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## Wills & Trusts

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# WILLS & TRUSTS

Gerry W. Beyer\*

## TABLE OF CONTENTS

I. INTESTACY .....	453
A. EQUITABLE ADOPTION .....	453
B. PASSAGE OF TITLE .....	453
II. WILLS.....	454
A. TESTAMENTARY CAPACITY.....	454
B. SELF-PROVING AFFIDAVIT.....	455
C. ADEMPION .....	455
D. WILL REFORMATION .....	456
E. INTERPRETATION AND CONSTRUCTION .....	456
F. POSTHUMOUS CLASS GIFT MEMBERSHIP.....	457
G. WILL CONTESTS .....	457
1. <i>Undue Influence—Sufficient Evidence</i> .....	457
2. <i>Arbitration</i> .....	458
H. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS .....	459
I. WILL DEPOSIT .....	460
III. ESTATE ADMINISTRATION .....	460
A. APPLICATIONS.....	460
B. VENUE .....	460
C. TIME FOR PROBATE .....	460
D. MUNIMENT OF TITLE .....	460
E. LATE PROBATE .....	461
1. <i>Default</i> .....	461
2. <i>Service of Process</i> .....	461
F. NOTICE TO CREDITORS.....	462
G. AFFIDAVIT IN LIEU OF INVENTORY.....	462
H. E-MAIL ACCESS .....	463
I. DISTRIBUTIONS BY INDEPENDENT EXECUTORS.....	463
J. ACCOUNTINGS.....	463
K. FINAL SETTLEMENT .....	464
L. SMALL ESTATE AFFIDAVIT .....	464
M. LAWYER TRUST ACCOUNTS .....	464
N. RECEIVER APPOINTMENT.....	464

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IV. TRUSTS .....	465
A. JURISDICTION .....	465
B. REFORMATION .....	465
C. POSTHUMOUS CLASS GIFT MEMBERS .....	466
D. DIVORCE RAMIFICATIONS .....	466
E. FORFEITURE CLAUSES .....	466
F. DISCLAIMERS .....	466
G. DELEGATION OF REAL PROPERTY POWERS .....	467
H. DECANTING .....	467
I. INSTITUTIONAL FUNDS .....	467
J. FIDUCIARY DUTY .....	467
K. TRUSTEE REMOVAL .....	468
V. OTHER ESTATE PLANNING MATTERS .....	469
A. ACCESS TO DIGITAL ASSETS .....	469
1. <i>Key Terms of Art</i> .....	469
2. <i>Reasons Fiduciary Desires Access to Digital Assets</i> .....	470
3. <i>Effective Date</i> .....	471
4. <i>Access Priority</i> .....	471
5. <i>Types of Access</i> .....	471
6. <i>Impact on Will Drafting</i> .....	471
7. <i>Personal Representative Access to the Contents of the Decedent's Electronic Communications?</i> .....	472
8. <i>Personal Representative Access to the Catalogue of Decedent's Electronic Communications and Other Digital Assets</i> .....	472
9. <i>Trustee Access</i> .....	473
10. <i>Custodian Compliance</i> .....	474
B. DURABLE POWER OF ATTORNEY .....	474
C. MEDICAL POWER OF ATTORNEY .....	476
D. SELF-DESIGNATION OF GUARDIAN .....	476
E. MENTAL HEALTH TREATMENT DECLARATION .....	476
F. TRANSFER ON DEATH DEEDS .....	476
G. TRANSFER ON DEATH MOTOR VEHICLES .....	476
H. MULTIPLE PARTY ACCOUNTS .....	477
1. <i>Survivorship Rights</i> .....	477
2. <i>Form</i> .....	477
3. <i>Ramifications of Divorce</i> .....	477
4. <i>Liability for Estate Taxes</i> .....	478
VI. CONCLUSION .....	478

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 December 1, 2016 through November 30, 2017. The reader is warned that not all newly enacted statutes or decided cases during the Survey period are presented, and not all aspects of each statute or case are analyzed. You must read

and study the full text of each statute or case before relying on it or using it as precedent. The discussion of most cases includes a moral, that is, the important lesson to be learned from the case. By recognizing situations that 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. INTESTACY

### A. EQUITABLE ADOPTION

Despite apparent clear statutory language to the contrary, the Texas courts have consistently held that when a child adopted by estoppel dies, the child's property passes to the biological family rather than to the adoptive family, as is the case when a formally adopted child dies.<sup>1</sup> The 2017 Legislature changed the definition of "child" to expressly include an equitably adopted child.<sup>2</sup> The 2017 Legislature also added language to the adoption statute to include equitably adopted children, which effectively overrules this case.<sup>3</sup>

### B. PASSAGE OF TITLE

If there is more than one heir, they each hold title to every asset as tenants in common.<sup>4</sup> For example, if three children inherit the property of their last-to-die parent, each owns one-third of each item of clothing, silverware, book, piece of furniture, etc. This, of course, can be extremely awkward if the three children are unable to agree among themselves regarding who receives full ownership of each asset. If they cannot agree, the item may be sold and proceeds divided proportionately. However, if the estate is independently administered, the executor may make distributions in divided or undivided interests in proportionate or disproportionate shares, and value the property to adjust the distribution for the differences in value of the assets.<sup>5</sup>

The problems associated with heirs holding as tenants in common are exacerbated with real property. The 2017 Texas Legislature addressed two of these problems. First, the Legislature became the eighth state to enact the Uniform Partition of Heirs Property Act.<sup>6</sup> Here is how the Uniform Law Commission describes the act:

[The act] helps preserve family wealth passed to the next generation in the form of real property. Affluent families can engage in sophisticated estate planning to ensure generational wealth, but those with smaller estates are more likely to use a simple will or to die intestate. For many lower- and middle-income families, the majority of the es-

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1. *See* Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963).

2. TEX. EST. CODE ANN. § 22.004(a) (West Supp. 2017).

3. *Id.* § 201.054(e).

4. *Id.* § 201.003 (West 2014).

5. *Id.* § 405.0015.

6. TEX. PROP. CODE ANN. ch. 23A (West Supp. 2017).

tate consists of real property. If the landowner dies intestate, the real estate passes to the landowner's heirs as tenants-in-common under state law. Tenants-in-common are vulnerable because any individual tenant can force a partition. Too often, real estate speculators acquire a small share of heirs' property in order to file a partition action and force a sale. Using this tactic, an investor can acquire the entire parcel for a price well below its fair market value and deplete a family's inherited wealth in the process. UHPA provides a series of simple due-process protections: notice, appraisal, right-of first-refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.<sup>7</sup>

Second, the Legislature changed the common law by providing that, under certain circumstances, a co-heir may adversely possess property owned by the other co-heirs.<sup>8</sup> To apply, there must be an uninterrupted ten-year period of adverse possession followed by another five years after affidavits of heirship and adverse possession are filed.<sup>9</sup> Then, notice must be published in the county where the property is located and written notice must be sent to the last known address of all the co-heirs by certified mail.<sup>10</sup> Title will then vest in the co-heir unless another co-heir files a controverting affidavit or brings suit to recover the co-tenant's share within five years of the date of the filing of the affidavits.<sup>11</sup>

## II. WILLS

### A. TESTAMENTARY CAPACITY

*Texas Capital Bank v. Asche*<sup>12</sup> demonstrates that once a jury determines a testator's capacity to execute a will, it will be difficult to have that finding overturned on appeal unless the jury's finding is against the great weight of the evidence. In the case, the trial court determined that the testator lacked capacity to execute multiple estate-planning documents spanning over a decade.<sup>13</sup> In addition, the trial court found that the testator was subjected to undue influence.<sup>14</sup>

The Dallas Court of Appeals made an exhaustive review of the evidence, which included both medical and lay testimony.<sup>15</sup> Although there was "unquestionably conflicting evidence" about the testator's capacity,

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7. Partition of Heirs Property Act, UNIFORM L. COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act> (last visited Feb. 6, 2018) [<https://perma.cc/2JFX-JWRP>].

