ORAL ARGUMENT — 10/6/99
98-1126
BADOUH & GORHAM V. HALE & PARKER

BRACEY: I represent Tom B. Gorham. Thank you for granting the petition for review in this case. This is an important case. It's a case of first impression in Texas. To the best of my knowledge, there have been only two cases decided by Texas courts addressing the disclaimer statutes. Neither of those cases addressed the situation we have here today, which is particularly the wording of §37A(g), which actually estopped a party from seeking to disclaim.

There is only four essential facts that were needed for decision. They were enough for Judge Fred Clark when he granted the motion for summary judgment. These four essential facts are not in dispute. In fact, the respondent takes the same position: The facts are undisputed and the decision should go in his favor.

O'NEILL: Do you agree with that then that we can render summary judgment on the cross-petition if we disagree with your position? There's nothing to send back.

BRACEY: There is nothing to send back. The first essential _____ facts is there's no time-line. It's in the brief as well.

O'NEILL: Doesn't 37A have a special definition for beneficiary?

BRACEY: Yes. it does. It says, includes. So it's perhaps even more than that. It includes a person who would have been entitled to _____ to receive property as a result of the death of another person by inheritance under a Will. That's exactly who Ms. Hale is. She is a beneficiary and absent the disclaimer, she's under attack. She was a person who was a beneficiary because she was entitled to receive property as a result of the Will of her mother.

O'NEILL: But doesn't the statute sort of contemplate, just this 37A, that there has to be a death before someone can become a beneficiary just by the way it's worded? For example, when it talks about filing a disclaimer it says, it has to be filed in the county where the decedent died. How would you know that before someone dies?

BRACEY: There's two questions I think the court has asked. One is, when can you disclaim? The basis of a disclaimer right arises after death. The legislature said, You have a 9-month time window to file that. But it doesn't link to the separate question of what is a beneficiary? When does beneficiary status arise? Be content your honor, that the law in Texas has long been the case that the beneficiary's status arises when the property interest arises, and that's when an expectancy is created. That's when you are named in the Will. That's what the common _____ of Texas is. I am a beneficiary under the Will.

HANKINSON: In 37A as Justice O'Neill was talking about it talks about a beneficiary being a person who would have been entitled to receive property as a result of the death of another person. Is this a different definition of beneficiary that might appear elsewhere in the law for specific purposes of 37A? It specifically it's tied not to just the Will, but as a result in death.

BRACEY: The CA made the mistake, the definition of 37A regulates the process and manner of disclaimer. It's not meant to be an exclusive specially restrictive definition of beneficiary. It's not even an exclusive definition. It's an inclusive definition, which includes the rest of Texas law as to what beneficiary is.

O'NEILL: Do you put any significance to the word "would have been entitled"? Instead of - it seems like under your argument if it included an expectancy, that the beneficiary included someone who had an expectancy that it would say, it could have _____. If we're going to look at the prime meaning. It would have been entitled upon death.

BRACEY: The question then becomes at what time-frame do we use as an _____. My point, the point of our brief is that that timeframe _____ after the time of the disclaimer. After that disclaimer, would this person have been entitled to receive the property at that time.

ABBOTT: How can you accept the property before death?

BRACEY: By conveying, by using it, by possessing it, by claiming it, by leading third-parties to their detriment.

O'NEILL: Leading third-parties to their detriment, third parties know that the pledge of expectancy is a pretty iffy proposition. It can lapse by the predeceasing of the beneficiary for example. Right?

BRACEY: That's right.

O'NEILL: And this statute is written in such a way that they say, If you file a disclaimer, it has the effect of their being a predeceasing beneficiary. You agree in the first instance that any _____ relies on the conveyance of an expectancy is taking a big chance of beneficiary predeceasing, being disinherited, Will changing, things of being amended?

