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## Wills & Trusts

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# WILLS & TRUSTS

Gerry W. Beyer\*

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This article discusses legislative and judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of November 1, 2014 through October 31, 2015. 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 the same situations arising with his or her clients.

## I. INTERFACE BETWEEN PROBATE CODE AND ESTATES CODE

The 2015 Texas Legislature made it clear that the Estates Code is to be treated as an amendment, albeit a huge one, to the Probate Code.<sup>1</sup> Accordingly, if a will refers to “the Probate Code as amended,” that reference is deemed to be the Estates Code.

## II. INTESTACY

### A. POSTHUMOUS HEIRS

Posthumous heirs must now be in gestation at the time of the intestate’s death to obtain inheritance rights.<sup>2</sup> This amendment precludes the use of the decedent’s sperm, eggs, or embryos to produce heirs who are born years or decades after the intestate’s death. In addition, there are no longer different rules for lineal and collateral posthumous heirs.

### B. DETERMINATION OF HEIRSHIP

The contents of the application to declare heirship was changed. Some of the significant changes are noted below:

- The time of death is no longer required; the date of the intestate’s death is sufficient.<sup>3</sup>
- Instead of providing the residences of the intestate’s heirs, the application must now state the physical addresses of the heirs where service can be had.<sup>4</sup>

The application must indicate whether each heir is an adult or a minor.<sup>5</sup> Service of citation is not needed on a party who entered an appearance or who has waived citation.<sup>6</sup>

## III. WILLS

### A. TESTAMENTARY CAPACITY

Regardless of how competent a person is at the time of will execution, family members who are dissatisfied with the terms of the will are likely

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1. *See, e.g.*, TEX. EST. CODE ANN. § 21.002 (West 2016).  
2. *Id.* § 201.056.  
3. *Id.* § 202.005.  
4. *Id.*  
5. *Id.*  
6. *Id.* § 202.055.

to contest the will, especially if the estate has substantial value. For example, in *In re Estate of Hemsley*,<sup>7</sup> after the probate court determined that the testator had testamentary capacity, the will contestants appealed. The El Paso Court of Appeals affirmed.<sup>8</sup> The court of appeals studied the evidence, which included testimony of the attorney who drafted the testator's power of attorney.<sup>9</sup> The attorney declined to draft the testator's will, fearing a contest due to the testator's celebrity status garnered through roles such as the character of George Jefferson from the classic television programs *All in the Family* and *The Jeffersons*.<sup>10</sup> The court of appeals also heard evidence from the attorney who eventually prepared the will.<sup>11</sup> This attorney had no doubt that the testator had full testamentary capacity.<sup>12</sup> Two other witnesses and a registered nurse caring for the testator testified in a similar manner.<sup>13</sup> Nonetheless, the contestants claimed that this evidence was legally insufficient.<sup>14</sup>

#### B. SAVINGS STATUTE

Texas now has a savings statute, which provides that a will is valid in Texas, even if it does not meet the Texas requirements, if it meets the requirements of the jurisdiction where (1) the will was executed; (2) the decedent was domiciled; or (3) the decedent had a place of residence.<sup>15</sup>

#### C. ONE-STEP SELF-PROVING AFFIDAVIT

Revisions to the sequencing of events for the proper use of a self-proving affidavit, which is included in the will itself, eliminated the extremely awkward procedure that was previously required.<sup>16</sup>

#### D. LIMITATION ON COURT'S AUTHORITY TO RESTRICT WILLS

A court may no longer prohibit a person from revoking an existing will or codicil.<sup>17</sup> Previously, the court was restricted only from preventing a person from executing a new will or codicil.

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7. 460 S.W.3d 629 (Tex. App.—El Paso 2014, pet. denied).

8. *Id.* at 637.

9. *Id.* at 635.

10. *Id.*

11. *Id.* at 635–36.

12. *Id.* at 636.

13. *Id.*

14. *Id.*

15. *See* TEX. EST. CODE ANN. § 251.053 (West 2016).

16. *See id.* § 251.1045(a). For a detailed discussion of the will execution ceremony under the amended statute, see Gerry W. Beyer, *How to Conduct a Modern Texas Will Execution*, EST. PLAN. DEV. TEX. PROF., at 1 (Oct. 20, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2087884](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087884) [<http://perma.cc/9RN4-PR34>].

17. TEX. EST. CODE ANN. § 253.001(b)–(c).

## E. ELECTION WILLS

*In re Estate of Cole*<sup>18</sup> serves as a reminder of the importance of a married testator including an election provision in a will that expressly states whether the will is, or is not, intended to trigger an election by the surviving spouse. A dispute arose as to whether a husband's will required his wife to make an election to either (1) assert rights to her one-half of the community estate; or (2) give up these rights in exchange for her gifts under the will.<sup>19</sup> The trial court determined, as a matter of law, that the will put the wife to an election, and the wife appealed.<sup>20</sup>

The Fort Worth Court of Appeals reversed.<sup>21</sup> The court of appeals focused on the clause of the husband's will that provided that he intended only to dispose of his property, "including [his] one-half interest in the community property."<sup>22</sup> His wife claimed that this clause meant that a gift in the will leaving an investment account to a son would only include funds that were the husband's separate property or his one-half of the community property.<sup>23</sup> The court of appeals conducted a careful review of Texas election will cases and concluded that the husband's will "did not clearly and unequivocally" put his wife to an election.<sup>24</sup> The husband's mere statement in the will that the investment account was his separate property "does not mitigate his prior clear and specific language that he intended only to dispose of his separate property and his one-half of the community property."<sup>25</sup> At most, this created an ambiguity that precluded a holding that the will put the wife to an election.

## F. NO CONTEST CLAUSE

Both a recent case and legislative change make it clear that no contest clauses are not effective to protect executors and other fiduciaries from claims of breach of fiduciary duty. They, however, are enforceable if a beneficiary attempts to change the testator's dispositive plan.

The statutory provision provides that forfeiture clauses are unenforceable if there is an existing law which provides that these clauses may not be construed to prevent a beneficiary from enforcing fiduciary duties or seeking a judicial construction of the will.<sup>26</sup>

In *Ard v. Hudson*,<sup>27</sup> the testatrix's will contained the following *in terrorem* provision:

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18. No. 02-13-00417-CV, 2015 WL 392230 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (mem. op.).

19. *Id.* at \*2.

20. *Id.* at \*2–3.

21. *Id.* at \*6.

22. *Id.* at \*5.

23. *Id.* at \*4.

24. *Id.* at \*4–6.

25. *Id.* at \*5.