8. TEX. CIV. PRAC. & REM. CODE ANN. § 16.0265(b) (West Supp. 2017).

9. *Id.* § 16.0265(e).

10. *Id.* § 16.0265(c)(2)–(3).

11. *Id.* § 16.0265(f).

12. No. 05-15-00102-CV, 2017 WL 655923 (Tex. App.—Dallas Feb. 17, 2017, pet. dismiss'd) (mem op.).

13. *Id.* at \*5.

14. *Id.*

15. *Id.* at \*6–10.

the court explained that it may not substitute its judgment for that of the jury.<sup>16</sup> The court then concluded that the evidence was legally and factually sufficient to support the jury's finding that the testator lacked capacity.<sup>17</sup> Accordingly, the court of appeals did not need to address the undue influence issue.<sup>18</sup>

#### B. SELF-PROVING AFFIDAVIT

The self-proving affidavit was revised to change the phrases "last will and testament" and "last will or testament" to "will" to reflect modern law which no longer maintains the common law distinction that wills were for real property and testaments were for personal property.<sup>19</sup>

#### C. ADEPTION

*Boothe v. Green*<sup>20</sup> shows that a testatrix making a specific devise should expressly explain the testatrix's intent if a division of surface and subsurface rights later occurs. In *Boothe*, the testatrix devised all of her "farm lands" and "pasture lands" to her three grandchildren.<sup>21</sup> The remainder of her estate was to pass to one of these grandchildren.<sup>22</sup> The testatrix then sold the land and, at the same time, received back from the purchaser an undivided one-half interest in the property's mineral interests.<sup>23</sup> A dispute arose between the heirs of the original devisees about whether the mineral interests passed under the grant of farm and pasture land or the original devise adeemed so that the minerals belonged solely to the heirs of the remainder grandchild.<sup>24</sup> The trial court held ademption occurred.<sup>25</sup>

The Corpus Christi-Edinburg Court of Appeals reversed, holding that total ademption did not occur.<sup>26</sup> Instead, ademption operated only pro tanto.<sup>27</sup> The mineral interest was part of the original devise that included both surface and mineral rights of the farm and pasture land.<sup>28</sup> Thus, the heirs of the three specific devisees are entitled to the mineral interest "leftover" from the original devise.<sup>29</sup>

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16. *Id.* at \*16.

17. *Id.*

18. *Id.*

19. TEX. EST. CODE ANN. § 251.104(e) (West Supp. 2017). Note that many other statutory references in the Estates Code were likewise updated.

20. 534 S.W.3d 93 (Tex. App.—Corpus Christi 2017, pet. filed).

21. *Id.* at 94.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 95.

26. *Id.* at 96.

27. *Id.*

28. *Id.*

29. *Id.*

#### D. WILL REFORMATION

The 2015 Legislature authorized courts to modify or reform a will even if the will is unambiguous but placed no time limit on that authority, creating the possibility that wills admitted to probate decades ago could be modified or reformed.<sup>30</sup> The Legislature now requires the action to be filed on or before the fourth anniversary of the date the will was admitted to probate.<sup>31</sup>

#### E. INTERPRETATION AND CONSTRUCTION

Straightforward estate planning strategies may reduce the need for resolving cases that use archaic techniques such as joint wills. For example, in *Jinkins v. Jinkins*,<sup>32</sup> a dispute arose between full and half-siblings over the ownership of certain land. The full siblings claimed that, upon their mother's death, the property passed into a trust that was solely for their benefit.<sup>33</sup> The half siblings (children of the step-mother) claimed that the property was owned by their father (the father of all the siblings) until his death fifty years later and passed to all siblings equally under the terms of his will.<sup>34</sup> The trial court examined the documents and the complex transactions that occurred for over half a century and concluded that the disputed property passed under the father's will to all four of his children equally.<sup>35</sup> The full siblings appealed.<sup>36</sup>

The First Houston Court of Appeals reversed.<sup>37</sup> The court explained that the property indeed passed into the trust when the full siblings' mother died and thus the property belonged solely to them.<sup>38</sup> To reach this result, the court had to engage in some very sophisticated estate and future interest discussion, which will demonstrate to readers that the time they spent on these issues in law school is important and not merely an academic exercise.<sup>39</sup>

The disputed property was originally held in the paternal grandparents' trust.<sup>40</sup> The father was the remainder beneficiary of this trust.<sup>41</sup> The joint will of the full siblings' mother allegedly transferred this property into the trust *before* the last grandparent died.<sup>42</sup> The court of appeals determined that the remainder interest was vested (father was born, ascertained, and no conditions precedent existed to his taking other than the natural expi-

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30. See Act of June 18, 2015, 84th Leg., R.S., ch. 949, § 19, 2015 Tex. Sess. Law Serv. ch. 949 (amended 2017) (current version at TEX. EST. CODE § 255.451).

31. TEX. EST. CODE § 255.451(a-1) (West Supp. 2017).

32. 522 S.W.3d 771 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

33. *Id.* at 775.

34. *Id.*

35. *Id.* at 778.

36. *Id.*

37. *Id.* at 786.

38. *Id.* at 780–84.

39. *Id.*

40. *Id.* at 781.

41. *Id.*

42. *Id.*

ration of the life estate) and thus was transferable.<sup>43</sup>

The court of appeals next examined the joint will to determine if it transferred the remainder interest of the surviving spouse (the father) into the trust. The plain language of the joint will provided that upon the death of the first to die (the mother of the full siblings), all property subject to disposition by the surviving spouse (the father) would pass into the trust. Since the father's remainder interest was transferable, it passed into the trust solely for the benefit of the full siblings.<sup>44</sup>

The court of appeals also rejected other more tenuous arguments of the half siblings such as the father's will revoked the irrevocable trust, the father had transferred property out of the trust so that it was no longer governed by the trust's terms, the half siblings were entitled to share as pretermitted children despite being express beneficiaries of the father's will, and the applicability of the two-year will contest statute of limitations barred the action.<sup>45</sup>

#### F. POSTHUMOUS CLASS GIFT MEMBERSHIP

The Legislature fixed a glitch in the 2015 statute that limited class gift membership to members born or in gestation at the time of the testator's death.<sup>46</sup> The statute originally made no distinction between immediate gifts ("to my grandchildren") and postponed gifts ("to my child for life and then to my grandchildren").<sup>47</sup> In the latter case, it is like the testator intended grandchildren born after the testator's death to be included in the gift.<sup>48</sup> The clarification provides that the beneficiary must be alive or in gestation at the death of the person by whom the class is measured rather than the testator.<sup>49</sup>

#### G. WILL CONTESTS

##### 1. Undue Influence—Sufficient Evidence

Overturning a jury verdict of undue influence is difficult and thus the proponent must make a vigorous defense of the claim at trial. For example, in *Estate of Rodriguez*,<sup>50</sup> the jury determined the testator executed a will and deed under undue influence.<sup>51</sup> The Corpus Christi-Edinburg Court of Appeals affirmed, holding that the evidence was legally sufficient to support the jury's verdict.<sup>52</sup> For example, the alleged undue influ-

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43. *Id.*

44. *Id.* at 782–83.

45. *Id.* at 782–84.

46. TEX. EST. CODE ANN. § 255.401 (West Supp. 2017).

47. Act of May 30, 2015, 84th Leg., R.S., ch. 949, § 19, 2015 Tex. Sess. Law Serv. ch. 949 (S.B. 995) (amended 2017) (current version at TEX. EST. CODE § 255.401).

48. *See id.*

49. *See* TEX. EST. CODE § 255.401(a-1).

50. No. 13-16-00091-CV, 2017 WL 1228905 (Tex. App.—Corpus Christi, Mar. 2, 2017, no pet.) (mem. op.).

51. *Id.* at \*2.

