

- 1  **Estate Disputes Update**
Steve Spitzer
Cowles & Thompson – Tyler
July 28, 2009

- 2  **Issues to Look For**
 - **Issue spotting**
 - **Potential trouble areas**
 - **CPA clients**
 - See CPA more regularly
 - Tax planning
 - Annual tax return
 - Attorney less often

- 3  **Wealth Transfer**
 - **Aging baby boomers**
 - **“Silver Tsunami”**
 - **Intergenerational Wealth Transfer**
 - **\$41 trillion, next 50 years**
 - Boston College study







- 4  **Web Site**
 - **www.TexasEstateDisputes.com**
 - **Available there:**
 - Info and FAQs
 - Sign up for email updates
 - Latest cases
 - Slides from this presentation

- 5  **Estate \ Probate Process**
 - **Front end – during life**
 - Formulating the estate plan
 - Drafting the documents

 - **Back end – after death**
 - Probate of the will
 - Resolving disputed issues

- 6  **“Writers or Fighters”**
 - **We resolve disputes**
 - **Not complex estate planning**

- 7  **Disputed Areas**
 - **Written documents**
 - Wills
 - Trusts
 - Deeds
 - **Estates**
 - Ownership of property

- **Guardianships**
 - **Heirship determinations (no will)**
- 8  **Challenge to Written Documents**
- **Testamentary Capacity**
 - **Undue Influence**
 - **Will Formalities**
- 9  **“War Stories”**
- **Prior C & T cases**
 - **Real problems for real clients**
 - **Areas:**
 - Trust abuse
 - Will contests
 - Elder exploitation
 - Will construction
 - Heirship cases
- 10  **Abuse by Trustee**
- **Abuse of trust by trustee**
 - Confidential settlement
 - **\$10 million+ in dispute**
 - **Trustee self dealing, personal gain**
 - Over decades
 - Earnings of trust assets depleted
 - **Multiple millions recovered**
 - C & T clients: trust beneficiaries
- 11  **Elder Exploitation – Swiss Ave.**
- **Dallas Morning News**
 - **Four part series**
 - August 2006
 - “Mary Ellen’s Will: the Battle for 4949 Swiss”
 - 5,800 sq ft mansion
- 12  **Swiss Ave.**
- **Deathbed will**
 - Disinherits daughter
 - Leaves estate to 2 antique dealers
- 13  **Swiss Ave.**
- **Mary Ellen – client’s mom**
 - **Dies Mar. 2, 2005 – age 88**
 - **First will – Oct. 2002**
 - Frances Giron – daughter \ only child
 - **Second will – Feb. 22, 2005**
 - (7 days before death)
 - Two antique dealers
 - Signed in hospital (video)...

14 **The Characters**

15

16 **Swiss Ave.**

- **Deathbed will thrown out**
 - Antique dealers lose
- **Giron's will prevailed**
 - C & T client wins
- **Antique dealers indicted**
 - Criminal trial awaits
- **Attorney disbarred**

17 **Tyler Case**

- **Will in hospital – 12/07**
 - Alzheimer's patient
 - 86 years old, nursing home
 - Believes birds flying around room
 - Less than month before death
- **Will disinherits our client**
 - Was in 2002 will, had power of atty.

18 **Will Construction – Ranch Case**







- **Will construction**
 - “following real property...”
 - Metes and bounds description
 - Left property out (sub set given)
 - Should have had 2 descriptions, one each prop.


