



## Recent Cases of Interest to Fiduciaries

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*Ali v. Smith, 554 S.W.3d 755 (Tx. Ct. App. 2018)*

**Texas Court of Appeals affirms trial court order holding that arbitration was not compelled under will or Texas Arbitration Act.**

**Facts:** Shafqat Ali was named as an executor under the will of Amjad Sultan. Following Sultan's death, Ali qualified as executor of Sultan's estate. Ali resigned as executor after a beneficiary filed an action alleging several breaches of fiduciary duty. After Ali's resignation, no other executors were named in the will. Therefore, Darlene Smith was appointed as administrator of the estate.

As administrator, Smith sued Ali. In response, Ali filed a motion to compel arbitration. Ali relied on the Texas Arbitration Act and a term of the will which provided that, if a dispute arose under the will, the dispute must be resolved by arbitration. Although the Texas Arbitration Act generally requires the parties to be signatories to an agreement, Ali argued that Smith's claims were made under the auspices of the will. Ali also argued that Smith received benefits under the will in the form of fiduciary compensation.

The trial court denied Ali's motion to compel arbitration. Ali appealed.

**Law:** The Texas Arbitration Act generally applies only to agreements between two or more parties. However, an arbitration clause may be enforced against a party who did not sign the agreement if the party receives substantial benefits under the agreement.

**Holding:** The Texas Court of Appeals, 14th District, affirmed the trial court's denial of Ali's motion to compel. Smith's lawsuit did not allege Ali had violated the terms of the will. Instead, Smith alleged that Ali had violated state law. Therefore, Smith's claim was not grounded in the terms of the will. The court contrasted Ali's argument against a case where a beneficiary alleged the trustee had violated the terms of the trust. In that case, the arbitration clause was enforceable because the beneficiary's argument was grounded in the trust instrument.

The Court of Appeals also rejected Ali's argument that Smith's fiduciary compensation was a substantial benefit under the will. Texas law authorizes an administrator to receive compensation even if there is no will. Because Smith was entitled to compensation under state law, her compensation did not amount to a substantial benefit under the will.

**Practice Point:** An arbitration clause may be enforceable against a beneficiary or fiduciary who did not negotiate the instrument containing the arbitration agreement if he or she obtains substantial benefits under the agreement. However, attorneys should distinguish between claims arising under state law and claims arising under the terms of the instrument.

Attorneys should also consider whether the claim implicitly recognizes the validity of the instrument. For example, in a 2014 case, a California court held that a beneficiary was not bound by an arbitration clause because she claimed that the trust amendment that created the arbitration requirement was produced by undue influence. The McGuireWoods Fiduciary Advisory Services summary of that case is available [here](#).

## *In re the Macy Lynne Quintalla Trust, 2018 WL 4903068 (Tex. App. 2018)*

### **Failure to provide a means to remove and replace trust protector leads to litigation; trust protector not an “interested person” in the trust with the authority to request trust accountings.**

**Facts:** In 2014, Oscar Leo Quintanilla (“Grantor”) created three substantially similar trusts for the benefit of his three children (“2014 Trusts”). He named Paul Perry (“Perry”) as trustee and Andrew Bradford West (“West”) as trust protector. Under the governing instruments of the 2014 Trusts, the trust protector’s sole power was to remove and replace the trustee. The governing instruments did not specify how to remove or replace the trust protector. The governing instruments, however, gave the trustee “in its discretion” the power to merge each of the 2014 Trusts with any similar trust created for the benefit of the same beneficiaries.

Shortly after the Grantor created the trusts, he and West had a falling-out. West, however, remained trust protector of the Trusts because no mechanism existed for his removal. West attempted to exercise his right to remove Perry as trustee and replace him with a corporate fiduciary. To prevent Perry’s removal as trustee, the Grantor in 2016 created three new trusts substantially similar to the earlier 2014 Trusts (“2016 Trusts”). Perry then exercised his authority under the governing instruments of the 2014 Trusts to merge each of the 2014 Trusts with its respective 2016 Trust. Perry provided notice to all the trust beneficiaries, who ratified the merger.

