrued and negating the discovery rule because the children pleaded it. To meet this burden, the defendants had to prove as a matter of law either that the discovery rule did not apply or that there was no genuine issue of material fact about when the children discovered, or in the exercise of reasonable diligence should have discovered, the nature of their injury. The court noted that the defendants' motion was not sufficient to meet this burden:

It appears that Monroe's motion and evidence only established the accrual date of the Appellants' claims against Monroe related to Tiltex Co. and the 1997 trust. But Monroe makes no effort in his motion to detail which specific causes of action are barred by these facts. Moreover, Monroe does not discuss whether or how the discovery rule applies to any of the Appellants' causes of action, although he does state that the Appellants had notice and disclosure regarding Tiltex Co. and the 1997 Trust as early as 2004 and 2005 through receipt of various information.

...

Regardless of the merits of Monroe's, Kyle's, and Rigby's limitations defenses, they failed to move for summary judgment on limitations on all of the Appellants' claims. Moreover, as to the Tiltex Co. and 1997 Trust claims on which they did move for summary judgment, they failed to adequately address their statute of limitations affirmative defense. For the foregoing reasons, we conclude that the trial court erred by granting summary judgment in favor of Monroe.

Id. at *19-21.

In *Britton v. Chase*, the parties settled a dispute regarding an estate in

1999. No. 01-13-00928-CV, 2014 Tex. App. LEXIS 7498 (Tex. App.—Houston [1st Dist.] July 10, 2014, no pet. hist.). In 2002, the court entered an order accepting a final accounting of the estate and discharged the administrator. In 2007, beneficiaries filed suit claiming that the administrator violated the earlier settlement agreement. They amended their petition in 2010 to seek a bill of review of the 2002 orders approving the accounting and discharging the administrator. The trial court denied the bill of review, and the beneficiaries appealed.

A bill of review is a direct attack on a judgment, seeking to correct, amend, modify or vacate the judgment. To obtain a bill of review, a litigant must plead and prove (1) a meritorious defense to the cause of action alleged to support the judgment (2) that he was prevented from making by the fraud, accident, or wrongful act of his opponent, (3) unmixed with any fault or negligence of his own. A bill of review must be brought within four years of the judgment's rendition unless the pleader establishes extrinsic fraud by the other party. Extrinsic fraud is fraud that denies a litigant the opportunity to fully litigate at trial all the rights or defenses that could have been asserted. It occurs when a litigant has been misled by his adversary by fraud or deception, or was denied knowledge of the suit. In other words, it is conduct that prevents a real trial upon the issues involved.

By contrast, intrinsic fraud is inherent in the matter considered and determined in the trial where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein. Included in intrinsic fraud are fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed. Unlike extrinsic fraud, intrinsic fraud will not toll the four-year statute of limitations for bringing a bill of review

The court of appeals affirmed the denial of the bill of review. The beneficiaries argued that the administrator improperly and clandestinely distributed estate assets to other beneficiaries, the accounting contained language not in the agreed judgment, and that the administrator concealed these facts by failing to serve citation of the accounting. The court concluded: "On the contrary, because the allegations of fraud relate to acts that were or could have been addressed during the estate's administration, [the beneficiaries] have pleaded intrinsic fraud, not extrinsic fraud." *Id.* The court held that the four-year statute of limitation barred the beneficiaries' bill of review claim.

G. There Must Be A Will Before There Is A Will Contest

In *Ellason v. Estate of Scott*, Ms. Scott, a grandmother, died intestate. No. 03-12-00040-CV, 2013 Tex. App. LEXIS 14184 (Tex. App.—Austin November 20, 2013, no pet.). Scott transferred the vast majority of her assets into a trust before she died, naming Ellason as the beneficiary. Ellason was also named the

estate's representative. A grandson filed several motions objecting to Ellason's handling of the estate and asserting that Scott "had no right to give" the property to Ellason and that it was supposed to be given to him and his brothers. He alleged that Ms. Ellason used fraud and undue influence to obtain said real properties to make sure the three Ellason brothers would receive nothing. He also filed a motion to contest a will, asserting that Scott's "will" was improperly executed, that she lacked testamentary capacity to execute it, and that Ellason exerted fraud and undue influence to overpower Scott's mind. The trial court approved Ellason's final accounting, and the appellant and his brothers each received slightly less than \$10,000. The court of appeals affirmed, holding that there was no will to contest. The court also held that if the grandson's allegations could be interpreted as challenging the trust, that the record did not provide any basis for such a claim.

