

**IF YOU KILL YOUR HONEY, DON'T EXPECT THE MONEY:  
THE RIGHTS OF A KILLER TO SHARE IN HIS VICTIM'S ESTATE**

Written and Presented by

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## I. The Whitmore Family Saga

### A. Summary of the Whitmore's Estate Planning

Charlie and Brenda Whitmore are happily married. They have two sons, Barry, 21, and Bubba, 18. Charlie and Brenda have a combined community estate valued in excess of five million dollars. Charlie and Brenda each have significant life insurance policies naming the other as primary beneficiaries and Barry and Bubba as contingent beneficiaries. Charlie and Brenda each have reciprocal wills wherein they create a by-pass trust in the amount of the unified credit, naming the other as beneficiary and Barry and Bubba as contingent beneficiaries. The remaining estate passes outright to the surviving spouse. Charlie and Brenda also have a retirement plan at work governed by ERISA under which each names the other as primary beneficiary and Barry and Bubba as contingent beneficiaries. Brenda has two living relatives, her mother, Pauline, and her sister, Judy.

### B. The Fateful Evening

One evening, Charlie, Brenda, Barry and Bubba go out for what is seemingly a nice dinner. When they arrive home, just as all four enter the front door, Bubba exclaims that he has forgotten his cell phone in the car and quickly turns away from the door. Charlie, Brenda, and Barry enter the house and are immediately confronted by a gunman who shoots and kills Brenda and Barry, and attempts to kill, but only seriously injures, Charlie. Bubba is also slightly wounded upon his return to the house.

Charlie recovers fully from his injuries. After further investigation, Bubba is arrested and, along with the shooter, is

charged with the murder of his mother, Brenda, and his brother, Barry. Bubba is accused of having arranged for the killing of his parents and his brother believing that he would inherit the entire estate and receive the insurance proceeds and retirement benefits. Bubba and the shooter are now in jail awaiting trial.

### C. The Probate Proceedings

Charlie files Brenda's will for probate and is appointed as independent executor. As mentioned, under Brenda's will, the unified credit amount passes in trust to Charlie for his lifetime, with Barry and Bubba, or their descendants, as contingent beneficiaries. The remainder passes to Barry and Bubba outright after Charlie's death. If Barry and Bubba, or their descendants do not survive Charlie, Brenda's will states her heirs at law take.

Charlie contends that Bubba receives nothing. Charlie has made a new will leaving his estate to his brother, Louis. Pauline and Judy, Brenda's surviving heirs, have hired an attorney to represent their interests with respect to the contingent interest in the by-pass trust created in Brenda's will.

### D. Probing Questions

(1) Upon Charlie's death, who are the beneficiaries of the by-pass trust created in Brenda's will if Bubba is convicted of murdering Brenda? Is it Bubba, assuming he is the only surviving beneficiary? Or is it Pauline and Judy, assuming they are Brenda's surviving heirs?

(2) Upon Charlie's death, who are the beneficiaries of the by-pass trust created in Brenda's will if Bubba is not convicted of murdering Brenda, but is convicted of a lesser

charge? Is it Bubba, assuming he is the only surviving beneficiary? Or is it Pauline and Judy, assuming they are Brenda's surviving heirs?

(3) Upon Charlie's death, who are the beneficiaries of the by-pass trust created in Brenda's will if Bubba is not convicted of any crimes relating to Brenda's death, but is found liable in a civil case for wilfully bringing about her death as an accomplice to the shooter? Is it Bubba, assuming he is the only surviving beneficiary? Or is it Pauline and Judy, assuming they are Brenda's surviving heirs?

(4) Who inherits Barry's estate if Bubba is convicted of murdering Barry and Barry died intestate, unmarried, and without children? Does Charlie have to split Barry's estate with Bubba as would be required under the laws of intestacy? Or does Charlie take the whole of Barry's estate?

(5) As with the questions regarding Bubba's acts with respect to Brenda, who inherits Barry's estate if Bubba is convicted of a lesser charge or is absolved of criminal liability altogether. What if Bubba is found only civilly liable for bringing about Barry's death?

(6) With respect to the insurance and retirement benefits, if Charlie had also died in the shooting (or if Charlie fails to change his contingent beneficiary designations before he dies), who receives the proceeds of the insurance and retirement benefits upon Charlie's death? Bubba, assuming he is the only surviving beneficiary? Or the nearest relative of Charlie?

Answering these questions requires a journey into a murky area of Texas law known

as "the slayer's rule."<sup>1</sup>

## II. Early Texas Law: The Killer Takes the Estate Regardless of His Conduct

### A. The Texas Constitution

Article 1, Sec. 21 of the Texas Constitution, originally adopted in 1876, provides:

No conviction shall work corruption of blood, or forfeiture of estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death.