Perry then filed a declaratory judgment action in the Probate Court of Bexar County, Texas, asking the court to declare that the merger was valid and that West was not an “interested person” entitled to notice of the merger. West counterclaimed, asking the court to hold that Perry could not merge the 2014 Trusts with the 2016 Trusts or, alternatively, that West was an “interested person” and therefore entitled to an accounting of the 2014 Trusts up through the date of the merger. The trial court held that the trust mergers were valid and that West was not an interested person. West appealed.

**Law:** The Texas Trust Code gives a trustee the power to combine two or more trusts “without a judicial proceeding if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes” of the trusts. Before merging trusts, a trustee must first give notice to “each beneficiary who might be then entitled to receive distributions from the separate trusts being combined.” Under Texas law, an “interested person” in a trust is a trustee, beneficiary, or “any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust.” A person is “affected by the administration of the trust” when that person is involved in managing aspects of the trust or could receive any of the trust assets.

**Holding:** The Texas Court of Appeals affirmed the trial court’s judgement. The Court of Appeals held that Perry was entitled to merge the 2014 Trusts with the 2016 Trusts pursuant to both the Texas Trust Code and the terms of the governing instruments of the 2014 Trusts. Texas law obligated Perry to give notice only to the current income beneficiaries. Perry gave the proper notice and obtained a release for the merger.

The Court of Appeals also held that West was not an “interested person” entitled to an accounting of the 2014 Trusts. The Court of Appeals stated that settlors and other persons who do not manage trust property are not “affected by the administration of the trust.” In the Court’s view, the power to appoint fiduciaries does not affect management of trust property, and therefore does not implicate the administration of the trust that might otherwise require notice to the trust protector.

**Practice Point:** Grantors of dynasty trusts are increasingly appointing trust protectors, trust advisors, and other third-persons who have the power to supervise trustees, amend the trust, appoint fiduciaries, and exercise similar oversight powers. These trust “watchmen” often serve a useful function in adapting a trust to unforeseen circumstances and providing a more cost-efficient means of overseeing the trustee than relying on the beneficiaries to vindicate their rights in court. However, the trust protectors named in the governing document may not remain the best individuals to fulfill this role forever. Drafters of estate planning documents should include provisions in trust instruments governing the removal and designation of trust protectors and similar power holders in case irreconcilable conflict arises between the trust protectors and the other parties interested in the trust. Additionally, if part of the trust protector’s role is to supervise the trustee’s performance, then estate-planners should make sure that the trust protector has the requisite authority to demand information and accountings from the trustee.

## ***Fielding v. Commissioner of Revenue, 916 N.W.2d 323 (2018)***

**Minnesota Supreme Court joins North Carolina in ruling that a statute defining “resident trust” is unconstitutional as applied to the taxpayer because under the Due Process Clause of the United States Constitution the domicile of the grantor at the creation of the trust is an insufficient basis, by itself, on which to impose income taxation on a trust’s worldwide income.**

**Facts:** Reid MacDonald (“Grantor”), a resident of Minnesota, in 2009 created four substantially similar irrevocable trusts for his four children (“Trusts”). One of the Grantor’s four children was domiciled in Minnesota. The other four children were domiciled in different states. Grantor funded the Trusts with shares of stock in Fairbault Foods, Inc., a Minnesota corporation (“Fairbault Foods”).

Initially, the Trusts were taxable as grantor trusts under subchapter J of the Internal Revenue Code because the Grantor retained the power to substitute trust assets for assets of equivalent value. In 2011, the Grantor irrevocably released his power to substitute assets, making the Trusts non-grantor trusts for federal and state income tax purposes.

The initial trustee of the trust was Edmund MacDonald, a domiciliary of California. From 2012 until July 2014, Katherine Boone, a domiciliary of Colorado, was trustee. In July 2014, William Fielding (“Fielding”), a domiciliary of Texas, became trustee. Fielding maintained the records of the Trusts in Texas and never visited Minnesota for business relating to the Trusts.

