



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-16-00148-CV

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**ROBERT EARL MASSEY, INDIVIDUALLY AND AS INDEPENDENT  
EXECUTOR OF THE ESTATE OF WILLIAM  
EARL MASSEY, DECEASED, APPELLANT**

**V.**

**INHERITANCE FUNDING COMPANY, INC., APPELLEE**

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On Appeal from the County Court at Law Number 2  
Parker County, Texas  
Trial Court No. CIV15-0299, Honorable Curtis J. Jenkins, Presiding

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April 24, 2018

**MEMORANDUM OPINION**

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant Robert Earl Massey appeals the trial court's judgment awarding appellee Inheritance Funding Company, Inc. funds held in the registry of the court. We will affirm.

Background

Massey's father William Earl Massey died in February 2008. A will contest ensued, between the proponents of a 2004 will and Massey, the proponent of a 2002 will. A

temporary administrator was appointed. At trial of the will contest and some related claims, Massey prevailed, and by an October 2009 judgment, the 2002 will was ordered admitted to probate. In February 2010, Massey qualified as independent executor and was issued letters testamentary. Except for some specific bequests not pertinent to this appeal, the 2002 will left his father's entire estate to Massey.

In February 2009, and on three other occasions during 2009, Massey engaged in transactions with appellee Inheritance Funding Company, Inc. ("IFC"). In the February 2009 transaction, Massey assigned his "beneficial interest" in his father's estate "in the amount of and to the extent of \$32,400.00 . . . reserving to myself the remaining beneficial interest." In exchange for the assignment, IFC agreed to pay \$17,420, "less applicable fees." The fees, listed in an exhibit to the assignment, reduced the net payment to Massey to an estimated amount of \$15,072. In the assignment, IFC further agreed to refund \$9100 to Massey if it received the \$32,400 within twelve months of the assignment's date, and to refund \$4600 if within 24 months. The assignment contained authority for executors and other personal representatives to pay the assigned amount to IFC "prior to making any distribution to [Massey]."

The other three assignments, executed in April, October, and November 2009, were like the first but for different amounts. In the April assignment, Massey assigned IFC his beneficial interest in the amount of \$12,700, in exchange for a payment after fees of \$5036; the October assignment was in the amount of \$10,100 for a payment after fees of \$5048; and the November assignment, \$14,700 for a payment after fees of \$8072. These assignments, like the first, called for refunds to Massey if IFC received its agreed-

upon amount within twelve or 24 months. The amount of the beneficial interests assigned on the four occasions totaled \$69,900.

The assignment documents carried the cause number of the Parker County probate proceeding, and appended to each was a certificate of service reflecting mailing of the assignment documents to Massey and copies to the attorney then representing him and the estate's temporary administrator. The assignment documents in the record also show they were filed with the county clerk at the time of their execution.

The record contains also a letter prepared on IFC letterhead, signed by Massey and addressed to his attorney. The letter makes reference to the four partial assignments totaling \$69,900. It states it serves as Massey's "formal irrevocable instruction and consent" for the attorney or the estate's representative to honor the assignments to IFC from distributions from the estate. The letter shows to be signed by Massey on November 2, 2009. It contains a signature line prepared for the attorney, under the caption, "Read and agreed." The signature line contains a signature, and is dated "11/4/09."

In addition to the will contest, the estate was involved in other litigation. One case, styled *Robert Earl Massey, as Independent Executor of The Estate of William Earl Massey, Deceased v. EECU*, in the 43rd District Court of Parker County, generated some \$738,600 for the estate. In that litigation, Massey was represented by the Dallas firm of Friedman & Feiger, LLP.

The record contains an August 2014 authorization, signed by Massey, individually and as independent executor, for Friedman & Feiger's disbursement of proceeds of the *EECU* litigation held in the firm's IOLTA account. The authorization reflects "client

advances” made on various dates in 2014, totaling \$197,274.71. The authorization also contains an entry entitled “Less Holdback on Known Claims,” including the amount of \$69,900 for “claim of Inheritance Funding Company.” Based on Massey’s authorization, Friedman & Fieger later deposited funds totaling \$116,520.78 into the trial court’s registry.

