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Wills and Trusts

Gerry W. Beyer

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WILLS & TRUSTS

Gerry W. Beyer*

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THIS article discusses legislative and judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of November 2, 2002 through November 1, 2003. The reader is warned that not all legislation enacted nor cases decided during the Survey period are presented, and not all aspects of each cited statute or case are analyzed. You must read and study the full text of each statute or case before relying on it or using it as precedent. The discussion of most cases includes a moral that is the important lesson to be learned from the case. By recognizing situations which have led to time-consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

I. INTESTACY

A. SPOUSAL DETERMINATION

A common-law marriage may be still be established by a partner even after many years have elapsed since the parties lived together, and even by the partner who, without first obtaining a divorce, marries another person as demonstrated by *Wilson ex. rel. C.M.W. v. Estate of Williams*.¹ Intestate and Partner were never married. However, Partner asserted that they had an informal or "common-law" marriage. Partner testified that they agreed to marry, lived together, and held each other out as husband and wife. Before Intestate's death, however, Partner moved out and married another man in a ceremonial marriage without first getting divorced from Intestate. Approximately four years later, Intestate died in an industrial accident giving rise to significant wrongful death and survival claims. The trial court found that Partner was Intestate's surviving spouse and therefore entitled to inherit from Intestate.²

The appellate court agreed. The court refused to apply the Family Code provision which was in effect when Partner and Intestate separated which required an action to establish a common-law marriage to be commenced no later than one year after the date on which the relationship ended. Instead, the court applied current Family Code Section 2.401(b) in effect at the time of Intestate's death. The Code merely provides a rebuttable presumption that no common-law marriage exists if no action to prove the common-law marriage is commenced within two years after the parties separate and cease living together. The court refused to examine the sufficiency of the facts establishing the common-law marriage because they had not been challenged.³

B. NON-MARITAL CHILD

Proof of biological paternity is not necessary for a child to inherit from his or her father if paternity is otherwise established as shown in *Wilson ex. rel. C.M.W. v. Estate of Williams*.⁴ Wife, while married to Husband, gave birth to Child. However, Intestate, a person with whom wife had lived briefly while separated from husband, acknowledged Child as his son, was named on Child's birth certificate as the father, and signed an acknowledgment of paternity form. Intestate died in an industrial accident giving rise to significant wrongful death and survival claims. The trial court found that Child was Intestate's son and therefore entitled to inherit from Intestate.⁵

The appellate court agreed, basing its analysis on the law as it existed on the date of Intestate's death. Accordingly, Husband was Child's pre-

1. *Wilson ex. rel. C.M.W. v. Estate of Williams*, 99 S.W.3d 640 (Tex. App.—Waco 2003, no pet.).

2. *Id.* at 642.

3. *Id.* at 645.

4. *Id.*

5. *Id.* at 641-43.

sumed father. The court examined Intestate's actions of acknowledging Child, being named on Child's birth certificate, and his signing of the paternity form. In addition, Wife testified that she did not have sexual relations with Husband for at least one year before Child's birth. The court determined that this was clear and convincing evidence which was sufficient to rebut the presumption that Husband was Child's father. The trial court was within its discretion to give little weight to the possibility that someone else was the father even though Mother testified that about nine months before Child's birth, she had sex with a man whose name she could not recall. The court did not examine a DNA report which may have shown Intestate was not the father because the report was not properly offered and thus was not before the court.⁶

The court also rejected the argument that Probate Code Section 42(b) requires a showing of a biological link between Intestate and Child except for adopted children. The Code provides that "[f]or the purpose of inheritance, a child is the child of his *biological* father."⁷ The court instead read the statute as defining who qualifies as a biological father rather than requiring Child to show an actual biological link to Intestate.⁸

II. WILLS

A. TESTAMENTARY INTENT

Client letters and memoranda that indicate provisions which the attorney should include in the will are not themselves wills. To reduce the chance of controversy, the attorney should consider having clients clearly mark such documents as "not a will or codicil." *In re Estate of Schiwetz*⁹ shows the problems that may arise if this step is not taken. Testatrix's 1992 will was admitted to probate. Later, Beneficiary filed an application to probate four alleged codicils to the 1992 will. These documents consisted of letters and memoranda to Testatrix's attorney in which Testatrix listed changes she wanted the attorney to make to her will. The trial court granted a summary judgment that these documents lacked testamentary intent and thus were not codicils to Testatrix's will.¹⁰

The appellate court affirmed. The court held that the documents clearly and unambiguously lacked testamentary intent. Instead, they were merely instructions or directions to the attorney to prepare new wills or codicils that carried out the requested changes. Testatrix did not intend these actual documents to be wills or codicils.¹¹

6. *Id.* at 645-50.

7. *Id.* at 649 (quoting TEX. PROB. CODE ANN. § 42(b) (Vernon 1998)).

8. *See id.* at 650 (explaining that a man who adopts a child is included in the definition of biological father).

9. *In re Estate of Schiwetz*, 102 S.W.3d 355 (Tex. App.—Corpus Christi 2003, pet. denied).

10. *Id.* at 358.

11. *See id.* at 363-64 (stating that for a document to retain the testamentary intent required, it must be proven the testator desired that document to be the instrument to dispose of the testator's property).

B. TESTAMENTARY CAPACITY

A will proponent must vigorously advocate that a testator had testamentary capacity as it will be difficult to overturn a jury finding of lack of capacity on appeal. In addition, it is essential for a drafting attorney to actually meet with the client and be present during the will execution ceremony. For example, in the case of *In re Estate of Blakes*,¹² approximately twelve hours before his death, Testator executed his will. The will left property to various individuals including his natural children, but his Wife, from whom he had been separated for over a decade, and Stepson were not named as beneficiaries. Wife convinced the jury that Testator lacked testamentary capacity and was subject to undue influence when he executed the will.¹³

The appellate court agreed there was sufficient evidence to support the jury's finding that Testator lacked testamentary capacity. Testator was in the end stages of cancer and executed the will in his hospital bed. Testimony revealed that Testator often showed signs of confusion after being admitted to the hospital several days before executing the will. The attorney who prepared the will never spoke with Testator and was not present during the will execution ceremony. Instead, the attorney drafted the will based on instructions from a friend. The court recognized there was also evidence that Testator had testamentary capacity, but the court concluded that the evidence of lack of capacity was not so weak as to make the jury's finding unjust.¹⁴

C. SIGNATURE

A signature to a will should be at the end of the document and clearly reflect the testator's approval of the document as the testator's will to avoid the problem which arose in the case of *In re Estate of Schiwetz*.¹⁵ A document alleged to be a codicil to a will was deemed to lack the testatrix's signature. The court held that the indication the document was "From [Testatrix]" at the top of the page did not operate as a signature. The name was written to inform the addressee of the source of the document rather than to act as a signature.¹⁶

D. SATISFACTION

Texas now has a statute explaining in what instances an inter vivos gift will be treated as being in satisfaction of a testamentary gift.¹⁷ The provision is analogous to the existing provision dealing with advancements in

12. *In re Estate of Blakes*, 104 S.W.3d 333 (Tex. App.—Dallas 2003, no pet.).

13. *Id.* at 335.

14. *Id.* at 335-37.

15. *In re Estate of Schiwetz*, 102 S.W.3d 355 (Tex. App.—Corpus Christi 2003, pet. denied).

16. *Id.* at 364.

17. TEX. PROB. CODE ANN. § 37C (Vernon Supp. 2004) (applicable only to wills executed on or after September 1, 2003).

an intestacy context.¹⁸ An inter vivos gift will be considered in partial or total satisfaction of a testamentary gift only if one of the following three conditions is satisfied:

- (1) The testator's will expressly indicates that the inter vivos gift is to be deducted from the testamentary gift.
- (2) The testator declares in a contemporaneous writing that the inter vivos gift is either (a) to be deducted from the testamentary gift or (b) is in satisfaction of the testamentary gift.
- (3) The beneficiary acknowledges in writing that the inter vivos gift is in satisfaction of the testamentary gift.¹⁹

The value of property the testator gives in partial satisfaction of a testamentary gift is determined at the earlier of the date when (1) the beneficiary acquires possession of or enjoys the property or (2) when the testator dies.²⁰

E. CONTRACTUAL WILLS

1. *Method of Proof*

The methods by which a contractual will may be proved have been modernized so that the contract may be established by the provisions of a written agreement that is binding and enforceable as well as the provisions of the will itself.²¹ Prior to this change, a totally valid contract such as a pre-marital agreement, post-marital agreement, divorce property settlement, or buy-sell agreement could exist, but because it was on a separate piece of paper, its establishment was problematic if the will did not state that a contract existed and list the material provisions of the contract.

2. *Pre-September 1, 1979 Wills*

Probate Code Section 59A requiring written evidence of the contract either in the will itself or, as discussed above, in a binding written agreement, applies only to wills executed on or after September 1, 1979. If an alleged contractual will is executed before September 1, 1979, the court may still consider extrinsic evidence in determining the contractual nature of the will. The court will deem the will contractual only if (1) the gift to the survivor is not absolute and unconditional, even though it may initially appear to be so and (2) the balance remaining from the estate of the first to die and estate of the last to die is treated as a single estate and jointly disposed of by both testators in the secondary dispositive provisions of the will.²²

18. See TEX. PROB. CODE ANN. § 44 (Vernon 2003) (setting forth situations in which an advancement is valid).

19. TEX. PROB. CODE ANN. § 37c (Vernon Supp. 2004) (applicable only to wills executed on or after September 1, 2003).

20. *Id.*

21. TEX. PROB. CODE ANN. § 58a(a) (Vernon Supp. 2004).

22. *Id.*

Older wills are still frequently litigated. In the case of *In re Estate of McFatter*,²³ the will provided that the survivor would hold the entire estate “as his or her property absolutely” and did not contain a secondary dispositive provision. Accordingly, the court determined that the will was not contractual. However, the courts in *Lorenz v. Janssen*²⁴ and *In re Estate of Osborne*²⁵ found that both prongs of the test were satisfied and thus the wills were contractual.²⁶

3. Post-September 1, 1979 Wills

In *Estate of Hearn v. Hearn*,²⁷ Husband and Wife executed reciprocal wills leaving personal and household effects to the survivor with the residuary passing to an inter vivos trust. After Husband died, Husband’s Children from a prior marriage asserted that Husband and Wife had executed contractual wills which would require Wife to fund the trust with her property immediately upon Husband’s death. The trial court granted Wife’s motion for a summary judgment, and held that she was under no obligation to fund the trust with her property. Children appealed.²⁸

The appellate court studied the will and determined that it was contractual in nature. The will expressly stated that it was contractual, referenced Probate Code Section 59A, and stated the material terms of the contract. These terms were that each spouse maintain a will that directs the executor of the first spouse to die to make a qualified terminable interest property (QTIP) election for property passing into the trust. However, the contract did not require Wife to maintain her will or transfer her property to the trust upon Husband’s death. Instead, the contract was fully performed when Husband died, and his residuary estate passed to the trust for which the executor made the QTIP election.²⁹

F. CONDITIONAL GIFTS

A conditional gift in a will may help a testator achieve important estate planning goals. For example, in *Marion v. Davis*,³⁰ Testator imposed a condition on all gifts in his will and testamentary trust—the share of any beneficiary who attempted to place Testator’s Wife into a nursing home before all estate assets were exhausted would be forfeited and distributed

23. *In re Estate of McFatter*, 94 S.W.3d 729 (Tex. App.—San Antonio 2002, no pet.).

24. *Lorenz v. Janssen*, 116 S.W.3d 421 (Tex. App.—Corpus Christi 2003, no pet.).

25. *In re Estate of Osborne*, 111 S.W.3d 218 (Tex. App.—Texarkana 2003, pet. filed).

26. See *Lorenz*, 116 S.W.3d at 425-26 (stating a contractual will exists because gifts from the testators were joint and the property of testators was treated as one); *In re Estate of Osborne*, 111 S.W.3d at 222-23 (enforcing a contractual will based on the language of the will); *In re Estate of McFatter*, 94 S.W.3d at 734 (explaining the will did not meet the second prong of the two prong requirements to have a contractual will and was therefore not enforceable).

