

January 2011

Wills and Trusts

Gerry W. Beyer

Recommended Citation

Gerry W. Beyer, *Wills and Trusts*, 64 SMU L. REV. 597 (2011)
<https://scholar.smu.edu/smulr/vol64/iss1/28>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

WILLS AND TRUSTS

Gerry W. Beyer*

TABLE OF CONTENTS

I. INTESTACY	598
II. WILLS.....	598
A. TESTAMENTARY INTENT.....	598
B. INTERPRETATION AND CONSTRUCTION	599
C. PRETERMITTED CHILDREN	601
D. CONTESTS	603
1. <i>Standing</i>	603
2. <i>Undue Influence</i>	604
III. ESTATE ADMINISTRATION	605
A. JURISDICTION	605
1. <i>District Court</i>	605
2. <i>Transfer</i>	605
B. APPEAL	606
C. STATUTE OF LIMITATIONS	607
D. LOST WILL	608
E. LATE PROBATE	608
F. INDEPENDENT ADMINISTRATION.....	609
1. <i>Unsuitability of Named Executor</i>	609
2. <i>Removal of Independent Executor</i>	609
G. RECOVERY FOR UNAUTHORIZED BANK TRANSACTIONS	610
H. CONTEMPT	611
I. ATTORNEY AD LITEM COSTS.....	612
IV. TRUSTS	612
A. JURISDICTION	612
B. REMOVAL OF TRUSTEE.....	613
C. SUCCESSOR TRUSTEE.....	614
D. CRIMINAL LIABILITY	614
V. CONCLUSION	614

THIS article discusses judicial developments in Texas related to the law of intestacy, wills, estate administration, trusts, and other estate planning matters. The reader is warned that not all newly de-

* Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law. B.A., Eastern Michigan University; J.D., Ohio State University; LL.M. & J.S.D., University of Illinois. The author gratefully acknowledges the excellent assistance of Kerri Griffin, J.D., Texas Tech University School of Law, in the preparation of this article.

cided cases during the Survey period are presented and not all aspects of each cited case are analyzed. You must read and study the full text of each opinion before relying on it or using it as precedent. The discussion of most cases includes the moral, that is, the important lesson to be learned from the case. By recognizing situations that have resulted in time-consuming and costly litigation, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

I. INTESTACY

The Texas Supreme Court in *Frost National Bank v. Fernandez*, held that the discovery rule is not applicable to heirship claims by non-marital children.¹ In *Frost*, an alleged heir brought suit to be declared an heir of the testator who had died over forty years earlier. The testator's will left his entire estate to his wife and the estate was closed in 1952. The alleged heir hoped that by setting aside a 1949 judgment which determined that none of the testator's estate passed by intestacy, she could claim an intestate share of this property. The alleged heir's excuse for not bringing the action in a timely manner, that is, within the four-year residual limitations period,² was that she was unaware of her possible status as an heir until recently.

The Texas Supreme Court held that the discovery rule does not apply to inheritance or heirship claims by non-marital children or to bill of review claims to set aside previous probate judgments.³ This holding is consistent with the Texas Supreme Court's 1997 decision in *Little v. Smith*,⁴ which rejected the discovery rule for heirship claims by adoptees. As in *Little*, the supreme court determined that the "strong public interest in according finality to probate proceedings" prevailed over the possible claim of a potential heir.⁵ Accordingly, a person with questionable parentage interested in making inheritance claims must determine the identity of his or her parents in a timely manner and then monitor the parent so he or she may bring a timely claim after the parent dies.

II. WILLS

A. TESTAMENTARY INTENT

Two recent cases serve as warnings to non-attorneys and attorneys alike of the importance of making sure a will clearly reflects the testator's intent to create an at-death disposition of property. First, in *In re Estate of Hendler*,⁶ the Dallas Court of Appeals addressed a situation where the testator wrote a statement on the bottom of the last page of his valid

1. 315 S.W.3d 494, 512 (Tex. 2010).

2. *Id.* at 509 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 1985)).

3. *Id.* at 511.

4. 943 S.W.2d 414, 420 (Tex. 1997).

5. *Frost Nat'l Bank*, 315 S.W.3d at 511 (quoting *Little v. Smith*, 943 S.W.2d 414, 421 (Tex. 1997) (internal quotations omitted)).

6. 316 S.W.3d 703 (Tex. App.—Dallas 2010, no pet.).

attested will indicating he was divorced and that his prior will still existed. The trial court granted summary judgment that this holographic material was a valid codicil and acted to republish the will.⁷

The court of appeals reversed,⁸ determining there were still fact issues of whether the testator had testamentary intent when he placed the hand-written statement on the bottom of his attested will.⁹ Thus summary judgment was improper. The court explained that the testator's words could be interpreted in two ways: (1) as a mere recitation of facts that he was divorced and had not revoked his will, or (2) as a statement that he reviewed his prior will with his divorces in mind and his prior will still stated his property disposition desires.¹⁰ Because both interpretations were reasonable, the trial court erred in issuing a summary judgment.¹¹

Second, in *In re Estate of Allen*,¹² a son probated his mother's will as a muniment of title and convinced the trial court to admit thirteen writings as codicils to his mother's will. His siblings appealed, asserting that these writings were not valid codicils because they did not demonstrate that their mother had testamentary intent.