The record provided us shows that IFC, beginning as early as 2010, undertook to force Massey to pay the amount assigned it in their transactions. The efforts included an attempt to remove him as independent executor, intervention in other litigation being conducted by the estate, presentation of a “claim” under the provisions of the probate code, and a demand for an accounting.

By the pleadings on which the trial court rendered its judgment, IFC alleged it had requested Massey to agree to the distribution of \$69,900 of the funds held in the court’s registry to IFC, but Massey refused. It alleged Massey, individually, had breached the assignment agreements and committed fraud, and that, as independent executor, Massey had breached his fiduciary duty to IFC. After mediation failed, IFC filed a traditional motion for summary judgment on its breach of contract and breach of fiduciary duty claims.

Massey filed counterclaims alleging his transactions with IFC were disguised loan transactions and were usurious, and alleging IFC’s act of seeking Massey’s removal as independent executor triggered a no-contest provision in the 2002 will.

The trial court heard argument at a hearing, granted IFC’s motion for summary judgment on its breach of contract and breach of fiduciary duty claims, granted IFC’s

motion for summary judgment on Massey's counterclaim, and signed a judgment awarding IFC \$69,900 from the funds held in the court's registry, and attorney's fees.

#### Issues on Appeal

In this Court, Massey organizes his arguments around four issues. The contentions supporting his issues overlap somewhat, however, and we will organize our analysis so as to address the contentions individually. And we emphasize that we address only the contentions presented by Massey's briefing.

#### Usury

Massey's primary contention is that the assignment agreements, by which IFC advanced funds in consideration of his instruction that a greater amount of money be paid IFC from distributions of estate assets to heirs, was simply a disguised loan bearing interest at an effective rate far above that permitted by Texas law.

We review a trial court's decision to grant a motion for summary judgment *de novo*. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). The movant for summary judgment must show that there is no genuine issue of material fact and he is entitled to summary judgment as a matter of law. *S. Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770, 775 (Tex. App.—Amarillo 2001, no pet.). Evidence favorable to the non-movant will be taken as true, and every reasonable inference is indulged in favor of the non-movant. *Id.* Once the movant has established a right to summary judgment, the non-movant has the burden of responding to the motion and presenting any issues to the trial court that would preclude summary judgment. *Id.*

Usury is “the contracting for, charging of, or collecting of interest in excess of the amount allowed by law.” TEX. FIN. CODE ANN. § 301.002(a)(17) (West 2017). Contracts for usurious interest are contrary to public policy and prohibited by the Texas Constitution and Texas Finance Code. *Sturm v. Muens*, 224 S.W.3d 758, 761 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing TEX. CONST. art. XVI, § 11; TEX. FIN. CODE ANN. §§ 302.001(b), 305.001-.008). Usury statutes are penal in nature and should be strictly construed. *Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988). A “loan” is defined as “an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor has an obligation to pay the creditor.” TEX. FIN. CODE ANN. § 301.002(a)(10). A usurious transaction consists of: (1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of greater compensation than is allowed by law for the borrower’s use of the money. *First Bank v. Tony’s Tortilla Factory*, 877 S.W.2d 285, 287 (Tex. 1994); *Sturm*, 224 S.W.3d at 761.

IFC argues the summary judgment evidence conclusively established that IFC’s assignment entitled it only to funds that otherwise would have been distributed to Massey from the estate and its entitlement was thus “contingent on [Massey] receiving an amount from the estate sufficient to cover the amount of the assignments.” IFC contends there is no evidence that Massey had an absolute obligation to repay the funds IFC advanced him, and the transaction, as a matter of law, thus cannot be usurious. We agree.