52. *Id.* at \*6.



encer lived with the testator, used the testator's funds to pay personal expenses, was present when the testator executed the documents, and those documents favored one child while excluding seven others.<sup>53</sup> While none of these factors alone was necessarily dispositive, taken together they were sufficient to support a finding of undue influence.<sup>54</sup>

## 2. Arbitration

Once a litigant agrees to settle a will contest case, the litigant should not try to interfere with its later enforcement of the settlement merely because of "settlement remorse." For example, in *Lawson v. Collins*,<sup>55</sup> the eleven children of the decedent had differing opinions regarding the validity of their mother's will. Some asserted that the will was valid while others claimed that the mother lacked capacity or that she was subject to fraud or undue influence when she executed the will.<sup>56</sup> The children actively involved in the litigation signed a Rule 11 Mediated Settlement Agreement.<sup>57</sup> This Agreement provided for binding arbitration if disputes under the Agreement later arose.<sup>58</sup> Disputes did arise and the arbitration concluded.<sup>59</sup> One of the children who was not previously involved with the litigation or settlement agreement then filed suit to contest the will.<sup>60</sup> After the trial court granted a summary judgment against her, one of the children who agreed to the settlement opposed confirmation of the award and was joined by her unsuccessful sibling.<sup>61</sup> The trial court rejected the opposition and signed an order confirming the award and ordering that it be enforced according to its terms.<sup>62</sup> The child who initially agreed to the settlement appealed.<sup>63</sup>

The Austin Court of Appeals affirmed.<sup>64</sup> The court of appeals first addressed the child's claim that she was coerced by the mediator to agree to the settlement.<sup>65</sup> The court of appeals agreed that the trial court was not in error for not allowing a hearsay affidavit in support of her coercion claim.<sup>66</sup> The court of appeals also agreed that it was permissible for the trial court to exclude a hearsay medical report showing that the child lacked the mental capacity to enter into the agreement.<sup>67</sup> The court of appeals held that it did not matter that she did not sign the settlement

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53. *Id.* at \*4-6.

54. *Id.* at \*6.

55. No. 03-17-00003-CV, 2017 WL 4228728 (Tex. App.—Austin Sept. 20, 2017, no pet.) (mem op.).

56. *Id.* at \*1.

57. *Id.*

58. *Id.* at \*2.

59. *Id.* at \*3.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at \*8.

65. *Id.* at \*4.

66. *Id.*

67. *Id.*

agreement because the arbitration award is final once the arbitrator signs it; there is no requirement that the parties sign it as well.<sup>68</sup> The court of appeals also rejected a multitude of other creative, but ineffective, arguments.<sup>69</sup>

#### H. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS

The Texas Supreme Court addressed the controversial issue of whether Texas recognizes a cause of action for tortious interference with inheritance rights in *Kinsel v. Lindsey*.<sup>70</sup> A jury found that the defendants were liable for tortiously interfering with the plaintiff's inheritance rights.<sup>71</sup> The trial court then awarded damages as well as other remedies in an attempt to undo the interference.<sup>72</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>73</sup>

The Amarillo Court of Appeals agreed and reversed.<sup>74</sup> The court of appeals based its holding on the fact that neither the Supreme Court of Texas nor the Fort Worth Court of Appeals had expressly recognized the tort.<sup>75</sup> A strong dissent pointed out that six of the Texas intermediate appellate courts have recognized the tort, including the Amarillo court.<sup>76</sup> In addition, six other courts, including the Fort Worth court, have discussed the tort without rejecting it.<sup>77</sup>

The Texas Supreme Court affirmed.<sup>78</sup> The supreme court reviewed the prior cases and explained that they did not show that the supreme court had previously recognized the tort.<sup>79</sup> Admitting some lower courts of appeal have recognized the tort, the supreme court declined to recognize the tort because the plaintiffs already had an adequate remedy—a constructive trust—imposed on the disputed inheritance, and thus the supreme court was “not persuaded to consider it *here*.”<sup>80</sup> Accordingly, the issue remains open and litigators will need to wait for another case to reach the supreme court to ascertain whether tortious interference with inheritance rights is a viable cause of action in Texas.

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68. *Id.* at \*5.

69. *See id.* at \*5–8.

70. 526 S.W.3d 411 (Tex. 2017).

71. *Id.* at 418.

72. *Id.*

73. *Id.*

74. Jackson Walker, LLP v. Kinsel, 518 S.W.3d 1 (Tex. App.—Amarillo, Apr. 10, 2015), *aff'd*, Kinsel v. Lindsey, 526 S.W.3d 411 (Tex. 2017).

75. *See* 518 S.W.3d at 10.

76. *Id.* at 30–33.

77. *See id.*

78. *See Kinsel*, 526 S.W.3d at 428.

79. *Id.* at 422–24.

80. *Id.* at 414 (emphasis added).

### I. WILL DEPOSIT

A person who has possession of a testator's original will and who cannot locate the testator after making a diligent search may deposit the will for a five dollar fee with the county clerk of the county of the testator's last known residence.<sup>81</sup> This provision solves the problem of what someone, especially an attorney, should do with an original will when the person does not know how to locate the testator or even if the testator is still alive.<sup>82</sup> The clerk's duties with respect to deposited wills were expanded and clarified.<sup>83</sup>

## III. ESTATE ADMINISTRATION

### A. APPLICATIONS

Applications to probate a will with an administration or as a muniment of title and applications for letters of administration must now contain the last three numbers of the driver's license numbers and social security numbers of both the decedent (if known or ascertainable with reasonable diligence) and the applicant.<sup>84</sup>

### B. VENUE

The venue provision for probating a will and granting of letters was amended to clarify how "next of kin" is defined when venue is based on their residence when the decedent died outside of Texas.<sup>85</sup> Basically, a spouse is the closest next of kin with others within the third degree by blood being determined by the normal intestacy order.<sup>86</sup>

### C. TIME FOR PROBATE

The Legislature clarified that it is the *application* for probate that must be filed within four years of the testator's death to open an estate administration rather than the will actually being admitted to probate within that time period.<sup>87</sup>

### D. MUNIMENT OF TITLE

The requirements for the application for the probate of a will as a muniment of title and required proof were made consistent with the situations where a muniment is authorized by allowing the application and proof to explain another reason why there is no necessity for administration besides the testator's estate not owing unpaid debts other than those

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81. TEX. EST. CODE ANN. § 252.001(a-1) (West Supp. 2017).

82. *Id.*

83. *Id.* § 252.2015.

84. *Id.* §§ 256.052(a), 257.051(a), 301.052(a).

85. *Id.* § 33.001(b).

86. *See id.*

87. *Id.* § 256.003(b).

secured by a lien on real property.<sup>88</sup>

## E. LATE PROBATE

### 1. Default

In *Ferreira v. Butler*,<sup>89</sup> the executrix of the decedent's estate attempted to probate the will of the decedent's wife nine years after her death. The wife's children from a previous relationship contested the application by asserting it was too late to probate the wife's will as more than four years had elapsed since the wife's death.<sup>90</sup> The executrix responded that the four-year rule did not apply under Texas Estates Code Section 256.003 because she was not in default; she applied to probate the will a mere one month after discovering the will.<sup>91</sup> The trial court denied probate and the executrix appealed.<sup>92</sup>

The Fourteenth Houston Court of Appeals affirmed.<sup>93</sup> The court of appeals explained that the executrix's timely conduct was irrelevant.<sup>94</sup> The important issue is whether the decedent acted timely, which he clearly did not.<sup>95</sup> The court of appeals explained that the executrix, both in her personal capacity and in her representative capacity, had no greater right than the decedent had when he died.<sup>96</sup>

The court of appeals did, however, recognize there is a split in authority in Texas regarding whether a default by a will beneficiary is attributed to that beneficiary's successors in interest (heirs or will beneficiaries).<sup>97</sup> In determining which position to follow, the court of appeals looked to a 1940 Dallas Court of Appeal case<sup>98</sup> that barred successors in interest "because the Supreme Court of Texas adopted that opinion and judgment by refusing a writ of error."<sup>99</sup>

### 2. Service of Process

*Byerley v. McCulley*<sup>100</sup> held that applicants for a late probate need to provide notice to the heirs regardless of when the testator died. The probate court admitted the testatrix's will to probate nineteen years after her death.<sup>101</sup> The probate court determined the applicant was not in default

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88. *Id.* §§ 257.051(a)(10), 257.054(5).