In 2014, after Fielding became trustee, he sold all of the Trusts’ interests in Fairbault Foods, incurring significant taxable gain. Before 2014, the trustees of the Trusts had been filing state income tax returns for the Trusts in Minnesota that treated each of the Trusts as Minnesota “resident trusts.” Fielding, however, filed the 2014 income tax returns for the Trusts as Minnesota resident trusts under protest and reserved the right to file for a refund. Fielding later filed amended returns, asserting that the Minnesota statute classifying the Trusts as Minnesota resident trusts was unconstitutional as applied to the Trusts because it violated the Due Process Clause of the United States Constitution.

Fielding sought a refund of over \$2 million for the difference between the income taxes the Trusts owed as resident trusts and the income taxes the Trusts would have owed as nonresident trusts. The Minnesota Commissioner of Revenue denied the refunds. Fielding appealed to the Minnesota Tax Court, which held that the statute was unconstitutional as applied and granted the refund claims. The Commissioner of Revenue appealed.

**Law:** Unlike grantor trusts (whose income is taxed to the grantor), in most states and under the Internal Revenue Code, non-grantor trusts are treated generally as separate taxpayers from the grantor, the trustee, the beneficiaries, and other persons interested in the trust. Minnesota, like many states, imposes an income tax on the Minnesota-source income of non-grantor trusts. Additionally, Minnesota imposes an income tax on the worldwide income of its residents, including any “resident trust.” Minnesota Statutes Section 290.01, Subdivision 7b(a)(2), defines a “resident trust” as “an irrevocable trust, the grantor of which was domiciled in this state at the time the trust became irrevocable.”

A state tax is not binding on the taxpayer and cannot be imposed if it violates the Due Process Clause of the United States Constitution. A tax will satisfy the Due Process Clause if there is a “minimum connection” between the state and the subject of the tax and if there is a “rational relationship” between the subject of tax and the benefits conferred on the taxpayer by the state. In determining whether Minnesota Statutes Section 290.01, Subdivision 7b(a)(2), is constitutional as applied to the taxpayer, the relevant inquiry is whether the definition of “resident trust” is consistent with due process under the facts and circumstances of this case.

**Holding:** The Minnesota Supreme Court agreed with the Minnesota Tax Court that Minnesota Statutes Section 290.01, Subdivision 7b(a)(2), was unconstitutional as applied to the Trusts. The parties did not dispute Minnesota’s right to tax income derived from Minnesota. However, the Court held that the sole fact that Grantor was a Minnesota resident when he created the Trusts was not sufficient under the Due Process Clause for Minnesota to tax the Trusts’ worldwide income.

Comparing this case to a similar Michigan case, the Court analogized that Minnesota's definition of "resident trust" is similar to a statute taxing any person born in Minnesota as a resident of Minnesota no matter where he or she resides or earns income in the future. For this reason, the court held that the Trusts' connections to Minnesota in the current taxable year, and not any prior taxable year, are the only relevant connections to the analysis. Furthermore, the court held that Grantor's connections to Minnesota were not relevant to the inquiry. Rather, the relevant connections were between the State of Minnesota and the trustee, who as the legal owner of the property of the Trusts has control and possession of the trust property.

**Practice Point:** This case, along with similar cases in other jurisdictions, could mark a change in how states classify and tax non-grantor trusts. Numerous states have statutes similar to Minnesota's that define a resident trust to include any trust created by an individual domiciled in the state when he or she created the trust. Minnesota's Supreme Court is following a widening trend in holding that the residence of the grantor, standing alone, is not a sufficient basis on which to impose tax on the worldwide income of a trust. This case, together with *Kimberly Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue*, has been granted certiorari by the United States Supreme Court.

If the U.S. Supreme Court upholds the ruling in this case and in *Kaestner*, then fiduciaries across the country would have to evaluate whether they need to reconsider what jurisdictions in which to file returns and whether to file as resident or nonresident trusts in those jurisdictions. The Supreme Court's ruling also could mean significant changes for planning.

