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WILLS AND TRUSTS

by
Rust E. Reid*

I. WILLS

WILL Construction. During 1984 the Texas Supreme Court dealt with the difficult issue of inheritance rights of adopted children in the somewhat unusual context of adult adoption. The court decided the issue, however, on a narrow ground of will construction. Under the facts of *Lehman v. Corpus Christi National Bank*¹ W.F.L. Lehman died on July 27, 1970, leaving a will dated May 4, 1966. The will provided for the creation of a trust, from which one-fourth of the income was payable to Melvin Lehman, son of W.F.L. Lehman. Melvin died survived by a natural son, Keith, and a son Randy adopted on August 24, 1978, at the age of twenty-six. On Melvin's death, his income interest in the trust was to pass to his "descendants," a term the will defined to include "the children of the person designated, and the issue of such children, and such children and issue shall always include those who are adopted."²

The question in dispute was whether the adult adoption of Randy Lehman had the effect of making him an income beneficiary under the terms of the will of W.F.L. Lehman. The court of appeals held that it did not.³ The court pointed out that a will is to be construed by the law as it existed at the date of death of the testator and acknowledged that an adopted child was entitled to inherit from and through the adoptive parents at the time of W.F.L. Lehman's death, as well as at present.⁴ At the time of W.F.L. Lehman's death, however, the relevant statute provided that an adopted adult inherited *from* the adoptive parent,⁵ but no corresponding provision existed for inheriting *through* the adoptive parent.⁶ Because Randy Lehman was an adult at the time of his adoption, he could not inherit under the will of

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1. 668 S.W.2d 687 (Tex. 1984). The facts are set forth in the appellate court decision, *Lehman v. Corpus Christi Nat'l Bank*, 665 S.W.2d 799, 800 (Tex. App.—Corpus Christi 1983).

2. Randy was the son by a previous marriage of Melvin Lehman's widow. 668 S.W.2d at 688.

3. 665 S.W.2d 799, 801 (Tex. App.—Corpus Christi 1983), *rev'd*, 668 S.W.2d 687 (Tex. 1984).

4. 665 S.W.2d at 800.

5. Act adopting Title 2 of the Family Code, ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1432, *repealed by* Act of June 19, 1975, ch. 476, § 43, 1975 Tex. Gen. Laws 1253, 1270.

6. The legislature amended the statute in 1975 to make adopted adults the children of

W.F.L. Lehman, and therefore Keith was entitled to his father's interest in the testamentary trust.

The Texas Supreme Court, in reversing the lower court's decision, declined to look to outside law because it found the will itself to be clear.⁷ The definition of "descendants" in the will drew no age distinction between natural and adopted children, and it unambiguously covered Randy Lehman.⁸ The court stated that, as indicated by the Texas Family Code,⁹ an adopted adult is a child of his parents by adoption for every purpose.¹⁰ Keith Lehman claimed that the trial court erred in excluding the testimony of the attorney who prepared W.F.L. Lehman's will. On a bill of exceptions, the attorney said that, in his opinion, W.F.L. Lehman did not intend to include adopted adults within the class of descendants. The bill of exceptions also showed, however, that the attorney did not discuss with the testator the question of adopted adults. The supreme court upheld this decision of the trial court for two reasons. First, Keith Lehman wanted to use extrinsic evidence to show that his grandfather would not have intended Randy Lehman to be included, in spite of the fact that the literal terms of the will covered Randy.¹¹ Second, Texas courts have long held in other contexts that a witness cannot testify to the state of mind of another person.¹²

In construing wills, the courts will exclude extrinsic evidence unless the document is ambiguous. In *Unitarian Universalist Service v. Lebrecht*¹³ the dispute concerned the use of a semicolon in the first codicil to Gertrude L. Vogt's will that raised a question as to whether the appellant charity was entitled to a share of the residue. The trial court granted the appellant's motion in limine, which denied the appellees the opportunity to introduce extrinsic evidence to show the decedent's intent.¹⁴ The trial court ruled, and both sides argued, that the will and codicil were unambiguous, but the appellate court disagreed after discussing several possible interpretations of the codicil.¹⁵ The court noted that, in the absence of ambiguity, a will is construed within the four corners of the document and that codicil and will must be construed together and interpreted as if both had been executed on the date of the codicil.¹⁶ In reading the two instruments together the court

their adoptive parents "for all purposes." TEX. FAM. CODE ANN. § 16.55 (Vernon Pam. Supp. 1975-1985).

7. 668 S.W.2d at 689.

8. *Id.* The court viewed the position taken by Keith Lehman as a form of the "stranger to the adoption" rule, which had been rejected in Texas. *Id.*

9. TEX. FAM. CODE ANN. § 16.55 (Vernon Pam. Supp. 1975-1985).

10. 668 S.W.2d at 689. The court referred, however, to the 1975 version of the statute, rather than the amended language. *See supra* note 6.

11. 668 S.W.2d at 689.

12. *Id.* (citing *Graves v. Campbell*, 74 Tex. 576, 580, 12 S.W. 238, 239-40 (1889); *Taylor v. Lewis*, 553 S.W.2d 153, 161 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.)).

13. 670 S.W.2d 402 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

14. The appellees attempted to condition consideration of their cross-point on the event that the court of appeals reversed the judgment of the trial court. The appellate court found no authority permitting a conditional appeal and considered the cross-point for all purposes. *Id.* at 403.

15. *Id.* at 404.

16. *Id.*

found the will and codicil of Gertrude L. Vogt to be susceptible to more than one meaning.¹⁷ The court held that extrinsic evidence was therefore admissible to show the decedent's intent and reversed and remanded for a new trial.¹⁸

Testamentary Capacity and Undue Influence. The Texas Supreme Court continues to wrestle with questions concerning capacity and undue influence. *Croucher v. Croucher*¹⁹ involved a will contest based on lack of testamentary capacity. James Croucher, Sr. executed his will on July 7, 1980, and died from a stroke about six weeks afterwards.²⁰ Mrs. Croucher, the sole devisee under his will, produced some evidence at trial that Mr. Croucher had testamentary capacity on July 7, 1980, but the jury found to the contrary. The question on appeal was whether Mrs. Croucher had established as a matter of law that her husband had testamentary capacity on the day he executed his will. Thus, the appellate court had to determine whether appellees, the testator's sons from a prior marriage, produced some evidence that their father was not competent to make a will.

The Texas Supreme Court noted that no direct evidence indicated that Mr. Croucher lacked testamentary capacity on July 7. Evidence of incapacity at other times, however, could be used to establish incapacity on the date the will was executed if it demonstrated that the condition was persistent and had some probability of being the same condition in effect when the will was executed.²¹ The court posed two tests that evidence adduced by the Croucher sons had to pass. First, was the evidence of the kind that would indicate lack of testamentary capacity? Some evidence showed that at times during 1980 Mr. Croucher was confused and his memory was sketchy. A physician testified that the occlusions could cause Mr. Croucher to be less than lucid at times. The court, therefore, concluded that the evidence was indeed of the kind that would indicate lack of testamentary capacity.²² Second, the court asked whether that evidence was probative of Mr. Croucher's capacity, or lack thereof, on the day the will was executed. Mr. Croucher's physical problems were shown to have existed in March and August of 1980, from which a jury could have inferred that he lacked testamentary capacity on July 7. Mr. Croucher had a failing memory resulting from his arteriosclerosis in March, before the will was executed. That same disease incapacitated him in August, after the will was made. The court therefore concluded that the evidence was probative of Mr. Croucher's lack of capacity on the day of execution.²³ The court thus held that Mrs. Croucher had not established as a matter of law that her husband had testamentary capac-

17. *Id.* at 404-05.

18. *Id.* at 405.

19. 660 S.W.2d 55 (Tex. 1983).

20. The testator executed the will in question during a series of physical problems that stemmed from diabetes and eventually led to the total occlusion of his right carotid artery and the partial occlusion of his left carotid artery.

21. *Id.* (quoting *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968)).

22. 660 S.W.2d at 55.