27. *In re Estate of Hearn v. Hearn*, 101 S.W.3d 657 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

28. *Id.* at 659.

29. *Id.* at 661.

30. *Marion v. Davis*, 106 S.W.3d 860 (Tex. App.—Dallas 2003, pet. denied).

to the remaining beneficiaries. After Testator died, Beneficiary placed Wife into a nursing home even though there were sufficient funds in Testator's estate to continue home care. The trial court held that Beneficiary had therefore forfeited his share.

The appellate court agreed. The court rejected various assertions by Beneficiary. First, the court held the condition was not against public policy. There was no evidence to support Beneficiary's claim that the estate lacked sufficient funds to care for Wife at home. Second, the court did not think it was relevant that Beneficiary used his authority as Wife's court-appointed guardian to place her in the nursing home. Third, the court refused to find that Wife, out of necessity, had to be placed in a nursing home merely because a doctor advised Beneficiary to do so. Fourth, the court held that it would be irrelevant even if Beneficiary could prove he acted in good faith when he placed Wife in the nursing home.³¹

G. PRETERMITTED CHILDREN

The 2003 legislature clarified the law governing pretermitted children. A specified method is used to determine the share of a pretermitted child if the testator made a "provision" for a non-pretermitted child in the will. The amendment provides that the testator's provision may be either vested or contingent.³²

H. CONSTRUCTION AND INTERPRETATION

1. "Cash" and "Money in Any Financial Institution"

A will drafter must be careful in selecting will language to make certain the testator's intent is carried out as shown by *In re Estate of Dillard*.³³ Testatrix's will provided that her personal property, except for "cash, certificates of deposit, and money in any financial institution" would pass outright to Husband.³⁴ The excepted property went into a trust. Testatrix died owning stocks, bonds, and partnership interests. The trial court held that these items were included in the excepted property and passed to the trust. Husband appealed.³⁵

The appellate court reversed. The court construed the phrase "cash, certificates of deposit, and money in financial institutions" to encompass coins, paper money, checks, and demand deposits only, and not stocks, bonds, or partnership interests.³⁶ The court recognized that circumstances surrounding the execution of the will or some other provision of the will could perhaps require a different construction but found there

31. *Id.* at 866-68.

32. TEX. PROB. CODE ANN. § 67(a) (Vernon Supp. 2004) (effective only with regard to testators who die on or after September 1, 2003).

33. *In re Estate of Dillard*, 98 S.W.3d 386 (Tex. App.—Amarillo 2003, pet. denied).

34. *Id.* at 392.

35. *Id.* at 390.

36. *Id.* at 392.

was no such evidence in this case. The court engaged in an extensive discussion of surrounding circumstances justifying its conclusion as well as citing to the landmark Texas Supreme Court case of *San Antonio Area Foundation v. Lang*³⁷ in which the court held that extrinsic evidence may not be used to create an ambiguity if the language has a settled legal meaning.³⁸

2. *Res Judicata*

Regardless of how much time has elapsed after a probate decision was rendered, someone may attempt to set it aside. The doctrine of *res judicata* will often be available to stop a relitigation of a finally-adjudicated claim as in *Lorenz v. Janssen*.³⁹ Husband and Wife executed a joint will in 1941 providing for the survivor to receive a life estate in all the property with a life estate passing to their children upon the survivor's death. The remainder passed to the "natural children" of Husband and Wife's children. In 1956, the court declared that two children adopted by Daughter ("Adopted Grandchildren") would not qualify as "natural children" and thus would not share in the remainder of the estate. Wife died in 1970 and the 1941 will was again probated with specific reference to the 1956 court action. Accordingly, when Daughter died in 1986 her interest passed to her surviving siblings instead of Adopted Grandchildren. In the present action, Adopted Grandchildren seek to set aside the 1956 judgment and the order admitting Wife's will to probate. The trial court rejected Adopted Grandchildren's claims.⁴⁰

The appellate court affirmed. The court held the 1956 declaratory judgment was *res judicata* and thus precluded Adopted Grandchildren's claims. The court determined that the court which rendered the 1956 judgment had subject matter jurisdiction to adjudicate Adopted Grandchildren's rights because the 1941 will was contractual. The 1941 will was contractual because it (1) did not give the survivor an absolute or unconditional gift, and (2) the remaining estate of the first to die and the estate of the last to die was treated as a single estate and jointly disposed of by both testators in the secondary dispositive provisions of the will.⁴¹

3. *Rights of Life Tenant*

A person devising a life estate should clearly indicate the rights of the life tenant and the remainder beneficiaries to avoid disputes between the life tenant and the remainder beneficiaries. Nonetheless, litigation may still occur as in *Singleton v. Donalson*.⁴² Testatrix devised a life estate in real property to her husband (Life Tenant) with the balance passing to

37. *San Antonio Area Found. v. Lang*, 35 S.W.3d 636 (Tex. 2000).

38. *In re Estate of Dillard*, 98 S.W.3d at 392-94.

39. *Lorenz v. Janssen*, 116 S.W.3d 421 (Tex. App.—Corpus Christi 2003, no pet.).

40. *Id.* at 423-24.

41. *Id.* at 425-26.

42. *Singleton v. Donalson*, 117 S.W.3d 516 (Tex. App.—Beaumont 2003, pet. denied).

named relatives (Remainder Beneficiaries) upon his death. Remainder Beneficiaries asserted that Life Tenant breached his duties by consuming and using the royalties and bonuses received from oil and gas produced on the real property. The trial court granted summary judgment in favor of Life Tenant and the appellate court affirmed.⁴³

The court recognized that oil and gas royalties and bonuses are usually considered corpus. However, Testatrix's will clearly showed that she intended to grant Life Tenant the right to consume and dispose of the royalties and bonuses. The court focused on the language Testatrix used to grant the life estate. She expressly included "fee, surface, minerals, royalties;" indicated that Life Tenant was "to enjoy the use and benefits . . . , including the income" of the property; and permitted Life Tenant to use these benefits "as he sees fit."⁴⁴

I. POWER OF APPOINTMENT

The 2003 legislature clarified whether a residuary clause will be deemed to exercise a power of appointment held by the testator.⁴⁵ A residuary clause or a clause purporting to dispose of all of the testator's property will exercise a power of appointment in favor of the will beneficiary only if one of the following two conditions is satisfied:

- (1) [T]he testator makes a specific reference to the power [of appointment] in the will.
- (2) [T]here is some other indication in a writing [(but not necessarily the will itself)] that the testator intended to include the property subject to the power [of appointment] in the will.⁴⁶

J. IN TERROREM PROVISION

A no-contest provision, also called an *in terrorem* or *forfeiture* clause, provides that a beneficiary who contests the will loses at least some, and typically all, of the benefits given under the will. Although these provisions are valid and enforceable, they are unpopular with the courts and are strictly construed. Courts avoid forfeiture unless the beneficiary's conduct comes squarely within the conduct the testator prohibited in the will. For example, in *Ferguson v. Ferguson*,⁴⁷ two beneficiaries each claimed the other violated the will provision when they took various actions. These actions included filing a complaint against the executor's inventory, appraisal, and list of claims, and filing a petition for a declaratory judgment. Both the trial and appellate courts held that the actions of these beneficiaries did not violate the *in terrorem* clause be-

43. *Id.* at 517.

44. *Id.* at 517-19.

45. See TEX. PROB. CODE ANN. § 58c (Vernon Supp. 2004) (applicable only to wills executed on or after September 1, 2003) (explaining the two situations in which a power of appointment may be exercised through a residuary clause).

46. *Id.*

47. *Ferguson v. Ferguson*, 111 S.W.3d 589 (Tex. App.—Fort Worth 2003, pet. denied).

cause neither action was intended to challenge Testator's dispositive plan. Instead, one action was to ascertain whether the inventory properly distinguished between Testator's community and separate property and the other was to interpret the terms of a settlement agreement.⁴⁸

Likewise, in the case of *In re Estate of Schiwetz*,⁴⁹ the court concluded that Beneficiary's attempt to probate the alleged codicils, which were executed subsequent to the will, was not a will contest. The court explained that to hold otherwise would in effect declare that the original will to be irrevocable. Testatrix's will was, by its very nature, ambulatory, meaning that Testatrix could revoke or change the will as long as she had the capacity to do so.⁵⁰

K. WILL CONTESTS—GENERALLY

1. Joinder of or Notice to Beneficiaries

Continued controversy exists whether will contestants need to join or give notice to will beneficiaries. In *Wojcik v. Wesolick*,⁵¹ a will contest was filed because the will physically had holes cut in it suggesting that beneficiaries were literally "cut out" of the will. In addition, one of the beneficiary's names was in a different color ink, perhaps indicating it was added by someone other than the Testator. Testator's estate asserted that Probate Code Section 93 precluded the will contest because the contestants did not join all of the beneficiaries of the will within two years of the admission of the will to probate, and the beneficiaries were necessary and indispensable parties under Texas Rule of Civil Procedure 39. The trial court agreed.⁵²

The appellate court reversed. The court examined Probate Code Section 93 and held that this section does not require joinder of all interested persons in a will contest. The Code does not expressly provide that will contestants must join or give notice of the will contest to any party. In addition, Rule 39 is not applicable because it conflicts with the unambiguous language of the Probate Code.⁵³ Note that the vast majority of states do require will contestants to give notice to interested parties, and this decision is in conflict with cases from two other districts.⁵⁴

48. *Id.* at 598-99.

49. *In re Estate of Schiwetz*, 102 S.W.3d 355 (Tex. App.—Corpus Christi 2003, pet. denied).

50. *Id.* at 365-66.

51. *Wojcik v. Wesolick*, 97 S.W.3d 335 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

52. *Id.* at 336-37.

53. *Id.* at 337-38.

54. See, e.g., *Kotz v. Kotz*, 613 S.W.2d 760, 761 (Tex. Civ. App.—Beaumont 1981, no writ); *Jennings v. Srp*, 521 S.W.2d 326, 328-29 (Tex. Civ. App.—Corpus Christi 1975, no writ).

2. Attorney's Fees of Losing Contestant

*Ray v. McFarland*⁵⁵ shows that a contestant attempting to probate a second will is likely to have a difficult time setting aside a jury finding that the probate action was not brought in good faith and with just cause. Beneficiary probated Will Two. Contestant attempted to probate Will One, alleging that Will Two was invalid because of lack of capacity or undue influence. The jury determined that Testatrix had capacity and was not unduly influenced. In addition, the jury determined that Contestant's attempt to probate Will One was not done in good faith and with just cause. Consequently, Contestant would not be entitled to attorney's fees under Probate Code Section 243. The court, however, granted Contestant's request for a judgment notwithstanding the verdict (n.o.v.) finding that Contestant did act in good faith and with just cause. Accordingly, the court permitted Contestant to recover attorney's fees from the estate. Beneficiary appealed.⁵⁶

The appellate court reversed. The court reviewed the evidence and found it was sufficient to support the jury's finding that Contestant's actions were not in good faith. For example, Contestant had inappropriately taken Testatrix's money and other property by abusing a power of attorney Testatrix had given Contestant. Accordingly, the trial court erred when it granted a judgment n.o.v.⁵⁷

3. Statute of Limitations

A will proponent should timely (within two years) attempt to probate a will if the proponent is dissatisfied that another will has already been admitted to probate.⁵⁸ Failure to do so may cause problems as in *Stovall v. Mohler*.⁵⁹ Decedent died in 1996. On March 24, 1997, a document purportedly to be Decedent's 1993 will, was admitted to probate. Daughter contested the will asserting that it was a forgery and that an earlier will, from 1986 or 1989, should be probated instead. Granddaughter was joined as a party and later non-suited from the case. On February 22, 1999, the court determined the will was a forgery and that the other two wills did not exist. Accordingly, Decedent died intestate. In 2000, Granddaughter filed an application to probate the 1986 will or, in the alternative, the 1989 will. Daughter obtained a summary judgment that Granddaughter's action was precluded as a matter of law under Probate Code Sections 73 and 93. Granddaughter appealed.⁶⁰

The appellate court affirmed. Granddaughter argued that the two year period to contest a will found in Probate Code Section 93 did not apply as

55. *Ray v. McFarland*, 97 S.W.3d 728 (Tex. App.—Fort Worth 2003, no pet.).

