Wills & Trusts

Gerry W. Beyer
Texas Tech University, GWB@ProfessorBeyer.com

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* 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 Mari Park, J.D., Texas Tech University School of Law, in the preparation of this article.
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This article discusses legislative and judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate
planning matters during the Survey Period of November 1, 2012, through October 31, 2013. The reader is warned that not all newly enacted statutes and decided cases during the Survey Period are presented, and not all aspects of each cited statute and case are analyzed. You must read and study the full text of each statute and case before relying on it or using it as precedent. The discussion of most cases includes a moral, that is, the important lesson to be learned from the case. By recognizing situations that have resulted in time-consuming and costly litigation in the past, the reader may be able to reduce the likelihood of similar situations arising with his or her clients.

I. THE ESTATES CODE

The 2009 legislature began the process of codifying the current Probate Code into the new Estates Code.\(^1\) Although called a “code,” the Probate Code is not a true “code” because it was enacted in 1955, which was before the 1963 legislature began the process of codifying Texas law into twenty-seven codes. The codification process is supposed to be nonsubstantive.\(^2\)

The portion of the Estates Code passed by the 2009 legislature focused on intestacy, wills, and estate administration.\(^3\) The guardianship and durable power-of-attorney provisions were added in 2011.\(^4\) “The 2011 legislature also made changes to the previously enacted portions of the Estates Code to be consistent with amendments it made to the existing Probate Code.”\(^5\) The 2013 legislature continued to fix issues with the 2009 and 2011 codifications as well as make substantive changes.\(^6\) The entire Estates Code became effective on January 1, 2014.\(^7\)

II. INTESTACY

A. CHILDREN FROM SURROGATE PARENTS

Under prior law, for a person to be a child of his or her mother for intestacy purposes, the child must either be biologically related or adopted.\(^8\) When a surrogate mother is used, the child may not be biologically related or adopted, and thus the intended mother was not considered a mother for inheritance purposes, even though she was for family law purposes.\(^9\) Effective for the estates of individuals who die on or after January 1, 2014, the intended mother is the

2. Id. § 11, 2009 Tex. Gen. Laws at 1732.
6. See id.
9. Id.
child’s mother for intestacy purposes. Likewise, the intended father will be considered to be the child’s father.

B. DETERMINATION OF HEIRSHIP

1. Statute of Limitations

   The 2013 legislature added Estates Code section 202.0025 to make it clear that there is no statute of limitations to a proceeding to declare heirship of a decedent. Although the provision was effective on January 1, 2014, the legislature stated that this section is “intended to clarify current law” and that “an inference may not be made regarding the statute of limitations for a proceeding to declare heirship filed before the effective date.”

2. Unsecured Creditors

   The 2013 legislature removed the restriction that only secured creditors could commence a proceeding to declare heirship. If a decedent dies on or after January 1, 2014, any creditor, unsecured or secured, may initiate an heirship proceeding.

3. Attorneys Ad Litem

   Estates Code section 202.009 was amended to impose a mandatory duty on the court to appoint an attorney ad litem in an heirship proceeding to represent the heirs whose names or locations are unknown. The court retains the discretion to appoint an attorney ad litem for an incapacitated heir.

4. Citation

   Estates Code section 202.056 now provides that citation may be waived only for a minor distributee who is under twelve years old. If the minor is twelve or older, citation may not be waived.

5. New Requirement

   A court cannot enter an order determining heirs unless the applicant files (1) a copy of the notice and proof of delivery sent to interested parties and (2) an affidavit of the applicant or a certificate signed by the applicant’s attorney stating that notice was given, the name of each person who received the notice if not shown on the proof, and the name of each person who waived citation.

13. Id. § 62(g), 2013 Tex. Gen. Laws at 2754.
15. Id. (amending TEX. EST. CODE ANN. § 202.004).
17. Id.
19. Id.
III. WILLS

A. FORMALITIES

A prudent attorney should have the testator and the witnesses initial each page of the will because this practice will make it easier to rebut claims of page substitution. For example, in the case of In re Estate of Pilkilton, a dispute arose whether pages of a properly executed will were replaced by different (“corrected”) pages at a later date. The Dallas Court of Appeals agreed with the trial court that the evidence was legally sufficient to support a finding that page substitution did not occur, especially because no one testified that the testator executed the will prior to all corrections being made.

B. SELF-PROVING AFFIDAVITS

The 2011 legislature amended Civil Practice & Remedies Code section 132.001 to permit the use of unsworn written affidavits made under penalty of perjury in lieu of written sworn affidavits. The 2013 legislature added a provision to Estates Code section 21.005 providing that this procedure is not applicable to self-proving affidavits on wills executed on or after January 1, 2014.

C. TITLE OF DEVISEE

Meekins v. Wisnoski serves as a reminder that a beneficiary’s vested interest in the estate remains subject to the testator’s creditors, and thus a beneficiary may lose his or her entire bequest or devise. A beneficiary claimed that a receiver appointed to sell property of the testator’s estate could not sell his interest because of the well-established principle that the interest of a beneficiary vests immediately upon the testator’s death. The Houston Fourteenth Court of Appeals rejected this argument, explaining that once an executor is appointed, the executor “holds legal title and a superior right to possess [the] property” to pay the decedent’s debts. Thus, when the probate court appointed a receiver to partition and sell estate property to pay a tax debt and the sale properly took place, the purchaser received the testator’s interest in the property.

D. COURT ORDERS RESTRICTING NEW WILLS

A person may disregard without penalty or sanction any portion of a court order that attempts to prohibit a person from executing a new will or a codicil to

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22. Id. at *4.
25. Meekins v. Wisnoski, 404 S.W.3d 690 (Tex. App.—Houston [14th Dist.] 2013, no pet.).
26. Id. at 697–98.
27. Id. at 698.
28. Id.
an existing will. This should reduce the practice of some family law lawyers who routinely include in their orders a mandate that the other spouse not change their testamentary plan during the pendency of the divorce.