26. TEX. EST. CODE ANN. § 254.005(b) (West 2016).

27. No. 02-13-00198-CV, 2015 WL 4967045 (Tex. App.—Fort Worth Aug. 20, 2015, pet. filed).

If any beneficiary hereunder shall contest the probate or validity of this Will or any provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits shall pass to the non-contesting residuary beneficiaries of this Will in the proportion that the share of each such non-contesting residuary beneficiary bears to the aggregate of the effective (non-contesting) shares of the residuary . . . . Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all provisions of this Will.<sup>28</sup>

One of the beneficiaries, Mary, brought suit against the executors and trustees for breach of duty, sought temporary and permanent injunctive relief, and requested the appointment of a receiver.<sup>29</sup> The fiduciaries claimed these actions triggered forfeiture of her benefits under the will.<sup>30</sup> The trial court agreed and Mary appealed.<sup>31</sup>

The Fort Worth Court of Appeals reversed.<sup>32</sup> The court of appeals held that “a beneficiary has an inherent right to challenge the actions of a fiduciary and does not trigger a forfeiture clause by doing so.”<sup>33</sup> The court of appeals continued by explaining that this right would be worthless if the beneficiary could not seek remedies.<sup>34</sup> Accordingly, the court of appeals also held that “a beneficiary exercising his or her inherent right to challenge a fiduciary may seek injunctive and other relief, including the appointment of a receiver, from the trial court to protect what the testator or grantor intended the beneficiary to have without triggering the forfeiture clause.”<sup>35</sup>

The court of appeals then turned its attention to the last line of the *in terrorem* clause, which imposes a condition precedent on being a beneficiary, that is, to “accept and agree” to the will provisions.<sup>36</sup> Consistent with its holding on the forfeiture part of the clause, the court of appeals stated that Mary’s actions did not violate the condition precedent.<sup>37</sup> Mary’s challenges were to the conduct of the fiduciaries, not the terms of the will.<sup>38</sup>

A beneficiary’s action must first fall within the scope of a no contest clause before the beneficiary’s good faith and just cause in bringing that

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28. *Id.* at \*2.

29. *Id.* at \*3–4.

30. *Id.* at \*4.

31. *Id.* at \*5–6.

32. *Id.* at \*9.

33. *Id.* at \*8.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at \*9.

38. *Id.*

action is relevant as a defense to forfeiture.<sup>39</sup> For example, in *Estate of Cole*,<sup>40</sup> a husband's will contained a no contest clause which, among other things, provided that if his wife contested the "characterization of [his] property as [his] separate property" she would forfeit all gifts to her under the will.<sup>41</sup> His wife made a claim for her community property interest against an investment account her husband classified as his separate property.<sup>42</sup> The trial court determined that her claim did not trigger the no contest clause but submitted the issue of her good faith and just cause to the jury, which subsequently decided she was lacking.<sup>43</sup> The wife appealed.<sup>44</sup>

The Fort Worth Court of Appeals first agreed with the trial court that the wife was not contesting the will or any of its provisions.<sup>45</sup> Instead, she was merely asserting a right to her own property, which the will did not prevent her from doing, because her husband stated that he was only disposing his separate property and his one-half of the community property.<sup>46</sup> Although puzzled about why the trial court submitted the issue of the wife's good faith and probable cause to the jury, such action did not impact the judgment and, thus, was harmless error.<sup>47</sup>

#### G. DIVORCE AND POUR OVER TRUSTS

The provisions of an irrevocable pour over trust in favor of an ex-spouse or a relative of an ex-spouse, who is not also a relative of the testator, will now be ineffective unless a court order or contract provides otherwise. Instead, the trust will be read as if that person disclaimed his or her interest or, in the case of fiduciary appointments, died before the divorce.<sup>48</sup>

#### H. EXONERATION

When the Probate Code was recodified, the 2009 Texas legislature inadvertently dropped the date on or after which the testator had to execute a will for the no-exoneration presumption to apply. This date, September 1, 2005, was restored.<sup>49</sup>

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39. See TEX. EST. CODE ANN. § 254.005 (West 2015).

40. No. 02-13-00417-CV, 2015 WL 392230 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (mem. op.).

41. *Id.* at \*1.

42. *Id.*

43. *Id.* at \*2.

44. *Id.* at \*3.

45. *Id.* at \*9.

46. *Id.*

47. *Id.*

48. See TEX. EST. CODE ANN. § 123.001(2)(b)(2) (West 2016).

49. *Id.* § 255.304.

### I. CLASS GIFTS

Unless the testator's will provides otherwise, a person must be born or in gestation at the time of the testator's death to qualify as a member of a class for purposes of a class gift.<sup>50</sup> This section, designed to preclude the use of the decedent's sperm, eggs, or embryos to produce class members who are born years or decades after the testator's death, may have an inadvertent impact because the section does not distinguish between immediate gifts (e.g., "to my grandchildren") and postponed gifts (e.g., "to my child for life, and then to my grandchildren"). In the latter case, it is likely the testator intended to include in the class grandchildren born after the testator's death.

### J. JUDICIAL MODIFICATION AND REFORMATION

In a major change in Texas law, courts have now been given the authority to modify and reform a will even if the will is unambiguous,<sup>51</sup> effectively overruling the Texas Supreme Court case, *San Antonio Area Foundation v. Lang*,<sup>52</sup> which held that "extrinsic evidence is not admissible to construe an unambiguous will provision."<sup>53</sup>

Below are the key features of how a court may exercise this new power:

- Only a personal representative may petition for modification or reformation;<sup>54</sup> disgruntled beneficiaries and wishful beneficiaries lack standing.
- The court has broad authority to order the personal representative to perform acts, which the testator prohibited, and to prevent the personal representative from acting as the testator specified.<sup>55</sup>
- The court must have a "good" reason for ordering the modification or reformation, such as to make estate administration more efficient, to carry out the settlor's tax objectives, to assist a beneficiary in qualifying for government benefits, or to correct a scrivener's error but only if there is clear and convincing evidence of the testator's intent.<sup>56</sup>
- The court must modify or reform the will to conform to the "probable" intent of the testator.<sup>57</sup>
- The personal representative has no duty to seek a reformation or modification and is not required to tell the beneficiaries that the personal representative has the ability to seek reformation or

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50. *See id.* §§ 255.401, 255.451.

51. *Id.* §§ 255.451–.455.

52. 35 S.W.3d 636 (Tex. 2000).

53. *Id.* at 637.

54. TEX. EST. CODE ANN. § 255.451(a).

55. *Id.*

56. *Id.* § 255.451(a)–(b).

57. *Id.* § 255.452.

modification.<sup>58</sup>

- The personal representative has no liability for failing to seek reformation or modification.<sup>59</sup>

Although these provisions have the laudable goal of carrying out the testator's intent, they have the possibility of preventing a testator from achieving certainty when drafting a will. For example, the testator could write, "I leave \$10,000 to X," and later have the court decide that the testator actually meant to leave X \$100,000 or that the funds were intended for Y. This is especially the case because the executor is often a beneficiary who would benefit from an increase in gifts to itself and a reduction in gifts to others.

#### K. CRIMINAL LAW INTERFACE

*McCay v. State*<sup>60</sup> explains that a person involved in "evil" conduct with respect to a will may also face criminal law liability in addition to having the court determine that the purported will is invalid.<sup>61</sup> The Dallas Court of Appeals held that a person commits the criminal offense of theft if the person, with intent to steal, causes a will to be executed in his or her favor and then files that will for probate.<sup>62</sup>

### IV. ESTATE ADMINISTRATION

#### A. APPLICATION TO PROBATE A WILL

An independent administrator designated by all of the decedent's distributees now has standing to file an application to probate the decedent's will and for the appointment of a personal representative.<sup>63</sup>

The applicant no longer needs to state the time of the testator's death; stating the date of death is sufficient.<sup>64</sup> With regard to a lost will, the applicant no longer needs to state the age and marital status of each of the beneficiaries and heirs. Instead, the applicant must now state whether the person is an adult or a minor.<sup>65</sup>

If a will is being probated as a muniment of title, the applicant no longer needs to state the time of the testator's death; stating the date of death is sufficient. The applicant, however, must now provide the physical address where service can be had on the executor named in the will.<sup>66</sup>

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58. *Id.* § 255.455(a).