Tex. Const. Art. 1, § 21 (West 2005).

Taken at face value, the Texas Constitution appears to allow a killer to inherit everything in his victim's estate.

### B. Early Civil Statute (now part of the Texas Probate Code)

In 1879, the early version of what later became Section 41(d) of the Texas Probate Code provided:

No conviction shall work corruption of blood, or forfeiture of estate, nor shall there be any forfeiture by reason of death by casualty; and the estate of those who destroy their own lives shall descend or vest as in case of natural death.

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<sup>1</sup> The author would like to acknowledge an excellent article by M. Keith Branyon, *The Slayer's Rule Revisited*, 1996 Adv. Est. Plan. & Probate, Tab Z, a review of which provided valuable information and a good framework for approaching the subject.

Tex. Rev. Civ. Stat. art. 1649 (1879).

Again, taken at face value, this early predecessor to the Texas Probate Code appears to allow a killer to inherit everything in his victim's estate.

### C. Early Case Law

This interpretation was borne out in *Hill v. Noland*, 149 S.W. 288 (Tex. Civ. App.-Texarkana 1912, no writ). In *Hill*, the brothers and sisters of Mack Noland filed suit against Mack's wife, Patsy, for title and possession and to remove the cloud from the title of a one-half undivided interest in this community property of deceased Mack and Patsy, alleging that Patsy had murdered Mack for the sole purpose of investing herself with the title to his property, and for that reason the community interest of Mack Noland did not pass and descend to her, but the title and right to possession passed and descended to the brothers and sisters as sole remaining next of kin. *Id.* at 288-289. The trial court ruled in Patsy's favor. The Court of Appeals reviewed the statute and concluded that Patsy inherited Mack's estate because the Legislature has "spoken with one voice in opposition to the exclusion of an heir from taking an estate, where the statute in plain terms designates him as one entitled to inherit." *Id.* at 289.

## III. Frustration Builds

### A. Murderer Doesn't Get it--But Then She Gets It!

In *Murchison v. Murchison*, 203 S.W. 423 (Tex. Civ. App.-Beaumont 1918, no writ), Margurite Murchison was accused of murdering her husband, R.H. Murchison, with the intention and for the purpose of securing and obtaining the proceeds of a life insurance

policy. R.H.'s heirs (his father, brothers, and sister) claimed that Margurite forfeited all right and interest that she otherwise might have had in and to the proceeds of said policy and, further, because of the fact she murdered R.H., she was not only prevented from claiming and recovering the insurance proceeds, but she also forfeited any part of R.H.'s estate to which she would have been entitled under the intestacy statute.

The Court first addressed the issue of the insurance policy. Finding no Texas Supreme Court case on point, the Court looked to a higher authority, citing *New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 600, 6 Sup.Ct. 881, 29 L.Ed. 1000 (1886), which states: "It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired." *Id.* at 425. The Murchison court concluded "nothing short of an express and unmistakable declaration in the Constitution or statutory law of this state, or a decision necessary upon the very point by the Supreme Court of this state, would cause us to subscribe to the doctrine that to permit a beneficiary in any character of insurance policy to recover life insurance money upon the contract itself, after having feloniously killed the insured with the intention and for the purpose of accelerating the due date of such policy and obtaining possession of such money, would not be against the public policy of this state, regardless of what the public policy of some other states may be, as declared by their courts." *Id.*

Margurite's lawyers pointed out the plain language of Article 1, Sec. 21 of the Texas Constitution and article 2456 (formerly

article 1649) which stated that “no conviction shall work forfeiture of estate” and that, therefore, the legislature had declared the public policy to be in favor of permitting such a beneficiary to recover upon the terms for the contract of insurance. The Court responded bluntly: “We cannot accept the correctness of this contention by counsel.” *Id.*

Unfortunately, the Court met an obstacle it could not overcome. The insurance policy apparently named no contingent beneficiary, therefore the proceeds were payable to R.H.’s estate. Reviewing the intestacy statutes, the Court found that Margurite was R.H.’s sole heir, reluctantly concluding that since the “statute of descent and distribution is plain and unambiguous in prescribing how property shall descend and vest upon the death of its owner, such statute must be given effect by the courts, regardless of the fact that the death of the owner was intentionally caused by one to whom, under the statute, his property is made to descend and vest.” *Id.* at 426.

B. Legislature to the Rescue--At Least As Far As Insurance Proceeds Are Concerned

In 1919, likely in response to the result in *Murchison*, the legislature adopted the predecessor of article 21.23 of the Texas Insurance Code, stating that a beneficiary would lose his rights to life insurance proceeds if he was the principal or an accomplice in “willfully bringing about the death of the insured.” Thus, for the first time, a statute was enacted which specifically prohibited a murderer from recovering benefits from his victim, although it was limited to insurance proceeds only.