Trusts that at one time were subject to income tax in a particular jurisdiction may no longer be subject to tax in that jurisdiction. This change could lead to planning opportunities for tax reduction, as well as situations in which fiduciaries suddenly find themselves subject to higher taxes. No matter what the specific outcomes for planners and fiduciaries, this case could result in one of the most significant changes in the income taxation of trusts in more than a decade.

***Walker v. Ryker, 2018 Cal. App. Unpub. LEXIS 6664 (2018).***

**A trust which provided for California law to apply to its interpretation and largely disinherited the testator's daughter was valid under California law and did not violate California public policy, even where the grantor was purportedly domiciled in Chile or Argentina.**

**Facts:** Douglas R. Tompkins founded The North Face and Esprit apparel lines. Before his death, he placed his assets in the Douglas R. Tompkins Revocable Trust with himself and Debra B. Ryker as the initial Co-Trustees (the "Trust"). Tompkins was survived by his wife, Kristin, and two daughters from a previous marriage, including Summer Tompkins Walker. Following Tompkins's death in 2015, Kristin became successor Co-Trustee.

The trust provided that upon Tompkins's death, Summer is only to receive selected items of Tompkins's personal property. The trust document explicitly stated that Tompkins "intentionally and with full knowledge made no provision for any person, whether claiming to be an heir of the Trustor or not, except as specifically provided" in the trust agreement.

Six months after Tompkins's death, Summer filed a petition in the Los Angeles Superior Court asking the court to determine the validity of the trust and its choice-of-law provisions (the Trust was governed by California law), alleging that Tompkins lived in South America at the time of his death and that the forced heirship laws applicable in Argentina and/or Chile should be applied to remove a portion of Tompkins's assets from the trust and distribute them to her.

The Co-Trustees moved for summary judgment arguing that Section 21103 of the California Probate Code and the choice of law provision in the Trust required the application of California law to construe the Trust. Summer asserted that the laws of the decedent's domicile should govern the distribution of his estate. The Superior Court granted the Co-Trustees' motion for summary judgment and dismissed the case. Summer appealed.

**Law:** Section 21103 of the California Probate Code provides: "The meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, or to any other public policy of this state applicable to the disposition."

**Holding:** The Court of Appeals confirmed the ruling of the Superior Court holding that California law applied and that the choice-of-law provision was enforceable under Section 21103 of the California Probate Code. In the context of probate matters, California law specifically recognizes that a person may choose the law of any state to govern the disposition of their assets following their death and the courts will generally apply the selected law. This ruling is supported by the well-established precedent regarding testamentary intent and the duty of the court to ascertain and give effect to the intent of the maker.

The Court of Appeals noted that the trust contained a clear choice-of-law provision, directing that the trust be construed in accordance with California law. The Court of Appeals further emphasized that Summer's argument that Tompkins was domiciled in Chile at the time of his death and that the trust's choice-of-law provision should be disregarded accordingly, were without merit. Section 21103 of the California Probate Code is unambiguous and the plain meaning controls.

The Court of Appeals further held that Tompkins's decision not to leave Summer any assets of significant value was not contrary to the public policy of California. California courts have long recognized the right of a parent to disinherit his or her children. California law presumes that the omission of a child from a will is intentional unless the child was born or adopted after the execution of the will. Accordingly, the Court of Appeals concluded that Tompkins's failure to provide Summer with a portion of his estate at his death did not violate California's public policy.

Lastly, the Court of Appeals addressed Summer's assertion that Tompkins created the trust to evade Chilean law and that enforcing the trust would violate California's public policy in favor of comity. The Court of Appeals applied an exception to the concept of comity, which precludes the application of foreign laws that are contrary to public policy of the forum state. The evidence offered by Summer to support the assertion that Tompkins structured his affairs in order to evade Chilean law failed to establish or even suggest that Tompkins's trust was illegal under Chilean law.