59. *Id.* § 255.455(b).

60. 476 S.W.3d 640 (Tex. App.—Dallas Sept. 9, 2015), *cert. filed*, *McCay v. Texas*, No. 15-9889 (June 24, 2016).

61. *Id.* at 642–43.

62. *Id.* at 645–66.

63. *See* TEX. EST. CODE ANN. §§ 256.051(a), 301.051 (West 2016).

64. *See id.* § 256.052(a).

65. *See id.* §§ 256.054, 257.053(3).

66. *Id.* § 257.051.

### B. TIMING FOR ISSUANCE OF LETTERS

An application for letters may now be filed even after four years from the decedent's death has elapsed if necessary to "prevent real property in a decedent's estate from becoming a danger to the health, safety, or welfare of the general public," provided that the applicant is a home-rule municipality that is a creditor of the estate.<sup>67</sup>

### C. FOREIGN WILLS

The 2015 Texas Legislature clarified the method of proving a foreign will and the effectiveness of a self-proving affidavit to make the probate process easier and more efficient.<sup>68</sup> In addition, it is now clear that a foreign will that has already been probated in another state or country may be admitted to probate in Texas, even if the application is filed more than four years after the testator's death.<sup>69</sup>

### D. APPLICATION FOR LETTERS OF ADMINISTRATION

The applicant for letters of administration no longer needs to state the time of the intestate's death; stating the date of death is sufficient.<sup>70</sup> The applicant no longer needs to state the age and marital status of each of the heirs. Instead, the applicant must now state whether each heir is an adult or a minor.<sup>71</sup>

### E. NOTICE TO BENEFICIARIES

The affidavit or certificate of the personal representative confirming notice to the beneficiaries no longer needs to contain the addresses of the beneficiaries.<sup>72</sup>

### F. AFFIDAVIT IN LIEU OF INVENTORY

A personal representative who elects to use the affidavit in lieu of inventory procedure does not need to provide the inventory to beneficiaries who are entitled to \$2,000 or less, have already received the property to which they are entitled, or have executed a written waiver.<sup>73</sup>

### G. EXEMPT PROPERTY

The amounts of personal property that are exempt from creditors were increased. For a single adult, the amount was increased from \$30,000 to \$50,000 and for a family, from \$60,000 to \$100,000.<sup>74</sup> If any exempt prop-

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67. *See id.* § 301.002(b).

68. *Id.* § 256.152(b)-(c).

69. *Id.* § 501.001.

70. *See id.* § 301.052(3).

71. *Id.* § 301.052(6).

72. *Id.* § 308.004(a).

73. *Id.* § 309.056(b-1).

74. TEX. PROP. CODE ANN. § 42.001(a) (West 2016).

erty remains in an insolvent estate that was not set aside for the surviving spouse and children, it is now clear that the balance of this exempt property passes in the same manner as other estate property.<sup>75</sup>

#### H. INDEPENDENT ADMINISTRATION

It is now clear that the beneficiaries or heirs may agree to independent administration in separate documents; they do not need to sign the same application.<sup>76</sup>

#### I. CREDITORS

##### 1. *Duty of Creditor to Possess or Sell*

If a creditor in a dependent administration elects or defaults to preferred debt and lien status, and decides to take possession or sell the collateral prior to the maturity of the debt, the creditor must do so within a reasonable time.<sup>77</sup> If the creditor does not, the court may order the property sold free of the debt and the proceeds used to pay the debt.<sup>78</sup> This will assist the estate in obtaining any surplus value the collateral may have over the debt owed as well as removing the property from the estate to reduce management expenses.<sup>79</sup>

##### 2. *Child Support Acceleration*

When computing the amount of accelerated child support for which a deceased parent is responsible, the present value of dental health insurance premiums must now be included as well as health insurance premiums.<sup>80</sup>

#### J. SMALL ESTATE AFFIDAVIT

The listing of estate assets in a small estate affidavit must now “indicate which assets the applicant claims are exempt.”<sup>81</sup>

#### K. BILL OF REVIEW

In *Valdez v. Hollenbeck*,<sup>82</sup> the intestate’s heirs sought to reopen an estate administration by using a bill of review ten years after it was closed and more than three years after learning that a probate court clerk had stolen over \$500,000 from the estate.<sup>83</sup> The probate court denied a statutory bill of review because more than two years had passed since the date of closing, but granted the heirs’ request for an equitable bill of review by

75. TEX. EST. CODE ANN. § 353.153.

76. *Id.* §§ 401.002, 401.003(a).

77. *Id.* § 355.1551.

78. *Id.*

79. *Id.*

80. TEX. FAM. CODE ANN. § 154.015(c)(2) (West 2016).

81. TEX. EST. CODE ANN. § 205.002(b).

82. 465 S.W.3d 217 (Tex. 2015).

83. *Id.* at 220.

applying the longer four-year period and the discovery rule.<sup>84</sup> The heirs then litigated their claims and prevailed against the administrator and surety both at the trial and appellate levels.<sup>85</sup>

The Texas Supreme Court reversed the holding that the time period to bring a bill of review had elapsed.<sup>86</sup> The heirs' ability to bring a bill of review was governed by the Probate Code's (now Estates Code § 55.251) two-year period.<sup>87</sup> In effect, the Code's time period abrogated the equitable bill of review in a probate context.<sup>88</sup> Accordingly, the heir's action was untimely regardless of whether limitations was tolled until they discovered the actions of the evil probate clerk.<sup>89</sup> Note that although the supreme court did not approve of tolling based on the discovery rule, it left open the issue of whether tolling should be allowed when violations of fiduciary duties and fraudulent concealment are at issue.<sup>90</sup>

This case teaches that in the probate context, bills of review are statutorily based, not based on equity. Thus, the statutory two-year period applies. The supreme court indicated its unwillingness to approve a discovery rule generally but left open the possibility that a discovery rule might be acceptable if the claim is based on a breach of fiduciary duty coupled with fraudulent concealment of that breach.

#### L. APPELLATE JURISDICTION

*In re Estate of Romo*<sup>91</sup> reinforces the rule that if multiple wills are filed for probate, the court must decide on the validity of each will before an appellate court will have jurisdiction to hear an appeal.<sup>92</sup> After an application to probate the testator's 2001 will was filed, an application to probate testator's 2006 will was filed and granted. The proponent of the 2001 will then contested the 2006 will on grounds that the testator lacked testamentary capacity or that the testator signed the will under undue influence. The probate court concluded that the 2006 will did not even comport with the statutory requirements for a valid will and set aside its order admitting the 2006 will to probate.<sup>93</sup> The probate court did not rule on the validity of the 2001 will.<sup>94</sup> The proponent of the 2006 will appealed.<sup>95</sup>

The El Paso Court of Appeals dismissed the appeal, finding that it lacked jurisdiction, because the order setting aside the probate of the

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84. *Id.* at 224.

85. *Id.* at 224–25.

86. *Id.* at 232.

87. *Id.* at 226–28.

88. *Id.* at 227–28.

89. *Id.* at 231.

90. *Id.*

91. 469 S.W.3d 260 (Tex. App.—El Paso 2015, no pet.).

92. *Id.* at 262–63.

93. *Id.* at 261.