The assignment agreements state that Massey, referred to there as “Seller,” “assigns, sells and transfers” to IFC (“Purchaser”) his “beneficial interest as heir, legatee, devisee or otherwise,” in his father’s estate, to the monetary extent described in each agreement. The agreements say “this transaction is not a loan,” and “is not intended as

collateral for any loan.” They continue, “Other than recourse for any expense or damage arising out of the material breach of this Assignment Agreement or fraud by Seller, Seller has no obligation, personally, to pay any amount to Purchaser.”

No one suggests the assignment agreements are ambiguous. The summary judgment record contains no evidence that the substance of the transactions reflected by the agreements was different than the agreements themselves state. *Koch v. Boxicon, LLC*, No. 05-14-0424-CV, 2016 Tex. App. LEXIS 3274, at \*16-17 (Tex. App.—Dallas March 30, 2016, no pet.) (mem. op.) (“[w]hether a transaction is usurious depends on its substance rather than its form.”) (citations omitted). The record shows IFC entered into the early agreements with Massey at a time he was involved in the will contest, and shows that recovery of assets of the estate required litigation against third parties. *Sturm*, 224 S.W.3d at 761.

Even viewing the evidence in the light most favorable to Massey, as we must, we see nothing to preclude summary judgment regarding the allegedly usurious nature of his agreements with IFC.

Massey concludes his brief by contending that the Texas estates code provisions permitting assignment of an interest in property to which the assignor is entitled under a will are unconstitutional in Texas if it does not impose a cap on the rate of return an assignor may receive for such an assignment. See TEX. ESTATES CODE § 122.201 (West 2015). The brief cites neither a provision of our state’s constitution nor any other authority to support the argument. The contention is inadequately briefed, and we will not address it. See TEX. R. APP. P. 38.1(i) (appellant’s brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and the record); *Shelton v.*

*Sargent*, 144 S.W.3d 113, 129 (Tex. App.—Fort Worth 2004, pet. denied) (an appellate contention must be supported by argument and authorities to be properly before the court).

#### No-Contest Provision of Will

Massey's appellate brief reiterates the contention from his counterclaim that the no-contest provision of the 2002 will was invoked when IFC moved to remove him as independent executor. The provision read:

If any person, whether or not related in any way by blood to me, shall either directly or indirectly attempt to oppose or set aside the probate of this Will or to impair or invalidate any of the provisions hereof and such person shall establish a right to any part of my estate, then such person is hereby given and bequeathed the sum of One Dollar (\$1.00) only and no further interest whatsoever in such estate.

Whether a forfeiture clause is triggered is a question of law. *Ard v. Hudson*, No. 02-13-00198-CV, 2015 Tex. App. LEXIS 8727, at \*20 (Tex. App.—Fort Worth Aug. 20, 2015, no pet.) (mem. op.) (citations omitted). No-contest clauses are strictly construed. *Badouh v. Hale*, 22 S.W.3d 392, 397 (Tex. 2002) (citation omitted). A “breach of a forfeiture clause will be found only when the beneficiary’s or devisee’s actions fall clearly within the express terms of the clause.” *Ard*, 2015 Tex. App. LEXIS 8727, at \* 20 (citing *Badouh*, 22 S.W.3d at 397; *In re Estate of Cole*, No. 02-13-00417-CV, 2015 Tex. App. LEXIS 838, at \*23 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (mem. op.)). The intention of the testator should be determined by the language used in the will. *Estate of Newbill*, 781 S.W.2d 727, 728 (Tex. App.—Amarillo 1989, no pet.).

The Fort Worth Court of Appeals held in *Ard* that a clause similar to that in the 2002 will was not triggered when a trust beneficiary challenged the actions of a fiduciary.



*Ard*, 2015 Tex. App. LEXIS 8727, at \*21-22 (citing *Conte v. Conte*, 56 S.W.3d 830, 833 (Tex. App.—Houston [1st Dist.] 2001, no pet.)). Assuming the no-contest provision otherwise would have application here, we likewise find that IFC's motion for Massey's removal does not fall clearly within its express terms.