19 **Will Construction – Ranch Case**


- **Will construction**
 - Assumed all property conveyed
 - Not discovered until years later
 - Only portion conveyed
 - \$4 million property
 - Settled during trial for \$2 million


20 **Will Construction - Law**


- **Ambiguity present?**
- **Question of law for court (not lay jury)**
- **If so, extrinsic evidence**
 - Beyond four corners of will
- **Common issues**
 - Property ID
 - “Land I own in Smith County”
 - ID of persons to receive property
 - “My children,” “my church”


- 21  **Guardianships**
- **Not for every situation**
 - Harsh remedy
 - **Least restrictive alternatives**
 - Power of attorney, etc
 - **Expense**
 - Ad litem, medical testimony
 - Annual court reports
 - **No “stealth” guardianship**
 - May get disinherited
- 22  **Heirships**
- **No will, statute decides**
 - **Complicated scheme**
 - **Heirs receive, regardless**
 - Of how big of a deadbeat they are
 - Even if no practical relationship to deceased
- 23  **Heirships**
- **Costly**
 - Much more than if had will
 - **Dependent administration**
 - Unless all heirs agree
 - Deceased does not choose administrator
 - **Real life example**
 - Two parents die within months
 - 4 kids combined
 - Sort out decades of transactions
- 24  **Who, What, When, Where**
- **Jurisdiction & Venue - where**
 - **Statute of limitations - when**
 - **Standing - who**
- 25  **Necessary Parties – Who?**
- **Do not have to join beneficiaries, heirs**
 - **However, settlement not binding on them**
 - **Family Settlement Agreement**
 - Only parties bound are parties signing
- 26  **Party Joinder – Who?**
- **Most states: all interested parties joined**
 - Mandatory, except in less than 10 states
 - **Texas: no mandatory joinder**
 - Heirs at law, etc.
 - **TRCP = joinder**
 - **Probate Code = no joinder**
 - **Probate Code controls any conflicts**


- 27  **Standing – Who?**
- **“Interested persons”**
 - Someone taking under the will
 - One taking by statute without the will
 - **Subject matter jurisdiction**
 - Can’t be waived, can void a judgment
 - **Will contestant should plead standing**

- 28  **Jurisdiction – Where?**
- **Constitutional County Court**
 - Smith County – Judge Baker
 - Disputes transferred to CCL # 3
 - **Statutory Probate Court**
 - Larger counties
 - Dallas, Tarrant, Harris, etc.
 - **Real court, real litigation**
 - Just as any other contested case
 - Discovery, depositions, etc.

- 29  **Venue – Where?**
- **Probate action**
 - County of deceased's “domicile”
 - Fixed place of residence
 - **Trust action**
 - County where trustee resides, or
 - County where trust administered

- 30  **Venue Transfer**
- **Better practice**
 - File at or before original pleading
 - **Probate Code**
 - May allow later filing
 - Before final decree

- 31  **Will Contests – When?**
- **Timeframe \ Limitations Period**
 - Before probate = anytime
 - Up to 4 years to probate
 - Longer for muniment of title
 - After admit to probate = two years
 - Filing later dated will = no contest
 - Two years does not apply
 - Still have the regular four years

- 32  **Will & Trust Contests**
- **Grounds**
 - Lack of testamentary capacity

- Second will trumps
 - Later dated will or trust
- Formalities not followed
- Forgery
- Undue influence
- Will construction

33  **Will & Trust Contests**

- **Threshold question**
 - “Unnatural Disposition”
 - “Natural Objects of Bounty”
 - Spouse
 - Descendants
 - Parents
- **Evidence of**
 - Undue influence
 - Lack of capacity

34  **Testamentary Capacity**

- **Even though aged, infirm and sick**
 - if has capacity,
 - right to dispose of property in any manner
- **Not for courts, friends or family to say**
- **Even if distribution not fair or wise**

35  **Testamentary Capacity**

- **Different from legal capacity**
- **Definition: "sufficient mental ability, at the time of the execution of the will, to understand the business in which the testator is engaged, the effect of his act in making the will, and the general nature and extent of his property."**

36  **Testamentary Capacity**

- **Must know**
 - next of kin, “natural objects of bounty”
- **Must 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."**

37  **Testamentary Capacity**

- **Relevant time**
 - Date that will was executed
 - Can look to other times also
 - If shows state of mind on day in question
- **Burden of proof to show**
- **On the proponent of the will**
 - On challenger in will contest
 - Beneficiary to file first

