Wills & Trusts

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Gerry W. Beyer*

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ABSTRACT

This article discusses developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of December 1, 2021, through November 30, 2022. The reader is warned that not all cases decided during the Survey period are presented, and not all aspects of each case are analyzed. You must read and study each case’s full text before relying on it or using it as precedent. The discussion of most cases includes a moral, that is, the important lesson to

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be learned from the case. By recognizing situations that resulted in time-consuming and costly litigation in the past, readers may be able to reduce the likelihood of the same situations arising with their own clients.

I. INTESTATE SUCCESSION

There are no significant developments during this Survey period addressing intestate succession issues.

II. WILLS

A. Execution Formalities

A will execution ceremony should be meticulously conducted to prevent claims that something went amiss with the required formalities, such as those that surfaced in Jones v. Jones. About six months after his first wife died, the testator married his second wife. On the same day as the wedding, he executed a will leaving his estate to his second wife, but if she predeceased, to his three children with his first wife. The testator initialed and dated each of the first six pages of his seven-page typewritten will. The seventh page contained only locations for the testator’s signature and for the witnesses to attest; no substantive or administrative provisions. However, a witness attested that the testator neglected to sign this page. The testator also did not sign the self-proving affidavit.

Twenty-two years later, the testator died. His second wife offered the will for probate, and one of the testator’s children contested the will, claiming it was invalid because it was not executed with the formalities required by Texas law. Testimony from two of the witnesses clearly reflected the will ceremony and the testator’s initialing of the first six pages of the will. Nonetheless, the trial court denied probate because the testator did not initial page seven’s attestation clause and did not sign the self-proving affidavit. The second wife appealed.

The Court of Appeals for the First District of Texas at Houston reversed, explaining that long-established Texas law recognizes that initials may constitute a signature and that the location of the signature is not specified.

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2. Id. at 580.
3. Id.
4. Id.
5. Id. at 581.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id. at 581–82.
11. Id. at 582.
12. Id.
by statute. The court rejected the child’s claim that the document was incomplete and lacked testamentary intent because the testator drafted it and knew that he did not sign the last page and the self-proving affidavit.

The court also rejected the child’s claim that the will was not properly witnessed, because the witnesses testified they saw the testator sign the will rather than initial the will. The court reviewed the testimony of the witnesses, which showed that they signed their names in the testator’s presence. There is no requirement under Texas law that the witnesses actually see the testator sign the will. In fact, the witnesses do not even need to know that the document they are witnessing is a will. The court also emphasized that initialing is a recognized method of signing.

B. Interpretation and Construction

As Prather v. Callon Petroleum Operating Co., Inc. explains, the phrase “survivor(s) thereof” will typically refer to people in a designated group who outlive the testator and not the heirs of a deceased group member. In this case, the testatrix devised property to her two children, but if a child predeceased the testatrix, the property would pass “to the survivor(s) thereof.” One child predeceased the testator. The litigants advanced two interpretations of this language. First, that the surviving child was the sole beneficiary of the devised property, being the survivor of the two beneficiaries. Second, that the successors in interest to the predeceased child’s estate owned the share that would have passed to the predeceased child because they were the survivors (children) of the deceased beneficiary.

Both the trial court and the Court of Appeals for the Eleventh District of Texas at Eastland agreed that the surviving child was the sole beneficiary of the property, because the surviving child was the survivor of the two named beneficiaries. The appellate court began its analysis by holding that the will was unambiguous, and thus is construed as a matter of law. Then, the court determined that the phrase “to the survivor(s) thereof”
constituted words of survivorship and did not mean heirs of a predeceased beneficiary.³⁹ They reasoned, “[c]ommon sense dictates that a ‘survivor’ is one who remains alive or survives an event; we cannot conceive of a contrary interpretation.”³⁰

C. Will Contests

_Mittelsted v. Meriwether_ shows that a jury’s finding of lack of capacity will be difficult to overturn on appeal.³¹ In this case, the testator left his estate to his half-brother and named him as the beneficiary of six financial accounts.³² After the testator died, the testator’s sisters contested the validity of the will on the grounds that the testator lacked testamentary and contractual capacity.³³ The jury agreed with the sisters, and thereafter the half-brother appealed.³⁴

