**[Ex 2-3f] 2006-10-11 791070a October 11 2006 Texas Senate Hearing on Jurisprudence**

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cases. So what you're entitled to get is, should be expanded. We believe that jury trial and right to jury trial should be absolute when you're talking about taking away a person's ability to care, think, and do for themselves.

We also believe that the inception, when a person is actually going to the very first hearing to determine whether or not they are incompetent, that the person should be entitled to a jury trial. We believe there should be an order, I'm sorry, a change of the law that would allow for reasonable times to which to sell property under probate code. In Mr. Epstein's mother's case, an order was entered to sell the large income producing piece of property eight years before it was sold.

At the time of the sale, none of the facts which existed eight years previous, sorry I generally don't have that problem, none of the facts which existed eight years previous were even relevant at that point in time. They no longer existed. Yet the court followed the law and sold the property.

No best interest test being appropriate or being contained within the code. Perhaps one of the more interesting aspects of what we propose is that if a fiduciary steals, he or she should be charged with a crime. Perhaps nothing is more important that if you're charged with caring for a person and if you decide to steal from them, you should be charged with a crime.

We do believe that the charging of excessive fees should be determined to be theft. I believe under 32.45 of the Texas Penal Code, which already deals with claims and cause of action of criminal nature against fiduciaries. Wait a minute, are you saying attorney fees that a judge approves can then be held to be a criminal offense? Who are you going to charge? You going to charge the attorney or the judge? Is judge going to be a co-conspirator? Sir, many times attorneys, I'm sorry, people in fiduciary capacities steal from their wards.

We are not suggesting that if a court has approved a fee, that anybody be charged with theft. Well if they're stealing from the estate, that would be a crime. That the way I heard you phrase that, it would be an award of attorney fees.

If attorneys fees have been charged in excess of the statute amount, would you not consider that theft? What are you tied up on the $50 steal? No sir, I'm tied up on people being being paid a fair fee and wards who really can't speak for themselves. If I send you a bill for Senator... If the attorney, if the attorney shows that he has spent the time that is enumerated in the bill, shows that it was reasonable and necessary to protect the assets of the ward or to represent the ward and the judge has approved them, are you saying in those cases someone can still be charged with felony theft? No sir, I think a stop on res judicata would apply. Senator Harris, if I send you a bill for work I do for you and you say, David that's too much money, that's too high, you have the ability to do that.

But if I'm your guardian and you're incapacitated, you never see the bill I send you. I write the bill, I approve it, I pay it myself after the court approves it. We're not suggesting if the court approves it, it should be a crime.

It's just that lawyers are out there charging excessive fees. The civil case I understand is called surcharge in probate court. We believe it should be added teeth of the criminal nature.

But this is pre-approval of the court. I think the laws of Texas would prevent any type of action after it's been approved. Thank you.

Senator Gallegos has a question. We have one. No, no, no, go ahead and finish.

Finally, to touch on an issue which you've heard here today already, that is of recusal. I forget which one of you asked the question, but as I understand it, in county courts and in district courts, if a recusal is filed upon a judge, the administrative judge of that particular region assigns a judge to hear the recusal. We simply believe that that would have a better appearance of fairness if probate judges also came within those same guidelines.

There are only 17 statutory probate judges in this state. Why not spread that out a little bit and let the administrative judge of each region assign a judge to hear these cases? Those are our guidelines. We're not trying to take up too much time.

We'd be happy to answer any questions you choose to email us or send us. Yes, sir. Senator Gallegos has a question.

One final question, Mr. Wilkerson. You testified earlier that the lawyers try to at least visit their wards on a regular basis. I think his testimony was that they don't visit their wards on a regular basis, but the voluntary wards do at least once a month.

Okay. I guess I'm telling my years here, when I was still at the fire station, I'd heard some of the young law students that were past the bar that they were living on ad litem cases alone. That's all they took.

Tell me that's not . . . Well, court appointments. There could be court appointments in . . . Is that still happening? I don't know, sir. Maybe ad litems might be a good training ground for young lawyers, but . . . I don't know what the word means, but you know . . . Ad litems are used throughout the judicial system.

I'm talking about the statement I just made that I heard when I was . . . we're talking about back in the 60s and 70s, that those attorneys strictly work on court-appointed cases. Sometimes that might be a good system, sir. In other words, if you took a young lawyer who can actually represent the interests of a child and watch more seasoned lawyers do that, that's a good training ground, and that's not just probate cases.

That's civil cases, oft times in personal injury, ad litems are appointed to represent . . . So, in your opinion, that's still happening? Yes, sir. Okay. Thank you.