94. *Id.*

95. *Id.*

2006 will was not a final order.<sup>96</sup> The court of appeals explained that Estates Code § 256.101 prescribes the procedure when two applications are simultaneously pending—that is, the court must determine which will (if either) to admit to probate.<sup>97</sup> Because the probate court had not yet ruled on the validity of the 2001 will, the order was not final.<sup>98</sup>

#### M. REMOVAL OF PERSONAL REPRESENTATIVE

*In re Estate of Montemayor*<sup>99</sup> demonstrates that a trial court's order removing an independent executor from office will be difficult to overturn on appeal.<sup>100</sup> The trial court removed the independent executor.<sup>101</sup> The trial court based its decision on evidence that he was living in the house, which was the main estate asset; was not making good faith efforts to sell the house; was not making necessary repairs; and was preventing the other beneficiaries from accessing the house.<sup>102</sup> The executor also stated that he would live in the house until the day he died. The order stated that he was guilty of gross mismanagement and was incapable of performing his fiduciary duties due to a material conflict of interest and thus Estates Code § 404.0035(b)(3), (5) authorized his removal.<sup>103</sup> The independent executor appealed.<sup>104</sup>

The San Antonio Court of Appeals affirmed.<sup>105</sup> The court of appeals explained that it reviewed the trial court's decision under an abuse of discretion standard and it could not find evidence of such abuse.<sup>106</sup> The court of appeals also rejected the independent executor's claim that removal was improper because the pleadings did not specifically use the terms "gross misconduct" and "gross mismanagement," because the pleadings gave fair notice by alleging breaches of fiduciary duty and self-dealing.<sup>107</sup>

#### N. LOST WILLS

In *In re Estate of Standefer*,<sup>108</sup> the trial court admitted the testator's will to probate although the proponent of the will was unable to produce the original and was only able to locate a photocopy. The Eastland Court of Appeals affirmed.<sup>109</sup>

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96. *Id.* at 262–63.

97. *Id.*

98. *Id.* at 263.

99. No. 04-14-00391-CV, 2015 WL 1875978 (Tex. App.—San Antonio Apr. 22, 2015, no pet.) (mem. op.).

100. *Id.* at \*5.

101. *Id.* at \*2.

102. *Id.* at \*1–2.

103. *Id.* at \*2 & n.2; see TEX. EST. CODE ANN. § 404.0035(b)(3), (5) (West 2015).

104. *In re Estate of Montemayor*, 2015 WL 1875978, at \*2.

105. *Id.* at \*5.

106. *Id.* at \*2, \*4.

107. *Id.* at \*3.

108. No. 11-14-00221-CV, 2015 WL 5191443 (Tex. App.—Eastland Aug. 21, 2015, no pet.).

109. *Id.* at \*7.

The court of appeals began by examining the evidence presented at trial.<sup>110</sup> The alleged will left the testator's entire estate to his two sons to the exclusion of his daughter who then claimed that the testator died intestate so she could inherit one-third of the estate.<sup>111</sup> The proponent testified that the testator told him about the existence of a will and that he searched diligently for the original after the testator died.<sup>112</sup> The proponent had also testified that the will was probably stored in a lockbox to which other people had access and someone had even improperly removed a title to one of the testator's cars.<sup>113</sup> An employee of the testator testified that she had previously seen an envelope labeled "Last Will and Testament" in the lockbox.<sup>114</sup> There was additional testimony about the drafting of the will and the contents of the will.<sup>115</sup>

The court of appeals recognized that, when the original will is last seen in the testator's presence and cannot be found after death, there is a presumption that the testator destroyed the will with revocation intent.<sup>116</sup> In this case, however, the evidence discussed above was sufficient to rebut the presumption by a preponderance of the evidence.<sup>117</sup>

The court of appeals next addressed whether the will was properly executed.<sup>118</sup> Because the will had a proper self-proving affidavit, there is a presumption of proper execution even though the affidavit is merely a photocopy.<sup>119</sup> The testator signed the will with his middle and last names rather than with his first, middle, and last names as was typed on the will.<sup>120</sup> The court of appeals explained that "there is no requirement that [a testator's] signature match exactly the type-written version of his name."<sup>121</sup> Other arguments about the validity of the signature (handwritten or stamped, different thickness of ink between the testator and the witnesses, etc.) were likewise rejected.<sup>122</sup>

The court of appeals also addressed the argument that the person who wrote the will for the testator was not an attorney, and thus by engaging in the unauthorized practice of law, her testimony lacked credibility about what happened during the will execution ceremony.<sup>123</sup> The court of appeals stated "there was no authority to support this proposition."<sup>124</sup>

To avoid problems such as those in this case, a testator needs to store the original will with great care and seek the assistance of an attorney

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110. *Id.* at \*1-2.

111. *Id.* at \*1.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at \*2.

116. *Id.* at \*3.

117. *Id.* at \*4.

118. *Id.* at \*4-5.

119. *Id.* at \*4, \*6-7.

120. *Id.* at \*4-5.

121. *Id.* at \*5.

122. *Id.*

123. *Id.* at \*6.

124. *Id.*

with estate planning experience to draft the will, rather than a bookkeeper who then would be practicing law without a license.

#### O. ATTORNEYS' FEES

In *Jones v. Coyle*,<sup>125</sup> the independent executrix demanded that a beneficiary return property belonging to the testatrix so that this property could be properly administered.<sup>126</sup> The beneficiary refused and the probate court allowed the beneficiary to retain the estate property.<sup>127</sup> After obtaining a writ of mandamus to force the turnover, the executrix asked the probate court to award her attorneys' fees against the beneficiary under Probate Code § 242 (recodified as Estates Code § 352.051).<sup>128</sup> The probate court refused and the executrix appealed.<sup>129</sup>

The Dallas Court of Appeals affirmed, holding that the probate court lacked the discretion to hold the beneficiary responsible for the attorneys' fees.<sup>130</sup> Instead, the estate is responsible for the fees.<sup>131</sup> The court of appeals explained that Texas follows the "American Rule" that does not allow fee awards unless expressly authorized by a statute or a contract.<sup>132</sup> The court of appeals closely examined the statute and found no basis for shifting the fees from the estate to the losing party.<sup>133</sup> Although the statute is written in the passive voice and does not state from whom the court should order the payment of fees, the court of appeals noted that fees are awarded regardless of whether the personal representative wins or loses the case.<sup>134</sup> Thus, it is implied that the estate is responsible, not another party.<sup>135</sup>

The court of appeals, however, did provide future litigants with sage advice by recommending that they seek attorneys' fees under other statutes that authorize them, such as the Texas Theft Liability Act.<sup>136</sup> In a trust case, however, Property Code § 114.064 allows the court to make an award of costs and attorneys' fees against any party as long as the award is "equitable and just."<sup>137</sup>

#### P. ESTATES OF ATTORNEYS

The 2015 Texas Legislature added new provisions to address what happens to trust and escrow accounts when a lawyer dies.<sup>138</sup> The personal

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125. 451 S.W.3d 486 (Tex. App.—Dallas 2014, no pet.).

126. *Id.* at 487.

127. *Id.*

128. *Id.*; see TEX. EST. CODE ANN. § 352.051(2) (West 2016).

129. *Jones*, 451 S.W.3d at 487.

130. *Id.*

131. *Id.* at 489.

132. *Id.* at 488.

133. *Id.* at 488–89.

134. *Id.* at 489.

135. *Id.*

136. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b) (West 2011)).