The Court of Appeals for the Fourteenth District of Texas at Houston affirmed, holding that the trial court did not abuse its discretion in admitting the testimony of certain witnesses about the testator’s lack of capacity, and that the evidence of these and other witnesses was sufficient to support the jury findings of lack of capacity.³⁵ The court’s lengthy opinion details the testimony of approximately twenty witnesses who testified about the testator’s capacity.³⁶

III. ESTATE ADMINISTRATION

A. Jurisdiction

_In re Estate of Rushing_ serves as a reminder that disputes over non-probate assets are unlikely to fall within the purview of a probate case.³⁷ The insured died without removing his ex-wife as the beneficiary of a life insurance policy governed by the Servicemembers Group Life Insurance Act.³⁸ However, the ex-wife disclaimed her interest in the policy in their divorce decree.³⁹ After the insured died, the insurance company made a partial disbursement to the ex-wife.⁴⁰ The administrator of the insured’s estate asserted a claim in the county court for a constructive trust over the insurance proceeds.⁴¹ The court determined it had jurisdiction over the administrator’s claim and imposed the

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29. _Id._ at 624.
30. _Id._ at 672.
32. _Id._ at 873.
33. _Id._
34. _Id._
35. _Id._
36. _See id._ at 875–89.
37. _In re Estate of Rushing_, 644 S.W.3d 383, 388 (Tex. App.—Tyler 2022, pet. denied).
38. _Id._ at 385.
39. _Id._
40. _Id._
41. _Id._
constructive trust. The ex-wife appealed, claiming the county court lacked subject matter jurisdiction.

The Court of Appeals for the Sixth District of Texas at Tyler reversed. The court held that (1) the administrator’s motion was neither a probate proceeding nor related to a probate proceeding, (2) the county court could not exercise pendant or ancillary jurisdiction over the claim, and (3) the county court lacked jurisdiction to enforce the ex-wife’s waiver in the divorce decree. The court explained that the life insurance policy is a non-probate asset and passes according to its contractual terms, not through the probate process. The administrator’s claim may have lacked a sufficiently close relationship to the probate of the insured’s estate. However, the court did not have to reach that issue because the proceed value of the policy exceeded the amount-in-controversy limits applicable to pendent and ancillary claims.

B. Transfer

_Aguilar v. Morales_ serves as a reminder that appellate courts lack jurisdiction over actions taken by courts in other appellate court districts. In this case, children engaged in protracted litigation involving a variety of issues in courts in both Bexar and El Paso counties after the death of their parents. Eventually, the Bexar County probate court issued a transfer order so the El Paso action would be consolidated and heard in Bexar County. Some of the parties challenged this order claiming that the lawsuit pending in El Paso County was unrelated to the Bexar County proceedings. The Court of Appeals for the Eighth District of Texas at El Paso determined that it lacked “any appellate or original jurisdiction to determine the legality of an order entered by a Bexar County court.” Likewise, the El Paso court lacked authority to rule on the issue of “whether a Bexar County judge was disqualified from hearing a matter in his or her court.”

C. Determination of Heirship

An heirship judgment is subject to modification via a timely statutory bill of review if error is shown. For example, in _Gill v. Vordokas_, the witnesses

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42. Id.
43. Id. at 386.
44. Id. at 390–91.
45. Id. at 388–90.
46. Id. at 386.
47. Id. at 389.
48. Id.
50. Id.
51. Id. at 704.
52. Id. at 707.
53. Id. at 711.
54. Id. at 713.
55. See Gill v. Vordokas, 656 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2022, no pet.).
testified that they believed the intestate died unmarried with four children.\textsuperscript{56} However, the attorney ad litem for the unknown heirs did not question the witnesses about the possibility that the intestate had a common law wife.\textsuperscript{57} Thirty days after the judgment determining that the four children were the intestate’s sole heirs, the alleged common law wife (ACLW) filed a motion for a new trial saying she did not receive timely notice of the heirship proceeding and that she had been the intestate’s common law wife for over two decades.\textsuperscript{58} The motion was not set for a hearing and thus was deemed overruled by operation of law.\textsuperscript{59} The ACLW did not appeal, but instead filed a petition for a statutory bill of review seventeen months thereafter.\textsuperscript{60} The trial court granted a summary judgment that the ACLW’s claims were barred by res judicata, and the ACLW appealed.\textsuperscript{61}