23. *Id.*

ity on July 7, 1980.²⁴

The decision in *Lowery v. Saunders*²⁵ resolved a will contest based on grounds of lack of testamentary capacity and undue influence. Bessie Cooke Cato, the testatrix, died on January 9, 1980, leaving several executed wills and codicils. The appellee was the primary beneficiary of a will dated April 7, 1976, and a codicil thereto. The will appellant offered for probate was executed on June 18, 1979, and eliminated appellee as a devisee and legatee. The trial court refused to admit the 1979 instrument to probate, ruling that the testatrix lacked testamentary capacity at the time of its execution and that appellant had exercised undue influence over her.²⁶

The court of appeals first addressed the argument relating to testamentary capacity.²⁷ The court rejected the appellant's contention that no legally and factually sufficient evidence supported the trial court's conclusion that the testatrix did not have testamentary capacity.²⁸ A psychiatrist had examined the testatrix before the will was executed. He filed an affidavit stating his belief that the testatrix had sufficient mental capacity to execute a will. On cross-examination of the psychiatrist, however, the appellee was able to demonstrate that the testatrix was not knowledgeable about the nature and extent of her property at the time she saw the psychiatrist and her attorney. During the psychiatrist's examination, the testatrix had described a house containing a piano, and she alluded to a small business from which she drew a monthly income and to ownership of stocks and bonds. Both the piano and the business had been sold sometime before the examination. No evidence indicated she ever owned any interest in securities. In addition, she stated that as her next of kin she had three nieces, one nephew, and one grandniece, but in fact she had two grandnieces, two nephews, and a grandnephew as next of kin.

The court next addressed the argument relating to undue influence.²⁹ The court held that the evidence was legally and factually sufficient to support the trial court's findings and conclusion that the testatrix was acting under

24. *Id.* at 58.

25. 666 S.W.2d 226 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

26. The court of appeals remarked that the trial court's holdings were conflicting. The appellate court noted that testamentary incapacity implies a lack of intelligent mental power, whereas undue influence implies existence of testamentary capacity, albeit subjected to a dominant influence. *Id.* at 229 n.2.

27. The court defined testamentary capacity as having "sufficient mental ability, at the time of the execution of the will, to understand the business in which the testatrix is engaged, the effect of her act in making the will, and the general nature and extent of her property. Moreover, the testatrix must also be able to know her next of kin and the natural objects of her bounty." *Id.* at 232. The testatrix must also be able to understand what the elements of the business to be transacted are and their obvious relation to each other, as well as be able to form a reasonable judgment as to them. The will proponent has the burden of proving that the testator had testamentary capacity. *Id.* at 232.

28. *Id.* at 233.

29. The court defined undue influence as "that dominion acquired by one person over the mind of another, which prevents the latter from exercising his discretion, which destroys his free agency, and which compels him to do something against his will from fear, or from a desire of peace, or from some feeling that he is unable to resist." *Id.* at 234. The party opposing or contesting probate of the will has the burden of proving undue influence. *Id.*

undue influence at the time she executed the 1979 will.³⁰ The testatrix's attorney testified that the appellant had instructed him on how to draft the will, that the appellant was present when the will was executed, and that the attorney had never seen the testatrix alone. The psychiatrist testified that the appellant had paid him for his services. The appellant testified that he had access to the testatrix's house and had a key to the house. The court of appeals concluded that this evidence was sufficient to support the trial court's finding that the appellant had exerted undue influence over the testatrix.³¹

Forfeiture Clause. Texas courts have not decided directly whether an exception to the enforceability of forfeiture clauses should exist when the contestant acts in good faith and with probable cause. A Texas court has now indicated a probable result. Under the facts of *Gunter v. Pogue*³² Gerald and Beryl Gunter offered for probate as the last will of Eldon Johnson a will dated November 28, 1979. JoAnn Pogue, William Otten, and Beryl Katchmazenski filed a will contest and offered for probate a will dated January 14, 1977. The Gunters opposed the probate of this will and offered alternatively wills dated March 2, 1978, and July 8, 1977. Following a jury trial, the July 1977 will was admitted to probate, and the Gunters were appointed co-independent executors. The will admitted to probate contained a forfeiture clause under which anyone who contested the will was to receive only ten dollars instead of the property given to that person under the will. The Gunters informed the other three individuals that as a result of their contest they would receive only the ten dollars specified by the forfeiture clause. These three then filed a motion to remove the Gunters as independent executors and, alternatively, a motion to compel the Gunters to distribute the assets of the estate without regard to the forfeiture provision. The trial court ordered the independent executors to distribute the property and assets of the estate disregarding the forfeiture clause, and the Gunters appealed the order.

The appellate court recognized the general rule that forfeiture provisions are to be construed strictly and that a breach of such a clause should be declared only when the acts of the parties come within the express terms of the clause.³³ After reviewing relevant case law, the appellate court indicated that Texas courts, given the proper circumstances, would and probably should adopt a good faith and probable cause exception.³⁴ The court disposed of the case without deciding the issue, however, stating that if the

30. *Id.* at 235.

31. *Id.*

32. 672 S.W.2d 840 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

33. *Id.* at 842.

34. *Id.* at 843. The court noted that some jurisdictions had allowed a good faith and probable cause exception to defeat a forfeiture clause and that while Texas courts have upheld the validity of forfeiture clauses, they have not referred to an exception for good faith and probable cause. The court further noted that no Texas cases had ruled directly on the issue of whether the good faith and probable cause exception to a forfeiture clause would be applied in Texas. *Id.* at 843.

appellees had sought to defeat the forfeiture clause, they would have had the burden to come forward with proof that their original actions of contest were based on good faith and with probable cause.³⁵ The record contained no evidence indicating that the contest of the will admitted to probate was brought in good faith and upon probable cause. As a result, the appellate court reversed and remanded the case.³⁶

Joint Will. Joint wills are a fruitful source of disputes. *Wiemers v. Wiemers*³⁷ is typical. Norma Wiemers and her three children brought a declaratory judgment action to determine whether the George H. Wiemers and Ida G. Wiemers joint will was contractual and irrevocable. Norma was the widow of Wesley C. Wiemers, one of the sons of George and Ida. George died on January 27, 1960, and the 1951 joint will was probated. Ida executed a new will on May 16, 1972, which attempted to revoke the joint will. Under the joint will, George and Ida intended the survivor of them to have a life estate in their real property, and they agreed that Wesley would have the remainder interest in the homestead provided he paid \$500 to his siblings. Ida left none of her property to Wesley in her 1972 will. In 1980 Wesley predeceased his mother, who died on September 16, 1981.

The trial court held that the will was not contractual, and the court of appeals affirmed, but the Texas Supreme Court reversed those decisions.³⁸ The court recognized that section 59A of the Probate Code, which calls for an express recital that a contract exists as a prerequisite of a contractual will,³⁹ applied only to wills executed on or after September 1, 1979.⁴⁰ The court then observed that a primary characteristic of a joint and contractual will is a comprehensive plan for a disposition of all property owned by both parties.⁴¹ The court concluded that the will at issue contained such a plan and held that Norma Wiemers was entitled to the constructive trust she requested.⁴²

Codicil. The issue in *Hoffman v. Irizarry*⁴³ involved the effect of an alleged clerical error made during the drafting of a codicil. Upon the death of Mabel Laura Keller three testamentary instruments were filed for probate: a will dated April 20, 1976; a will dated June 21, 1976, which revoked all earlier wills; and a codicil dated April 12, 1977. References in the codicil were to the April 20 will, rather than the more recent June 21 will. The testatrix's attorney testified at trial that the testatrix intended the codicil to

35. *Id.* at 844.

36. *Id.* at 845.

37. 683 S.W.2d 355 (Tex. 1984).

38. *Id.* at 356.

39. TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980) provides: "A contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract."

40. 683 S.W.2d at 356.

41. *Id.*

42. *Id.* at 357. Section 59A of the Probate Code should reduce disputes in this area.

