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Probate and Trusts - Case Law Update/Statutory Update

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TABLE OF CONTENTS

I. CASE LAW UPDATE .......................................................... 1233
   A. INTESTACY ............................................................. 1233
      1. Basic Distribution .............................................. 1233
      2. Non-Marital Children .......................................... 1234
      3. Escheat ............................................................ 1235
   B. WILLS ................................................................. 1236
      1. Formalities ...................................................... 1236
      2. Pretermitted Child ............................................ 1237
      3. Revocation ...................................................... 1237
      4. Construction .................................................... 1238
      5. Contractual Wills ............................................. 1245
      6. Contests .......................................................... 1246
      7. Settlement Agreements ........................................ 1247
   C. ESTATE ADMINISTRATION ........................................... 1248
      1. Jurisdiction ...................................................... 1248
      2. Transfer .......................................................... 1254
      3. Application to Probate Multiple Wills .................... 1255
      4. Personal Representative Appointment ........................ 1255
      5. Suitability of Executor ....................................... 1256
      6. Receivers ........................................................ 1256
      7. Creditors Claims ............................................... 1257

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8. Muniment of Title .................................................. 1260
9. Homestead ............................................................ 1260
10. Bill of Review ....................................................... 1260
11. Statute of Limitations ............................................. 1261

D. Trusts................................................................. 1262
1. Creation .............................................................. 1262
2. Substitute Fiduciary Act ........................................... 1262
3. Termination ........................................................... 1263
4. Enforcement .......................................................... 1264
5. Foreign Trusts in Texas Courts ................................... 1265

E. Other Matters .......................................................... 1265
1. Disclaimers ............................................................ 1265
2. Joint Account ........................................................ 1266
3. Negligent Misrepresentation ...................................... 1267
4. Malpractice ............................................................ 1268
5. Unauthorized Practice of Law ...................................... 1270
6. Retirement Plans ...................................................... 1271
7. Power of Attorney .................................................... 1272

II. Statutory Update ....................................................... 1273

A. Texas Probate Code .................................................. 1273
1. Section 3(d): Definition: Corporate Fiduciary ................. 1273
2. Section 5(b): Mandatory Assignment of Statutory Probate Judges: County Court ....................... 1273
3. Section 5A(b): Personal Representative is a Party: Jurisdiction ..................................................... 1274
4. Section 5B: Personal Representative is a Party: Transfer Any Proceeding .................................. 1274
5. Section 5C: Ad Valorem Taxes ..................................... 1274
6. Section 10B: Decedent's Medical Records ....................... 1275
7. Sections 15, 17, 17A & 18: Clerks' Records ...................... 1276
8. Section 52: Affidavit of Heirship ................................ 1276
9. Section 95C: Foreign Wills: Original Signatures .............. 1276
10. Section 105A: Appointment of Foreign Corporate Fiduciary ....................................................... 1276
11. Section 128B: Citation: Wills Probated After Four years .......................................................... 1277
12. Sections 149A & C: Actions in “County Courts.” ............. 1277
13. Sections 149D-G: Release of Independent Personal Representatives .................................................. 1277
14. Section 194(5): Safekeeping Depositories ...................... 1278
15. Section 221A: Changing Resident Agent ......................... 1278
16. Section 221B: Resignation of Resident Agent .................... 1278
17. Section 222: Removal of Personal Representative if There is No Resident Agent ....................... 1278
18. Section 270: Homestead Debts ...................................... 1278
19. Section 322: Child Support, Class 4 Claim ....................... 1279
B. GUARDIANSHIP CODE .................................. 1279
1. Section 601(5): Definition of Corporate Fiduciary .. 1279
2. Section 606(b): Mandatory Assignment of Statutory Probate Judges: County Court .................... 1279
3. Section 607(b): Guardian is a Party: Jurisdiction ... 1280
4. Section 608: Guardian is a Party: Transfer Any Proceeding ........................................ 1280
5. Sections 625, 627, 627A & 628: Clerks’ Records .... 1280
6. Section 633: Notice to Proposed Guardian .......... 1280
7. Section 642: Standing .............................. 1280
8. Sections 646 & 647A: Certification Requirements for Court Appointed Attorneys .......................... 1280
9. Section 648A(b): Court Investigator’s Duties Expanded ........................................ 1281
10. Section 665: Guardian’s Fees from Other Funds ... 1281
11. Section 665B(a): Attorneys Fees: Unsuccessful Applicants .............................................. 1281
12. Section 677A(e): Form: Designation of Guardian in Case of Later Need ................................. 1281
13. Section 682: Eliminates Term Requirement from Applications .............................................. 1281
14. Section 682A: Applications for Guardianship Before Eighteenth Birthday ............................ 1281
15. Sections 683 & 683A: Court Initiated Guardianships .......................................................... 1282
16. Section 694A-I (House Bill 1663): Modification or Restoration ................................................ 1282
17. Section 695A: Family Members to Replace Agencies ......................................................... 1282
18. Sections 697 & 698: Reporting on Private Professional Guardianship Program Employees .... 1283
19. Section 743(j): Guardian of the Person Reports Without an Attorney ..................................... 1283
20. Section 868(f): Tomorrow Fund: An Approved Investment .................................................. 1283
21. Section 875: Notice to Proposed Temporary Guardian ....................................................... 1283
22. Sections 886-886F: POWs and MIAs .................. 1283

C. PROPERTY CODE: TRUST CODE .................... 1283
1. Section 113.018: Investment Agents .................. 1283
2. Section 113.026: New Charitable Beneficiary ...... 1283
3. Section 113.060: Delegation of Trust Investments ... 1284
4. Section 113.1021: Annuities & Life Insurance in Charitable Trusts 1284
5. Section 114.032: Virtual Representation 1285
6. Section 115.002: Trust Venue 1285

D. Property Code: Other 1286
1. Section 5.011: Notice of Annexation 1286
2. Sections 41.002 & 41.005: Urban Homestead Increased to Ten Acres 1286
3. Section 42.002(a): (House Bill 1805) Life Insurance Exemption 1286
4. Section 42.002(1): Roth IRAs 1286
5. Section 142.004(a): Tomorrow Fund in 142 Trusts 1286
6. Sections 142.008 & 142.009: Structured Settlements 1286

E. Family Code 1287
2. Section 4.201: Family Harmony Bill (aka “The Bill Formerly Known as the Transmutation Bill”) 1288

F. Civil Practice & Remedies 1289
1. Section 16.004(a): Limitations for Fraud & Breach of Fiduciary Duties 1289
2. Section 37.005: Declaratory Judgments for Independent Personal Representatives Final Accounts 1289
3. Section 64.101-108: POWs & MIAs 1289
4. Sections 71.012 & 71.022: Certain Litigation Without Ancillary Letters 1290
5. Sections 137.001-.007,.008,.0010: Advance Directives 1290

G. Finance Code: Article 1, Section 1.001, Title 3, Chapter 201: Interstate Banking Bill 1290

H. Government Code 1290
1. Section 21.009(2): Brazoria County Courts at Law 1290
2. Section 25.1802(a): Nueces County Courts at Law 1290
3. Section 25.00221: Statutory Probate Courts Intra County Transfers 1290
4. Section 25.0003: Probate Jurisdiction of Statutory County Courts 1290
5. Section 25.1034(j): Harris County Case Assignment 1290
6. Section 25.2651: Multi County Statutory Probate Courts 1291
7. Section 54.601: Probate Masters 1291
8. Section 81.101: Unauthorized Practice of Law 1291
9. Section 466.410: Lottery Prize Assignment 1291
10. Section 531.125: Guardianship Grants 1292

I. Health & Safety Code 1292
I. CASE LAW UPDATE

The first part of this article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the survey period of October 1, 1998 through September 30, 1999. Not all cases decided during the survey period are presented and not all aspects of each cited case are analyzed. Writ histories were current as of September 10, 2000.1

The discussion of most cases include a moral, that is, the important lesson to be learned from the case. By recognizing situations which have lead to 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.

A. Intestacy

1. Basic Distribution

The intestate distribution rules are rigid and do not take into account the relationships between family members other than those dictated by biology. The potential intent-defeating ramifications of dying intestate are demonstrated by the case of Lane v. State Farm Mutual Automobile Insurance Company.2 Intestate died in an automobile accident and was covered by an underinsured motorist policy purchased by his maternal grandparents. Insurer examined the Texas Probate Code3 and determined that it should pay the benefits equally to Father and Mother because Intestate had no spouse and no descendants. Mother rejected

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1. Writ histories were derived from the KeyCite service as provided on WESTLAW.
2. 992 S.W.2d 545 (Tex. App.—Texarkana 1999, pet. denied).
Insurer’s tender of a draft contending that Insured should not have paid Father. The trial court granted Insurer’s request for a summary judgment on this and other issues not relevant to this discussion.

The appellate court affirmed the summary judgment with regard to the distribution of the underinsured motorist benefits. Mother’s claim that the benefits should have been paid to the Intestate’s estate lacked merit because no administration of Intestate’s estate existed; Insurer could not have paid the proceeds to an administrator. The court indicated that an intestate’s estate immediately passes to the heirs, subject only to recovery of possession by a subsequently appointed administrator.

2. Non-Marital Children

The inheritance rights of non-marital children have a long and complex history. In re Estate of Chavana demonstrates that a non-marital child may be able to prove paternity with only a preponderance of the evidence in a probate action if the alleged father died prior to the 1987 amendment to the Texas Probate Code which requires proof by clear and convincing evidence. Intestate died in 1985 with three non-marital children. Intestate married the mother of Son after Son’s birth but never married the mother of Daughters. Intestate acknowledged that all three children were his. Son claimed that he was the sole heir under the law existing at the time of Intestate’s death. Daughter One argued that the 1985 statute was unconstitutional. In addition, she claimed that Intestate equitably adopted both Daughters. The lower court ruled against Daughters. In 1988, an appellate court reversed holding that the trial court had prematurely decided that Intestate had actually died without a valid will. The court also indicated that the constitutional and equitable adoption points lacked merit.

Almost a decade later, the trial judge determined that Intestate had indeed died without a valid will. The judge ruled that all three children were heirs because the Supreme Court of Texas had ruled that the 1985 provision on legitimacy was unconstitutional and there was sufficient evidence to support Daughters’ paternity claims. Son appealed.

The appellate court affirmed. The court rejected Son’s claim that in 1988 the appellate court had affirmed the trial court’s determination that

4. See Lane, 992 S.W.2d at 554.
5. See id. at 552.
8. 993 S.W.2d 311 (Tex. App.—San Antonio 1999, no pet.).
11. See id. at 684.
13. See In re Estate of Guajardo, 993 S.W.2d at 319.
Son was the sole heir when it stated that Daughters' claims were without merit. This statement did not create a binding "law of the case" which must be followed in subsequent litigation. The court refused to apply this discretionary doctrine to reach the unconstitutional result of depriving Daughters of an opportunity to prove paternity. The court also rejected Son's argument that the Texas Supreme Court's notation of "writ denied" acted to give res judicata effect to dicta in the original case.

The court then rejected Son's assertion that the statute of limitations had run on the paternity actions because non-marital children may petition the probate court for a determination of a right to inherit under the Texas Probate Code without regard to the feasibility of a paternity action under the Family Code. Daughters had timely asserted their claims in the probate action, unlike the claimants in cases such as Cantu v. Sapenter where the purported child waited eleven years from the date of the alleged father's death to present a claim which the court consequently held to be barred by the residuary four-year statute of limitations.

The court next determined the proper standard of proof that Daughters must meet to prove paternity. Although current law requires heirship to be determined by clear and convincing evidence, Intestate died prior to the enactment of this law and thus it was sufficient for the trial court to find heirship upon proof by a preponderance of the evidence. The appellate court reviewed the evidence of paternity and determined that the trial court's finding of paternity was supported by a preponderance of the evidence.

3. Escheat

If a person dies intestate and without heirs, the person's property will escheat to the Texas government. This rare event occurred in the case of In re Estate of Torrance. Intestate died in 1959 in New York City. In a subsequent action by the New York public administrator, the State of Texas intervened asserting that various oil and gas interests escheated because Intestate had no heirs. Over the next several years, numerous individuals claimed to be Intestate's heirs. The lower courts rejected these claims until 1997 when a court held that four individuals were Intestate's

14. See id. at 315.
15. See id.
16. See id. at 319. Even if the law of the case applied, Dickson v. Simpson, 807 S.W.2d 726 (Tex. 1991), would act to overrule it.
17. See id. at 316.
18. See id. at 317 (citing TEX. PROP. CODE ANN. § 42 (Vernon 1980 & Supp. 2000)).
20. See id. at 553.
21. See In re Estate of Chavana, 993 S.W.2d at 318.
22. See id. at 319.
24. 991 S.W.2d 98 (Tex. App.—El Paso 1999, no pet.).
grandchildren and thus entitled to inherit the estate. The State of Texas appealed.

The appellate court reversed and held that Intestate’s property escheated. The court examined the evidence and found that it was insufficient to support the trial court’s finding that the grandchildren’s parent was actually Intestate’s child. The court analyzed a maze of evidence which included allegations that three separately named people were actually the same individual and that Intestate was a light-skinned African-American who after giving birth to the grandchildren’s father abandoned him, changed her name, pretended to be white, and married a white man. The court characterized the theory as “intriguing” but determined that there was insufficient evidence to support it. Thus, relatively solid evidence of heirship is needed because courts will not permit heirship determinations to stand if they are based merely on speculation.

B. WILLS

1. Formalities

A will must be executed with the formalities mandated by the Texas Probate Code to be valid. Although strict compliance is normally required, an important statutory exception exists and is demonstrated in the case of In re Estate of Livingston. Son filed Testator’s 1991 will for probate. Daughter contested alleging that Testator had executed a new will in 1997 which revoked the 1991 will. Both the trial and appellate courts rejected Son’s claim that the 1997 will was invalid because it was unwitnessed. Son asserted that the fact that the witnesses did sign the self-proving affidavit was irrelevant. Son’s argument was unsuccessful because he failed to realize that the Boren rule, which required the will and the self-proving affidavit to be independently signed, was repealed by a 1991 amendment to the Texas Probate Code which permits a signature on a self-proving affidavit to be considered as being on the will itself. Nonetheless, the witnesses should sign the actual will, rather than just the self-proving affidavit. Although the will would still be valid, the will would not be treated as self-proving thereby necessitating additional proof during the probate process.

25. See id. at 104.
26. See id.
27. See id. at 101.
28. See id.
30. 999 S.W.2d 874 (Tex. App.—El Paso 1999, no pet.).
31. See id. at 876-77.
32. See Boren v. Boren, 402 S.W.2d 728 (Tex. 1966).
34. See id.
2. Pretermitted Child

Every will should expressly cover the possibility of pretermitted children, that is, children who are born to or adopted by the testator after the testator executes the will. The testator should (a) specifically indicate that a pretermitted child takes nothing or (b) provide a mechanism for determining a share for the child. Litigation may result if the testator did not take these precautions as demonstrated by Estate of Gorski v. Welch. Testator's will left his entire estate to his three adult sons and excluded his two adult daughters. After executing his will, Testator had a third daughter (Pretermitted Child). Testator consented to a final decree in a paternity suit and agreed, among other things, to pay child support and maintain medical insurance on Pretermitted Child. After Testator died, the trial court awarded 25% of Testator's estate to Pretermitted Child under the pretermitted child statute. The court rejected the argument that the statute did not apply because the paternity decree acted to "otherwise provide for" Pretermitted Child.

The appellate court reversed, determining what Testator's obligation to pay child support and maintain medical insurance did not terminate upon Testator's death because of the contractual consent to the paternity decree. Thus, the decree was binding on Testator's estate. The court also noted that Pretermitted Child was receiving social security death benefits. The court then held that Pretermitted Child was provided for outside of Testator's will by a provision intended to take effect at Testator's death. Testator disposed of his property through the payment of social security taxes and as a result of that payment, Pretermitted Child received benefits upon his death. In addition, Testator's intention that the child support payments would continue after his death is evidence that Testator did not exclude Pretermitted Child from his will due to inadvertence or oversight.

3. Revocation

By Agreement Incident to Divorce

A testator must comply with the requirements of the Texas Probate Code to revoke a will. As In re Estate of Wilson verifies, other at-
tempts to revoke will be ineffective despite the testator’s intent to nullify the will. In this case, Husband and Wife executed a joint will and were later divorced. Husband died without changing the will. The trial court determined that the agreement incident to the divorce acted to revoke the will.

The appellate court reversed by explaining that the Texas Probate Code enumerates the only methods by which a testator may revoke a will, that is, by physical act or a subsequent writing executed with the same requirements as a will. The agreement incident to Husband’s and Wife’s divorce did not meet those requirements and thus did not operate to revoke the will.

