

CAUSE NO. 464101

IN THE ESTATE OF

BILLIE NELSON KUHNEL

DECEASED

§ IN THE PROBATE COURT

§

§ COURT NUMBER THREE

§

§ HARRIS COUNTY, TEXAS

**FIRST AMENDED PETITION OF CONTESTANT KENNETH ROY KUHNEL AND
APPLICATION TO PROBATE DECEDENT'S 1976 WILL**

Contestant Kenneth Roy Kuhnel files this First Amended Original Petition for Declaratory Relief and Application to Probate Decedent's 1976 Will regarding the probate and non-probate estates of Billie Nelson Kuhnel ("Decedent"). In support hereof, Contestant respectfully will show the Court the following:

PARTIES

1. Contestant Kenneth Roy Kuhnel ("Roy" or "Contestant"), are residents of New York. Deborah is a surviving daughter of Decedent Doris Norton ("Decedent"); Michael is one of Decedent's surviving sons.

2. Devon Kuhnel ("Devon" or "Proponent") is a resident of Harris County, Texas.

3. Brian Heath Kuhnel ("Brian" or "Executor") is a resident of Harris County, Texas.

DISCOVERY

4. Discovery will be conducted pursuant to Rule 190.4 of the Texas Rules of Civil Procedure (Level 3). Contestant affirmatively pleads that he seeks declarations as listed below; these declarations amount to monetary relief in excess of \$250,000.00 but not more than \$1,000,000.

STANDING AND GOOD FAITH

5. Contestant, who has standing to contest the purported will as the surviving husband of the Decedent, brings this action in good faith, based upon the information available to him as

of the present date. Through investigation and his personal knowledge, there are facts sufficient to support a contest of the October 27, 2017, Last Will and Testament of Billie Nelson Kuhnel (the “Purported Will”) based on lack of testamentary capacity and undue influence. Contestant also challenges the Purported Will as it was last seen in the possession of the Decedent, it cannot be found, and the parties submitted only a copy of the Will. Contestant also challenges the alleged non-probate designation(s) and/or contracts of Decedent in favor of Proponent based on lack of contractual capacity and undue influence. Specifically, on information and belief, Devon wrongfully took monies from Decedent; these monies should be in the estate.

BACKGROUND

6. Decedent died on January 20, 2018. Decedent was married to Contestant at the time of her death. Decedent and Contestant had two children: Brian and Paul Allen Kuhnel (“Paul”). Devon is Paul’s son and Decedent and Contestant’s grandson.

7. By the time of her death, Decedent had amassed an estate worth more than \$500,000. On information and belief, Decedent’s cognitive abilities had been significantly impaired at the time of the execution of the Purported Will. Further, Decedent was impaired at the time of the purported non-probate designation(s)/contract(s)/transfer(s) allegedly executed/done after 2016 and leading up to her death.

8. Decedent had a previous will that left everything to Contestant. This previous will is dated May 25, 1976 (“1976 Will”).¹ This 1976 Will has now been located; Contestant asks this Court to admit this 1976 Will as Decedent’s true last will and testament.

9. The Purported Will was admitted to probate on April 10, 2018. This Purported Will could not be located and a copy was admitted to probate. However, on January 31, 2020,

¹ See Exhibit A, Decedent’s 1976 will.

Contestant filed a contest to the Purported Will, challenging the will on several grounds, including lack of testamentary capacity, undue influence by Devon and that the Purported Will was revoked.

10. Due to Decedent's diminished mental and physical state, Decedent became progressively more confused, incoherent, and forgetful.

11. On information and belief, as Decedent's mental and physical wellbeing deteriorated, Devon began controlling and/or manipulating her. He began managing her financial affairs, obtained a power of attorney benefitting himself and withdrew thousands of dollars from Decedent's bank accounts.

12. As her medical state continued to decline in 2016, Decedent developed a more limited understanding of her surroundings due to her confusion. On information and belief, she also had a limited ability to communicate and was often confused in 2016 until her death. Specifically, Decedent failed to pay her taxes.