43. 673 S.W.2d 674 (Tex. App.—Dallas 1984, writ *dism'd*).

refer to and modify the June 21 will and that the references to April 20 were a result of errors made by his legal assistant. The jury accepted this testimony, and the trial court admitted the codicil to probate as a modification of the June 21 will.

The parties appealing the trial court's judgment contended not that the codicil was intended to republish the April 20 will, but that the codicil should not have been admitted to probate because it showed no intent on its face to modify the June 21 will. The court of appeals interpreted their argument to mean that the codicil should be treated as a nullity, from which it would follow that in executing the codicil the testatrix performed an empty and useless act.⁴⁴ According to the court, the law would not presume that the testatrix intended a useless act, particularly when the codicil did not contradict or create an ambiguity in the June 21 will, but instead could be read in harmony with it.⁴⁵ The court concluded that whether the testatrix intended the codicil to refer to and modify the June 21 will was a question of fact and, therefore, that extrinsic evidence was admissible to aid the jury's determination.⁴⁶ Thus the appellate court refused to overturn the decision of the trial court.⁴⁷

Ademption. In *Bates v. Fuller*⁴⁸ Sara Helen Bates and Fay Ellen Gleaton sued their sister, Carolyn Fuller, and her son, Thomas Michael Fuller, in the Fullers' capacities as co-independent executors of the estate of Pearla S. Coffman, mother of the three sisters. The action in part sought construction of the decedent's will. In response to one of the issues the trial court ruled that the bequest to Sarah Bates and Fay Gleaton in their mother's will was adeemed by the sale of certain property during the lifetime of Pearla Coffman. The relevant provision of Pearla Coffman's will provided that if she owned any real estate on the date of her death, such real estate was to be sold to pay for all legally enforceable debts, funeral expenses, all costs of last illness, administration expenses, and any federal estate taxes. After payment of these debts, expenses, and taxes, the balance of the proceeds was to be divided equally among the three sisters. If the testatrix owned no real estate at the time of her death, however, the debts, expenses, and taxes were to be paid from the residue of the estate, which was bequeathed to Carolyn Fuller.

The court of appeals first held that the bequest at issue was a specific or special bequest, rather than demonstrative or general.⁴⁹ Consequently, the bequest was subject to the operation of the general ademption rule, which provides that if the subject matter of a special bequest or devise is not a part of the testator's estate at the time of death, the bequest is adeemed unless a contrary intention is expressed in the will.⁵⁰ Upon examining the specific

44. *Id.* at 676.

45. *Id.*

46. *Id.*

47. *Id.*

48. 663 S.W.2d 512 (Tex. App.—Tyler 1983, no writ).

49. *Id.* at 515.

50. *Id.* (citing *Shriner's Hosp. for Crippled Children v. Stahl*, 610 S.W.2d 147, 148 (Tex.

language in the will, the court found that the testatrix intended to make a bequest of the cash proceeds from the sale of the real property remaining in her estate after the payment of the debts, expenses, and taxes.⁵¹ The net proceeds from the sale of the Coffman home had been deposited in a separate savings account and were on hand in that account at the time of Mrs. Coffman's death. The court held that the bequest of sale proceeds was not adeemed by the sale since the proceeds were an identifiable part of the estate at the time of death, but that the operation of the general ademption rule would have resulted in an ademption if the proceeds had not been traceable at the time of death.⁵² The appellate court therefore reversed that part of the trial court's judgment holding that the bequest was adeemed.⁵³

Doctrine of Election. The trespass to try title suit in *Smith v. Smith*⁵⁴ involved primarily the doctrine of election. The trial court awarded title to a 170.89-acre tract of land to the plaintiffs, and the defendants sought reversal of the judgment. Plaintiffs claimed title to the land under the will of James E. Smith, Sr., who allegedly received the remainder interest in the tract of land in question under the will of his mother, Lois McHugh Smith. Defendants claimed title under a deed of gift executed by Blackstone L. Smith, Sr., surviving husband of Lois McHugh Smith; Blackstone Smith had died before this suit was filed. Lois Smith's will left all of her real property to her husband, Blackstone Sr. The will devised to her son, James Sr., subject to the life estate to Blackstone Sr., the remainder interest in the 170.89-acre tract of land in dispute. In addition, the will left to Blackstone Sr. Lois Smith's personal property and a life estate in and all revenues from certain separate property of hers in Pecos County. The parties to the litigation agreed that the 170.89-acre tract of land at issue was the separate property of Blackstone Sr.⁵⁵ Plaintiffs contended that Blackstone Sr. elected to take under the will and that, therefore, neither he nor defendants could properly assert that Lois Smith's will did not effectively dispose of the real estate that was the separate property of Blackstone Sr.⁵⁶

The court of appeals found it impossible to read the will in its entirety without being forced to the conclusion that Lois Smith attempted to give to her son James Sr. an interest in the land owned as separate property by

1980)). The court noted several discussions of the ademption rule by authorities in the field. 663 S.W.2d at 516.

51. 663 S.W.2d at 515.

52. *Id.* at 516.

53. *Id.*

54. 657 S.W.2d 457 (Tex. App.—San Antonio 1983, no writ).

55. Evidence in the trial court established that Blackstone Sr. accepted the benefits of the will by taking possession of personal property and accepting royalties from oil-producing lands that had been Lois Smith's separate property. *Id.* at 461.

56. Under the doctrine of election, if Lois Smith attempted to devise the separate property of Blackstone Sr., over which she legally had no control, and he accepted under her will benefits he otherwise would not have had, then he is estopped from challenging her will as an effective disposition of his property. The principle is that a person cannot take benefits under a will and then make a claim that, if given effect, would negate to some extent the effect of the will.

Blackstone Sr.⁵⁷ Regardless of whether she mistakenly believed that the land in question was community property, the doctrine of election came into operation because the will permitted no conclusion other than that she intended to dispose of land that she did not own.⁵⁸ The defendants pointed out, however, that any election by Blackstone Sr. could not stand unless evidence supported a finding that he had knowledge of the extent of the estate and of his duty to choose between inconsistent rights and that he intended to make an election as shown by his words and acts. The court of appeals found evidence in the record that supported the existence of these prerequisites.⁵⁹ The appellate court therefore affirmed the trial court's decision, holding that the doctrine of election operated to preclude the defendants from claiming an interest in the tract at issue.⁶⁰

Standing to Contest a Will. The decision in *Plummer v. Roberson*⁶¹ permits the party named as executor in a decedent's will to contest a later will of the decedent even though that party has no other interest in either will. The decision stemmed from the death of Ada M. Moore on January 3, 1979. Altemeta Roberson, who was named independent executrix in Ada Moore's 1977 will, filed that will for probate in the county court of Fayette County. After Biffy Poole filed a will contest, the probate proceeding was transferred to the district court of Fayette County. Matthew W. Plummer likewise filed a will of Ada M. Moore for probate in the Fayette County court. This will was dated October 10, 1968, and named Plummer as executor. The county court transferred this probate application to the district court of Fayette County, and the district court consolidated the two proceedings.

Before a trial on the merits took place the district court granted a motion to dismiss Plummer's claim for lack of standing. After the dismissal Roberson and Poole settled their differences, and the district court admitted the 1977 will to probate. On appeal Plummer complained that the district court erred in dismissing him for want of interest. The court of appeals recognized that section 10 of the Probate Code provides that any person interested in an estate may contest any issue before that issue is determined by the court.⁶² As defined in section 3(r) of the Probate Code, "interested persons" are "heirs, devisees, spouses, creditors, or any others having a property right in,

57. *Id.* at 460.

58. *Id.*

59. The court pointed out that Blackstone Sr. acquired the land in question by inheritance, so he could not be heard to say that he did not know the land was his property. Blackstone Sr. acted as executor of Lois Smith's estate and accepted benefits under the will, so he had to have been familiar with the will's contents. Finally, the court stated that if Blackstone Sr. accepted benefits of the will while remaining ignorant of the material facts, elementary equitable considerations would require that he surrender the benefits he had received. *Id.* at 461.

60. *Id.* at 462.