H. Jurisdictional Issues

In *In re Estate of Treviño*, a court of appeals issued mandamus relief ordering that a county court's order transferring a case to district court was void. No. 04-13-00404-CV, 2013 Tex. App. LEXIS 13655 (Tex. App.—San Antonio November 6, 2013, no pet.). A decedent's wife filed an application to probate a will and appoint her the executrix in county court. Several days later, she filed a claim against another for declaratory relief and other claims and filed a motion to transfer the case to district court because she expected there to be a will contest filed. The county court granted the motion to transfer. A few days later, the other party filed in the county court a motion to transfer venue, opposition to probate, and a motion for assignment of a statutory probate court judge. The county court denied that request, and the requesting party filed a mandamus proceeding challenging the transfer order and refusal to assign a statutory probate judge.

The court of appeals held that jurisdiction over probate proceedings is governed by section 4C(a) of the Texas Probate Code which provided that in a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, the county court has original jurisdiction over probate proceedings. The court also noted that the Probate Code also provided for an exception: when a matter in a probate proceeding is contested, the county court may, on its own motion—or must, on the motion of any party—transfer the contested matter to the district court, which may then hear the contested matter as if originally filed in the district court. The relevant county did not have a statutory probate court or county court at law exercising original probate jurisdiction.

The issue presented was whether transfer to the district court was available on the date of the county court's order of transfer. The court held that transfer to a district court was not available until some matter in the proceeding became "contested," and no issue was or could be considered contested until a party other than the filing party appeared challenging the application for probate

or the allegations made and relief sought in the other suit.

Finally, Probate Code section 4D provided that a county court judge had a mandatory duty to request assignment of a statutory probate court judge to hear a contested matter when a party files such a motion before the judge of the county court transfers the matter to a district court. The court held that because the county court based its order denying the request for assignment of a statutory probate court judge, at least in part, on the previous transfer to the district court, that the order denying assignment was also an abuse of discretion and must also be vacated. The court held that the county court has no discretion other than to request the assignment of a statutory probate court judge.

I. Proper Parties For Will Contest

In *In re Whittingham*, the court of appeals affirmed a dismissal of a former executor where a contestant filed a will contest against an executor who had been discharged by the trial court under Section 149E of the Texas Probate Code. 409 S.W.3d 666 (Tex. App.—Eastland 2013, no pet.). After the decedent passed, his will was admitted to probate and an executor was appointed. A year and a half later, the court granted the executor’s application for judicial discharge pursuant to Section 149E of the Texas Probate Code. The order stated that “executor has fulfilled all duties required of him under the Texas Probate Code and that the Executor shall be discharged from any liability involving matters relating to past administration of the Estate that have been fully and fairly disclosed and any further responsibilities to this Court and the beneficiary of the Estate.” *Id.* Six months later, a child of the decedent filed a will contest and named the executor and the beneficiary under the probated will as parties. The executor filed a motion to dismiss him from the suit as he had been discharged, and the trial court granted same. The court of appeals affirmed the dismissal.

Generally, many Texas courts have found that an executor is a proper party to a will contest. The executor is said to have virtual representation for the beneficiaries under the contested will. But, those cases dealt with executors that had not yet been discharged. The court of appeals held that the broad discharge language in the order in this case applied not only to the beneficiaries but also to other third parties. The court held that when the party filed his will contest, there was no acting executor to be served as a virtual representative, and that when there is no duly appointed executor, the proper parties are the heirs or beneficiaries of the estate. Dismissal of the former executor was affirmed.