56. *Id.* at 729.

57. *Id.* at 730.

58. See TEX. PROB. CODE ANN. § 93 (Vernon 2003) (stating any interested person may bring suit to contest a will's validity during the two year period after a will is probated).

59. *Stovall v. Mohler*, 100 S.W.3d 424 (Tex. App.—San Antonio 2002, pet. denied).

60. *Id.* at 425-26.

the 1993 will was not actually admitted to probate because it was later found to be a forgery. The court rejected this argument and determined that the language in Section 93, which provides that the limitation runs "after a will has been admitted to probate," applied because the 1993 will was technically admitted to probate even though it was later found to be invalid.⁶¹ The fact that the 1993 will was later determined to be a forgery did not negate the fact it was initially admitted to probate.⁶²

L. UNDUE INFLUENCE

A will contestant alleging undue influence must have enough evidence to raise a fact issue to withstand a proponent's motion for summary judgment. For example, in *In re Estate of Butts*,⁶³ Contestants allege that Testatrix's will was the product of undue influence. The trial court granted summary judgment in favor of Proponents, and the appellate court affirmed.⁶⁴

The court began its analysis with a discussion of the elements of undue influence and the basic principles which apply when a court determines whether undue influence was exerted. The court then focused on the acts of each person (Catherine, Evelyn, and Deborah) who allegedly unduly influenced Testatrix. Contestants admitted they had no evidence supporting their allegations against Catherine. Evelyn may have had the opportunity to exert undue influence, but "mere opportunity is not sufficient to establish undue influence."⁶⁵ Likewise, the fact that she arranged for a notary and the witnesses for the will did not prove undue influence, especially since the attorney who prepared the will testified that Testatrix had capacity and explained the reasons behind the dispositive provisions of her will. Deborah did not even benefit from Testatrix's will, and her conduct was consistent with her role as Testatrix's friend.⁶⁶

M. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS

The lower courts of Texas have recognized the tort of tortious interference with inheritance rights.⁶⁷ However, the courts have not delineated exactly what actions would constitute tortious interference. Taking an

61. *Id.* at 427 (quoting TEX. PROB. CODE ANN. § 93 (Vernon Supp. 2001)).

62. *Stovall*, 100 S.W.3d at 429.

63. *In re Estate of Butts*, 102 S.W.3d 801 (Tex. App.—Beaumont 2003, pet. denied).

64. *Id.* at 805.

65. *Id.*

66. *Id.* at 803-05.

67. *See, e.g., King v. Acker*, 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ) (holding that because the power of attorney was not signed by King, sufficient evidence existed to find tortious interference); *Suprise v. Dekock*, 84 S.W.3d 378, 380 (Tex. App.—Corpus Christi 2002, no pet. (quoting *King*, 725 S.W.2d at 754) (explaining that "[a]ny intentional invasion of, or interference with, property, property rights, personal rights or personal liberties causing injury without just cause or excuse is an actionable tort"); *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144, 146 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (reiterating the holding in *King* which provides for the existence of a tortious interference with a person's right to inheritance).

opposite approach, the 2003 legislature declared certain specified actions may *not* be considered tortious interference. Specifically, “the filing or contesting in probate court of any pleading relating to a decedent’s estate [will] not constitute tortious interference with the inheritance of the estate.”⁶⁸

N. TAX APPORTIONMENT

As *Rosen v. Wells Fargo Bank Texas*⁶⁹ emphasizes, a testator who wishes probate assets to bear the transfer tax burden must expressly indicate that even non-residuary probate assets are to be used to pay taxes. Testator’s will provided for all transfer taxes to “be paid out of the residue of my estate without apportionment.”⁷⁰ However, there was no residuary property. Consequently, a dispute arose over whether (1) other probate assets should shoulder the transfer tax burden or (2) transfer taxes should be apportioned under Probate Code Section 322A. The probate court ordered all transfer taxes be paid solely from the probate assets.⁷¹

The appellate court reversed. The lack of a residuary estate negated Testator’s direction, and thus, the default apportionment provisions of Probate Code Section 322A still applied. Therefore, the probate assets qualifying for the marital deduction did not incur any estate tax burden, and the taxable non-probate assets bore the entire estate tax liability.⁷²

A strong dissent argued that Testator actually had a residuary estate which passed under the marital trust provisions of the will. In addition, it was clear that Testator was extremely concerned with transfer taxes being paid “without apportionment” as well as with having them paid out of the residuary. The majority, in effect, ignored Testator’s desires not to have taxes apportioned merely because the named gift was insufficient.⁷³

III. ESTATE ADMINISTRATION

A. VENUE

Proper venue for an action by or against a personal representative for personal injury, death, or property damages will now be determined under the Civil Practice & Remedies Code.⁷⁴ This change may be a codification of the holding in *Reliant Energy, Inc. v. Gonzalez*.⁷⁵ Because the

68. TEX. PROB. CODE ANN. § 10C (Vernon Supp. 2004).

69. *Rosen v. Wells Fargo Bank*, 114 S.W.3d 145 (Tex. App.—Austin 2003, no pet.).

70. *Id.* at 148.

71. *Id.*

72. *Id.* at 151-52.

73. *See id.* at 158 (Mack, J., dissenting) (explaining that it is the duty of the courts to determine intent from the words actually used in the will and not by speculating about their meaning).

74. TEX. CIV. PRAC. & REM. CODE § 15.007 (Vernon Supp. 2004) (applicable only to actions filed on or after September 1, 2003).

75. *Reliant Energy, Inc. v. Gonzalez*, 102 S.W.3d 868 (Tex. App.—Houston [1st Dist.] 2003, pet. granted).

amendment only discusses venue, however, uncertainty still remains regarding jurisdiction. In addition, the courts could broadly interpret the phrase "property damages" to cover all sorts of injury to the value of property not just those caused by a tort such as a motor vehicle accident (e.g., breach of fiduciary duty).

B. APPEAL

1. Finality of Appealed Judgment

A person dissatisfied with a final order of a trial court should timely file a notice of appeal as reflected by *In re Estate of Padilla*.⁷⁶ The appellate court held that a Decree of Partition and Distribution was a final, appealable judgment. The court applied the test set forth in *Crowson v. Wakeham*,⁷⁷ and indicated that the order was final because it disposed of each issue raised in the pleadings. The order addressed all of the relief sought and identified the persons entitled to the estate and the shares of each. The court then refused to hear the merits of the appeal because the notice of appeal was untimely filed, and thus, the appellate court had no jurisdiction to hear the appeal.⁷⁸

2. Supersedeas Bond

*In re Shore*⁷⁹ demonstrates that an executor should file a supersedeas bond if the result of the appeal would impact the amount of estate property the executor will receive. Executor was dissatisfied with a county court order regarding the partition and distribution of the estate of which Executor was also a beneficiary. The order did not award Executor all of the property to which he believed he was entitled. Consequently, he appealed the judgment but neglected to file a supersedeas bond. The other beneficiaries filed a motion to force Executor to comply with the order. Executor then filed a mandamus proceeding to stop the judge from enforcing the order.⁸⁰

The resolution of this case turned on the application of Section 29 of the Probate Code which dispenses with the appellate bond when an executor appeals a lower court decision *unless* the appeal personally concerns the executor. The appellate court refused to issue mandamus because the appeal involved the amount of money Executor would personally obtain as a result of the final distribution of the estate. Accordingly, bond was required.⁸¹

76. *In re Estate of Padilla*, 103 S.W.3d 563 (Tex. App.—San Antonio 2003, no pet.).

77. *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995).

78. *In re Estate of Padilla*, 103 S.W.3d at 566.

79. *In re Shore*, 106 S.W.3d 817 (Tex. App.—Texarkana 2003, no pet.).

80. *Id.* at 818.

81. *See id.* at 818-21 (explaining that Shore must file a supersedeas bond to preclude the underlying judgment from being executed).

C. INVENTORY

If a person is dissatisfied with the characterization of property listed on an estate inventory, a timely appeal of the court's approval of the inventory should be filed. For example, in *Garner v. Long*,⁸² the probate court approved the inventory of the decedent's estate which listed certain property as the community property of the decedent and his predeceased spouse. Later, the executor of the decedent's predeceased wife attempted to show this property was actually the predeceased spouse's separate property. The appellate court agreed with the executor that the probate court's approval of the inventory did not conclusively determine the character of the property. However, the approval did act as prima facie evidence of the property's character. The court examined the probate court's approval and concluded that it was a final, appealable order. The executor of the predeceased spouse's estate did not timely appeal this order, and thus, it was final, binding, and no longer contestable.⁸³

D. SURVIVAL ACTION

*Lorentz v. Dunn*⁸⁴ shows the importance of a person who anticipates bringing a survival action to have a personal representative appointed prior to filing suit. Days before the statute of limitations was to run on Decedent's negligence claim, Administrator filed to be appointed as Decedent's personal representative. Before being appointed, Administrator filed a survival action falsely stating that she had already been properly appointed by the court. Administrator was later appointed but by that time, the statute of limitations had already run. The trial court dismissed the survival action because Administrator did not have standing when she filed the case.⁸⁵

The appellate court affirmed. Section 71.021 of the Civil Practice & Remedies Code provides standing for survival actions to the personal representative and, in some cases, an heir. Administrator was not an heir and had not yet been appointed either at the time she filed the survival action or when the statute of limitations had run. The court indicated that her standing once being appointed did not relate back to the time of filing.⁸⁶

E. APPRAISERS

Overturing the appointment of an appraiser is difficult. Thus, a personal representative should communicate carefully with the court at the

82. *Garner v. Long*, 106 S.W.3d 260 (Tex. App.—Fort Worth 2003, no pet.).

83. *Id.* at 263-66.

84. *Lorentz v. Dunn*, 112 S.W.3d 176 (Tex. App.—Fort Worth 2003, pet. filed). See generally *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45 (Tex. App.—Austin 2003, no pet.) (considering an appeal from a summary judgment order for lack of standing to file a survival action).

85. *Lorentz*, 112 S.W.3d at 177-78.

86. *Id.* at 179.

time of probate regarding whether an appraiser is actually needed so that the court and the personal representative are "on the same page." In *Nadolney v. Taub*,⁸⁷ the order admitting Testator's will to probate appointed Appraiser. Executrix later objected to Appraiser's request for a \$35,000 retainer. Appraiser secured a court order directing Executrix to pay \$30,000 directly to Appraiser or into the registry of the court. Executrix elected to pay the money into the court's registry. Later, Executrix filed a bill of review under Section 31 of the Probate Code seeking either to obtain a fair, market-based fee agreement with Appraiser or to have another appraiser appointed. The original judge recused himself. At the hearing, there was testimony showing Appraiser was appointed because the judge believed the estate to be taxable when in reality, the estate, although large, was structured to avoid federal estate tax. The court granted the bill of review and explained there was no reason for the appointment of an appraiser in this case. In a separate cause, the court permitted Executrix to retrieve the funds she had paid into the court's registry. Appraiser appealed.⁸⁸

The court engaged in an extensive discussion of the bill of review procedure. Then, the court examined Section 248 of the Probate Code which provides that the trial court must appoint an appraiser either (1) upon application of an interested party or (2) if the court deems it necessary. Since no one applied for the appointment of an appraiser, the appellate court focused on whether the trial court committed substantial error when it deemed the appointment of an appraiser to be necessary. The court held that there was sufficient evidence to support the trial court's appointment of an appraiser. For example, Executrix would need to know the value of real property to properly fund the by-pass trust. However, the court also held that since the administration was independent under Section 145 of the Probate Code, it had no authority to order Executrix to pay an advanced appraisal fee to Appraiser or the court's registry. Appraiser would be a claimant against the estate and should proceed as a creditor.⁸⁹

F. REMEDY FOR IMPROPER SALE

As litigation proceeded to demonstrate Executrix's gross mismanagement of estate property in the case of *In re Estate of Hernandez*,⁹⁰ the trial court judge ordered that a parcel of real property not be sold at this time. Nonetheless, Executrix sold the parcel to her son. The trial court set aside this sale even without a specific request to do so. Executrix appealed.⁹¹

87. *Nadolney v. Taub*, 116 S.W.3d 273 (Tex. App.—Houston [14th Dist.] 2003, pet. filed).