61. 666 S.W.2d 656 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

62. *Id.* at 657. TEX. PROB. CODE ANN. § 10 (Vernon 1980) provides: "Any person interested in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition, as in other suits."

or a claim against, the estate being administered."⁶³ Even though Plummer did not plead that he was an heir, devisee, spouse, or creditor of Ada Moore, or that he had a property right in or a claim against her estate, the appellate court concluded that the district court should not have dismissed Plummer from the proceeding.⁶⁴ The appellate court held that Probate Code sections 75⁶⁵ and 76,⁶⁶ independent of section 10, empowered Plummer, as named executor, to apply for probate of the 1968 will.⁶⁷ Plummer's application for probate of the 1968 will as executor, without more, was sufficient to permit him to remain in the proceeding.⁶⁸

II. TRUSTS

Texas Trust Code. Extensive revisions in the statutory trust laws of Texas became effective on January 1, 1984. These revisions are contained in the new Texas Trust Code, codified in chapters 111-115 of title 9 of the Property Code.⁶⁹ The Trust Code retains many of the substantive provisions of its predecessor, the Texas Trust Act,⁷⁰ and adds provisions relating to topics that have become more important in recent years.⁷¹

The general provisions of Chapter 111 describe the applicability of the Trust Code. In case of any conflict between the Trust Code and the terms of a trust, the trust terms control except that the settlor may not relieve a corporate trustee of the duties, restrictions, and liabilities under sections 113.052 and 113.053, which prohibit certain self-dealing activities.⁷² The Trust Code is to be considered an amendment of the Trust Act for purposes of any instrument that refers to the Trust Act.⁷³ The Trust Code covers express trusts only, and not resulting trusts, constructive trusts, business trusts, or security instruments.⁷⁴ Common law rules continue to prevail except as the Trust Code alters those rules.⁷⁵ The Trust Code governs all trusts created on or after January 1, 1984, and all transactions occurring on

63. TEX. PROB. CODE ANN. § 3(r) (Vernon 1980).

64. 666 S.W.2d at 657.

65. TEX. PROB. CODE ANN. § 75 (Vernon 1980) provides: "Upon receiving notice of a death of a testator, the person having custody of the testator's will shall deliver it to the clerk of the court which has jurisdiction of the estate."

66. *Id.* § 76 provides: "An executor named in a will or any interested person may make application to the court of a proper county: (a) For an order admitting a will to probate (b) For the appointment of the executor named in the will."

67. 666 S.W.2d at 658.

68. *Id.*

69. TEX. PROP. CODE ANN. §§ 111.001-115.017 (Vernon 1984).

70. Texas Trust Act, ch. 148, 1943 Tex. Gen. Laws 232, *repealed by* Act of May 25, 1983, ch. 567, 1983 Tex. Gen. Laws 3269.

71. For discussion of the Trust Code see STATE BAR OF TEXAS, GUIDE TO THE TEXAS TRUST CODE (1983); Cawley, *Probate Litigation*, in ADVANCED ESTATE PLANNING AND PROBATE COURSE at T (1984); Jenson, *Texas Trust Code—Determination of Income and Principal*, in ADVANCED ESTATE PLANNING AND PROBATE COURSE at S (1984); McMahan, *Texas Trust Code—Powers and Duties of Trustees*, in ADVANCED ESTATE PLANNING AND PROBATE COURSE at R (1984).

72. TEX. PROP. CODE ANN. § 111.002(a) (Vernon 1984).

73. *Id.* § 111.002(b).

74. *Id.* § 111.003.

75. *Id.* § 111.005.

or after that date relating to trusts created earlier.⁷⁶

Chapter 112 of the Trust Code governs the creation, validity, modification, and termination of trusts. The provisions of this chapter are largely consistent with prior Texas law under the Trust Act and Texas court decisions. Many of its new provisions are based upon the *Restatement (Second) of Trusts*.⁷⁷ Unlike the Trust Act, the Trust Code generally requires written evidence of the trust terms for the creation of trusts of personal property,⁷⁸ although this requirement does not extend to two types of trusts of personal property. First, no writing is required to create a trust of personal property when that property is transferred to a trustee who is neither settlor nor beneficiary if the transferor simultaneously expresses the intention to create a trust.⁷⁹ Second, a trust of personal property is enforceable if the owner of such property declares in writing that he holds the property as trustee for another or for the owner and another as beneficiary.⁸⁰

Chapter 113 of the Trust Code regarding administration of trusts borrows heavily from the Trust Act. The chapter generally expands the powers of a trustee and clarifies a trustee's power to act in previously uncertain circumstances. A corporate trustee may deposit funds with itself as a permanent investment if authorized by the terms of the trust.⁸¹ A beneficiary currently eligible to receive distributions from a trust created before January 1, 1984, may authorize such a deposit.⁸² A trustee is authorized to participate in a business, including a proprietorship, partnership, limited partnership, corporation, or association.⁸³ The Trust Code grants expanded powers to a trustee to manage mineral properties and the surface estate of real property.⁸⁴ A trustee may now purchase insurance to protect itself and the trust property.⁸⁵ The Trust Code enlarges a trustee's power to borrow by permitting it to borrow from itself.⁸⁶ In addition, the Trust Code contains an entirely new provision permitting distributions to minors and incapacitated beneficiaries if such distributions are made (1) to the beneficiary directly,

76. *Id.* § 111.006.

77. RESTATEMENT (SECOND) OF TRUSTS (1957).

78. TEX. PROP. CODE ANN. § 112.004 (Vernon 1984).

79. *Id.*

80. *Id.* Other provisions of chapter 112 are also notable. The chapter approves additions of property to an existing trust unless prohibited by the terms of the trust or unless the property is unacceptable to the trustee. *Id.* § 112.006. See also *id.* § 113.004 (providing that a trustee may receive from any source additions to the assets of the trust). A corporate trustee, before it may serve, must have the power to act as trustee in Texas. *Id.* § 112.008(a). In an adaptation of TEX. PROP. CODE ANN. § 37A (Vernon 1980), one provision permits a beneficiary to disclaim in a prescribed manner an entire or partial interest in a trust if the beneficiary has not accepted any benefits therefrom. TEX. PROP. CODE ANN. § 112.010 (Vernon 1984). In a departure from RESTATEMENT (SECOND) OF TRUSTS § 330 (1957), which requires that the power of revocation be reserved, the Trust Code continues the Texas position that a trust is revocable unless expressly made irrevocable. TEX. PROP. CODE ANN. § 112.051(a) (Vernon 1984).

81. TEX. PROP. CODE ANN. §§ 113.007, .057 (Vernon 1984).

82. *Id.* § 113.057(a).

83. *Id.* § 113.008.

84. *Id.* §§ 113.009, .012.

85. *Id.* § 113.013.

86. *Id.* § 113.015.

(2) to the beneficiary's guardian or estate, (3) for the health, support, maintenance, or education of the beneficiary, (4) to a custodian under the Uniform Gifts to Minors Act,⁸⁷ or (5) by reimbursement of the person actually caring for the beneficiary.⁸⁸ Also, the Trust Code makes clear that a trustee may comply with the terms of a written executory contract signed by the settlor.⁸⁹ This exception to the general prohibition against self-dealing avoids some of the problems that have occurred as a result of section 352 of the Probate Code.⁹⁰ Finally, the new code reenacts the prudent person rule of the Trust Act.⁹¹

The Trust Code carries forward the concept that allocations between income and principal are to be made in accordance with the statute unless the trust instrument contains a contrary provision.⁹² The new statutory provisions allocating trust principal and income are based on the Revised Uniform Principal and Income Act (1962).⁹³ Unlike the Trust Act, which had set forth specific accounting methods to be used in determining the net profits of a business or farming operation,⁹⁴ the Trust Code simply provides that generally accepted accounting principles are to be determinative in such calculations.⁹⁵ Former accounting methods, however, are not necessarily precluded. The Trust Code also prescribes the proper allocation of production payments from mineral properties,⁹⁶ but no longer provides for a specific allocation of gross proceeds from the sale of timber to principal,⁹⁷ instead placing the allocation within the discretion of the trustee.⁹⁸ Lastly, the trustee's compensation is to be allocated between income and principal in a manner that the trustee, in its discretion, determines to be just and equitable.⁹⁹

Chapter 114 sets forth the liabilities, rights, and remedies of trustees, beneficiaries, and third persons. The trustee is not liable to a beneficiary for a loss in value or failure to make a profit unless a breach of trust has occurred.¹⁰⁰ The Trust Code describes circumstances under which a successor

87. UNIF. GIFTS TO MINORS ACT, 8A U.L.A. 317 (1966).

88. TEX. PROP. CODE ANN. § 113.021 (Vernon 1984).

89. *Id.* § 113.053(e)(1).