13. As Decedent's physical and mental condition became progressively weaker, Devon continued to exert tremendous pressure on Decedent. When Decedent neared her weakest mental and physical condition, Devon took advantage of her weakened state and secured her signature on the Purported Will and/or other purported non-probate payable on death and/or designated beneficiary account(s). Devon controlled Decedent's finances thereafter, making her withdraw funds from her accounts, make changes to her account(s) and/or having her execute the Purported Will. As a result, Decedent's non-probate designation(s) and/or change(s) on her account(s) and Purported Will after 2016 are and were invalid.

14. After she was incapacitated in approximately 2016, Devon had Decedent change her Purported Will and non-probate accounts in favor of himself, including beneficiary designation(s)/contract(s) on her account.

15. Through deception, undue influence, and by taking advantage of Decedent's tragic medical condition, Devon obtained Decedent's signature on the Purported Will and/or non-probate designations after 2016. Contestant seeks declarations that the Purported Will and/or non-probate designation(s)/contract(s) be declared invalid based on Decedent's lack of contractual/testamentary capacity and Devon's undue influence. Further, Contestant seeks a reimbursement to the Estate of the monies wrongfully taken by Devon using a power of attorney or otherwise.

16. Based on the foregoing facts, Devon's undue influence and Decedent's myriad physical and mental problems, Contestant, as Decedent's surviving widower, now files this action because after 2016: (a) the purported non-probate designations and/or other purported changes to Decedent's bank or financial accounts purportedly made by Decedent do not reflect Decedent's true contractual intent; (b) Purported Will does not reflect Decedent's true testamentary intent; (c) the non-probate contracts, transfers and/or designations are the result of Devon's exertion of undue influence on Decedent during a time when Decedent's cognitive abilities and physical condition were significantly diminished; (d) the original Purported Will was last in the possession of Decedent and cannot be located and/or (e) Decedent lacked the requisite testamentary and/or contractual capacity to make changes to her probate and non-probate estates.

CAUSES OF ACTION

Request for Declaratory Relief

17. Contestant incorporates Paragraphs 5-16 as if fully set forth herein. Based on the foregoing, Contestant seeks a declaration that:

- a. After 2016, Decedent did not have sufficient mental ability to understand the business of making a Will, the effect of her act in so making a Will, and the general nature and extent of her property;

- b. After 2016, Decedent did not have the mental capacity to know the object of her bounty, her next of kin, or their claims upon her. She did not have sufficient memory to collect in her mind the elements of the business to be transacted and to hold them long enough to perceive, at least, their obvious relation to each other and to be able to form a reasonable judgment as to them;
- c. After 2016, Decedent lacked the testamentary capacity required by law to make a valid Last Will and Testament;
- d. At the time of the execution of the Purported Will, Decedent was ill. Her cognitive abilities were diminished, and she was dominated by Devon in many of her activities and decisions;
- e. At the time of the execution of the alleged non-probate designation(s), transfers and/or contracts after 2016, Decedent was ill. Her cognitive abilities were diminished, and she was dominated by Devon in many of her activities and decisions;
- f. Decedent was unduly influenced to execute or sign the Purported Will and/or non-probate designation(s)/contract(s) after 2016 by Devon's compulsion, arguments, and/or deception. Devon, allowing his mind to substitute for Decedent's own, made the Purported Will and/or non-probate designation(s)/contract(s) without the Decedent assenting to them or their terms;
- g. After 2016, the beneficiary designation(s)/contract(s) and/or other transfers in Decedent's non-probate financial accounts and/or assets were and are invalid;
- h. Decedent revoked the Purported Will;
- i. there exists a constructive trust around all monies, funds or other assets stemming from Decedent's non-probate financial accounts;
- j. Decedent's non-probate monies and/or assets be distributed in accordance with the laws of the state of Texas and/or the 1976 Will;
- k. The Purported Will dated October 27, 2017, is invalid and ineffective;
- l. the Decedent died testate and the 1976 Will should be admitted to probate; and
- m. Proponent Devon is to receive no portion of the monies, funds or other assets from Decedent's non-probate and probate estates due to his fraud, deceit and/or undue influence.

18. For the reasons set forth above, pursuant to § 256.204 of the Texas Estates Code and § 37.004 of the Texas Civil Practice and Remedies Code, Contestants challenge the validity of the Purported Will and/or other non-probate transfers and/or designations after 2016 and request

declarations from this Court as set forth above. Specifically, Contestant hereby offers to probate the 1976 Will of Decedent. According to the 1976 Will, Contestant should be named the Independent Executor.