89. 531 S.W.3d 337 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

90. *Id.* at 338.

91. *Id.*

92. *Id.*

93. *Id.* at 344–45.

94. *Id.* at 341.

95. *Id.*

96. *Id.* at 341–45.

97. *Id.* at 342 (comparing *In re Estate of Campbell*, 343 S.W.3d 899, 905–08 (Tex. App.—Amarillo 2011, no pet.) (default of beneficiary did not bar successors in interest) with *Schindler v. Schindler*, 119 S.W.3d 923, 929 (Tex. App.—Dallas 2003, pet. denied) (default of beneficiary barred successors in interest)).

98. *Faris v. Faris*, 138 S.W.2d 830 (Tex. Civ. App.—Dallas 1940, writ ref'd).

99. *Ferreira*, 531 S.W.3d at 343.

100. 514 S.W.3d 426, 428–30 (Tex. App.—Tyler 2017, no pet.).

101. *Id.* at 427.

for probating the will within four years of the date of the testatrix's death and that service was made by posting.<sup>102</sup> An heir sought a bill of review asserting that he did not receive sufficient notice.<sup>103</sup>

The Tyler Court of Appeals agreed and granted the bill of review.<sup>104</sup> The applicant claimed that, under the law at the time of the testatrix's death, service for a late probate by posting was sufficient.<sup>105</sup> The heir asserted that the law applicable when the applicant filed the will for probate governs, which requires service on heirs whose addresses can be ascertained with reasonable diligence.<sup>106</sup>

The court of appeals recognized that when the law was changed to require service in 1999, the legislation contained a savings clause providing that the change to require service on the heirs upon a late probate applied only if the person died on or after September 1, 1999.<sup>107</sup> However, when Probate Code Section 128B was repealed and replaced by Texas Estates Code Section 258.001, there was no express savings clause.<sup>108</sup> Because there was no savings clause and the text of Section 258.001 does not limit the applicability of the notice requirements, notice to the heirs was required.<sup>109</sup> Accordingly, admitting the will to probate after only notice by posting was a substantial error justifying the issuance of a bill of review.<sup>110</sup>

#### F. NOTICE TO CREDITORS

Previously, a personal representative had to provide notice to creditors by publication in a newspaper printed in the county where the letters were issued. This caused difficulty in compliance as many newspapers are physically printed in a county different from where they are distributed. To solve this problem, the Legislature authorized publication in a newspaper "of general circulation" in the county where letters were issued.<sup>111</sup>

#### G. AFFIDAVIT IN LIEU OF INVENTORY

The 2011 Legislature authorized an independent executor to file an affidavit in lieu of the inventory, appraisal, and list of claims if no debts other than secured debts, taxes, and administration expenses remain by the inventory due date.<sup>112</sup> This procedure keeps the decedent's property from being listed on the public record and thus helps with privacy concerns.<sup>113</sup> However, the executor must still prepare a sworn inventory and

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102. *Id.*

103. *Id.* at 427–28.

104. *Id.* at 430.

105. *Id.* at 428.

106. *See* TEX. EST. CODE ANN. § 258.001 (West 2014).

107. *Byerley*, 514 S.W.3d at 429.

108. *Id.*

109. *Id.*

110. *Id.* at 430.

111. TEX. EST. CODE § 308.051(a) (West Supp. 2017).

112. *Id.* § 309.056 (West 2014).

113. *See id.*

provide a copy to each beneficiary unless an exception exists.<sup>114</sup> The 2017 Legislature authorized the court to fine the executor up to \$1,000 if the executor misrepresents that all required beneficiaries received the inventory.<sup>115</sup>

#### H. E-MAIL ACCESS

*In re Cokinos, Boisien & Young*<sup>116</sup> shows that an attorney may find it prudent to keep paper copies of documents relating to fees so that the attorney's executor can have unfettered access to them. The trial court ordered a law firm to turn over to an attorney's executor e-mails between the attorney and the firm concerning a lawsuit that may be relevant to a fee-sharing dispute between the attorney and the law firm.<sup>117</sup> The order included a protective order to preserve potentially confidential and privileged communications.<sup>118</sup> The law firm petitioned for a writ of mandamus to prevent enforcement of the judge's disclosure order.<sup>119</sup>

The Dallas Court of Appeals denied the petition.<sup>120</sup> The court of appeals explained that the executor had a duty to collect all debts due the estate and the e-mails were relevant to the claim for fees against the law firm.<sup>121</sup> If the attorney were alive, the attorney would have had access to the e-mails and thus so would the executor.<sup>122</sup> Note that the court of appeals did not address whether any specific document might be privileged or subject to the attorney-client work product doctrine.<sup>123</sup>

#### I. DISTRIBUTIONS BY INDEPENDENT EXECUTORS

Independent executors now have much greater leeway in distributing residuary property. Instead of giving each beneficiary an undivided share in every asset, the executor may make distributions in divided or undivided interests in proportionate or disproportionate shares, and value the property to adjust the distribution for the differences in value of the assets.<sup>124</sup>

#### J. ACCOUNTINGS

Under prior law, the personal representative in a dependent administration was required to file the annual accounting by the end of the first

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114. *See id.*

115. *Id.* § 309.0575(a) (West Supp. 2017).

116. 523 S.W.3d 901 (Tex. App.—Dallas 2017, no pet.).

117. *Id.* at 902–03.

118. *Id.* at 903.

119. *Id.*

120. *Id.* at 904.

121. *Id.*

122. *Id.*

123. *Id.* The court decided this case before the newly enacted Texas Revised Uniform Fiduciary Access to Digital Assets Act became effective.

124. TEX. EST. CODE ANN. § 405.0015 (West Supp. 2017).

and subsequent years after receiving letters.<sup>125</sup> This was virtually impossible to do because there was no lead time from the end of the year to when the accounting was due.<sup>126</sup> Now, the personal representative has sixty days from the end of a year to file the accounting.<sup>127</sup>

#### K. FINAL SETTLEMENT

The dependent personal representative's final settlement no longer need show that all inheritance taxes have been paid because Texas no longer has an inheritance tax.<sup>128</sup>

#### L. SMALL ESTATE AFFIDAVIT

The maximum value of an intestate estate (excluding homestead and exempt property) eligible to use the small estate affidavit procedure was raised to \$75,000 from \$50,000.<sup>129</sup>

#### M. LAWYER TRUST ACCOUNTS

The 2015 Legislature added Chapter 456 to address what happens to trust and escrow accounts when an attorney dies. The 2017 Legislature updated these provisions in two regards. First, after receiving the appropriate instructions regarding the distribution of the funds, the financial institution must comply within seven business days (previously it was "a reasonable time").<sup>130</sup> Second, any person aggrieved by the financial institution's failure to distribute funds timely may now bring a private cause of action against the institution.<sup>131</sup>

#### N. RECEIVER APPOINTMENT

In proper cases, the appointment of a receiver during a will contest is a prudent move to preserve the status quo of the testator's property until the merits of the case are resolved. For example, in *Estate of Price*,<sup>132</sup> after the death of the famous country music legend Ray Price, his wife and son filed competing motions to probate wills and to contest each other's proposed will.<sup>133</sup> The trial court appointed a receiver to take possession of the property subject to the will contests.<sup>134</sup> His wife asserted the trial court abused its discretion in so doing and appealed.<sup>135</sup>

The Texarkana Court of Appeals affirmed, finding that the decision to

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125. See Act effective Jan. 1, 2014, 81st Leg., R.S., ch. 680, § 1, 2009 Tex. Gen. Laws 1689–90 (amended 2017) (current version at TEX. EST. CODE § 359.001).