The Tyler Court of Appeals reversed, agreeing with the siblings that these writings lacked testamentary intent.¹³ The writings contained extensive lists of personal property with indications that these "statements" of property were "for" the son. Their mother signed the writings and two individuals witnessed them. However, they were not labeled as "wills" or "codicils" and lacked any language showing the mother's intent for these writings to dispose of property upon her death. The court explained that merely indicating in a "statement" that property is "for" someone does not show an intent to make an at-death property disposition.¹⁴

B. INTERPRETATION AND CONSTRUCTION

The courts of appeals in Texas were busy during the Survey period resolving interpretation and construction issues often caused by poor will drafting. The Fort Worth Court of Appeals in *In re Estate of Florence*¹⁵ notably held that the statute of limitations for interpretation actions begins to run when parties advocate conflicting interpretations, not when the testator's will is admitted to probate. In this case, the testator's will gave his wife, among other things, his "tangible property." The residuary of the estate passed into a testamentary trust. The wife's death over twenty years later raised an issue as to whether real property was included within the term "tangible property," thus passing part of the wife's

7. *Id.* at 706–07.

8. *Id.* at 714.

9. *Id.* at 708–09.

10. *Id.* at 708.

11. *Id.*

12. 301 S.W.3d 923 (Tex. App.—Tyler 2009, pet. denied).

13. *Id.* at 929.

14. *Id.*

15. 307 S.W.3d 887, 893 (Tex. App.—Fort Worth 2010, no pet.).

estate to her under the testator's will, or whether this real property passed through the testamentary trust.

The court of appeals focused not on the merits of the claim but rather on whether the statute of limitations had run on the interpretation action brought by the beneficiaries of the wife's will.¹⁶ Both sides agreed that the residuary four-year statute of limitations applied but disagreed as to when the time began to run. The court rejected the argument that the statute of limitations began to run from the date the testator's will was admitted to probate.¹⁷ Instead, the court determined that the statute did not run until one of the parties claimed that the term "tangible property" included both tangible personal property and real property.¹⁸

*In re Estate of Catlin*¹⁹ involved an oddly-worded will in which the residuary of the testator's estate passed into a testamentary trust for the benefit of a beneficiary who predeceased the testator and whose death caused the trust to terminate. A debate arose regarding whether the residuary estate passed to the remainder beneficiaries of the testamentary trust or via intestacy. Both the trial and appellate court determined that the residuary passed to the remainder beneficiaries of the trust even though the trust was both created and terminated at the same moment.²⁰ The Amarillo Court of Appeals was unwilling to adopt a different interpretation because to do so would render terms of the will meaningless, circumvent the testator's intent—as reflected in the will—to give his son only a small part of the estate, and cause 90% of the testator's estate to pass by intestacy to this son.²¹

Testator's holographic will in the Beaumont Court of Appeals case of *In re Estate of Craigen* provided for his wife to "get[] everything till she dies," but later in the will he left his wife "all [] real & personal property."²² Both the trial court and court of appeals determined that the will was ambiguous.²³ Although there was no extrinsic evidence of the testator's intent, the courts applied standard interpretation rules to conclude that the testator intended to leave his wife all his property outright, and not just a life estate.²⁴

The court based its conclusion on a variety of factors including that: (1) the will was drafted by a lay individual and thus terms are given their popular rather than technical meaning, so that "till she dies" does not create a life estate but merely states the obvious—that a person may only use property while alive, (2) if the will granted his wife a life estate, the remainder would pass via intestacy and wills are interpreted to avoid in-

16. *Id.*

17. *Id.* at 891.

18. *Id.* at 893.

19. 311 S.W.3d 697 (Tex. App.—Amarillo 2010, pet. denied).

20. *Id.* at 702.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 828–29.

testacy, (3) Texas law favors the early vesting of interests, and (4) the will was ambiguous because the Testator referred to his wife by two different first names.²⁵

The last interpretation case is *In re Estate of Slaughter*,²⁶ decided by the Texarkana Court of Appeals. In this case, the testator died in 1965 and his 1955 holographic will was duly admitted to probate. A dispute arose whether this will either (1) devised all his mineral rights to his three sons to be held as tenants in common or (2) devised only the royalty rights to his three sons as tenants in common with the remainder of the mineral estate passing to the sons in equal but divided interests. The trial court determined that the will was patently ambiguous and determined that the testator meant to devise all mineral interests to his sons as tenants in common.²⁷ The court of appeals reversed.²⁸

The court of appeals began by examining the testator's will that devised each son 158 acres of land and also provided that the three sons were to "share and share alike production royalty and unproduction royalty."²⁹ The court explained that the testator's language was unambiguous in that it transferred 158 acres to each son and reserved the royalty interest from the entire tract to be held by the sons as tenants in common, each owning an undivided one-third of the royalty interest.³⁰ The court recognized that the term "unproduction royalty" was an "unusual expression," but was nonetheless unambiguous, meaning "to cease production or not to produce oil and gas," or what is commonly known as, shut-in royalty (royalties paid to keep the lease in force when a well capable of producing oil and gas is not utilized because there is no market for the oil and gas).³¹

C. PRETERMITTED CHILDREN

A parent has no obligation to provide a testamentary gift for his or her child, even if the child is a minor.³² Thus, a parent may disinherit one or more children. However, to protect a child from an accidental or inadvertent disinheritance, Texas law provides a forced share of the parent's estate for certain children who are born or adopted after the parent executed his or her will.³³ Two cases decided during the Survey period shed light on the situations where a child may or may not be successful in obtaining this forced share.

25. *Id.* at 827–29. Surprisingly, the court did not mention the construction rule that if two provisions of a will conflict, the latter provision controls. *See, e.g.,* *Martin v. Dial*, 57 S.W.2d 75, 79 (Tex. Comm'n App. 1933).

26. 305 S.W.3d 804 (Tex. App.—Texarkana 2010, no pet.).

27. *Id.* at 806.

28. *Id.* at 812.

29. *Id.* at 807–08.

30. *Id.* at 810.

31. *Id.* at 811–12.

32. *See* TEX. PROB. CODE ANN. § 67 (West Supp. 2010).