E. FORFEITURE CLAUSES

1. Burden of Proof

The 2013 legislature clarified the party who has the burden of proof with regard to the enforceability of forfeiture clauses. A forfeiture clause is presumed enforceable unless the party who wants the clause to be unenforceable establishes by a preponderance of the evidence that just cause existed for bringing the action and the action was brought and maintained in good faith.

2. Strict Construction

Courts strictly construe in terrorem provisions and are unlikely to enforce them when property disposition is not impacted by the lawsuit. For example, in Di Portanova v. Monroe, the trial court granted applicants’ request for eight trusts to be consolidated under the court’s deviation authority provided in Property Code section 112.054. The court explained that “because of circumstances not known to or anticipated by the settlors, the original terms of the Eight Trusts would substantially impair the accomplishment of the purposes of the Eight Trusts in ways [the settlors] could not have anticipated.” The consolidation did not impact the dispositive provisions of the trusts.

The appellants asserted that the consolidation violated in terrorem will provisions which stated that forfeiture occurs if an action is brought “for the purpose of modifying, varying, setting aside or nullifying any provision hereof . . . on any ground whatsoever.” The Houston First Court of Appeals rejected this assertion, holding that the suit for judicial modification of administrative terms was not intended to thwart the testators’ intent and thus did not trigger forfeiture. In fact, the wills did not prohibit consolidation, and the consolidation would prevent waste and avoid impairment of the administration of the trust.

F. INTERPRETATION AND CONSTRUCTION

In Netherton v. Cowan, the testator’s will devised a beneficiary a remainder interest in certain real property, but if the beneficiary were to predecease the testator or die “before the property . . . vests in him,” the property would pass to an alternate beneficiary. The beneficiary died prior to the holder of the life
estate. 37 When the life estate owner died, a dispute arose between the beneficiary’s estate and the alternate beneficiary over the ownership of the land. 38

Both the trial court and the San Antonio Court of Appeals held that the property was part of the beneficiary’s estate. 39 The court of appeals explained that Texas law favors a construction that results in vesting at the earliest possible time, and thus the remainder interest vested in the beneficiary immediately upon the testator’s death. 40 In addition, the court noted that the testator’s will did not include language requiring the holder of the remainder interest to outlive the life tenant as a condition of the devise. 41

**G. CONTESTS**

1. **Statute of Limitations**

A person who believes a will is invalid must contest that will on a timely basis, or even meritorious claims will be lost. For example, in *Omohundro v. Ramirez-Justus*, the El Paso Court of Appeals affirmed a summary judgment because the suit was time-barred under Probate Code section 93 (two years from date of probate to contest a will subject to limited exceptions not applicable to this case). 42 Accordingly, the court did not address any of the appellant’s substantives issues. 43

2. **Discharged Independent Executor as Proper Party to Contest**

*In re Estate of Whittington* teaches that an independent executor who obtains a judicial discharge is not a proper party to a subsequent contest of the will. 44 The probate court admitted the testator’s will to probate and appointed an independent executor. 45 After completing his duties, the independent executor obtained a judicial discharge under Probate Code section 149E (now Estates Code section 405.003). 46 Approximately six months later, a contestant filed a will contest and had citation served upon the independent executor. 47 The trial court granted the independent executor’s motion to be dismissed from the action on the ground that he was not a proper party due to the judicial discharge. 48 Although the trial court originally imposed sanctions on the grounds that there was no existing law supporting why the independent executor

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37. Id. at *2.
38. Id.
39. Id. at *4.
40. Id.
41. Id.
43. Id.
44. *In re Estate of Whittington*, 409 S.W.3d 666, 673 (Tex. App.—Eastland 2013, no pet.).
45. Id. at 667.
46. Id.
47. Id. at 668.
48. Id.
would be a proper party and that the argument to establish a new rule was 
frivolous, the court later reconsidered and denied sanctions.49

The Eastland Court of Appeals agreed that the independent executor was not 
a proper party due to the judicial discharge.50 A judicial discharge is designed for 
the executor to "obtain a shield from any liability involving matters relating to 
the past administration of the estate that have been fully and fairly disclosed."51 
In addition, it would be absurd to force the executor to defend the will with his 
or her own money after all of the estate assets have already been distributed and 
there is no guarantee that the beneficiaries have retained any of those assets for 
reimbursement purposes.52 The court also agreed that sanctions were not 
appropriate because this issue was a matter of first impression.53

H. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS

In re Estate of Valdez confirms that a will contestant cannot be held liable for 
tortious interference with inheritance rights.54 After proponent filed 
applications to probate the testatrix’s will, the contestant filed a will contest.55 
The proponent then attempted to hold the contestant liable for tortious 
interference with inheritance rights.56 The trial court granted the contestant a 
summary judgment.57 The San Antonio Court of Appeals affirmed.58 Citing 
Probate Code section 10C (now Estates Code section 54.001), the court 
explained that Contestant could not be held liable “because his lawful act of 
filling a will contest was not tortious conduct.”59

IV. ESTATE ADMINISTRATION

A. JURISDICTION

Haga v. Thomas reminds us that Texas courts have jurisdiction regarding the 
administration of Texas real property regardless of where the will was admitted 
to probate.60 The decedent was a North Carolina resident at the time of his 
death.61 The beneficiary was successful in getting a court in North Carolina to 
administer the decedent’s will to probate.62 After the decedent’s parents had a Texas 
probate court admit the will to probate and construe how the will disposed of 
Texas real property, the beneficiary appealed, claiming that the North Carolina

49. Id.
50. Id. at 673.
51. Id. at 670.
52. Id.
53. Id. at 673.
55. Id. at 231.
56. Id.
57. Id.
58. Id. at 230.
59. Id. at 234.
61. Id. at 732.
62. Id. at 733.
court had exclusive jurisdiction over the decedent’s will and the administration of his estate.63