88. *Id.* at 276-78.

89. *Id.* at 280-81, 283-84.

90. *In re Estate of Hernandez*, 112 S.W.3d 304 (Tex. App.—El Paso 2003, pet. denied).

91. *See id.* at 306-07 (explaining the appeal is based on claims of lack of subject matter jurisdiction and violations of due process).

The appellate court affirmed. The court rejected Executrix's claim that the court must base its order on a specific request to set aside the sale. The court discussed Section 352 of the Probate Code which prohibits this type of sale and concluded the section does not require any specific form as long as it is filed in the appropriate court and a hearing is held with adequate proof before the court sets aside the sale. The court also rejected Executrix's claim that she was being deprived of property without due process of law. She did not have an interest in the property sold to her son unless, as was alleged, she was actually the indirect purchaser of the property in violation of the statute. Likewise, the court rejected the argument that Executrix's son had to be joined as a party.⁹²

G. CREDITORS OF ESTATE

1. Attorney's Fees of Unsuccessful Will Proponent

Attorney's fees and costs awarded to a person who in good faith and with just cause attempts to have a will admitted to probate under Section 243 of the Probate Code are now included with other administration expenses as a Class 2 claim.⁹³ This change increases the likelihood of attorneys receiving payment for their services if the estate is insolvent.

In *Hope v. Baumgartner*,⁹⁴ Testator's 1995 will was admitted to probate. Contestant asserted that the 1995 will was invalid because Testator lacked testamentary capacity and was subject to undue influence. Contestant offered Testator's 1972 will for probate in which he was a named beneficiary. The court determined that the 1995 will was valid. Contestant was awarded \$91,000 in attorney's fees under Section 243 of the Probate Code. A dispute then arose regarding the proper classification of Contestant's claim under Section 322 of the Probate Code, that is, is it a Class 2 claim (administration expenses) or a Class 8 claim (all other claims)? The trial court determined that it was a Class 2 claim.⁹⁵

Recognizing that this issue was one of first impression in Texas, the appellate court reversed holding that the claim belongs in Class 8. The claim did not fit in Class 2 because it was not incurred to preserve, safe keep, or manage the estate. Instead, Contestant's expenses resulted in a burden to the estate and were incurred not for the estate's benefit but rather in an attempt to achieve an outcome favorable to him personally.⁹⁶

As discussed above, Section 322 (Class 2) was amended by the 2003 Texas Legislature. However, it is problematic whether this amendment would change the result in *Hope*. It is true that the amendment adds the phrase "including fees and expenses awarded under Section 243 of this code."⁹⁷ However, the limitation in the prior clause still remains. That is,

92. *Id.* at 307-08.

93. TEX. PROB. CODE ANN. § 322 (Vernon Supp. 2004).

94. *Hope v. Baumgartner*, 111 S.W.3d 775 (Tex. App.—Fort Worth 2003, no pet.).

95. *Id.* at 776-77.

96. *Id.* at 778.

97. TEX. PROB. CODE ANN. § 322 (Vernon Supp. 2004).

that the expenses be "incurred in the preservation, safekeeping, and management of the estate."⁹⁸ The court in *Hope* found that the expenses of the contestant resulted "in a burden to the estate and not preservation of it."⁹⁹ Accordingly, a court could still interpret the section in such a way to deny Class 2 classification. Class 2 classification would have been more likely if the legislature had used the word "and" rather than "including." The term "and" would have eliminated the restrictions of "preservation, safekeeping, and management" with regard to Section 243 fees and expenses while the term "including" retains those restrictions.

2. *Delinquent Property Taxes*

A taxing entity attempting to collect delinquent *ad valorem* taxes which elects to file a claim in probate court in a dependent administration should timely bring suit if the claim is rejected either expressly or by operation of law. The ramifications of failing to do so are demonstrated by *Andrews v. Aldine Independent School District*.¹⁰⁰ School District filed a probate claim for delinquent *ad valorem* taxes in a dependent administration. Executor took no action for six months. School District then posted the properties for foreclosure sale. Executor asserted that School District's claims were barred by limitation because School District did not file suit within ninety days after its claim was rejected by operation of law under Sections 310 and 313 of the Probate Code. The trial court rejected this argument and Executor appealed.¹⁰¹

The appellate court reversed. The court reviewed Section 5C of the Probate Code governing actions to collect delinquent property taxes. Because School District presented a claim against the estate, it was subject to the rules governing the enforcement of claims in probate proceedings under Section 5C(d)(1). Accordingly, because Executor took no action on School District's claim, it was deemed rejected after thirty days under Section 310. School District then had nine days to bring suit under Section 313. Because School District failed to do so, School District's claim was barred. The court rejected a variety of School District's arguments including that Section 5C was unconstitutional under Article VIII, Section 10 as an impermissible legislative act releasing a citizen from the payment of county taxes.¹⁰²

H. LATE PROBATE

If a beneficiary discovers the existence of a will more than four years after the testator's death, that beneficiary should attempt to probate the will and claim that he or she was not in default. The beneficiary should

98. *Id.*

99. *Hope*, 111 S.W.3d at 778.

100. *Andrews v. Aldine Indep. Sch. Dist.*, 116 S.W.3d 407 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

101. *Id.* at 409.

102. *Id.* at 410-12.

not rely on someone else to probate the will who may be found to be in default as shown by *In re Estate of Williams*.¹⁰³ Testator died in 1980. However, it was not until 1998 that one of the beneficiaries attempted to probate the will as a muniment of title. Beneficiary asserted that he was not “in default” under Section 73(a) of the Probate Code for waiting more than four years after the testator’s death and thus was entitled to a late probate. He asserted that he was unaware of the will’s existence until 1998 and then acted promptly to offer the will for probate. Evidence showed, however, that Beneficiary always knew about the will and even had custody of the will until 1992. Nonetheless, the trial court admitted the will to probate.¹⁰⁴

The appellate court reversed. The court held that Beneficiary was in default because he knew about the will and had kept it in his safety deposit box. The court also held that the potential “not in default” status of other will beneficiaries was irrelevant because these beneficiaries did not apply to probate the will even though they knew Beneficiary was attempting to do so.¹⁰⁵

I. SETTLEMENT AGREEMENTS

Settlement agreements need to be properly structured and reviewed. The agreement should be drafted so that it is neither underinclusive nor overbroad. For example, in *Ferguson v. Ferguson*,¹⁰⁶ Husband devised to Wife the marital home which was Husband’s separate property. Controversy arose regarding the classification of other assets as Husband’s community property or separate property. The parties reached a settlement in which Wife received a sum of money in exchange for giving up all other claims against Husband’s estate. Thereafter, the executor demanded that Wife leave the marital home asserting that she had agreed to relinquish all claims to Husband’s property. The trial court found that the settlement agreement covered the marital home and ordered Wife to vacate.¹⁰⁷

The appellate court carefully reviewed the settlement agreement and held as a matter of law that the agreement did not impact the devise of the marital home to Wife, especially since there had never been any prior controversy regarding Wife’s ownership of the home under the terms of the will. In dicta, the court indicated that even if the marital home had been covered by the agreement, Wife would still have her constitutional and statutory homestead rights to use and occupy the property because

103. *In re Estate of Williams*, 111 S.W.3d 259 (Tex. App.—Texarkana 2003, no pet.).

104. *Id.* at 260.

105. *Id.* at 263-64.

106. *Ferguson v. Ferguson*, 111 S.W.3d 589 (Tex. App.—Fort Worth 2003, pet. denied). See also *Smith v. Smith*, 112 S.W.3d 275, 281 (Tex. App.—Corpus Christi 2003, pet. denied) (considering whether there was sufficient evidence to establish substantial performance based on the terms and conditions listed in a settlement agreement).

107. *Ferguson*, 111 S.W.3d at 591-93.

there was no evidence that she intended to waive those rights.¹⁰⁸

J. REINSTATEMENT OF PERSONAL REPRESENTATIVE AFTER REMOVAL

The clerk must now also give notice to the successor representative of the decedent's estate if a personal representative who is removed seeks reinstatement.¹⁰⁹

K. UNQUALIFIED COMMUNITY ADMINISTRATION

*Coleman v. Winn-Coleman, Inc.*¹¹⁰ shows that a surviving spouse who is the sole heir to the community property need not first obtain a judicial declaration of heirship to recover community property when no one has been appointed as the personal representative of the deceased spouse's estate. Intestate died survived by Wife and their two children. No administration was opened for Intestate's estate. One of the assets in Intestate's estate was a promissory note on which he was the named payee. Wife sued to collect the note asserting the note was community property and that she had the right to recover on the note as the unqualified community administrator of Intestate's estate under Section 160 of the Probate Code. The trial court granted summary judgment in favor of the makers of the note because no court had yet declared Wife as Intestate's heir in an heirship proceeding.¹¹¹

The appellate court reversed. The court explained that under Section 45 of the Probate Code, all community property passed to Wife because all of Intestate's descendants were also descendants of the surviving spouse. In this situation, Section 155 of the Probate Code states that no administration of community property is necessary. Section 160 of the Probate Code then provides that the surviving spouse has the power to sue for the recovery of community property and to collect claims due to the community estate unless someone has qualified as the administrator. Accordingly, Wife had the authority to sue the makers of the promissory note.¹¹²

L. RE-LETTERING OF PROBATE CODE SECTION 84

For decades, Section 84 of the Probate Code has had two subsections labeled "(b)"—one dealing with proof of a non-self-proved attested written will and the second addressing proof of a holographic will. At long last, the 2003 legislature has provided unique letters to these subsections.¹¹³

108. *Id.* at 596, 598.

109. TEX. PROB. CODE ANN. § 222A (Vernon Supp. 2004).

110. *Coleman v. Winn-Coleman, Inc.*, 110 S.W.3d 104 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

111. *Id.* at 107.

112. *Id.* at 108-10.

113. *See* TEX. PROB. CODE ANN. § 84 (Vernon Supp. 2004) (describing proof required for various will forms).

M. REMOVAL OF OUTDATED GUARDIANSHIP LANGUAGE

Since the legislature severed the decedent estate and guardianship provisions a decade ago, vestiges of guardianship language remained in Sections 222A and 245 of the Probate Code. The 2003 legislature removed this outdated language.¹¹⁴

N. ESTATE AS LEGAL ENTITY

Litigants must remember that an estate is not a legal entity and to name the personal representative of the decedent as the party. For example, in *Miller v. Estate of Self*,¹¹⁵ Plaintiff named the “estate of Decedent” as the defendant in a lawsuit. The petition was served on Administrator of Decedent’s estate. After a verdict against Decedent was rendered in the case, Administrator moved to dismiss for lack of jurisdiction, and the trial court granted the motion. Plaintiff appealed.¹¹⁶

The appellate court affirmed. The court began its analysis with the basic, albeit often overlooked, rule that the estate of a decedent is not a legal entity which may sue or be sued. Plaintiff argued that the estate had waived the issue. The court, however, reasoned that since there was no legal entity named in the suit, there was no one who could waive any defect therein.¹¹⁷

Plaintiff next argued the dismissal was improper because Administrator participated in the lawsuit. The court recognized that if a personal representative is served and participates in the suit in a representative capacity, the resulting judgment is valid even though it names the estate. However, the court found that although Administrator was served, he did not actually participate in the lawsuit as Plaintiff alleged. Plaintiff did not attend the trial, and no documents were filed either by him or on his behalf in the case.¹¹⁸

IV. TRUSTS

A. TRUST INTENT

*Barrientos v. Nava*¹¹⁹ demonstrates the extent to which courts are willing to reach to find that a person created a trust, especially if the beneficiaries are minor children. The final decree of divorce required Ex-Husband to name Children as beneficiaries of a life insurance policy and Ex-Wife as the trustee. Ex-Husband did not comply. Instead, he desig-

114. See TEX. PROB. CODE ANN. § 222A(b) (Vernon Supp. 2004) (describing reinstatement of personal representatives after removal); TEX. PROB. CODE ANN. § 245 (Vernon Supp. 2004) (discussing when a personal representative is responsible for costs of removal and attorney’s fees).

115. *Miller v. Estate of Self*, 113 S.W.3d 554 (Tex. App.—Texarkana 2003, no pet.).