137. TEX. PROP. CODE ANN. § 114.064 (West 2014).

138. See TEX. EST. CODE ANN. § 456.001 (West 2016).

representative now has the authority to enter into a written contract with a Texas lawyer who may then be a signer on the account, determine the proper recipients of the funds in the account, distribute the funds to the proper recipients, and then close the account.<sup>139</sup> If the personal representative is a Texas attorney, the person may take these steps him or herself.<sup>140</sup> The financial institution has a duty to comply with the attorney's instructions and is not liable for the actions of the attorney.<sup>141</sup>

## V. TRUSTS

### A. STANDING

In *In re XTO Energy, Inc.*,<sup>142</sup> the trustee failed to pursue litigation on behalf of the trust under the terms of the trust, which granted the trustee the discretion to carry out the trustee's powers and perform the trustee's duties.<sup>143</sup> A beneficiary, unhappy with the trustee's inaction, brought action against the defendant on behalf of the trust. The trustee and the defendant sought a writ of mandamus to force the trial court to dismiss the beneficiary's suit for lack of subject matter jurisdiction.<sup>144</sup>

The Dallas Court of Appeals began its analysis by recognizing that a trust beneficiary may sue a third party on behalf of the trust if the trustee cannot, or will not, bring the action.<sup>145</sup> A beneficiary, however, cannot bring an action merely because the trustee has refused to do so because "[t]o allow such an action would render the trustee's authority to manage litigation on behalf of the trust illusory."<sup>146</sup>

The court of appeals concluded that a beneficiary may not bring the suit unless "the beneficiary pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct, or a clear abuse of discretion."<sup>147</sup> The court of appeals then engaged in a detailed analysis of the underlying dispute and determined that there were no facts that would support a finding that the trustee's decision not to bring suit was "the result of fraud, misconduct, or a clear abuse of discretion."<sup>148</sup> Accordingly, the court of appeals conditionally granted mandamus relief.<sup>149</sup> The court of appeals, however, allowed the beneficiary's claims against the trustee for breach of duty to continue.<sup>150</sup>

This case appears to be the first time a Texas court has ruled on "the right of a beneficiary to enforce a cause of action against a third party

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139. *Id.*

140. *Id.*

141. *Id.*

142. 471 S.W.3d 126 (Tex. App.—Dallas 2015, no pet.).

143. *Id.* at 127.

144. *Id.* at 130.

145. *Id.* at 131.

146. *Id.*

147. *Id.* at 132.

148. *Id.* at 135–36.

149. *Id.* at 137.

150. *Id.* at 138.

that the trustee considered and concluded was not in the best interests of the trust to pursue.”<sup>151</sup> The court of appeals announced that the action may proceed if the trustee’s failure to bring the action is “the result of fraud, misconduct, or a clear abuse of discretion.”<sup>152</sup>

## B. JURISDICTION

*Warren v. Weiner*<sup>153</sup> teaches that a family court does not acquire exclusive jurisdiction over a trust even though trust matters may be covered in the divorce decree.<sup>154</sup> A mother and father created a trust for a child and named themselves as co-trustees. The mother and father divorced, but the divorce decree provided for them to continue serving as trustees.<sup>155</sup> After accusing each other of violating the terms of the trust, the mother brought an action in probate court to terminate the trust or remove the father as a co-trustee.<sup>156</sup> In response, the father claimed that the probate court lacked jurisdiction because the family court has continuing, exclusive jurisdiction.<sup>157</sup> The probate court agreed and the mother appealed.<sup>158</sup>

The First Houston Court of Appeals reversed.<sup>159</sup> The court of appeals determined that the Family Code did not give the family court exclusive jurisdiction over the trust.<sup>160</sup> Instead, the family court has exclusive jurisdiction only over matters implicating the Family Code.<sup>161</sup> The divorce decree cannot grant or waive a court’s jurisdiction by agreement.<sup>162</sup>

The court of appeals also determined that the family court did not have dominant jurisdiction.<sup>163</sup> The claims of breach of trust were not connected with the divorce proceedings in family court.<sup>164</sup> Neither the child nor the trust were parties to the divorce.<sup>165</sup> There was no dispute relating to the trust at the time of the divorce.<sup>166</sup>

*Dowell v. Quiroz*<sup>167</sup> serves as an important reminder that a party bringing survival or wrongful death claims must ascertain the correct court in which to bring the actions.<sup>168</sup> The Corpus Christi Court of Appeals held that a statutory county court at law with probate jurisdiction does not

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151. *Id.* at 131.

152. *Id.* at 132.

153. 462 S.W.3d 140 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

154. *Id.* at 144.

155. *Id.* at 142.

156. *Id.*

157. *Id.* at 143.

158. *Id.*

159. *Id.* at 146.

160. *Id.* at 143–44.

161. *Id.* at 144 (citing TEX. FAM. CODE ANN. § 155.001(a) (West 2014)).

162. *Id.*

163. *Id.* at 145.

164. *Id.*

165. *Id.*

166. *Id.*

167. 462 S.W.3d 578 (Tex. App.—Corpus Christi 2015, no pet.) (mem. op.).

168. *Id.* at 586.

have subject matter jurisdiction to hear survival and wrongful death claims that are incident to an estate under Probate Code § 5A, because the statutory provision existed on the date the claims were filed.<sup>169</sup> This holding appears consistent with current law under Estates Code § 31.002(b).<sup>170</sup>

## C. TRUST PROTECTORS

### 1. Private Trusts

The 2015 Texas Legislature added § 114.0031 to the Trust Code to provide more detailed coverage of trust protectors in the private trust context.<sup>171</sup>

The key features of this new provision are:

- The settlor may grant the protector any powers and authority which the settlor desires including, but not limited to, the power to remove and appoint trustees and advisors, the power to modify or amend the trust for tax purposes or to facilitate efficient trust administration, and the power to modify, expand, or restrict the terms of a power of appointment that the settlor granted to a beneficiary.<sup>172</sup>
- By default, the trust protector is a fiduciary. The settlor, however, may provide that a protector acts in a nonfiduciary capacity.<sup>173</sup>
- The trustee is liable for following the directions of a trust protector only if the trustee's conduct constitutes willful misconduct.<sup>174</sup>
- If the settlor requires the trustee to obtain the consent of a trust protector before acting, the trustee is not liable for any act taken or not taken as a result of the protector's failure to provide the required consent after being requested to do so, unless the trustee's actions constitute willful misconduct or gross negligence.<sup>175</sup>
- Unless the settlor provided otherwise, the trustee has no duty to monitor the protector's conduct, to provide advice to or consult with the protector, or tell the beneficiaries that that the trustee would have acted differently from how the protector directed.<sup>176</sup>
- The trustee's actions in carrying out the protector's directions are deemed to be merely administrative actions and are not considered to be the trustee monitoring or participating in actions within the scope of the protector's authority, unless there is clear and convincing evidence to the contrary.<sup>177</sup>

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169. *Id.* at 584–85.

170. TEX. EST. CODE ANN. § 31.002(6) (West 2016).

171. *See* TEX. PROP. CODE ANN. § 114.0031 (West 2016).

172. *Id.* § 114.0031(d).

173. *Id.* § 114.0031(e).

174. *Id.* § 114.0031(f).

175. *Id.* § 114.0031(g).

176. *Id.* § 114.0031(h).

177. *Id.* § 114.0031(i).