C. Current Insurance Code Provision

Article 21.23 has been re-codified although essentially unchanged.

Section 1103.151 of the Texas Insurance Code provides:

A beneficiary of a life insurance policy or contract forfeits the beneficiary's interest in the policy or contract if the beneficiary is a principal or an accomplice in wilfully bringing about the death of the insured.

Tex. Ins. Code. §1103.151 (West 2005).

Section 1103.152 of the Texas Insurance Code provides:

(a) Except as provided by Subsection (b), if a beneficiary of a life insurance policy or contract forfeits an interest in the policy or contract under Section 1103.151, a contingent beneficiary named by the insured in the policy or contract is entitled to receive the proceeds of the policy or contract.

(b) A contingent beneficiary is not entitled to receive the proceeds of a life insurance policy or contract if the contingent beneficiary forfeits an interest in the policy or contract under Section 1103.151.

(c) If there is not a contingent beneficiary entitled to receive the proceeds of a life insurance policy or contract under Subsection (a), the nearest relative of the insured is entitled to receive those proceeds.

Tex. Ins. Code. §1103.152 (West 2005).

D. Probate Code Follows Suit--But Not Quite

In 1955, the legislature enacted the Texas Probate Code. The legislature repealed the predecessors to the previously mentioned article 1649 and enacted Section 41(d). Section 41(d) of the Texas Probate Code essentially combines the constitutional provision with the insurance code provision. The current version provides:

No conviction shall work corruption of blood or forfeiture of estate, except in the case of a beneficiary in a life insurance policy or contract who is convicted and sentenced as a principal or accomplice in wilfully bringing about the death of the insured, in which case the proceeds of such insurance policy or contract shall be paid as provided in the Insurance Code of this State, as same now exists or is hereafter amended; nor shall there be any forfeiture by reason of death by casualty; and the estates of those who destroy their own lives shall descend or vest as in the case of natural death.

Tex. Prob. Code. §41(d) (West 2005).

**IV. Equity to the Rescue—  
The Constructive Trust**

A. An “End Around” the Statute

Frustrated with the results of the application of the plain language of the constitutional and probate code provision on the rights of a killer to inherit his victim’s assets (other than insurance proceeds), lawyers and judges turned from law to equity. Although not the first case on the issue, the Court in *Parks v. Dumas*, 321 S.W.2d 653 (Tex. Civ.

App.-Fort Worth 1959, no writ), found a way around the statutes.

In *Parks*, it was stipulated that defendant, James Clifford Parks, willfully, voluntarily and unlawfully killed and murdered his parents, Luther E. and Eunice Parks, by shooting them with a gun. The defendant was convicted of the felony offense of murdering his mother, Eunice, and received a twenty year sentence in the penitentiary. *Id.* at 654. Both parents died intestate. *Id.* Plaintiffs, the brothers of Luther Parks (and, except for defendant, his sole surviving heirs) and the father and sister of Eunice Parks (her sole surviving heirs, except for defendant) filed suit for the purpose of imposing a constructive trust on the community estate of the parents of defendant. *Id.* The trial court found that in equity a constructive trust should be imposed upon all the property belonging to the estates of Luther and Eunice Parks in favor of their lawful heirs, other than defendant, and judgment was entered for plaintiffs accordingly. *Id.* The defendant appealed. *Id.*

The Court of Appeals affirmed, disagreeing with the result in *Hill v. Noland*, 149 S.W. 288 (Tex. Civ. App.-Texarkana 1912, no writ) and quoting *Greer v. Franklin Life Ins. Co.*, 221 S.W.2d 857, 859 (Tex. 1949), which stated that “the more modern view of imposing a constructive trust upon property inherited by a murderer from his victim, for the benefit of the heirs other than the murderer, was evidently not suggested or considered” by the *Hill* court *Id.* at 655.

The *Parks* court reviewed the history of the imposition of constructive trusts in similar cases. The Court cited *Pritchett v. Henry*, 287 S.W.2d 546, 548 (Tex. Civ. App.-Beaumont 1955, writ dismissed), wherein the court addressed the identical question of

whether a person who willfully and unlawfully kills another may take title as an heir or legatee of his victim and retain it free of a constructive trust sought to be impressed upon such property by law for the benefit of the victim's heirs at law other than the killer. *Id.* The *Pritchett* court held that the killer acquired legal title to the property of his victim, but that the law imposed a constructive trust thereon for the heirs other than the killer, noting that by imposing a constructive trust upon the murderer, the court is not making an exception to the provisions of the statutes, but is merely compelling a murderer to surrender the profits of his crime and thus preventing his unjust enrichment. *Id.* The *Pritchett* court, citing Scott on Trusts, stated that in order to deprive a murderer of the property, it is not necessary to make an exception to the statute; all that is necessary is to apply the well-settled equitable principle under which a constructive trust is imposed upon one who acquires property through his own wrong. *Id.*