BRACEY: I will acknowledge a big risk for two reasons There's only two ways that a beneficiary status can be defeated - actually three: 1) a predeceasing situation (Ms. Hale was a lot younger than her mother); 2) the Will being changed - a salient fact here is that Ms. Badouh, the decedent was in a guardianship because she lacked the mental capacity to manager her affairs; very unlikely the Will would be changed; and 3) a renunciation, which that same statute basically says, Renunciation and disclaimer mean the same thing: You don't want the gift. The courts have expressed that as an offer by the estate. It is rejected.

I do not agree that the risks of dealing with an expectancy was iffy or low. Here, it was higher it would be realized. Mrs. Hale used her expectancy to secure legal services. I use that word "secure" in two matters: 1) to obtain them; and 2) then from the predator lawyer's perspective to give him some source of collateral for the payment of a fee. The essence of this case is that expectancies may be used in Texas and conveyed. That's the fundamental definition in the property code.

The property code states: A person may make an inter vivos, conveyance of an inheritance that commences in the future.

O'NEILL: Yes, an expectancy can be conveyed and there's language in *Hale v. Hollon* case that says that it's assignable in equity to _____ for consideration and when the expectancy has fallen into possession it will be enforceable. But if it doesn't ever fall into possession it's not enforceable. And isn't that the intent of this language about there being a death? It doesn't fall into possession until a death, and until you possess it, you can't accept it.

BRACEY: I respectfully disagree. Because if you can convey a certain property, if you can gain value from that property, benefit from that property, use that property, then you have a property interest. There's no question about it I believe under the case law, that you can deal with your expectancies, you can pledge your expectancies, you can obtain credit for those expectancies.

O'NEILL: And they're still expectancies though. If they don't fall under possession, you have nothing?

BRACEY: If they don't mature - Mr. Gorham had a deed of trust that was contingent upon the Will not being changed and Mrs. Hale not die before her mother.

GONZALES: It's not just possession though is it? Is it necessary that you possess it?

BRACEY: You don't need to possess it.

O'NEILL: Then the capacity of beneficiary is the issue because if it's not in the capacity of beneficiary, we don't get control of possession?

BRACEY: Yes, exactly. That's a limitation. But what other capacity was Mrs. Hale acting when she voluntarily exercised the meaning and control sufficient to convey property in trust under a deed of trust. That in our opinion is acting in the capacity of a beneficiary. There is no other capacity she could have been acting in. The CA suggested no other capacity she could have been acting in. Then the court has to go immediately to the final straw and say, Okay, subsequent to that, Mrs. Hale filed the disclaimer in property form within the proper timeframe. Is it valid? That's the only question I believe before the court. The answer is, no. Because no disclaimer shall be effective after acceptance of the property by the beneficiary.

* * * * * * * * * *

RESPONDENT

PARKER: The decision that is made on the case before you today is twofold: Basically it's whether to reinforce the Texas Probate Code, and to pass rulings to change it. And if we change it, then we're going to be opening the floodgates for new litigation from creditors and so forth.

The case also relies on the interpretation of 37A of the Probate Code and also what violates a no contest clause. What is more than a mere filing of a no contest clause?

I have two issues that I would like to discuss today: 1) was a disclaimer executed by Hale valid and effective as a matter of law? and 2) what constitutes more than a mere filing to violate a no contest clause of a Will?

In my first issue I will show that the disclaimer executed by Hale was valid and effective as a matter of law, and therefore, should be upheld as against all. And in the second issue, I will try to paint a picture of case law and facts in this case of what constitutes more than a mere filing to violate a no contest clause of a Will.

ENOCH: On the issue of the validity of the disclaimer, you have a deed of trust lien on this expectancy and it applied to a house. On the date that the codicil was probated what was the status of the house?

PARKER: It was in the hands of the estate for Mrs. Badouh. Are you asking me where did the property vest as under the probate code?

ENOCH: What was the status of this house when the decedent - she dies and now what's the status of the house? It goes to the heir?