116. *Id.* at 556.

117. *Id.* at 556-57.

118. *Id.* at 557-58.

119. *Barrientos v. Nava*, 94 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

nated his parents to receive the proceeds outright upon his death. Ex-Husband also had various benefits payable at his death through his employer. He named his Sister as trustee of these proceeds for the benefit of Children. After Ex-Husband's death, his surviving parent received and spent almost all of the proceeds of the insurance policy without Ex-Wife's knowledge. Although Sister was aware of the shenanigans regarding the life insurance policy, she did not inform Ex-Wife. When these facts came to light, Ex-Wife sued. The trial court found that Ex-Husband did not actually create a trust when he named Sister as the trustee of the benefits because there were no definite trust terms. Nonetheless, the court determined it had the equitable power to "remove" Sister as the "trustee" of the benefits and "substitute" Ex-Wife as the "trustee" to compensate Ex-Wife for the loss of the insurance proceeds. Sister appealed asserting, among other claims, that Ex-Husband had not created a trust when he designated her as the trustee.¹²⁰

The court held that Ex-Husband created a valid trust. The court began its analysis by studying the beneficiary designation forms. In the space for information regarding the primary beneficiary, Ex-Husband placed his Sister's name followed by a statement that she was trustee for Children. The court recognized that no particular form of words is required to create a trust. The court determined that these statements were sufficient inter vivos transfers to create trusts under Section 112.001 of the Trust Code.¹²¹

The court next addressed whether the designations provided reasonable certainty regarding the property, purpose, and beneficiary of the trust so that the trust would not fail for vagueness. The court held that the property and beneficiaries were clearly set forth. In addition, the court determined that by naming minor beneficiaries, it was reasonably certain that Ex-Husband intended the proceeds to be used for the general welfare of Children. The comprehensive provisions of the Trust Code provided the remaining terms of the trust.¹²²

However, the mere use of trust language will not necessarily create a trust as in *McAnally v. Friends of WCC, Inc.*¹²³ A deed conveyed land to named individuals "as trustees" of a cemetery. After a dispute arose, a corporation was formed for the purpose of acquiring control and ownership over the land. This corporation asserted that the original grant created a trust. The court held that the use of the term "trustee" did not create a trust, especially since the deed failed to name a beneficiary. Thus, the corporation could not use the Texas Trust Code to seek relief.¹²⁴

120. *Id.* at 274-76.

121. *Id.* at 282.

122. *See id.* (explaining that the trust sets forth additional specifications to allow the trustee to know what actions to take and be held accountable for).

123. *McAnally v. Friends of WCC, Inc.*, 113 S.W.3d 875 (Tex. App.—Dallas 2003, no pet.).

124. *Id.* at 878, 882.

B. CONSTRUCTION AND INTERPRETATION

1. *Termination Events*

A settlor should consider providing detailed guidance with regard to when a condition which triggers trust termination is satisfied. For example, in *Hurley v. Moody National Bank of Galveston*,¹²⁵ Settlor created a testamentary trust for Beneficiary. The trust was to terminate when Beneficiary either (1) reached age 35 or (2) completed his education, whichever occurred first, with the balance to be distributed to Beneficiary's mother and uncle. The trust provides that Beneficiary is not considered as completing his education so long as he is "continuing his formal education at a recognized academic college or university which meets the approval of trustee."¹²⁶ Beneficiary notified Trustee that he had withdrawn from college, did not intend to continue his education, and that the trust should be terminated. The remainder beneficiaries (Mother and Uncle) agreed. Trustee, however, did not terminate the trust because Trustee believed that Beneficiary's dissatisfaction with higher education was only temporary. To resolve this issue, Trustee requested a declaratory judgment regarding whether the trust had terminated under its own terms. Subsequently, Beneficiary went back to college, requested the court to continue the trust, and explained that his original withdrawal from college and request for the trust to terminate was influenced by his heavy use of illegal drugs. The court determined that the trust had not terminated. Uncle appealed.¹²⁷

The appellate court affirmed. The court examined the trust, especially its statement that the principal purpose of the trust is to provide for Beneficiary's education and the Settlor's grant of broad discretion to Trustee. The court thought it was reasonable for Trustee to view the one-and-a-half years during which Beneficiary did not enroll in college as a mere break in his education, not a completion of it. Settlor had not required Beneficiary to be continuously enrolled in college. The court also noted that Uncle had originally told Trustee the trust should not be terminated. The court held the trust was not ambiguous, and it did not terminate on its own terms.¹²⁸

2. *Reformation*

*Estate of Hearn v. Hearn*¹²⁹ demonstrates that a person attempting to reform a trust must have solid evidence that an agreement exists and that there was a mistake in reducing that agreement to writing. Husband and

125. *Hurley v. Moody Nat'l Bank of Galveston*, 98 S.W.3d 307 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

126. *Id.* at 309.

127. *Id.* at 309-10.

128. *See id.* at 311 (contending that Uncle's statement was an admission by a party opponent which proves the Trustee's correct interpretation of the trust).

129. *In re Estate of Hearn v. Hearn*, 101 S.W.3d at 657, 657 (Tex. App.—Houston [1st Dist.] 2003, pet denied).

Wife executed reciprocal wills leaving personal and household effects to the survivor with the residuary passing to an inter vivos trust. After Husband died, Husband's Children from a prior marriage unsuccessfully claimed that Husband and Wife had executed contractual wills which would require Wife to fund the trust with her property upon Husband's death. Children then urged the court to reform the trust to reflect Husband's alleged intent. The court refused to reform the trust.¹³⁰

The court began its analysis by identifying the two elements which Children must satisfy before the court would reform the trust. First, there must have been an agreement between Husband and Wife. Second, there must have been a mutual mistake in reducing that agreement to writing. The court expressed no opinion as to whether a unilateral mistake would support reformation of a trust. Wife successfully negated these elements by showing that she had never agreed to place her property in the trust upon Husband's death. The court examined a letter from the attorney who drafted the wills and trust and concluded that it did not even raise a fact issue with regard to whether Wife had agreed to fund the trust with her property when Husband died.¹³¹

3. *Latent Ambiguity*

*Eckels v. Davis*¹³² teaches that wills and trusts need to be periodically reviewed and updated to eliminate ambiguities. Settlor established an inter vivos trust identifying two accounts at a financial management company by account numbers as trust property. For internal bookkeeping reasons, the company renumbered one of the accounts. When the trust terminated, the remainder beneficiaries asserted that they were entitled to the funds from the renumbered account. However, the beneficiaries of Settlor's will claimed that they were entitled to the funds because the renumbered account was not covered by the trust. The trial court held that the renumbered account passed under the terms of the trust.¹³³

The appellate court affirmed. The renumbering of the account created a latent ambiguity, that is, an ambiguity which is not apparent from the face of the trust but which arises when the trustee attempts to carry out the terms of the trust. Extrinsic evidence is admissible to resolve a latent ambiguity. The evidence was clear that the change in the account number was the unilateral act of the company and thus, did not reflect any change in Settlor's intent to have this account pass under the terms of the trust.¹³⁴

130. *Id.* at 659.

131. *Id.* at 662-63.

132. *Eckels v. Davis*, 111 S.W.3d 687 (Tex. App.—Fort Worth 2003, pet. denied).

133. *Id.* at 691-93.

134. *See id.* at 695-97 (explaining that extrinsic evidence conclusively shows the settlor's intent was to move assets into a living trust and give remaining assets, less \$600,000, to the settlor's children and his wife).

C. INVESTMENT AND MANAGEMENT STANDARD OF CARE

1. Generally

Until January 1, 2004, the propriety of the trustee's investments were judged according to the prudent person standard.¹³⁵ A trustee was required to exercise the degree of care and level of skill that a person of ordinary prudence would exercise in dealing with that person's own property. The trustee was required to consider three main factors in selecting an investment. First, the trustee examined the safety of the investment. Risky or speculative investments were not allowed. Second, the trustee determined the investment's potential to appreciate in value. Third, the trustee evaluated the income which the investment was expected to generate. Prior law also contained a portfolio-type provision in that the determination of whether a trustee acted prudently was based on a consideration of how all the assets of the trust were invested collectively rather than by examining each investment individually.¹³⁶

The Texas version of the Uniform Prudent Investor Act took effect on January 1, 2004.¹³⁷ Under this "total asset management" approach, the appropriateness of investments is based on the performance of the entire trust portfolio. A prudent investor could decide that the best investment strategy is to select some assets that appreciate and others that earn income as well as some investments that are rock-solid balanced with some that have a reasonable degree of risk. In selecting investments, the trustee should incorporate risk and return objectives that are reasonably suited to the trust. Different trusts may call for different investment approaches depending on the trustee's abilities, the trust's purposes, the beneficiary's needs, and other circumstances.¹³⁸

2. Diversification

The new legislation codifies the trustee's duty to diversify to spread the risk so that if one investment goes bad, the entire trust does not suffer. However, the trustee is not required to diversify if the circumstances demonstrate the purposes of the trust would be better served without diversifying.¹³⁹ For example, assume that Settlor created a trust containing Settlor's heirloom jewelry and a 20,000 acre farm that has been in Settlor's family for almost 200 years. At the termination of the trust, all remaining trust property passes to Settlor's children. Should Trustee sell some of this property to create a balanced portfolio of investments? Retaining all trust property in two assets of this type is certainly not a proper diversification. On the other hand, it is reasonable to conclude that Settlor wanted the heirloom jewelry and the farm to remain in the trust so

135. TEX. PROP. CODE ANN. § 113.056 (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 113.056 (Vernon Supp. 2004).

136. *Id.*

137. TEX. PROP. CODE ANN. §§ 117.001-012 (Vernon Supp. 2004).

138. *Id.* § 117.004.

139. *Id.* § 117.005.

they would pass to Settlor's children and thus Trustee may retain the assets without diversification.

3. *Asset Retention*

The trustee must review trust assets within a reasonable time after accepting the trust or receiving trust property. The trustee must then bring the trust property into compliance with the prudent investor rule.¹⁴⁰ This is a significant change from prior Texas law which permitted the trustee to retain the initial trust property without diversification and without liability for loss or depreciation.¹⁴¹

4. *Loyalty*

The new legislation codifies the principle that the trustee's loyalty is to the beneficiaries.¹⁴² Accordingly, *social investing* may be problematic, especially if the returns from a "politically correct" investment are lower than from other investments. Social investment refers to the consideration of factors other than the monetary safety of the investments and their potential to earn income and appreciate in value. Examples of these types of factors include a company's handling of environmental matters, whether a company does business with countries with policies that do not protect human rights, whether a company employs and pays substandard wages to workers in foreign countries, and the political party affiliation of the company's leadership.

5. *Delegation of Management and Investment Functions*

The traditional rule regarding delegation of powers is that the trustee may delegate mere ministerial duties but may not delegate discretionary acts. Investment of trust property was deemed a discretionary act and thus not subject to delegation. In 1999, Texas altered this rule and allowed the trustee to delegate investment decisions to an investment agent.¹⁴³ The statute required the trustee to send written notice to the beneficiaries at least thirty days before entering into an agreement to delegate investment decisions to an investment agent. Generally, the trustee remained responsible for the agent's investment decisions. However, the trustee could have avoided liability for the investment agent's decisions if all of the relatively strenuous criteria specified in the statute were satisfied.¹⁴⁴

The new legislation takes a very different approach. The trustee may delegate any investment or management decision provided a prudent

140. *Id.* § 117.006.