Based upon the same rationale, the *Parks* court stated that the imposition of a constructive trust does not violate the statutes of descent and distribution because it is “a creature of equity.” *Id.* The court stated that a “constructive trust is imposed in a situation like the one before us so that the statutes of descent and distribution may not be used as an instrument for perpetrating or protecting a fraud. Certainly the statutes should not be used as a vehicle to acquire property through parenticide. We hold that, though defendant inherited the property of his parents, the law imposed a constructive trust thereon in favor of the heirs other than defendant.” *Id.*

B. Application of Constructive Trust Not Automatic

(1) *Proponent of Constructive Trust Must Strictly Prove the Elements*

In *Medford v. Medford*, 68 S.W.3d 242 (Tex. App.–Fort Worth 2002, no pet.), Roger Medford and his mother, Carolea, got into a fight which resulted in his mother suffering serious injuries from which she eventually died. *Id.* at 245. Roger was tried and convicted of causing serious bodily injury to an elderly person, but he was not convicted for her death. *Id.* at 245. As a result of their mother’s death, Roger and his brother, William, became tenants in common of their mother’s home. *Id.* at 245. When William decided to rent out the home, Roger filed suit from prison to recover his half of the rental income. *Id.* at 245. William argued that a constructive trust should be imposed on Roger’s inheritance due to his conduct leading to his mother’s death. *Id.* at 248. Both parties filed for summary judgment. The Court granted Roger a “take nothing judgment” against William.

William presented summary judgment evidence establishing a prima facie case for Roger's responsibility for Carolea’s death. *Id.* at 249. The criminal trial transcript reflected medical testimony that Carolea’s many injuries were consistent with a blow from a hand and with either being hit with or pushed into a hard object. *Id.* The doctor further testified that Carolea suffered cerebral contusions and broken bones, classifying these injuries as serious bodily injuries, and opined that they ultimately caused Carolea’s death. *Id.* Despite his protestations of innocence, Roger was found guilty by a jury of causing these same injuries. *Id.*

While acknowledging the proof was substantial, the Court found that it was not sufficient alone to support the imposition of a constructive trust denying Roger beneficial interest in property he came to possess through his act of violence against his mother. *Id.* The Court opined that the proponent of a constructive trust must strictly prove the elements necessary for the imposition of the trust. *Id.* at 249-250. The party seeking to impose the constructive trust must prove unfair conduct or unjust enrichment on the part of the wrongdoer. *Id.* William presented neither evidence regarding why he should be beneficiary of a constructive trust or, alternatively, in whose benefit a trust should be formed, nor evidence regarding the very existence of the assets for which Roger sued, rents collected on the home. *Id.* Without an accounting and without evidence addressing who might be entitled to beneficial use of Roger's property, the trial court was unable to grant the specific relief William requested. *Id.* The court stated that, in other words, while a constructive trust is appropriate given Roger's involvement in his mother's death, William's proof was insufficient to enable the trial court to enter a clear order imposing a constructive trust and defining its terms. *Id.* The Court reversed the summary judgment and remanded the case to the trial court for further proceedings. *Id.*

*(2) However, There Is No “Unyielding Formula” to Establish a Constructive Trust*

While the *Medford* Court did not affirm the judgment in favor of William, the Court refuted Roger's contention that he must be convicted of murder in order for a constructive trust to be imposed. (This issue is discussed further below.) The Court stated that it found no authority that requires a murder conviction as a prerequisite to recovery under a civil

equity claim *Id.* at n. 3. The Court pointed out that there is no “unyielding formula” to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted. *Id.* at n. 3. Further, a party need only prove facts that warrant imposition of constructive trust by a *preponderance of evidence.* *Id.* at n. 3. (emphasis added).

*(3) Proof of An Actual Conviction is Not Required to Impose a Constructive Trust*

Section 41(d) states that a “conviction” does not automatically cause forfeiture except in the case of a life insurance policy or contract. Section 1103.151 of the Texas Insurance Code does not use the word “conviction.”