#### Interference with Duties of Independent Executor

Massey contends also that the trial court's award to IFC of funds held in the court's registry improperly interfered with his statutory role in administration of the estate as an independent executor. As authority for his contention, Massey relies on *D'Unger v. De Pena*, 931 S.W.2d 533 (Tex. 1996) (per curiam), in which mandamus issued to require the trial court to release probate funds to an independent executor without first requiring a final account and discharge of the predecessor administrator of the estate. The court cited the Probate Code's provision that, once an independent administration has been created, no further action of any nature may be had in the probate court except where the Code specifically and explicitly provides for some action. *Id.* at 534 (citing TEX. PROB. CODE ANN. § 145(h); now TEX. ESTATES CODE ANN. § 402.001). It then held that Probate Code section 221(d) did not constitute a specific and explicit provision for action in the probate court, and concluded that "nothing in the Probate Code specifically and explicitly provides for the probate court to withhold the funds in its registry from the independent executor under the circumstances in this case." *Id.*

The funds awarded IFC in this case were not held in the court's registry by action of a predecessor administrator, but were deposited there by Massey. The *D'Unger* opinion cannot be read to preclude an independent executor like Massey from voluntarily depositing estate funds into the registry of the court. In his reply brief, responding to IFC's

breach-of-fiduciary-duty claim, Massey emphasizes his agreement “to hold back \$69,900.00 for the claim of Inheritance Funding Company.” Having authorized the deposit of those funds into the court’s registry, and having joined issue with IFC over its entitlement to them, Massey will not be heard to contend the court’s adjudication of the funds’ ownership interfered with his role.

#### Abandonment or Waiver of Claims

Massey argues there was evidence that IFC abandoned or waived its claims to the funds. One of his appellate issues contends the trial court erred by failing to recognize a fact issue regarding waiver that precluded summary judgment for IFC.<sup>1</sup>

A party can waive its contractual right by intentionally relinquishing a known right or by engaging in intentional conduct inconsistent with claiming that right. *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 722 (Tex. App.—Dallas 2004, no pet.). Massey’s waiver argument begins with events that occurred in 2010 in a suit brought by Massey for the estate in district court in Denton County. Massey apparently sought by the suit to recover from third parties funds or property belonging to the estate. IFC filed a plea in abatement in that suit, making the court aware of its pending motion to remove Massey as independent executor and asking that the district court suit be abated pending resolution of the removal motion in Parker County. In response, Massey noticed the depositions of three of IFC’s California employees. When it heard IFC’s motion to quash the deposition notices, the district court granted the motion to quash but from the bench

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<sup>1</sup> We agree with IFC that Massey’s argument supporting the issue cites no authority. We nonetheless address the argument in the interest of justice. TEX. R. APP. P. 38.1(i); 38.9.

the judge ordered IFC to designate a corporate representative. IFC did not do so at the time. In a 2015 affidavit appearing in the record, the attorney who represented Massey in 2010 related the Denton County events. The affidavit states that following the judge's order, counsel for IFC said "that Inheritance Funding might not be provide [sic] a witness for a deposition in Texas," and that the affiant "told [Massey] that I believed Inheritance Funding might abandon their claim."

On appeal, Massey argues the attorney's statement, coupled with evidence of lapses of time that occurred in IFC's pursuit of recovery of its funds from Massey, raised genuine issues of material fact supporting a waiver defense. TEX. R. CIV. P. 94. We disagree. The attorney's statement that he believed IFC "might abandon" their claim is not evidence of IFC's intent to abandon or waive its claim, nor do the delays in its prosecution of the claim shown by the record suggest intentional conduct inconsistent with its claim. See *Johnson*, 148 S.W.3d at 722.

#### Conclusion

For the reasons discussed, we overrule Massey's appellate issues and affirm the judgment of the trial court.

James T. Campbell  
Justice