126. See generally *id.*

127. TEX. EST. CODE §§ 359.001(a), 359.002(a) (West Supp. 2017).

128. *Id.* § 362.010, repealed by Act of May 28, 2017, 85th Leg., R.S., ch. 844, § 38.

129. *Id.* § 205.001(3).

130. *Id.* § 456.003.

131. *Id.* § 456.0045(a).

132. 528 S.W.3d 591 (Tex. App.—Texarkana 2017, no pet.).

133. *Id.* at 592.

134. *Id.*

135. *Id.*

appoint a receiver was not an abuse of discretion.<sup>136</sup> The court of appeals began its analysis with Texas Civil Practice and Remedies Code Section 64.001, which allows a court to appoint a receiver in an action between two parties who are jointly interested in the same property.<sup>137</sup> Although it is true that the appointment of a receiver is a harsh, drastic, and extraordinary remedy, the trial court did not abuse its discretion in appointing a receiver in this case.<sup>138</sup> There was sufficient evidence that the son had an interest in the property and the property was in danger of being lost, removed, or materially injured.<sup>139</sup>

#### IV. TRUSTS

##### A. JURISDICTION

*Lee v. Lee*<sup>140</sup> teaches that a statutory probate court has concurrent jurisdiction with the district court over both inter vivos and testamentary trusts irrespective of whether any probate matter regarding the trust is pending in the statutory probate court. In *Lee*, the beneficiaries sued in a statutory probate court to remove the trustee.<sup>141</sup> The trustee claimed that the court lacked jurisdiction and suit should have been brought in district court under Trust Code Section 115.001.<sup>142</sup> The trustee admitted that the statutory probate court has concurrent jurisdiction over testamentary trusts but asserted that this jurisdiction is restricted to when a probate proceeding is actually pending in the statutory probate court.<sup>143</sup>

The Fourteenth Houston Court of Appeals disagreed with the trustee.<sup>144</sup> The court of appeals determined that the jurisdiction of statutory probate courts is independent of its probate jurisdiction.<sup>145</sup> “[T]he absence of a pending probate proceeding does not deprive a statutory probate court of its independent jurisdiction over testamentary-trust actions.”<sup>146</sup> The court of appeals also recognized that the statutory probate court has jurisdiction over inter vivos trusts as provided in Texas Estates Code Section 32.006.<sup>147</sup>

##### B. REFORMATION

The 2015 Legislature granted the court broad authority to reform a will in Estates Code Sections 255.451–255.455.<sup>148</sup> The 2017 Legislature placed

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136. *Id.* at 597.

137. *Id.* at 593.

138. *Id.* at 593–94.

139. *Id.* at 595.

140. 528 S.W.3d 201 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

141. *Id.* at 206.

142. *Id.* at 211.

143. *Id.* at 211–12.

144. *Id.* at 213.

145. *Id.* at 212.

146. *Id.* at 213.

147. *Id.*

148. TEX. EST. CODE ANN. §§ 255.451–255.455 (West Supp. 2017).



an equivalent provision in the Trust Code. A court may now reform a trust if necessary or appropriate to (1) prevent waste or impairment of the trust's administration; (2) achieve tax objectives; (3) qualify a beneficiary for governmental benefits; and (4) correct a scrivener's error, even if the trust is unambiguous, provided the settlor's intent is established by clear and convincing evidence.<sup>149</sup>

### C. POSTHUMOUS CLASS GIFT MEMBERS

To be consistent with the Texas Estates Code provision on posthumous class gift members, the Legislature amended the Trust Code to include a parallel provision. Thus, a beneficiary must be alive or in gestation at the death of the person by whom the class is measured unless the trust instrument expressly provides otherwise.<sup>150</sup>

### D. DIVORCE RAMIFICATIONS

The Legislature made several clarifications to the impact of divorce on a trust. First, the divorce of a person who is not the settlor of a trust does not trigger automatic revocation of provisions in favor of that person's former spouse or other ex-relatives.<sup>151</sup> Second, if a married couple creates a joint revocable trust, divorce, and they do not divide the trust before the first spouse dies, then the trust is divided into shares for each settlor based on each spouse's contributions to the trust.<sup>152</sup> Then, the provisions in favor of the ex-spouse and the ex-spouse's relatives are rendered ineffective with regard to the share created for the deceased spouse unless a court order, express trust terms, or an applicable marital agreement provides otherwise.<sup>153</sup>

### E. FORFEITURE CLAUSES

The Legislature clarified the provision governing forfeiture clauses to make it clear forfeiture clauses will "not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust."<sup>154</sup>

### F. DISCLAIMERS

Disclaimers by trustees were simplified in several respects: (1) a trustee does not need to give the attorney general notice of a disclaimer involving a charitable trust if the attorney general executes a written waiver, and (2) a beneficiary is deemed to have waived notice if an authorized person on behalf of an incapacitated beneficiary has received the dis-

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149. TEX. PROP. CODE ANN. § 112.054(b-1), (e), (f) (West Supp. 2017).

150. *Id.* § 112.011.

151. TEX. EST. CODE § 123.052(a) (West Supp. 2017).

152. *See id.* § 123.052(b).

153. *Id.* § 123.056.

154. TEX. PROP. CODE § 112.038 (West Supp. 2017).

claimer notice.<sup>155</sup>

#### G. DELEGATION OF REAL PROPERTY POWERS

The Legislature expanded the ability of a trustee to delegate a wide variety of powers to an agent by providing a non-exclusive laundry list of powers so that an agent may deal with all aspects of a real property transaction.<sup>156</sup> The trustee's delegation must be in a writing that is properly acknowledged.<sup>157</sup> The agent's authority only lasts six months and will end sooner if the delegation contains an earlier date or the trustee dies, becomes incompetent, resigns, or is removed. The trustee remains responsible to the beneficiaries for all of the agent's actions.<sup>158</sup>

#### H. DECANTING

The Legislature made several changes to the decanting provisions to make this technique available in a greater number of situations than when originally enacted in 2013. In addition, a clarification makes it clear that merely because a court has authorized a trustee to decant does not limit the ability of a beneficiary to sue the trustee for a breach of trust.<sup>159</sup>

#### I. INSTITUTIONAL FUNDS

The Texas Uniform Prudent Management of Institutional Funds Act originally provided that the Trust Code did not apply to certain charitable funds held in trust form under the act. The 2017 Legislature revised this provision to limit only the applicability of Chapter 116 (Uniform Principal and Income Act) and Chapter 117 (Uniform Prudent Investor Act).<sup>160</sup> The rest of the Trust Code now applies to these institutional funds.

#### J. FIDUCIARY DUTY

*Jones v. Wells Fargo Bank, N.A.*<sup>161</sup> demonstrated that a beneficiary should ascertain the theories behind a claim for breach of duty and plead them in a timely manner. In *Jones*, the beneficiary sued the trustee for breach of fiduciary duty in state court and the trustee removed the case to the U.S. District Court for the Northern District of Texas.<sup>162</sup> The district court dismissed all of the beneficiary's claims except for one, which arose out of the trustee's nonsuiting a case against an inspector for not competently performing a pre-purchase inspection of a house that the trust was

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155. *Id.* § 240.0081(c), (d), (e-1).

156. *Id.* § 113.018(a), (b), (c).

157. *Id.* § 113.018(e).

158. *Id.* § 113.018(f).

159. *Id.* §§ 112.071, 112.072, 112.074(a), 112.078, 112.085.

160. *Id.* § 163.011.

161. 858 F.3d 927 (5th Cir. 2017).

162. *Id.* at 931.

purchasing for the beneficiary.<sup>163</sup> The jury found that a breach occurred but determined that the lawsuit had no value.<sup>164</sup> However, the jury awarded damages on a theory not pled, that is, that the trustee should have nonsuited the case sooner once it became clear that the trustee would not prevail against the inspector.<sup>165</sup> The jury then awarded damages and the trustees appealed.

