

Pickup Styx

By Fred A. Fenster

Anna Nicole Smith's untimely passing has created a whirlwind of unanticipated problems that will reverberate for years.

At the time of her demise, Smith's notoriety arguably was at its zenith, and her prospects for achieving great wealth were good. In May, the U.S. Supreme Court gave her the opportunity to battle the family of Texas oil magnate J. Howard Marshall II to recover a portion of his estimated \$1.6 billion estate; she was the spokesperson for TrimSpa; and on Sept. 28, *People* magazine reportedly paid \$1 million for photographs of her "commitment ceremony" in the Bahamas with her lawyer, Howard K. Stern.

Public interest in Smith was given another boost in September when she gave birth to daughter Dannielynn Hope Marshall Stern.

But Smith also was a tragic figure: Her son, Daniel Smith, died three days after her daughter was born; she was named in a class-action lawsuit filed against TrimSpa; and claims of paternity have been asserted by Stern, photographer Larry Birkhead and Frederic von Anhalt, the husband of Zsa Zsa Gabor.

Years ago, Smith retained an attorney to prepare her will. Unfortunately, this last testament has created far more issues than it resolved, practically ensuring years of litigation in the United States and foreign courts.

On July 30, 2001, Vickie Lynn Marshall, aka Vicki Lynn Smith, Vickie Lynn Hogan and Anna Nicole Smith, executed her will in California, declaring that she was unmarried and had "one child, Daniel Wayne Smith."

The will states: "Except as otherwise provided in this Will, I have intentionally omitted to provide for my spouse and other heirs, including future spouses and children and other descendants now living and those hereafter born or adopted, as well as existing and future stepchildren and foster children."

The obvious intent of the provision was to disinherit everyone except Daniel Wayne Smith. That conclusion is confirmed by the Disposition of Estate portion of the will: "All of the property of my estate (the 'residue') ... shall be distributed to Howard Stern, Esq., to hold in trust for my child under such terms as he and a court

of competent jurisdiction may declare."

From that language, one might conclude that Dannielynn, Stern, Birkhead and von Anhalt do not have a claim to Smith's estate. But then, who does?

Neither Smith nor the Century City attorney who prepared the will envisioned that her son would predecease her. Worse, California law mandates that the language of a will must be interpreted to effectuate the decedent's directives. Probate Code Section 21102(a); *Estate of Newmark*, 67 Cal.App.3d 350 (1977); *Estate of Hilton*, 199 Cal.App.3d 1145 (1988).

Moreover, the rules of construction set forth in the Probate Code do not apply when the intention of the decedent is set forth in the will. Probate Code Section 21102(b).

As the court opined in *Estate of Keller*, 134 Cal.App.2d 232 (1955): "[W]hat the testator intended to accomplish is to be gathered, if possible, by giving the most ordinary interpretation to the language used, without resorting to specious and fanciful reasoning. ... Courts are not invested under the guise of construction with the privilege of rewriting a testator's will."

Smith's potential heirs can be expected to attack the will on various grounds. Initially, they will assert that the document is ambiguous and contradictory. For example, in addressing the residue of Smith's estate, Stern is appointed to hold the property "in trust for my child" as noted above — but the ensuing language contemplates the inclusion of additional offspring by providing for her children.

Support for ambiguity arguments also can be found in paragraph 3.4.2, Tax Elections and Decisions, which provides that "no compensating adjustments shall be made among my beneficiaries ... except as my Executor deems equitable."

Similarly, successor executors, under paragraph 3.6, "shall be obligated to inquire into the propriety of any act or omission of a predecessor if so requested in writing by ... any adult beneficiary or the guardian of a minor beneficiary of the Trust."

Article V of Smith's will, Taxes and Other Expenses of My Estate, contains a catchall of Probate Code provisions and refers to "any beneficiary under the Will" and "the beneficiaries of the Trust," while notifying the world that the executor "shall have the power" to prefer "one beneficiary or group of

beneficiaries over another."

Against that backdrop is the question of whether Smith's effort to exclude "future children" complies with Probate Code Section 6571, which permits disinheritance where "the testator's failure to provide for the child in the Will was intentional and that intention appears from the Will." Equally problematic is the will's failure to describe what would happen to Smith's estate in the event her son did not live to 25.

Complicating those issues is Section 6.2, which seems to confirm that no one other than Smith's son will be entitled to receive the estate's assets: "Except as otherwise provided herein and in the Trust, I have intentionally omitted to provide for any of my heirs, or persons claiming to be my heirs, whether or not known to me."

Under that scenario, a court will be asked to interpret the will to protect Smith's heirs, whoever they might be. Some potential heirs also may assert that Stern influenced Smith unduly as her attorney, lover and confidant to overturn the will.

The best argument, though, is that the will should be invalidated because its terms are impossible to implement, owing to the fact that Smith's son predeceased her. Hence, the estate should be treated as one of intestacy: "A court's inquiry in construing a Will is limited to ascertaining what the testator meant by the language which was used. If he used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended." *In re Klewer's Estate*, 124 Cal.App.2d 219 (1954).

Interestingly, Smith's will has not yet been submitted for probate. Assuming the court follows *Klewer's* and its progeny, a host of questions must be answered:

- Is the commitment ceremony



that occurred in the Bahamas tantamount to a marriage?