90. TEX. PROP. CODE ANN. § 352 (Vernon 1980); see *Furr v. Hall*, 553 S.W.2d 666, 671 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (co-executors forbidden from selling stock of the estate to corporations of which they were officers); *7-Up Bottling Co. v. Capital Nat'l Bank*, 505 S.W.2d 624, 626-27 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (fiduciary who purchased stock of the estate pursuant to option granted by decedent adjudged of self-dealing).

91. TEX. PROP. CODE ANN. § 113.056 (Vernon 1984). The prudent person rule as set forth in the Texas Trust Act required that, with respect to investments, the trustee "exercise the judgment and care under the circumstances then prevailing, which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs . . ." Act to amend Trust Act, ch. 77, § 13, 1945 Tex. Gen. Laws 109, 113 (repealed 1983).

92. TEX. PROP. CODE ANN. § 113.010 (Vernon 1984).

93. UNIF. PRINCIPAL AND INCOME ACT, 7A U.L.A. 429 (1952).

94. Texas Trust Act, ch. 148, §§ 31-32, 1943 Tex. Gen. Laws 232, 242-43 (repealed 1983).

95. TEX. PROP. CODE ANN. § 113.106 (Vernon 1984).

96. *Id.* § 113.107(c).

97. See Texas Trust Act, ch. 148, § 33, 1943 Tex. Gen. Laws 232, 243 (repealed 1983).

98. TEX. PROP. CODE ANN. § 113.108 (Vernon 1984).

99. *Id.* § 113.111.

100. *Id.* § 114.001(b).

trustee will be liable for a predecessor's breach of trust.¹⁰¹ If a beneficiary has incurred a liability to the trust, the trustee has a right of offset notwithstanding any spendthrift provision of the trust.¹⁰² The Code expressly authorizes the payment of "reasonable compensation" to a trustee absent trust terms to the contrary.¹⁰³ In certain circumstances, collection under a suit against the trustee in his representative capacity may be had directly from the trust property.¹⁰⁴

The jurisdiction and venue provisions of chapter 115 follow the corresponding provision in the Trust Act.¹⁰⁵ Unlike the Trust Act, however, the Trust Code, under the concept of virtual representation, enumerates situations in which persons will be bound by an order binding another.¹⁰⁶ To the extent no conflict of interest exists, an order binding a guardian binds the ward, an order binding a trustee binds the beneficiaries in certain proceedings, a parent may represent his minor child as guardian ad litem or as next friend, and an unborn or unascertained person is bound to the extent his interest is adequately represented by another party in the proceeding.¹⁰⁷

Removal of Trustee. In *Akin v. Dahl*¹⁰⁸ the Texas Supreme Court demonstrated a reluctance to remove a settlor-trustee on account of disputes with a beneficiary. George Dahl was trustee of a discretionary trust created by his late wife. The beneficiaries under the trust included Dahl, his daughter, Gloria Dahl Akin, her husband Ted Akin, the children of the Akins, and the children's spouses. The trust instrument provided that trust income and corpus would go to the trustee and that disbursements to the other beneficiaries would be at the discretion of the trustee. Hostility developed between Dahl and the other beneficiaries when the Akins brought guardianship and incompetency proceedings against Dahl. He countered with a malicious prosecution suit against them, and the Akins sued to remove Dahl as trustee. Based on a jury finding that Dahl had developed such hostility toward Gloria Akin and the Akin children that his decisions would probably be influenced adversely, the trial court removed Dahl as trustee.¹⁰⁹

Before the Texas Supreme Court, Gloria Akin urged that section 39 of the Trust Act¹¹⁰ permitted the removal of a trustee at the discretion of the trial court and that review of the trial court's action should be governed by the

101. *Id.* § 114.002.

102. *Id.* § 114.031(b).

103. *Id.* § 114.061.

104. *Id.* §§ 114.083, .084.

105. Compare *id.* § 115.001 (jurisdiction) and *id.* § 115.002 (venue) with Texas Trust Act, ch. 148, § 24, 1943 Tex. Gen. Laws 232, 238-39 (relating to the jurisdiction and venue of actions pertaining to trusts) (repealed 1983).

106. TEX. PROP. CODE ANN. § 115.013 (Vernon 1984).

107. *Id.*

108. 661 S.W.2d 911 (Tex. 1983), *cert. denied*, 104 S. Ct. 1911, 80 L. Ed. 2d 460 (1984).

109. 661 S.W.2d at 913.

110. Texas Trust Act, ch. 148, § 39, 1943 Tex. Gen. Laws 232, 246 (repealed 1983) provided in part that trustees who materially violated or attempted to violate an express trust could be removed in the discretion of the court having jurisdiction.

“arbitrary or unreasonable” standard.¹¹¹ The court interpreted the section differently, indicating that the provision was intended to ensure that the grounds for a trustee’s removal not be limited expressly to those enumerated in the section, but rather might include those that the trial court, in its discretion, deemed necessary and proper.¹¹² Since the removal of a trustee is not a discretionary act of the trial court, the “arbitrary and unreasonable” standard did not apply.¹¹³

Also at issue was the question of whether the jury findings concerning hostility could justify a trustee’s removal. The court stated that before a trustee could be removed in circumstances such as those at hand, a finding that the trustee’s hostility does or will affect his performance in the office is necessary.¹¹⁴ The jury must decide that the trustee could not properly serve due to the hostility.¹¹⁵ The jury did not make this finding, and consequently the court held that Dahl could not be removed as trustee.¹¹⁶ The court asserted that it would not sanction the creation of hostility by a beneficiary of a trust in order to effect the removal of a trustee.¹¹⁷

Existence of Trust Relationship. A common real estate practice in Texas is to place title for convenience in an individual as “trustee” without the creation of any express trust. The practice has long been recognized in the Texas Trust Act¹¹⁸ and is still recognized in the Texas Trust Code.¹¹⁹ The practice demands care, however, as demonstrated by *Corsi v. Nolana Development Association*.¹²⁰

In *Corsi* Nolana Development Association sued Ann R. Corsi for breach of her fiduciary duties as trustee. The Association, a joint venture composed of three individuals, owned as its sole asset undeveloped land in Hidalgo County. As part of a refinancing transaction, the land was placed in the name of Ann R. Corsi, trustee. Except for a deed of trust she alone signed, no document recognized the trust or assigned any duties to her as trustee. Payments on the loan secured by the land fell into default, and eventually the property was sold at a foreclosure sale. The joint venture then brought suit for breach of fiduciary duty. The trial court awarded damages to the Association for the alleged breach.

On appeal Mrs. Corsi argued that she was a trustee in name only, that the trust was a passive trust, and that no evidence or insufficient evidence showed that she had any duties with respect to the trust. The court of appeals acknowledged that the mere use of the word “trustee” would not of

111. This standard was held applicable to decisions regarding a trial court’s abuse of discretion in *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649, 651 (Tex. 1970).

112. 661 S.W.2d at 913.

113. *Id.*

114. *Id.* at 914.