Presumption if Original Not Found

Hunter v. Palmer shows that a person asserting the existence of a lost will or codicil will have little difficulty presenting sufficient evidence to rebut the presumed revocation presumption and preclude a summary judgment. Decedent executed a will in 1982 and a codicil in 1986. After she died in 1997, neither document could be found. Sons requested an intestate administration and Daughter filed an application to probate Decedent’s lost will. Sons opposed the probate based on the presumption that Decedent had revoked her will because the original could not be found and there was no evidence that Decedent had not voluntarily revoked the will. Daughter responded by claiming that the presumption was inapplicable because Sons had not established that the will and codicil were last seen in her possession or in a place to which she had ready access. The trial court granted Sons’ motion for summary judgment.

The appellate court reversed, holding that there was a genuine issue of material fact as to whether Decedent’s will was last seen in her possession. The court found the statements of the drafting attorney that Decedent took the original will and “probably” took the original codicil as sufficient to preclude summary judgment.

4. Construction

No Apparent Ambiguity—Use of Extrinsic Evidence

Regardless of the unambiguous nature of the terms used in a will, many Texas courts admit extrinsic evidence to vary the plain meaning of those terms. Thus, a testator must carefully select the words used in the will to minimize the possibility of a court straying from those words. On the other hand, a person attempting to show that the testator meant something different from the exact terms of the will has the opportunity to introduce evidence of the testator’s actual usage. The Lang v. San

47. See id. at 171.
48. See id.
49. 988 S.W.2d 471 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
50. See id. at 473.
51. See id.
Antonio Area Foundation\textsuperscript{52} case reminds testators of the tremendous importance of selecting depository words with care. In Lang, Testatrix devised certain real property to Niece and Nephew. The lower court ruled that assets related to that real property, such as promissory notes, collections, and net profit interests, were not part of the devised property and thus passed to the residuary beneficiary. The court refused to admit extrinsic evidence showing that Testatrix thought of the land, the notes, and the profits as one “investment package” which she meant to pass by the devise to Niece and Nephew.

The appellate court reversed, holding that the trial court should have considered the extrinsic evidence.\textsuperscript{53} The court indicated that even though the terms of the will are unambiguous, “the court may turn to extrinsic evidence of surrounding circumstances to ascertain the meaning of the words used in the will.”\textsuperscript{54} The extrinsic evidence may show that Testatrix was referring to a bundle of assets that comprised an established family business investment, not just the actual land, and thus summary judgment was improper.\textsuperscript{55}

“Nieces and Nephews”

Wills should expressly state what type of relationship is needed to fall within a class gift, that is, must the relationship be by blood or will a relationship by affinity suffice. Failure of the will to indicate clearly the testator’s intent may result in a dispute such as the one in Martin v. Palmer.\textsuperscript{56} Testator’s will named Testator’s “nieces and nephews” as beneficiaries. A dispute arose as to whether this phrase referred only to Testator’s “blood” nieces and nephews or whether it also referred to Testator’s “affinity” nieces and nephews, that is, the nieces and nephews of Testator’s predeceased wife. The trial court held that Testator’s will only referred to his nieces and nephews by blood, and not to the nieces and nephews of Testator’s predeceased wife.

The appellate court reversed because Testator’s blood nieces and nephews failed to prove the absence of a genuine issue of material fact regarding the meaning of the phrase “nieces and nephews” as used in Testator’s will.\textsuperscript{57} The court reviewed the evidence which demonstrated, for example, that Testator and his wife had been married for 50 years, had no children, treated some of the nieces and nephews as if they were their own children, referred to the nieces and nephews as their own without making any distinction based on whether the person was related by blood or affinity, and executed reciprocal wills leaving their residuary estates to

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\textsuperscript{52} 5 S.W.3d 738 (Tex. App.—San Antonio, 1999, pet. granted).
\textsuperscript{53} See id. at 743.
\textsuperscript{54} Id. at 742.
\textsuperscript{55} See id. The court also noted two other issues which are tied to the admission of extrinsic evidence. First, the possibility of ademption because some of the real property had been sold after Testatrix executed her will and second, the application of Tex. Prob. Code Ann. § 58(c) (Vernon 1980 & Supp. 2000), the Texas “contents” statute.
\textsuperscript{56} 1 S.W.3d 875 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).
\textsuperscript{57} See id. at 881.
the nieces and nephews without making a reference to the type of relationship, if the other spouse had already died.\footnote{58. See id. Being a case of first impression in Texas, the court also conducted an extensive review of out-of-state cases and secondary authorities.}

The court determined that there is no Texas authority which mandates that the phrase "nieces and nephews" refers only to those individuals related by blood.\footnote{59. See id. at 880-81.} A reasonable fact finder could infer that the Testator and his wife intended to pass their ultimate estates to their nieces and nephews as a class composed of both individuals related by blood and affinity.\footnote{60. See id. at 881.}

Exercise of Power of Appointment

In \textit{Wright v. Greenberg},\footnote{61. 2 S.W.3d 666 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).} Mother's will created a testamentary trust for Father. The trust granted Father "the power to appoint the entire remaining principal . . . by will."\footnote{62. Id. at 669.} If Father failed to exercise this power, the remaining trust property would pass to a trust created for Daughter's benefit. Father died with a will stating that he intended to dispose of all of his property "including any property over which I may have a power of appointment."\footnote{63. Id.} Father's will left the residuary of his estate to an inter vivos trust he created thirteen years after Mother's death. The trial court determined that Father's will exercised his testamentary power of appointment. Daughter appealed, asserting that Father's will failed to exercise the power of appointment because Father's will (1) failed to actually dispose of the property, (2) did not expressly refer to the power of appointment created in Mother's will, and (3) did not make a reference to the property that was the subject of the power of appointment.\footnote{64. See id. at 671.}

The appellate court rejected Daughter's arguments and affirmed.\footnote{65. See id. at 677.} The court began its analysis by discussing the landmark case of \textit{Republic National Bank of Dallas v. Fredericks},\footnote{66. 283 S.W.2d 39 (Tex. 1955).} which set forth the basic rules regarding the exercise of a power of appointment:

The general rule is that in order for a will or deed to constitute the exercise of a power of appointment the intent to exercise such power must be so clear that no other reasonable intent can be imputed under the will. The will must refer (1) to the power of appointment or (2) to the property subject to such power, or (3) the donee of the power must have owned no other property to which the will could have attached and thus the will have been a vain and useless thing except it be held to be an exercise of the power . . . . If, from the circumstances or the instrument executed, it be doubtful as to whether it was the intention to execute the power possessed by the grantor, then it will not be held that by such act or conveyance that
power was in fact executed.\textsuperscript{67}

The court determined that the Republic National Bank test only requires the will to satisfy one of three enumerated criteria to be a valid exercise of the power of appointment.\textsuperscript{68} In this case, Father's will expressly stated that he intended to dispose of any property over which he had a power of appointment. The court found that this was adequate to refer to the power of appointment and to exercise that power in favor of his residuary estate.\textsuperscript{69}

A well-reasoned dissent argues that Father's will was inadequate to actually exercise the power.

The mere inclusion of the generic words 'power of appointment' in the introductory section should not be elevated to an exercise of a specific power, especially where the identity of the appointee is missing and must be supplied by reference to an entirely different part of the will (the residuary clause), which itself does not mention the power of appointment and which is not tied, directly or indirectly, to the section that does.\textsuperscript{70}

To avoid the type of problem raised by the Wright case, a will should clearly indicate that the testator is exercising a power of appointment if such is consistent with the testator's intent. Language such as, "I hereby exercise the power of appointment granted to me in [description of instrument creating power of appointment] in favor of [name of appointee]" may reduce claims of an improper exercise of the power.

Future Interests

Interpretation and construction problems are bound to occur when a will creates unusual types of future interests as seen in the case of Deviney v. NationsBank.\textsuperscript{71} Testator devised his interest in certain property as to Wife and Daughters share and share alike, on the express condition and limitation that said interest remain undivided and be kept in tact [sic] with the other undivided interest of my brothers and sisters, until such time as all of the joint owners should desire to partition, sell or otherwise dispose of the entire interest in all or any part of said property, and provided further that in the event of the death of my wife or either of my said daughters before the same shall have been partitioned or disposed of as aforesaid, the interest of such deceased shall pass to the survivor or survivors, and in the event my wife and both of my said daughters should die before said property has been partitioned or disposed of as aforesaid, then my interest in such part of the said "Roe Taylor Estate" land shall pass to my brothers and sisters, save and except Isla Taylor Clendening, who no longer owns an interest in said Estate Property, and in the event any of my said brothers and sisters, except the said Isla Taylor Clendening, should then be deceased, the share

\textsuperscript{67} Id. at 46-47 (numbering added).
\textsuperscript{68} See Wright, 2 S.W.3d at 671.
\textsuperscript{69} See id. at 673.
\textsuperscript{70} Id. at 678 (Frost, J. dissenting).
\textsuperscript{71} 993 S.W.2d 443 (Tex. App.—Waco 1999, pet. denied).
of such Decedent shall pass to his or her Descendants per stirpes. My said wife and daughters shall not have the right to sell or otherwise dispose of their interest in the said “Roe Taylor Estate” property so long as it shall remain in tact [sic] as an undivided interest, except by the joinder of the other co-owners. If and when the said Estate Property shall be partitioned with the consent of the other co-owners as aforesaid, the share and interest set aside to my said wife and daughters shall vest in them in fee simple without any limitations or conditions.

Wife predeceased Testator and thus her interest passed through the residuary clause of Testator’s will to Daughters. Both Daughters have also died. NationsBank as independent executor of one of the daughter’s estates and as trustee of her trust received conflicting opinions regarding whether it had any interest in this property. One attorney indicated that NationsBank had no interest because the property was not partitioned while Daughters were alive. On the other hand, another attorney opined that the conditions in Testator’s will constituted an invalid restraint on alienation and, thus, this daughter owned a fee simple interest in the property which should be distributed according to the terms of her trust. NationsBank subsequently filed a declaratory judgment to determine the correct outcome. The trial court declared Testator’s conditions and limitations void and that the daughter’s estate owned an undivided half interest in the property.

The appellate court reversed.\textsuperscript{72} The court began its analysis by reviewing the estates and future interests law of Texas. The court then recognized that Testator did not want the property partitioned unless all co-owners agreed.\textsuperscript{73} The will granted to Daughters a life estate as joint tenants with rights of survivorship. The court believed the restraint on partition lasted a reasonable time because the restraint was limited to the lives of Daughters.\textsuperscript{74} Thus, the court held that this partial restraint on alienation was permissible.\textsuperscript{75}

The remainder interest following Daughters’ life estate, which would vest if the property had not already been partitioned (as was the case), was held by Testator’s Siblings.\textsuperscript{76} The court determined that Siblings held a defeasible fee interest subject to a shifting executory limitation, that is, a partition by Daughters which would automatically vest full ownership in Daughters.\textsuperscript{77}

The court then examined the provision which provided that Daughters could not convey (as contrasted with partition) their interests in the property without the co-owners’ consents. The court held that this was an invalid disabling restraint on alienation.\textsuperscript{78} However, Daughters could

\textsuperscript{72} See id. at 452.
\textsuperscript{73} See id. at 450.
\textsuperscript{74} See id. at 451.
\textsuperscript{75} See id.
\textsuperscript{76} See id.
\textsuperscript{77} See Deviney, 993 S.W.2d at 451.
\textsuperscript{78} See id.
only convey what they owned as discussed above.\(^{79}\)

Because Daughters had not partitioned the property, Daughters had no interest which existed after they died or to pass at death; their estate had no title or interest in the property.\(^{80}\) Instead, Testator's Siblings and their descendants became the fee owners of the property.\(^{81}\) To avoid this type of technical and confusing analysis, the better practice is to place the property in trust and provide the trustee with instructions regarding the management and use of the property.

**Tax Apportionment**

Tax provisions in a will must be clear. To avoid any doubt as to the testator's intent, the will should expressly state whether the testator wants (a) tax apportionment as provided by the Texas Probate Code\(^ {82}\) and the Internal Revenue Code,\(^ {83}\) (b) the residuary of the estate to bear the burden of estate taxes on both probate and nonprobate assets, or (c) some other specifically described approach. *Peterson v. Mayse*\(^ {84}\) demonstrates a problem that may arise when the testator does not follow this advice. Testator died with a taxable estate consisting primarily of nonprobate assets, such as life insurance proceeds. An issue arose regarding the source of payment of the estate taxes, that is, are they apportioned according to Probate Code § 322A and I.R.C. § 2206 or does the will provide for the residuary of the probate estate to serve as the primary source of funds to pay the estate taxes. The following two provisions of Testator's will are relevant:

**Death Taxes, Debts and Expenses**—The Executor shall pay any death taxes out of my property passing under paragraph 2(C) hereof [the residuary clause]. All of my debts, funeral expenses, and expenses incurred in the administration of my estate paid by the executor shall be paid out of my property passing under paragraph 2(C) hereof.

**10(E). Death Taxes**—The term “Death taxes” shall refer to all estate, inheritance, and succession taxes, together with any interest or penalties thereon, which are assessed by reason of my death (other than any taxes imposed by Chapter 13 or Section 2032A of the Internal Revenue Code).\(^ {85}\)

The trial court determined that this language of the will did not override the tax apportionment statutes. Accordingly, the trial court held that both probate and nonprobate assets were proportionately burdened by estate tax liability.

The appellate court reversed,\(^ {86}\) holding that the language of the will clearly and unambiguously provided that death taxes should first be paid

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79. *See id.*
80. *See id.* at 452.
81. *See id.*
84. 993 S.W.2d 217 (Tex. App.—Tyler 1999, pet. denied).
85. *See id.* at 219.
86. *See id.*
from the assets described in the residuary clause of Testator's will. The court recognized that the Texas Probate Code does not require specific mention that death taxes on nonprobate assets are to be paid by the estate to override the apportionment presumption. "It is true that nothing in the will expressly exonerates the nonprobate property from the burden of death taxes; however, the statute does not make such a requirement." The court determined Testator's simple words were clear and that "[n]o presumption can supplant plain and unambiguous language." Finally, the court also stated that it could "not give an unambiguous will a meaning different from that warranted by its words merely to carry out a hypothesis as to the decedent's intention." The court declined to determine whether apportionment would apply to the payment of death taxes that would remain after exhausting the residuary estate. The court declined to rule on this issue because the trial court had not addressed it.

Conditional Gift

To carry out the likely intent of a divorced testator not to leave property to former stepchildren, a sympathetic court may adopt an interpretation of a will which ignores the express language of both the will and Texas statutes. In In re Estate of Wilson, Husband and Wife executed a joint will and were later divorced. The will provided for the survivor to receive the entire estate. The will also provided that "all property..., owned by the one of us dying last shall at his or her death pass to our children." Although Husband and Wife had no children, together, each had children from prior relationships. Husband died without changing the will.

The appellate court first eliminated Wife's gift under Texas law which automatically voids testamentary gifts made during marriage to the former spouse. The court then focused on the provision of the will stating that "all property..., owned by the one of us dying last shall at his or her death pass to our children." Wife's children argued that this was a residuary clause making a class gift to children of both former partners and that all of the children were beneficiaries. Wife's children supported their argument with the Probate Code's language that the will "must be read as if the former spouse failed to survive the testator" which thus created

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87. See id. at 220.
88. See id. at 222.
90. Peterson, 993 S.W.2d at 221.
91. Id.
92. Id. at 222.
93. See id.
94. 7 S.W.3d 169 (Tex. App.—Eastland 1999, pet. denied).
96. See id.
the legal fiction that Wife had already died and that Husband was legally
the spouse who died last.

The appellate court rejected this argument and held that the will did
not contain a residuary clause.98 Instead, the language at issue created a
conditional gift to the children.99 The condition was not met because
Wife was still biologically alive and, thus, Husband's estate passed by in-
testate succession to his only child.100

5. Contractual Wills

Strong evidence is needed to establish a contractual will, even if the
will is governed by former Texas law which did not require the will itself
to state its contractual nature.101 For example, in Reynolds v. Estate of
Benefield,102 Wife died with a will leaving her entire estate to Son. Nieces
and Nephews of Wife's predeceased Husband contested the will on a va-
riety of grounds. In addition, they asserted that Wife and Husband had
an understanding that upon the death of the survivor, the estate would be
split into two equal shares, one for Son and the other for Nieces and
Nephews. Neither Husband's 1977 will nor Wife's 1996 or 1997 wills
made mention of a contract or understanding. However, Husband's will
and Wife's 1996 will did provide for Nieces and Nephews. The trial court
found that a contract existed and that Wife's 1997 will breached the
agreement.