The Texas Supreme Court addressed the issue in *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977), appealed on other grounds, 611 S.W.2d 685 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). In *Bounds*, Dr. Bounds pleaded *nolo contendere* to his wife's shooting death and was convicted of negligent homicide in the first degree. *Id.* at 926. It was not known whether he intentionally shot her or unintentionally shot her while wrestling the gun away from her. *Id.* Bounds argued that his conviction for negligent homicide implied that he killed without intent, and that, therefore, a constructive trust should not be imposed. The court disagreed, stating that although the conviction for negligent homicide implied that the killing was without intent, it is still settled law that the criminal case was not binding upon the court in a civil proceeding. *Id.* at 928. The Court pointed that this was particularly true when the conviction was based upon plea bargaining. *Id.* The Court concluded that the imposition of a

constructive trust was not inconsistent with Section 41(d) of the Texas Probate Code. Because the jury found that (1) Bounds shot and killed his wife; (2) the action was intentional; and (3) such action was wrongful, the findings supported the judgment of the trial court forfeiting Bounds' interest in the insurance policy on the life of his wife and imposing a constructive trust on the property devised to him under her will. *Id.* (emphasis added)

As previously stated, the Court in *Medford v. Medford*, 68 S.W.3d 242, 249 n.3 (Tex. App.–Fort Worth 2002, no pet.) stated that a murder conviction is not a prerequisite for a constructive trust to be imposed.

(4) *Circumstantial Evidence Can Support the Imposition of the Constructive Trust*

The facts supporting the imposition of the constructive trust may be based on circumstantial evidence. *Medford v. Medford*, 68 S.W.3d 242 , 249 n.3 (Tex. App.–Fort Worth 2002, no pet.), citing *Thompson v. Mayes*, 707 S.W.2d 951, 955 (Tex. App.–Eastland 1986 writ ref'd n.r.e.).

*Thompson* was a suit to impose a constructive trust on the assets which passed to Donald Thompson under the will of his father, Jo B. Thompson. The other devisee under Jo's will was his sister, Leonette Mayes. *Id.* at 953. Don committed suicide after the suit was brought and Nancy Thompson, his mother was substituted in as defendant. *Id.* The jury found that Don “intentionally and wrongfully caused the death” of his father by gunshot. *Id.*

Nancy argued that since Don was never indicted for his father's death, no constructive trust should be imposed. *Id.* at 955. Further,

Nancy argued that the evidence which linked Don to his father's death was circumstantial. *Id.* at 955. The Court held that since the jury found Don had intentionally and wilfully caused his father's death, the fact that the jury's finding came from circumstantial evidence was irrelevant to the imposition of the constructive trust. *Id.* at 955. The Court stated Texas courts have taken the position that the law will impose a constructive trust upon the property of a deceased which passes by inheritance or by will if the beneficiary willfully and wrongfully caused the death of the deceased. *Id.*

While circumstantial evidence may be used to establish a constructive trust, the evidence must transcend mere suspicion. *Johnson v. Felts*, 140 S.W.3d 702, 707 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2004, pet. denied). In *Johnson*, the husband's relatives alleged that his wife caused his death. *Id.* at 702. The trial court granted the wife's no evidence motion for summary judgment. On appeal, the court reviewed voluminous testimony indicating that the wife's version of the events of her husband's death had numerous inconsistencies, and further, that the wife was having an affair. *Id.* at 707-08. However, the Court concluded that while the “sum total” of the voluminous testimony presented by appellant may constitute evidence that some wrongful act had been committed, “not one scintilla of causation evidence was ultimately produced.” *Id.* at 708. A conclusion that the wife caused the death of her husband would be based on nothing but mere “possibility, speculation, and surmise.” *Id.* The Court therefore affirmed the summary judgment in the wife's favor.

(5) *Defenses to Imposition of Constructive Trust*

In addition to being able to force the plaintiff to meet his burden of proof to impose a constructive trust, the alleged killer may have several defenses available to him.

*A. Insanity*

In *Simon v. Dibble*, 380 S.W.2d 898 (Tex. Civ. App.- San Antonio 1964, writ ref'd), Orlando V. Dibble, Jr., while insane, shot and killed his wife, Sabina Julia Dibble. *Id.* at 899. She left two insurance policies in which he was the beneficiary, and the insurance companies paid into court the proceeds of these policies with the request that the court determine who should receive them. *Id.* After citing what was then Article 21.23 of the Texas Insurance Code, the Court stated that it was quite clear that under the provisions of the Article a husband who has willfully killed his wife cannot receive the proceeds of an insurance policy taken out by her with him as the beneficiary. *Id.* However, a different situation was presented in the case at bar. In this case, the husband was insane, and therefore not capable of willfully taking the life of his wife. *Id.* Orlando V. Dibble, Jr., was tried for the murder of his wife, and was acquitted upon the ground that he was insane at the time he did so. *Id.* Further, the parties stipulated that Dibble was insane at the time he killed his wife. *Id.* Accordingly, Orlando was entitled to the policy proceeds.