Mr. Epstein, did you have anything you wanted to add? Since we're running out of time, I'll go ahead and pass. We'd be glad to hear from you if you'd like to say something. Okay, I'd like to maybe finish a little bit, if you don't mind.

Again, I'd like to thank you for your attention on this issue. You may ask yourself why I spent so much time and money getting here. It's not because I need the money, nor do I need my mother's money.

It's simply that the court-appointed guardians, probate, and appeals courts have failed my mother and many others also. It is just wrong and must be corrected. Those who defend the current guardianship case rely on one case that was also cited in my mother's appeal.

It's the Henderson case, and I'd like to quote from that and read it, if you don't mind the short part of it. It's on tab 7, page 46. It's the last paragraph, lower right-hand column, and please indulge me in reading.

The court reasons that public policy favors dual compensation because one functioning in both capacities should avoid duplication of work and could thus lower cost. The probate court is a true protector of the estate's interest as conducts a final review of all monies leaving the estate. Probate courts will most closely scrutinize the application of attorneys fees submitted by the representative serving in dual capacity, resulting in an even greater protection of the estate, and the relationship between the attorney and client and guardian and ward is based on trust so that we should presume that an individual serving in both capacities would perform her duty in a manner that is in the best interest of the estate.

The plain and simple fact is that this is a fairy tale. It's not happening. The guardians aren't protecting the wards.

The probate courts aren't protecting the wards. The appellate courts aren't protecting the wards. The only one it's going to be up to the legislators to protect the wards.

The plain and simple fact is the legislators are going to have to stop the abuse and to tighten up the probate laws. They are too loose currently. They allow for too much wiggle room and you have guardians which blur the line between guardians and attorneys when they hire themselves and then they charge their regular attorneys fees and they're fleecing the wards and there is nobody currently that is hearing their voice or protecting them.

That's all I have to say. Mr. Epstein, we appreciate your testimony. Thank you.

Thank you for being here this morning. Chair calls Robert Alpert. Welcome.

May I have my son sit up here as well? These trusts relate to him. You bet. He needs to fill out a card as well.

Good morning Mr. Chairman, members of the committee. My name is Robert Alpert. I have long taught my sons that you can be part of a solution or you can be part of a problem.

I'm hoping that we and this committee will be part of a solution. I've been involved in a situation involving three trusts I formed for my children for now seven and a half years. This case was tried.

I ended in June of 05 and a year later we finally got a judgment. I'd like to tell you some of the facts not because I'm merely trying to take your time and tell you a story but because the facts of this case, the abuses within this case, bring rise to the recommendations that I will provide as related to modifications in legislation. Imagine what it is like to work for over 30 years and create trust for your children to pay for their education and contribute to their financial security.

Imagine the orchestration of a scheme by your former lawyer to make himself trustee of the trusts to steal money from those trusts and execute a plan to enrich himself at the expense of your children. The beneficiaries, your children, are not consulted, formally oppose the litigation initiated by the trustee, and relieve the alleged trustee of any conceivable duty to prosecute his claims. Yet the trustee ignores your children while he executes his scheme.

Who under the law can one rely on to stop such an injustice? Since it involves trusts, if a lawsuit is filed in probate court, you would expect to be able to rely on a probate judge to enforce the law, to protect the interests of the beneficiaries. Imagine that the very judge you rely on turns out to have an agenda of his own. To enrich his friends and former law firm by authorizing the distribution of several million dollars from these trusts to them.

Imagine a judge who ignores the wishes and interests of the beneficiaries, ignores the facts when evidence of the scheme undertaken by your former lawyer, and ignores the findings of the jury, which after six years of litigation conclude the lawyer has breached his fiduciary duty. Imagine a judge then prolonging the agony and refusing to enter a judgment for yet another year. A judgment that when finally signed is inconsistent with the jury findings.

Imagine, I'm sorry, and the judge discharges the alleged trustee, and then releases the trustee for all the blatantly illegal actions he has taken, and then in violation of both the trust instrument and the law, the judge reappoints the same person he's discharged, the very person the jury determined had breached his fiduciary duties. Judges should not be able to abuse their judicial power to enrich their friends. Judges should not violate the code of judicial conduct, all with impunity.

All judges in Texas must recognize and honor their duty to serve and adjudicate matters in accordance with the laws of the great state of Texas. They must not be allowed to arbitrarily give away to strangers the financial resources that were to be preserved for loved ones. The discretion of abusive probate judges must be contained by legislation, and the rights of beneficiaries to challenge an abusive judge must be expanded and protected.