The appellate court reversed.103 The court first recognized that Texas
Probate Code § 59A, which requires a contractual will to expressly recite
that a contract exists and set out its material provisions, did not apply
because Husband's will was executed before September 1, 1979.104 The
court carefully examined the evidence and found it insufficient to support
a jury finding of a contractual will even under pre-§ 59A law.105 Hus-
band's 1977 will left his entire estate to Wife in fee simple without any
indication that it was other than an absolute and unconditional gift. Wife
did not execute a similar will in 1977. In fact, her somewhat similar will
was not signed until 1996. Although Wife's 1996 will did provide for
Nieces and Nephews, it was not in exactly the same manner as Husband's
will. The court determined that the oral statements of Nieces and Neph-
ews that there was some type of understanding between Husband and
Wife were also too weak to establish a contract.106

98. See In re Estate of Wilson, 7 S.W.3d at 171.
99. See id.
100. See id.
cuted on or after September 1, 1979 to state that the contract exists and the material terms
of that contract).
103. See id. at 886.
104. See id. at 888, n.5.
105. See id. at 889.
106. See id.
6. Contest

In Terrorem Provision

In re Estate of Foster\textsuperscript{107} demonstrates the well-established principle that *in terrorem* clauses will be strictly construed to avoid forfeiture if at all possible. Child One and Child Two applied for the probate of Mother's 1993 will. In the alternative, they requested that an earlier will in which they receive a smaller share of the estate be admitted to probate. Child Three claimed that this filing of an application to probate alternative wills was a will contest and thus triggered the forfeiture of the property left to Child One and Child Two. The trial court rejected Child Three's claim.

The appellate court affirmed.\textsuperscript{108} The application to probate the 1993 will alleged that this will was a "valid" will. The earlier will was to be probated only if the court found that the 1993 will was invalid. The court determined that Child One and Child Two did not contest the will.\textsuperscript{109} Note, however, that the court did review a statement by Child One that he did not think Mother understood the will because she could not read it due to impaired eyesight.\textsuperscript{110} Accordingly, a will beneficiary should be extremely careful not to take any action or make any statement which could support a claim that the beneficiary is contesting the will.

True Property Owners

True owners of property are not barred by the will contest statute of limitations\textsuperscript{111} from claiming that certain property did not belong to the testator and thus is not part of the testator's probate estate. For example, in *Dickson v. Dickson*,\textsuperscript{112} Testator's will left certain land to Wife. Son claimed prior ownership on the basis of adverse possession or parol gift. The trial court granted Wife's motion for summary judgment deciding that Son's holding was not hostile and that Son's claim of a parol gift was barred by the statute of limitations for contesting a will.

The appellate court reversed.\textsuperscript{113} The court first held that there was conflicting evidence regarding whether Son's taking was hostile and thus summary judgment was inappropriate.\textsuperscript{114} Next, the court determined that the two year statute of limitations did not apply because Son was not contesting the validity of Testator's will.\textsuperscript{115} Instead, Son was claiming that certain property belonged to him and was not in the Testator's estate in the first place. The court employed a humorous analogy: "[T]he will possibly could have devised the father's interest, if any, in the Astrodome at the time of his death. Would the actual owners of the Astrodome be

\textsuperscript{107} 3 S.W.3d 49 (Tex. App.—Amarillo 1999, no pet.).
\textsuperscript{108} See id. at 51.
\textsuperscript{109} See id. at 52.
\textsuperscript{110} See id. at 53.
\textsuperscript{112} 993 S.W.2d 735 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
\textsuperscript{113} See id. at 736.
\textsuperscript{114} See id. at 739.
\textsuperscript{115} See id. at 740.
barred from asserting their ownership interest because of section 93? We think not."

7. Settlement Agreements

Family settlements are often a wise choice for resolving estate disputes. Before signing a family settlement agreement, each party must make certain that he or she is satisfied with its provisions because it will be difficult to set aside in a subsequent action. In addition, the terms of any agreement containing notations, interlineations, and the like should be retyped prior to execution. The problems which may result if these simple steps are not followed are reflected in Crossley v. Staley. Children entered into a settlement agreement regarding Father's estate. Each child signed the document which contained numerous handwritten additions and revisions. Many months later, Daughters faxed a message to Son's attorney stating that they would commence a lawsuit against him unless he agreed to restructure his consideration under the settlement agreement. Thereafter, Son obtained a summary judgment that the settlement agreement, including the handwritten interlineations, was valid.

The appellate court affirmed. The court first resolved a jurisdictional issue by determining that the trial court had the authority to ascertain the validity of the settlement agreement. Next, the court focused on the agreement itself.

Family settlement agreements of estate matters are highly favored by Texas courts. They will not be disturbed for any ordinary mistake either of law or fact and will be upheld where all parties have the same knowledge or means of obtaining knowledge and there is no fraud, misrepresentation, concealment, or conduct otherwise inequitable on the part of another party . . . . A unilateral mistake of law by one party to a family settlement agreement will not support an avoidance of the agreement.

The court then addressed and rejected Daughters' claim that the suit for a declaratory judgment deprived them of their choice of forum to assert tort claims. The facts demonstrated that the suit was for a judicial determination of rights under the written settlement agreement, not an action to preemptively file for a declaration of nonliability of potential tort claims. The court concluded its analysis by holding that the trial court's determination that it had venue was proper because, for example, many provisions of the settlement agreement involved a partnership

116. Id.
117. 988 S.W.2d 791 (Tex. App.—Amarillo 1999, no pet.).
118. See id. at 792.
119. See id. at 796 (relying on TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (Vernon 1997) which authorizes a person interested under a written contract to seek a determination of the validity of the instrument).
120. Id.
121. See id. at 797.
122. See Crossley, 988 S.W.2d at 747.
which had its principal office in the county.\textsuperscript{123}

Res Judicata

A will contestant must make the best case possible the first time the validity of the decedent's will is litigated. If the contestant fails, subsequent actions by others who also stand to benefit from the will's invalidity may be barred by res judicata as in the case of \textit{In re Estate of Ayala}.'\textsuperscript{124} The trial court admitted Testator's will to probate. Wife and Son contested. They lost at both the trial and appellate levels. Testator's three other children then filed a new action to contest the will. The trial court granted summary judgment against these children holding that their claims were barred by res judicata.

The appellate court affirmed.\textsuperscript{125} Son contested Testator's will in the first action and was in a position identical to that of the three children who brought the new action.\textsuperscript{126} Because these children stood in privity with parties to the original will contest, their subsequent claim to invalidate the probate of the will was barred by res judicata.\textsuperscript{127}

C. Estate Administration

1. Jurisdiction

Choice of Law

\textit{Smith v. Lanier}\textsuperscript{128} demonstrates that the jurisdiction of a Texas court over the property of a Texas decedent is not easily defeated by a person simply transferring the property out of Texas before another claimant has the opportunity to prevent the transfer. Wife died in Texas and her will was admitted to probate. Wife's will left her entire estate to Charity and appointed Executor to administer the estate. Daughter, Husband's child from a prior marriage, used a power of attorney she had previously obtained from Husband and began gathering Husband's assets. Daughter then moved Husband to South Carolina and continued to gather his assets and move them to South Carolina. Husband died within a few weeks of the move. Husband's will was admitted to probate in South Carolina. The will named Daughter as the sole beneficiary and the executor. In the inventory of Husband's estate, Daughter named Husband as the sole owner of the property she had transferred from Texas. Executor began proceedings in Texas to halt the probate process in South Carolina to protect Charity. For example, Executor requested a determination of the community or separate nature of the assets and a temporary restraining order to prevent Daughter from removing property from Texas. Daughter objected to the Texas court's personal and subject matter jurisdiction. The probate court held that it did have jurisdiction and issued an injunc-

\textsuperscript{123} See \textit{id.} at 798.
\textsuperscript{124} 986 S.W.2d 724 (Tex. App.—Corpus Christi 1999, no pet.).
\textsuperscript{125} See \textit{id.} at 725.
\textsuperscript{126} See \textit{id.} at 727.
\textsuperscript{127} See \textit{id.}
\textsuperscript{128} 998 S.W.2d 324 (Tex. App.—Austin 1999, pet. denied).
tion requiring Daughter to deposit half of the assets she had transferred to South Carolina with the Texas probate court until the court could make a characterization of the property. Daughter appealed.

The appellate court affirmed. The court first determined that it had in rem jurisdiction. Daughter argued that all the property she removed from Texas was Husband's separate property and thus there was a lack of the minimum contacts necessary to obtain in rem jurisdiction. The court held that there were sufficient contacts. The court stressed that the property involved in the case was held in Texas during the marriage of two Texas residents and was subject to probate proceedings following the death in Texas of a Texas resident. The court also explained that Daughter cannot make a determination that the property was separate. Texas law presumes that property held during marriage is community so Daughter has the burden of proving that the property was actually Husband's separate property. The court also rejected the argument that the Texas court lost its in rem jurisdiction when the property left Texas because the removal from Texas was not court authorized; Daughter's unilateral transfer of the property to South Carolina did not defeat Texas jurisdiction.

The court then determined that it had personal jurisdiction over Daughter as the Executor of Husband's estate. The court stated that because the Texas probate court had in rem jurisdiction to the extent of having the authority to characterize the couple's property at the time of Wife's death, the court has jurisdiction over Daughter as representative of Husband's estate.

The court next decided that it had personal jurisdiction over Daughter as an individual. The court provided an extensive list of transactions Daughter conducted in Texas relating to Husband's property which were sufficient to support the trial court's finding of personal jurisdiction. The court also rejected Daughter's claim that she was shielded from personal jurisdiction because most of her acts in Texas were as an agent for Husband under his power of attorney. "An agency relationship does not shield an individual from jurisdictional contacts with a state, only from possible liability flowing from the activities conducted within the forum state."

129. See id. at 328.
130. See id. at 331.
131. See id. at 332.
132. See id. at 331.
133. See Smith, 988 S.W.2d at 332.
134. See id.
135. See id. at 333.
136. See id.
137. See id.
138. See Smith, 988 S.W.2d at 334-35.
139. See id. at 334.
140. See id.
141. Id. at 334-35.
The court determined that it had subject matter jurisdiction even though the property had been transferred to South Carolina and was subject to an ongoing probate proceeding in that state.\(^{142}\) The Texas proceeding was initiated first and thus the property was already encumbered by the exercise of the Texas probate court's subject matter jurisdiction.\(^{143}\) Finally, the court determined that the trial court did not abuse its discretion when it declined to exercise the principle of comity and defer its subject matter jurisdiction to the South Carolina court.\(^{144}\) The Texas court only required one-half of the property to be returned, that is, the maximum amount which could have been Wife's community property share.\(^{145}\)

**Survival Action**

Potential heirs and beneficiaries who think that the decedent has an action that survives should make certain that they get a personal representative appointed in a timely fashion and have that person bring the survival action before the statute of limitations expires. The case of *Ford Motor Co. v. Cammack*\(^ {146}\) shows the problems that are caused by delay. Parents brought a survival action against Company alleging that Company's negligence caused the death of Daughter. The trial court found in Parents' favor. Company appeals on various grounds including that Parents lacked standing to bring the survival action because they were not appointed by the court as Daughter's personal representatives. The appellate court agreed and reversed.\(^ {147}\)

The court began its discussion with a brief history of survival causes of action. At common law, an individual's action for personal injuries did not survive the person's death.\(^ {148}\) However, the Texas legislature abrogated this rule in section 71.021 of the Civil Practices and Remedies Code.\(^ {149}\) The personal representative of the decedent's estate is normally the only person who is entitled to recover estate property.\(^ {150}\) However, there are circumstances where an heir may have standing to bring suit on behalf of the decedent's estate.\(^ {151}\) "Heirs at law can maintain a survival suit during the four year period the law allows for instituting administration proceedings if they allege and prove that there is no administration pending and that none is necessary."\(^ {152}\) Parents assert that Company waived the issue by failing to timely file a verified plea in abatement in the trial court.

\(^{142}\) See *id.* at 335.

\(^{143}\) See *Smith*, 988 S.W.2d at 335.

\(^{144}\) See *id.* at 336.

\(^{145}\) See *id.* at n.10.

\(^{146}\) 999 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

\(^{147}\) See *id.* at 3. This summary does not discuss the wrongful death judgment which was affirmed.

\(^{148}\) See *id.* at 4.

\(^{149}\) See *id.*

\(^{150}\) See *id.*

\(^{151}\) See *Ford Motor Co.*, 999 S.W.2d at 4.

\(^{152}\) Id.
The court held that Company did not waive the error because Company is claiming a lack of jurisdiction.\textsuperscript{153} Parents did not offer any proof that Daughter died intestate and that Parents were her rightful heirs. Likewise, if she died testate, Parent’s did not prove they were the legal representatives of her estate. In addition, Parents did not prove Daughter’s estate owed no debts and that consequently no administration was needed. The court concluded that Parents lacked standing and that the survival claim is now barred by the statute of limitations.\textsuperscript{154}

Transfer to District Court

In \textit{Herbst v. Sheppard},\textsuperscript{155} Siblings presented a claim against Brother’s estate seeking compensation for care they provided Brother during the last years of his life. Executor denied the claim. Claimants then sued in the county court in which the administration was pending. The court transferred the case under Texas Probate Code section 5(b) on its own motion to the district court, sitting as a probate court. Executor claimed that the district court was without jurisdiction to hear the case. The appellate court held that the court did have jurisdiction.\textsuperscript{156}

Executor contended that the district court lacked jurisdiction over the case because the estate was being independently administered resulting in jurisdiction being proper only in a district court under Texas Probate Code section 145(h). Although the case was in district court, the district court was actually sitting as a probate court. Consequently, Executor claimed that because the estate was under the control of an independent executor, the district court sitting as a probate court lacked jurisdiction. The court declined to follow \textit{Carroll v. Carroll},\textsuperscript{157} and held that Texas Probate Code section 145(h) only prohibits further action in the county court, not the district court.\textsuperscript{158} The court believed this was consistent with Texas Probate Code section 5A which defines “incident to an estate” with respect to actions in district courts as including all claims against an estate.\textsuperscript{159}

Child Support

A person seeking to recover child support arrearages or to modify a child support arrangement should first go to the court which granted the divorce and obtain a judgment. The person may then present this judgment to the estate for payment just like any other debt. The importance of following this procedure is reflected in \textit{Fleming v. Easton}.\textsuperscript{160} Testator’s divorce decree provided that the provisions for child support would not terminate upon Testator’s death but would instead become an obligation of the estate. After Testator’s death, Ex-Spouse filed a motion to confirm

\textsuperscript{153} See \textit{id.}
\textsuperscript{154} See \textit{id.} at 6.
\textsuperscript{155} 995 S.W.2d 310 (Tex. App.—Corpus Christi 1999, pet. denied).
\textsuperscript{156} See \textit{id.} at 314.
\textsuperscript{157} 893 S.W.2d 62 (Tex. App.—Corpus Christi 1994, no writ).
\textsuperscript{158} See \textit{Herbst}, 995 S.W.2d at 313-14.
\textsuperscript{159} See \textit{id.} at 313.
\textsuperscript{160} 998 S.W.2d 252 (Tex. App.—Dallas 1999, no pet.).
child support arrearages and to modify the divorce decree in the county court which had admitted Testator's will to probate. The motion sought a judgment for accrued but unpaid child support as well as to modify the divorce decree so that Ex-Spouse could obtain a lump sum payment for all future child support that would be owed by Testator's estate. The court awarded the child support arrearages but refused to make the lump sum award. Ex-Spouse appealed.

The appellate court held that the county court lacked jurisdiction to make both arrearages and lump sum awards. The court rejected Ex-Spouse's claim that Texas Probate Code section 5A encompassed these claims against Testator's estate. The court explained that jurisdiction over these claims had already vested in the district court that had signed the divorce decree. Texas Family Code section 155.002 grants a trial court which exercises domestic relations jurisdiction continuing and exclusive jurisdiction over all matters pertaining to a parent-child relationship once the court renders a final judgment or order. The court distinguished In re Graham, in which the Supreme Court of Texas held that the probate court was authorized to transfer to itself a non-final divorce action. The court also noted that nothing had occurred to divest the district court of its jurisdiction. Accordingly, the probate court has no jurisdiction until these claims are reduced to judgment by the proper court.

**Negligent Misrepresentation Claims**

Estate of Arlitt v. Paterson shows that negligent misrepresentation claims against a testator's estate planning attorney may be brought in the probate court. Husband died leaving a 1983 will and a 1985 codicil which substantially reduced the size of the Daughter's share, one of his four children. Daughter contested the will and codicil. The contest dragged on for many years. Wife, individually and as the executor of Husband's estate, along with Other Children sued Attorneys who drafted the will and codicil. They alleged that Attorneys represented Husband and Wife jointly in preparing the estate plan and that they were negligent in so doing. Attorneys responded that they were not liable for a variety of reasons such as lack of privity, expiration of the statute of limitations, and lack of subject matter jurisdiction. The trial court granted Attorneys' motion for summary judgment without specifying a reason.