33. *Id.*

In *Bailey v. Warren*,³⁴ the testator's valid will left his entire estate to his wife, but if she did not survive him to his heirs-at-law. The testator had two non-marital children who claimed they were entitled to his estate as pretermitted children. Son One claimed that although he was born twelve years before the testator executed the will, he was nonetheless pretermitted because the testator was not adjudicated as his father until one year after he executed his will. Son Two claimed he was pretermitted because he was born after the testator executed the will and was not provided for, even though the contingent beneficiary was the testator's "heir-at-law." The trial court granted summary judgment in favor of both children.³⁵

The Tyler Court of Appeals reversed.³⁶ With regard to Son One, the court rejected the argument that he was "constructively born" after will execution because the testator was not adjudicated as his father until after he executed his will.³⁷ Instead, once an adjudication of paternity occurs, Son One is treated as being the testator's child from birth, which was twelve years prior to will execution.³⁸

The court began its analysis of Son Two's case by recognizing that Son Two was a pretermitted child because he was born many years after the testator executed his will.³⁹ However, Son Two was mentioned or otherwise provided for in the testator's will and was thus not entitled to a pretermitted child's share.⁴⁰ The contingent class gift to the testator's "heirs-at-law" encompassed Son Two as Son Two would have been one of the testator's heirs had the testator's wife not survived.⁴¹ The court also explained that even if Son Two was not included in this class gift, he would still not be entitled to share in the testator's estate because he would be limited to sharing in the contingent gift to Son One as an heir at law.⁴² Because the testator's wife survived, Son One received nothing, and thus Son Two would receive nothing as well.⁴³

In *In re Estate of Hendler*,⁴⁴ the testator executed a valid will in 1990 leaving his entire estate to his brother. Thereafter, the testator had two children. In 1999, he signed a holographic statement on the last page of his will indicating that his prior will still existed. After the testator's death, his two children claimed that they were pretermitted and thus each entitled to half of the testator's estate. The trial court granted summary judgment rejecting the children's claim, holding that the codicil acted to republish the will and that the children could thus not be treated as born

34. 319 S.W.3d 185 (Tex. App.—Tyler 2010, pet. denied).

35. *Id.* at 188.

36. *Id.* at 187.

37. *Id.* at 191.

38. *Id.*

39. *Id.* at 191.

40. *Id.* at 194.

41. *Id.*

42. *Id.* at 194–95.

43. *Id.* at 195.

44. 316 S.W.3d 703 (Tex. App.—Dallas 2010, no pet.).

after the date the testator executed the will.⁴⁵ In addition, the trial court found that even if the children were pretermitted, they were otherwise provided for and thus precluded from sharing in the estate.⁴⁶

The Dallas Court of Appeals found the summary grant of judgment improper⁴⁷ because it was possible that the children were pretermitted depending on the outcome of a trial on the issue of the validity of the holographic statement as a codicil.⁴⁸ The court then evaluated whether one or both children were “otherwise provided for” so they could not take even if they were determined to be pretermitted, and examined⁴⁹ three possible ways in which the testator provided for his children.⁵⁰ First, the testator paid social security taxes, which allowed his children to receive death benefits.⁵¹ Rejecting the reasoning of the 1999 San Antonio Court of Appeals case *Estate of Gorski v. Welch*,⁵² the court held that the testator did not voluntarily supply the social security death benefits because they are a product of federal law that mandates the payment of social security taxes.⁵³

Second, the court rejected the argument that the testator’s court-ordered child support obligations were sufficient to demonstrate that he provided for his children.⁵⁴ The support order was rendered by default and the obligation ended upon the testator’s death, unlike the order in *Gorski*, which was entered by consent and continued after the testator’s death.⁵⁵

Third, the court agreed that one of the sons was otherwise provided for because the testator named him as a contingent beneficiary on one of his life insurance policies.⁵⁶ The court rejected his argument that a contingent disposition is insufficient because the Probate Code states that the disposition may be “vested or contingent.”⁵⁷

D. CONTESTS

1. Standing

*In re Estate of Redus*⁵⁸ reminds practitioners that the requirements to establish standing to contest a will or probate a will are significantly less than the requirements to contest a will successfully or to have the will admitted to probate. Proponent One sought to probate the testator’s

45. *Id.* at 706–07.

46. *Id.* at 707.

47. *Id.* at 708.

48. *Id.*

49. *Id.* at 711.

50. *Id.* at 712–14.

51. *Id.* at 712.

52. 993 S.W.2d 298 (Tex. App.—San Antonio 1999, pet. denied).

53. *Hendler*, 316 S.W.3d at 712–13.

54. *Id.* at 714.

55. *Id.* at 713–14.

56. *Id.* at 714.

57. *Id.* (quoting TEX. PROB. CODE ANN. § 67(d) (West 2003)).

58. 321 S.W.3d 160 (Tex. App.—Eastland 2010, no pet.).

2007 will, which named Proponent One as the sole beneficiary. Proponent Two claimed that the 2007 will was invalid and sought to probate the testator's 2005 will, which named Proponent Two as a primary beneficiary. The trial court determined that Proponent Two lacked standing and dismissed Proponent Two's action.⁵⁹

The Eastland Court of Appeals reversed.⁶⁰ The court began its analysis by looking at Probate Code section 10, which requires that "a person must have an interest in an estate to have standing."⁶¹ The court then turned to the Probate Code's definition of "interested person."⁶² Even Proponent One agreed that a beneficiary of a prior will has standing. However, Proponent One asserted that Proponent Two failed to introduce important evidence at the in-limine hearing, (such as the 2005 will itself), proof of the elements necessary to probate a missing will, and evidence to overcome the presumption of revocation that arises when the original cannot be produced. The court of appeals explained that Proponent One was "commingling the issues decided in an in-limine hearing with those decided at trial" on the merits.⁶³ To establish standing, it was sufficient for Proponent Two to testify that he was a beneficiary of the testator's 2005 will, file a copy of the will, and present other evidence of the will's existence and his status as a beneficiary (e.g., testimony from the drafting attorney).⁶⁴ Accordingly, Proponent Two had standing.⁶⁵