I fully realize the committee does not have a mandate to punish judges. This is not my purpose in coming here today. My purpose and goal is to help the legislature understand certain abuses in the probate system, and encourage legislation to stop the abuses.

Today you will hear of a pattern of conduct in several cases presided over by Judge Michael Wood of Harris County Probate Court No. 2. You will hear how Judge Wood has exploited the assets of families for the benefit of his friends. My purpose for being here is to encourage the change, to avoid the possibility of such devastating conduct in the future.

What I'm about to describe happened to my family and could happen to your family. It has no doubt happened to the families of some of your constituents. In fact, it happens to families with more frequencies than most people realize.

Many of those families are powerless to even complain. They should not be faced with this problem. The law should have protected my family.

It should protect all families, but it doesn't. I hope this committee will take steps to change that. In 1994, I hired Mark O'Reilly, a CPA and attorney, as in-house counsel and corporate counsel.

This man became a trusted officer in my private investment company. During his period of employment, my father became very, very ill and ultimately died in the summer of 1997. I, like many of you, was very, very close to my father, and his loss was devastating to me.

During this period of time, I relied on O'Reilly to oversee my passive business investments. In addition, O'Reilly worked to facilitate the instructions of independent trustees of three trusts that I had formed for my two sons. Since 1990, I made annual gifts to two of my sons' trusts.

In cooperation with the trustees, I loaned large sums of money to the trust within guidelines provided by my accountants, so that each trust could make investments and accelerate its growth. As a result of the loans, the trust accumulated net assets of $3.5 million prior to litigation, commenced by O'Reilly in the spring of 1999. During the summer of 1998, I became very concerned about O'Reilly's personal and professional conduct, and in September of the same year, I determined that it was in my family's best interest to terminate his employment.

In the spring of 1999, O'Reilly filed a lawsuit against me, asserting that he was trustee of my three children's trusts. I didn't appoint him. He claimed that I had breached a fiduciary duty to the trust, never mind that no lawyer to whom I have ever spoken thinks a grantor owes a continuing duty to trusts formed.

Of course, my family and I were shocked that O'Reilly had initiated this campaign against me. In subsequent months, I learned O'Reilly's motivation when he attempted to shake me down, asking for a payment to him, not the trust, of $300,000 to end the litigation. Of course, it would have been much more cost-effective to simply pay him the money and let him go away, but I was not prepared to demonstrate to my sons that that kind of conduct was acceptable, so I elected to defend the lawsuits.

Little did I know that O'Reilly's plan was so elaborate that it would make Andrew Fastow blush. In the subsequent four years, I learned the following. Prior to working for my company, O'Reilly had developed a plan to change his identity and move abroad if he could accomplish his goal of embezzling $10 million from his former employer.

That was learned through O'Reilly's own handwritten notes, which were discovered after he was no longer my employee. O'Reilly was fired by that employer. O'Reilly intercepted a $138,000 federal income tax refund, which represented money I had advanced at O'Reilly's direction to one of the trusts to pay taxes he advised were due when they were not.

O'Reilly then sought a refund of the funds paid and had them directed to him. The funds were never repaid to me. They did not even remain in the trust to which I advanced.

Instead, 70% of the refund was used by O'Reilly to serve his own interests. In a hearing in October 1999 before Judge Wood, O'Reilly lied three times through his lawyer Darlene Payne-Smith, saying he had not received the check. He had, in fact, received it and cashed it.

In another hearing in December, O'Reilly and Payne-Smith misled the court by failing to disclose that they had already removed 70% of the proceeds, including money paid to Payne-Smith's law firm. They said the money was in an appropriate trust account. That's not true.

Amazingly, Judge Wood ultimately even awarded O'Reilly a judgment against me to reimburse O'Reilly for the amounts he used from my funds to pay his lawyers to sue me. I received none of the money back and the trust, which borrowed the money from me, ended up with a debt to me it couldn't repay because O'Reilly and his lawyers, rather than the trust, ended up with the money, all with Judge Wood's blessing. Discovery confirmed the most significant of the transactions which O'Reilly complained about in the lawsuit were transactions that he personally designed and executed in my absence.

This fact was reconfirmed through subsequent testimony of third-party witnesses during the trial. Yet in the face of overwhelming evidence to the contrary, Judge Wood determined that O'Reilly was the trustee, that he should have no responsibility for the actions he took while claiming to be trustee, and that he should remain as trustee despite my family's understandable desire, repeatedly expressed, to rid themselves of O'Reilly and his interference in their financial affairs. The most shocking evidence is yet to come.

We discovered in the same time frame that O'Reilly filed his lawsuits against me. He entered negotiations with the Internal Revenue to become an anonymous confidential paid informant. This is the stuff of which they write books.