The appellate court reversed holding that the statutory probate court had subject matter jurisdiction over Wife and Other Children's claims be-

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161. See id. at 254.
162. See id. at 255.
163. See id. at 254.
164. See id.
165. 971 S.W.2d 56 (Tex. 1998).
166. See Fleming, 998 S.W.2d at 254.
167. See id. at 255.
168. See id.
because they are incident to Husband's estate under the 1985 version of the Probate Code.\textsuperscript{170} If they were successful on these claims, the action would directly impact the assimilation of assets for the estate and consequently, the statutory probate court had jurisdiction.\textsuperscript{171}

\textit{Compliance With Rules Required}

Jurisdiction rules must be carefully followed, even if it may seem inefficient to do so. For example, in \textit{Burns v. Burns},\textsuperscript{172} Father died survived by Son One, Son Two, and Daughter. Father's will named Son One and Son Two as co-executors and provided for his estate to be divided equally among his three children. Before the administration of Father's estate was finished, Daughter died. Daughter's will named Son One and Son Two as co-executors and, except for a few specific gifts, divided her estate evenly between her two brothers.

Problems arose during the administration of Daughter's estate. Son Two resigned and brought suit in the county court to have Son One removed from office and to recover funds Son One allegedly misappropriated from Daughter's estate. Using Texas Probate Code § 5(b), the county court transferred the case to the district court and Son One resigned. The county court appointed a new executor and appointed an auditor to review Daughter's estate. The auditor discovered that Son One had overpaid himself from both Daughter's estate and assets still held in Father's estate. Son One did not challenge the contents of the report and consequently the district court entered summary judgment in favor of Son Two and the new executor of Daughter's estate directing the payment of certain funds to each.

Son One appealed asserting that the district court lacked subject matter jurisdiction because part of Son Two's claim was incident to Father's estate which was pending in another court. The appellate court began its analysis by examining Son Two's standing to bring a claim on behalf of Daughter's estate in the first place.\textsuperscript{173} Normally, a beneficiary lacks this ability.\textsuperscript{174} However, in this case, Son One would be highly unlikely to bring suit against himself and thus Son Two had standing to bring the suit on behalf of Daughter's estate.\textsuperscript{175} When the court appointed the new executor, that person had standing to pursue the claim and Son Two was divested of his standing.\textsuperscript{176}

The court next examined the district court's ability to resolve issues regarding the funds in Father's estate. The court in which the probate of Father's estate was pending had dominant jurisdiction over the claims re-

\textsuperscript{170} \textit{See id.} at 718. Although this case is based on the 1985 version of the Texas Probate Code, the same result is likely under the Probate Code in its current formulation.

\textsuperscript{171} \textit{See id.}

\textsuperscript{172} 2 S.W.3d 339 (Tex. App.—San Antonio 1999, no pet.).

\textsuperscript{173} \textit{See id.} at 342-43.

\textsuperscript{174} \textit{See id.} at 342.

\textsuperscript{175} \textit{See id.} at 342-43 (citing Chandler v. Welborn, 294 S.W.2d 801 (Tex. 1956)).

\textsuperscript{176} \textit{See Burns}, 2 S.W.3d at 343.
lating to the accounts involving Father's property. Accordingly, it was improper for the district court involved with Daughter's estate to exercise jurisdiction over these claims. These claims are incident to Father's estate and need to be brought in that action under Texas Probate Code section 5A(b). The court thus dismissed without prejudice the district court's judgment as it related to accounts involved with Father's estate. The court recognized that its finding would cause Son Two and the executor to relitigate many of the same claims in two courts. The court was sympathetic but realized it had no choice because no single court had sufficient jurisdiction to adjudicate all the claims. "[J]udicial economy cannot confer subject matter jurisdiction."

Finally, the court reversed the summary judgment with regard to the funds Son One allegedly improperly distributed from Daughter's estate. Although the evidence was enough to support a finding that the distributions were disproportionate, it did not establish as a matter of law that they were wrongful.

2. Transfer

In re Kenedy Foundation explains that district courts cannot take advantage of the transfer and consolidation powers granted to statutory probate courts under Texas Probate Code section 5B. Heirs filed an application to determine heirship of an intestate decedent who had died in the 1800s. The case was filed in a county court in Zapata County and later transferred to district court in Zapata County which issued several judgments declaring various individuals to be the heirs. The Kenedy Foundation subsequently filed a declaratory judgment in Kenedy County to establish itself as the owner of certain real property potentially subject to the claims of these heirs. The heirs filed petitions in Zapata County to be declared the owners of the Kenedy County land. In addition, they asked the Zapata County district judge to transfer the Kenedy County proceeding to Zapata County and to consolidate it. The judge granted the motion to transfer and consolidate. The Kenedy Foundation then sought a writ of mandamus from the appellate court to require the Zapata County judge to vacate his order.

The appellate court conditionally granted the writ. The heirs claim that the judge's transfer order was proper under Texas Probate Code section 5B which permits the judge of a statutory probate court to transfer to

177. See id. at 344
178. See id.
179. See id.
180. See id.
181. See id. at 344-45.
182. See Burns, 2 S.W.3d at 344-45.
183. Id. at 345 n.6.
184. See id. at 346.
185. See id. at 345-46.
186. 982 S.W.2d 548 (Tex. App.—San Antonio 1998, no pet.).
187. See id. at 549.
the court certain actions appertaining to or incident to the estate. However, the Zapata County district court is not a statutory probate court and, thus, section 5B does not authorize the transfer.\textsuperscript{188} A district court cannot qualify as a statutory probate court because it is not a statutory court; instead, it is a constitutional court.\textsuperscript{189}

3. Application to Probate Multiple Wills

Filing several wills for probate in the alternative may further the public policies of promoting judicial economy, avoiding a multiplicity of actions, and encouraging resolutions in one proceeding. For example, in \textit{In re Estate of Foster},\textsuperscript{190} Child One and Child Two applied for the probate of Mother’s 1993 will. In the alternative, they requested that an earlier will in which they receive a smaller share of the estate be admitted to probate. Child Three claimed that this filing of an application to probate alternative wills was not authorized under Texas Probate Code sections 81 and 83. The trial court rejected Child Three’s claim.

The appellate court affirmed.\textsuperscript{191} Texas Rule of Civil Procedure 48 expressly provides that a party may set forth two or more claims in the alternative.\textsuperscript{192} The Probate Code does not prohibit “the filing of two or more wills for probate, alternatively, in one application.”\textsuperscript{193}

4. Personal Representative Appointment

\textit{In re Estate of Crenshaw}\textsuperscript{194} serves as a reminder that it is essential to comply with the technicalities of the Rules of Civil Procedure when litigating estate issues. Failure to do so may result in additional delays and increased expense. Executor named in Testatrix’s will filed an application to probate the will and for letters testamentary. In the application, Executor described himself as “the” surviving son although in actuality at least one other son also survived. One of the other sons moved for a continuance on the ground that Rule 245 of the Texas Rules of Civil Procedure entitled him to at least a forty-five day notice before the first trial setting. The trial court denied the motion and appointed Executor.

The appellate court reversed and held that the other son was entitled to the forty-five day notice.\textsuperscript{195} Executor attempted to circumvent the forty-five day period by claiming that Testatrix’s power to select her executor is absolute. The court dispatched this argument by pointing out that Texas Probate Code section 78 prevents a wide variety of persons from serving as the executor.\textsuperscript{196} The court also noted that there were potentially valid

\begin{footnotes}
\footnotetext[188]{See \textit{id.} at 550-51.}
\footnotetext[189]{See \textit{id.}}
\footnotetext[190]{3 S.W.3d 49 (Tex. App.—Amarillo 1999, no pet.).}
\footnotetext[191]{See \textit{id.} at 56.}
\footnotetext[192]{See \textit{id.} at 52.}
\footnotetext[193]{Id.}
\footnotetext[194]{982 S.W.2d 568 (Tex. App.—Amarillo 1998, no pet.).}
\footnotetext[195]{See \textit{id.} at 570.}
\footnotetext[196]{See \textit{id.}}
\end{footnotes}
reasons for disqualifying Executor from serving, such as a conflict of interest, demonstrating that the court’s function in appointing the personal representative is not merely ministerial. As a final argument, Executor claimed that a controversy involving the appointment of a personal representative is not worthy of a full adversarial trial. The court rejected this claim by pointing to Texas Probate Code section 10 which provides that an interested person may file opposition to any issue and is entitled to be heard just like in other suits.

5. Suitability of Executor

As In re Estate of Foster indicates, substantial evidence is needed to show that the executors named in a will are unsuitable for the position. Child One and Child Two applied for the probate of Mother’s will and were appointed as executors. Child Three claimed that the trial court abused its discretion in determining that they were not unsuitable executors.

The appellate court rejected Child Three’s claim. Child One and Child Two were the named executors in Mother’s will. Mother named Child Three as the alternate executor. Child One and Child Two were also serving as the executors for Father’s estate and Child Three asserted that they were neglectful in performing their duties with respect to Father’s estate. Child Three also claimed that they were in a conflict of interest situation because they may owe money to the estate as well as be entitled to distributions from the estate. The court reviewed this and other evidence and concluded that the trial court did not abuse its discretion in determining that Child One and Child Two were not unsuitable.

6. Receivers

A personal representative should think very carefully before seeking the appointment of a receiver to perform an act which the personal representative could do on his or her own initiative. The hassles of imposing additional legal procedures may outweigh any potential benefit. In the case of In re Estate of Herring, Husband and Wife purchased a tract of land which became community property. After Wife died, this land was subject to the payment of community debts and the right of the administrator to possess and control the land during the administration process under Texas Probate Code section 177(b). “[W]hile under the jurisdiction of the probate court, all community property, including the half-interest of the surviving spouse, is subject to administration and sale by the probate court as a part of the estate of the deceased spouse.”

197. See id.
198. See id. at 570-71.
199. 3 S.W.3d 49 (Tex. App.—Amarillo 1999, no pet.).
200. See id. at 54.
201. See id. at 54-56.
202. 983 S.W.2d 61 (Tex. App.—Corpus Christi 1998, no pet.).
203. Id. at 63.
court authorized the administrator to sell this land and convey the entire community interest to a third party. "There is no additional requirement for the holder of a community interest in the property to join in the deed, any more than the beneficiaries of the decedent's estate are required to join in such a conveyance." Nonetheless, the trial court ordered Husband to sign the deed. When Husband refused, the administrator sought the appointment of a receiver to complete the sale and convey the land. The trial court appointed the receiver and Husband appealed.

The appellate court affirmed and rejected a variety of Husband's complaints about the appointment of a receiver. Husband complained that the administrator failed to post an applicant's bond under Texas Rule of Civil Procedure 695a. Although Texas Probate Code section 12(c) excuses the administrator from posting "security for costs" in any suit brought in a fiduciary capacity, this section would not excuse the bond because it secures payment of a variety of damages, not just costs. Nonetheless, the court viewed this appointment of a receiver as, in reality, a request for turnover relief under Civil Practice and Remedies Code section 31.002(b)(3), which provides that the decision whether to require a bond is within the discretion of the trial court. Accordingly, the court held that the bonding requirements of Rule 695a did not apply.

The court also rejected Husband's claim that there were no pleadings or evidence to support the appointment of a receiver. The court determined that the trial court had the discretion to appoint a receiver to carry out the order of sale. The court could not determine how Husband could be harmed by the appointment of a receiver since the administrator had full authority to sell the property without Husband's consent. Finally, the court rejected Husband's assertion that the probate court should have abated the order until Husband's separate claims of fraud on the community were resolved. The existence of these claims did not "deprive the trial court of its ability to carry out the order of sale."

7. Creditors Claims

Spousal Support Agreement

An agreement incident to divorce which provides for periodic payments should expressly state whether the obligation to pay continues after the death of the obligor to reduce the likelihood of litigation if the obligor dies prior to making all of the payments. The importance of tak-

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204. Id.
205. See id. at 65.
206. See id. at 64.
207. See id.
208. See In re Estate of Hurring, 983 S.W.2d at 65.
209. See id.
210. See id.
211. See id.
212. See id.
213. See id.
ing this precaution is highlighted in *Cardwell v. Sicola-Cardwell.* Husband and Wife entered into an agreement incident to their divorce which provided for Husband to pay Wife support until Husband made 300 payments or Wife died, whichever occurred first. Husband died after making 148 payments. Wife filed suit against Husband’s estate for the remainder of the payments. The trial court rejected Wife’s claim. The appellate court reversed.

The court began its analysis with a review of the law regarding contract-based alimony and how this type of alimony, unlike court-ordered alimony, has had a long history of judicial support. The court then decided that contract law governs the determination of whether Husband’s duty to pay continues after his death. Under general principles of contract law, an obligation survives the death of a party and binds the party’s “estate if the contract is capable of being performed by the estate representative.” The court rejected the claim that the contract was one for personal services and thus could be performed only by Husband. This contract merely provided for the payment of money, which is an act the personal representative can easily perform. “The amount owed is merely a debt with no distinctively personal characteristics.” Accordingly, the court ordered that Wife recover the present value of the remaining payments.

**Care Services**

A person providing care services who wants to be paid for rendering the services should memorialize the agreement in writing. Failure to do so may raise problems such as those found in *Herbst v. Sheppard.* Siblings presented a claim against Brother’s estate seeking compensation for care they provided Brother during the last years of his life. Executor denied the claim which was based on breach of express contract and quantum meruit. Claimants then sued in the county court in which the administration was pending. The court transferred the case to the district court which granted Executor’s claim for summary judgment. The appellate court affirmed.

The court reviewed the evidence and held that there was no evidence of an express agreement between Siblings and Brother to compensate Siblings for their care services. Likewise, the court held that there was insufficient evidence to support a claim for quantum meruit because

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215. See id. at 724.
216. See id. at 725.
217. See id. at 726.
218. Id.
219. See id. at 726-27.
220. See Cardwell, 978 S.W.2d at 726.
221. Id.
222. See id. at 728.
223. 995 S.W.2d 310 (Tex. App.—Corpus Christi 1999, pet. denied).
224. See id. at 312.
225. See id. at 314.
there was no evidence that Brother was reasonably notified that Siblings expected Brother to pay them additional sums for their services over the amount he had already paid to them for expenses.  

Fraud and Breach of Fiduciary Duty

Cross v. Old Republic Surety Co. 227 reminds estate creditors of the importance of determining whether their claims are liquidated or unliquidated and then complying with all the technical requirements of the Texas Probate Code. Administrator qualified as the personal representative of Decedent's estate and filed a surety bond issued by Bonding Company conditioned upon Administrator "well and truly, faithfully perform[ing] all the duties required of him." 228 Administrator and Decedent had engaged in various acts of wrongful conduct in which they defrauded Decedent's sister (Administrator's aunt) ("Aunt"). Administrator first placed the money in Decedent's name and, after her death, in the name of her estate. He then distributed it to himself as Decedent's sole heir. Aunt's temporary conservator ("Conservator") sought to recover from Bonding Company on Administrator's bond. The probate court found in favor of Bonding Company because Conservator had not followed the Probate Code procedures for claims against Administrator.

The appellate court reversed. 229 The claims procedures in the Probate Code apply to liquidated claims. 230 However, Conservator's claim for fraud and breach of fiduciary duty against Administrator were unliquidated until the court issued a judgment. 231 Likewise, Conservator's claim against Bonding Company was unliquidated and the procedures for liquidated claims, such as making a presentment prior to suit, did not apply. 232

The court then held that the probate court erred in refusing to render judgment in Conservator's favor because the undisputed evidence conclusively established his right to recover against Bonding Company. 233 The evidence showed that Administrator breached his duties in a variety of ways thus triggering Bonding Company's liability on the bond. 234 The court rejected Bonding Company's argument that Conservator did not follow the procedures in Texas Probate Code sections 326 and 328 to seek an order of payment and then if payment is not made, to obtain a judgment against the administrator and the surety. 235 A creditor does not have to comply with these procedures when the estate does not have sufficient funds on-hand to pay the claim. 236

226. See id. at 315.
228. Id. at 773.
229. See id.
230. See id. at 774.
231. See id. at 775.
232. See id. at 776.
233. See Cross, 983 S.W.2d at 778.
234. See id. at 777.
235. See id.
236. See id.
8. Muniment of Title

In *Power v. Chapman*, Wife’s will was admitted to probate as a muniment of title. Husband sued the executor named in the will for breach of fiduciary duty. The court held that no fiduciary relationship arose because the named executor did not qualify as the executor of the estate. A named executor has no authority to deal with the estate and assumes no fiduciary duties until that person is officially appointed by a court with proper jurisdiction as the executor.

9. Homestead

A person asserting homestead rights should not voluntarily move out of the home even if an heir or beneficiary insists that the person vacate the premises as evidenced by *Power v. Chapman*. Prior to marriage, Husband and Wife entered into a prenuptial agreement listing certain assets as the separate property of each and indicating that these assets would pass at death as if no marriage had taken place. Wife died with a will leaving her entire estate to Son, a child from a previous relationship. Husband lived in Wife’s home until he remarried. Husband asked Son if he could remain in the house with his new spouse but Son said no. Husband moved out.