2. *Undue Influence*

*In re Estate of Russell*⁶⁶ demonstrates that a jury finding of undue influence is very difficult to overturn on appeal, even if the facts supporting the finding are weak. In this case the testatrix's will was successfully contested by her granddaughters who claimed the testatrix was subject to undue influence when she executed her will. The El Paso Court of Appeals affirmed, finding it sufficient evidence to prove the elements of undue influence.⁶⁷

The court of appeals made a summary review of the evidence, focusing on one child's involvement with his mother's execution of a will disinheriting her granddaughters contrary to the provisions of her prior wills.⁶⁸ Despite the testatrix having testamentary capacity, the court determined that because she made an unexpected, unnatural disposition of her property by removing her grandchildren as beneficiaries, the jury could only conclude that this feat was accomplished through the son's exercise of

59. *Id.* at 161–62.

60. *Id.* at 161.

61. *Id.* at 162 (citing TEX. PROB. CODE ANN. § 10 (West 2003)).

62. *Id.* (citing TEX. PROB. CODE ANN. § 3(r)).

63. *Id.*

64. *Id.* at 163.

65. *Id.* at 164.

66. 311 S.W.3d 528 (Tex. App.—El Paso 2009, no pet.).

67. *Id.* at 536.

68. *Id.* at 531–34.

undue influence.⁶⁹

III. ESTATE ADMINISTRATION

A. JURISDICTION

1. District Court

In *Frost National Bank v. Fernandez*,⁷⁰ an alleged heir brought suit in both district court and statutory probate court in an attempt to be declared an heir of the testator who died over 40 years earlier and whose estate was closed in 1952. She hoped that by setting aside a 1949 judgment wherein none of the testator's estate passed by intestacy, she could claim an intestate share of this property. The district court granted summary judgment against the alleged heir. On appeal, the Corpus Christi Court of Appeals held that due to the district court's lack of subject matter jurisdiction, it must abate the proceedings until the probate court resolved the heirship issue.⁷¹

The Texas Supreme Court reversed.⁷² The supreme court held that the alleged heir's "direct attack on a previous judgment vested the district court with subject matter jurisdiction."⁷³ The district court was entitled to take her heirship allegation as true, which then would be sufficient to give her standing.⁷⁴ The supreme court explained that standing existed "regardless of whether the alleged relationship was true or subject to rebuttal on the merits."⁷⁵

The Texas Supreme Court also held that Probate Code section 48(a) "does not authorize a probate court to exercise jurisdiction over heirship claims when an estate has been closed for decades and the decedent did not die intestate."⁷⁶

2. Transfer

*Fernandez v. Bustamante*⁷⁷ demonstrates that failure of a personal representative to qualify (take the oath, post the bond, or both) does not deprive a court of jurisdiction over the administration teaches. Here, Applicant One filed an application for appointment as a temporary administrator in County One and although granted, Applicant One never qualified because she failed to post bond. Applicant Two then filed an

69. *Id.* at 534. The court of appeals also determined that the son tortiously interfered with the granddaughters' inheritance rights and; further, that the trial court appropriately awarded costs against the son despite failing to prove good faith with sufficient cause because the grandchildren were not seeking their attorney fees under Probate Code § 243. *Id.* at 535–36.

70. 315 S.W.3d 494 (Tex. 2010).

71. *Id.* at 497.

72. *Id.*

73. *Id.*

74. *Id.* at 503.

75. *Id.* at 503–04.

76. *Id.* at 497.

77. 305 S.W.3d 333 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

application in County Two. The Houston Fourteenth Court of Appeals determined that County One had jurisdiction to transfer venue to County Two.⁷⁸ The court explained that the probate court in County One obtained jurisdiction when the administration was opened even though Applicant One did not post the required bond.⁷⁹ The Probate Code provides that when venue is proper in more than one court, the court where the application is first filed has jurisdiction to the exclusion of other courts.⁸⁰ A probate proceeding does not terminate merely because the bond was not paid.⁸¹ Instead, the court has jurisdiction until the administration is closed.⁸²

B. APPEAL

The courts of appeal often have to determine whether a trial court's judgment is final and appealable or merely interlocutory. In doing so, they apply the test set forth in *Crowson v. Wakeham*.⁸³ This test provides that if the Probate Code does not state that a judgment is final and appealable, then the judgment is interlocutory "if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of."⁸⁴ Three cases concerning this test were decided during the Survey period.

In *Fernandez v. Bustamante*,⁸⁵ the Houston Fourteenth Court of Appeals faced the issue of whether a venue determination in a probate proceeding is appealable. The court found that the Probate code contained no statute on point⁸⁶ and thus applied the *Crowson* standard.⁸⁷ The court then pointed to Texas Civil Practice & Remedies Code section 15.064(a) and rule 87 of the Texas Rules of Civil Procedure which provide that a venue determination in general "is not a final judgment that is ripe for appeal."⁸⁸ The court found no reason to deviate from the general rule that venue determinations are interlocutory.⁸⁹ Accordingly, the court dismissed the appeal for want of jurisdiction.⁹⁰

In *Pollard v. Pollard*, a husband obtained an order from the trial court to require his wife's independent executor to account under Probate Code section 149A.⁹¹ The executor appealed, arguing that the husband

78. *Id.* at 339.

79. *Id.* at 341-42.