*B. Self-Defense*

In *Giles v. Wiggins*, 442 S.W. 2d 839 (Tex. Civ. App.-Fort Worth 1969, writ ref'd n.r.e.), Vergia L. Giles, the insured, was shot by his wife, Evelyn Jean Wiggins, nee Evelyn Jean Giles, the primary beneficiary of the

policy. Vergia died as result thereof. *Id.* at 840. The insurance company deposited the proceeds into the registry of the court for determination as to who was entitled thereto. *Id.* The case was tried to the court without a jury. The court, contrary to the claims of the the decedent's next of kin, found that Evelyn at the time of the shooting was acting in self-defense and that, therefore, she did not willfully bring about the death of the insured and therefore was entitled to the proceeds of the policy. *Id.* Relying on *Greer* and *Dibble*, the Court of Appeals affirmed the judgment, pointing out that, as stated in *Greer*, where the beneficiary intends to kill the insured and the killing is *legal*, the beneficiary does not lose his or her rights under the policy. *Id.*

In *Ovalle v. Ovalle*, 604 S.W.2d 526 (Tex. Civ. App.-Waco 1980, no writ), Roberto Ovalle, Sr. died, leaving five children and a wife, not the mother of his children. His brother, Raul G. Ovalle, was appointed Administrator of his Estate. *Id.* at 527. His widow, Anita, made application to the probate court for 1) family allowance; 2) exempt property allowance; and 3) furniture, automobile, personalty and use of the parties' homestead. *Id.* The Administrator and deceased's children opposed the applications alleging: 1) Anita intentionally killed the decedent; and 2) that because of Anita's action in wrongfully bringing about the death of decedent she should not be allowed to collect any proceeds from his estate. *Id.* Trial was to the court which rendered a final order decreeing that: Anita Ovalle recover 1) \$4500.00 family allowance; 2) \$500.00 allowance in lieu of exempt property; 3) exempt personal property (furniture, fixtures, tools, two automobiles); and 4) right of occupancy of the homestead. *Id.* The trial court filed Findings of Fact, one of which stated, "In causing the death of her husband,

Anita Ovalle was justified in using deadly force against her husband, because she reasonably believed that such force was immediately necessary to protect herself against the use by Roberto Ovalle of unlawful force". *Id.* The Administrator appealed, contending such finding was against the great weight and preponderance of the evidence. *Id.*

Reviewing the facts, the Court noted that Anita was indicted for murder of her husband, but convicted of voluntary manslaughter, and sentenced to 10 years probation as a result of plea bargaining. *Id.* at 528. The court stated that a judgment in a criminal case is not binding upon the court in a civil proceeding, and that this rule is particularly applicable where the conviction is based upon plea bargaining. *Id.* The Court went into detail as to the facts surrounding the killing. The Court noted that although the deceased's actions amounted to unlawful force or threat of unlawful force, he afterwards said he was sorry. It was thereafter Anita got the gun and stood in the doorway of the bedroom. Anita had more than adequate time to have left the house and retreated, but Anita fired four shots into deceased--any one of which shots the pathologist medical examiner of Travis County testified would have been fatal. *Id.* at 529. Based upon such evidence as a whole, the Court concluded the trial court's finding that Anita was justified in using deadly force against her husband because she reasonably believed that such force was immediately necessary to protect herself against the use by her husband of unlawful force was against the great weight and preponderance of the evidence. *Id.*

### C. Statute of Limitations

A suit to impose a constructive trust is not an action for injury done to the person of another; rather, it is an action in equity to prevent unjust enrichment of a person who has wrongfully acquired property. *Thompson v. Mayes*, 707 S.W.2d 951, 954 (Tex. App.—Eastland 1986 writ ref'd n.r.e.). Therefore, the two-year statute of limitations under Section 16.003 of the Texas Practice & Remedies Code does not apply. *Id.* The *Thompson* Court, however, did not say which limitations period was applicable.

Arguably, if an action to impose a constructive trust is not one for personal injury, such suit would be governed by the four-year residual statute of limitations period set forth in Section 16.051 of the Texas Practice & Remedies Code. *See Mayo v. Hartford Life Insurance Co.*, 220 F. Supp. 2d. 714, 769 (S.D. Tex. 2002). It has been held that actions to establish a constructive trust *based on fraud* are governed by the four-year statute of limitations. *Austin Lake Estates, Inc. v. Meyer*, 557 S.W.2d 380, 383 (Tex. Civ. App. 1977, no writ)(emphasis added). However, fraud may or may not be involved in a suit to impose a constructive trust based upon the slayer's rule. However, it could be argued that since such a suit is based upon the idea of unjust enrichment, the action would be a suit for "debt" and therefore governed by the four-year statute of limitations under Section 16.004 (3) of the Texas Practice & Remedies Code.