He was to be paid as both a lawyer and receive a fee of up to seven and a half million dollars if the allegations he put forth were true. O'Reilly used his position of confidence as my personal lawyer and as the alleged trustee of my children's trust in an effort to gain a substantial financial reward for himself. The allegations put forth by O'Reilly were not truthful.

Obviously this conduct was a breach of his fiduciary duty to the children's trust. It was also a breach of his attorney-client duties to me and my companies. The Internal Revenue Service Criminal Division investigated me in the trust for four years and closed the file in August 2004 without any action against me.

The Internal Revenue Civil Division also investigated and ultimately accepted all of the tax returns as filed without change which affirmed that his allegations were without merit. Although O'Reilly denied under oath that he had backdated documents used to appoint himself as trustee of my three children's trusts, his legal assistant confirmed the backdating in a deposition. This single fact, when combined with the deceptions described above, would clearly convince any reasonable fact finder that O'Reilly was unfit to serve as trustee.

Nonetheless, Judge Wood did not allow the jury to hear and decide the contested issue concerning O'Reilly's backdating and if he was properly appointed the trustee. But notwithstanding the judge withholding essential evidence from the jury, the jury determined that O'Reilly had breached his fiduciary duties and yet the judge reversed it. Following O'Reilly's employment with my company, he became involved with another Houston entrepreneur and sure enough O'Reilly then executed another scheme to extract money from that person.

Being a probate judge of Harris County is a prestigious public position but it comes with a weighty responsibility. The Code of Judicial Conduct in the state of Texas is comprised of eight canons, a copy of which I will provide with my written presentation after the hearing. I believe Judge Wood ignored his duties and responsibilities as described in the Code of Judicial Conduct by pursuing an agenda to enrich his former law firm and appointee friends at the expense of my family.

I believe it has happened to other families to whom it has been even more devastating. The law should be changed to protect from such abuses. The underlying premise of O'Reilly's lawsuit was that a grantor of a trust has a fiduciary duty to that trust.

Every lawyer with whom I've spoken on this subject has indicated that a grantor does not have a fiduciary duty to a trust. A responsible judge who is respecting the judicial canons would have dismissed O'Reilly's case in the early days of litigation when all interested parties besides O'Reilly opposed, formally opposed the litigation. O'Reilly however retained the law firm most likely to succeed in Harris County Probate Court No.

2. It quickly became apparent that Judge Wood wanted to provide an opportunity for his former law firm whose senior partner Frank Harmon has been one of his closest friends for decades. Mr. Harmon has been involved in the election of more than 20 judges in Texas and is considered the Harris County judicial kingmaker. Mr. Harmon's wife is federal judge Melinda Harmon who previously has been recused when presiding over matters related to judge, I'm sorry, to Mike Wood.

The same law firm and the same lawyer Darlene Payne-Smith, this is the lawyer who lied to the judge in October and December 1999 as I described earlier, is even representing Judge Wood's bonding company in a separate case about a witness, about which a witness will testify. To clarify it's related to Miss Norman's client Mr. Whatley. I believe Judge Wood violated the canons by exercising a blatant pattern of bias.

An example was evidenced in a hearing on March 11, 2004 when my counsel stated he wanted to take the deposition of an important witness who had personal knowledge of Riley's scheme. Judge Wood said, do you, referring to Grantor's counsel, really want to take his deposition if it means they, referring to the plaintiff's lawyers, get their fees paid in full and I start paying the attorney fees for their new lawyer if they still want to withdraw. I think that's what's going to happen.

I'm going to pay them all their back fees and pay their new lawyer fees out of the trust until this thing is tried in the next century sometime. During six long years I watched in disappointment how Judge Wood started as a fact-finder, became a biased jurist, and ultimately became an unvarnished advocate for the client of his former firm in his effort to enrich them. I believe Judge Wood violated the judicial canons by authorizing payments to friends and cronies of approximately two million dollars for my children's trusts.

On January 7, 2005, Judge Wood awarded James Raymond, who claimed to be one of Judge Wood's closest personal friends, a hundred and twenty thousand dollars after refusing my children's counsel an opportunity to adequately question Mr. Raymond's invoices as to their reasonableness and necessity. In total frustration, following the hearing, I approached the bench and I asked Judge Wood in the presence of numerous witnesses, sir, don't you have any more friends you'd like to enrich at my children's expense? And the judge said, I think I can find a few. I believe Judge Wood ignored the laws of the state of Texas to achieve his personal objectives but the law should have made that impossible.

The law should protect my family

**This file is longer than 30 minutes.**

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