80. *Id.* at 340 (citing TEX. PROB. CODE ANN. § 8(a) (West 2003)).

81. *Id.* at 341.

82. *Id.*

83. 897 S.W.2d 779 (Tex. 1995).

84. *Id.* at 783.

85. 305 S.W.3d 333 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

86. *Id.* at 339.

87. *Id.* at 337-38; see *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995).

88. *Bustamante*, 305 S.W.3d at 338.

89. *Id.* at 339.

90. *Id.*

91. 316 S.W.3d 238 (Tex. App.—Dallas 2010, no pet.).

was not an interested person and lacked standing to request an accounting because his wife had successfully divorced him prior to her death.

The Dallas Court of Appeals dismissed the appeal for lack of jurisdiction⁹² explaining that an order to account is interlocutory and not appealable for two reasons: (1) “No statute declares an order for an accounting to be final,” and (2) the order “is not part of any proceeding other than the overall independent administration of the [wife’s] [e]state.”⁹³

In *Rawlins v. Weaver*, the trial court granted an executor’s order to sell specified real property of the estate.⁹⁴ The Dallas Court of Appeals held that it lacked jurisdiction to hear the appeal because the order was interlocutory and hence non-appealable.⁹⁵

C. STATUTE OF LIMITATIONS

A person dissatisfied with a determination of heirship should timely appeal or file a bill of review. Failure to do so may result in losing an otherwise viable claim as so happened in *In re Estate of Rogers*.⁹⁶ The trial court found that the decedent died intestate, determined heirs, and appointed independent administrators in 2006. In 2009, the decedent’s friends attempted to set aside these orders and probate the decedent’s will. The independent administrators claimed that it was too late to challenge the orders as more than two years had passed from the date of judgment. Both the time to appeal and file a bill of review under Probate Code section 31 had elapsed.⁹⁷ The friends claimed, however, that they were within the four year period to probate a will under Probate Code section 73.⁹⁸ The trial court granted summary judgment in favor of the independent administrators, and the El Paso Court of Appeals affirmed.⁹⁹ The court recognized that normally a will proponent has four years from the date of the testator’s death to probate the will.¹⁰⁰ However, Probate Code section 73 does not address the situation where the court has already entered a final judgment affirming decedent’s intestacy.¹⁰¹ The friends had the option to either appeal the trial court’s judgment or file a bill of review.¹⁰² Because they did neither in a timely manner, they were barred from setting aside the judgment.¹⁰³

92. *Id.* at 239.

93. *Id.* at 240.

94. 317 S.W.3d 512 (Tex. App.—Dallas 2010, no pet.).

95. *Id.* at 514.

96. 322 S.W.3d 361 (Tex. App.—El Paso 2010, no pet.).

97. TEX. PROB. CODE ANN. § 31 (West 2003).

98. *Id.* § 73.

99. *Rogers*, 322 S.W.3d at 362–63.

100. *Id.* at 363.

101. *Id.*

102. *Id.*

103. *Id.* at 364.

D. LOST WILL

The trial court in *In re Estate of Catlin*¹⁰⁴ admitted a lost will to probate under Probate Code section 85.¹⁰⁵ The Amarillo Court of Appeals affirmed, rejecting the contestant's assertion that there was insufficient evidence to establish why the original could not be produced. Thus, the contestant failed to rebut the presumption of revocation that arises when the original will is not available for probate.¹⁰⁶ In an almost unbelievable opinion, the court accepted the proponent's explanation that he looked in the testator's home, office, safety deposit boxes, and drafting attorney's office, but could not find the original.¹⁰⁷ The court explained that the proponent did not have to demonstrate an affirmative reason why the original could not be located such as "the eating habits of a neighbor's goat, the occurrence of a Kansas tornado, the devastation of a flash flood, or the like."¹⁰⁸

This opinion is remarkable and shocking. The reasoning of the court of appeals makes it impossible for a testator to revoke a will by physical act because even if the will cannot be found and there is no affirmative reason why it cannot be found, a copy may nonetheless be probated. Accordingly, prudent practice is to revoke a will by subsequent writing and endeavor to ensure that the new writing is found after death.

E. LATE PROBATE

Both the trial court and the Tyler Court of Appeals agreed that the proponent in *In re Estate of Rothrock*¹⁰⁹ was in default for failing to probate the testator's will within four years of death, and thus the will could not be admitted to probate. The proponent, a non-Texas lawyer, knew about the testator's will from the time of the testator's death. Although he was the sole beneficiary of the will to the exclusion of his five siblings, he did not probate the will believing there was insufficient property to warrant doing so.

Thirteen years later when it turned out that the testator died owning valuable mineral interests, the proponent attempted to probate the will. The court of appeals held that it was too late and that the proponent and his siblings' agreement not to probate the testator's will was not a sufficient excuse.¹¹⁰ The proponent made the decision not to probate the will. The fact that the decision was wrong is not a sufficient excuse for delaying beyond the four-year period.¹¹¹

104. 311 S.W.3d 697 (Tex. App.—Amarillo 2010, pet. denied).

105. TEX. PROB. CODE ANN. § 85 (West Supp. 2010).

106. *In re Estate of Catlin*, 311 S.W.3d at 699, 703.

107. *Id.* at 700.

108. *Id.* at 701.

109. 312 S.W.3d 271, 275 (Tex. App.—Tyler 2010, no pet.).

110. *Id.* at 274–75.