Husband asserts that he did not waive his homestead rights in the premarital agreement because it did not expressly waive these rights. Nonetheless, the court indicated that there was enough evidence to support a finding that Husband abandoned his homestead rights when he voluntarily moved out of the home after his remarriage.

10. Bill of Review

*Power v. Chapman* provides a valuable review of the law relating to bills of review in probate matters. Prior to marriage, Husband and Wife entered into a prenuptial agreement listing certain assets as the separate property of each and indicating that these assets would pass at death as if no marriage had taken place. Wife died. Wife’s will predated the marriage and left her entire estate to Son, her child from a previous marriage. The court admitted this will to probate as a muniment of title in June 1991. Husband lived in Wife’s home until he remarried in March 1992.

In January 1993, Husband learned that he had community property rights and homestead rights in Wife’s estate. Accordingly, in June 1994, he filed a bill of review contending that the order admitting the will to probate was improper because he did not receive notice and that this notice failure deprived him of his rights in Wife’s estate. Husband claimed it was not his fault for not pursuing his claims earlier because he

237. 994 S.W.2d 331 (Tex. App.—Texarkana 1999, no pet.).
238. See id. at 336.
239. See id. at 335.
240. See id.
241. 994 S.W.2d 331 (Tex. App.—Texarkana 1999, no pet.).
relied on Son’s attorney who allegedly told him that he had no rights in Wife’s estate. Husband also brought claims against Son for fraud, conversion, and intentional infliction of emotional distress. The trial court granted the equitable bill of review and set the case for trial. Subsequently, the trial court granted summary judgment in favor of Son on all claims which invoked the court’s original jurisdiction and dismissed the remaining claims for lack of subject matter jurisdiction.

The appellate court affirmed by holding that neither a statutory nor an equitable bill of review would provide Husband with a remedy. The court began by addressing the viability of a statutory bill of review under Texas Probate Code section 31. A statutory bill of review must be filed within two years of the allegedly erroneous order. Husband filed his petition well outside of the two year period and thus Husband could not use this section to gain the requested relief.

The court then looked at the ability of Husband to file an equitable bill of review. To succeed on this theory, Husband must prove (1) a meritorious defense which would have prevented the probating of the will as a muniment of title, (2) that he could not make this defense because of Son’s fraud, accident, or wrongful act, (3) that his failure to do so was without any fault or negligence of his own, and (4) that he did not fail to pursue legal remedies which were available to him. The court indicated that even if Son and his attorney had acted improperly, Husband had notice of his potential claims approximately six months before the time period for bringing a statutory bill of review expired. Accordingly, Husband was not entitled to an equitable bill of review because he failed to pursue his legal remedies.

11. Statute of Limitations

In Wallace v. Collins, Heir of a partial intestate decedent sued Executrix to recover a legacy, compel an inventory, require an accounting and distribution, and remove Executrix. The trial court granted Executrix’s motion for summary judgment on the grounds that the statute of limitations on Heir’s claims had run.

The appellate court reversed on the ground that a genuine issue exists as to the material fact of whether the estate is still open. If the estate is still open, the trial court had jurisdiction to hear Heir’s claims and they would not be barred by the statute of limitations. Even if the estate

242. See id. at 335.
243. See id. at 334.
244. See id.
245. See id.
246. See Power, 994 S.W.2d at 335.
247. See id.
248. See id.
249. 988 S.W.2d 258 (Tex. App.—Texarkana 1998, pet. denied).
250. See id. at 261.
251. See id. at 260.
was closed, Heir's claims were still timely (except the cause of action to remove Executrix). Heir filed her claims within four years after the two-year waiting period imposed by Texas Probate Code section 149B before a person interested in the estate can petition a court for an accounting and distribution. To clarify the status of the estate, independent personal representatives should close the administration by affidavit following the procedure in Texas Probate Code section 151. No issue would then exist as to whether the administration is still pending.

D. Trusts

1. Creation

_Bailey v. Bailey_ shows how courts are willing to extend trust concepts to areas where trust law would initially not seem applicable. Pursuant to a court order, Mother deposited $400 per month for child support with the clerk of the court. The clerk was directed to pay $300 to Father and $100 into a joint checking account for the general health, maintenance, education, and welfare of Child. The order also provided that when the duty to provide child support ended, the remaining funds would be distributed to Child. The trial court awarded Child all the funds in the account pursuant to this order and Father appealed.

The appellate court held that the trial court's award of the remaining funds was proper. The court concluded that the transaction had the elements of a trust. "[I]n ordering child support, the trial court is creating for all practical purposes a 'hybrid express' trust wherein the payor is the trustor, the payee is the trustee, and the child is the beneficiary." The court recognized that the child support arrangement was not a traditional trust. "But, because it involves an intent (though judicially expressed), a specific purpose (though judicially designated), and a specific duration (though judicially set), it is much like an express trust. Thus, we are compelled to treat it like an express trust." Accordingly, the terms of the trust mandated the distribution of the remaining funds to Child and the trial court did not abuse its discretion by so ordering.

2. Substitute Fiduciary Act

_Texas Commerce Bank National Association v. Wood_ shows that compliance with the Substitute Fiduciary Act will not prevent a class certification for Beneficiaries who allege the substitution was improper.

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252. See id. at 261.
253. See id.
254. 987 S.W.2d 206 (Tex. App.—Amarillo 1999, no pet.).
255. See id. at 211.
256. See id.
257. Id. at 211-12.
258. See id. at 212.
259. Id.
260. See id. at 212-13.
261. 994 S.W.2d 796 (Tex. App.—Corpus Christi 1999, pet. dism’d).
Bank purchased Trust Company and then formed four national banks. Bank transferred trust accounts it had acquired from Trust Company to these new banks. Bank notified Beneficiaries about the change and advised them that they could contest the transfer by filing a petition in the appropriate court. Shortly thereafter, the new banks along with the transferred accounts were sold to other entities. Beneficiaries filed a class action against Bank alleging that the profits it earned from the transfers belong to the trusts, not to Bank as trustee. The trial court certified Beneficiaries as a class. The appellate court affirmed the certification. Bank appealed on a variety of grounds, including that it had fully complied with the Substitute Fiduciary Act as contained in the Texas Finance Code, section 274.101 et seq.

The court rejected Bank's claim that the class certification was improper because the transfers had complied with the Substitute Fiduciary Act. In determining the propriety of a class action, the question is not whether [Beneficiaries] have stated a cause of action or will prevail on the merits, but rather whether the requirements of the class certification rule have been met.

3. Termination

_Sorrel v. Sorrel_ discusses the powers of the trustee when a trust terminates. Three Sons were serving as trustees of Settlor's trust. Two years after the trust terminated in favor of the Sons as remainder beneficiaries, Son One brought suit against Son Two and Son Three complaining that they had failed to wind up the trust and divide the trust property according to the terms of the trust. He also alleged a variety of other improprieties. The trial court ratified the trustees' actions since the termination of the trust except for the trustees' attempted partition of the real property. The court also declared that all real property belonging to the trust was owned by the Sons as tenants in common.

The appellate court affirmed. The court determined that the Sons' power as trustees to partition the trust's real property did not survive the termination of the trust. "[O]nly those powers incidental to winding up the trust survive termination and, as the partition of realty is not necessary to closing the trust under the circumstances, the trustee could not partition realty among the beneficiaries." The Texas Trust Code section 112.052, permits the trustee to continue to exercise trust powers only "for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate benefi-
4. Enforcement

Statute of Limitations

Beneficiaries must promptly bring actions for breach of duty not just when professional fiduciaries are involved, but also in situations where family members are serving as fiduciaries for other family members. A beneficiary cannot fail to bring an action in a timely manner and then assert as a reason for the failure the beneficiary's desire to keep family peace and avoid unpleasant confrontations. The case of **Wright v. Greenberg**\(^{271}\) is instructive. Mother's will created a testamentary trust for Daughter naming Father as trustee. After Father died twenty years later, Daughter brought an action against Executor of his estate alleging that Father mishandled trust property. Executor argued that Daughter's claims are barred by the residual four-year statute of limitations contained in section 16.051 of the Texas Civil Practice & Remedies Code. Daughter urged that Executor was estopped to assert that limitations had run. Daughter claimed that she had to show respect for her father and rely on the information he supplied to her. She asserted that she relied on statements Father made to her that she would be "a very rich girl" and thus did not inquire into how trust property was being handled.\(^{272}\) Daughter also explained that Father would become upset if Daughter requested too much information about the trust.

The appellate court held that these facts were insufficient to show that Executor was equitably estopped to raise the statute of limitations.\(^{273}\) Simply stated, there was no evidence of any misrepresentation or concealment of material facts.\(^{274}\) Statements of Father's opinion about the future financial status of Daughter were not enough to create an estoppel.\(^{275}\)

The court then examined whether the statute of limitations barred Daughter's action. Daughter asserted that Executor had the burden (1) to prove when the cause of action accrued, and (2) to negate the discovery rule. The court determined that the cause of action accrued approximately five years before Father's death.\(^{276}\) Father had resigned as trustee and there was an extensive paper trail documenting the communications between Father and Daughter regarding the trust. On appeal, Daughter claimed that Executor failed to negate the discovery rule. But, Daughter

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270. See **Sorrel**, 1 S.W.3d at 870-71.
272. See id. at 674.
273. See id. at 675-76.
274. See id. at 675.
275. See id.
276. See id. at 676.
failed to raise the discovery rule at trial and Executor has the burden of negating the discovery rule only if it was plead or otherwise raised. The court consequently affirmed the trial court's judgment that the statute of limitations barred Daughter's breach of duty action.

Service of Process

In Price v. Dean, the trial court rendered a default judgment against Trustee in her capacity as a trustee. The appellate court reversed on the ground that the service was deficient because the return of service did not indicate service in her capacity as a trustee. The court determined that it did not matter that she knew about the lawsuit because "[a] default judgment is improper against a defendant who has not been served in strict compliance with the law, even if [she] has actual knowledge of the lawsuit." Likewise, it was irrelevant that the citation was in proper form and did name Trustee in her representative capacity.

5. Foreign Trusts in Texas Courts

An out-of-state trust may be amenable to process in Texas if an agent with authority to bind the trust contractually agrees for venue to be in Texas. For example, in Bernice Claire Row Trust v. Throckmorton Land & Cattle Co., Plaintiff sued Defendant for breach of a pasture agreement. Plaintiff later learned that Defendant was not the owner of the ranch although Defendant managed the ranches. Instead, the ranch was owned by two Oklahoma trusts. The trusts maintained that Defendant was not an agent of the trusts, but merely a tenant of the ranch. The trial court rejected the trusts' argument and held that Defendant was an agent of the trusts and had actual authority to bind the trusts on the pasture agreement with Plaintiff.

The appellate court affirmed. The court concluded that there was legally and factually sufficient evidence to support the trial court's finding that Defendant had the actual and implied power to make the pasture agreement. In addition, the trusts were amenable to process in Texas because Defendant, their agent, had entered into a written agreement which provided for venue of any dispute arising out of the contract to be in Texas.

E. Other Matters

1. Disclaimers

An heir or beneficiary subject to a federal tax lien may not avoid that

277. See Wright, 2 S.W.3d at 677.
278. 990 S.W.2d 453 (Tex. App.—Corpus Christi 1999, no pet.).
279. See id. at 454.
280. Id.
281. See id. at 454-55.
282. 979 S.W.2d 383 (Tex. App.—Eastland 1998, no pet.).
283. See id. at 385.
284. See id.
285. See id.
liability by disclaiming estate property. In *Drye v. United States*, Heir stood to inherit all of Intestate’s estate and had many creditors including the Federal Government, which had filed a tax lien on all of Heir’s property. Although Heir properly disclaimed his inheritance under state law so that the property would pass to his daughter, the government claimed that the disclaimer did not defeat the federal tax lien.

The Supreme Court of the United States sided with the government and held that Heir’s interest as an heir to Intestate’s estate constituted property (or a right to property) to which the federal tax lien attached despite Heir’s exercise of a state law giving him the right to disclaim the interest retroactively. State law determines the rights or interests held by a person but federal law determines whether those rights or interests are property or rights to property within the meaning of the federal tax lien statutes.

2. Joint Account

The surviving co-signer on a bank account in *Pressler v. Lytle State Bank* claimed that the account had survivorship rights. However, the account signature card had conflicting designations. The box next to the language creating the survivorship feature was marked with an “x” in blue ink while the box next to the individual account designation was marked by a typewriter, just like the rest of the card. The jury found that the blue ink “x” was not placed on the card by the owner of the account or with his consent. Consequently, the trial court ordered the surviving co-signer who had withdrawn the funds from the account to return the funds to the owner’s estate as well as to pay the estate’s attorney fees and costs. The surviving co-signer appealed contending that she inappropriately had the burden of proving that the blue “x” was placed on the account by the owner or with his consent. In addition, she claimed that the jury’s finding was not supported by the evidence.

The appellate court rejected the co-signer’s claims and affirmed the trial court’s holding that the account did not grant the co-signer survivorship rights. The court, following Texas Probate Code section 439(a) and prior cases, concluded that “a party who claims to own an account as the survivor of a joint account with right of survivorship bears the burden of proving her claim.” The court then reviewed the evidence and found that there was ample evidence to support the jury’s finding that the owner of the account did not place the blue “x” in the survivorship box

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286. 120 S. Ct. 474 (1999).
287. See id. at 483.
288. See id. at 481. *Drye* effectively overrules *Leggett v. United States*, 120 F.3d 592 (5th Cir. 1997), which held that the federal tax lien did not attach to the disclaimed property.
289. 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no pet.).
290. See id. at 563.
291. Id. at 564.
and that it was not placed there with his consent.\textsuperscript{292}

3. \textit{Negligent Misrepresentation}

Texas courts recognize the tort of negligent misrepresentation as described by section 552 of the Restatement (Second) of Torts.\textsuperscript{293} The elements for this cause of action are:

1. the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest;
2. the defendant supplies 'false information' for the guidance of others in their business;
3. the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and
4. the plaintiff suffers pecuniary loss by justifiably relying on the representation.\textsuperscript{294}

In 1999, the Supreme Court of Texas held in the case of \textit{McCamish, Martin, Brown \& Loeffler v. F.E. Appling Interests},\textsuperscript{295} that attorneys, just like other professionals, could incur liability for negligent misrepresentation. The court explained that

a negligent misrepresentation claim is not equivalent to a legal malpractice claim. Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the non-client based on the professional’s manifest awareness of the non-client’s reliance on the misrepresentation and the professional’s intention that the non-client so rely. Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim. The theory of negligent misrepresentation permits plaintiffs who are not parties to a contract for professional services to recover from the contracting professionals.\textsuperscript{296}

The recent case of \textit{Estate of Arlitt v. Paterson}\textsuperscript{297} appears to be the first case discussing negligent misrepresentation in a will drafting context. Husband died leaving a 1983 will and a 1985 codicil which substantially reduced the size of the share of Daughter, one of his four children. Daughter contested the will and codicil in a contest that dragged on for many years. Wife, individually and as the executor of Husband’s will, along with Other Children sued Attorneys who drafted the will and codicil. They alleged that Attorneys represented Husband and Wife jointly in preparing the estate plan and that they were negligent in so doing. Attorneys responded that they were not liable for a variety of reasons such as lack of privity, expiration of the period of limitations, and lack of subject matter jurisdiction. The trial court granted Attorneys’ motion for summary judgment without specifying a reason. The appellate court

\textsuperscript{292} See \textit{id.} at 565.
\textsuperscript{293} See \textit{Federal Land Bank Ass'n of Tyler v. Sloane}, 825 S.W.2d 439, 442 (Tex. 1991).
\textsuperscript{294} \textit{Id.} at 442.
\textsuperscript{295} 991 S.W.2d 787 (Tex. 1999).
\textsuperscript{296} \textit{Id.} at 792 (citations omitted).
\textsuperscript{297} 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied).
reversed.\textsuperscript{298}

The appellate court recognized that a plaintiff must show privity to prevail on a legal malpractice claim,\textsuperscript{299} but that privity is not needed to establish a duty not to negligently misrepresent.\textsuperscript{300} The court explained that a negligent misrepresentation claim is not the same as a malpractice claim and that an attorney may be subject to a negligent misrepresentation claim even though the attorney is not subject to a malpractice claim.\textsuperscript{301} The appellate court remanded these claims because Attorneys' motion did not address the negligent misrepresentation claims and held that it was error for the trial court to render judgment against Wife and Other Children.\textsuperscript{302}

4. Malpractice

Joint Clients

Attorneys and beneficiaries may act with regard to each other to such an extent that an attorney-client relationship actually arises which eliminates the protection granted in the \textit{Barcelo} case. For example, in \textit{Estate of Arlitt v. Paterson},\textsuperscript{304} Husband died leaving a 1983 will and a 1985 codicil which substantially reduced the size of the share of Daughter, one of his four children. Daughter contested the will and codicil in a contest that dragged on for many years. Wife, individually and as the executor of Husband's will, along with Other Children sued Attorneys who drafted the will and codicil. They alleged that Attorneys represented Husband and Wife jointly in preparing the estate plan and that they were negligent in so doing. Attorneys responded that they were not liable for a variety of reasons such as lack of privity, expiration of the period of limitations, and lack of subject matter jurisdiction. The trial court granted Attorneys' motion for summary judgment without specifying a reason. The appellate court reversed.\textsuperscript{305}

The appellate court began its malpractice discussion by holding that the two year statute of limitations for legal malpractice claims may not have expired because it does not begin to run until Wife and Other Children discover or reasonably should have discovered the wrongfully caused injury.\textsuperscript{306} Attorneys had failed to conclusively prove that Wife and Other Children filed their malpractice claims more than two years after they discovered or reasonably should have discovered the wrongfully caused injury.\textsuperscript{307} Thus, the trial court improperly granted Attorneys' motion for

\textsuperscript{298} See id. at 716.
\textsuperscript{299} See id. at 718 (citing \textit{Barcelo v. Elliott}, 923 S.W.2d 575 (Tex. 1996)).
\textsuperscript{300} See id.
\textsuperscript{301} See id.
\textsuperscript{302} See id.
\textsuperscript{303} See \textit{Barcelo v. Elliott}, 923 S.W.2d 575 (Tex. 1996).
\textsuperscript{304} 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied).
\textsuperscript{305} See id. at 716.
\textsuperscript{306} See id. at 719.
\textsuperscript{307} See id.
The court then focused on privity. The court recognized that in Barcelo, the Supreme Court of Texas held that "an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust." The court concluded that Wife and Other Children must establish that they were in privity of contract with Attorneys to move forward with a malpractice claim. With regard to Other Children, the court held that there was no evidence that Husband was acting as Other Children's agent when he consulted with Attorney and there was no evidence that Attorneys represented Other Children. Thus, summary judgment denying these claims was affirmed. Likewise, summary judgment was proper against Wife in her capacity as Husband's executor.