The Houston First Court of Appeals affirmed.64 The court began its analysis by examining Probate Code section 95(a), which allows a probated will from another state to be admitted to probate in Texas.65 However, the court pointed out that this section “does not address whether a Texas probate court has jurisdiction to resolve disputes concerning the administration of an estate or the construction of a will of a decedent who died in another state and was domiciled in that other state, but who owned real property in Texas.”66 The court reviewed leading Texas cases and concluded that “the existence of real property in Texas gives Texas courts jurisdiction over an administration concerning that property.”67

B. STATUTE OF LIMITATIONS TO PROBATE WILL

In re Estate of Allen demonstrates that Texas courts are “quite liberal in permitting a will to be offered as a muniment of title after the statute of limitations has expired upon the showing of an excuse by the proponent for failure to offer the will earlier.”68 A wife filed her husband’s will for probate as a muniment of title more than four years after his death.69 The will left his entire estate to his wife of over fifty-six years.70 The trial court admitted the will to probate under Probate Code section 73(a) after finding that the wife was not in default for failing to probate the will within the four-year period.71 The testator’s son appealed.72

The Eastland Court of Appeals affirmed.73 The court reviewed the facts, which showed that the wife had consulted an attorney shortly after her husband’s death.74 The attorney told her that she had the option of probating the will as a muniment of title or executing an affidavit of heirship and that regardless of which option she selected, she would receive the entire estate.75 Because the wife wanted the estate handled quickly and inexpensively, she opted for the affidavit of heirship.76

When the wife and the son had a dispute over keeping livestock on certain real property, the wife consulted a different attorney.77 This attorney discovered that her husband owned hundreds of acres of land as his separate property in

63. Id. at 733–35.
64. Id. at 738.
65. Id. at 736.
66. Id.
67. Id. at 737.
68. In re Estate of Allen, 407 S.W.3d 335, 339 (Tex. App.—Eastland 2013, no pet.).
69. Id. at 337.
70. Id. at 336–37.
71. Id. at 338.
72. Id. at 336.
73. Id.
74. Id. at 337.
75. Id.
76. Id.
77. Id.
which his children would have a substantial interest under intestacy (e.g., two-thirds outright plus a life estate in the wife’s life estate in the other one-third of the property).78 Within a month of learning of her children’s interest in the property under the affidavit of heirship, the wife filed the will for probate.79

The court of appeals reviewed the evidence and found that it was sufficient to support the trial court’s finding that the wife was not in default.80 She relied on the advice of her attorney in not probating the will in a timely manner.81 She had no legal training and had no reason to distrust her attorney when he asserted that she would receive all of her husband’s property under an affidavit of heirship.82 Once she realized that her first attorney had given her bad advice, she promptly filed the will for probate.83

C. APPEAL

Pine v. deBlieux demonstrates that in the gap period between the appellate court’s opinion and the court’s issuance of its mandate, a final judgment of a trial court is likely to be set aside if it conflicts with the opinion and mandate.84 In a prior opinion, the Houston First Court of Appeals determined that the administratrix was unsuitable as a matter of law.85 The executrix sought review by the Texas Supreme Court, which denied her petition.86 The court of appeals then issued its mandate.87 However, in the interim, the trial court rendered a final judgment disposing of some of the decedent’s assets.88

When the trial court’s action was brought to the attention of the court of appeals, the court of appeals held that the trial court should not have rendered a final judgment while the unsuitable administratrix was still in office.89 Accordingly, the court reversed the trial court’s determination of the proper recipient of certain decedent’s assets.90

The court recognized that Probate Code section 28 (now Estates Code section 351.053) allows the administratrix to continue to act and that Texas Rule of Appellate Procedure 18.6 provides that an interlocutory order takes effect when the mandate is issued.91 However, the court explained that the administratrix acted at her own peril when she continued to make claims to estate property hoping that the Texas Supreme Court would grant her petition and then find in her favor.92

78. ld.
79. ld.
80. ld. at 341.
81. ld.
82. ld.
83. ld.
84. Pine v. deBlieux, 405 S.W. 3d 140, 147 (Tex. App.—Houston [1st Dist.] 2013, no pet.).
85. ld. at 142.
86. ld. at 143.
87. ld.
88. ld.
89. ld. at 147.
90. ld.
91. ld. at 146.
92. ld.
D. BILL OF REVIEW

A party seeking an equitable bill of review must be certain to prove the required elements.93 For example, in the case of *In re Estate of Aguilar*, Son One probated his father’s will as a muniment of title.94 Seven months later, Son Two attempted to set aside the probate by filing an equitable bill of review (not a statutory bill of review under Probate Code section 31).95 Both the trial court and San Antonio Court of Appeals denied the application.96

The court of appeals explained that to obtain an equitable bill of review, “the applicant must plead and prove: (1) a meritorious defense to the underlying cause of action, (2) which the applicant was prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake, (3) unmixed with any fault or negligence on its own part.”97

Son Two attempted to rely on a special situation where absence of service or lack of notice of the dispositive trial setting relieves the applicant from showing the normal elements for an equitable bill of review.98 The court rejected this argument because the evidence showed that Son One gave proper notice of the muniment of title action by posting as required by Probate Code section 128(a) (this notice also demonstrates that element two was not satisfied).99

E. ATTORNEY AD LITEM

A probate court judge may now appoint an attorney ad litem for a broader range of individuals, including missing heirs and unknown or missing persons for whom cash was deposited into the court’s registry.100 In addition, the court must tax the attorney ad litem’s compensation as a cost of the probate and order that compensation to be paid out of the estate by any party, or, in the case of funds in the court’s registry, from those funds.101

F. APPLICATION FOR LETTERS TESTAMENTARY

The requirements for the contents of an application for letters testamentary have changed. There are two key differences. First, the application must contain the state of residence and physical address where service can be had of the executor named in the will or the person to whom the applicant desires that letters be issued.102 Second, the application no longer needs to contain the addresses of the witnesses.103

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94. Id. at *9.
95. Id. at *1.
96. Id.
97. Id. at *2.
98. Id.
99. Id.
101. Id.
103. Id.
G. PROOF OF FACTS

The 2013 legislature added Estates Code section 301.155 to provide that any fact that must be provided, e.g., in applications for the issuance of letters, may be provided by live testimony, or if the witness is unavailable, “by deposition on written questions.”