## 2. Charitable Trusts

Trust Code § 114.003, which previously covered protectors for all types of trusts, is now applicable only to charitable trusts imposing more restrictive rules than the new § 114.0031 provides for private trusts.<sup>178</sup>

### D. PERPETUAL CARE CEMETERY TRUSTS

A perpetual care cemetery trust may now be modified or terminated using the court's deviation powers under Property Code § 112.054.<sup>179</sup> In addition to the grounds in this section, the court may modify the trust "if the income from the fund is inadequate to maintain, repair, and care for the perpetual care cemetery and another source for providing additional contributions to the fund is unavailable."<sup>180</sup> The Banking Commissioner of Texas must consent to any changes before the court may order the changes.<sup>181</sup>

## VI. OTHER ESTATE PLANNING MATTERS

### A. TRANSFER ON DEATH DEEDS

The 2015 Texas Legislature enacted a "Texasized" version of the Uniform Real Property Transfer on Death Act, joining over a dozen other states that have already done so.<sup>182</sup> This Act permits a property owner to designate the new owner of real property upon his or her death in a deed that is properly recorded during the owner's lifetime.<sup>183</sup> Below are some of the key features of this Act:

- The property owner must have contractual capacity (not merely testamentary capacity) to execute a Transfer on Death (TOD) deed.<sup>184</sup>
- An agent under a power of attorney may not execute a TOD deed on behalf of the property owner.<sup>185</sup>
- The beneficiary does not need to know about the TOD deed and does not need to have supplied any consideration.<sup>186</sup> The beneficiary, however, may disclaim the property following the normal disclaimer procedures.<sup>187</sup>
- The named beneficiary has no legal or equitable interest in the property until the beneficiary survives the property owner by 120 hours.<sup>188</sup>

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178. *Id.* § 114.003.

179. TEX. HEALTH & SAFETY CODE ANN. § 712.0255 (West Supp. 2015).

180. *Id.*

181. *Id.*

182. TEX. EST. CODE ANN. § 114 (2016).

183. *Id.* §§ 114.051, 114.055.

184. *Id.* § 114.054.

185. *Id.*

186. *Id.* § 114.056.

187. *Id.* § 114.105.

188. *Id.* § 114.103.

- The property owner may revoke the TOD deed at any time and does not need a reason for so doing.<sup>189</sup>
- The property owner may not make the TOD deed irrevocable.<sup>190</sup>
- The property owner's will cannot revoke or supersede a TOD deed.<sup>191</sup>
- If the property owner names his or her spouse as the beneficiary and then a court issues a final judgment of divorce, the TOD deed is revoked as long as notice of the judgment is recorded before the property owner's death.<sup>192</sup>
- The TOD deed has no legal effect during the property owner's lifetime.<sup>193</sup> For example, the property owner may transfer the property to someone other than the beneficiary, even if the transferee has actual knowledge of the TOD deed, as long as the transferee records his or her deed before the property owner dies.
- When the property owner dies, creditors with interests in the property are generally treated like other estate creditors.<sup>194</sup>
- When the property owner dies, the property transferred by a TOD deed is subject, as a last resort, to the claims against the estate, including allowances in lieu of exempt property and the family allowance.<sup>195</sup>
- The Act provides optional forms a property owner may use to create and revoke TOD deeds.<sup>196</sup>

## B. DISCLAIMERS

The Texas version of the Uniform Disclaimer of Property Interests Act replaces the disclaimer provisions in both the Estates Code and the Trust Code.<sup>197</sup> Below are some of the significant changes:<sup>198</sup>

- The nine-month deadline to make a disclaimer was removed.<sup>199</sup> There is no longer a time-based deadline for Texas disclaimers although the nine-month rule still applies under federal law to disclaimers made for tax purposes.<sup>200</sup>

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189. *Id.* § 114.052.

190. *Id.*

191. *Id.* § 114.057(b).

192. *Id.* § 114.057(c).

193. *Id.* § 114.101.

194. *Id.* § 114.104.

195. *Id.* § 114.106.

196. *Id.* §§ 114.151, 114.152.

197. TEX. PROP. CODE ANN. §§ 240.001–.151 (West 2016).

198. See generally Glenn M. Karisch et al., *Disclaimers Under the New Texas Uniform Disclaimer of Property Interests Act*, TEXAS PROBATE (Aug. 25, 2015), <http://texasprobate.com/download-cle-articles/Disclaimers%20Under%20the%20New%20Texas%20UPPIA.pdf> [https://perma.cc/2UJ2-UNBZ] (addressing a comprehensive discussion of the Uniform Act).

199. TEX. PROP. CODE ANN. § 240.151 (lacking to mention a deadline requirement that would bar a disclaimer); see Karisch et al., *supra* note 198, at 10.

200. See Karsich et al., *supra* note 198, at 29.

- The mechanics of making a disclaimer were simplified.<sup>201</sup> For example, an heir or beneficiary disclaiming an interest no longer needs to file the disclaimer with the court; merely delivering it to the personal representative is normally sufficient.<sup>202</sup>
- Separate provisions govern the disclaimer of different types of property and ownership methods.<sup>203</sup>
- Disclaimers by fiduciaries are expressly covered under rules for different types of fiduciaries,<sup>204</sup> clarifying many areas where uncertainty existed under prior law.

### C. MALPRACTICE

According to *Messner v. Boon*,<sup>205</sup> a successor personal representative lacks standing to sue an attorney for malpractice who provided advice to a previous personal representative.<sup>206</sup> The administratrix filed suit against an attorney alleging malpractice for improper representation of (1) the decedent while the decedent was alive; and (2) the executrix after the decedent died.<sup>207</sup> The trial court granted a take-nothing judgment against the administratrix and she appealed.<sup>208</sup> The Texarkana Court of Appeals held that the administratrix had standing to pursue claims for malpractice, which the decedent had while alive, but lacked standing with regard to the attorney's representation of the executrix.<sup>209</sup>

With regard to the claim that the attorney was negligent in the representation of the decedent, the court of appeals followed the clear line of authority of Texas Supreme Court cases holding that although the attorney owed no duties to non-client beneficiaries, the attorney owed duties to the decedent and it is those duties, which the administratrix claims were breached.<sup>210</sup> In other words, the administratrix merely brought the action the decedent could have brought had he not died.

But with regard to the attorney's duties to the executrix, those duties are owed only to the executrix.<sup>211</sup> Thus, a successor personal representative such as the administratrix lacks standing to bring those claims.<sup>212</sup> The court of appeals rejected the administratrix's claim that she stepped into the executrix's shoes when she took office and thus could bring whatever claims the executrix could have brought if she had remained in office.<sup>213</sup>

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201. TEX. PROP. CODE ANN. § 240.101.

202. See Karisch et al., *supra* note 198, at 13–14.

203. TEX. PROP. CODE ANN. §§ 240.102–.105 (West 2016); see Karisch et al., *supra* note 198, at 11, 15–16.

204. TEX. PROP. CODE ANN. § 240.109.

205. 466 S.W.3d 191 (Tex. App.—Texarkana 2015), *judgm't vacated w.r.m.*, 2016 Tex. LEXIS 106 (Tex. Jan. 29, 2016).

206. *Id.* at 195.

207. *Id.*

208. *Id.*

209. *Id.* at 206.

210. *Id.* at 205–06.

211. *Id.* at 206.