The Court of Appeals noted that the use of corporations and trusts is a common and legitimate means of avoiding taxation and avoiding forced heirships where applicable. The Court of Appeals therefore concluded that the principles of comity did not outweigh Tompkins's directives and California's public policy in favor of a testator's freedom to dispose of his estate in the way he sees fit.

**Practice Point:** Practitioners should be cognizant of the effect of choosing a governing law other than that of the state of domicile of the grantor and should understand the potential challenges that may arise based on state legislature and public policy in determining the proper interpretation of the will or trust.



## ***Estate of Luce, No. 02-17-00097-CV (Ct. App. Texas 2018)***

**A testator who suffered physical injuries rendering him unable to speak and paralyzed from the chest down, but who suffered no head or brain injuries, validly executed a new will by communicating his preferences through a “blinking system” and directing the notary to sign on his behalf in the presence of a witness in accordance with Texas law.**

**Facts:** Michael and Gayelynn met in 1987 and married in 1989. Both had children from prior marriages. In 1998, Michael executed a will (the “1998 Will”) naming Gayelynn as executor and giving his entire estate to her if she survived him. Michael had a distant relationship with his two daughters, and later adopted two of Gayelynn’s adult sons. Over the course of their 26-year marriage, Michael and Gayelynn separated four times, and Gayelynn filed for divorce three times. She filed for divorce for the last time in June 2015.

On October 11, 2015, Michael was in an ATV accident that left him paralyzed from the chest down, but the accident did not cause any head or brain injuries, and Michael continued to be alert and oriented as to person, time, and place. Before being intubated, he clearly communicated to hospital staff that he wanted his daughters, not his estranged wife, to make his decisions for him. Michael was subsequently intubated and left unable to speak.

On October 18, 2015, attorney Kevin Ferrier met with Michael and determined Michael’s wishes through a series of leading questions that Michael answered by blinking his eyes to indicate “yes” or “no.” Based on Michael’s answers, the attorney determined that Michael wanted to revoke all prior wills and leave his estate to his daughters. The attorney drafted the will and read it to Michael privately and then in the presence of a notary and two witnesses. The notary signed the will on Michael’s behalf, in the presence of the witnesses, the witnesses signed in Michael’s presence, and the will was notarized (the “2015 Will”). No one else was present in the hospital room.

Michael died on November 26, 2015. Gayelynn offered the 1998 Will for probate, and Michael’s daughters offered the 2015 Will for probate. Gayelynn contested the 2015 Will.

At trial a jury found that: (1) the 2015 Will was validly executed in accordance with statutory execution requirements, (2) Michael had testamentary capacity, (3) the 2015 Will was not a product of undue influence, (4) the 2015 Will revoked the 1998 Will, and (5) Gayelynn did not bring her suit in good faith. The 2015 Will was admitted to probate by a trial judge who subsequently lost reelection. The replacement judge vacated the lack of good faith ruling and awarded attorneys’ fees to Gayelynn to be paid by the estate. Both sides appealed.

**Law:** Pursuant to Texas Estates Code Section 251.001, a person must be of sound mind to execute a valid will. Testamentary capacity requires that the person understand that he is making a will, the effect of the will, and the general nature and extent of his property. Texas Estates Code Section 251.051(2) allows a notary to sign for a person who is physically unable to sign or make a mark if directed to do so by that person, in the presence of a witness who has no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the document being signed.

**Holding:** On appeal, the Court of Appeals affirmed the validity of the 2015 Will, but reversed the decision to vacate the finding that Gayelynn had brought her suit in bad faith. With respect to the validity of the 2015 Will, the Court of Appeals held that there was sufficient evidence to support the jury’s finding that the 2015 Will was properly and validly executed.

The attorney, the notary, and both witnesses testified that the attorney and Michael established a blinking system to communicate, that through the blinking system Michael confirmed that he understood the execution process, that the notary was signing the will for him, and that he was requesting the notary to sign for him. The notary further testified that she signed the will at Michael’s direction. Therefore, the Court of Appeals held that there was some evidence to support the jury’s finding that Michael directed another person to sign the 2015 Will for him.