H. BOND

A new provision, Estates Code section 305.004, addresses the procedure for bond in the few cases where bond is required. If the bond is timely filed, but the court fails to take timely action on the bond, the personal representative may file a motion for a hearing at which the judge must specify any objections to the bond on the record.

I. EXECUTOR’S ABILITY TO RECOVER ESTATE PROPERTY

Family members have a tendency to grab a decedent’s assets even if they have no authority to do so. The personal representative has a right to possession of all estate assets and a duty to acquire that possession. Obtaining a turnover order is one way for the personal representative to satisfy that duty, as In re Estate of Hutchins demonstrates. One of the testatrix’s children obtained possession of certain items of estate property without proper authority. The independent executrix filed a “Motion for Turnover Order” in her attempt to force the child to return the estate property. She based her request on Probate Code section 37, which provides that the personal representative has “the right to possession of the estate as it existed at the death of the testator.” The trial court denied the turnover motion on the basis that the independent executrix was not a judgment creditor and thus could not use the turnover procedure provided in the Civil Practice and Remedies Code section 31.002. The independent executrix petitioned for a writ of mandamus.

The Dallas Court of Appeals granted mandamus. The court explained that the independent executrix was not seeking a turnover order under the Civil Practice and Remedies Code section 31.002. Instead, Independent Executrix was specifically requesting relief under Probate Code section 37, which gives the personal representative the right to possession of all estate property.

104. Id. § 34, 2013 Tex. Gen. Laws at 2746.
105. TEX. EST. CODE ANN. § 305.004 (West 2014).
107. TEX. EST. CODE ANN. § 351.102 (West 2014).
109. Id. at 581.
110. Id. at 584 (quoting TEX. PROB. CODE ANN. § 37, TEX. EST. CODE ANN. §§ 101.001, 101.003, 101.051).
111. See id. at 585.
112. Id. at 583.
113. Id. at 580.
114. Id. at 585.
115. Id.
The court made two other findings. First, a separate lawsuit under Probate Code section 233A, granting the personal representative the right to sue to recover estate property, is not necessary to recover estate property under Probate Code section 37. Second, even if an alleged family agreement actually existed, the personal representative is nonetheless entitled to possession of the estate as it existed on the date of death; the court found no case which concluded that section 37 is superseded by a family settlement agreement.

J. PERSONAL REPRESENTATIVE

In re Estate of Arizola is instructive from two perspectives. First, the opinion indicates that strict compliance with the statutorily required contents for an application for letters may not be required. The applicant for letters of administration failed to list an heir in violation of Probate Code section 82(e). The trial court nonetheless appointed the applicant. The San Antonio Court of Appeals held that this error did not lead to an improper judgment as the applicant was qualified and had a superior right to serve as the administrator. Accordingly, the court held that the appointment was proper.

Second, although a dependent personal representative should usually seek prior court approval (permission) rather than take the action and then seek ratification (forgiveness), failure to do so is not necessarily a breach of duty. The court of appeals affirmed the trial court’s refusal to remove an administrator for misapplication, waste, or embezzlement of estate assets under Probate Code section 222(a)(F) merely because he filed a motion seeking ratification of certain conduct. The court explained that although seeking prior court approval may be a better approach, failure to do so is not clear and convincing evidence of a misapplication or embezzlement.

K. INDEPENDENT ADMINISTRATION

1. Consent Rules

New rules govern the individuals who must consent to an independent administration if the decedent did not provide for one in his or her will. First, if the will contains a pour-over provision, the beneficiaries of the trust who receive property outright upon the decedent’s death must consent. Second, a minor’s natural guardian may consent to the appointment of a successor on the minor’s estate.

116. Id. at 588.
117. Id. at 588–89.
119. Id. at 670–71.
120. See id.
121. Id. at 667.
122. Id. at 671.
123. Id.
124. Id. at 673.
125. Id.
126. Id.
behalf if there is no conflict of interest. 128 Third, if the beneficiary of a testamentary trust is incapacitated, the trustee may file an application to continue the administration or consent for the beneficiary as long as the trustee is not the proposed successor. 129

2. Removal

The court may now remove an independent executor without notice in specified circumstances, such as if there are sufficient grounds to believe the executor has misapplied or embezzled estate property. 130 In addition, removal is authorized with mere written notice by certified mail if the executor does not timely qualify or file the inventory or affidavit in lieu thereof. 131

3. Distribution

If the court becomes involved in the distribution of an estate being independently administered, the court is now permitted to order distribution of undivided interests in property if it is incapable of distribution without a prior partition or sale. 132

L. CREDITORS

The deadline for a creditor to submit a claim was changed from four months to 120 days, which could make a difference depending on the number of days in the relevant months (thirty-one day long months or the short month of February). 133

M. INVENTORY

1. Use of Affidavit in Lieu of Inventory Expanded

The typical language creating an independent administration provides, “I direct that no action be had in any court other than the probating of this will and the filing of an inventory, appraisement, and list of claims.” This language could be interpreted as requiring the filing of the inventory. The 2013 legislature made it clear that the affidavit in lieu of inventory option is available even if the will requires the filing of inventory, as long as the will does not specifically prohibit the filing of an affidavit in lieu of inventory. 134 In addition, the amendment added the word “required” before “inventory” in the statutory language typically included in a will to create an independent administration to reduce this problem further. 135

129. Id.
131. Id.
135. Id.
2. Liability Protection

An executor cannot be held liable for the executor’s decision to file either a traditional inventory or the affidavit in lieu of inventory.136

3. Remedies

A person dissatisfied with an affidavit in lieu of inventory now has the same potential remedies as a person dissatisfied with a traditional inventory.137