212. *Id.*

213. *Id.*

The court of appeals explained that the decedent could not have brought suit against the attorney for this alleged malpractice and thus neither can the administratrix.<sup>214</sup> Of course, the executrix or her estate has standing to bring a malpractice claim against the attorney.<sup>215</sup>

#### D. MULTIPLE-PARTY ACCOUNTS

##### 1. *Disclosures*

The disclosure requirements with which a financial institution must comply were tightened.<sup>216</sup> A financial institution would be wise to use the suggested form and have the customer initial to the right (not to the left, below, or above) of each paragraph to avoid the necessity of complying with additional requirements.<sup>217</sup> The statutory form provided does not have lines to initial on the right and thus they need to be added.<sup>218</sup> The statute provides that “each paragraph of the form” needs the customer’s initials. It is possible that this requires the customer to initial not only the type of account the customer selected, but all the other account-type paragraphs as well as the textual paragraphs. A new section provides similar rules for credit unions, which are more like those that previously existed for other financial institutions.<sup>219</sup>

##### 2. *P.O.D. Accounts*

A guardian of the estate or an agent of an original payee may open a Paid on Death (P.O.D.) account for the ward or principal.<sup>220</sup>

##### 3. *Trust Accounts*

The provisions governing trust accounts were clarified to remove previous doubts as to the ability to name an express written trust as the beneficiary of a trust account.<sup>221</sup>

##### 4. *Effect of Divorce*

Under most circumstances, provisions of a P.O.D. or trust account in favor of an ex-spouse or a relative of the ex-spouse who is not a relative of the decedent will not be effective to transfer the funds to the ex-spouse or the ex-spouse’s relative.<sup>222</sup>

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214. *Id.*

215. *Id.*

216. TEX. EST. CODE ANN. § 113.053 (West 2016).

217. *Id.*

218. *Id.* § 113.052.

219. *Id.* § 113.0531.

220. *Id.* § 113.152(c).

221. *Id.* § 113.001.

222. *Id.* § 123.151(b).

### 5. Access When Depositor Died Intestate

If an intestate dies owning a bank account that has funds which do not pass to another person under the terms of the account, an interested person may apply to the court for an order requiring the financial institution to reveal the balance in the account.<sup>223</sup> This request may be done if 90 days have passed since the intestate died, no letters have been issued, and no petition for the appointment of a personal representative is pending.<sup>224</sup> This new procedure will help heirs determine the appropriate administration method for the decedent's estate.

### 6. Standing of Personal Representative

*Bank of America, N.A. v. Eisenhauer*<sup>225</sup> teaches that the personal representative of a decedent who opened a multiple-party account, which would transfer the money outside of probate, lacks the ability to recover for breach of that contract because none of the funds would be in the decedent's estate whether or not the contract was breached.<sup>226</sup> A husband and his wife opened a joint account with survivorship rights that also named two pay on death beneficiaries upon the death of the last joint owner. After the husband died, one of the beneficiaries closed the account even though the wife was still alive. The bank issued equal checks to both beneficiaries.<sup>227</sup> The other beneficiary realized that this was incorrect, so he used the power of attorney he had for the wife and deposited the funds into a new account in the wife's name and named himself as the pay on death beneficiary.<sup>228</sup> The beneficiary who closed the account kept the funds she improperly received from the account.<sup>229</sup>

After the wife died, the other beneficiary became the wife's executor and sued the bank for the money it improperly distributed to the beneficiary who closed the account.<sup>230</sup> The jury found that the bank failed to comply with the deposit agreement, but that the estate suffered no damages.<sup>231</sup> The trial court granted the executor's request for a judgment notwithstanding the verdict and the court of appeals affirmed.<sup>232</sup>

The Texas Supreme Court reversed without even hearing oral arguments.<sup>233</sup> The supreme court explained that neither the wife nor her estate lost anything when the beneficiary who improperly closed the account received half of the account funds.<sup>234</sup> The account was a non-probate asset and the estate would not have held any funds, even if the

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223. *Id.* § 153.003.

224. *Id.*

225. 474 S.W.3d 264 (Tex. 2015) (per curiam).

226. *Id.* at 265.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 266.

account had remained open until the wife's death.<sup>235</sup>

#### E. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS

In *Jackson Walker v. Kinsel*,<sup>236</sup> a jury found that the defendants were liable for tortiously interfering with the Kinsels' inheritance rights.<sup>237</sup> The trial court then awarded damages as well as other remedies in an attempt to undo the interference.<sup>238</sup> The defendants appealed not on the ground that their conduct was not tortious, but rather that the tort is not recognized as a cause of action.<sup>239</sup>

The Amarillo Court of Appeals agreed and reversed.<sup>240</sup> The court of appeals based its holding on the fact that neither the Texas Supreme Court nor the Fort Worth Court of Appeals has expressly recognized the tort.<sup>241</sup>

The strong dissent points out that six of the Texas intermediate appellate courts have previously recognized the tort, including the Amarillo Court of Appeals.<sup>242</sup> Additionally, six other courts, including the Fort Worth Court of Appeals, discussed the tort assuming it was a valid cause of action.<sup>243</sup>

Surprisingly, neither opinion cited to Estates Code § 54.001 (formerly Probate Code § 10C), which, in this author's opinion, impliedly provides legislative recognition of the tort.<sup>244</sup> In relevant part, this section states, "[t]he filing or contesting in probate court of a pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate."<sup>245</sup> Why would the Texas legislature say something cannot be tortious interference if Texas does not recognize the tort in the first place?

#### F. DURABLE POWER OF ATTORNEY

##### 1. Filing Requirement

If a durable power of attorney is used in a real property transaction that needs to be recorded, the power of attorney must be filed not later than the thirtieth day after the real property instrument is filed.<sup>246</sup> The

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235. *Id.* at 265–66.

236. No. 07-13-00130-CV, 2015 WL 2085220 (Tex. App.—Amarillo, Apr. 10, 2015, pet. filed) (mem. op).

237. *Id.* at \*3.

238. *Id.*

239. *Id.*

240. *Id.* at \*19.

241. *Id.* at \*3 (The Texas Supreme Court transferred the case from the Fort Worth Court of Appeals to the Amarillo Court of Appeals as part of its docket equalization efforts).

242. *Id.* at \*20 (Pirtle, P.A., dissenting).

243. *Id.* at \*21.

244. TEX. EST. CODE ANN. § 54.001 (West 2016).

245. *Id.*

246. TEX. EST. CODE ANN. § 751.151.

amendment does not provide the consequences of a late filing.<sup>247</sup> For example, is the underlying real property transaction void or voidable?

## 2. *When Fiduciary Duties Are Owed*

In *Jordan v. Lyles*,<sup>248</sup> an agent was accused of breach of fiduciary duty by placing a significant portion of the principal's property into accounts naming her as a pay on death beneficiary or giving her survivorship rights.<sup>249</sup> The Tyler Court of Appeals first addressed whether the principal's heirs had standing to bring a suit for breach of fiduciary duty.<sup>250</sup> The court of appeals explained that normally an heir lacks standing because the principal's personal representative usually has the exclusive right to bring the suit.<sup>251</sup> However, because the principal's estate was handled with a muniment of title, there was no executor appointed and thus the heirs had standing.<sup>252</sup>

The jury awarded the heirs damages for breach of fiduciary duty and tortious interference with inheritance rights.<sup>253</sup> The court of appeals, however, granted the agent's motion for a judgment notwithstanding the verdict.<sup>254</sup> The agent argued that the court was correct because the transactions were fair to the principal.<sup>255</sup> But the agent was unable to prove that she specifically discussed the transactions with the principal and informed him of the material facts relating to them.<sup>256</sup> The agent unsuccessfully claimed she was merely a scrivener when she completed various actions for the principal rather than acting in a fiduciary capacity.<sup>257</sup> Accordingly, the court of appeals reversed and reinstated the jury verdict.<sup>258</sup>

Accordingly, an agent owes fiduciary duties to the principal at all times, even when the agent technically is not acting under the authority granted by the power of attorney. Thus, an agent should act with the utmost degree of loyalty to the principal and avoid being involved in any transaction that could potentially benefit the agent.