The U.S. Court of Appeals for the Fifth Circuit reversed, finding in favor of the trustees.<sup>166</sup> The Fifth Circuit explained that, because the beneficiary did not plead the claim and the trustee never consented to try the unpled claim, it was improper for the court to award damages on the theory that the trustee breached for not non-suiting the case earlier.<sup>167</sup> The Fifth Circuit also affirmed the district court's rejection of the beneficiary's other claims because they were barred by the Texas statute of limitations on breach of fiduciary duty claims.<sup>168</sup>

#### K. TRUSTEE REMOVAL

Both current and remainder trust beneficiaries have standing to seek a trustee's removal. However, a beneficiary should not use removal actions as a means of hassling the trustee when the trustee has not actually breached fiduciary duties. For example, in *Aubrey v. Aubrey*,<sup>169</sup> the remainder beneficiary sought to remove the trustee for breach of fiduciary duty and self-dealing.<sup>170</sup> The trustee responded that the remainder beneficiary had previously brought many lawsuits unsuccessfully against the trustee and requested that the court deem the remainder beneficiary a vexatious litigant and award sanctions.<sup>171</sup> The trial court granted both requests.<sup>172</sup> The remainder beneficiary appealed.<sup>173</sup>

The Dallas Court of Appeals first rejected the trustee's assertion that the remainder beneficiary lacked standing to seek removal.<sup>174</sup> The court of appeals explained that a remainder beneficiary *is* a beneficiary and thus has standing to seek the trustee's removal as an interested person under Trust Code Section 111.004, defining "interested person"; and Trust Code Section 113.082, granting interested persons that right to petition for the removal of a trustee.<sup>175</sup>

Nonetheless, the facts were sufficient to support the trial court's deter-

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163. *Id.* at 931–32.

164. *Id.* at 932.

165. *Id.*

166. *Id.* at 936.

167. *Id.* at 933.

168. *Id.* at 934.

169. 523 S.W.3d 299 (Tex. App.—Dallas 2017, no pet.).

170. *Id.* at 302.

171. *Id.* at 303.

172. *Id.* at 308.

173. *Id.*

174. *Id.* at 313.

175. *Id.* (citing TEX. PROP. CODE ANN. §§ 111.004(7), 113.082(a) (West 2014))

mination that the remainder beneficiary was a vexatious litigant.<sup>176</sup> The court agreed with the trustee that the trial court did not abuse its discretion when it concluded that there was no reasonable probability that the remainder beneficiary could prevail and that the other requirements for vexatious litigant status were satisfied.<sup>177</sup> Although the court of appeals agreed that sanctions against the remainder beneficiary were warranted, the court of appeals held the trial court abused its discretion in determining the amount of the award and thus remanded the determination of the amount of sanctions to the trial court.<sup>178</sup>

## V. OTHER ESTATE PLANNING MATTERS

### A. ACCESS TO DIGITAL ASSETS

Prudent professionals must address digital assets in all estates they plan or administer. The 2017 Texas Legislature enacted the Texas Revised Uniform Fiduciary Access to Digital Assets Act (TRUFADAA) as Chapter 2001 of the Texas Estates Code, which adds clarity to the steps to take when planning and administering estates.<sup>179</sup>

#### 1. Key Terms of Art

*Digital assets* are electronic records (think binary 1s and 0s) in which a person has a right or interest. The term “digital asset” is a very broad term which encompasses all electronically-stored information, including (1) information stored on a user’s computer and other digital devices; (2) content uploaded onto websites; (3) rights in digital property; and (4) records that are either the catalogue or the content of an electronic communication.<sup>180</sup> Examples include (1) e-mails; (2) text messages; (3) photos; (4) digital music and video; (5) word processing documents; (6) social media accounts (e.g., Facebook, LinkedIn, Twitter); (7) online financial, utility, credit card, and loan accounts; and (8) gaming avatars. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.<sup>181</sup>

A *fiduciary* means a personal representative of an estate (executor or administrator), an agent under a non-medical power of attorney, a guardian of an estate, and a trustee of a trust.<sup>182</sup> This article summarizes TRUFADAA’s impact on personal representatives and trustees. The Act’s application to agents and guardians are beyond the scope of this article.<sup>183</sup>

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176. *Id.* at 315.

177. *Id.* at 314–15.

178. *Id.* at 320.

179. TEX. EST. CODE ANN. ch. 2001 (West Supp. 2017).

180. *Id.* § 2001.002(8).

181. *Id.*

182. *Id.* § 2001.002(12).

183. For a detailed discussion, see Gerry W. Beyer & Kerri G. Nipp, *Cyber Estate Planning and Administration*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2166422](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422) (last updated Aug. 27, 2017) [<https://perma.cc/5H7Q-9QQB>].

A *user* is a person who has an account dealing with digital assets.<sup>184</sup> In this context, the user would be the decedent, principal, ward, or trustee.<sup>185</sup>

The *custodian* is the person who carries, maintains, processes, receives, or stores a digital asset (e.g., the user's e-mail provider such as Yahoo, Google, or Suddenlink; the hosts of the user's social media accounts such as Facebook or LinkedIn; and the user's financial accounts maintained on-line in banks, brokerage firms, utility providers, credit card issuers, and mortgage companies).<sup>186</sup>

## 2. *Reasons Fiduciary Desires Access to Digital Assets*

There are many reasons why a fiduciary would desire access to the user's digital assets.<sup>187</sup>

- (1) Many people forego paper statements for financial accounts such as bank accounts, retirement accounts, and brokerage accounts.<sup>188</sup> A personal representative may seek access to the contents of the decedent's e-mail messages to ascertain where these accounts are located and to gain the information necessary to complete the estate inventory, pay bills, and distribute the funds appropriately.<sup>189</sup> Likewise, an agent or guardian may need this information for similar purposes.<sup>190</sup>
- (2) Many people forego paper statements for utilities, credit cards, car loans, and home mortgages.<sup>191</sup> The fiduciary may need to give notice to and pay these creditors and thus needs access to e-mail messages to determine the names of the creditors and the amounts owed.<sup>192</sup>
- (3) Some digital assets like domain names, customer lists, manuscripts, and compositions may have significant economic value.<sup>193</sup> The personal representative needs access to these assets for management, inventory, and distribution purposes.<sup>194</sup>
- (4) Some digital assets like family photos and videos do not have monetary value but they have great sentimental value and need to be preserved or transferred to the proper heirs or beneficiaries.<sup>195</sup>

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184. TEX. EST. CODE § 2001.002(24).

185. *Id.*

186. *Id.* § 2001.002(6).

187. Beyer & Nipp, *supra* note 183, at 3.

188. Beyer & Nipp, *supra* note 183, at 2.

189. Beyer & Nipp, *supra* note 183, at 3.

190. Beyer & Nipp, *supra* note 183, at 3.

191. Beyer & Nipp, *supra* note 183, at 2.

192. Beyer & Nipp, *supra* note 183, at 3.

193. Beyer & Nipp, *supra* note 183, at 2, 4.

194. Beyer & Nipp, *supra* note 183, at 3.

195. Beyer & Nipp, *supra* note 183, at 4.

### 3. *Effective Date*

TRUFADAA applies to a fiduciary regardless of when the decedent died, the power of attorney or will was executed, the guardianship commenced, or the trust was created.<sup>196</sup>

### 4. *Access Priority*

First priority is given to the user's instructions using the custodian's online tool, that is, the custodian's service that allows the user to provide directions for disclosure (or nondisclosure) of digital assets to a third person.<sup>197</sup> Examples include Google's Inactive Account Manager and Facebook's Legacy Contact.