111. *Id.*

F. INDEPENDENT ADMINISTRATION

1. *Unsuitability of Named Executor*

A court will attempt to permit the named executor to serve because of a long-standing tradition of permitting a testator to select his or her executor. This will be the case even if the named executor has “massaged” the facts as in *In re Estate of Gay*.¹¹² The Brothers asserted that they were their deceased father’s “personal representatives by testamentary designation” to the Tenth Circuit Court of Appeals so they could substitute as a party to a lawsuit pending at the time of their father’s death. In reality, they had not been appointed by a court as their father’s personal representatives. When they later attempted to be appointed as their father’s independent executors, the probate court determined that they were “unsuitable”¹¹³ because they misrepresented themselves before a federal tribunal.¹¹⁴

The Houston Fourteenth Court of Appeals held that the probate court abused its discretion and “acted without reference to guiding rules and principals by refusing to appoint [Brothers].”¹¹⁵ The court looked closely at what the Brothers actually told the Tenth Circuit.¹¹⁶ They represented that they were “named” as independent co-executors; a true statement. They never claimed they were actually appointed. In addition, the Brothers’ actions were designed to benefit their father’s estate by defending an appeal. The court also noted that the primary beneficiary of the will, the decedent’s wife (Brothers’ mother), was in favor of their appointment, having declined to serve as the independent executrix despite being first named in the will.¹¹⁷

2. *Removal of Independent Executor*

Several aspects of an action to remove an independent executor from office were analyzed in *In re Estate of Hoelzer*.¹¹⁸ After his step-mother died, Son was appointed as the successor independent executor of his father’s estate. He then filed a claim against the father’s estate on behalf of himself and his three siblings for reimbursement of funds his step-mother received as a result of asbestos litigation twenty years before. The probate court removed Son because the court had previously determined that Son and his siblings were not creditors of their father’s estate and that any potential claims were time-barred. Thus, Son’s actions constituted gross misconduct and gross mismanagement.¹¹⁹

The Beaumont Court of Appeals affirmed, explaining that there was

112. 309 S.W.3d 676 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

113. TEX. PROB. CODE ANN. § 78(c) (West 2003).

114. *In re Estate of Gay*, 309 S.W.3d at 679.

115. *Id.* at 681.

116. *Id.* at 680.

117. *Id.*

118. 310 S.W.3d 899 (Tex. App.—Beaumont 2010, pet. denied).

119. TEX. PROB. CODE ANN. § 149C (West 2010).

sufficient evidence to show that Son's actions were inappropriate.¹²⁰ It was only necessary for the trial court to determine that sufficient grounds appeared to support the belief that Son misapplied or was about to misapply property of the estate, that is, to pay a judgment-barred claim.¹²¹ It is not necessary for the court to be absolutely certain that misapplication has occurred or may occur in the future.¹²²

Son also claimed that he was required to answer the complaint too soon. Probate Code section 149C provides that the court may remove an independent executor after the executor is cited by personal service to answer at a time and place fixed in the notice.¹²³ This specific provision governs over Texas Rule of Civil Procedure 245, which requires at least a notice of forty-five days.¹²⁴ Thus, the Probate Court may require the executor to answer sooner than forty-five days. In addition, the court of appeals held that service on the executor's attorney by any method satisfies the personal service on the executor requirement.¹²⁵

G. RECOVERY FOR UNAUTHORIZED BANK TRANSACTIONS

In a case of first impression, the Texas Supreme Court addressed an intriguing issue regarding the recovery of unauthorized bank transactions that arose under a peculiar set of facts.¹²⁶ After the decedent's death in 2000, a fake administrator presented a bank with fraudulent letters of administration. Over the next few months, he withdrew most of the decedent's funds from the account. In 2003, the court appointed a real administratrix. The real administratrix learned about the decedent's account at the bank in February 2004, but did not contact the bank until June 2005 when she demanded the bank recredit the account for the funds the fake administrator withdrew.

The bank refused, pointing to the one-year repose period to make claims under Business and Commerce Code section 4.406, which was reduced to sixty days by contract.¹²⁷ The real administratrix, however, claimed the period did not begin to run until the bank made the bank statements available. The San Antonio Court of Appeals in *Lenk v. Jefferson State Bank*¹²⁸ held that sending statements to the fake administrator and holding the statements at the bank's office were insufficient to satisfy the bank's duty, and thus the real administratrix could recover. The bank appealed.

The Texas Supreme Court reversed in *Jefferson State Bank v. Lenk*.¹²⁹

120. *Hoelzer*, 310 S.W.3d at 901.

121. *Id.* at 907.

122. *Id.*

123. TEX. PROB. CODE ANN. § 149C (West Supp. 2010).

124. TEX. R. CIV. P. 245.

125. *Id.* at 904; see TEX. PROB. CODE ANN. § 33(f)(1) (West 2003).

126. *Jefferson State Bank v. Lenk*, 323 S.W.3d 146 (Tex. 2010).

127. TEX. BUS. & COM. CODE ANN. § 4.406(c) (West 2002).

128. 323 S.W.3d 199 (Tex. App.—San Antonio 2009), *rev'd*, 323 S.W.3d 146 (Tex. 2010).

129. 323 S.W.3d 146, 150 (Tex. 2010).

The supreme court held that in the context of deceased customers, “(1) a bank satisfies its burden by retaining account statements for retrieval by the estate administrator, and (2) the repose period begins to run once an administrator is appointed.”¹³⁰ Thus, since the real administratrix waited until over two years after her appointment to demand the bank recredit the account, her demand came too late and was barred.¹³¹ The supreme court explained that after a customer’s death, a bank cannot send statements to the customer. Thus retaining the statements was appropriate.¹³² Once a personal representative is appointed, the time period begins to run as the personal representative now has the right to all the decedent’s business records and papers.¹³³

Accordingly, a personal representative must examine bank account statements immediately after being appointed or risk the running of the repose period which will bar recovery for unauthorized withdrawals from the decedent’s accounts. The repose period can run before the personal representative obtains knowledge of the account. Thus, the personal representative must take prompt action to locate all the decedent’s accounts. The decedent’s most recent income tax returns may be helpful in determining the existence of the accounts.