4. Penalty for Failure to File

The legislature added Estates Code section 309.057 to allow the court to impose a fine, not to exceed $1,000, on any personal representative who does not file an inventory (or affidavit in lieu of inventory) after being cited for failing to do so.138

5. Successor Personal Representative

A successor personal representative only needs to file an inventory listing the undistributed assets remaining on the date of the successor’s qualification if the previous representative had already filed an inventory.139

N. EXEMPT PROPERTY

1. Homestead

The homestead will be protected from most creditors only if the decedent was survived by a person entitled to claim homestead occupancy rights, that is, a spouse or minor child.140

2. Allowances

The allowance in lieu of homestead was raised to $45,000 from $15,000.141 The allowance for other exempt property was raised to $30,000 from $5,000.142

3. Family Allowance

A family allowance will not be available for an adult incapacitated child if the decedent was not supporting the child at the time of the decedent’s death.143

136. Id. (adding TEX. EST. CODE ANN. § 309.056(d)).
140. Id. § 8, 2013 Tex. Gen. Laws at 2739 (amending TEX. EST. CODE ANN. § 102.004).
142. Id.
O. BANK ACCOUNT RECOVERY

*Coffey v. Bank of America* teaches that an executor who wishes to claim that a decedent’s checks were not properly payable must act promptly to provide detailed notice to the financial institution.144 In addition, the executor must remember that survivorship, trust, and pay-on-death accounts are nonprobate assets and that the new owner of the account should bring any claims associated with the account.145 In *Coffey*, after the depositor died, the executrix claimed that the bank paid checks that were not properly payable and thus the estate should recover the amounts of those checks.146 Both the trial court and Beaumont Court of Appeals rejected the executrix’s claims on a variety of grounds based on the Uniform Commercial Code.147

The account at issue was a pay-on-death account. The bank proved that it provided monthly statements to the depositor and, after the depositor’s death, to the pay-on-death payee.148 Because they did not report the alleged unauthorized transactions within sixty days (the statutory one-year period having been shortened by contract), it was too late to recover from the bank.149 Besides, the account was a nonprobate asset and not in the depositor’s estate.150

The court of appeals pointed to *Jefferson State Bank v. Lenk*151 as support for Executrix’s claim that the time period did not actually begin to run until the executrix was appointed.152 The court held that even if this were the case, the executrix did not report the allegedly improper transactions to the bank until after the time period had run.153 The court explained that merely filing a lawsuit within that time was insufficient, as the pleading did not specifically identify the checks at issue.154

P. POWER OF SALE

Estates Code section 401.006 was clarified to make clear that a court may grant a power of sale over personal property, as well as real property, if the court authorizes the independent personal representative to sell property, even though the will failed to grant a power of sale.155

Q. FINAL ACCOUNT

The personal representative must now provide a copy of the final account to

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145. See id. at *6.
146. Id. at *1.
147. Id. at *7.
148. Id. at *3.
149. Id. at *7.
150. See id. at *4.
153. Id. at *7.
154. Id.
everyone entitled to citation on the final account and thereafter file an affidavit (or attorney’s certificate) listing details, including the names of these individuals and that each of them was provided with a copy of the final account.\(^{156}\)

R. Registry of the Court

Property passing to an unknown or missing person may be turned over to the court’s registry. This causes a problem because a court is ill-equipped to store grandmother’s china and dad’s lawnmower. The court is now required to order the representative to convert all the assets to cash and then deposit the cash.\(^{157}\) This procedure, however, could cause irreparable loss of family heirlooms.

S. Attorney Fees

1. Fees Denied—Late Request

A party to a probate dispute who wishes to recover attorney’s fees should request them in the original complaint or answer, or as shortly thereafter as possible. Kirkland v. Schaff shows what happens if this advice is not followed.\(^{158}\) The Dallas Court of Appeals held that the probate court erred in allowing a trial amendment to request attorney’s fees under Probate Code section 245.\(^{159}\) The probate court had already issued a final order removing the administrator from office.\(^{160}\) Accordingly, “the probate court abused its discretion by granting the trial amendment and awarding appellees attorney’s fees after the probate court’s final order removing appellant as administrator was signed.”\(^{161}\)

2. Fees Denied—Not in Estate’s Best Interest

An executor should have an actual basis in fact before seeking to recover estate property. If an executor makes wild and unsupported accusations that then trigger attorney’s fees, the court is unlikely to permit the recovery of those fees from the estate, as in the case of In re Estate of Bessire.\(^ {162}\) A son was appointed as the independent executor of his mother’s estate. The son later accused the mother’s daughter (his sister) of improperly taking money from their mother’s estate before she died.\(^ {163}\) Extensive discovery proceedings and legal maneuvering subsequently occurred, resulting in the son being removed as the executor and the daughter being appointed in his place.\(^ {164}\) In addition, the son was denied his attorney’s fees, which amounted to over $80,000.\(^ {165}\) The son appealed.\(^ {166}\)

159. Id. at 655.
160. Id.
161. Id.
163. Id. at 644.
164. Id. at 646.
165. Id. at 645–46.
166. Id. at 645.
The Amarillo Court of Appeals affirmed.\(^{167}\) After writing extensively on the procedural aspects of the claim, the court focused on whether the evidence supported a legal theory justifying the trial court’s denial of the son’s attorney’s fees.\(^{168}\) The court began its analysis by recognizing that the son was a fiduciary and was charged with collecting estate property under Probate Code section 233.\(^{169}\) However, this duty must be exercised with reasonable care.\(^{170}\) The court examined the evidence, which revealed that the son actually admitted that he had no basis for his claim that the daughter had taken estate property.\(^{171}\) Accordingly, the son’s attorney’s fees were not expended in the best interest of the estate and should not be paid out of estate funds under Probate Code section 242.\(^{172}\) The court explained that “when the personal representative’s own omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the personal representative for his attorney’s fees.”\(^{173}\)

V. TRUSTS

A. VENUE

The legislature made changes to the venue provisions for trust actions when there are multiple trustees.\(^{174}\) These sections need to be carefully studied to ascertain proper venue. Note that the sections may be in conflict if there are multiple noncorporate trustees plus at least one corporate trustee.