## V. Proving Forfeiture of Insurance Benefits

### A. What does “Wilfully” Mean Under the Insurance Code?

As stated above, Section 1103.151 of the Texas Insurance Code provides that a beneficiary of a life insurance policy or contract forfeits the beneficiary's interest in the policy or contract if the beneficiary is a principal or an accomplice in *wilfully* bringing about the death of the insured. However, the word “wilfully” is not defined.

The leading case on the issue is *Greer v. Franklin Life Ins. Co.*, 148 Tex. 166, 221 S.W.2d 857 (1949). In *Greer*, a woman stabbed and killed her husband and pled guilty to murder without malice. *Id.* at 858. Although she was a beneficiary under her husband's insurance policy, the Court pointed out that the Texas Insurance Code barred recovery where a beneficiary willfully caused the insured's death. *Id.* Members of the husband's family brought suit against the wife and the insurer, and the wife in turn asserted her claim to proceeds. *Id.* At trial, the wife admitted that the killing was not in self-defense. *Id.* The Texas Supreme Court held that she could not recover on the policy.

Upon examination of Texas cases the court concluded that “wilfully” connotes something more than that the beneficiary shall have intended the death of the insured to result from his or her act. *Id.* at 859. The factor of “illegality” must also be present. But the Court made clear that the word does not mean “maliciously.” *Id.* In the course of further discussion, the opinion refers to its rule as one “based on intent and illegality as distinguished from malice.” *Id.* at 860. The Court concluded that the killer not only offered no substantial evidence of a lack of deadly intent or of legal justification of her act but expressly admitted it

was not done in self-defense or even against resistance on the part of the victim, and that previous to the trial she had pleaded guilty to 'murder without malice,' making no suggestion that the circumstance of the plea were such as to give it less than its normal effect. *Id.* Therefore, the “wholly unqualified admission of a plea of guilty with the other evidence above mentioned and in the absence of contrary evidence, established intent and illegality as a matter of law.” *Id.* Judgment was therefore rendered in favor of the next of kin and against the killer.

### B. Who is the “Nearest Relative”

Section 1103.152(c) of the Texas Insurance Code provides that if there is not a contingent beneficiary entitled to receive the proceeds of a life insurance policy or contract, the “nearest relative” of the insured is entitled to receive those proceeds. That term does not appear to be defined in the Texas Insurance Code.

This issue was addressed in *Clifton v. Anthony*, 401 F. Supp. 2d 686 (E.D. Tex 2005). The Court reviewed various statutes in determining the definition of “nearest relative.” The Court started with the Texas Code of Construction Act, which states that in cases where there is no defined meaning of a word in the relevant code, “words and phrases shall be read in context and construed according to the rules of grammar and common usage.” *Id.* at 689, *citing Tex. Gov't Code § 311.011(a) (Vernon 2004)*. A relative has been defined as “a person connected with another by blood or affinity; a person who is kin with another.” *Id.*, *citing Black's Law Dictionary 1314 (8th ed.2004)*. This definition of relative is consistent with Texas statutes. *Id. citing Tex. Bus. & Comm..Code Ann. § 24.002(11) (Vernon 2002)* (a relative is “an individual related by consanguinity within the

third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.") and *Tex. Prop. Code Ann. § 111.004(13) (Vernon 1995)* (a relative is "a spouse or, whether by blood or adoption, an ancestor, descendant, brother, sister, or spouse of any of them"). The term does not depend on one's status as an heir or whether one was born in wedlock. *Id.*

## **VI. Forfeiture of ERISA and Other Benefits**

In *Administrative Committee for the H.E.B. Investment and Retirement Plan and the H.E.B. Investment and Retirement Plan v. Harris*, 217 F. Supp. 2d 759 (E.D. Tex. 2002), Mary K. Graham Harris ("Mary") worked for H.E. Butt Grocery Co., Inc. and was covered by her employer's Investment and Retirement Plan (the "Plan"). *Id.* at 760. Her husband, Alfred David Harris, was named as the sole beneficiary and no contingent beneficiary was named. On February 18, 2001, Mary died. *Id.* On March 8, 2001, Alfred David Harris was indicted for murder and manslaughter in connection with his wife's death. *Id.* On August 27, 2001, Alfred David Harris plead guilty to murder/manslaughter, a second-degree felony and was later sentenced to ten years in prison. At the time of Mary's death, her husband and four children survived her. *Id.* The Plan did not contain a provision directing the payment of benefits in situations where the beneficiary has been convicted of intentionally killing the insured. *Id.* H.E.B. sought a declaratory judgment stating its obligations under the Plan--should it pay the husband as beneficiary under the Plan or should it pay the children because of Texas's slayer statute? *Id.*