J. Collateral Estoppel From Guardianship Proceedings

In *In re Pilkilton*, the court of appeals affirmed a trial court’s finding that a subsequently executed will should be admitted to probate. No. 05-11000246-CV, 2013 Tex. App. LEXIS 1080 (Tex. App.—Dallas February 6, 2013, no pet.). Shortly after the challenged will was executed, a guardianship proceeding was instituted regarding the decedent’s capacity. The trial court granted a temporary

guardianship, and later made that permanent. The court found as follows: "J. B. Pilkilton is totally without capacity and lacks the necessary capacity as provided by the Texas Probate Code to care for himself and to manage his individual property as a reasonably prudent person, based on reoccurring acts or occurrences within the last six-month period, and that a full guardianship of both the person and estate of J. B. Pilkilton, the incapacitated person, should be granted." *Id.* In the later will contest case, the contestants alleged that the issue of mental capacity to execute the will was already decided in this earlier guardianship proceeding, and that the earlier guardianship judgment had collateral estoppel effect. The trial court disagreed, and the court of appeals affirmed. The court of appeals stated that a finding of incapacity in a guardianship proceeding is different from a finding of a lack of testamentary capacity in a will contest. And the court in the guardianship proceeding (in March and April) did not determine that the testator did not have testamentary capacity on February 11. The court concluded that the issue involved in this will contest, the decedent's testamentary capacity on February 11, 2007, was not identical to the issue that was fully and fairly litigated and essential to the judgment in the prior guardianship proceeding and that collateral estoppel, therefore, did not apply.

K. Tortious Interference With Inheritance Claim

In *In re Estate of Valdez*, the court of appeals held that a party cannot assert a tortious interference with inheritance claim solely based on filing a will contest. 406 S.W.3d 228 (Tex. App.—San Antonio 2013, pet. denied). After a proponent filed an application to probate a will, a contestant filed a contest. The proponent then asserted a tortious interference with inheritance claim against the contestant. The trial court granted the contestant a summary judgment on that claim.

The court of appeals affirmed for the contestant. The court first discussed the claim of tortious interference with inheritance rights. "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.* The court held that in addition to the tortious conduct, "we have described the elements of this cause of action as the following: '(1) that an interference with one's property or property rights occurred; (2) such interference was intentional and caused damage; and (3) the interference was conducted with neither just cause nor legal excuse.'" *Id.* The court then cited to tortious interference with contract precedent that held that "[b]ringing suit to determine one's rights under a contract is a proper exercise of a legal right and cannot form the basis for a claim of tortious interference." *Id.*

The court cited to Texas Probate Code section 10C and held that the contestant could not be held liable because his act in filing the contest was allowed by the statute and was not tortious conduct:

The language of the Texas Probate Code is clear that "[t]he filing or contesting in probate court of any pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate." Thus, Robertson's mere filing of a will contest in this case did not constitute a tortious interference with inheritance of Martha Jane's estate. Valdez provides no authority to show how Robertson's alleged lack of standing would affect Robertson's statutory right under Texas Probate Code section 10C to file a will contest. Thus, Robertson's summary judgment evidence conclusively established that Valdez's cause of action for tortious interference failed as a matter of law. Because Valdez failed to raise a genuine issue of material fact as to the tortious nature of Robertson's actions, as a matter of law, the will contest cannot be considered a proper basis for Valdez's claim for tortious interference.

Id.

V. Ethics Issue – The Lawyer Witness

A situation once considered to be unusual is becoming almost commonplace in the probate world. In years past it was fairly typical for the lawyer who drafted the will or trust instrument to represent the estate upon the death of the testator, without great controversy. Now, with the impressive increase in wealth – sometimes astounding wealth – the role of the drafter/estate attorney has taken on added complexity. In today's world, the drafter may very well find himself or herself representing the trustee of a substantial trust, appointed under or pursuant to the documents he or she drafted. What are the ethical implications (as well as limitations) associated with the lawyer who represented the decedent prior to death, and who now represents the trustee/executor of an estate?

Fact scenario: Lawyer X represented decedent over the course of twenty years, during which time he drafted multiple wills and trust instruments. The last of these documents, executed while decedent was in her late 80's, included a trust instrument naming as trustee the bank whom decedent's attorney had represented from time-to-time. The trust was fully funded with virtually all of the wills and trusts executed by decedent during her lifetime following the same disposition scheme: minor gifts to her only child with the bulk of the estate going to the Little Sisters of the Downtrodden, a 501C(3) non-profit organization.

Shortly after death, trustee receives a demand from an attorney representing the dispossessed child claiming that all of the wills and trusts executed during decedent's lifetime were invalid because decedent allegedly suffered from schizophrenia during her entire life, and therefore lacked testamentary and mental capacity to execute valid instruments. Trustee calls attorney who drafted the instrument and engages attorney to represent trustee in

what is shaping up to be a spirited contest. May the drafter represent the trustee?