Gayelynn challenged Michael’s capacity to make the 2015 Will, specifically his ability to understand the contents of the 2015 Will and that he knew the “natural objects of his bounty and their claim on him.” Medical records confirmed that Michael did not suffer head or brain injuries as a result of the accident. The attorney testified that Michael had testamentary capacity, and was awake, alert, and lucid. A doctor who examined Michael two days after the execution of the 2015 Will testified that Michael was competent and able to make his own decisions, financial and medical, and that Michael had sufficient mental ability to make the 2015 Will two days before. Based on this

evidence, the Court of Appeals held that there was some evidence to support the jury's finding that Michael had testamentary capacity to sign the 2015 Will.

Gayelynnne also challenged the finding that Michael's sister, Tina, did not unduly influence Michael. The Court of Appeals held that exertion of undue influence cannot be inferred by opportunity alone and there must be some evidence that the influence was not only present but was in fact exerted in connection with the making of the will. The Court of Appeals stated that "although weakness of mind and body caused by infirmities of disease, age, or otherwise may be considered as material in establishing the testator's physical incapacity to resist or the susceptibility of his mind to an influence exerted, such weakness does not establish that his mind was in fact overpowered or subverted at the time the will was executed . . . Influence is not undue unless it destroys the testator's free agency and the testament produced expresses the will of the person exerting the influence." The Court of Appeals held that while Michael was in physical distress, he was not experiencing mental distress which would render him susceptible to undue influence.

Lastly, the Court of Appeals held that the replacement judge erred in vacating the jury's finding that Gayelynnne brought her suit in bad faith and awarding her attorneys' fees because there was sufficient evidence to support the jury finding. Gayelynnne was aware before the trial that Michael told hospital staff he was getting divorced and didn't want Gayelynnne involved in his care in any way.

**Practice Point:** Practitioners drafting and overseeing the execution of wills and trusts by alternative communication means should be aware of the specific execution requirements of the state whose laws apply, take precautionary steps to ensure that the testator or grantor is competent and has a full and complete understanding of the communication means utilized to dictate their wishes, and direct the execution of such documents. Videotaping of the execution ceremony in unique or unusual circumstances may be beneficial and thwart later challenges on the basis of lack of capacity or undue influence.

*In re Wilson, 300 Neb. 455, 915 N.W.2d 50 (2018)*

**Supreme Court of Nebraska holds that trial court order removing siblings as trustees of revocable trust did not also remove the siblings as trustees of a sub-trust created under the revocable trust agreement.**

**Facts:** Henry B. Wilson Jr. created the Henry B. Wilson Jr. Revocable Trust (the “Revocable Trust”) under agreement dated as of June 27, 2002 (the “Trust Agreement”). Henry died on December 23, 2010, survived by his three adult children, Lou Ann, Roseann, and Roger.

Under the terms of the Revocable Trust, upon Henry’s death, three separate sub-trusts were created for each of Lou Ann, Roseann, and Roger. Roseann and Roger were named as successor trustees of the Revocable Trust and as trustees of each child’s separate trust.

Roseann and Roger, as trustees of the Revocable Trust, transferred real estate interests from the Revocable Trust to the children’s separate trusts, but otherwise neglected to administer the separate trusts. Lou Ann filed a petition alleging Roseann and Roger had breached their fiduciary duties and asking the trial court to remove Roseann and Roger as trustees of the Revocable Trust.

The trial court agreed that Roseann and Roger had breached their fiduciary duties as trustees of the Revocable Trust and entered an order removing Roseann and Roger as trustees of the Revocable Trust. Lou Ann’s petition did not ask the trial court to remove Roseann and Roger as trustees of her separate trust nor did the trial court remove them as trustees of that trust.

Lou Ann appealed the trial court’s decision not to remove her siblings as trustees of her separate trust. The Nebraska Court of Appeals held that the trial court’s order had, in fact, removed Roseann and Roger as trustees of Lou Ann’s trust. Therefore, the Court of Appeals concluded that the trial court had not erred.