The Fourteenth Houston Court of Appeals reversed and remanded.\textsuperscript{62} The court explained that res judicata is not normally a defense to a bill of review because a bill of review’s purpose is to change a prior judgment.\textsuperscript{63} The court explained that the ACLW’s filing of a bill of review under Estates Code § 55.251 was timely (within two years) and alleged “error.”\textsuperscript{64} The elements needed for an equitable bill of review, such as the proper exercise of diligence, are irrelevant.\textsuperscript{65}

\textbf{D. Late Probate}

Normally, Texas Estates Code § 256.003 requires an applicant to file a will for probate within four years of the testator’s death unless the applicant can prove that the applicant was not in default.\textsuperscript{66} Although Texas courts are lenient in finding that an applicant to probate a will was not in default, two recent cases emphasize that the applicant still must act timely after discovering the will and learning that probate is necessary.\textsuperscript{67} In \textit{Marshall v. Estate of Freeman}, the trial court admitted the testator’s will to probate as a muniment of title forty-one years after his death, once they found that the applicant was not in default.\textsuperscript{68} The Austin Court of Appeals reversed, holding that no evidence supported the trial court’s conclusion that the applicant was not in default.\textsuperscript{69} Evidence showed that the applicant

\textsuperscript{56.} Id. at 400.
\textsuperscript{57.} Id.
\textsuperscript{58.} Id.
\textsuperscript{59.} Id.
\textsuperscript{60.} Id.
\textsuperscript{61.} Id.
\textsuperscript{62.} Id. at 402.
\textsuperscript{63.} Id. at 401–02.
\textsuperscript{64.} Id.; Tex. Est. Code Ann. § 55.251.
\textsuperscript{65.} Gill, 656 S.W.3d at 401–02.
\textsuperscript{66.} Tex. Est. Code § 256.003.
\textsuperscript{68.} Marshall, 2022 WL 1273305, at *1.
\textsuperscript{69.} Id.
discovered the existence of the testator’s will more than four years before filing the application to probate the will. Evidence also showed that an attorney told the applicant that the will needed to be probated over one year before the filing of the application. The court recognized that Texas courts are lenient in excusing the applicant’s delay in probating a will. However, in this case, the applicant knew that he should probate the will, but his excessive delay in filing the application meant that he actually was in default. The court also noted that the applicant waited seven months after an heir filed a determination of heirship action.

In the case *Matter of Estate of Masters*, the applicant attempted to probate the testator’s will as a muniment of title six years after the testator’s death. The heirs filed a small estate affidavit and argued that the applicant was in default and thus the application should be denied. The trial court agreed, and the applicant appealed. The El Paso Court of Appeals affirmed, holding that the applicant was in default in probating the will more than four years after the testator’s death. The court explained that the applicant had possession of the will within days of the testator’s death, but took no action to probate the will until six years later. In addition, an attorney advised the applicant that probate was needed several months before the applicant filed the will. The court conducted an extensive analysis of Texas not-in-default cases and concluded that the trial court’s implied finding of default was “not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.”

### E. Executor Removal

An executor’s alleged mismanagement of a decedent’s non-probate assets is not a ground for removal as the Tyler Court of Appeals explained in *In re Estate of Collins*. The sole beneficiary of the testator’s estate convinced the trial court to remove the independent executor from office. The beneficiary asserted that the executor, in his individual capacity, had misappropriated funds from a joint bank account that the executor

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70. Id.
71. Id. at *2.
72. Id. at *3.
73. Id. at *4.
74. Id.
76. Id.
77. Id. at 149.
78. Id. at 155.
79. Id. at 148.
80. Id.
81. Id. at 155.
82. In re Estate of Collins, 638 S.W.3d 814, 821 (Tex. App.—Tyler 2021, no pet.).
83. Id. at 817–18.
had with the testator when he withdrew substantially more than his net contributions.\textsuperscript{84} The trial court determined that this was gross misconduct and a material conflict of interest under Estates Code § 404.0035(b) and ordered the removal of the executor from his position.\textsuperscript{85}