The court next examined Wife's personal claim for malpractice. Wife claimed that privity existed between Wife and Attorneys because they jointly represented Wife and Husband in the estate planning process. On the other hand, Attorneys argued that they represented only Husband and thus there was no privity. The court determined that Barcelo would not prevent Wife's personal claim because she could qualify as a represented beneficiary. "The Barcelo rule thus does not deny a cause of action to one of two joint clients." Accordingly, the trial court's summary judgment against Wife personally was improper because there is a material issue of fact as to whether Attorneys represented Wife as well as Husband.

Lack of Tax Savings Provisions

In Guest v. Cochran, Parents hired Attorney who was a close friend of Preferred Child. Slighted Children alleged that Attorney conspired with Preferred Child so that Preferred Child would obtain a disproportionate amount of Parents' estates via an irrevocable inter vivos trust and other non-probate arrangements. Parents, however, never signed these instruments. The wills did not contain bypass trusts to save estate taxes on the unified credit amount. In addition, Attorney did not advise the Surviving Spouse or the executors of Deceased Spouse's estate that Surviving Spouse could disclaim a portion of the estate to reduce the size of her estate which would be subject to the estate tax upon her death. As a result, the estate of the second parent to die paid $60,000 in estate taxes. The trial court granted summary judgment in favor of Attorney.

308. See id.
309. Id. at 720 (quoting Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996)).
310. See Estate of Arlitt, 995 S.W.2d at 720.
311. See id.
312. See id.
313. See id.
314. See id. at 721.
315. Id.
316. See Estate of Arlitt, 995 S.W.2d at 721.
317. 993 S.W.2d 397 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
The appellate court affirmed the summary judgment on Slighted Children's individual claims against Attorney for malpractice following *Barcelo*. The court rejected the argument that *Barcelo* was bad law and that the lower court should decide differently because of the ever changing landscape of Texas law. The *Barcelo* shield protecting negligent attorneys from liability for their estate planning errors continues to hold. It is unlikely that a lower court will decide otherwise; it will take a new Texas Supreme Court decision or legislative action before attorneys will be liable to intended beneficiaries for their estate planning malpractice.

5. Unauthorized Practice of Law

In June 1997, the Houston Unauthorized Practice of Law (UPL) Subcommittee notified Nolo Press that it was investigating the sale of computer software designed to assist purchasers to create living trusts. Nolo Press responded. In March 1998, an investigator of the Dallas UPL indicated that he had been assigned to investigate the situation in further detail and that an informal hearing would be held in August 1998. Nolo Press then requested additional information about the complaint, the investigation, the hearing process, and details regarding the inner workings of the UPL. The Dallas UPL refused to provide much of this information and cited confidentiality as the reason. Four weeks prior to the hearing, Nolo Press petitioned the Supreme Court of Texas for a writ of mandamus to compel the UPL Committee to supply a laundry list of information and documents. The court granted the petition and stayed the hearing.

In the case of *In re Nolo Press/Folk Law, Inc.*, the court held that it lacked jurisdiction to issue mandamus against the UPL Committee or any of its members. The court determined, however, that Nolo Press's petition should be treated in part as an administrative rather than a judicial matter. It then vacated the court's 1986 order which limited disclosure of Committee records. Thus, Nolo Press was entitled to the requested information and documents.

Note that the 1999 Texas Legislature amended the definition of "practice of law" so that the sale of form preparation computer software to non-attorneys is not the practice of law as long as the programs clearly and conspicuously state that they are not a substitute for the advice of an

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318. See id. at 406.
319. See id. The court did not sustain the summary judgment in favor of Attorney on claims Slighted Children brought against Attorney in their representative capacity as Parents' co-executors because Attorney failed to address these claims in his summary judgment motion. See id.
320. 991 S.W.2d 768 (Tex. 1999).
321. See id. at 775-76.
322. See id. at 778.
323. See id. at 779.
324. See id.
6. Retirement Plans

A person considering marriage after accumulating a significant amount of property in a retirement plan governed by ERISA must determine the potential rights the new spouse will have in the principal and income when the marriage ends, be it by the person’s death or by divorce. For example, in *Lipsey v. Lipsey*326 Husband had a 401(k) plan prior to marriage which complied with ERISA. After less than a year of marriage, Wife filed for divorce. The trial court held that the corpus of the plan was Husband’s separate property and that the increase in the plan’s value which occurred during the marriage belonged to the community. The court awarded Wife a substantial portion of this increase and Husband appealed.

The appellate court reversed.327 Husband argued that the undistributed income from the plan is not community property and thus not subject to the trial court’s just and right division of the marital estate. Wife asserted that ERISA vests her (the non-participating spouse) with a beneficial interest in the plan. The court began its analysis by looking at *Boggs v. Boggs*,328 which considered the competing claims of a non-participating surviving spouse and those of children from a prior marriage.329 In this case, however, Wife is not a surviving spouse because Husband is still alive. Instead, the court was called upon to resolve a dispute between the participating spouse and the non-participating spouse. Although ERISA confers beneficiary status on a surviving spouse, it does not confer this status on a non-participating spouse merely by reason of marital status.330 ERISA does not confer a right to the non-participating spouse but simply allows for enforcement of an existing right that arises under the domestic relations law of the state.331

Consequently, the court needed to determine if the increase in value of Husband’s 401(k) plan during marriage was community property under Texas law. The court held that this increase in value was Husband’s separate property.332 Husband received no distributions from the plan during the marriage. In addition, Husband had no right to compel a distribution during the marriage because he had not yet reached the required age. Thus, Husband had not acquired the increase in value and therefore the increase could not qualify as community property.333 Although earned during marriage, the plan income remained part of the trust estate and

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326. 983 S.W.2d 345 (Tex. App.—Fort Worth 1998, no pet.).
327. See id. at 347.
329. See *Lipsey*, 983 S.W.2d at 351.
330. See id.
331. See id. at 350.
332. See *Lipsey*, 983 S.W.2d at 349.
333. See id.
was not subject to division by the trial court. The court then held that “absent an existing community property right, ERISA’s QDRO provision does not create a community property interest.” The court also rejected Wife’s claim that Husband constructively acquired the income. “Absent fraud, a spouse may create a trust from separate property, and so long as the income remains undistributed during marriage and there is no right to compel distribution, the income is not acquired during marriage and remains separate trust property.”

7. Power of Attorney

In Comerica Bank-Texas v. Texas Commerce Bank National Association, Principal appointed Agent in a “springing” durable power of attorney under which the Agent’s authority would commence only upon Principal’s disability. Principal signed this power of attorney in 1986. In 1991, Principal created an inter vivos trust and holographic will. Principal became incapacitated in 1995 and Agent used the power of attorney to transfer some of Principal’s property to the inter vivos trust. After Principal died, Executor sued Trustee to impose a constructive trust on the assets Agent transferred to the trust alleging that the power of attorney was either invalid or, if valid, it did not authorize agent to make the transfer. The trial court granted Executor’s request for a summary judgment.

The appellate court reversed. The court recognized that the Probate Code as it existed in 1986 did not expressly recognize springing powers of attorney. Nonetheless, there was nothing in the Probate Code or other Texas law which prohibited their creation. Accordingly, the court determined that Principal properly created a springing durable power of attorney.

The dissenting opinion relies on the legislative history of the 1993 legislation to show that springing powers were not previously authorized in Texas. The opinion continues to explain that the enabling legislation provided that powers of attorney executed before the effective date of the statute are to be governed by the law in effect when the power was executed. Accordingly, the justice concludes that the power of attorney was invalid and ineffectual.
II. STATUTORY UPDATE

The 1999 Legislature made substantial changes to the statutes governing probate, wills, guardianships and trusts. The Governor vetoed two bills. The first was an omnibus guardianship bill346 and the second was a bill clarifying the transfer rights of the Probate Court No. One of Travis County, Texas.347

In addition to the traditional session laws, all legislation, enacted or proposed, can be found at This website was created and is maintained by the State of Texas and provides not only the full text of any bill but also the full history.

A. TEXAS PROBATE CODE

1. Section 3(d): Definition: Corporate Fiduciary348

Section 3(d) changed the definition of corporate fiduciaries to financial institutions as defined by section 201.101 of the Finance Code that have trust powers and are doing business under the laws of this state or another state. The "another state" provision was added. A financial institution under the Finance Code is a bank, savings and loan, credit union or trust company. It specifically includes not only those chartered federally and in Texas but also those chartered by another state. This definition is different from the definition of "financial institutions" under Chapter XI of the Texas Probate Code on multi party accounts; which includes brokerage firms.

2. Section 5(b): Mandatory Assignment of Statutory Probate Judges: County Court349

Before this amendment in counties with only a constitutional county court, the county judge could transfer a probate matter to the district court or assign it to a statutory probate court. The county judge, being the chief administrative officer of the county, generally sent the matter to the

346. This bill, Tex. H.B. 1851, out of the 76th Regular Texas Legislative Session in 1999, contained the original proposals from the Real Estate, Probate and Trust Law Section of the State Bar of Texas plus several amendments. Governor Bush vetoed the bill because one of those amendments would allow third parties to apply to the probate court for approval of a sports or entertainment contract with a minor. Bush's veto message said this bill would interfere with the parental relationship.

347. The jurisdictional statute for the Travis County statutory probate court, Texas Government Code Section 25.2293(d), requires the consent of the other court before a matter can be transferred from that other court to the probate court. This is the only statutory probate court with such a restriction. All other statutory probate courts can transfer pursuant to Texas Probate Code section 5B without consent. Tex. H.B. 3635, also out of the 76th Regular Texas Legislative Session in 1999, would have eliminated the consent requirement. It also expanded the Travis County Probate Court's jurisdiction over matters under the Health and Safety Code, Texas Government Code Section 25.2293(b). Governor Bush said this was an unnecessary expansion of that court's jurisdiction.

district judge because there was no cost to the county. The assignment to
a statutory probate judge would be an additional expense to the county.

Now a probate litigant may insist on the appointment of a statutory
probate judge if a district judge has not already been appointed.

In addition, the appointed statutory probate judge will now have the
powers held by a statutory probate judge under sections 5A and 5B. Pre-
viously an appointed statutory probate judge only had the powers of a
judge of a constitutional county court. This provision is effective immediately.

3. Section 5A(b): Personal Representative is a Party: Jurisdiction

In 1997 section 5A was amended to give the probate court jurisdiction
over all matters in which a personal representative was a party; all such
actions were “appertaining to estates and incident to an estate.” This
was also intended to allow transfers under section 5B. However, the
phrase “for the purpose of this section” was included in the 1997 statute.
This bill deletes “for the purpose of this section.” With this bill, and the
amendments to section 5B, infra, statutory probate courts now have jur-
sisdiction over, and can transfer, any matter in which a personal repre-
sentative is a party. This provision became effective September 1, 1999.

4. Section 5B: Personal Representative is a Party: Transfer Any
Proceeding

This amendment to the transfer statute expressly authorized transfers
to probate courts any proceeding in which a personal representative is a
party. This became effective September 1, 1999 and applies to motions
filed on or after that date.

5. Section 5C: Ad Valorem Taxes

The Legislature passed a bill effecting ad valorem taxes. It amended
parts of the Texas Probate Code. The amendments only apply to dece-
dents' estates that are currently under administration, where the estate
claims an interest and is not an independent administration. Suits to
enforce tax liens or impose personal liability for ad valorem taxes im-
posed in a county other than where the administration is occurring, must
be brought under Tax Code section 33.41 in a court of competent

350. There is a sister provision for guardianships, see Texas Probate Code Section
606(b).
353. There is a companion provision in the Guardianship Code. See Tex. Prob. Code
jurisdiction.358

If a probate proceeding has been pending for less than four years and the probate is in the same county where the taxes were imposed, the taxing unit may present a claim under Texas Probate Code section 5C, subsection (c). If they do file a claim they cannot then file an action in another court.359 If the taxing unit did not present a claim and the probate proceedings have been pending more than four years, it must bring the action under Tax Code section 33.41 in a court of competent jurisdiction.360 Any action brought under this subsection must include the personal representative as a party.

Questions Raised by the Statute. The statute raises several questions. If these rules do not apply to independent administrations, where are actions involving independents brought, the probate court? It does not clearly tell us where to bring an action if the taxes and the probate are in the same county and no claim was filed and four years have not elapsed. Texas Probate Code section 5C, subsection (f) requires the personal representative to be made a party (and may not have a personal judgment taken against the estate) if the action is brought under subsection (e). It does not explain the rules if the action is brought under subsections (b), (c) or (d). Also, in subsection (e) it requires the personal representative to be made a party if the estate has been open more than four years. In practice after four years, most personal representatives will have closed the estate or at least distributed all of the estate. There are conforming amendments to the claims procedures.361

Guardianship. There is also an amendment to the guardianship code waiving the requirement of presentment for delinquent claims when the guardianship is in a different county. This suggests that presentment must be made in a guardianship when the taxes arise in the same county where the guardianship became pending.

Effective Date. This statute is effective September 1, 1999 and applies to all estates and all actions pending on or after that date.

6. Section 10B: Decedent’s Medical Records362

In 1997 this section was added to allow access to a decedent’s medical records when there was a will contest or other proceeding where a party relies on the decedent’s mental or testamentary capacity. The records could be obtained upon presenting a certified copy of a document establishing a will contest. The 1999 amendment says a filed marked copy of such a document is sufficient. This became effective September 1, 1999 and applies only to estates of persons dying after that date.

7. Sections 15, 17, 17A & 18: Clerks’ Records

Clerks will now be required to keep a case file rather than “probate minutes.”364 Rather than keep a judge’s probate docket,365 a claim docket366 and a probate fee book,367 the clerk may maintain the probate information on microfilm or some form of electronic media.368 The clerk shall keep an index of these records.369 These records, including “records on a computer file, on microfilm, in the form of a digitized optical image, or in another similar form of data compilation,” shall be evidence.370

8. Section 52: Affidavit of Heirship

This bill provides a form for affidavits of heirship. The title insurance industry was involved in preparing this statute. It is expected that its use will be readily accepted by title companies. That form is attached as an appendix.

9. Section 95C: Foreign Wills: Original Signatures

If a will has already been probated in a foreign jurisdiction, it can be probated in Texas by attaching an attested copy of the will and order admitting it to probate to the application to probate the will in Texas. The amendment to this statute requires the original signature of the judge and clerk on the attestation. Seals or other mechanical reproduction of a judge’s or clerk’s signature will no longer be acceptable. However, this original signature requirement does not apply to wills and orders recorded in the deed records under Texas Probate Code sections 96 through 99 and section 107.