115. *Id.*

116. *Id.*

117. *Id.*

118. Texas Trust Act, ch. 148, § 8, 1943 Tex. Gen. Laws 232, 234 (repealed 1983).

119. TEX. PROP. CODE ANN. § 114.082(a) (Vernon 1984).

120. 674 S.W.2d 874 (Tex. App.—Corpus Christi 1984, writ granted).

itself create a trust and that since the trustee was given no affirmative powers and duties, the trust at issue was "passive or dry."¹²¹ According to the court, in such a trust the beneficiary is entitled to actual possession and enjoyment of the property and is also entitled to dispose of it.¹²² Legal title, not merely an equitable interest, vests immediately in the beneficiary upon execution of the deed.¹²³ As a matter of law, therefore, Mrs. Corsi could not have breached her fiduciary duty to the Association.¹²⁴ The appellee responded that even if an express trust failed, a resulting trust arose. The court answered that even assuming a resulting trust arose, the evidence was insufficient to show the terms of the trust or the conditions under which it arose.¹²⁵ The judgment of the court of appeals therefore reversed the trial court's allowance of recovery against Mrs. Corsi.¹²⁶

*Otto v. Klement*¹²⁷ addressed the issue of the admissibility of parol testimony to determine the ownership of deposited funds owned by a decedent. Lorraine M. Otto owned at the time of her death a checking account and a savings account, both in the form of a joint tenancy with right of survivorship. Her brother, Harry Joseph Otto, was the only other signatory to these accounts. The decedent also owned at death a certificate of deposit payable to "Lorraine Marie Otto or Harry Otto, Trustee." Lorraine Otto died intestate on October 18, 1980, and her sister, Olivia C. Klement, qualified as administratrix of the estate. Harry Otto sued for a declaration of the ownership of the funds. Over his objections the trial court admitted testimony bearing on Lorraine Otto's intent in establishing the accounts and her intended distribution of the funds. The testimony indicated that she wished her assets to be distributed equally among her sisters and brothers. In light of this testimony the trial court denied Harry Otto the full ownership of the funds held in the two joint survivorship accounts and in the certificate of deposit.

Relying on section 439(a) of the Probate Code,¹²⁸ which became effective on August 27, 1979, the appellate court held that the survivor owns all funds in a joint survivorship account and that a court may not consider evidence of the depositor's intent of ownership.¹²⁹ Accordingly, the parol testimony admitted by the trial court was ineffective to change legal ownership of the checking and savings account funds, and Harry Otto was entitled to these funds.¹³⁰ Ownership of the certificate of deposit was not so easily resolved, however. Harry Otto contended that Lorraine Otto made herself a joint ten-

121. *Id.* at 877-78.

122. *Id.* at 877.

123. *Id.*

124. *Id.* at 878.

125. *Id.* at 878-79.

126. *Id.* at 879.

127. 656 S.W.2d 678 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

128. TEX. PROB. CODE ANN. § 439(a) (Vernon 1980) provides that sums that remain on deposit in a joint account at death belong to the surviving party, if the account is subject to a written agreement under which the interest of the deceased party is made to survive to the surviving party.

129. 656 S.W.2d at 681.

130. *Id.*

ant and beneficiary of Harry Otto, by having the certificate issued to "Lorraine Marie Otto or Harry Otto, Trustee," and that she thereby created a trust account of funds that he, as trustee, owned. The court of appeals nevertheless noted that the word "trustee" does not alone give rise to a trust and pointed out that section 436(14) of the Probate Code¹³¹ requires that in order for a deposit to become a trust account the trust relationship must be established by the form of the account and of the deposit agreement with the depository.¹³² The record did not contain any deposit agreement establishing the certificate of deposit as a trust account. The court conceded that the form of the certificate served to vest some interest and control in Harry Otto, but it was uncertain whether Lorraine Otto intended to name herself the beneficiary of Harry Otto and to vest absolute ownership of the funds in him at death or whether Lorraine Otto intended that Harry Otto as trustee administer the funds not for himself, but for others at her death.¹³³ Because of this ambiguity the court of appeals held that the trial court properly admitted parol evidence to ascertain the correct meaning of the language.¹³⁴ The appellate court, therefore, upheld the trial court's determination that Harry Otto was not entitled to all of the funds represented by the certificate of deposit.¹³⁵

Constructive Trust. In *Stout v. Clayton*¹³⁶ O'Neil Stout, the divorced husband of the deceased Lillie Stout, sued as guardian of the estate of their adopted son, John. The defendants were Lillie's two older sisters, Mary Ann Metz and Martha Clayton. The plaintiff sought to set aside a deed executed by Lillie in favor of the defendants. The property in question was Lillie's one-third interest in a ranch that she and her two sisters had inherited from their mother. Lillie had long been diabetic and her condition worsened during 1977. In that year she executed a deed to her share of the ranch, naming her two sisters as grantees. An attorney drew the deed but did not record it until the date of Lillie's death in 1978.

The plaintiff pled for the imposition of a constructive trust on the property conveyed to the sisters.¹³⁷ A finding that a constructive trust should be imposed would mandate that the sisters reconvey the property to Lillie's heir, unless the defendants proved the existence of a bar, such as fraud against

131. TEX. PROB. CODE ANN. § 436(14) (Vernon 1980) provides that a trust account means an account in the name of one or more parties as trustees for one or more beneficiaries when the relationship is established by the form of the account and the deposit agreement with the financial institution and no subject of the trust exists other than the sums on deposit in the account.

132. 656 S.W.2d at 682.

133. *Id.*

134. *Id.*

135. *Id.* at 682-83.

136. 674 S.W.2d 821 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

137. The court stated that such a trust was an equitable remedy, appropriate when a confidential relationship exists between grantor and grantee and the grantor relies on the oral promise of the grantee to reconvey the property. *Id.* at 823.

creditors.¹³⁸ The defendants maintained that the plaintiff was not entitled to a constructive trust because Lillie engaged in a fraudulent conveyance as a matter of law. The record showed that Lillie believed it necessary to convey the property to her sisters in order to collect Medicaid and social security benefits. Mary Ann testified that she and Martha were told that Lillie could not receive benefits as long as she owned the land.

The appellate court recognized that the directed verdict in favor of the two sisters would have been proper if a fraudulent conveyance had occurred.¹³⁹ The defendants, however, did not prove actual fraud or an actual creditor position of the government. Even if Lillie had thought she was engaged in a fraudulent transaction, no proof of a fraudulent transaction had been presented. The court could not ascertain from the record whether the government was a creditor.¹⁴⁰ Because no evidence proved a conveyance in fraud of creditors, no bar to impressing the land with a constructive trust was present. The court therefore ordered the defendants to execute a deed conveying the land in question to John Stout.¹⁴¹

III. ESTATE ADMINISTRATION

Probate Court Jurisdiction. In recent years the most troubling issue in controversies involving estates has been the jurisdictional questions raised by sections 4 and 5 of the Texas Probate Code.¹⁴² Practitioners must often make difficult choices as to the proper forum. As a result of the existing confusion, litigation involving personal representatives may have to be determined on procedural grounds. Recent cases demonstrate the complexity present in this area.

In *Seay v. Hall*¹⁴³ Willie Rhoneta Seay brought a wrongful death and survival action against several defendants in a Dallas County district court for the death of her husband from injuries received when a boiler safety valve released scalding water and steam on him. Five days later she initiated the same causes of action against the same defendants in the probate court of Dallas County, in which administration of her husband's estate was pending. The defendants moved to dismiss in the probate court, claiming that the court lacked jurisdiction over both causes. Mrs. Seay argued that the probate court had jurisdiction over both causes of action under section 5 and 5A of the Probate Code.¹⁴⁴ The probate court ordered dismissal for want of

138. As authority for this proposition the court cites to *Mills v. Gray*, 147 Tex. 33, 39-40, 210 S.W.2d 985, 988-89 (1948). 674 S.W.2d at 824.

139. 674 S.W.2d at 826.

140. *Id.*

141. *Id.*

142. TEX. PROB. CODE ANN. §§ 4, 5 (Vernon 1980).

143. 677 S.W.2d 19 (Tex. 1984).

144. TEX. PROB. CODE ANN. § 5(d) (Vernon 1980) provides that courts that exercise original probate jurisdiction are empowered to hear all matters incident to an estate. *Id.* § 5A(b) provides that when the jurisdiction of a probate court is concurrent with that of a district court, causes of action "appertaining to estates" or "incident to an estate" are to be brought in the probate court. Furthermore, section 5A(b) defines the phrases "appertaining to estates" and "incident to an estate" as including:

jurisdiction.