The appellate court reversed.\textsuperscript{86} The court explained that the joint account had survivorship rights and thus was a non-probate asset.\textsuperscript{87} Even if the executor's withdrawals during the testator's life were improper, the funds would have been returned to the joint account.\textsuperscript{88} The executor would then be entitled to them as the survivor.\textsuperscript{89} Accordingly, the court held that the trial court abused its discretion in removing the executor.\textsuperscript{90}

\section*{F. Family Allowance}

\textit{In re Estate of Wetzel} demonstrates the importance for a surviving spouse seeking a family allowance to make the claim before one year has elapsed, to strengthen the argument that the allowance is actually needed for maintenance and is not just an attempt to secure a greater share of the deceased spouse's estate.\textsuperscript{91} The surviving spouse requested a family allowance of $166,728, asserting that she needed that sum for her maintenance for one year after her husband's death, and that she did not have sufficient separate property of her own.\textsuperscript{92} The trustee, who was also the beneficiary of the husband's estate, objected, asserting the surviving spouse had sufficient separate property, and thus did not need a family allowance.\textsuperscript{93} The trial court agreed and denied the request, and the surviving spouse appealed.\textsuperscript{94}

The appellate court first rejected the surviving spouse's claim that the trial court lacked subject matter jurisdiction because the administration was independent, citing Estates Code § 402.001.\textsuperscript{95} The court explained that "although section 402.002 limits the probate court's supervision of the independent administration, it does not deprive the probate court of jurisdiction over matters relating to the estate."\textsuperscript{96}

The Tyler Court of Appeals affirmed the trial court, holding that it did not abuse its discretion in denying the surviving spouse's family allowance.

\begin{footnotes}
\item 84. \textit{Id.}
\item 85. \textit{Id.} at 818–19; see \textit{Tex. Est. Code Ann.} § 404.0035(b).
\item 86. \textit{In re Estate of Collins}, 638 S.W.3d at 821.
\item 87. \textit{Id.} at 820.
\item 88. \textit{Id.}
\item 89. See \textit{id.}
\item 90. \textit{Id.} at 820–21.
\item 91. \textit{In re Estate of Wetzel}, No. 05-20-01104-CV, 2022 WL 1183294, at *4 (Tex. App.—Dallas Apr. 21, 2022, no pet.) (mem. op.).
\item 92. \textit{Id.} at *1.
\item 93. \textit{Id.}
\item 94. See \textit{id.}
\item 95. \textit{Id.} at *2; see \textit{Tex. Est. Code Ann.} § 402.001.
\item 96. \textit{In re Estate of Wetzel}, 2022 WL 1183294, at *2.
\end{footnotes}
claim.\textsuperscript{97} Estates Code § 353.101 prohibits a family allowance for a surviving spouse if the spouse has adequate separate property.\textsuperscript{98} Among the evidence the trial court could have considered was the surviving spouse’s separate property interest in the homestead.\textsuperscript{99} The court recognized that she had rights to the homestead, but here she had already sold the homestead and thus the prohibition on partition was inapplicable.\textsuperscript{100} In addition, the surviving spouse did not apply for a family allowance until after her spouse was deceased for over one year.\textsuperscript{101} Thus, the allowance was not needed for her support during the one year after the deceased spouse’s death.\textsuperscript{102}

G. CLAIMS AGAINST THE ESTATE

Courts are reluctant to exempt parties to a real estate transaction from compliance with the statute of frauds.\textsuperscript{103} Thus, a party desiring to use the part performance exception must have definitive evidence admitted at the hearing of all the elements needed to qualify for the exception, as \textit{Estate of Banta} demonstrates.\textsuperscript{104} The temporary administrator applied to sell a parcel of the decedent’s real property.\textsuperscript{105} The occupants of the property claimed that they had entered into an oral contract with the decedent to purchase the property.\textsuperscript{106} The occupants claimed that the contract was enforceable, even though oral, because of the part performance exception—they made a sizeable down payment, made regular monthly payments, paid property taxes, carried insurance, and made repairs and improvements to the property.\textsuperscript{107} At trial, the occupants provided no proof of their part performance assertions.\textsuperscript{108} Accordingly, the trial court rejected their claim and granted the temporary administrator’s application to sell the property.\textsuperscript{109} The occupants appealed.\textsuperscript{110}