PARKER: All property vest in someone at the immediate time of death, therefore, it would have vested in Mrs. Hale at the exact second at which Mrs. Badouh died.

ENOCH: Now the probate code permits Mrs. Hale to disclaim any interest within a certain period of time and not suffer any sort of adverse consequences as a result of this devise, correct?

PARKER: Yes.

ENOCH: But at the point in time that the ownership vests in Mrs. Hale it has a deed of trust on it from Mrs. Hale for the value of that house?

PARKER: Yes.

ENOCH: So when she attempts to execute the disclaimer, hasn't she already exercised control by transferring an interest in that home?

PARKER: No, I would argue that she did not.

ENOCH: But she owned it. She had the power to convey. That expectancy has now been realized. She has an effective lien on this house. Why isn't that an exercise of control over the house even assuming that somehow she wasn't a beneficiary before she executed the lien? She now has a document that she's executed exercising authority over that house, the house is vested in her as of the date of her mother's death. How is she now able to disclaim under the statute?

PARKER: Under the statute it states that as against all, you can disclaim as if you pre-decease the decedent. Therefore, you have to think of it - I would have to think of it in the analysis of you taking the interpretation of the following events: the deed of trust was done; the disclaimer; then the Will directing the property to the administration; and then prior to its distribution to the beneficiaries, and all these things occurred simultaneously. The same second if we might say because of the death. And because under 37A of the probate code, it generally states that it relates back for all purposes to the death of the decedent. As I'm understanding it it's naming someone in a Will that's in an offer to them to accept that property. And so I'm going to take that analysis one step further because one can't disclose of something that one doesn't have. Then I'm going to say that you can't mortgage what you never owned as well.

It relates back as against all creditors because she never exercised actual dominion and control over that property.

GONZALES: Can you give me an example under 37A(g) what would exercising dominion or control look like?

PARKER: The only way I could give you what would exercising dominion and control look like would be through the case law I've read that was prior holdings before. And what the TC's held were someone holding it as against all others after a person dies. Or, encumbering that property after that person died, doing anything adverse to that property as against others after the time of death, not prior to, as the CA correctly rules that a beneficiary cannot act prior to a death of a decedent as to that property. And when Mrs. Hale gave a deed of trust and a promissory note to an attorney that was a probate attorney for his services that had knowledge of disclaimers, had other remedies available to secure his payment of his fees, that was prior to her acting as a beneficiary. And the probate code clearly under 37A says, After as a beneficiary.

O'NEILL: Have you looked for any legislative history behind 37A statute that specifically in terms of the part that says, In the capacity of beneficiary why that language was included?

PARKER: I tried to look into legislative history on Westlaw and I couldn't find anything in the statute particularly as to why it was stated in that definition. No, I couldn't find anything. Not that it's not there. I could not find anything as to why beneficiary was defined in the way it was.

O"NEILL: Is this statute like any other statutes of other states that you know of or all they are different?

PARKER: There are some other states that hold a similar statute to this. As to what exact state they are, I couldn't tell you right now.

O'NEILL: Are there any other state's cases that have interpreted that in the capacity of beneficiary language if there is some other statute?

PARKER: I don't know right off the top of my head. I know that there are some cases that are out of other states that we used in our brief that state similar results as to someone prior to a person dying, and so forth, and not acting as a beneficiary until after death. But not on point to this case. This case is pretty unique as to that.

GONZALES: In the world of probate jurisprudence, can you be an efficient beneficiary before death?

PARKER: I would have to say no. I would have to say that based on the probate code, specifically and not the property code, not the tax code, not any other code, the probate code under the Texas law states that a beneficiary is after.

GONZALES: What status do you have then when she signs a Will, you have an expectancy, what is your status?

PARKER: Your status is of a future interest is what I would like to call it, or an expectancy. You can get hit by a bus tomorrow and that interest goes away because you predeceased as the 4-corners of the Will that is to be interpreted under the probate code states, that if the party puts in there that if this person predeceases me it will pass as though to these other people. And that clause is in there to protect people if they die or whatever so their property will stay within their family and pass through.