H. CONTEMPT

According to *In re Byrom*, the ability to have a misbehaving executor imprisoned for violating court orders is limited because of the constitutional prohibition against debtor imprisonment.¹³⁴ In this case a creditor presented the independent executor with unsecured claims based on previous probate court orders stating that the claims were to be paid from estate funds within thirty days. When the creditor presented these claims, the thirty days had already elapsed and the executor rejected both claims. Two years later, the creditor filed suit to remove the executor. The trial court removed the executor from office but did not discharge him. The court also ordered the executor to pay the creditor’s attorney fees and expenses within thirty days and to deposit estate property into the registry of the court. The executor did not comply with these orders, so the creditor filed a motion to enforce the orders by contempt. After hearing evidence, the court remanded the executor to jail unless he made the required payments. Because the executor did not comply, he was confined to jail. After posting bond, however, he was released from jail. He then filed a writ of habeas corpus, which was denied, and was again sent to jail. He filed for a writ of mandamus.

The Tyler Court of Appeals explained that “a person who willfully disobey a valid court order is guilty of contempt” and imprisonment is

130. *Id.* at 149.

131. *Id.* at 150.

132. *Id.* at 149–50.

133. TEX. PROB. CODE ANN. § 37 (West 2003).

134. 316 S.W.3d 787 (Tex. App.—Tyler 2010, orig. proceeding [mand. denied]).

normally appropriate.¹³⁵ However, the Texas Constitution prohibits a person from being imprisoned for a debt.¹³⁶ After a lengthy analysis of contempt law, the court concluded that the executor was held in contempt for failing to deposit funds that would be used to pay debts, and thus the contempt order was unconstitutional.¹³⁷ The court granted the executor's petition for a writ of habeas corpus.¹³⁸

I. ATTORNEY AD LITEM COSTS

In guardianship cases, the guardianship estate is responsible for the costs of a guardian ad litem,¹³⁹ but *In re Estate of Frederick*¹⁴⁰ demonstrates that in estate cases, the court may assess ad litem costs as it determines. After her son died and his wife attempted to probate his intestate estate, the son's mother contested the application of the son's wife. The court appointed an attorney ad litem for the unknown and unascertained heirs. After litigation successfully showed that the wife was indeed the son's wife, the court assessed the costs of the ad litem against the mother.

The Fort Worth Court of Appeals affirmed.¹⁴¹ The court examined Probate Code section 34A, which authorizes the court to appoint an attorney ad litem and noted that the "statute does not specify against whom these costs must be assessed."¹⁴² Thus, the assessment is within the court's discretion.¹⁴³ Although an earlier case¹⁴⁴ and legislative history suggest that the estate should be responsible for these costs, the court noted that section 34A is clear and thus the text of the section is determinative.¹⁴⁵ Because the section is silent, Probate Code section 12(a) provides that the general rules of civil procedure apply, which state that costs are generally assessed against the non-prevailing party unless the court decides to assess them differently for good cause.¹⁴⁶ The court then held that the trial court did not abuse its discretion by assessing costs against the mother.¹⁴⁷

IV. TRUSTS

A. JURISDICTION

*Carroll v. Carroll*¹⁴⁸ makes clear that except for the limited exceptions

135. *Id.* at 791.

136. Tex. Const. art. I, § 18.

137. *Byrom*, 316 S.W.3d at 793.

138. *Id.* at 795.

139. TEX. PROB. CODE ANN. § 669 (West 2003).

140. 311 S.W.3d 127 (Tex. App.—Fort Worth 2010, no pet.).

141. *Id.* at 128.

142. *Id.* at 129-30; see TEX. PROB. CODE ANN. § 34A (West 2003).

143. *Frederick*, 311 S.W.3d at 130.

144. *Ajudani v. Walker*, 232 S.W.3d 219, 224 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

145. *Frederick*, 311 S.W.3d at 130-31.

146. TEX. R. CIV. P. 131, 141.

147. *Frederick*, 311 S.W.3d at 131.

148. 304 S.W.3d 366 (Tex. 2010).

in Trust Code section 115.001(d), district courts must hear cases involving trusts. In this case, a beneficiary sued a trustee for breach of duty in district court. The district court transferred the case to the county court at law and issued an order removing the trustee from office, awarding damages, and granting other relief. On appeal to the Texas Supreme Court, the trustee raised the issue of the county court at law's jurisdiction for the first time.

The supreme court agreed with the trustee that the county court at law lacked jurisdiction and that its judgment was thus void.¹⁴⁹ The supreme court explained that subject matter jurisdiction cannot be waived, and thus it was permissible for the trustee to raise the issue late in the litigation.¹⁵⁰ For support the supreme court pointed to Trust Code section 115.001, which grants district courts exclusive jurisdiction over trust matters except for certain situations not relevant to this case.¹⁵¹ The supreme court examined the Government Code to see if any other ground existed to permit a county court at law to have trust jurisdiction and found none.¹⁵² Accordingly, the county court at law's judgment was void and the case was transferred back to the district court.¹⁵³

B. REMOVAL OF TRUSTEE

In *Conte v. Ditta*, a trial court removed a trustee from office, and the trustee asserted that an earlier settlement agreement regarding the trustee's personal use of over \$500,000 of trust funds was an election of remedies precluding or waiving the removal action. The Houston First Court of Appeals in *Conte v. Ditta*¹⁵⁴ disagreed, explaining that the settlement remedied a past injury while the removal action was to prevent future injury.