B. DEFINITION OF “PROPERTY”

The “property” definition now expressly includes “property held in any digital or electronic medium.”\(^{175}\)

C. SPENDTHRIFT PROTECTION

A settlor will not be considered a beneficiary of a trust merely because the settlor’s interest in the trust was created by the exercise of a power of appointment by a third party.\(^{176}\) Likewise, property contributed to a laundry list of trusts will not be considered to have been contributed by the settlor.\(^{177}\) These changes help trusts retain spendthrift protection by assuring that the settlor is not treated as a beneficiary.

\(^{167}\) Id.
\(^{168}\) Id. at 647.
\(^{169}\) Id. at 649–50.
\(^{170}\) Id.
\(^{171}\) Id.
\(^{172}\) Id.
\(^{173}\) Id.
\(^{175}\) Id. § 1, 2013 Tex. Gen. Laws at 1807 (amending TEXAS PROP. CODE ANN. § 111.004).
\(^{176}\) Id. § 2, 2013 Tex. Gen. Laws at 1807–08 (amending TEXAS PROP. CODE ANN. § 112.035).
\(^{177}\) Id.
D. DISCOVERY

In re Paschall warns that an inter vivos trust may not be as private as once believed because even remote claims to the trust property may result in the trust instrument being discoverable. The testatrix died with a will leaving her entire estate to the trustee of her inter vivos trust. Seven years later, a dispute arose regarding the validity of the will and thus the passage of the estate under the trust. Distant intestate heirs (first cousins, twice removed) were successful in getting the trial court judge to order the production of the trust instrument. The executor sought a writ of mandamus asserting that the contestants lacked standing.

The Waco Court of Appeals denied the writ. The court explained that the contestants have a contingent pecuniary interest in the estate, that is, if they are successful in setting aside the will and proving they are the intestate heirs, they would be entitled to the property that is now being held in the testatrix’s trust. Accordingly, they have standing to seek discovery of the trust instrument.

E. FORFEITURE CLAUSES

The legislature made a parallel change to Property Code section 112.038 to be consistent with the changes discussed above which were made to the Probate and Estates Codes.

F. DECANTING

Texas has joined the growing number of states which have statutes granting the trustee the power to decant, that is, to distribute trust principal to another trust for the benefit of one or more of the beneficiaries of the original trust under specified circumstances. These provisions are lengthy and highly complex.

G. PURCHASE OF INSURANCE

A corporate trustee may now purchase insurance underwritten or distributed by an affiliate unless the settlor expressly prohibited doing so in the trust.
H. ALLOCATION OF TRUSTEE COMPENSATION

Rather than being required to allocate trustee compensation equally between income and principal, the trustee may now allocate in any manner as long as it is consistent with the trustee’s fiduciary duties.190

I. ARBITRATION

In the landmark case of Rachal v. Reitz, the Texas Supreme Court held that an arbitration clause in a trust is enforceable.191 A beneficiary brought suit asserting that the trustee misappropriated trust property and failed to provide a proper accounting.192 Because the settlor included a provision in his inter vivos trust requiring the beneficiaries to arbitrate any dispute with the trustees, the trustee moved to compel arbitration.193 Both the trial court and the Dallas Court of Appeals held that this provision was unenforceable.194 The court of appeals explained that a person cannot be compelled to arbitrate a dispute if the person did not agree to relinquish the person’s ordinary right to litigate.195 The beneficiary is merely a recipient of equitable title to property and not a party to the trust instrument.196 A trust is a conveyance of property coupled with a split of legal and equitable title and the imposition of fiduciary duties on the trustee.197 A trust is not an agreement or contract.198

The Texas Supreme Court reversed, holding that the arbitration provision is enforceable against the beneficiaries for two reasons.199 First, the court will enforce conditions the settlor attached to the gifts to carry out the settlor’s intent.200 The settlor included a clear statement that he wanted all disputes to be arbitrated and thus the court will give effect to that provision.201

Second, the Texas Arbitration Act requires the enforcement of agreements to arbitrate.202 Even though the beneficiaries did not expressly agree, they are deemed to have agreed through the doctrine of “direct benefits estoppel” because they accepted benefits of the trust and filed suit to enforce the terms of the trust.203 These actions are the assent required to form an enforceable arbitration agreement.204 If a beneficiary is unhappy with the arbitration

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192. Id. at 842.
193. Id.
195. Id. at 310–11.
196. Id. at 310.
197. Id.
198. Id.
200. Id. at 844.
201. Id.
202. Id. at 845.
203. Id. at 846–47.
204. Id. at 845–46.
provision, the beneficiary may disclaim under Trust Code section 112.010.205 The supreme court stated that “it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms.”206

This case raises the following issue and concerns:

• Although this was a trusts case, it would seem likely the court would reach the same result if the arbitration provision was contained in a will.
• Although beneficiaries do have the ability to disclaim before accepting benefits, it is unlikely that beneficiaries read the trust and seek legal advice about the consequences of accepting benefits. Instead, beneficiaries just collect the benefits and study the trust instrument in detail only when something goes wrong.
• The supreme court does not discuss how to handle the situation where the beneficiaries are minors or incompetent individuals.
• Arbitration provisions may become boilerplate so that the justification that the settlor intentionally imposed the requirement may be problematic.
• If a settlor really wanted to mandate arbitration, the settlor could include a provision requiring the trustee to obtain the beneficiary’s written consent to arbitrate as a condition precedent to receiving trust distributions.