The court of appeals concluded that the probate court had jurisdiction over the survival cause of action, but not over the wrongful death cause of action.¹⁴⁵ Quoting the definition of personal property in section 3(z) of the Probate Code,¹⁴⁶ it decided that the survival cause of action was an asset of the estate, and thus a matter incident to the estate.¹⁴⁷ The court noted that a cause of action for personal injury survives the death of the injured party and may be asserted by the heirs or administrator on behalf of the estate.¹⁴⁸ On the other hand, a wrongful death action belongs to the statutory beneficiaries, who may or may not be heirs or devisees of the decedent.¹⁴⁹ Thus, such an action cannot be an estate asset, and the probate court had jurisdiction over only the survival action.¹⁵⁰

The Texas Supreme Court affirmed the appellate court's judgment that the probate court had no jurisdiction over the wrongful death action, but reversed the judgment holding that the probate court did have jurisdiction over the survival cause of action.¹⁵¹ To reach its decision the court focused on the breadth of three statutory terms: "appertaining to estates" and "incident to an estate,"¹⁵² "all matters relating to the settlement . . . of estates"¹⁵³ and "claims."¹⁵⁴ After reviewing extensively the constitutional and legislative history of the relevant provisions of the Probate Code, the court set forth guidelines for construction of the three terms. It observed that the first term was designed to limit probate court jurisdiction to matters in

[T]he probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also include, but are not limited to, all claims by or against an estate, all actions for trial of title to land and for the enforcement of liens thereon, all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the applying of constructive trusts, and generally all matters relating to the settlement, partition, and distribution of estates of wards and deceased persons.

Id. § 5A(b).

Section 3(c) defines "claims" to include "liabilities of a decedent which survive, including taxes, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration, estate and inheritance taxes, liabilities against the estate of a minor or incompetent, and debts due such estates." *Id.* § 3(c).

145. 663 S.W.2d 468, 469 (Tex. App.—Dallas 1983), *rev'd*, 677 S.W.2d 19 (Tex. 1984).

146. "'Personal property' includes interests in goods, money, *choses in action*" TEX. PROB. CODE ANN. § 3(z) (Vernon 1980) (emphasis added).

147. 663 S.W.2d at 470.

148. *Id.*

149. *Id.* at 472.

150. *Id.* at 472-73.

151. 677 S.W.2d at 20.

152. TEX. PROB. CODE ANN. § 5A(b) (Vernon 1980).

153. *Id.*

154. *Id.* § 3(c). The Texas Supreme Court in *Seay* distinguished two of its precedents, *English v. Cobb*, 593 S.W.2d 674 (Tex. 1979), and *Lucik v. Taylor*, 596 S.W.2d 514 (Tex. 1980). *English* held that a county court at law handling probate matters had jurisdiction to determine ownership to money in a savings account jointly in the name of the decedent and her sister. 593 S.W.2d at 676. In *Lucik* an injunction that prohibited will contestants from changing the form or location of the decedent's assets was upheld as being incident to an estate. 596 S.W.2d at 516. The court noted that *Seay* did not involve any probate asset similar to a savings account containing a fixed sum of money. 677 S.W.2d at 24.

which the "controlling issue . . . was the settlement, partition, or distribution of an estate."¹⁵⁵ It concluded that neither wrongful death nor survival actions were intended to be matters appertaining to or incident to estates.¹⁵⁶ Second, it held that "claims" are limited to those of a liquidated nature.¹⁵⁷ As a result, neither cause of action before the court constituted a claim by the estate.¹⁵⁸ With respect to the third statutory phrase the court again turned to the "controlling issue" standard, expressing approval of judicial interpretations that permit a probate court to exercise jurisdiction when the controlling issue of the action relates to settlement, partition, or distribution of the estate.¹⁵⁹ Neither cause of action could satisfy this test.¹⁶⁰ As additional support for its decision, the court noted that the intent of the statutes at issue was to utilize the special expertise of the statutory probate court judges in handling matters appertaining to an estate.¹⁶¹ The court asserted that personal injury litigation was not within this special domain.¹⁶²

Other recent decisions have wrestled with the jurisdiction of statutory probate courts. In *Nichols v. Prejean*¹⁶³ Warren W. Nichols, suing in his capacity as independent executor, sought a temporary and permanent injunction enjoining one defendant from occupying or possessing certain real property of an estate pending the administration of that estate. Nichols also sought a return from that defendant of certain personal property that was part of the estate. In addition Nichols sought to recover from a second defendant certain sums to which the estate was entitled as a result of that defendant's breach of fiduciary duties while acting as a guardian of the estate. Finally, he sued to recover from two other defendants as sureties upon the second defendant's bond as guardian. The district court granted the defendants' plea in abatement to dismiss the suit, and the executor appealed. The appellate court affirmed, holding that all the causes of action the executor asserted fell within the term "matters incident to the estate"¹⁶⁴ and that the constitutional county court of San Augustine County had exclusive jurisdic-

155. 677 S.W.2d at 23 (emphasis by the court).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 24.

160. *Id.*

161. *Id.*

162. *Id.* A case similar to *Seay* is *Adams v. Calloway*, 662 S.W.2d 423 (Tex. App.—Corpus Christi 1983, no writ), which involved a tort action against R.W. Calloway as administrator of the estate of Charles W. Adams. The action arose out of an airplane crash that killed Adams and injured the plaintiff. The action was filed in a district court in Dallas County while probate was pending in a statutory probate court. The district court sustained the defendant's plea in abatement with regard to the exclusive jurisdiction of the probate court. On appeal, the plaintiff contended that an unliquidated tort claim does not fall within the ambit of matters incident to the estate and so was properly brought in the district court. The appellate court rejected that contention, stating that § 5A of the Probate Code covers all claims, both liquidated and unliquidated, against an estate. *Id.* at 427. Consequently, the tort claim against the estate had to be brought in the probate court. *Id.* The court relied in part on that aspect of the court of appeals decision in *Seay* that was later reversed by the Texas Supreme Court. *Id.* at 426. *Seay* has resolved this particular jurisdictional question.

163. 673 S.W.2d 394 (Tex. App.—Tyler 1984, no writ).

164. TEX. PROB. CODE ANN. § 5(d) (Vernon 1980).

tion to hear the cause of action as matters incident to the estate.¹⁶⁵

In *Pullen v. Swanson*¹⁶⁶ Gretchen S. Pullen sued Jeanelle Swanson, executrix of the estate of J.F. Swanson, in a district court of Harris County to collect on a series of promissory notes executed by the decedent. The decedent's will was admitted to probate in a probate court in Harris County before the collection suit was filed in district court. The defendant filed in the district court a "Motion to Dismiss and/or Alternatively Plea in Abatement." The district court granted the motion and abated the action, and Pullen appealed. The appellant argued that the district court had original jurisdiction over a suit to collect from an estate on promissory notes executed by the deceased even if an estate proceeding is already pending in a statutory probate court. The appellate court, however, asserted that the plain language of section 5A equated "claims by or against an estate"¹⁶⁷ with the phrases "appertaining to estates" and "incident to an estate,"¹⁶⁸ and therefore affirmed the district court's abatement.¹⁶⁹

In *Farah v. Fashing*¹⁷⁰ William F. Farah as relator brought an action for writ of mandamus against a judge of a county court at law in El Paso County. Farah sought to set aside an order dismissing a third-party malpractice action that he had filed in a probate proceeding. Beneficiaries of the estate had protested Farah's final accounting and filed a claim on behalf of the estate, seeking a money judgment against him because of his alleged mismanagement of the estate. Farah had responded by filing in the same probate proceeding a third-party action for indemnity and contribution against the attorneys who represented him in his capacity as administrator. He had alleged that the actions challenged by the beneficiaries were carried out under the guidance of the attorneys and that they should be liable to him for indemnification or contribution should his actions be found improper. The probate court had dismissed the third-party action for want of subject matter jurisdiction.