The Court of Appeals for the Second District of Texas at Fort Worth affirmed.\textsuperscript{111} The court explained that for a contract for the sale of real property to be exempted from the statute of frauds, the purchaser must pay consideration, take possession, and make valuable and permanent improvements with the seller’s consent, or even without improvements, the facts show it would be a fraud on the purchaser if the contract were

\textsuperscript{97} Id. at *4.
\textsuperscript{98} Id. at *3; Tex. Est. Code § 353.101.
\textsuperscript{99} \textit{In re Estate of Wetzel}, 2022 WL 1183294, at *4.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at *3.
\textsuperscript{102} \textit{See id.}
\textsuperscript{103} \textit{See Estate of Banta}, No. 02-21-00327-CV, 2022 WL 2526940, at *4–6 (Tex. App.—Fort Worth July 7, 2022, pet. denied) (mem. op.).
\textsuperscript{104} Id. at *5.
\textsuperscript{105} Id. at *1.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at *6.
The court explained there was no proof in the record to substantiate the occupants’ claims of making payments and improvements. Mere affidavits attached to pleadings and not admitted into evidence, and arguments made by their attorney at the trial, were insufficient.

**H. Claims of the Estate**

*Henry v. Brooks* explains that if a life tenant pays expenses that a co-tenant or owner of a remainder interest should pay, such as the principal of a loan, the reimbursement right survives to the life tenant’s estate. In this case, the surviving spouse and his step-daughter owned the spouse’s homestead in equal undivided shares upon the deceased spouse’s death. The surviving spouse exercised his right to continue to occupy the homestead. At the time of the deceased spouse’s death, the homestead was subject to a loan. The surviving spouse quickly remarried, and died five years later, leaving his estate to his new spouse. Thus, his new spouse and step-daughter owned the property in equal undivided shares. The new spouse continued to live in the home. The step-daughter then brought a partition action seeking to sell the property to the highest bidder. The new spouse, both individually and as executor of the surviving spouse’s estate, counterclaimed seeking reimbursement for funds the surviving spouse and the new spouse had spent on the property which benefited the step-daughter. The trial court denied the claim, and the new spouse appealed.

The Tyler Court of Appeals began its discussion by explaining the general rights of life tenants and of tenants in common. The court then applied those principles to the various expenses for which the new spouse sought reimbursement. With regard to the principal portion of loan payments the surviving spouse paid, the new spouse was entitled to be reimbursed for one-half of that amount, that is, the amount by which the step-daughter was unjustly enriched. The step-daughter was unsuccessful in claiming that the right to reimbursement did not survive the surviving spouse’s death. The court held that a reimbursement claim is a vested right that

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112. Id. at *5.
113. Id.
114. Id.
116. Id. at 661.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. at 663.
126. Id. at 664–65.
127. Id. at 665.
128. Id. at 666.
survives the death of the life tenant. However, the court also held that the new spouse was not entitled to reimbursement for the payments she made after the surviving spouse died because she continued to live in the property without interference from the co-tenant, the step-daughter, and thus received a quid pro quo for the payments.

IV. TRUSTS

A. Standing

The Supreme Court of Texas addressed the standing of a trust beneficiary to bring suit against the trustee in *Berry v. Berry*. In this case, a trust beneficiary sued the trustees for breach of duty, an accounting, and to remove the trustees. Both the trial and lower appellate court agreed that she lacked the ability to bring her claims. The Supreme Court of Texas reversed, explaining that because the beneficiary was not expressly designated by name but only by a class designation (issue of a named beneficiary), she was not automatically an interested person under Property Code § 111.004(6) who could bring her claims under Property Code § 115.011. Thus, a court must determine if the unnamed beneficiary is an interested person by using the Code’s standard that the person’s status as an interested person “may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.”

The court then examined the facts to determine that her interest in the trust was sufficient to support her claim that she is an interested person. For example, she has a present financial interest in the trust (the right to withdrawal a proportionate share of any trust contribution) that would be affected by the suit as well as a contingent interest in trust distributions that would occur when the named beneficiary (her father) dies.