J. BANKRUPTCY

The Supreme Court of the United States case of Bullock v. BankChampaign teaches that a bankrupt trustee who breaches fiduciary duties, but not in an evil manner, may be successful in getting a judgment based on that breach discharged.207 The settlor created a trust for his children and named one of the children as the trustee.208 The trustee breached his fiduciary duties by borrowing funds from the trust, and thus his siblings obtained a judgment against him for the benefits he received from his self-dealing.209 The trustee had previously paid all borrowed funds with interest, and the trial court determined that he had no malicious motive.210 The trustee later filed for bankruptcy and sought discharge of the judgment.211 The Bankruptcy Court held that the debt was not dischargeable under 11 U.S.C. section 523(a)(4), which provides that discharge is not available “as a debt for defalcation while acting in a fiduciary capacity.”212 Both the Federal District Court and the Eleventh Circuit agreed.213

205. Id. at 846.
206. Id. at 847.
208. Id. at 1757.
209. Id.
210. Id.
211. Id.
212. Id. at 1755.
213. Id. at 1755–56.
The U.S. Supreme Court, in a unanimous opinion, reversed.\textsuperscript{214} The Court explained that the debt could be discharged because the trustee was not (in this author’s words) “evil.”\textsuperscript{215} The Court held that for the debt to be non-dischargeable, the trustee must have acted with a culpable state of mind “involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior.”\textsuperscript{216}

K. RECEIVERSHIP

It is well accepted that receivership is an “extreme” remedy and will be granted “only where great emergency or imperative necessity requires it.”\textsuperscript{217} Elliott v. Weatherman demonstrates this principle in a case where after the settlors died, their three children became co-trustees of their trust.\textsuperscript{218} Two of the trustees sued the third trustee alleging that he had violated the terms of the trust, breached fiduciary duties, and converted some of the trust property.\textsuperscript{219} To resolve this dispute, the trial court appointed a receiver upon the request of the allegedly breaching trustee over certain assets of the trust as authorized by Trust Code section 114.008(a)(5).\textsuperscript{220} The other two trustees appealed.\textsuperscript{221}

The Austin Court of Appeals reversed.\textsuperscript{222} The court stated that “[e]ven if a specific statutory provision authorizes a receivership, a trial court should not appoint a receiver if another remedy exists at law or in equity that is adequate and complete.”\textsuperscript{223} The court also explained that the two other trustees did not have sufficient notice that the receivership remedy was requested, that is, a minimum of three days’ notice under the Texas Rules of Civil Procedure 695 because real property was involved.\textsuperscript{224} Even with respect to the personal property subject to the receivership, the court held that the evidence was insufficient to justify the appointment of a receiver without notice and the opportunity to be heard.\textsuperscript{225}

VI. OTHER ESTATE PLANNING MATTERS

A. DISCLAIMERS

As of January 1, 2014, an heir or will beneficiary will no longer be able to disclaim property if that person is in arrears in paying child support.\textsuperscript{226} Every

\textsuperscript{214} Id. at 1761.
\textsuperscript{215} See id. at 1759.
\textsuperscript{216} Id. at 1757.
\textsuperscript{218} Elliott v. Weatherman, 396 S.W.3d 224, 226 (Tex. App.–Austin 2013, no pet.).
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 227–28.
\textsuperscript{221} Id. at 229.
\textsuperscript{222} Id. at 225.
\textsuperscript{223} Id. at 228.
\textsuperscript{224} Id. at 229.
\textsuperscript{225} Id. at 229–30.
disclaimant must state in the disclaimer whether the beneficiary is a child support obligor. Note that trust beneficiaries may still disclaim to avoid their child support obligations because the legislature did not make changes to the disclaimer provisions of the Trust Code.

B. DURABLE POWER OF ATTORNEY

Several changes were made to the statutory durable power of attorney form provided in Estates Code section 752.051: (1) adding a more detailed explanation in the instructions section on how a power of attorney operates, (2) requiring the principal to initial in front of powers to be granted (rather than crossing out powers the principal does not desire to grant), (3) including the exercise of a general power of appointment if the principal initials the gifting power, and (4) adding a comprehensive explanation of the agent’s duties.

A statutory probate court will have jurisdiction of actions brought by an agent under a power of attorney arising out of the agent’s performance of the agent’s duties as of January 1, 2014. Previously, the statutory probate court’s jurisdiction extended only to actions against the agent.

C. MEDICAL POWER OF ATTORNEY

The statutory form for the medical power of attorney was revised to reflect changes made in 2009 permitting the principal to have the power acknowledged before a notary rather than having it witnessed.

If a county has a statutory probate court, it now has concurrent jurisdiction with the district court over actions to set aside the power due to the principal’s lack of competency or being under duress, fraud, or undue influence.

D. LIFE INSURANCE

Upon divorce (or even while the divorce is pending), life insurance beneficiary designations need to be updated to reflect the insured’s intent because policies governed by federal law will not get the benefit of state law, which typically automatically voids a beneficiary designation in favor of an ex-spouse. In the U.S. Supreme Court case of *Hillman v. Maretta*, the insured named his then-wife as the beneficiary of a life insurance policy covered by the Federal Employees’ Group Life Insurance Act of 1954. The insured later divorced the beneficiary and remarried, but he neglected to change the

227. Id.
228. Id.
231. Id.
233. Id. § 2, 2013 Tex. Gen. Laws at 537 (adding TEX. HEALTH & SAFETY CODE ANN. § 166.165(a-1)).
234. TEX. FAM. CODE ANN. § 7.005 (West 2011).
After his death, both his current wife and his former wife claimed the proceeds.236 His current wife claimed that the divorce acted to revoke Insured’s designation of his now ex-wife as a beneficiary under Virginia law.237 On the other hand, his former wife asserted that local law was preempted by federal law, and thus the designation of her as the beneficiary remained effective.238 In addition, the former wife also claimed that the Virginia statute holding her liable for the proceeds was likewise preempted even if preemption occurred.239 The U.S. Supreme Court agreed that the Virginia statute was preempted and that the ex-wife was entitled to the proceeds of the life insurance policy.240