Roseann and Roger appealed the Court of Appeals’ decision to the Supreme Court of Nebraska.

**Law:** A court will generally only consider issues addressed in the pleadings. Therefore, if a trust agreement creates multiple trusts, a court will typically only grant relief with respect to the trusts addressed in the pleadings.

**Holding:** The Supreme Court of Nebraska held that the trial court’s order did not remove Roseann and Roger as trustees of Lou Ann’s trust.

The Court noted that Lou Ann’s pleadings named Roseann and Roger as trustees of the Revocable Trust. Furthermore, Lou Ann only asked the court to remove Roseann and Roger as trustees of the Revocable Trust. The trial court proceedings also showed that the trial court had only considered whether Roseann and Roger had breached their fiduciary duty as trustees of the Revocable Trust.

**Practice Point:** Revocable trust agreements often create separate sub-trusts for children and grandchildren upon the grantor’s death. Attorneys, advisors, and fiduciaries must distinguish between the revocable trust and sub-trusts created under the trust agreement. If an attorney prepares documents (such as a court filings or non-judicial settlement agreements) for a trust, the documents should clearly identify the trust in question.

*In re Estate of Duane Frances Horton, 325 Mich.App. 325 (July 17, 2018).*

**An unsigned and undated electronic note on decedent's phone was ruled a valid will where the proponents of the will could show, by clear and convincing evidence, that the decedent intended the electronic note to be his will.**

**Facts:** Decedent's handwritten suicide note stated that his "final note, my farewell" could be found on his phone. The suicide note provided instructions for accessing the final note. The suicide note was handwritten and unsigned. The final note was completely type written and existed only in electronic format (the "Electronic Note"). Decedent typed out his full name at the end of the Electronic Note, but did not otherwise sign the Electronic Note.

The Electronic Note contained farewell messages, funeral instructions and directions regarding the disposition of the Decedent's possessions. The Electronic Note distributed assets to individuals other than the Decedent's mother, who was the Decedent's sole legal heir. During Decedent's lifetime, Guardianship and Alternatives, Inc. ("GAI") had served as Decedent's court-appointed conservator.

GAI submitted the Electronic Note to the probate court as the Decedent's will. The decedent's mother filed a competing petition for probate alleging that Decedent died intestate. After an evidentiary hearing, the probate court concluded that the Decedent meant for the Electronic Note to constitute his will, and that the probate court would therefore honor the Electronic Note as a valid will. The Decedent's mother appealed.

**Law:** Michigan law allows for three types of valid wills: (i) formal wills; (ii) a document that qualifies as a holographic will; and (iii) a document or writing that the decedent intended to constitute his will (an "intended will"). *See* MCL 700.2502. A formal will must be in writing and signed by the testator and two witnesses. MCL 700.2502(1). A holographic will need not be witnessed, but must be dated, and the testator's signature and the material portions of the will must be in the testator's handwriting. MCL 700.2502(2).

The standard for proving an intended will is clear and convincing evidence of the testator's intent that the document constitute his will. MCL 700.2503. Intent can be demonstrated by extrinsic evidence. MCL 700.2502. Pursuant to case law, the determination of whether the decedent intended a document to constitute his will turns on the question of whether the person intended the document to be a final statement of the posthumous distribution of his property.

**Holding:** On appeal, the Court of Appeals of Michigan affirmed the probate court's decision to admit the Electronic Note to probate as the Decedent's will. The Court of Appeals specifically rejected Decedent's mother's attempt to argue that an intended will must also meet the requirements of a holographic will. Instead, the Court of Appeals reviewed the extrinsic evidence of the decedent's intent and ruled that the clear and convincing evidence standard had been met even though the Electronic Note did not meet the requirements for a formal will or a holographic will.