B. Breach of Fiduciary Duty

1. Statute of Limitations

A highly complex series of transactions and decades of litigation among family members led to the Supreme Court of Texas engaging in a detailed

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129. *Id.* at 666–67.
130. *Id.* at 667–68. The court also looked at a reimbursement claim for an access easement and found the trial court was within its discretion to deny the claim based on the facts and surrounding circumstances. *Id.* at 668–69.
132. *Id.* at 522.
133. *Id.* at 523.
134. *Id.* at 528, 531.
135. *Id.*; TEX. PROP. CODE ANN. § 111.004(7).
137. *Id.*
discussion of limitations for breach of fiduciary duty in *Berry v. Berry*.\textsuperscript{138} The court began its analysis by stating that the statute of limitations for breach of fiduciary duty is four years, which “accrues when the defendant’s wrongful conduct causes the claimant to suffer a legal injury.”\textsuperscript{139} However, the accrual time may be extended by the discovery rule, that is, “the statute of limitations does not begin to run until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the wrongful act.”\textsuperscript{140} The court then explained that the discovery rule is a “narrow exception” reserved for “exceptional” cases where the injury is “inherently undiscoverable.”\textsuperscript{141}

The court then addressed whether constructive notice from recording in public records would preclude the operation of the discovery rule.\textsuperscript{142} The court “recognized that the constructive notice conveyed by deed records does not always bar application of the discovery rule.”\textsuperscript{143} The court then confined the exception “to cases where the plaintiff had no ‘reason to monitor’ the deed records because he had ‘no reason’ to ‘believe’ or ‘suspect’ that a legal injury had occurred.”\textsuperscript{144}

In this case, the court determined that the facts demonstrated that the plaintiff had actual notice of facts that would have alerted him to the wrongful act if he had exercised reasonable diligence.\textsuperscript{145} Even though fiduciary duties were owed to the plaintiff, he still had the “responsibility to ascertain when an injury occurs.”\textsuperscript{146} This was especially true in this case, as the plaintiff was both a beneficiary and co-trustee of the trust, and the suit was against his brothers, who were fellow co-trustees.\textsuperscript{147}

2. **Necessary Parties**

*In re Trust A and Trust C* is a complex case involving an alleged breach of duty by a trustee selling trust property (stock).\textsuperscript{148} The lower court issued a declaratory judgment voiding the transfer.\textsuperscript{149} Without reaching the merits, the El Paso Court of Appeals explained that it was setting aside the lower court’s judgment because the transferees of the stock were not made parties to the action.\textsuperscript{150} The transferees could not be bound by a judgment adversely impacting their interest without being joined as parties as the Declaratory Judgment Act mandates.\textsuperscript{151}

\textsuperscript{138} *Id.* at 520–22.
\textsuperscript{139} *Id.* at 523.
\textsuperscript{140} *Id.* at 524. (quoting Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997)).
\textsuperscript{141} *Id.*
\textsuperscript{142} *Id.* at 525–26.
\textsuperscript{143} *Id.* at 525.
\textsuperscript{144} *Id.*
\textsuperscript{145} *Id.*
\textsuperscript{146} *Id.* at 526.
\textsuperscript{147} *Id.*
\textsuperscript{149} *Id.*
\textsuperscript{150} *Id.* at 594, 604.
\textsuperscript{151} TEX. CIV. PRAC. & REM. CODE ANN. § 37.006.
C. MODIFICATION

In the case, *In re Troy S. Poe Trust*, the Supreme Court of Texas addressed the issue of whether a jury trial is available in a trust modification action.\(^{152}\) The settlor expressly required the trustees to agree on all decisions.\(^{153}\) Unfortunately, the trustees were combatants in other litigation and were unable to agree on several trust matters.\(^{154}\) One trustee obtained an order from the probate court to make various modifications to the trust, and the other trustee appealed.\(^{155}\)

The El Paso Court of Appeals reversed, explaining that the trial court improperly rejected the other trustee’s request for a jury trial because the question of whether the trust needed to be modified was a fact question.\(^{156}\) Property Code § 115.012 provides that normal civil procedure rules and statutes apply to trust actions.\(^{157}\) These rules and statutes, along with the Texas Constitution, guarantee the right to a jury trial.\(^{158}\) The trustee made a timely request for a jury trial (the court held the failure to pay the jury fee did not forfeit the right to claim error).\(^{159}\) The court rejected the claim that Property Code § 112.054 precludes a jury trial on modification issues because it provides that the “court shall exercise its discretion” in determining the modifications.\(^{160}\) The court examined the statute and found no reasonable argument that jury trials were precluded on fact issues.\(^{161}\)