Not surprisingly, the answer to the question posed is multi-faceted. The starting point is, of course, whether the claims that are asserted thrust the attorney into the role of “material” witness or whether those claims place the lawyer on the periphery of the facts, and thereby making his involvement “immaterial” to the outcome. In either event, the prospect that the lawyer could be a witness carries with it significant ethical considerations.

The starting point for a discussion of “Lawyer as Witness” is Rule 3.08, Texas Rules of Disciplinary Conduct (“Rules”), which provides in pertinent part:

a. A lawyer shall not accept or continue employment as an advocate before a tribunal in a pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer’s client, unless . . .

(5) The lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

The following provision, Rule 3.08(b), prohibits a lawyer from continuing as an advocate if the lawyer believes that he/she will be compelled to give “substantially adverse” testimony (adverse to the lawyer’s client), unless the client consents after full disclosure.

If a lawyer is barred from representing a client under either paragraph (a) or (b), Rule 3.08(c) extends the prohibition to other members of the lawyer’s firm unless the client gives informed consent. Rule 3.08 does not prohibit the testifying lawyer from participating in the preparation of the matter as long as the testifying lawyer takes no active role as an advocate before the tribunal. See Rule 3.08, cmt. 8.

The distinction made by the Rule is meaningful: the lawyer must first qualify as a witness “necessary to establish an essential fact” on behalf of his/her client. Second, assuming the lawyer meets that criterion, the prohibition extends to his/her participation in a “pending adjudicatory proceeding” as an “advocate,” not as a “participant.” The lawyer can thus write briefs in the back room while his/her partner handles the advocacy required in a case. That is, assuming he/she is not subject to disqualification or, equally important, that his/her participation in the proceeding does not prejudice the client.

The purposes of Rule 3.08 have been described as follows: “to insure (1) that a client’s case is not compromised by being represented by a lawyer who could be more effective for the client by not also serving as an advocate; (2) that the client not be burdened by counsel who may have to offer testimony that is

substantially adverse to the client's cause; (3) to avoid confusion for the finder of facts; and (4) to avoid prejudice to the opposing party that can arise from a single person playing dual roles." Tex. Comm. On Professional Ethics, Op. 468 (1991); accord, Tex. Comm. On Professional Ethics, Op. 471 (1992); Texas Lawyer's Creed, Art. 1 (condemns . . . "acting as both witness and advocate."). See also *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex. App.—Corpus Christi, 1989, writ den'd) (Held: trial court erred in refusing to disqualify lawyer who was a material fact witness and an expert witness for his client in a case alleging breach of good faith and fair dealing against insurance company).

Rule 3.08(a)(5) has been described as seeking to balance "the interest of the client in being represented by counsel of his or her choice with the interests of the opposing party." Rule 3.08 cmt. 7. It also serves as recognition of the fact that the opponent may be "unfairly prejudiced in some situations" where the advocate is also a key witness. *Ayres v. Canales*, 790 S.W.3d 554 (Tex. 1990) (Advocate/witness' disqualification reversed, with court holding that party seeking to disqualify must show actual prejudice to itself).

The "Lawyer as Witness" discussion typically involves a situation in which a lawyer who is both advocate and witness is threatened with disqualification in a motion brought against the lawyer by a former client. Under another of the Rules (1.09), the lawyer may not be adverse to a former client in a matter that is substantially related to the matter(s) which the lawyer handled for the former client. The analysis and underlying consideration that informs that Rule is whether the challenging party has been or will be prejudiced by the lawyer's continued pursuit of the matter adverse to the former client. See *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422-23 (Tex. 2002). This Rule has been followed consistently in Texas for many years. See, e.g., *Henderson v. Floyd*, 891 S.W.2d 252, 253-54 (Tex. 1995).

The law is scant in this area as to the precise issue presented here (i.e., lawyer-witness, non-advocate). As noted, most of the existing authority involves an attempt to disqualify the lawyer/witness, as opposed to whether the fact that a lawyer may be a witness mandates the lawyer's (and his law firm's) withdrawal. The Rules provide some guidance, requiring withdrawal if a lawyer serves as both advocate and witness and the representation will result in a violation of Rule 3.08 or other applicable Rules such as 1.15, comment 10 (referring to Rule 1.01 [Competent and Diligent Representation]; Rule 1.05, comment 22 [Confidentiality of Information]; Rule 1.06(e) [Representation of Opposing Parties in Same Litigation]; Rule 1.07(c) [Certain Intermediaries]; Rule 1.11(c) [Adjudicatory Officials, Law Clerks]; Rule 1.12(d) [Lawyers Employed or Retained by an Organization]).