ATTORNEYS' FEES AND EXPENSES

19. Contestant is entitled to and hereby requests his reasonable and necessary attorneys' fees and expenses incurred in bringing this declaratory action under § 37.009 and § 38.001(8) of the Texas Civil Practice and Remedies Code and § 352.052 of the Texas Estates Code.

JURY DEMAND

20. Contestant hereby demands a trial by jury and tenders the requisite fee.

CONDITIONS PRECEDENT

21. All conditions precedent have been performed, have occurred or have been waived.

PRAYER

Contestant prays that Proponent be cited to appear and that, upon the trial of this matter, Judgment be entered in favor of Contestant as follows:

- a. declaratory relief as described above;
- b. actual damages;
- c. pre- and post-judgment interest as allowed by law;
- d. all reasonable and necessary attorneys' fees and expenses;
- e. costs of suit; and

f. all other and further relief to which Contestant is justly entitled.

Respectfully submitted,

LAW OFFICE OF MICHAEL A. TREVINO, PLLC

By: /s/ Michael Trevino

MICHAEL TREVINO

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Houston, Texas 77079

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mtrevino@mtrevinolaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to all pro se parties and counsel of record in accordance with the Texas Rules of Civil Procedure on this the 27th day of January, 2023.

Jorge Borunda
jorge@borundapc.com

Adam W. Fomby
adam@fombylaw.com

ATTORNEYS FOR BRIAN KUHNEL, INDEPENDENT EXECUTOR OF THE ESTATE

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ATTORNEY FOR DEVON KUNEL

/s/Michael Trevino
Michael Trevino

OF

BILLIE ALLEEN KUHNEL

THE STATE OF TEXAS

X

KNOW ALL MEN BY THESE PRESENTS:

COUNTY OF HARRIS

X

That I, BILLIE ALLEEN KUHNEL, now domiciled in Harris County Texas, being in good health, of sound and disposing mind and memory, and over the age of eighteen (18) do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils and testamentary instruments of any nature heretofore made by me.

I

I direct that all of my just debts, including the cost of my last illness and my funeral expenses, including the cost of a suitable monument at my grave, be paid as soon as practicable after my death except that any debts which are payable in installments or are not due until at least one year from the date of my death need not be paid during the administration of my estate but may, if the terms of such debts permit, be continued and paid according to their tenor. In the event that any property or interest in property passing under this Will, by operation of law or otherwise by reason of my death shall be encumbered by mortgage or lien or shall be pledged to secure any obligation (whether the property or interest in property so encumbered or pledged shall be owned by me jointly or individually), it is my intention that such indebtedness shall not be charged to or paid from my estate, but that the devisee, legatee, joint owner taking by survivorship or beneficiary receiving such property or interest shall take it subject to all encumbrances existing at the time of my death.

II

I direct that my Executors pay out of my Estate inheritance succession and other taxes (together with any penalties thereon) assessed by reason of my death by the Government of the United States

Billie Alleen Kuhnel

or any state or territory thereof, in respect of any such property to be included in my gross Estate or like tax purposes by any of such governments whether this property passes under this Will or otherwise, without contribution by any recipient of any such property.

III

I hereby give, bequeath and devise in fee simple all of the property which I may own at the time of my death, real, personal and mixed, tangible and intangible, of whatsoever nature and where-soever situated, including all property which I may acquire or become entitled to after the execution of this Will, to my beloved husband, KENNETH ROY KUHNEL, if he survives me.

Should my beloved husband, KENNETH ROY KUHNEL, predecease me, then I give, bequeath and devise in fee simple all the property which I may die seized and possessed, as outlined in Paragraph III, to my beloved children PAUL ALLEN KUHNEL and BRIAN HEATH KUHNEL, and any other child or children born to or adopted by my beloved husband, KENNETH ROY KUHNEL and me, share and share alike.