141. TEX. PROP. CODE ANN. § 113.003 (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 117.006 (Vernon Supp. 2004).

142. TEX. PROP. CODE ANN. § 117.007 (Vernon Supp. 2004).

143. TEX. PROP. CODE ANN. § 113.060 (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 117.011 (Vernon Supp. 2004).

144. *Id.*

trustee of similar skills could properly delegate under the same circumstances. Of course, the trustee must exercise reasonable care, skill, and caution in selecting and reviewing the agent's actions. In the usual case, the trustee is not liable to the beneficiaries or the trust for the decisions or actions of the agent.¹⁴⁵

6. *Language Invoking Prudent Investor Standard*

Certain phrases in trust instruments are deemed to trigger the prudent investor standard. Note that some of these phrases which invoke the prudent investor standard clearly appear to invoke a much different standard (e.g., "prudent person rule").¹⁴⁶

D. DISCRETION OF TRUSTEE

A support trust should clearly indicate whether the trust "may," "must," or "may not" consider the beneficiary's other resources in determining whether to make a distribution. In other words, is the trust to provide a minimum level of support and anything the beneficiary has or acquires is irrelevant, or is the trust to provide a safety net if the beneficiary's other resources and income are inadequate? Failure to do so may cause problems such as those in the case of *In re Estate of Dillard*.¹⁴⁷ Settlor granted Trustee of a testamentary trust the ability to make distributions of principal to Beneficiary (who happened to be the same person as Trustee) if Beneficiary "in the discretion of the Trustee, . . . should be in need of additional funds for maintenance and support."¹⁴⁸ Trustee/Beneficiary claimed that his discretion was not limited to situations where his other resources were inadequate. Both the trial and appellate court disagreed.¹⁴⁹

The court held the trust was not ambiguous and that Settlor's intent was clear that principal distributions were allowed only if Beneficiary actually needed the additional funds for maintenance and support. The trust did not give Trustee "utter discretion to do that which the trustee may care to at any given moment. . . . [Trustee] must exercise [discretion] only after considering the beneficiary's needs, age, condition, separate resources, the size of the trust estate, health, and the like."¹⁵⁰

145. TEX. PROP. CODE ANN. § 117.011 (Vernon Supp. 2004).

146. See *id.* § 117.012 (stating the use of the phrases "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule" in the trust will permit any strategy or investment allowed under this chapter).

147. *In re Estate of Dillard*, 98 S.W.3d 386 (Tex. App.—Amarillo 2003, pet. denied).

148. *Id.* at 389.

149. See *id.* at 394-95 (explaining the trustee's discretion is not absolute, but it must be utilized only after considering factors such as the estate's size, needs of the beneficiary, and conditions of the estate).

150. *Id.* at 395.

E. ALLOCATION OF RECEIPTS AND EXPENSES BETWEEN PRINCIPAL AND INCOME—TRUSTS IN GENERAL

Effective January 1, 2004, the Texas version of the 1997 Uniform Principal and Income Act (UPIA) will mandate how a trustee allocates receipts and expenses between principal and income unless the trust instrument provides otherwise.¹⁵¹ This Act reflects the most significant change in allocation rules in many decades. Some of the key provisions of this new legislation are reviewed below.

1. *Allocation Methods*

The trustee has three ways to determine how to allocate receipts and expenses between income and principal. First, the settlor may have provided instructions in the trust instrument. These instructions may state specific allocation rules or may merely give the trustee discretion to make the allocation.¹⁵² An allocation in accordance with the UPIA's rules by a trustee who has discretionary authority is presumed to be fair and reasonable to all beneficiaries.¹⁵³ Second, if the instrument is silent, the trustee must apply the rules in Chapter 116.¹⁵⁴ Third, if neither the instrument nor the statute specifies the proper method of allocation, the trustee must allocate to principal.¹⁵⁵ This last rule is a significant departure from prior law which provided that the trustee must allocate in a "reasonable and equitable" manner if both the instrument and statute were silent.¹⁵⁶

2. *Trustee's Adjustment Power*

Section 116.005 is the most innovative provision of the 1997 UPIA. Consider the following example: Settlor created a testamentary trust requiring trust income to be paid to Daughter for life with the remainder to Granddaughter. The trust corpus consists primarily of real estate which is appreciating in value at about fifteen percent per year due to its proximity to the edge of a growing city. The land is still subject to a multiple-year lease which Settlor signed with Tenant many years ago. The rent Tenant pays is significantly below market value and is insufficient to support Daughter as Settlor intended. May Trustee sell part of the land and allocate a portion of the profits to income?

Under traditional trust rules, Trustee could not allocate any of the profits from the sale of the real estate to income. Granddaughter has a right to the principal and appreciation belongs to the principal. However, Section 116.005 grants the trustee the power to adjust between principal and income under specified circumstances. The adjustment power section is

151. TEX. PROP. CODE ANN. §§ 116.001-206 (Vernon Supp. 2004).

152. *Id.* § 116.004(a)(1)-(2).

153. *Id.* § 116.004(b).

154. *Id.* § 116.004(a)(3).

155. *Id.* § 116.004(a)(4).

156. TEX. PROP. CODE ANN. § 113.101(a)(3) (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 116.004 (Vernon Supp. 2004).

quite lengthy and requires Trustee to consider a variety of factors such the settlor's intent and the identity and circumstances of the beneficiaries. In this example, it appears that Settlor established the trust to provide for Daughter, and Settlor's intent would be frustrated if Trustee did not allocate some of the profits to income to provide Daughter with an appropriate level of support.¹⁵⁷

The adjustment power has proven to be an extremely controversial aspect of the 1997 UPIA because of its tremendous departure from traditional law, the fear that trustees may abuse the power, and the potential of a beneficiary suing a trustee if the trustee does not exercise the adjustment power in the beneficiary's favor. Accordingly, many of the states enacting the 1997 version of the Act have omitted the adjustment provisions or have altered or restricted them in some way.

Section 116.006 provides the trustee with the option of seeking court approval of an adjustment between principal and income under Section 116.005. The Texas version of this section differs from the uniform version in that it includes additional protections for the beneficiaries.¹⁵⁸

3. *Non-Charitable Unitrusts*

To avoid the accounting hassle of allocating receipts and expenses between the income and remainder interests, as well as to reduce the inherent conflict of interest between current and future beneficiaries, some settlors adopt a *unitrust* or *total return* approach. The current beneficiary of a unitrust is entitled to receive a fixed percentage of the value of the trust property annually. The current beneficiary may or may not also be entitled to additional distributions. Under a unitrust, both beneficiaries have the same goal—they want the value of the property in the trust to increase. It does not matter to them whether the increase in value is due to receipts of traditionally nominated income (e.g., interest or rent) or principal (i.e., appreciation). All increases inure to the benefit of all beneficiaries. Likewise, all beneficiaries share in the expenses regardless of their usual characterization. Section 116.007 assists unitrusts to qualify for various tax benefits. The UPIA does not contain an equivalent provision.¹⁵⁹

4. *Termination of Income Interest*

Section 116.051 provides guidance to the trustee for determining and distributing net income after (1) a decedent dies or (2) an income interest in a trust ends. In a significant departure from prior law, unpaid pecuniary gifts in a will (either outright or in trust) begin to earn interest one

157. See generally TEX. PROP. CODE ANN. § 116.005 (Vernon Supp. 2004) (explaining the trustee's power to adjust trust assets between income and principal).

158. See generally *id.* (listing factors to consider the extent of power conferred to the trustee to make adjustments).

159. Compare TEX. PROP. CODE ANN. § 116.007 (Vernon Supp. 2004), with TEX. PROP. CODE ANN. § 117.001-.012 (Vernon Supp. 2004).

year after the decedent dies rather than one year after the court grants letters testamentary.¹⁶⁰ In another change, the trustee may now allocate interest on estate taxes to either principal or income rather than only against principal.¹⁶¹

5. *Zero-Coupon Bonds*

The trustee should allocate interest received on money lent (e.g., a certificate of deposit) to income. In a change from prior law, a trustee no longer may allot to income the increase in value of a bond which pays no interest but appreciates in value (e.g., U.S. Series E savings bonds and other zero-coupon bonds) unless its maturity date is within one year after acquisition.¹⁶²

6. *Insubstantial Allocations*

Under many circumstances, the new rules free the trustee from the obligation of allocating insubstantial amounts. Instead, the entire amount is allocated to principal.¹⁶³ The section, however, does not define "insubstantial." Thus, a \$1,000 receipt could be substantial for some trusts but insubstantial for others depending on the size of the trust corpus.¹⁶⁴

7. *Annuity Allocations*

The new provisions provide guidance for a trustee when allocating receipts from deferred compensation plans, annuities, and similar arrangements such as IRAs. Generally, each year, receipts are allocated to income until they total four percent of the asset's fair market value. Amounts in excess of four percent are allocated to principal.¹⁶⁵ The Texas version of this section deviates significantly from the UPIA which provides that ten percent of each distribution is income with the remaining ninety percent passing to principal.¹⁶⁶

8. *Liquidating Asset Allocation*

A *liquidating* or *wasting asset* is one which goes down in value as it is used to produce income beyond what would be considered mere depreciation from normal use and age. Examples of these types of assets include leaseholds, patents, copyrights, and royalties. The trustee must now allo-

160. TEX. PROB. CODE ANN. § 378B(f) (Vernon 2003), *repealed by* TEX. PROP. CODE ANN. § 116.051 (Vernon Supp. 2004). *But see* TEX. PROB. CODE ANN. § 378B(f) (Vernon 2003) (amended by 2003 Legislature with a technical change that arguably leaves the prior law still affective).

161. TEX. PROP. CODE ANN. § 116.051 (Vernon Supp. 2004).

162. *Id.* § 116.163. *Cf.* TEX. PROP. CODE ANN. § 113.105(b), *repealed by* TEX. PROP. CODE ANN. § 116.163 (Vernon Supp. 2004) (explaining the income beneficiary at the time of the increase of the bond's value is the beneficiary of distributions).

163. TEX. PROP. CODE ANN. § 116.171 (Vernon Supp. 2004).

164. *Id.*

165. *Id.* § 116.172.

166. *Compare id.* § 116.172, *with* TEX. PROP. CODE ANN. § 117.001-.012 (Vernon Supp. 2004).

cate ten percent of each receipt to income and the remaining ninety percent to principal.¹⁶⁷ This allocation is significantly different from prior Texas law which provided that receipts up to five percent of the asset's value each year were income with any excess being principal.¹⁶⁸

9. *Oil & Gas Royalty Allocation*

Traditionally under Texas law, oil and gas royalties were allocated seventy-two-and-one-half percent to income and twenty-seven-and-one-half percent to principal. These percentages were based on former federal income tax rules which used these percentages for depletion allowances. The UPIA gives only ten percent to income with the remaining ninety percent to principal. Note how unfair this would be to a beneficiary who is receiving seventy-two-and-one-half percent and then discovers that the new law cuts the percentage way down to ten percent. Texas deviates from the UPIA by requiring the trustee to allocate these receipts "equitably."¹⁶⁹ In addition, the trustee may use the prior allocation percentages if the trust owned the natural resource on January 1, 2004.¹⁷⁰

10. *Timber Allocation*

Timber is unlike other natural resources because it is renewable; the trees will grow back. The time it will take the trees to regrow, however, depends on the type of trees. For example, some varieties of pine trees may be ready to harvest in twenty years while other trees such as redwoods may take over a century. Consequently, it is difficult to create a precise allocation rule. The new law explains that receipts are income if the timber removed does not exceed the rate of new growth, but receipts become principal if they are from timber in excess of the regrowth rate.¹⁷¹ This provision provides more guidance than prior law which merely instructed the trustee to do what was reasonable and equitable.¹⁷²

11. *Non-Income Earning Property*

The trustee should not retain property that does not earn income absent express permission in the trust instrument unless it is prudent to retain it under Chapter 117. Although some nonproductive assets, such as collectible items and unleased land, may have the potential of significantly appreciating in value, the retention of nonproductive property usually would violate the trustee's duty of fairness to the income beneficiaries. Under prior law, the trustee was required to promptly sell underproductive property which meant property that did not earn at least

167. TEX. PROP. CODE ANN. § 116.173 (Vernon Supp. 2004).

168. TEX. PROP. CODE ANN. § 113.109 (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 116.173 (Vernon Supp. 2004).

169. TEX. PROP. CODE ANN. § 116.174 (Vernon Supp. 2004).

170. *Compare id.*, with TEX. PROP. CODE ANN. § 117.001-.012 (Vernon Supp. 2004).