In reaching its decision, the Court of Appeals reasoned that the Electronic Note was clearly intended to be read after the decedent's death based on the apologies and explanations for his suicide, funeral requests, final farewells and reflections on the afterlife. Further, the Court of Appeals found that the Electronic Note provided clear instructions for distribution of the decedent's property upon his death. The Court of Appeals also considered the Decedent's strained relationship with his mother and concluded that he specifically intended to direct assets away from his mother, who would otherwise have inherited his property. Given these facts, the Court of Appeals agreed with the probate court that the Decedent intended the Electronic Note to be his will, and therefore the Electronic Note should be considered a valid will. The Court of Appeals also awarded costs to GAI as the prevailing party.

**Practice Point:** Under the Michigan Court of Appeals ruling, the universe of viable claims against a will may be greatly expanded as litigants will face no bar of formalities other than production of a document that clearly evidences an intent that it constitute the decedent's final will.

As of March 20, 2019, GAI had filed an answer to the Decedent's mother's application for appeal to the Supreme Court of Michigan. If the Court of Appeals ruling stands, fiduciaries, at least in Michigan, should consider whether they have a duty to confirm that no other writings - including in an email, on a tablet, or in the cloud - exist that a decedent might have "intended to be a will."

***O'Connor v. O'Connor, 26 Cal. App. 5<sup>th</sup> 871 (4<sup>th</sup> Dist., Aug. 29, 2018)***

**A requirement that a power of appointment can only be exercised by a specific reference to that power in a will did not require the beneficiary to name the trust itself in his will.**

**Facts:** John was a beneficiary of Sub-Trust A and Sub-Trust B governed by a trust created by John's parents. John had no power of appointment over Sub-Trust A. Sub-Trust B granted John a general power of appointment over the trust property. The trust language specified that the power was exercisable "by a will specifically referring to and exercising this general testamentary power of appointment."

Two weeks before his death, John executed a will that said "I exercise any Power of Appointment which I may have over that portion of the trust or trusts established by my parents for my benefit or any other trusts for which I have Power of Appointment I exercise [sic] in favor of my brother [Kevin]." John had two other siblings, Astrid and Brian, who would be beneficiaries with Kevin if John's exercise of the power of appointment was not valid.

Kevin petitioned the probate court to establish the validity of the exercise power of appointment. Astrid and Brian objected and argued that the language in John's will was not a specific reference and was therefore not a valid exercise of the power. The parties stipulated to having a judicial referee hear the matter.

After four days of trial, the referee issued a statement of decision finding that John's exercise of the power of appointment over Sub-Trust B was valid. The probate court adopted the referee's ruling as its own decision and declared Kevin the prevailing party. Brian and Astrid appealed.

**Law:** By statute in California, a power of appointment can be exercised only by complying with any requirements as to the manner, time and conditions of the exercise specified in the creating instrument. The statute expressly prevents courts from excusing compliance with a donor's specific reference requirement. Case law has found that a blanket statement exercising any power of appointment that may or may not exist to be insufficient to satisfy the specific reference requirement.

**Holding:** The California Fourth District Court of Appeals affirmed the probate court's decision and held that the language of the will contained sufficient detail to constitute a specific reference to the power of appointment granted by Sub-Trust B. The Court of Appeals determined that John was not required to specifically reference Sub-Trust B by name because the specific reference requirement in the trust referred to the power itself and not the trust instrument.

Through statutory interpretation, the Court of Appeals concluded that where the reference required is only to the power and not to the instrument, the determining factor is whether the language exercising the power contains sufficient detail "such that it is reasonable to conclude... that [the decedent] made an intentional and deliberate, not inadvertent, exercise of the *particular* power ... granted to him." Further, the Court of Appeals found that the language John used, particularly the reference to trusts created by his parents, made it sufficiently clear that he was referring to the power that Sub-Trust B granted to him. The Court of Appeals agreed with the judicial referee's statement that the additional phrase "or any other trusts for which I have Power of Appointment" did not invalidate the preceding specific reference to John's power of appointment over Sub-Trust B.

**Practice Point:** A reminder to practitioners to be careful in drafting, both when creating a power of appointment and when attempting to exercise one. In exercising a power, one should be as specific as possible.