Second priority is given to the user's instructions in the user's will, power of attorney, or trust.<sup>198</sup> If the user has not provided instructions through an online tool or other writing or electronic record, then the service provider's terms of service agreement (the "I agree" button) will govern the rights of the decedent's personal representative.<sup>199</sup> Typically, these provisions will prohibit access by third parties.<sup>200</sup>

### 5. *Types of Access*

There is a major difference between the two types of access.<sup>201</sup> The first type is access to the contents of electronic communications, which refers to the substance or meaning of the communication such as the subject line and text of e-mail messages.<sup>202</sup>

The second type of access encompasses both the catalogue of electronic communications (e.g., the name of sender, the e-mail address of the sender, and the date and time of the message but *not* the subject line or the content) and other digital assets (e.g., photos, videos, material stored on the user's computer, etc.).<sup>203</sup>

### 6. *Impact on Will Drafting*

Digital assets need to be addressed from two perspectives. First, if the person owns any digital assets that are transferable upon death, the person may wish to make a gift of the asset to a named person.<sup>204</sup> If not, they will pass under the residuary clause.<sup>205</sup>

Second, the person needs to determine if the person wants the executor to read the substance of email messages, texts, and private social media

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196. See TEX. EST. CODE ANN. ch. 2001 (West Supp. 2017).

197. *Id.* § 2001.051(a).

198. *Id.* § 2001.051(b).

199. Beyer & Nipp, *supra* note 183, at 5.

200. Beyer & Nipp, *supra* note 183, at 5.

201. Beyer & Nipp, *supra* note 183, at 11.

202. Beyer & Nipp, *supra* note 183, at 11.

203. Beyer & Nipp, *supra* note 183, at 11.

204. Beyer & Nipp, *supra* note 183, at 18.

205. Beyer & Nipp, *supra* note 183, at 18.

postings.<sup>206</sup> If yes, then express language granting access must be included in the will.<sup>207</sup>

7. *Personal Representative Access to the Contents of the Decedent's Electronic Communications?*

If a deceased user consented in the user's will, a custodian must disclose the contents of electronic communications to the personal representative of a deceased user's estate if the representative provides:

- a written request for disclosure;
- a certified copy of the deceased user's death certificate;
- a certified copy of letters testamentary or letters of appointment proving the representative's authority; and
- a copy of the documentation (typically, the will) in which the user consented to the disclosure of the content of electronic communications specifically (if not so provided pursuant to an online tool).<sup>208</sup>

Before complying with the request, the custodian has the right to request additional information such as:

- information necessary to identify the user's account;
- evidence linking such account to the user; and
- a finding by the court that the account actually belonged to the decedent, the disclosure of the contents would not violate the Stored Communications Act and other federal laws, the user consented to disclosure, disclosure is permitted by TRUFADAA, and disclosure is reasonably necessary for estate administration.<sup>209</sup>

If the deceased user did not consent to the disclosure of contents (e.g., no express language in the will or died intestate), the executor will not be able to obtain access to the contents.

8. *Personal Representative Access to the Catalogue of Decedent's Electronic Communications and Other Digital Assets*

The requirements for a personal representative to gain access to the catalogue and digital assets other than the content of electronic communications are less stringent. Unless prohibited by the user or court order, the personal representative is granted access to the catalogue and digital assets other than the content by default (upon providing the custodian with the specified required documentation, which is basically the same as is required to access contents except there is no requirement that the decedent's will be produced or that the decedent specifically consented to disclosure).<sup>210</sup>

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206. Beyer & Nipp, *supra* note 183, at 18.

207. Beyer & Nipp, *supra* note 183, at 18.

208. TEX. EST. CODE ANN. § 2001.101(a) (West Supp. 2017).

209. *Id.* § 2001.101(b).

210. *Id.* § 2001.102.

The ability of a custodian to request a court order under any circumstance makes access very burdensome for personal representatives as well as the courts. This author has heard from representatives of Google and Facebook that they will *always* require a court order. The reason behind this is these companies want the security of a court order before releasing any information for fear of liability for improper disclosure.

Because of the likelihood that a custodian will require a court order before granting access, include the appropriate language in the earliest possible pleading in the administration of the estate of a deceased user such as the application for an independent administration, determination of heirship, or admission of a will as a muniment of title. (Note: It is uncertain how judges will react to being asked to make these findings in these proceedings.)

### 9. *Trustee Access*

If the trustee is the original user, meaning that the trustee, in his or her capacity as the trustee, opened an online account or procured a digital asset, then the custodian must provide the trustee with all content, catalogues, and digital assets of the trust.<sup>211</sup>

If the trustee is not the original user (for example, a settlor has a digital asset and then transfers it to a trust, either during life or at death), then different rules apply based on whether the trustee is requesting content or non-content material.

Upon receiving the specified required documentation, including a certified copy of the trust agreement that grants disclosure of the content specifically and a certification by the trustee under penalty of perjury that the trust exists and the trustee is currently serving as the trustee, a custodian must disclose to a trustee the content of electronic communications unless otherwise directed by the user, provided for in the trust agreement, or ordered by the court.<sup>212</sup>

When the trustee is not the original user, a custodian (upon receiving the specified required documentation) must disclose to a trustee the catalogue and all digital assets other than the content unless otherwise directed by the user, provided for in the trust agreement, or ordered by the court.<sup>213</sup>

In both cases, the custodian may request additional information such as a number, user name, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account or evidence which links the account to the trust.

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211. *Id.* § 2001.151.

212. *Id.* § 2001.152.

213. *Id.* § 2001.153.



### 10. Custodian Compliance

The custodian must comply with a request to disclose not later than sixty days after receipt of a proper request along with the required documentation.<sup>214</sup>

When a custodian discloses digital assets, the custodian may at its sole discretion:

- grant the fiduciary full access to the user’s account;
- limit access to that which is sufficient for the fiduciary’s performance of designated tasks;
- provide the fiduciary with a paper or digital copy of a digital asset;
- assess a reasonable administrative charge for disclosing digital assets;
- withhold an asset deleted by a user; or
- make the determination that a request imposes an undue burden on the custodian, and if necessary, petition the court for an order.<sup>215</sup>

The comments to the Uniform Act acknowledge that each custodian has a different business model, and some may prefer one method for disclosure over another. An example of the type of situation that is preemptively addressed by allowing the custodian to claim that a request imposes an undue burden is where a fiduciary requests disclosure of “any email pertaining to financial matters,” which would require the custodian to sift through all emails and determine which ones were relevant or irrelevant.<sup>216</sup> In such event, the custodian may decline the fiduciary’s request, and either the fiduciary or the custodian may request guidance from a court.<sup>217</sup>

A custodian incurs no penalty for failing to disclose within sixty days of a proper request. If the custodian does not disclose, the fiduciary may apply to the court for an order directing compliance.<sup>218</sup> This court order must state that compliance is not in violation of 18 U.S.C. § 2702.<sup>219</sup> The decedent’s estate, principal, ward, or trust bears all the expenses of seeking and obtaining the court order such as attorney fees and court costs.

A custodian is immune from liability for disclosing or failing to disclose if done in good faith.<sup>220</sup> However, a custodian is likely to be liable if it fails to comply with a valid court order.

### B. DURABLE POWER OF ATTORNEY

The 2017 Legislature made extensive changes (the bill is 58 pages long) to many aspects of durable power of attorney law.<sup>221</sup> Below is a brief

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214. *Id.* § 2001.231(a).

215. *Id.* § 2001.053.

216. REV. UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 6 cmt (Unif. Law Comm’n 2015).

217. *Id.*

218. TEX. EST. CODE § 2001.231(a) (West Supp. 2017).

219. *Id.*

220. *Id.* § 2001.232.