171. TEX. PROP. CODE ANN. § 116.175 (Vernon Supp. 2004).

172. TEX. PROP. CODE ANN. § 113.108 (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 116.175 (Vernon Supp. 2004).

one percent of its value per year, assuming the trustee was under a duty to sell either according to the terms of the trust or because it was imprudent to retain the property.¹⁷³ Once the trustee sold the underproductive property, the trustee was often required to allocate a portion of the sale proceeds to income as *delayed income* to make up for the income the trust should have earned had this portion of the trust been placed in income-producing investments.¹⁷⁴

The new legislation dispenses with the allocation of delayed income. Now, the proceeds from the sale or other disposition of a trust asset are principal without regard to the amount of income the asset produced. However, the trustee does retain the duty to make property productive for marital deduction trusts to make certain they continue to qualify for favored tax treatment.¹⁷⁵

12. Expense Allocation

The new legislation makes two significant changes from prior law. First, trustee compensation is now apportioned one-half against principal and one-half income while former law permitted the trustee to allocate compensation on a just and equitable basis. Second, expenses from accountings and judicial proceeds are also allocated equally while under prior law all these expenses were charged against income.¹⁷⁶

13. Depreciation Allocation

A trustee may make transfers from income to principal to compensate for the depreciation of the principal.¹⁷⁷ Under prior law, however, a trustee was required to make a reasonable allowance for depreciation.¹⁷⁸

F. ALLOCATION OF RECEIPTS AND EXPENSES BETWEEN PRINCIPAL AND INCOME—CHARITABLE TRUSTS

The 2003 legislature established a procedure to permit the trustee of a charitable trust to make adjustments between principal and income within certain parameters.¹⁷⁹ The Legislature did not correlate this section with the passage of the Uniform Principal and Income Act which also contains a procedure for making adjustments between principal and income. Accordingly, it is unclear whether charitable trustees are re-

173. TEX. PROP. CODE ANN. § 113.110 (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 116.176 (b) (Vernon Supp. 2004).

174. *Id.*

175. TEX. PROP. CODE ANN. § 116.176(b) (Vernon Supp. 2004).

176. *Compare id.* § 116.201, with TEX. PROP. CODE ANN. § 113.111 (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 116.201 (Vernon Supp. 2004).

177. TEX. PROP. CODE ANN. § 116.203 (Vernon Supp. 2004).

178. TEX. PROP. CODE ANN. § 113.111 (a)(2) (Vernon 1995), *repealed by* TEX. PROP. CODE ANN. § 116.203 (Vernon Supp. 2004).

179. TEX. PROP. CODE ANN. § 113.0211 (Vernon Supp. 2004). Note the unusual effective date provision which provides that this section applies only to a "demand for an accounting" which is made on or after September 1, 2003. The legislature probably intended this limitation to apply only to Section 3 which deals with accountings. *See id.*

stricted to Section 113.0211 or whether they may use the Uniform Act procedure as well.

G. EXCULPATORY CLAUSES

The Texas Legislature codified rules regarding the enforceability of exculpatory clauses in trusts.

1. *General Limitation on Enforceability*

A settlor is prohibited from relieving a trustee of liability for a breach of trust committed (1) in bad faith, (2) intentionally, or (3) with reckless indifference to the interest of the beneficiary. In addition, the settlor may not permit the trustee to retain any profit derived from a breach of trust.¹⁸⁰ An exculpatory clause is ineffective to the extent the provision was included in the trust because of an abuse by the trustee of a fiduciary duty to or confidential relationship with the settlor.¹⁸¹

2. *Chapter 142 Management Trusts*

An exculpatory provision in a Chapter 142 management trust will be enforceable only if the following two requirements are satisfied:

- (1) The exculpatory provision is limited to specific facts and circumstances unique to the property of that trust and is not applicable generally to the trust.
- (2) The court creating or modifying the trust makes a specific finding that there is clear and convincing evidence the exculpatory provision is in the best interests of the beneficiary of the trust.¹⁸²

This new requirement is a reaction to the Texas Supreme Court opinion in *Texas Commerce Bank, N.A. v. Grizzle*,¹⁸³ in which the court enforced a boilerplate exculpatory clause in a Chapter 142 trust.¹⁸⁴

3. *867 Trusts*

Rules analogous to those for Chapter 142 management trusts now govern Section 867 of the Probate Code trusts as well.¹⁸⁵

H. ACCOUNTINGS BY TRUSTEE

1. *Deadline After Beneficiary Request*

Rather than having a "reasonable time" to render an accounting after a beneficiary's written request, a trustee must now provide the accounting on or before the ninetieth day after the trustee receives the demand un-

180. *Id.* § 113.059(c).

181. *Id.* § 113.059(d).

182. *Id.* § 142.005(j).

183. *Tex. Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002).

184. *Id.* at 256. *See also* *Clifton v. Hopkins*, 107 S.W.3d 755, 761 (Tex. App.—Waco 2003, no pet.) (acknowledging the Texas Supreme Court-affirmed exculpatory clauses are not prohibited by public policy and valid under the Trust Code).

185. TEX. PROB. CODE ANN. § 868(c) (Vernon Supp. 2004).

less a court order provides for a longer period.¹⁸⁶

2. *Recovery of Costs for Suit to Compel Accounting*

If the beneficiary is successful in a suit to compel an accounting, the court now has the discretion to award all or part of the court costs and all the beneficiary's reasonable and necessary attorney's fees against the trustee in either the trustee's individual or representative capacity. Note that the section does not seem to permit the court to award only a part of the attorney's fees; it appears to be an "all or nothing" situation unlike with regard to court costs where the court has the discretion to award "all or part."¹⁸⁷

3. *Contents of Accounting*

A trustee should render a complete accounting in the form mandated by the Trust Code. For example, in the case of *In re Estate of Dillard*,¹⁸⁸ the court ordered Trustee to provide an accounting in the form required by Section 113.152 of the Trust Code. Trustee submitted an accounting and the court approved it. The appellate court, however, held that the trial court erred in so doing because the accounting did not contain all the items enumerated in the Code.¹⁸⁹

I. REMOVAL

1. *In Court's Discretion*

a. Discretionary Nature of Court's Decision

Despite the use of the word "may" in Section 113.082 of the Property Code, Texas courts have held that they *must* remove a trustee for the specific reasons enumerated in the statute such as for materially violating the trust or becoming insolvent.¹⁹⁰ The 2003 legislature changed the statute by adding the phrase "in its discretion" after the term "may" to make it clear that whether or not to remove a trustee is always a discretionary decision of the court.¹⁹¹

b. For Other Cause

The court will consider a wide array of factors in determining whether it is proper for a court to remove a trustee "for other cause" as in *Bar-*

186. TEX. PROP. CODE ANN. § 113.151(a) (Vernon Supp. 2004) (applicable only to a demand for an accounting made on or after September 1, 2003).

187. *See id.* (stating the court may award "all or part of the costs of court" and all attorneys' fees).

188. *In re Estate of Dillard*, 98 S.W.3d 386, 386 (Tex. App.—Amarillo 2003, pet denied).

189. *Id.* at 397-98.

190. *See Akin v. Dahl*, 661 S.W.2d 911, 913 (Tex. 1983).

191. TEX. PROP. CODE ANN. § 113.082 (Vernon Supp. 2004). Note the unusual effective date provision which provides that this section applies only to a "demand for an accounting" which is made on or after September 1, 2003. The legislature probably intended this limitation to apply only to Section 3 which deals with accountings. *See id.*

rientos v. Nava.¹⁹² After holding that Ex-Husband had created valid trusts, the appellate court examined the facts and determined that they were adequate to support the trial court's decision to remove Sister as trustee under Section 113.082(a)(3) of the Trust Code "for other cause." The court conducted an extensive evaluation of Sister's conduct and agreed Sister had not made reasonably prudent decisions regarding the investment of trust funds, did not have the ability to manage them for Children's best interest, and had hostility which interfered with her ability to manage the property.¹⁹³

2. Additional Listed Ground

The court may remove a trustee "if the trustee fails to make an accounting that is required [either] by law or by the terms of the trust."¹⁹⁴

3. Non-Ground

"A trustee of a charitable trust may not be removed solely on the grounds that the trustee exercised the trustee's power to adjust between principal and income under [new Property Code Section] 113.0211."¹⁹⁵

J. SUCCESSOR TRUSTEE

*Barrientos v. Nava*¹⁹⁶ shows a person displeased with a trial court's naming of a successor trustee will have a difficult time showing that the trial court's decision was arbitrary or unreasonable. After holding Ex-Husband had created valid trusts and it was proper to remove Sister, the appellate court examined the facts and determined they were adequate to support the trial court's decision to substitute Ex-Wife as trustee. The court noted that Ex-Wife was the mother of the beneficiaries and thus in the best position to ascertain their needs. In addition, Ex-Wife's conduct demonstrated that she had the ability to invest the property on behalf of Children.¹⁹⁷

V. OTHER ESTATE PLANNING MATTERS

A. DIVORCE AND BENEFICIARY DESIGNATIONS

In *Keen v. Weaver*,¹⁹⁸ Husband named Wife as the beneficiary of his annuity plan which was governed by ERISA. Husband and Wife divorced. Wife waived any interest in the plan in the divorce settlement agreeing the plan would be Husband's sole property. Husband died thirteen years after divorcing Wife without changing the beneficiary designa-

192. See *Barrientos v. Nava*, 94 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2003, no pet.) and *supra* text accompanying note 119.

193. *Id.* at 288.

194. TEX. PROP. CODE ANN. § 113.082(a)(3) (Vernon Supp. 2004).

195. *Id.* § 113.082(c).

196. See *Barrientos*, 94 S.W.3d at 270 and *supra* text accompanying note 119.

197. *Id.* at 289-90.

198. *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), *cert. denied* 124 S. Ct. 808 (2003).

tion. Relying on the beneficiary designation, the annuity company began paying Wife. Husband's Mother, the contingent beneficiary, claimed the proceeds. The trial court rejected Mother's claim and held Wife was entitled to the proceeds.¹⁹⁹ The appellate court reversed holding that Texas redesignation statute (Section 9.302 of the Family Code), although preempted by ERISA under *Engelhoff v. Engelhoff*,²⁰⁰ applied as federal common-law and thus prevented Wife, a former spouse, from receiving the annuity.²⁰¹

The Texas Supreme Court affirmed the appellate court in a five to four decision but based its decision on the Wife's waiver, not the redesignation statute. The court explained that ERISA does not prohibit a plan administrator from recognizing a beneficiary's waiver, disclaimer, or other repudiation of plan benefits. Because Wife's waiver of her interests in the plan was specific, knowing, and voluntary, the court deemed it to be enforceable under federal common-law. Accordingly, the plan's benefits are payable to Mother, the contingent beneficiary.²⁰²

The four justice dissent explains that ERISA clearly preempts state law and that there is no basis to distinguish between the Texas redesignation statute and Wife's waiver. The opinion explains that the majority

is unable to supply any reason, real or imagined, why ERISA would explicitly require plans to be administered according to their terms, preempt state law to assure that end, and then reincorporate state law into federal common-law so that plans are not administered according to their terms, thereby making the express statutory language [of ERISA] simply illusory.²⁰³

This decision reflects the court's reluctance to conform with the law as pronounced by the United States Supreme Court when to do so would be contrary to Texas law and public policy. The United States Supreme Court indicated that plan administrators should not have to master the relevant laws of fifty states. The same logic would apply to how each state determines the contents of federal common-law. Although the legal basis of the Texas court's decision is problematic, it carries out the highly likely intent of Husband, albeit unexpressed, to not have annuity payments made to an ex-spouse from whom he had been divorced for thirteen years. This issue is certain to arise repeatedly and should be addressed by an amendment to ERISA which expressly voids the designation of an ex-spouse made prior to divorce.

B. STATUTORY PROBATE COURT JURISDICTION

The 2003 legislature enacted three bills impacting statutory probate

199. *Id.* at 723-23.

200. *Engelhoff v. Engelhoff*, 532 U.S. 141 (2001).

201. *Weaver v. Keen*, 43 S.W.3d 537, 544 (Tex. App.—Waco 2001), *aff'd on other grounds*, *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003).

202. *Keen*, 121 S.W.3d at 728-29.

203. *Id.* at 730 (Hecht, J., dissenting).

court jurisdiction.²⁰⁴ Some of the changes are technical in nature and enhance the readability and clarity of the Probate Code's jurisdiction provisions which effect decedents' estates and guardianships. Unfortunately, other provisions further complicate the already confusing nature of statutory probate court jurisdiction.