The Court found authority holding that ERISA does not preempt a state's slayer statute. *Id.* at 761. However, even if ERISA preempted Texas' slayer's statute, the Court found it would be inappropriate to allow a slayer to benefit from his wrongdoing under ERISA. *Id.* In deciding who is entitled to ERISA benefits between the innocent children of a murdered spouse and the intentional killer of one's spouse, the court held that federal common law as influenced by state slayer statutes cannot allow the murderer to be rewarded with entitlement to ERISA benefits. *Id.* In so deciding, the court agreed with the conclusion of other courts that in enacting ERISA, Congress could not have intended to ensure recovery of ERISA benefits when one spouse intentionally kills the other spouse. *Id.* Thus, because federal common law would not allow a slayer to recover ERISA benefits, a similar conclusion will be reached whether the court finds ERISA preemption exists or not--Alfred David Harris will not receive the proceeds of his wife's ERISA benefits. *Id.*

## **VII. Possible Answers to the Probing Questions**

Having reviewed the current state of the law of the subject, how do we answer the questions posed at the outset of the article?

### **A. Discussion of the Possible Answers to Questions 1, 2 and 3--Who are the Beneficiaries of The By-Pass Trust Created In Brenda's Will Upon Charlie's Death?**

Even if Bubba is convicted of murdering Brenda, Section 41(d) of the Texas Probate Code states on its face no conviction shall work forfeiture of estate. This would appear to mean that Bubba, or his descendants, would be the beneficiary of the

by-pass trust. However, Pauline and Judy are likely to defeat Bubba if they are able to convince the Court to impose a constructive trust on the assets in favor of them as Brenda's surviving heirs. Bubba would not necessarily have to be convicted of any crime in order for Pauline and Judy to be successful. Further, the result in the criminal case will not be binding upon the court in the civil proceeding. However, following the holdings in cases such as *Pritchett* and *Bounds*, Pauline and Judy will likely have to show that Bubba either shot and killed his mother or played a significant role in the killing; (2) that his actions were intentional; and (3) that his actions were wrongful. Keep in mind that Bubba was "wounded" himself in the shoot-out. He will more than likely claim that he, too, was a victim and that he would not be unjustly enriched by receiving the benefits. Therefore, even though the case against Bubba can be based upon circumstantial evidence, the evidence against Bubba must transcend mere surmise or suspicion. Further, Pauline and Judy must show why they should be the beneficiaries of the trust. The fact that they are the only surviving heirs of Brenda, other than Bubba, that they are also contingent beneficiaries of the by-pass trust, and the fact that they played no part in the wrongdoing should help their cause. However, what if Bubba pre-deceases Charlie and, during a conjugal visit, fathers a child who survives Charlie? It would appear that Pauline and Judy's argument for a constructive trust weakens when the Court is staring at a innocent minor heir of his deceased grandmother.

B. Discussion of Possible Answers to Questions 4 and 5--Who Takes Barry's Estate?

Given the fact that Barry was only 21 years old at the time of his death, Barry's estate is likely to be minimal. However, regardless of the

value of the estate, one would follow an analysis similar to that set forth in the response to Questions 1 through 3. Again, even if Bubba is convicted of murdering Barry, Section 41(d) of the Texas Probate Code states on its face no conviction shall work forfeiture of estate. This would appear to mean that Bubba, or his descendants, would be a beneficiary of one-half of Barry's estate by intestacy. However, Charlie is likely to defeat Bubba if he is able to convince the Court to impose a constructive trust on Bubba's share in favor of him as the surviving heir. Charlie's case would proceed similarly to Pauline and Judy's case with respect to Brenda's by-pass trust, but Charlie's case may be a little stronger since he is the surviving husband and was also a possible victim of Bubba's conduct.

C. Discussion of the Possible Answer to Question 6--Who Takes the Insurance and Retirement Benefits?

Since Charlie survived Brenda, and since Charlie had no role in Brenda's death, Charlie would take the insurance and the ERISA benefits as Brenda's named beneficiary. However, assuming Charlie also died in the shoot-out, it would appear that Brenda's insurance benefits would go to her "nearest relatives," presumably her mother, Pauline, and sister, Judy in equal shares since Bubba wilfully brought about Brenda's death. Charlie's insurance would go to his "nearest relative," presumably his brother, Louis, if Bubba also wilfully brought about Charlie's death.

Based on the holding in the *H.E.B. Investment and Retirement Plan* case, it would appear that the ERISA benefits would be payable in the same fashion.

Assuming Charlie survives Brenda, but forgets or fails to change the contingent beneficiary on his insurance policy and on his ERISA plan, does Bubba get those benefits as the surviving contingent beneficiary? Surprisingly, it would appear that Bubba would, in fact, receive those benefits. Bubba would not be barred under the insurance code because he would not be an accomplice or principal in bringing about the death of the insured, in this case, Charlie.