The relator contended before the appellate court that the county court at law had ancillary probate jurisdiction over matters "incident to an estate"¹⁷¹ of a deceased. The appellate court relied on *Lucik v. Taylor*¹⁷² for its position that section 5(d) of the Probate Code¹⁷³ does confer ancillary jurisdiction upon the county probate courts, but that the outcome of the additional controversy must be "necessary" to the resolution of the particular estate.¹⁷⁴ The court saw no necessary relationship between Farah's recovery from the attorneys and the augmentation of any estate assets flowing to the

165. 673 S.W.2d at 395-96.

166. 667 S.W.2d 359 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

167. TEX. PROB. CODE ANN. § 5A(b) (Vernon 1980).

168. *Id.*

169. 667 S.W.2d at 362-64.

170. 666 S.W.2d 341 (Tex. App.—El Paso 1984, no writ).

171. TEX. PROB. CODE ANN. § 5(d) (Vernon 1980).

172. 596 S.W.2d 514, 516 (Tex. 1980). For discussion of *Lucik*, see *supra* note 154.

173. TEX. PROB. CODE ANN. § 5(d) (Vernon 1980).

174. 666 S.W.2d at 342.

beneficiaries.¹⁷⁵

With the decision of *Seay v. Hall*,¹⁷⁶ some of the confusion with respect to jurisdiction may be abating. *Seay* made clear that wrongful death and survival actions are not "incident to an estate." If the courts follow the Texas Supreme Court's dicta relating to claims and matters using the special expertise of the statutory probate court, a touchstone in determining where jurisdiction lies will be created.

Secured Claims Against an Estate. Cessna Finance Corp. v. Morrison,¹⁷⁷ a case involving Cessna's secured claim against a decedent's estate over the purchase of an airplane, demonstrates the necessity for care involving claims. The decedent executed a promissory note and a conditional sales contract with Cessna that provided for a deferred payment in eighty-four monthly installments. In the sales transaction the seller reserved a security interest that was assigned to Cessna along with the contract and note. The decedent died in Bolivia, apparently as a result of the crash of the airplane. Cessna filed a claim with Lucian L. Morrison, the administrator of the decedent's estate, for the balance due on the secured debt. Morrison filed his written objections to the claim, pointing out that the claim failed to specify whether Cessna desired to have the claim allowed and approved as a matured secured claim under section 306(a)(1) of the Probate Code, to be paid in due course of administration, or whether it desired to have the claim allowed, approved, and fixed, under section 306(a)(2), as a preferred debt and lien against a specific property securing the debt.¹⁷⁸ In addition, the administrator rejected Cessna's claim in its entirety. He argued before the probate court that, because Cessna had failed to specify an election under section 306(a), its claim should be treated as a preferred debt and lien claim against the specific property. The probate court directed that Cessna's claim be classified as a preferred debt and lien claim limited to the aircraft comprising the security for the debt.

Before the appellate court Cessna contended that, because its claim was presented within the six-month period provided by section 298(a) of the Probate Code,¹⁷⁹ the probate court exceeded its powers in classifying the claim

175. *Id.*

176. 677 S.W.2d 19 (Tex. 1984); *see supra* text accompanying notes 143-62.

177. 667 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1984, no writ).

178. TEX. PROB. CODE ANN. § 306(a) (Vernon 1980) provides:

(a) Specifications of Claim. When a secured claim against an estate is presented, the claimant shall specify therein, in addition to all other matters required to be specified in claims:

(1) Whether it is desired to have the claim allowed and approved as a matured secured claim to be paid in due course of administration, in which event it shall be so paid if allowed and approved; or

(2) Whether it is desired to have the claim allowed, approved, and fixed as a preferred debt and lien against the specific property securing the indebtedness and paid according to the terms of the contract which secured the lien, in which event it shall be so allowed and approved if it is a valid lien; provided, however, that the personal representative may pay said claim prior to maturity if it is for the best interest of the estate to do so.

179. TEX. PROB. CODE ANN. § 298(a) (Vernon 1980).

as a preferred debt and lien against the security. Cessna further contended that the claim itself reflected an election to have the claim allowed as a matured secured claim for money payable out of the general assets of the estate. Morrison pointed out that the secured creditor must make an affirmative election within the six-month period following the original grant of letters; otherwise, the claim is to be treated as a preferred debt and lien against the specific security. The court of appeals sided with the administrator and held that because Cessna did not make the affirmative election required by section 306(a) the probate court was authorized to treat the claim as a preferred debt and lien against the specific property, as provided by section 306(b) of the Probate Code.¹⁸⁰ Cessna's claim did not affirmatively reflect an election to proceed under section 306(a), even though the claim alleged on information and belief that the aircraft had been lost or destroyed.¹⁸¹ The court noted that the administrator had timely filed its objections to the claim, but Cessna made no effort thereafter to amend or supplement the claim to indicate the required election.¹⁸² As a result of this decision Cessna was left with nothing but a substantially worthless preferred lien against the wrecked plane.

Judgment Against an Executor. The family dispute in *Montgomery v. Kennedy*¹⁸³ centered on a bill of review to set aside a prior agreed judgment. Virginia Lou Wilkinson Montgomery and her minor children sued her brother Jack B. Wilkinson, Jr. and her mother Virginia McEntire Kennedy, who were co-independent executors and trustees of a trust created in 1969 under the will of Virginia Lou's father. The will directed that one-fourth of the residuary estate be placed in a trust with Virginia Lou as beneficiary and with her children eventually to receive whatever remained of the trust corpus. By 1974 Jack Jr. had not yet funded the testamentary trust, and Virginia Lou consulted her attorney. The attorneys for Virginia Lou and Jack Jr. sought an amicable solution. Without formal discovery procedures Virginia Lou's attorney was given access to documents from the estate's files in Jack Jr.'s office. When the attorney visited the office in September of 1974, the brother did not disclose the existence of new assets and dealings in the estate, and his attorneys furnished balance sheets and income statements that were no longer current. The negotiations eventually produced a compromise figure of \$350,000 for Virginia Lou and her children. In order to make the settlement binding on the minor children, a "friendly" suit was filed, and the settlement was incorporated in an agreed judgment. After the judgment Virginia Lou discovered an oil and gas lease that had not been disclosed in September 1974. She then filed the bill of review to set the judgment aside.

The Texas Supreme Court recognized that a bill of review to set aside a former judgment would be justified when that judgment was obtained by

180. 667 S.W.2d at 583.

181. *Id.*

182. *Id.*

183. 669 S.W.2d 309 (Tex. 1984).

fraud.¹⁸⁴ Only extrinsic fraud, however, as opposed to intrinsic fraud, would entitle Virginia Lou and her children to bill of review relief.¹⁸⁵ The court took note of its long-standing position that in the context of a fiduciary's duty of full disclosure, in a suit to partition or divide assets the fraudulent concealment of an asset constitutes extrinsic fraud, and a court will therefore set aside its former judgment in an equitable proceeding.¹⁸⁶ Consequently, the court held that the fraud at issue was extrinsic and remanded the cause to the trial court.¹⁸⁷

184. *Id.* at 312.

185. *Id.* Extrinsic fraud is collateral in that the fraud must be collateral to the matter actually tried and not a matter that was actually or potentially at issue in the trial. *Id.* at 312-13 (citing *Crouch v. McGaw* (Panama Ref. Co.), 134 Tex. 633, 639, 138 S.W.2d 94, 97 (1940)). Intrinsic fraud, on the other hand, occurs when the fraudulent acts relate to an issue involved in the original action, or when those acts were litigated or could have been litigated therein. 669 S.W.2d at 313 (citing *Mills v. Baird*, 147 S.W.2d 312, 316 (Tex. Civ. App.—Austin 1941, writ ref'd)).

186. 669 S.W.2d at 313. The highest court distinguished a bill of review in which the alleged specific fraudulent acts were known and in issue, in which event the fraud is intrinsic. *Id.* at 313-14.

187. *Id.* at 314.