10. Section 105A: Appointment of Foreign Corporate Fiduciary

This section has always controlled the circumstances under which a court may appoint a foreign institution as a fiduciary. That authority is continued but now a court may appoint only if a Texas financial institution can be appointed under the laws of the state of that foreign fiduciary. Also, the court may require the foreign fiduciary to deposit all cash and

safekeep all other assets in financial institutions which have their main office or a branch office in this state.

11. **Section 128B: Citation: Wills Probated After Four years**

   This is a new section. It sets out the citation requirements when a will is offered for probate more than four years after death. It requires citation of the heirs. The citation, or waiver of citation, must state that the will cannot be admitted to probate if the proponent is at fault. Further, it specifies that if a prior will has already been admitted to probate, the beneficiaries of that probated will must be served rather than the decedent’s intestate heirs. Finally, this statute confirms that wills can still be probated after four years. In 1997 the Texas Legislature amended the Texas Probate Code provisions on muniment of title. That legislation had internal inconsistencies that suggested that a will could not be probated after four years. This statute removes that uncertainty.

12. **Sections 149A & C: Actions in “County Courts”**

   As a result of amendments over the years, Sections 149A (demands for accountings from independent administrators and executors) and 149C (removal of independent administrators and executors) have had references to different courts. This amendment makes the court references consistent by referring to county courts as defined in section 3 of the Texas Probate Code. Section 3 says that county courts include district courts when they are exercising jurisdiction in contested matters.

13. **Section 149D-G: Release of Independent Personal Representatives**

   An independent personal representative may now obtain a judicial discharge under the declaratory judgment statute. If the independent personal representative provides an accounting with a distribution of the estate, they may seek a judicial discharge for all matters which are fully and fairly disclosed. The personal representative may retain a reasonable re-

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375. If there is a prior probated will, the beneficiaries of that will, rather than the heirs at law, must be served. See id.

376. Prior to 1997 section 89A of the Texas Probate Code controlled the probate of a will as a muniment of title. In 1997 the Legislature amended 89A and added 89B and 89C. They are the pleading statute (89A), the proof statute (89B) and the judgment statute (89C). The pleading and proof statutes required that the applicant plead and prove that four years had not elapsed since the death of the decedent. The judgment statute had no such restriction. This new section 128B confirms that a will can be probated after four years if the applicant is not at fault. See id.

377. See id.

378. See id.

379. Previously, an independent executor or administrator was specifically prohibited from conditioning distribution upon a release, Texas Probate Code section 151(d) stated “An independent executor shall not require a waiver or release from the distributee as a condition of delivery to a distributee.” Now such a release can be obtained only by following the new procedure. See Tex. H.B. 1852, 76th Leg., R.S. (1999).
serve. If the court determines that the reserve was not reasonable, it may order a further distribution. The court may assess fees and costs of the proceeding in favor of or against any personal representative or any beneficiary.380

This act became effective September 1, 1999, but only applies to estates of persons dying after that date.

14. Section 194(5): Safekeeping Depositories381

Only "financial institutions"382 with their main offices or a branch office in the State of Texas can hold safekept funds.

15. Section 221A: Changing Resident Agent383

Before a person who is not a resident of Texas can be appointed a personal representative, he must designate a resident agent for purposes of service of process. There has been no explicit procedure for a personal representative to change that resident agent. Effective September 1, 1999, a personal representative may change the resident agent and this amendment applies to all changes made on or after that date.

16. Section 221B: Resignation of Resident Agent384

Similarly, there was no mechanism for a resident agent to resign. This statute allows an agent to resign after giving notice to the personal representative and filing with the court. The resignation is effective upon entry of the court order. This procedure became effective as of September 1, 1999, and applies to all resignations made on or after that date.

17. Section 222: Removal of Personal Representative if There is No Resident Agent385

A court may remove a personal representative if a new resident agent is not appointed. This applies to all motions to remove filed on or after September 1, 1999.

18. Section 270: Homestead Debts386

While there have been several recent amendments to the Texas Constitution387 and the Texas Property Code388 regarding permissible debts on homesteads, no conforming amendments have been made to the Texas Probate Code. This bill updates the Texas Probate Code to reflect all of

384. See id.
385. See id.
386. See id.
those changes. However, this statute became effective September 1, 1999 and purports to apply only to estates of persons dying after that date.

19. **Section 322: Child Support, Class 4 Claim**

“[D]elinquent child support and child support arrearages that have been confirmed and reduced to money judgment...” are new class 4 claims. Old class 4 claims for certain taxes, penalties and interest are now class 5 claims. All other claims likewise move down: Unsecured are now class 8. This act applies only to estates of decedents dying on or after September 1, 1999.

20. **Section 389: Guardianship Investment Statute Repealed**

In 1993 all guardianship provisions were moved to chapter 13, beginning at section 601 of the Texas Probate Code and those sections are now referred to as the Texas Guardianship Code. Several guardianship provisions and references were overlooked and not removed in 1993. In particular, the contents of section 389 were copied to section 855 but section 389 was not repealed. This bill finally repealed that statute.

21. **Sections 404 Closing Estates & 406 Final Accounts: Elimination of Guardianship References**

These sections continued to have references to guardianships after the 1993 separation of the guardianship provisions. This bill eliminates all of those provisions.

**B. Guardianship Code**

1. **Section 601(5): Definition of Corporate Fiduciary**

See section 3(d) above.

2. **Section 606(b): Mandatory Assignment of Statutory Probate Judges: County Court**

In counties with only county courts, a litigant may insist on the appointment of a statutory probate judge if a district judge has not been appointed. The appointed judge would then have the powers held by a statutory probate judge under sections 607 and 608. This statute became effective immediately.

395. Also see the companion provision for decedent’s estate in Texas Probate Code Section 5(b).
3. **Section 607(b): Guardian is a Party: Jurisdiction**

This gives statutory probate courts jurisdiction over all matters in which a guardian is a party. This conforms to the changes to section 5A above (regarding decedent's estates) made in 1997 and 1999. This became effective September 1, 1999.

4. **Section 608: Guardian is a Party: Transfer Any Proceeding**

Like the amendments to §5B, supra, this allows a statutory probate court to transfer to its court any proceeding in which a guardian is party if the guardianship is pending in its court. This provision applies to all motions to transfer filed on or after September 1, 1999.

5. **Sections 625, 627, 627A & 628: Clerks' Records**

See Texas Probate Code sections 15, 17, 17A and 18 above.

6. **Section 633: Notice to Proposed Guardian**

If the applicant is not the proposed guardian, the guardian must be named in the application and served with process. The Texas Department of Human Resources sought this change as a result of it being frequently named guardian without any prior notice.

7. **Section 642: Standing**

A person may not bring or contest a modification or restoration proceeding if they have an adverse interest. The legislative history states that a guardian does not have an adverse interest merely because they are a guardian. Something else must be shown, such as the guardian has an adverse action pending or is making some claim against the ward. This amendment became effective September 1, 1999 and applies to all matters in which a final determination had not been made on that date.

8. **Sections 646 & 647A: Certification Requirements for Court Appointed Attorneys**

To be appointed by a court in a guardianship, an attorney must be certified by the State Bar. The certification requirements are modified by this bill. Now an attorney must complete only a three hour course (formerly four hours) provided by the State Bar of Texas. The first certification expires after two years. If the attorney has been certified for the immediately preceding four years, then the subsequent certifications are good for four years.

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9. Section 648A(b): Court Investigator’s Duties Expanded\(^{402}\)

This adds to the duties of the court investigator those duties “required by this code.”

10. Section 665: Guardian’s Fees from Other Funds\(^{403}\)

Previously a court could order a guardian’s compensation for persons serving solely as guardian of the person from the ward’s estate. Now the court may authorize those payments from county funds if there are such funds budgeted. The legislature established a new grant program.\(^{404}\)

11. Section 665B(a): Attorneys Fees: Unsuccessful Applicants\(^{405}\)

Now a court may authorize attorneys fees for guardianship applicants who were successful. Those fees can be paid from the ward’s estate or, if his estate is not sufficient, from county funds if any have been so budgeted.

12. Section 677A(e): Form: Designation of Guardian in Case of Later Need\(^{406}\)

The form is amended to expressly allow the waiver of bond for a guardian of the declarant’s children.

13. Section 682: Eliminates Term Requirement from Applications\(^{407}\)

Guardianship applications no longer have to set out the requested term of the guardianship.

14. Section 682A: Applications for Guardianship Before Eighteenth Birthday\(^{408}\)

An application can be filed for a minor who will need a guardianship after becoming an adult. The application can be for a guardianship of the person or of the estate, or both. The application shall not be made more than sixty days before the child’s eighteenth birthday. This statute refers to the filing of an application, it is not clear if that application can be taken up before the child reaches eighteen.

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15. **Sections 683 & 683A: Court Initiated Guardianships**

A court must have probable cause of incapacity to appoint an ad litem or court investigator. An information letter from an interested person or a physician’s statement establishes probable cause. If the court creates a guardianship, it may compensate the guardian ad litem from the ward’s estate. If the estate is unable to pay, it may compensate the guardian from county funds if any are available. The information the letter “may” contain is set out in section 683A.

16. **Section 694A-I (House Bill 1663): Modification or Restoration**

This bill expands the provisions regarding restoration or modification of a guardianship. A ward may initiate the process by an informal letter. Anyone has standing to bring the action or contest it, except as set out in section 642. Except for good cause, a subsequent action may not be filed for one year. Application requirements, set out in section 694B, are similar to those for a guardianship including listing names and addresses of the ward’s spouse, children and siblings, or next of kin, if the ward is over sixty years of age.

The court shall appoint an attorney ad litem. That ad litem shall represent the ward only in that restoration or modification proceeding. The statute has the unusual provision that at the hearing the court shall only hear “relevant” evidence. The applicant has the burden of proof which is a preponderance of the evidence. No modification or restoration shall occur unless a doctor’s certificate is also provided. The certificate must be within 120 days of filing the application or after the application but before the date of the hearing.

The ward may retain private counsel. That lawyer will be reimbursed from the ward’s estate if the court concludes that the attorney “had a good-faith belief that the ward had the capacity to retain the attorney’s services.”

These changes apply to all applications “in which a final determination on the application has not been made” by September 1, 1999.

17. **Section 695A: Family Members to Replace Agencies**

If a guardianship program or a governmental agency which is serving as guardian learns of a family member or friend who is willing and able to serve, they shall bring this to the attention of the court. If the court determines that such a person’s appointment is in the best interest of the ward, the court shall cause an application for appointment to be filed.

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410. See id.
18. **Sections 697 & 698: Reporting on Private Professional Guardianship Program Employees**^{413}

Section 697 requires the county clerk to submit the names of the employees of all private professional guardianship programs which it has certified to the Health and Human Services Commission.

19. **Section 743(j): Guardian of the Person Reports Without an Attorney**

This bill makes clear that a guardian of the person may file his report without the assistance of an attorney.

20. **Section 868(f): Tomorrow Fund: An Approved Investment**^{414}

The Texas Tomorrow Fund is an approved and listed investment for section 867 trustees if the trustee determines it is in the beneficiary's best interest.

21. **Section 875: Notice to Proposed Temporary Guardian**^{415}

Like section 633 for permanent guardianships, if the proposed temporary guardian is not the applicant, they must be given notice. This provision was included at the specific request of the Department of Human Resources.

22. **Sections 886-886F: POWs and MIAs**^{416}

Receiverships for POWs and MIAs are moved to the Civil Practice and Remedies Code.

C. **PROPERTY CODE: TRUST CODE**

1. **Section 113.018: Investment Agents**

Investment agents are added to the list of authorized agents that a trustee may employ. This is a conforming statute to the delegation statute (section 113.060).

2. **Section 113.026: New Charitable Beneficiary**^{417}

A trustee may designate a new charitable beneficiary upon default of the original, thus avoiding a court proceeding to select a new charity. The new beneficiary shall be similar in purpose to the original charity. If the settlor is living and capable of participating, the trustee shall consult with the settlor. Their decision, or disagreement, shall be reported to the Attorney General. If he does not agree with their decision, he may bring an

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action. If they have not agreed, he shall bring an action. This statute is effective immediately upon enactment but only applies to trusts created on or after the effective date.

3. **Section 113.060: Delegation of Trust Investments**

   Traditionally, the investment duty was nondelegable. Now a trustee may delegate and has a choice. First the statute says the trustee may simply delegate but will be liable for the conduct of the investment agent, just like any other agent. Or, if the trustee complies with the terms of the statute, the trustee will avoid liability for the errors or omissions of the investment agent. The requirements include notice to the beneficiaries at least thirty days before the trustee enters into the contract. The trustee must exercise the care of a prudent person in selecting the investment agent and establishing the scope and terms of the delegation. The trustee's investigation of the proposed agent's credentials include the agent's experience, performance history, financial stability, professional licenses, and any bonds or insurance.

   The investment agent must be subject to Texas court jurisdiction. The delegation agreement must include the investment agent's agreement to be subject to the trustee's investment standards under section113.056, and the agent must assume liability for failing to follow that standard. Finally, the trustee must periodically review the investment decisions of the agent.

   This act became effective September 1, 1999.

4. **Section 113.1021: Annuities & Life Insurance in Charitable Trusts**

   With this new statute, increases in the value of life insurance (before death) and deferred annuities (before annuitization) in charitable trusts are allocated to trust income. However, such increases are not subject to distributions until the trustee receives cash. This makes NIMCRUTs (net income makeup charitable remainder unitrusts; sometimes also referred to as "spigot trusts") much more attractive to donors.

   With this statute, when the annuity is cashed, the non charitable beneficiary (typically the donor) can receive the make up distributions. The trustee can make up the shortfalls from earlier years. Most significant, by deciding when to make withdrawals from the annuity, the trustee can control when distributions are made to the beneficiary.

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419. See Restatement (Second) of Trusts, § 171(h) (setting out the traditional prohibition of delegation rule, Restatement (Third) of Trusts §§ 227 and 171 (allowing delegation if the trustee acts with discretion and prudence). This new statute is based on Section 807 of the Uniform Trust Act, Draft, National Conference of Commissioners on Uniform State Laws.
421. For a discussion of NIMCRUTs and their uses, see "Estate Planning for the Large Estate," Kathryn Henkel, 1997 Advanced Estate Planning and Probate Course, section I.
This act was intended to be limited to charitable trusts. However, the restriction is only set out in the heading of the statute. Further, there is no definition of a charitable trust. It is unknown whether it would apply to a trust that has an incidental charitable beneficiary, such as an intervivos trust which is the primary testamentary document and has a small bequest to a charity.

The proponents of this bill made it applicable to existing trusts by having it apply to all allocations of principal and income after its September 1, 1999 effective date.

This is a default rule. To avoid it, this statute must be specifically negated.

5. Section 114.032: Virtual Representation

This bill extends the litigation concept of virtual representation to out of court releases and other contractual agreements. If there is no conflict, and if a minor or unborn or unascertained beneficiary’s interests are adequately represented, the contract will be binding on them even though they did not sign the agreement. This does not apply to agreements which modify or terminate a trust. This act became effective September 1, 1999.

6. Section 115.002: Trust Venue

The venue rules for trusts were substantially rewritten in 1999. Before this act, venue for an individual trustee was in the county of the trustee’s residence and for a corporate trustee it was in the county of the corporation’s principal office. With this amendment, venue for an individual trustee is in the county of the trustee’s residence; or any “situs of administration” of the trust for the past four years. For multiple trustees or a corporate trustee venue is any “situs of administration” of the trust for the last four years. An action against a corporate trustee may also be brought in the county of its principal office. “Situs of administration” means the location primarily responsible for dealing with the settlor and the beneficiaries.

The statute is a clear mandatory statute. For just and reasonable cause the court may transfer the proceeding. Reasonable cause includes, but is not limited to, location of records and convenience of the parties and witnesses. This act became effective September 1, 1999.

423. See Article 3 of the Uniform Trust Act, Draft, National Conference of Commissioners on Uniform State Laws, and in particular, sections 303, 304 and 305.
425. Compare to Section 205 of the Uniform Trust Act, Draft, National Conference of Commissioners on Uniform State Laws.
D. Property Code: Other

1. Section 5.011: Notice of Annexation

This statute requires notice by sellers of the possibility of annexation. It does not apply, inter alia, to transfers by a fiduciary in the course of administration; nor by one co-owner to another co-owner, or by a family member to a lineal descendant.

2. Sections 41.002 & 41.005: Urban Homestead Increased to Ten Acres

With the passage of the constitutional amendment in November of 1999, the urban homestead was increased from one acre to ten acres in one or more contiguous lots. In addition, the statute spells out the factors to consider in determining if property is urban or rural.

3. Section 42.002(a) (House Bill 1805): Life Insurance Exemption

Life insurance is exempt from creditors under this section and under § 21.22 of the Insurance Code. This Property Code provision has a $30,000/$60,000 (individual/family) limitation and the Insurance Code has no limitation. As a result of this apparent conflict, some bankruptcy courts have held that the cash value of a life insurance policy counts toward the $30,000/$60,000 limitation. By eliminating this reference, the unlimited provision of the Insurance Code will control. This does not repeal the life insurance exemption.