The Supreme Court of Texas reversed, holding that § 112.054 “does not confer a right to a jury trial in a judicial trust-modification proceeding.”\(^{162}\) The court explained that the section discusses the court making the decision to modify in its discretion—no mention of a jury.\(^{163}\)

However, the court remanded the case for the appellate court to consider whether there may be a right under the Texas Constitution to a jury trial.\(^{164}\) The appellate court explained that a determination needs to be made whether “a Section 112.054 judicial trust-modification proceeding is not a “cause” within the meaning of Article V, Section 10 of the Texas Constitution but, rather, a ‘special proceeding’ falling outside its purview.”\(^{165}\) The Texas Supreme Court refused to address the issue because it was not raised until the motion for rehearing in the court of appeals.\(^{166}\)

\(^{152}\) *In re Troy S. Poe Trust*, 646 S.W.3d 771, 772 (Tex. 2022).
\(^{153}\) *Id.* at 773.
\(^{154}\) *Id.* at 774.
\(^{155}\) *Id.* at 774–75.
\(^{157}\) *Id.* at 178; TEX. PROP. CODE ANN. § 115.012.
\(^{158}\) See *In re Troy*, 591 S.W.3d at 178.
\(^{159}\) *Id.* at 180.
\(^{160}\) *Id.* at 182; TEX. PROP. CODE § 112.054.
\(^{161}\) *In re Troy*, 591 S.W.3d at 182.
\(^{162}\) *In re Troy S. Poe Trust*, 646 S.W.3d 771, 777 (Tex. 2022).
\(^{163}\) *Id.*
\(^{164}\) *Id.* at 781.
\(^{165}\) *Id.* at 772–73.
\(^{166}\) See *id.* at 781.
V. CONCLUSION

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

Poor drafting of wills, by attorneys or the testators themselves, is a prominent cause for appellate litigation regarding the interpretation of a will in Texas. As seen in Prather, even phrases that may seem commonsense should be treated with an abundance of caution to avoid potential litigation. To prevent any issues, the drafter should take time to clearly define all terms and ensure the testator’s intent is clearly represented in the will.

When conducting the will ceremony itself, the attorney should ensure that each of the required formalities are carried out correctly as well. Many of the fine details can be misconstrued later, as we have previously seen in Jones, and can cause much larger issues for clients in the future. While it is not required for a witness to see the testator sign the will, it is generally recommended to have them knowingly view the process as a precaution. In the will ceremony, it is good practice to ensure the testator has signed all the necessary pages as well.

Disputes over non-probate assets are unlikely to fall in the jurisdiction of a probate case. Assets like life insurance policies are considered non-probate and should therefore pass through their contractual terms. Additionally, attorneys should be mindful that appellate courts lack jurisdiction of cases that were previously observed in other appellate court districts.

It is also important to ensure that probate matters are timely filed. They should be cognizant of the rules regarding the statute of limitations and be sure to file within four years of the testator’s death unless the relevant exception applies. Attorneys must also ensure that there is proper standing in their cases. If the beneficiary of a trust is not expressly named, and instead is referred by a class designation, there will not be automatic

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168. See id.
169. See Jones v. Jones, 649 S.W.3d 577, 589 (Tex. App.—Houston [1st Dist.] 2022, no pet.).
170. See id. at 588–89.
171. See id. at 589.
172. See In re Estate of Rushing, 644 S.W.3d 383, 386 (Tex. App.—Tyler 2022, pet. denied).
173. Id. at 386.
175. See Berry v. Berry, 646 S.W.3d 516, 523 (Tex. 2022); TEX. EST. CODE ANN. § 256.003.
176. Berry, 646 S.W.3d at 528–29.
standing and the court will have to inquire further to determine whether they are an interested party. 177

If attorneys take the time to ensure these simple details are correct, they can prevent costly disputes from arising for their clients in the future.

177. See id. at 527.