HECHT: So you can mortgage that interest?

PARKER: I'm saying you couldn't. I'm arguing that you couldn't mortgage something that you don't own.

HECHT: So the future interest the expectancy, you can't mortgage?

PARKER: How would you mortgage you never owned? I don't know how you would do that.

O'NEILL: But the law says you can.

PARKER: That you can mortgage your future interest? Under the property code it said that...

O'NEILL: The case law says that an expectancy can be assigned. *Hale v. Hollon* said that only a decade ago. So you agree that an expectancy is assignable? It can be. The question is, can it then be disclaimed?

PARKER: Correct.

HANKINSON: What do you call a person who owns an expectancy or a future interest as you characterized it? They are not a beneficiary.

PARKER: A contingent beneficiary. My second issue is talking about the violation - what's more than a mere filing of a no contest clause of a Will. And whether Mr. Badouh's actions fall strictly within those requirements under the no contest clause of Mrs. Badouh's Will. It's stated in there directly towards Mr. Badouh, her son, that in any way if he tries to redirect, hinder, or contest my Will, then not only is he cut out of the Will, but his son, my grandson, also will not take under this Will. And more than a mere filing means if you file a turnover order in a case and it states in _____ that a mere filing of a Will contest is not sufficient to invoke such a harsh remedy of forfeiture under no contest clauses if it is later dismissed prior to any proceedings being had. And in the present case, the facts show that the acts of filing the turnover order and arguing it before the TC falls strictly within the no contest clause of the Will. By Mr. Badouh attempting to change the way in which the decedent intended to pass the property...

HANKINSON: The decedent intended to pass the property to a client. How is this a Will contest? Isn't your opponent trying to enforce what the decedent said when she executed her Will?

PARKER: In her Will it specifies though that if the executor needs to lease my property, to sell it and do other things with it before passing it to the persons I intended for it to go to to take care of funeral expenses, to take care of anything, then they can do that. They have that power to do it.

HANKINSON: But that's not what this disclaimer sought to do. I'm getting a disconnect here. This turnover procedure, the proceeding that was filed and the action that was taken here was an intent to make sure the property passed in accordance with the terms of the Will, not to undo what the Will prescribed.

PARKER: But he was trying to direct the court to give him the property, not to let it go through the estate as it was wished to do in the Will.

HANKINSON: But in order for there to be a turnover it would have had to have passed under the Will in a way that would allow him then to collect the money that he claimed he was due as a creditor. Otherwise he couldn't stand in the shoes as a creditor unless it actually passed under the Will the way the testator intended.

PARKER: Well he could have allowed it to pass through the Will properly by waiting the allotted time, after 9 months, or by waiting till the property actually was put in her name, or she exercised dominion and control over such property.

HANKINSON: But my point is is that the whole point of the turnover procedure was not to undue what the testator intended under the Will. It was in fact to enforce and make sure the property passed in a way that was prescribed by the Will.

PARKER: They filed an application to sell the property also. So I would have to disagree in a way with what you're saying...

HANKINSON: The only reason they could sell the property or get it be a turnover order was for it to pass in connection with the way the Will prescribed that it should pass, otherwise, they wouldn't have had any claim to it.

PARKER: But doesn't the court have the power to direct the property any way that they feel is necessary?

HANKINSON: My question to you though is, the effect and the basis for the turnover was relied upon actually enforcing the Will as written and having the property pass the way the Will prescribed that it should pass?

PARKER: I didn't see it that way. I saw it the way that he was trying to ask the court to turn this property over to him.

HANKINSON: On what basis?

PARKER: On the basis of him being a creditor.

HANKINSON: Creditor of the _____ under the Will?