4. Section 42.0021(a): Roth IRAs

With this act, Roth IRAs are exempt as well as traditional IRAs. The effective date says the exemption applies to all contributions made before, on or after the date of the act.

5. Section 142.004(a): Tomorrow Fund in 142 Trusts

The Tomorrow Fund is an approved investment for Section 142 trusts.

6. Sections 142.008 & 142.009: Structured Settlements

This bill sets out the procedures for establishing a structured settlement for a minor or incapacitated person.

427. See Tex. S.B. 496, 76th Leg., R.S. (1999); see also Senate Joint Resolution 22.
E. Family Code


These provisions were a last minute amendment in the Senate to a house bill. They codify the rules for measuring reimbursement when one estate makes financial contributions to another. For example, community funds are used to build an apartment house on a husband’s separate property lots; or community funds are used to pay down the mortgage on the separate property of the wife.

The statute is phrased in terms of the community estate making contributions to separate property. However, in Section 3.404 the same principals are extended to all financial contributions between the various estates: his separate, her separate, their community. This bill made no provision for community time, toil, and labor contributed to separate property.

The statute provides that such contributions create an “equitable interest” that does not create an ownership interest but rather gives rise to a “claim . . . which matures on the termination of the marriage.” The amendment also provides that enhancement is the measure when community contributions discharge debt on separate property. The section on debt retirement actually provides a formula.

The formula says the equitable interest is calculated by multiplying the ‘net enhanced value’ (not defined) by the ‘sum’ (sic) created by dividing

1. the total amount of the payments made by the community estate to reduce the principal of the debt on the separate property; by
2. the sum of
   (A) the amount computed under Subdivision (1);
   (B) the total amount of the payments made by the separate estate to reduce the principal on the debt; and,
   (C) the total amount of any additional amount spent by the separate estate to acquire the interest in the property.

The statute authorizes a court to impose an equitable lien. Unfortunately, it says a court “shall impose an equitable lien . . .” The amendment affirms the inception of title doctrine.

Finally, it eliminates offsets for “use and enjoyment during the marriage.” For example there shall be no offset for living in the home. However, it is not clear if it also applies to income generated by the property. It is assumed that this language was carefully selected and used to deal with the frequent problem of the courts holding that living in the house is an offset.

432. They were amendments to Tex. H.B. 734 which allows Texans to convert separate property to community property, see the Texas Family Code section § 4.201.
433. See Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985); see also Penick v. Penick, 763 S.W.2d 194 (Tex. 1988).
Financial contributions for improvements are not controlled by the formula. In those situations, the value of the improvements on dissolution of the marriage is the measure.

The amendment is effective September 1, 1999. It goes on to say it applies to suits for dissolution pending on September 1, 1999 or filed on or after that date. Some observers have suggested that this means this amendment only applies to actions for divorce and not to probate proceedings. There is no legislative history to suggest that distinction.

There has been substantial criticism from lawyers about this statute. As a result, the legislative author has assembled a study committee of family law and probate attorneys to study the statute and make recommendations for the coming session.

2. Section 4.201: Family Harmony Bill (aka “The Bill Formerly Known as the Transmutation Bill”)435

With the passage of the enabling Constitutional Amendment436 at the November 1999 election, Texans for the first time are able to change separate property to community by written agreement.

All other community property states can already do this. Currently separate property can only be converted to community by co-mingling. Texans may want to do this for a variety of reasons including to maximize use of the unified credit. If one spouse holds most of the assets as separate property, there is a risk of losing unified credit.437 If one spouse has less than the unified credit amount and dies first, his or her unified credit would be lost. This can be avoided by giving to that spouse sufficient property to reach the unified credit amount. Also, if separate property is converted to community, both halves enjoy a step up in basis on the death of the first spouse. In many harmonious families, tracing of separate property is an unnecessary expense. Conversion to community can eliminate that process and its attendant costs.

There was opposition to this bill, primarily from the Family Law Section of the State Bar and its members. They were concerned that people would convert their separate property to community and have regrets upon divorce. That is a legitimate concern and one that has to be carefully considered before entering into any such arrangement. Proponents of the bill point out that converting to community is much less draconian than the existing alternatives. A gift of separate property to the other spouse which is then the separate property of donee spouse is not subject to division by the divorce court. The donor spouse has no chance of recovering it on divorce, nor is it as drastic as the currently permitted practice of converting community to separate. Again, such separate property

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436. See House Joint Resolution 36.
437. In 2000, a person may give away or die holding, or a combination of the two, $675,000 without incurring any tax, see I.R.C. § 2001. That amount is increasing until 2006 when it will reach $1,000,000.
is not available for division on divorce. In addition, the spouses, even if they agree, could not (prior to the constitutional amendment) convert it back to community.

There was also concern that any conversion to community property exposed the converted property to an increased range of debts. However, if the property is maintained as the sole management community of the contributing spouse, the increase in range of liabilities is limited to tort claims.

This bill became effective for agreements entered into on or after January 1, 2000.

F. Civil Practice & Remedies

1. Section 16.004(a): Limitations for Fraud & Breach of Fiduciary Duties

This statute clarifies existing law and declares that actions for fraud and breach of fiduciary duties have four year statutes of limitations. According to the legislative history, this does not change the current discovery rule. Finally, it states that it is not intended to effect the current two year statute for breaches of the duty of good faith and fair dealing in insurance contracts. The bill says it is a clarification of existing law and does not state its effective date. Presumably, it is effective immediately and applies to all pending actions.

2. Section 37.005: Declaratory Judgments for Independent Personal Representatives Final Accounts

This section has been expanded to clearly cover independent executors and administrators. In addition, it specifically authorizes a court to declare the legal rights of independent executors or administrators regarding settlement of accounts and fiduciary fees. This is a companion provision to the release of independent personal representatives under Texas Probate Code sections 149D-G. This became effective September 1, 1999, but applies only to estates of persons dying after that date.

3. Section 64.101 - .108: POWs & MIAs

The receivership provisions for POWs and MIAs that were in the Texas Probate Code are now in the Civil Practice and Remedies Code.

4. Sections 71.012 & 71.022: Certain Litigation Without Ancillary Letters

If a foreign personal representative complies with Texas Probate Code § 95, then he does not have to obtain ancillary letters under Texas Probate Code § 105 to pursue a wrongful death or survival action.

5. Sections 137.001 - .008, .0010: Advance Directives

If a physician is unwilling to comply with a directive, he must use reasonable efforts to transfer the patient. A physician may use treatment contrary to an advance directive if those instructions have not reduced the severity of the behavior.

G. Finance Code: Article 1, Section 1.001, Title 3, Chapter 201: Interstate Banking Bill

This contains the same venue provisions found in House Bill 2317 amending the trust code. It makes several changes to the Texas Probate Code regarding foreign corporate executors and administrators which have been set out above. Finally, it adds a new Chapter 9 to the Texas Trust Company Act.

H. Government Code

1. Section 21.009(2): Brazoria County Courts at Law

The reference to Brazoria County Courts at Law being statutory probate courts was repealed. Those courts no longer have the jurisdiction or powers of a statutory probate court.

2. Section 25.1802(a): Nueces County Courts at Law

Also, the statutory probate court jurisdiction of Nueces County Courts at Law was repealed.

3. Section 25.00221: Statutory Probate Courts Intra County Transfers

This act allows transfers of actions by a statutory probate court to another statutory probate court or to another court having jurisdiction. However, the statute is limited to courts within the same county.

4. Section 25.0003: Probate Jurisdiction of Statutory County Courts

Statutory county courts do not have statutory probate court jurisdiction.

445. See id.
5. **Section 25.1034(j): Harris County Case Assignment**\(^{448}\)

In Harris County, the clerk is now to assign and docket, “at random,” matters and proceedings in the Probate Courts as follows: Statutory Probate Court No. 1 30%, Court No. 2 30%, Court No. 3 20%, and Court No. 4 20%.

6. **Section 25.2651: Multi County Statutory Probate Courts**\(^{449}\)

This statute allows several counties to voluntarily band together to establish a multi-county statutory probate court.

7. **Section 54.601: Probate Masters**\(^{450}\)

This bill will allow statutory probate judges, with the consent and funding of the county commissioners, to appoint masters. This bill does not apply to Dallas or Harris Counties.

8. **Section 81.101: Unauthorized Practice of Law**\(^{451}\)

This bill is in response to an injunction entered against Quicken by a Federal Court in Dallas.\(^{452}\) In that case, Judge Barefoot Sanders said that Quicken’s Family Lawyer program was the unauthorized practice of law. This bill reverses that holding; it says producing and selling such a program is not the unauthorized practice of law. However, it goes on to say, in less than crisp language, that this does not authorize anyone (for example bankers, real estate agents or insurance salesmen) to use any programs or forms to practice law. It appears to be merely an acknowledgment of the right to act pro se.

This statute does not deal with the liability of Quicken or any other provider, it merely says they are not practicing law. In addition, this probably does not finally resolve the question.\(^{453}\) Given the importance of the principals involved, the first amendment, a state’s right to regulate the practice of law and the advent of the computer and the internet, this is more likely the beginning of this problem rather than the end.

9. **Section 466.410: Lottery Prize Assignment**\(^{454}\)

This bill allows the assignment of lottery prizes. However, if there is an IRS ruling or court determination that such provision causes an immediate income tax for those who do not assign their lottery prize, the right of

\(^{451}\) See SB 764, 76th Leg., R.S. (1999); see also Tex. H.B. 1507, 76th Leg., R.S. (1999).
\(^{453}\) See In re Nolo Press/Folk Law, Inc., 991 S.W. 2d 768 (Tex. 1999) (discussing who controls the practice of law: the Texas Supreme Court or the Texas Legislature).
assignment shall cease. This bill also makes unclaimed lottery prizes available for indigent health care.

10. Section 531.125: Guardianship Grants

Grants will now be available to pay guardians when there are no other funds available.

I. Health & Safety Code

1. Chapter 166: Advance Directives

This bill brings health care, living wills and out of hospital do not resuscitate provisions into one statute. The Directive to Physician form is set out at section 166.033. A person may now specifically provide that he or she shall not receive artificial hydration or nutrition. Provisions for Out of Hospital DNR (Do Not Resuscitate) Orders are set out at section 166.083. The actual forms are not in the statute, but rather are to be prepared by the state board. The Medical Power of Attorney is set out at sections 166.163 & 166.164. This replaces the current Health Care Power of Attorney. Existing Health Care powers are still valid, however, only Medical Powers should be executed after September 1, 1999.

2. Section 593.081: Trust Funds For State Eleemosynary Inmates

Currently trust funds of persons in state facilities is limited to $50,000. This statute raises that amount to $250,000.

3. Sections 711.002(g) & (j): Inscriptions on Grave Markers

Texans can now provide in advance what is to be placed on their grave markers. There is now also a presumption that a married woman wants her grave marker to reflect the last name she used.

J. Insurance Code: Article 1.14-1A, Section 7: Charitable Gift Annuities

Charitable gift annuities are not subject to the requirements applied to insurance companies in the issuance of annuities. Further, charitable gift annuities are not subject to the deceptive trade practices act (Business and Commerce Code, sections 15.05, 17.46 and 17.50(a)(3)).

K. Local Government Code Section 118.052

This bill eliminates the $3 for the first page and $2 fee structure for probate filings. Instead there is now a $45 fee for original filings (includ-
ing the "additional, special fee" of $5), a $25 for annual and final ac-
countings, a $10 for annual and final reports of guardians of the person, a
$25 for applications for sale of real or personal property, $2 for claims,
and a $40 for adverse actions.

In addition, if you file your inventory after 120 days there is a charge of
$25. There continues to be a $3 charge for approving and recording the
bond and $2.00 for administering the oath.

L. Non-Profit Corporation Act (Art. 1396-2.31 V.A.T.S.)
Charitable Immunity

These bills state that a charity is immune from any suit claiming that a
charity who is acting as a trustee is engaging in the trust business contrary
to the Texas Trust Company Act. Also, it provides for interlocutory ap-
peals if the defense of immunity is not granted.

M. Transportation Code Section 501.031

Allows registration of motor vehicles, including mobile homes, to be
held in right of survivorship form. Previously, the right of survivorship
form could only be used by spouses.

N. Trust Company Act: Multistate Trust Business, VATS
342A-9.001 et seq.

A trust may apply the laws of another state if the instrument does not
provide otherwise and the trust, or its subject matter, bears a reasonable
relationship to this state and to another state, or the "trust institution"
and its "affected client" agree to the application of the laws of "the other
state." However, Trust Code Section 113.052 (restrictions on loans by
or to a trustee) and Section 113.053 (purchases or sales by a trustee) will
still apply and cannot be overridden by foreign law.

O. Texas Constitution: Article VII, Section 11 b Prudent
Investor Standards for the Permanent
University Fund

This constitutional amendment allows the Permanent University Fund
to now manage its assets according to the prudent investor rules rather
than the traditional prudent man rule.

In particular, this constitutional amendment says the Permanent Uni-
versity Fund shall be invested pursuant to the prudent investor standard.
All investments shall be taken into consideration, not single investments.

461. See Tex. H.B. 2066, 76th Leg., R.S. (1999); see also Tex. H.B. 3276, 76th Leg., R.S.
(1999).
464. See Trust Company Act § 9.005(b).
465. See Trust Company Act § 9.005(c).
466. See House Joint Resolution 58.
Available funds shall be based on total return on all investments. The amount of distributions for the available fund shall be consistent with a stable and predictable stream of annual distributions, maintaining the purchasing power of the fund and its annual distributions, and the annual distributions to the available fund shall not exceed 7% of the fair market value of the permanent university fund investment assets.
SECTION 2. Chapter III, Texas Probate Code, is amended by adding Section 52A to read as follows:

Sec. 52A. FORM OF AFFIDAVIT OF FACTS CONCERNING IDENTITY OF HEIRS.

An affidavit of facts concerning the identity of heirs of a decedent may be in substantially the following form:

AFFIDAVIT OF FACTS CONCERNING THE IDENTITY OF HEIRS

Before me, the undersigned authority, on this day personally appeared ____________ ("Affiant") (insert name of affiant) who, being first duly sworn, upon his/her oath states:

1. My name is ____________ (insert name of affiant), and I live at ____________ (insert address of affiant's residence). I am personally familiar with the family and marital history of ____________ ("Dcedent") (insert name of decedent), and I have personal knowledge of the facts stated in this affidavit.

2. I knew decedent from ____________ (insert date) until ____________ (insert date). Decedent died on ____________ (insert date of death). Decedent's place of death was ____________ (insert place of death). At the time of decedent's death, decedent's residence was ____________ (insert address of decedent's residence).

3. Decedent's marital history was as follows: ____________ (insert marital history and, if decedent's spouse is deceased, insert date and place of spouse's death).

4. Decedent had the following children: ____________ (insert name, birth date, name of other parent, and current address of child or date of death of child and descendants of deceased child, as applicable, for each child).

5. Decedent did not have or adopt any other children and did not take any other children into decedent's home or raise any other children, except: ____________ (insert name of child or names of children, or state "none").

6. (Include if decedent was not survived by descendants.) Decedent's mother was: ____________ (insert name, birth date, and current address or date of death of mother, as applicable).

7. (Include if decedent was not survived by descendants.) Decedent's father was: ____________ (insert name, birth date, and current address or date of death of father, as applicable).

8. (Include if decedent was not survived by descendants or by both mother and father.) Decedent had the following siblings: ____________ (insert name, birth date, and current address or date of death of each sibling and parents of each sibling and descendants of each deceased sibling, as applicable, or state "none").
9. (Optional.) The following persons have knowledge regarding the decedent, the identity of decedent's children, if any, parents, or siblings, if any: ____________ (insert names of persons with knowledge, or state "none").

10. Decedent died without leaving a written will. (Modify statement if decedent left a written will.)

11. There has been no administration of decedent's estate. (Modify statement if there has been administration of decedent's estate.)

12. Decedent left no debts that are unpaid, except: ____________ (insert list of debts, or state "none").

13. There are no unpaid estate or inheritance taxes, except: ____________ (insert list of unpaid taxes, or state "none").

14. To the best of my knowledge, decedent owned an interest in the following real property: ____________ (insert list of real property in which decedent owned an interest, or state "none").

15. (Optional.) The following were the heirs of decedent: ____________ (insert names of heirs).

16. (Insert additional information as appropriate, such as size of the decedent's estate.)

Signed this ____ day of ____________, ____.

__________________________
(signature of affiant)

State of ____________

County of ____________

Sworn to and subscribed to before me on ____________ (date) by ____________ (insert name of affiant).

__________________________
(signature of notarial officer)

(Seal, if any, of notary)

__________________________
(printed name)

My commission expires: ______