E. COMMUNITY PROPERTY SURVIVORSHIP AGREEMENTS

A community property survivorship agreement is designed to provide survivorship rights to community property, not to convert separate property into community property. Unless the agreement also meets the requirement of a conversion agreement, it will be ineffective to create survivorship rights in separate property, as demonstrated by In re Estate of Cunningham.242 A husband and his wife entered into a community property survivorship agreement by using a fill-in-the-blank form with the assistance of family members rather than an attorney.243 After the husband died, the trial court granted his wife’s application to adjudicate the agreement as valid.244 Four months later, one of the husband’s children (the wife’s stepson) filed a bill of review under Probate Code section 31 claiming that the court made a substantial error because some of the property allegedly covered by the agreement was actually the husband’s separate property.245 The trial court denied the bill of review.246 The Dallas Court of Appeals reversed.247 The court explained that the community property survivorship agreement, although purporting to include “all inheritance property” within its scope, did not meet the requirements of Family Code sections 4.203 and 4.205 to act as a conversion of separate property (the inherited property) into community property which would then be covered by the survivorship agreement.248 For example, the agreement did not state that they were converting separate property into community property.249 In addition, there was no evidence showing that either spouse received the required fair and reasonable disclosure of the legal effect of converting separate property.

236. Id. at 1949.
237. Id.
238. Id.
239. Id.
240. Id.
241. Id. at 1953.
243. Id. at 687.
244. Id.
245. Id.
246. Id.
247. Id. at 686.
248. Id. at 688.
249. Id.
to community property. Because the survivorship agreement did not convert the husband’s separate property into community property, the original order was substantially in error, and the trial court erred in not granting the bill of review.

F. McKeehan v. McKeehan Overruled

According to the Austin Court of Appeals case of McKeehan v. McKeehan, an agreement relating to a nonprobate asset which contains a choice of law clause causes that state’s law to govern the asset, such as whether the asset has the survivorship feature. The 2013 legislature added Estates Code section 111.054 to provide that if more than 50% of that asset (e.g., a bank account, retirement plan, annuity, or insurance contract) was contributed by a Texas resident, Texas law will determine whether the asset has the survivorship feature, irrespective of any choice of law provision. The applicability of this new provision is based on the date of the owner’s death being on or after January 1, 2014, rather than the date on which the decedent entered into the agreement. To enhance the likelihood of a court upholding this statute, the legislature stated that the change represents “the fundamental policy of [Texas] for the protection of its residents and [is] intended to prevail over the law of another state or jurisdiction, to the extent those laws are in conflict with Texas law.”

G. IRAs

The 2013 Texas legislature clarified that Roth IRAs (both regular and inherited) are protected from creditors.

H. Body Disposition

Because a marriage is terminated only by a court decree or death, a person in the process of divorce needs to update his or her entire estate plan to remove the spouse from the normal priority the spouse has to make financial, medical, and body disposition arrangements. In re Estate of Woods demonstrates the importance of so doing. After the decedent died, a battle ensued between his surviving spouse and the independent executor, his son from a prior marriage, over who has priority to decide on the disposition of the decedent’s cremains. The trial court determined the son had priority.
The Tyler Court of Appeals reversed.261 The court pointed to Health & Safety Code section 711.002(a) which states that the surviving spouse has priority over body disposition if the deceased spouse did not make other arrangements.262 The court held that it was irrelevant that decedent had filed for a divorce from his wife a few months before his death.263

VII. CONCLUSION

The new cases and legislation address a wide array of issues, some very narrow and some with potentially broad impact. This article has already discussed the practical application of the cases and statutes. It is also important to understand some overarching principles that transcend individual cases and statutes and form a pattern. Here are some examples of patterns this author detected:

- The testator’s intent is important in will construction and courts will enforce and uphold provisions when the testator’s intent is clear.264
- Timeliness and prompt action are required not only in will contests but in giving notice to other parties.265
- Estate planning arrangements should be reviewed and changed accordingly during and after divorce to remove former spouses as beneficiaries or default decision makers.266
- Courts will not “punish” without some solid basis for the punishment.267

261. Id.
262. Id. at 849.
263. Id. at 848.
264. Netherton v. Cowan, No. 04-12-00627-CV, 2013 WL 4091773 (Tex. App.—San Antonio Aug. 14, 2013, no pet.) (mem. op.) (testator’s will did not attach condition for interest to vest); Di Fortunata v. Monroe, 402 S.W.3d 711 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (wills did not prohibit consolidation and suit did not thwart testator’s intent); Rachal v. Reitz, 403 S.W.3d 840, 848 (Tex. 2013) (arbitration was condition settlor attached and court will enforce).
265. Coffey v. Bank of America, No. 09-12-0013-CV, 2013 WL 257363, at *3 (Tex. App.—Beaumont Jan. 24, 2013, no pet.) (mem. op.) (filing lawsuit was insufficient notice to bank so too late to recover); Kirkland v. Schaff, 391 S.W.3d 649 (Tex. App.—Dallas 2013, no pet.) (attorney’s fees should be requested in original complaint or soon after); Omohundro v. Ramirez-Justus, 392 S.W.3d 218, 223 (Tex. App.—El Paso 2012, pet. denied) (suit barred because not brought on timely basis).
266. In re Estate of Woods, 402 S.W.3d 845 (Tex. App.—Tyler 2013, no pet.) (wife still had priority over body disposition because divorce was not finalized); Hillman v. Mareta, 133 S. Ct. 1943 (2013) (state law automatically voiding ex-spouses as beneficiaries is preempted by federal law, thus exwife was entitled to proceeds of life insurance policy).
267. In re Estate of Valdez, 406 S.W.3d 228, 234 (Tex. App.—San Antonio 2013, pet. denied) (will contest is lawful act and not tortious conduct); In re Estate of Allen, 407 S.W.3d 335, 339 (Tex. App.—Eastland 2013, no pet.) (relief on attorney’s bad advice, so not in default); Pine v. deBlieux, 405 S.W.3d 140, 147 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (administratrix acted “at her own peril” in continuing claims during “gap period” between court’s opinion and issuance of mandate); Bullock v. BankChampaign, 133 S. Ct. 1754 (2013) (bankrupt trustee who breached duties could get judgment discharged because must have acted with “culpable” mind).