PARKER: He was a creditor. He had a judgment himself. So as an individual he was trying to turn over this property. He was also expecting to inherit from it as well. Yes. But if you read clearly her no contest clause it says, In anyway alter or change the way in which my Will is

distributing anyway. I mean the Will should stand for itself. It should just only standup almost and say, this is how my wishes are as if she was telling it on a video that this is how I want it to go. I want it to do this, this, and this. And he was trying to change it indirectly.

BAKER: Would it be a correct statement to say, that the turnover order was filed in the other court that issued the judgment, is that correct?

PARKER: Yes.

BAKER: Not in the probate court?

PARKER: And it was also filed in the probate court. It was filed in a separate court...

BAKER: In what respect?

PARKER: It was filed in a separate court based on the judgment that Mr. Badouh had against Hale. But then they also filed it in the probate court after the decedent passed as against the property that Hale was intended to receive, but had not yet received through the probate process. Yes, property vests immediately upon death of someone. And somebody in Texas has to for somebody to be responsible for it. But I think he jumped the gun here is what I'm trying to say and he also mentioned it. A mere filing says, more than a mere filing is anything done after that filing. Mr. Badouh argued in the probate court, the mere mentioning of turnover. If I say turnover or arguing for it, that is - it seems like they drew a line that he passed. And that is more than a mere filing.

BAKER: What did he file in the probate court? Here's my order from this order DC showing that I have an order to turnover the house?

PARKER: He filed a motion with the case number of the probate court in the decedent's case requesting a turnover order and an application for the sale of the property for the benefit of himself to satisfy his judgment. So I guess what you're saying, yes sir, that would be correct in saying. That's what he did.

In prayer I would pray that the court overrules the CA as to my point of error no. 3 and hold that Hale's disclaimer was valid and effective as a matter of law, and the no contest clause be strictly enforced as against Edward Badouh, Jr.

* * * * * * * * * * *

REBUTTAL

SCHOUEST: I represent Edward Badouh, Jr. in this matter. I want to briefly address the no contest issue and then move onto a more substantive issue which is the disclaimer. The court is

correct in perceiving that the no contest clause is virtually the turnover. The turnover was in a separate action. Mr. Badouh was acting in his capacity as a judgment creditor, not as a beneficiary. And certainly there have been a lot more egregious cases in this state that have not even come close to constituting a violation of a no contest clause. This is not a contest of the Will. In fact he need to enforce the Will to have the judgment creditor status and have the property in turn. So there's no question that we were looking to uphold the Will, not challenge the Will.

ENOCH: The turnover process simply presents to the judgment debtor an order that they turn over whatever interest they have in a piece of property?

SCHOUEST: That's correct.

ENOCH: And Mr. Badouh goes to the probate court to try and get the probate court to do something different with the house than the Will said. The Will said, Give the house to my daughter. And Mr. Badouh goes into probate court and says don't give the house to the daughter. Give the house to me. Doesn't that change the Will?

SCHOUEST: What he does is he goes to the other court...

ENOCH: I understand going to the other court simply says, enter this turnover which directs Hale to turnover whatever interests she has in the house. But he now goes over to the probate court and asks the judge in the probate court to take control of the house?

SCHOUEST: It was _____ declaratory judgment action request in the probate proceeding which just said, Declare that I'm entitled to proceed with my turnover order in the other action despite what's pending here in the probate court.

ENOCH: So he was asking the probate court, Don't take this case. Let me go pursue...

SCHOUEST: He wanted to have declaratory relief that he was entitled to proceed with the turnover order. Because of that, the house now was in the probate estate. He wasn't saying turn it over to me. He was saying I am now Mrs. Hale as judgment creditor, not that I'm changing the Will, but I am Mrs. Hale. I'm standing in her shoes. So they're not looking to change the Will. In fact it's interesting that if we were to uphold the disclaimer in this statute we would essentially be doing the same thing as well.

O'NEILL: Are you saying further and future interests includes the expectancy?