IV

Should my beloved husband KENNETH ROY KUHNEL predecease me, I designate and appoint my cousin, GEORGE STURM, and his wife, of Karnes City, Texas, as Guardians of the Person and of the Estate of any of my children who is less than eighteen (18) years of age as to Guardian of the Person and Guardian of the Estate. It is my intent that Guardianship of the Person and of the Estate of PAUL ALLEN KUHNEL and/or BRIAN HEATH KUHNEL, and any other child born to or adopted by my beloved husband, KENNETH ROY KUHNEL, and me, shall exist until each child reaches the age of eighteen (18) years, at which time the proportional share of the child reaching the age of eighteen (18) years shall be payed over to him or her, free of such Guardianships. In the event the said GEORGE STURM and his wife shall predecease me or shall fail, resign, or refuse to qualify as Guardian, I designate and appoint my brother, WILLIAM NELSON, JR. as Guardian of the Person and of the Estate of any of my children who are less than eighteen (18) years of age at the date of my death

Belle Allen Kuhnelt

as to Guardian of the Person and Guardian of the Estate, to have the same rights and responsibilities which would enure to GOERGE STURM and his wife, if they had qualified.

I appoint my beloved husband, KENNETH ROY KUHNEL, to be Independent Executor, without bond, and I further direct that no action shall be had in the County or Probate Court in relation to the settlement of my estate other than the probating and recording of this Will and the return of the statutory inventory, appraisement and list of claims of my estate.

If my beloved husband, KENNETH ROY KUHNEL, should predecease me, or should otherwise fail to qualify or refuse to serve, I nominate my brother, WILLIAM NELSON, JR., as Independent Executor, without bond, and I further direct that no action shall be had in the County or Probate Court in relation to the settlement of my estate other than the probating and recording of this Will and the return of the statutory inventory, appraisement and list of claims of my estate.

IN TESTIMONY WHEREOF, I here hereunto signed my name to this my Last Will and Testament all in the presence of the undersigned who witnessed the same at my request, on this the 25th day of May, 1976, at Pasadena, Texas.

Billie Alleen Kuhnelt
BILLIE ALLEEN KUHNEL

The foregoing instrument was signed, published and declared by BILLIE ALLEEN KUHNEL, the Testatrix, to be her Last Will and Testament, in our presence and we, at her request, and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses, this 25th day of May, 1976.

Jackie Beyer
WITNESS

Ann Zimmerman
WITNESS

16303 Sageclay Ln., Hou. 77089
ADDRESS

2208 Glenwood, Pasadena, Tex
ADDRESS

BEFORE ME, the undersigned authority, on this day personally appeared BILLIE ALLEEN KUHNEL, Jackie Byer and Ann Zimmerer, known to me to be the testatrix and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said BILLIE ALLEEN KUHNEL, testatrix, declared to me and to the said witnesses in my presence that said instrument is her Last Will and Testament, and that she had willingly made and executed it as her free act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testatrix, that the said testatrix had declared to them that said instrument is her Last Will and Testament, and that she executed same as such and wanted each of them to sign it as a witness, and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testatrix and at her request; that she was at that time eighteen (18) years of age or over and was of sound mind; and that each of said witnesses was then at least fourteen (14) years of age.

Billie Alleen Kuhnel
TESTATRIX

Jackie Byer
WITNESS

Ann Zimmerer
WITNESS

SUBSCRIBED AND ACKNOWLEDGED before me by the said BILLIE ALLEEN KUHNEL, and subscribed and sworn to before me by the said

Jackie Byer and Ann Zimmerer, witnesses, this the 25th day of May, 1976.

Francis L. West
NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, T E X A S

Automated Certificate of eService

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Michael Trevino on behalf of Michael Trevino
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Envelope ID: 72241196
Status as of 1/30/2023 4:22 PM CST

Associated Case Party: BrianHeathKuhnel

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Jorge Borunda		jorge@borundapc.com	1/27/2023 8:21:53 PM	SENT
Adam Fomby		adam@fombylaw.com	1/27/2023 8:21:53 PM	SENT

Associated Case Party: DevonAllenKuhnel

Name	BarNumber	Email	TimestampSubmitted	Status
Geoff R. Casavant		geoff@thetituslawfirm.com	1/27/2023 8:21:53 PM	SENT
Christy KBrown Moton		christy@thetituslawfirm.com	1/27/2023 8:21:53 PM	ERROR

Associated Case Party: RoyKennethKuhnel

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Case Contacts

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