- 38 **Undue Influence**
- **A form of fraud**
 - **Force, intimidation, duress, or deception**
 - **Causing will contrary to testator's desire**
 - **Assumes the existence of**
 - Testamentary capacity
- 39 **Undue Influence**
- **Elements:**
 - **1) exertion of an influence**
 - **2) that subverts or overpowers the mind of the testator; and**
 - **3) will that would not have been executed but for the influence.**
- 40 **Undue Influence**
- **Not every influence is "undue"**
 - **Was the free agency of the testator destroyed?**
 - **Was the resulting writing the will of the one exerting the influence?**
 - **Burden of proof**
 - Party contesting the will
- 41 **Undue Influence - Factors**
- (1) **relationship between the testator, the contestants and the party accused of exerting influence;**
 - (2) **opportunities existing for the exertion of the type of influence in question;**
 - (3) **circumstances surrounding the drafting and execution of the will;**
- 42 **Undue Influence - Factors**
- (7) **the testator's mental or physical incapacity to resist;**
 - (8) **words and acts of the testator;**
 - (9) **weakness of mind and body of the testator;**
 - (10) **whether the will is unnatural in its terms of disposition of property.**
- 43 **Will Contests – When?**
- **Strategy**
 - Best if before probate
 - Burden of proof issues
- 44 **Executor & Trustee Removal**
- **Fiduciary duties to beneficiaries**
 - Duty to fully account
 - Duty of full disclosure
 - Duty of loyalty
 - **No mismanagement**
 - **No self dealing**
 - **Executor education on these points**
 - Many are unaware

- 45 **Executor & Trustee Removal**
- **Tex. Supreme Court – Summer 09**
 - **Trustee removal – any time**
 - No limitations period
 - Ongoing fiduciary duty
 - **Executor removal – not often**
 - Once named in will, appt. by court
 - Stays unless gross misconduct
- 46 **Should I be an executor?**
- **Think twice!!**
 - **Fiduciary duty**
 - **Potential liability**
 - **Fee to charge**
- 47 **Fiduciary Duty - Definition**
- To prove Emma Executor complied with her fiduciary duty, she must show:**
- a. the transactions in question were fair and equitable to Betty Beneficiary;
 - b. Emma Executor made reasonable use of the confidence that Betty Beneficiary placed in her;
 - c. Emma Executor acted in the utmost good faith and exercised the most scrupulous honesty toward Betty Beneficiary;
- 48 **Fiduciary Duty - Definition**
- d. Emma Executor placed the interests of Betty Beneficiary before her own, did not use the advantage of her position to gain any benefit for herself at the expense of Betty Beneficiary, and did not place herself in any position where her self-interest might conflict with her obligations as a fiduciary; and
 - e. Emma Executor fully and fairly disclosed all important information to Betty Beneficiary concerning the transactions.
- 49 **Serving as Executor**
- **OK if you want risk**
 - **Potential claims**
 - **Appearance of conflict of interest**
 - **Reason for rule 128A**
 - Attorney serving as executor
- 50 **No Contest Clause**
- **Forfeiture clause**
 - **Disfavored by the courts**
 - **If you challenge will, you take nothing**
 - **Need to put beneficiary to a choice**
 - **If he takes nothing anyway**
 - What's to lose?
- 51 **Trustee Liability**
- **Prudent investor rule**
 - **Portfolio as a whole**
 - Not just one investment
- 52 **Non-Probate Assets**

- **Insurance policies**
- **Retirement plans**
- **Bank accounts**
 - Survivorship, pay on death
- **Can be majority of estate**
- **Can ruin a good estate plan**
- **Beneficiary designations control**

53 **Bank Accounts**

- **POD**
- **Joint tenants w survivorship**
- **Probate code magic language =**
 - Non probate
- **Signature cards**
- **Depository agreements**