The trustee also alleged that the trial court abused its discretion in removing her from office, even though she used trust funds to pay her personal expenses, caused the trust to suffer material financial loss, and had personal interests adverse to and in conflict with her duties as trustee. After reviewing the evidence, the appellate court found there was sufficient evidence to support the trial court's findings and agreed that the trial court did not abuse its discretion.¹⁵⁵ The court noted that the breach of trust was not cured merely because the trustee acknowledged she misappropriated trust funds after being caught.¹⁵⁶

149. *Carroll*, 304 S.W.3d at 368.

150. *Id.* at 367.

151. *Id.* at 367–68.

152. *Id.* at 368.

153. *Id.*

154. 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] 2010, no pet.). This is the remand of *Ditta v. Conte*, 298 S.W.3d 187 (Tex. 2009), in which the Texas Supreme Court held that “no statutory limitations period restricts a court’s discretion to remove a trustee. A limitations period, while applicable to suits seeking damages for breach of fiduciary duty, has no place in suits that seek removal rather than recovery.” *Id.* at 188.

155. *Conte*, 312 S.W.3d at 958.

156. *Id.*

C. SUCCESSOR TRUSTEE

The *Conte* case also dealt with the appropriate method of filling the vacancy after the trustee is removed.¹⁵⁷ After the trial court removed the trustee from office, it appointed a successor trustee without following the settlor's instructions for selecting a successor trustee. The Houston First Court of Appeals held that the court exceeded its authority to deviate from the terms of the trust under Trust Code section 112.054.¹⁵⁸ Instead, the court should follow the terms of the trust that authorized a majority of adult beneficiaries to appoint a successor trustee.¹⁵⁹ A court exercising its deviation power must do so in a manner that conforms as nearly as possible to the settlor's intent.¹⁶⁰ Here, the settlor expressed his intent when he provided instructions on the method of ascertaining a successor trustee. The fact that one of the beneficiaries was the removed trustee did not impact her rights as a beneficiary. Thus, a proper deviation would have been to prevent the beneficiaries from appointing anyone who was previously removed as a trustee.¹⁶¹

D. CRIMINAL LIABILITY

Prosecutors must have a good understanding of trust law or else a crooked trustee may escape justice, as demonstrated by *Bowen v. State*.¹⁶² In this case, a jury convicted the trustee of misapplication of fiduciary property valued at over \$200,000 under Penal Code section 32.45. Trustee was then sentenced to eight years in prison, fined \$10,000, and ordered to pay \$350,000 in restitution.

The Eastland Court of Appeals agreed there was substantial evidence that the trustee misapplied well over \$200,000 of trust assets.¹⁶³ However, the indictment specifically stated that these trust assets were owned by one named beneficiary or held for her benefit; it did not list all the beneficiaries. Because only about \$100,000 was held in trust for the named beneficiary and the jury charge did not include a lesser offense, the trustee's conviction was reversed.¹⁶⁴

V. CONCLUSION

The cases discussed in this article address a wide array of issues, some very narrow and some with potentially broad impact. This article has already discussed the practical application of many of the cases, however, it is also important to understand some overarching principles that tran-

157. *Id.* at 959–60.

158. *Id.* at 960.

159. TEX. PROP. CODE ANN. § 113.083 (West 2007).

160. *Id.* § 112.054(b).

161. *Conte*, 312 S.W.3d at 960–61.

162. 322 S.W.3d 435 (Tex. App.—Eastland 2010, pet. granted).

163. *Id.* at 441.

164. *Id.* at 442–43.

scend individual cases and form a pattern. Here are some examples of patterns this author detected:

- The Texas Supreme Court has shown an increased interest in cases relating to estate planning, as evidenced by three significant cases during the Survey period.¹⁶⁵
- Courts are apt to “punish” litigants who wait too long to assert estate-based claims.¹⁶⁶
- Courts strictly enforce the concept that testamentary intent must be clearly stated.¹⁶⁷
- Courts are willing to “forgive” conduct that has at least a quasi-reasonable excuse.¹⁶⁸
- Litigants who conducted themselves in outrageous manners will nonetheless try to find some way to escape liability¹⁶⁹ and are sometimes successful.¹⁷⁰

165. See, e.g., *Frost National Bank v. Fernandez*, 315 S.W.3d 494 (Tex. 2010); *Jefferson State Bank v. Lenk*, 323 S.W.3d 146 (Tex. 2010); *Carroll v. Carroll*, 304 S.W.3d 366 (Tex. 2010).

166. See, e.g., *Frost National Bank v. Fernandez*, 315 S.W.3d 494 (Tex. 2010); *In re Estate of Rogers*, 322 S.W.3d 361 (Tex. App.—El Paso 2010, no pet.); *In re Estate of Rothrock*, 312 S.W.3d 271 (Tex. App.—Tyler 2010, no pet.); *Jefferson State Bank v. Lenk*, 323 S.W.3d 146 (Tex. 2010).

167. See, e.g., *In re Estate of Allen*, 301 S.W.3d 923 (Tex. App.—Tyler 2009, pet. denied); *In re Estate of Hendler*, 316 S.W.3d 703 (Tex. App.—Dallas 2010, no pet.).

168. See, e.g., *In re Estate of Catlin*, 311 S.W.3d 697 (Tex. App.—Amarillo 2010, pet. denied); *In re Estate of Gay*, 309 S.W.3d 676 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

169. See, e.g., *In re Estate of Russell*, 311 S.W.3d 528 (Tex. App.—El Paso 2009, no pet.); *In re Estate of Hoelzer*, 310 S.W.3d 899 (Tex. App.—Beaumont 2010, pet. denied); *Conte v. Ditta*, 312 S.W.3d 951 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Bowen v. State*, 322 S.W.3d 435 (Tex. App.—Eastland 2010, pet. granted).

170. See *Bowen v. State*, 322 S.W.3d 435 (Tex. App.—Eastland 2010, pet. granted).