## 3. *Breach of Duty*

In *Miller v. Lucas*,<sup>259</sup> the agent transferred the principal's property to himself using the authority granted under a durable power of attorney.<sup>260</sup> After the principal died, the distributees of the principal's estate entered

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247. *Id.*

248. 455 S.W.3d 785 (Tex. App.—Tyler 2015, no pet.).

249. *Id.* at 789.

250. *Id.* at 790–91.

251. *Id.* at 790.

252. *Id.* at 791.

253. *Id.* at 790.

254. *Id.*

255. *Id.* at 794.

256. *Id.*

257. *Id.*

258. *Id.* at 796.

259. No. 02-13-00298-CV, 2015 WL 2437887 (Tex. App.—Fort Worth May 21, 2015, pet. denied) (mem. op.).

260. *Id.* at \*1.

into a family settlement agreement and assigned to the plaintiff the right to pursue an action against the agent. The trial court granted summary judgment in favor of the plaintiff and ordered that the property be conveyed to the plaintiff free of all encumbrances.<sup>261</sup> The agent appealed.<sup>262</sup>

The Fort Worth Court of Appeals affirmed the trial court's finding of breach of fiduciary duty because the self-dealing was conclusively established—the agent used the power of attorney to convey the principal's property to himself by deed.<sup>263</sup> The court of appeals, however, determined that the trial court's remedy was excessive because it exceeded the relief the plaintiff sought.<sup>264</sup> The trial court erroneously ordered the property conveyed free of *all* encumbrances, not just those that arose after the agent sold the property to himself.<sup>265</sup>

#### G. TRANSFERS TO MINORS

The amount that may be transferred to a custodian for the benefit of a minor under certain circumstances has been increased from \$10,000 to \$25,000, to account for inflation.<sup>266</sup>

#### H. MISAPPLICATION BY FIDUCIARY

The values of property that a fiduciary must have misapplied to be guilty of various offenses increased, to account for inflation.<sup>267</sup> For example, to be guilty of a first degree felony, the fiduciary now must misapply more than \$300,000, rather than \$200,000.<sup>268</sup>

#### I. DIRECTIVE TO PHYSICIANS

The form for the Texas Directive to Physicians (Living Will) received minor changes.<sup>269</sup>

#### J. BODY DISPOSITION

##### 1. *Persons With Authority to Control Disposition*

The decedent's personal representative has been added to the list of individuals who have the authority to control the disposition of remains if the decedent did not leave written instructions or name an agent. The priority of the personal representative is after the decedent's adult siblings, but before more distant relatives.<sup>270</sup> Liability for the costs rests solely on the decedent's estate and not the personal representative

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261. *Id.* at \*2.

262. *Id.*

263. *Id.* at \*4.

264. *Id.*

265. *Id.*

266. TEX. PROP. CODE ANN. § 141.007(c) (West 2016).

267. TEX. PENAL CODE ANN. § 32.45(c) (West 2016).

268. *Id.* § 32.45(c)(7).

269. TEX. HEALTH & SAFETY CODE ANN. § 166.033 (West Supp. 2015).

270. *See id.* § 711.002.

individually.<sup>271</sup>

## 2. *Effect of Divorce*

If the decedent divorces an agent after signing the document, the ex-spouse may not make disposition arrangements unless the instrument expressly states that the ex-spouse is to serve as agent regardless of the divorce.<sup>272</sup>

## 3. *Clarification of When Agent Signs*

Previously, there was some confusion as to whether the agent must sign the document at the time of execution or only after the decedent dies. The statute now provides that the agent does not need to sign until the agent acts pursuant to the appointment.<sup>273</sup>

## 4. *Non-Compliance Damages*

If the provider of a prepaid funeral contract or other contract providing for funeral arrangements fails to comply with the contract, the provider “is liable for the additional expenses incurred in the disposition of the decedent’s remains as a result of the breach of contract.”<sup>274</sup>

## 5. *Form*

The form, which is now optional rather than mandatory, has been changed in several ways including:<sup>275</sup>

- The form is now called “Appointment for Disposition of Remains.”<sup>276</sup>
- The spaces for the agent’s acceptance of the appointment were moved from the body of the form to the end of the form.<sup>277</sup>
- The form now includes an explanation providing that the appointment of a spouse is revoked upon divorce unless the instrument states otherwise.<sup>278</sup>

## K. SELF-HELP FORMS

The 2015 Texas Legislature charged the Texas Supreme Court with the task of promulgating a wide range of self-help forms in English and Spanish. The forms are also to include plain language instructions for wills in six common scenarios (e.g., single with no children and married with an adult child), an application for probating a will as a muniment of title, and

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271. *See id.* § 711.002(a-3).

272. *See id.* § 711.002(c).

273. *Id.*

274. *Id.* § 711.002(g).

275. *Id.* § 711.002(b).

276. *Id.*

277. *Id.*

278. *Id.*

a small estate affidavit.<sup>279</sup> Each form must also state that it is not a substitute for attorney advice.<sup>280</sup> The clerks of the probate courts will have the duty to tell the general public about the forms, and the court must accept these forms unless they are completed so poorly that it causes a substantial defect that cannot be fixed.<sup>281</sup> Note that the Spanish versions are for convenience only and cannot be submitted to the probate court.<sup>282</sup>

## VII. CONCLUSION

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

- Litigants must be certain to file in the court that has proper jurisdiction, otherwise their claims will be dismissed.<sup>283</sup>
- Courts want to ensure that claims can be brought if the claimant is not trying to contest the will itself, but instead is trying to bring a good faith claim, which does not fall within the scope of a no contest clause.<sup>284</sup>
- The legislature wants to ensure that the effect of divorce is clear.<sup>285</sup> It impacts pour over trusts, P.O.D accounts, and body disposition, among other things.
- The legislature is trying to make the estate planning and probate process easier and more accessible by admitting foreign wills that have already been probated in other states and providing self-help forms.<sup>286</sup>

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279. TEX. GOV'T CODE ANN. § 22.020 (West Supp. 2015).

280. *Id.* § 22.020(e).

281. *Id.* § 22.020(g).

282. *Id.* § 22.020(d).

283. *See Dowell v. Quiroz*, 462 S.W.3d 578, 586 (Tex. App.—Corpus Christi 2015, no pet.) (mem. op.); *Warren v. Weiner*, 462 S.W.3d 140, 144 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

284. *See* TEX. EST. CODE ANN. § 254.005(b) (West 2016); *Ard v. Hudson*, No. 02-13-00198-CV, 2015 WL 4967045, at \*8 (Tex. App.—Fort Worth Aug. 20, 2015, pet. filed) (mem. op.); *Estate of Cole*, No. 02-13-00417-CV, 2015 WL 392230, at \*9 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (mem. op.).

285. *See* TEX. EST. CODE ANN. § 123.001(b); *id.* § 123.151; TEX. HEALTH & SAFETY CODE ANN. § 711.002(c) (West Supp. 2015).

286. *See* TEX. EST. CODE ANN. § 256.152(b)–(c); TEX. GOV'T CODE ANN. § 22.020.