221. *See id.* §§ 752.001–.115.

summary of some of the key changes:

- The statutory form was extensively revised.<sup>222</sup>
- Co-agents are expressly allowed.<sup>223</sup>
- An agent is not a fiduciary until the agent accepts the appointment and is actually serving as the agent.<sup>224</sup>
- An agent may be given the power to appoint a successor agent.<sup>225</sup>
- An agent is presumed to be entitled to reasonable compensation and reimbursement of reasonable expenses.<sup>226</sup>
- The agent has expanded powers to create, amend, and revoke inter vivos trusts, make gifts, and change beneficiary designations.<sup>227</sup>
- A co-agent with actual knowledge of a breach or imminent breach of fiduciary duty by another agent has the duty to notify the principal of the breach.<sup>228</sup>
- The agent has the duty to preserve the principal's estate plan.<sup>229</sup>
- The appointment of a temporary guardian suspends the agent's powers unless the court provides otherwise.<sup>230</sup>
- The rules regarding when a court may remove an agent are expanded and clarified.<sup>231</sup>
- The individuals who may request a construction of a power of attorney were expanded.<sup>232</sup>
- A copy of a power of attorney (physical or electronic) has the same effect as the original.<sup>233</sup>
- Detailed provisions requiring third parties to accept the agent's authority along with options for third parties to refuse acceptance under specified circumstances.<sup>234</sup>
- Under limited circumstances, the agent may bring a statutory cause of action to force a third party to accept the agent's authority.<sup>235</sup>
- Third parties, such as financial institutions, cannot require a durable power of attorney to be on the institution's form.<sup>236</sup>
- A third party who relies on the power of attorney may rely on a presumption that the principal's signature is genuine.<sup>237</sup>

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222. *Id.* § 752.051.

223. *Id.* § 751.021.

224. *Id.* § 751.101.

225. *Id.* § 751.023(b).

226. *Id.* § 751.024 (but only if power executed on or after September 1, 2017).

227. *Id.* § 751.031(b) (Unless the power provides otherwise, an agent who is not an ancestor, spouse, or descendant of the principal cannot exercise these powers in favor of himself, herself, or anyone he or she has a legal obligation to support.).

228. *Id.* § 751.121(a).

229. *Id.* § 751.122.

230. *Id.* § 751.133(a).

231. *Id.* § 753.002.

232. *Id.* § 751.251.

233. *Id.* § 751.0023(c).

234. *Id.* § 751.201.

235. *Id.* § 751.213.

236. *Id.* § 751.202.

237. *Id.* § 751.210.

### C. MEDICAL POWER OF ATTORNEY

The disclosure statement is no longer a separate document. Instead, it is included within the medical power of attorney form itself.<sup>238</sup>

### D. SELF-DESIGNATION OF GUARDIAN

If the self-designation of guardian does not disqualify anyone from serving as a guardian, then the formalities are reduced—an acknowledgment by a notary substitutes for the two witnesses and it is then considered self-proved if it contains the new acknowledgement language found in the statute.<sup>239</sup>

### E. MENTAL HEALTH TREATMENT DECLARATION

The formalities for a declaration of mental health treatment were modernized. Instead of having two witnesses sign the declaration, it is now permissible for the declarant to have the declaration notarized. The statutory form was also updated to reflect this change.<sup>240</sup>

### F. TRANSFER ON DEATH DEEDS

The 2017 Legislature clarified the Texasized version of the Uniform Real Property Transfer on Death Act enacted in 2015 as Chapter 114 of the Texas Estates Code by providing: (1) if a beneficiary fails to survive the transferor by 120 hours (regardless of whether the beneficiary is a sole or co-beneficiary) and the deed fails to provide otherwise, the beneficiary's share passes under the normal lapse rules of the Texas Estates Code; and (2) more options for the transferor to select regarding how the property passes if one or more beneficiaries fails to survive.<sup>241</sup>

### G. TRANSFER ON DEATH MOTOR VEHICLES

The 2017 Legislature added Chapter 115 to the Texas Estates Code to allow the owners of a motor vehicle to name a beneficiary who will own the vehicle upon the owner's death (co-beneficiaries are not allowed).<sup>242</sup> The designation is a revocable non-testamentary transfer and cannot be changed by the owner's will.<sup>243</sup> If the vehicle is jointly owned with survivorship rights, both co-owners must agree to the beneficiary designation.<sup>244</sup> The beneficiary must apply for a transfer of the vehicle's title within 180 days of the owner's death.<sup>245</sup>

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238. TEX. HEALTH & SAFETY CODE ANN. § 166.164 (West Supp. 2017).

239. TEX. EST. CODE §§ 1104.203, 1104.204 (West Supp. 2017).

240. TEX. CIV. PRAC. & REM. CODE ANN. §§ 137.003(a), 137.011 (West Supp. 2017).

241. TEX. EST. CODE §§ 114.103, 114.151.

242. *See id.* §§ 115.001–.006.

243. *Id.* § 115.002.

244. *Id.* § 115.003.

245. TEX. TRANSP. CODE ANN. § 501.0315(c) (West Supp. 2017).

## H. MULTIPLE PARTY ACCOUNTS

### 1. *Survivorship Rights*

The signature card in *Hare v. Longstreet*<sup>246</sup> contained an “X” in a box labeled “MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP,” and both the deceased and surviving joint parties initialed on the blank next to the box. Both the trial and appellate courts held that this indication was insufficient to create survivorship rights in the surviving party.<sup>247</sup>

The Tyler Court of Appeals explained that the signature card lacked language substantially similar to the language required by Texas Estates Code Section 113.151(b) (“On the death of one party to a joint account, all sums in the account the date of the death vest in and belong to the surviving party as his or her separate property and estate.”).<sup>248</sup> Merely stating that the account has the right of survivorship is insufficient to make it so.<sup>249</sup>

This author believes that most lay people would assume that checking the box next to a phrase saying “with right of survivorship” would be sufficient to create survivorship rights. Thus, estate attorneys must have “eyes-on” all signature cards and account contracts to ascertain whether the accounts of both their living and deceased clients actually have the survivorship feature.

### 2. *Form*

The statutory Uniform Single-Party or Multiple-Party Account Selection Form Notice no longer requires the customer to initial to the right of each paragraph, which was rarely done because the form had the blanks to the left of some, but not all, of the paragraphs.<sup>250</sup> Instead, the customer now must merely sign a paragraph indicating that the customer read the form and received disclosure of the ownership rights to the accounts.<sup>251</sup>

### 3. *Ramifications of Divorce*

An ex-spouse, as well as the ex-spouse’s relatives who are not also relatives of the deceased spouse (for example former mothers-in-law), are now prevented from taking under provisions of a joint account with survivorship rights unless there has been a reaffirmation of the survivorship agreement.<sup>252</sup> Prior to this amendment, only ex-spouses and their relatives named as P.O.D. or trust account beneficiaries were automatically prevented from receiving the funds. The funds are distributed as if the ex-spouse or ex-relative had predeceased the deceased joint account

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246. 531 S.W.3d 922 (Tex. App.—Tyler 2017, no pet.).

247. *Id.* at 928.

248. *Id.* at 925.

249. *Id.* at 928.

250. See TEX. EST. CODE ANN. §§ 113.052 (West Supp. 2017).

251. *Id.* §§ 113.052, 113.053(a-1).

252. *Id.* § 123.151(b).

holder.<sup>253</sup> However, a financial institution is not liable for paying the funds to the ex-spouse or the ex-spouse's relative.<sup>254</sup>

#### 4. *Liability for Estate Taxes*

A multiparty account is now liable for estate taxes caused by the inclusion of that account in a decedent's estate regardless of whether other assets of the estate are sufficient to pay them.<sup>255</sup>

## VI. CONCLUSION

The new statutes and cases 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 statutes and cases. It is also important to understand some overarching principles that transcend individual statutes and cases, and forming a pattern. Here are some examples of patterns this author detected:

- The Texas Legislature pushed Texas toward the modern age by updating various statutes to include language and processes indicative of common practices. The Texas Legislature also continues to streamline processes and clarify current forms within statutes to create a better process overall.
- The influence of digital assets was memorialized and will only continue to assert its dominance in estate planning as we become more evolved with our use of technology.
- Texas courts continue to narrowly interpret jury decisions, which makes pretrial matters and litigation even more important than they already were.

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253. *Id.* § 123.151(c-1).

254. *Id.* § 123.151(d-1).

255. *Id.* § 113.252.