54 **Bank Accounts**

- **Bank usually protected**
 - Not liable for payment of funds
- **Claim against person receiving \$**
 - Collectability issues

55 **Bank Accounts**

- **What is needed for non probate transfer?**
- **Survivorship accounts**
 - Must be signed by party deceased
- **POD accounts**
 - Signed by original depositor

56 **Bank Accounts**

- **Who owns before death?**
- **Survivorship accounts**
 - Account holders
 - In proportion to net contributions
- **POD accounts**
 - Original depositor
 - Main distinctive of POD account
 - No access to recipient during lifetime

57 **Anticipating Will Disputes**

- **Video the signing? - problems**
 - Do you video them all?
 - May look more feeble than they are
 - Did the Swiss Ave. video help?
- **Sign multiple wills?**
 - One fails, go back to the one prior
 - Use same attorneys as first time
- **Letter from physicians near in time**

58 **Anticipating Will Disputes**

- **Selection of witnesses**
- **Orchestration of execution ceremony**
- **No contest clauses**
 - With economic disincentive
 - Put contestant at risk of loss
- **Revocable trusts**
 - Decreases property passing by will
 - Harder to challenge

59  **Anticipating Problems**

- **Give away during lifetime**
- **Put into trust**
- **Undue influence**
 - Persons not present at will signing

60  **Attorney Roles**

- **Drafter**
 - Key witness in litigation
- **Litigator**
 - Stay out of drafting
 - Send back to estate planner
- **Accountant**
 - CPA, tax issues

61  **Homestead**

- **Occupancy right of surviving spouse**
- **Can't be distributed to beneficiaries**
- **As long as survivor lives there**
- **Even if HS is deceased's SP**

62  **Exempt Property**


- **If estate insolvent**
- **Exempt property (exempt from creditors)**
 - Set aside
 - Pass free of debt


63  **Red Flags for Trouble**


- **Unnatural disposition of assets**
 - all to one child, nothing to others
 - all to a caregiver and none to the children, etc.
- **Second marriage**
 - children from first marriage receive less or nothing
- **Physical health and mental decline of client**
 - Along with a drastic change in estate plan

64  **Red Flags for Trouble**


- **Aggressive relative**
- **An overly domineering spouse, child, caregiver, or other relative**
- **Person unduly interjecting him/herself into the estate planning process.**

- 65  **How to Help**
- **Do you have a will?**
 - Avoid heirship
 - **How long ago since will prepared?**
 - Changes in family
 - Divorce, second marriage, etc.
 - **Mental state of client**
 - Who manages affairs?
 - **Discord among family members**


- 66  **Mediation**
- **Just do it!!**
 - Saves litigation expense
 - Allows parties to control the outcome
 - Juries much less predictable
 - **Think win-win**
 - Not courtroom battle
 - Build rapport
 - Look for mutually acceptable outcome


- 67  **Mediation**
- **Document settlement well**
 - Prepare in advance
 - Bring beefed up memo
 - Clarify details
 - Saves later headaches

- 68  **Recent Legislative Changes**
- **2009 session just ended**
 - **Updates on web site soon**
 - Email updates

- 69  **Property ownership issues**
- **Realty owned as tenant in common**
 - **Who decides?**
 - Sale
 - Paying taxes, insurance
 - Property access and liability
 - **Partition**
 - By agreement, by suit

- 70  **Michael Jackson**
- **Estate planning report card**
 - **Had a will = good**
 - Avoids heirship
 - His choice of executor (not mom)
 - **Had a trust – keeps private**
 - **Guardian for kids**
 - Mother, Diana Ross

- 71  **Steve McNair**
- No will – murdered July 4
 - \$75 million in NFL earnings
 - Emergency request by widow
 - Two other sons inherit
 - Did agent fail him?

- 72  ***THANK YOU!***
- Steve Spitzer
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