- Who is Dannielynn's father?
- If Birkhead's and Dannielynn's DNA match, will Bahamian law — which provides that a man who lives with a child's mother for a period preceding the birth (Stern) has paternal rights that may outweigh those of the biological father

— apply?

- Does Smith's mother have any right to her daughter's estate?
- What if none of Smith's alleged liaisons is the father?
- Which court has jurisdiction to decide these issues? What law will apply?
- Finally, who will be entitled to the estate's assets?

These controversies will generate legal challenges and provide ample tabloid fodder for the foreseeable future. In the interim, the public's interest in the Smith story might continue to nudge world events to the back pages.

Fred A. Fenster is a partner at Rutter Hobbs & Davidoff in Century City.

California Should Follow Texas in Asbestos Cases

By Joe Nixon

From football to lawmaking, Texans think everything they do is bigger and better. They even boast that their capitol is taller than the one in Washington, D.C. But when it came to fixing their civil-justice system, Texans looked to California for how to do it right.

In Texas, doctors were being sued out of business, leaving the state with 25 percent fewer doctors for the population than the other states, a crisis situation. Texans went to California to learn from the laws that the state passed in 1975 — in the middle of its own medical-liability crisis — to protect doctors from frivolous lawsuits.

Texas lawmakers saw that California's Medical Injury Compensation Reform Act was working. California doctors were paying half to one-fourth of the medical-malpractice insurance premiums that doctors in Texas were paying. And the Golden State was blessed with more doctors.

In 2003, Texas followed California's lead and passed sweeping medical-malpractice reforms. Since then, these reforms have had tremendous success in eliminating frivolous lawsuits, lowering the cost of practicing medicine and increasing access to health care. Physicians are applying to practice medicine in record numbers, and the state has more applicants than it can process, particularly in the high-risk fields of obstetrics, neurosurgery, emergency care and orthopedic surgery.

Following that success, in 2005 Texas adopted sweeping reforms to address the asbestos litigation crisis. Several hundred thousand people in the United States have claimed they are ill from exposure to asbestos. Although the vast majority will never be sick or impaired, some workers have contracted severe illnesses, such as mesothelioma, a deadly incurable cancer. Smokers exposed to asbestos are more susceptible to lung cancer.

But the other 90 percent of claimants, estimated to be 650,000 so far, usually allege that they have asbestosis, which shows up as small scars on an X-ray but generally poses little or no impairment — not even shortness of breath. As a result of the multitude of claims, the frivolous, unimpaired claimants were siphoning settlement dollars away from those who were truly sick.

Texas lawmakers responded with a multidistrict litigation court to have consistent pretrial rulings, imposed medical criteria on nonmalignant claims and required each person's claim to stand on its own merits. The state created standards for medical experts and required greater scrutiny of medical evidence. Combined, these and other related changes punctured the unimpaired-lawsuit bubble.

Through the years before the reforms, Texas's court system processed 100,000 unimpaired plaintiffs, many of whom never lived in Texas. Since the 2005 reforms, 50,000 unimpaired individual claims have been put on hold until those plaintiffs can provide objective medical evidence to support



their lawsuits. Not surprisingly, the unimpaired plaintiffs are unwilling to expose the weakness of their claims and are not filing the required independent medical reports to substantiate their claims and move their cases to trial.

Amazingly, as a result of the collapse of the unimpaired asbestosis docket in Texas, Lone Star State lawyers are moving cases, law offices and, in some instances, their entire practices to California. The Golden State has not adopted a multidistrict litigation procedure or new laws to deal with unimpaired claimants in mass tort litigation, making it desirable for relocation.

This has created an opportunity in California to continue the pursuit of litigation on behalf of people who have been exposed to asbestos but are uninjured or unimpaired. The cost in Texas for maintaining this type of litigious environment for years was enormous. Local courts were clogged, and nationally, 70 companies declared bankruptcy, in large part because of the cases filed in Texas.

Though California is one of the favored venues for unimpaired asbestosis claims, it should not feel alone. Arkansas, Massachusetts, New York, Oklahoma and Virginia also have seen big jumps in their unimpaired asbestosis dockets. Fine lawyers are expected to locate the most favorable venue for their clients. But a favorable venue for unimpaired claimants is not fair for those who are dying from cancer and are justly entitled to full

compensation.

It is unjust to people who are truly suffering from exposure to asbestos to have their damage awards reduced and resolution delayed by the thousands of claims made by those who are not ill and have no medically objective evidence of impairment. It is unjust for financially solvent defendants to bear a greater share of liability caused by the bankruptcy of their co-defendants. And it is unjust to shift the costs of the unimpaired docket to consumers through higher prices of products made by those defendants still standing.

Before 2005, when Texas had as many as 14,000 unimpaired claimants file suit per year, the judicial system did a poor job of establishing justice for those who were really sick. The system used for the resolution of civil disputes is not designed for examining the efficacy of the judicial system itself. That job must be done legislatively, as California did for its doctors in 1975 and as Texas has most recently done.

Texas has drawn key lessons from California, but lessons also could be learned from the Lone Star State. Unless Californians follow Texas' lead in unimpaired asbestos litigation, they can look for the next gold rush at their local courthouse.

Joe Nixon is senior fellow in civil justice studies at California-based Pacific Research Institute and former state legislator in the Texas House of Representatives (1994-2006).

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