Representative cases include *In re: Estate of Arizola*, 401 S.W.3d 664 (Tex. App.—San Antonio, 2013, no pet.) (allegation that challenged attorney has personal factual knowledge and may be called as a witness insufficient to demonstrate necessity of lawyer's testimony; disqualification denied); *Solvex*

Sales Corp. v. Triton Mfg. Co., 888 S.W.2d 845 (Tex. App.—Tyler 1994, writ denied) (lawyer/advocate who withdrew as lead counsel nine days before trial, then testified at trial, held: not subject to disqualification because he was not the “advocate” at trial); *cf. Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416 (Tex. 1996); *Ayres v. Canales*, 790 S.W.2d 554 (Tex. 1990, orig. proceeding) (court looked to Rule 3.08 “for guidance” in overturning disqualification).

Three Professional Ethics Committee opinions that have addressed lawyer-witness issues are instructive. Tex. Comm. On Professional Ethics, Op. 468 (1991); Op. 471 (1991); and Op. 475 (1992). In Opinion 468, the Committee held that a lawyer could represent his wife in a proceeding involving her previous husband, in which the lawyer was not a party and had no potential common liability but in which he would testify as a witness for his wife. The Committee arrived at a similar conclusion regarding another matter in which a creditor had sued his wife concerning a community debt, and in which he would be a necessary witness. In both situations, the Committee referred to the exception in Rule 3.08(a)(5), and stated that the representation therefore was permissible only if the lawyer “promptly notified opposing counsel of [the] dual role and advised him/her that disqualification would work substantial hardship on the client.” (Emphasis supplied). The key determinant in both situations was that the lawyer was an advocate whose testimony was necessary on an essential fact.

The Committee concluded in Opinion 471 that, with the informed consent of the client, a law firm could represent a client in an appeal from a trial at which a lawyer in the law firm, other than the lawyer who would argue the appeal, testified as a fact witness on behalf of the client. Once again, the lawyer’s testimony was deemed to be necessary.

In Opinion 475, the Committee considered whether under Rule 3.08 a lawyer had to withdraw when the opposing party claimed that it would call the lawyer as a witness at trial following unsuccessful negotiations in which the lawyer was actively involved. One party claimed that the negotiations had resulted in a binding contract, but the lawyer’s client took the opposite position. The Committee concluded that the lawyer’s withdrawal was unnecessary when his testimony would be “mostly cumulative of other witnesses. First, the lawyer is not being called as a witness by his client and is not a witness ‘necessary to establish essential facts on behalf of his client. . . . Secondly, the testimony will not be adverse to the client. . . .” *Id.*

Even then, bare allegations that an attorney “has personal knowledge of essential facts and may be called as a witness” do not constitute grounds for the attorney’s disqualification. See *In re: Estate of Arizola*, 401 S.W.3d 664 (Tex. San Antonio, 2013, no pet.).

What happens, though, when the lawyer, while not also serving as an advocate, has factual knowledge that is not “necessary to establish essential facts,” yet still will appear as a witness? Under these circumstances, the issue

becomes one of prejudice to the client. The client must be afforded the opportunity to give its informed consent, whether or not the anticipated testimony is adverse to the client's interest. See Rule 3.08(b) and (c) and comments 8 and 9.

While other Texas cases (including Supreme Court authority) look to Rule 3.08 for guidance, those cases routinely involve disqualification. In situations where disqualification is not an issue, the following requirements are imposed by Rule 3.08 and its comments:

If the lawyer is also an advocate, he/she must step aside: a) if the lawyer knows or believes that the lawyer is or may be a witness; b) necessary to establish an essential fact on behalf of his or her client; c) unless prompt notification has been given to opposing side and disqualification would work a substantial hardship on the client; and d) in any event, the lawyer must first obtain the client's informed consent before testifying.

VI. Conclusion

Due to the considerable wealth that is being transferred from one generation to the next, there will certainly be an increased level of litigation concerning that transfer. Claims of undue influence and mental incompetence will become more and more litigated in a variety of contexts. This paper was intended to provide an update of recent legal issues in this complex area.