SCHOUEST: Absolutely. That's exactly what it includes. The property we're talking about and as she exercises immediate control over is not the physical house. The property she exercises immediate control over is her inheritance right to the house. And as far back as 1990 when the Will was executed, she had those inheritance rights. In 1994 when she executed the deed of trust, she

exercised dominion or control over those rights because it was _____.

GONZALES: Was she a beneficiary at that point?

SCHOUEST: Absolutely. She was a beneficiary in 1990 when the Will was executed. Here's the point. The term "property" in the probate statute we're looking at specifically says that that property is all legal and equitable interests, whether present or future, whether vested or contingent. What did she bequeath in her deed of trust? She bequeathed all of her present and future rights interests in the property, including her expectancy of ownership by reason of inheritance from suit. She definitely has pledged that property. And again, the point is, the property is the inheritance interest not the physical property. That's what she exercised dominion and control over and that's what the deed of trust is related to and that's what Mr. Badouh's judgment plaintiff(?) related to, is the interest in the property. Now if you get too physical house, yes, you have to take her interest in the property.

O'NEILL: What is the purpose of the disclaimer statute?

SCHOUEST: I think the essential purpose is to not force somebody to take on property for whatever adverse consequences that may have.

O'NEILL: For benefit of credit?

SCHOUEST: That would be one possible _____. But again, the legislature said that you can do that as long as you have not previously and contradictory except in property. And that's what we're dealing with here. I agree with you, if this was a case was there was no acceptance obviously she's entitled to _____ case law and the statute is very clear on that. But if she previously accepted the property, which she clearly did in this case by pledging it under the deed of trust...

O'NEILL: So the disclaimer would be good as to the general judgment creditor?

SCHOUEST: Had she not previously accepted the property it would be effective as to any creditor.

O'NEILL: But I thought you were saying the deed of trust is what constituted the acceptance?

SCHOUEST: She accepted the property. You go live in a house, you've lived in it. You can't live there after the acceptance is accepted.

O'NEILL: You're saying it's not the deed of trust that's the acceptance, but the living in it?

SCHOUEST: I'm saying the deed of trust is the acceptance of it, or after acceptance she's accepted the house. The statute doesn't say, you've accepted in one way and not another. You've either accepted the property or you haven't accepted the property. And that's what she's done in this case.

O'NEILL: What act do you say constitutes acceptance?

SCHOUEST: The acceptance is her pledging of her interest in the house under the deed of trust.

O'NEILL: So it's the specific pledge, the deed of trust?

SCHOUEST: That is the act of acceptance in this case.

O'NEILL: But how would that affect the general judgment creditor?

SCHOUEST: The statute doesn't break it down to whether you've accepted it as to one person or another. It just says, if you've accepted, your disclaimer is invalid. There is no provision in the statute which calls for a partial invalidity. It's invalid or it's not invalid. You've either accepted it or you haven't accepted it.

O'NEILL: Would you agree with present counsel that there's nothing to send back to the TC if we were to go that way? The CA just sort of says, send it back to determine.

SCHOUEST: I agree that there is not really much factual dispute...

O'NEILL: So you agree we could render on the _____?

SCHOUEST: I think that we would request that you render. I think it's an appropriate judgment case.

O'NEILL: So there's no equity argument _____?

SCHOUEST: As far as I'm concerned there is not.

GONZALES: I heard you say that acceptance occurred when she pledged her expectation of receiving inheritance, but the disclaimer relates to the actual house, not her expectation received in the house?

SCHOUEST: She disclaimed her inheritance rights, that's what a disclaimer does. And what did she pledge before? She pledged her inheritance rights. She accepted what she disclaimer. That's the point. We're not talking about the physical house being the property. Again, under the definition

of property, we're talking about her inheritance rights, equitable interests, and that's what she pled before and accepted, that's what she's attempting to disclaim, that's what Mr. Bracey's client and my client, the interest we're trying to get to as creditors of Mrs. Hale.