Perhaps the most significant issue is the determination of proper jurisdiction for a proceeding involving a testamentary trust. Below are five possibilities:

- (1) If the estate is still pending in the statutory probate court which probated the will creating the trust, the action must be brought in that court. If the estate is not pending, the action would be brought in the appropriate district court.
- (2) Regardless of whether the estate is still pending in the statutory probate court which probated the will creating the trust, the action must be brought in that court. This could result in the probate court hearing actions regarding testamentary trusts many decades after the estate was closed.
- (3) The action must be brought in the statutory probate court in the county which has venue as determined by the Trust Code regardless of the county in which the will was originally probated.
- (4) The action may be brought either (a) in the district court or (b) in the statutory probate court if the estate is still pending or if the personal representative of an estate is a party to the proceeding.
- (5) The action must be brought in the district court unless the estate is still pending in a statutory probate court or if the personal representative of an estate is a party to the proceeding.²⁰⁵

C. MULTIPLE-PARTY ACCOUNTS

1. Joint Account

As *In re Estate of Dillard*²⁰⁶ demonstrates, the attorney should personally inspect all signature cards and account contracts to make certain they are signed, unambiguously create precisely the type of account the client desires, and clearly reference the current account numbers. Husband and Wife opened an account with a brokerage firm and signed an agreement containing clear survivorship language sufficient under Section 439 of the Probate Code. The agreement, however, expressly referred to a different account number than the number on the account when Wife died. The trial court found the current account was also controlled by the survivorship agreement.²⁰⁷

204. Tex. H.B. 4 § 3.05, 78th Leg., R.S. (2003); Tex. H.B. 1470 §§ 2-6, 33, 78th Leg., R.S. (2003); Tex. H.B. 1473 §§ 1-4, 16, 78th Leg., R.S. (2003).

205. Glenn M. Karisch, 2003 *Legislative Update*, available at <http://www.texasprobate.com/03leg/03updatepaper.htm> (last visited Jan. 5, 2004).

206. *In re Estate of Dillard*, 98 S.W.3d 386, 386 (Tex. App.—Amarillo 2003, pet denied).

207. *Id.* at 396-97.

The appellate court agreed. The evidence showed that the two numbers actually referred to the same account. The numbers changed when the account was transferred from the brokerage's office in one city to an office in another city. Accordingly, the funds in the account were still governed by the original agreement containing the survivorship language.²⁰⁸

2. *P.O.D. Account*

The importance of careful signature card inspection is also shown by *Parker v. JPMorgan Chase Bank*.²⁰⁹ Depositor opened accounts in payable on death (P.O.D.) form in favor of Beneficiary. However, Depositor did not sign the account contracts. After Depositor's death, Bank paid the proceeds to the executor of Depositor's estate. Beneficiary brought suit against Bank asserting the Bank made the payments in error. The trial court granted summary judgment in favor of Bank.²¹⁰

The appellate court affirmed. The court held that Depositor did not create P.O.D. accounts because she did not sign written agreements creating the P.O.D. feature as required by Section 439(b) of the Probate Code.²¹¹

The court also rejected Beneficiary's argument that Bank had no standing to raise the lack of Depositor's signature because of Section 448 of the Probate Code, which eliminates a financial institution's protection from liability if it receives written notice from a party able to request present payment that withdrawals are not to be allowed. In this case, Beneficiary had no right to request withdrawals because the account was not a valid P.O.D. account.²¹²

3. *Convenience Accounts*

The rules governing convenience accounts were modernized to permit multiple parties and multiple convenience signers on the same account.²¹³ This change enhances the usefulness of convenience accounts. For example, a husband and wife may be parties and designate a child as a convenience signer or a parent may designate several children as convenience signers. The Uniform Single-Party or Multiple-Party Account Selection Form Notice was revised to reflect this change.²¹⁴

208. *Id.*

209. *Parker v. JPMorgan Chase Bank*, 95 S.W.3d 428 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

210. *Id.* at 429-30.

211. *Id.* at 431-32.

212. *Id.* at 432.

213. TEX. PROB. CODE ANN. § 439A (Vernon Supp. 2004) (effective only with respect to convenience accounts created on or after September 1, 2003).

214. *Id.*

4. Creditors

The 2003 legislature clarified the rights of creditors against multiple-party accounts. No multiple-party account is effective against the claim of a secured creditor who has a lien on the account. Any party, except a convenience signer to a convenience account, may use the account as collateral without the joinder of any of the other parties. If the secured creditor is a financial institution, the creditor must give written notice sent by certified mail that the account was used as collateral to the other party within thirty days of perfection. However, notice need not be given to parties who have no current ownership rights such as P.O.D. payees, trust account beneficiaries, and convenience signers.²¹⁵

D. POWERS OF APPOINTMENT

The 2003 legislature codified various aspects of the law governing the exercise of powers of appointment. Unless the power of appointment expressly provides otherwise, the donee of a power of appointment may do the following things when exercising the power:

- (1) Appoint present, future, or both present and future interests.
- (2) Impose conditions and limitations on the appointment.
- (3) Impose restraints on alienation.
- (4) Appoint interests to a trustee for the benefit of one or more objects of the power.
- (5) Create any right existing under the common-law.
- (6) Grant the objects of the power of appointment the power to appoint the property provided that these powers of appointment must be exercisable only in favor of the objects of the power who would have been permissible objects under the original donee's power.
- (7) If the donee has the power to appoint outright to the object of the power, exercise the power to give a power of appointment to the object of the original power. The donee of the original power becomes the donor of the second generation power. There are no restrictions on the identity of the objects of the second generation power; in other words, these objects do not have to be permissible objects of the original power of appointment.²¹⁶

E. LIFE INSURANCE

Many employers purchase life insurance policies on employees. Unless the employee qualifies as a key employee whose death would cause a financial hardship to the employer, the employer lacks an insurable interest and thus the employee's estate would have a claim to the proceeds. Thus, a personal representative should check with the deceased's employ-

215. *Id.* § 442 (effective only for multiple-party accounts created on or after September 1, 2003).

216. TEX. PROP. CODE ANN. §§ 181.081-.083 (Vernon Supp. 2004).

ers, both present and past, to ascertain the existence of such a policy. The case of *Torrez v. Winn-Dixie Stores, Inc.* is instructive.²¹⁷ Employer purchased a life insurance policy on Employee naming itself as the beneficiary. When Employee died in 1996, Employer collected the proceeds of the policy. Executor of Employee's estate gained knowledge of this policy in December 2001 and filed suit approximately three months later claiming that Employer did not have an insurable interest in Employee's life and thus requested that the court impose a constructive trust on the proceeds. Employer argued that Executor's claim was barred by limitations and the trial court agreed.²¹⁸

The appellate court reversed and remanded for a trial on the merits. The court agreed with Executor's assertion that the statute of limitations was tolled until Executor discovered the existence of the policy because the policy was inherently undiscoverable. The court rejected Employer's claim that Executor had a duty to ask Employer whether it had purchased a life insurance policy on Employee's life. Accordingly, the trial court's granting of a summary judgment was improper because Executor filed suit within a few months of the policy's discovery.²¹⁹

F. DELIVERY OF DEED

Delivery of a deed to a third party to be delivered to the donee after the donor's death is usually not a prudent estate planning tool because of the uncertainty and litigation it is likely to produce as in *Rothrock v. Rothrock*.²²⁰ Settlor established a trust which included Settlor's residence. Settlor served as the trustee of the trust. In 1977, Settlor, in both his individual and representative capacities, signed a deed conveying the residence to a corporation wholly owned by Settlor's Wife. Settlor gave the deed to Wife but told her not to record it until Settlor died. Twenty years later, Wife's child by a prior marriage heard rumors that Settlor wanted Wife to return the deed. Wife's child found the deed and gave it to an attorney for safekeeping. Settlor filed a copy of the deed and an affidavit explaining that he had not delivered the deed, and the deed was void. After Settlor's death, the original deed was properly filed. Beneficiaries of the trust successfully sued to recover the residence for the trust.²²¹

The appellate court reversed. Settlor delivered the deed to Wife, a third party, with instructions to record it upon his death. There was no evidence that he reserved the right to recall the deed. The court held that the evidence conclusively established that Settlor intended to convey to the grantee corporation a future interest in the residence contingent on

217. *Torrez v. Winn-Dixie Stores, Inc.*, 118 S.W.3d 817 (Tex. App.—Fort Worth 2003, pet. filed).

218. *Id.* at 819.

219. *Id.* at 820-22.

220. *Rothrock v. Rothrock*, 104 S.W.3d 135 (Tex. App.—Waco 2003, pet. denied).

221. *Id.* at 137-38.

Settlor predeceasing Wife. Thus delivery of the deed, albeit to a third party, was effective as a matter of law. Settlor may not undo the transaction merely because he later had a change of heart.²²²

G. DURABLE POWER OF ATTORNEY

Agents under a durable power of attorney must be informed that they are subject to fiduciary duties toward the principal even if they do not exercise any authority under the power of attorney as explained in *Vogt v. Warnock*.²²³ Principal designated Agent as his durable power of attorney. Agent knew about her appointment, but she never exercised any authority which Principal granted to her. Later, Principal made many gifts to Agent and paid her to manage his personal and financial affairs. Some of these gifts were of property Principal had originally placed in a revocable trust in favor of Son. Agent was also named as the primary beneficiary of Principal's will. After Principal died, Executor filed suit against Agent alleging breach of fiduciary duty under the durable power of attorney. The trial court found that some transfers were fair while others were unfair and therefore were set aside. Agent appealed.²²⁴

The appellate court held that as a matter of law Agent stood in a fiduciary capacity to Principal even though she never acted under the durable power of attorney. Accordingly, Agent had the burden to prove that all of the Principal's transfers to her were fair. However, the court agreed with Agent that it was unreasonable for the jury to conclude that certain gifts were unfair to Principal. Instead, the evidence was clear that all transfers were fair. There was no evidence showing that Principal did not understand his actions, was acting under undue influence, or that Agent exerted any pressure on him to make the transfers. It was irrelevant that the transactions were not fair from Son's perspective.²²⁵

H. SURROGATE MOTHERS

The Texas Legislature has now authorized gestational agreements between a surrogate mother and the intended parents.²²⁶ If the agreement is properly validated, the woman who gave birth to the child will not be treated as the child's mother. Accordingly, this child will not inherit from or through the birth mother. Instead, the mother and father of the child will be the intended parents, and inheritance rights will accrue accordingly.²²⁷

222. *Id.* at 138-40.

223. *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.—El Paso 2003, pet. denied).

224. *Id.* at 780-81.

225. *Id.* at 784-86.

226. TEX. FAM. CODE ANN. §§ 160.751-.762 (Vernon Supp. 2004).

227. *Id.*

I. ADVANCE DIRECTIVES

Texas now has extensive procedures which must be followed when either (1) the attending physician wishes to cease life-sustaining treatment but the patient's advance directive or medical agent indicates that treatment should be continued, or (2) the attending physician wishes to continue life-sustaining treatment but the patient's advance directive or medical agent indicates that treatment should be withheld.²²⁸ These procedures will assist the patient in being transferred to a facility willing to comply with the advance directive or the agent's instructions.²²⁹

J. OUT-OF-HOSPITAL DO-NOT-RESUSCITATE ORDER

1. *Individuals Authorized to Comply*

The types of individuals who may honor a *physician's* do-not-resuscitate order in an out-of-hospital setting have been expanded to include (1) licensed nurses, and (2) anyone providing health care services in an out-of-hospital setting.²³⁰ Emergency medical services personnel responding to a call for assistance, however, may honor only a properly executed or issued out-of-hospital DNR order or a prescribed DNR identification device.²³¹

2. *Minors*

An out-of-hospital do-not-resuscitate order may now be executed for a minor by the minor's parents, guardian, or managing conservator only if the minor has first been diagnosed by a physician as suffering from a terminal or irreversible condition.²³²

228. TEX. HEALTH & SAFETY CODE ANN. §§ 166.052-.053 (Vernon Supp. 2004).

229. *See id.*

230. *Id.* § 166.102.

231. *Id.*

232. *Id.* § 166.085.

Articles

