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Wills and Trusts

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THIS article discusses legislative and judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate-planning matters during the Survey period from November 2, 2004 through November 1, 2005. The reader is warned that not all legislation enacted nor cases decided during the Survey period are presented, and not all aspects of each cited statute or case are analyzed. You must read and study the full text of each statute or case before relying on it or using it as precedent. The discussion of most cases includes a moral that is the important lesson to be learned from the case. By recognizing situations that have resulted in time-consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

I. INTESTACY

The Texas 2005 Legislature made a significant change with respect to the law governing inheritance by a person who is adopted as an adult. Under prior law, there was no difference between the inheritance rights of a person who was adopted as a minor and a person who was adopted after reaching adulthood; that is, both types of adopted individuals inherited not only from their adoptive parents but also retained the right to inherit from their biological parents. With regard to intestate individuals who die on or after September 1, 2005, the adopted adult may no longer inherit from or through his or her biological parent.[1]

1. TEX. FAM. CODE ANN. § 162.507(c) (Vernon Supp. 2006); TEX. PROB. CODE ANN. § 40 (Vernon Supp. 2006).

This amendment may lead to an absurd result. For example, assume that Mother and Father have a child in 1985. Mother dies in 1990 and Father marries Step-Mother in 1995. As time passes, Child and Step-Mother become close, and shortly after Child reaches age eighteen, Step-Mother adopts Child. If Father dies intestate, Child will not be considered an heir because the statute provides that an adopted adult may not inherit from a biological parent.

II. WILLS

A. Testamentary Intent

In re Estate of Steed[2] demonstrates that a jury's finding of lack of testamentary intent must be supported by evidence that creates more than a mere suspicion that a testator did not have intent to execute a will. In this case, the jury determined that the testator's will was invalid because he had no intent for the instrument to be his will. The appellate court reversed, holding that the jury's finding of lack of testamentary intent was so against the great weight and preponderance of the evidence that it was clearly wrong and unjust.[3]

The court studied the will itself and found that it was brimming with testamentary intent. The testator was a lawyer who had a significant wills practice. The testator's holographic will was labeled as a "last will and testament," made a variety of gifts to his wife and family, and appointed his wife as the independent executrix of the estate. The only evidence negating the testator's testamentary intent was the testimony of individuals who simply "thought" that the testator did not mean the document to be his will. There was no evidence of any unusual or extraordinary circumstances when the testator executed the will that would cast doubt on his intent.[4]

B. Testamentary Capacity

Merely being old or acting in an eccentric or bizarre manner is not enough to conclusively show lack of testamentary capacity. Further, if the jury finds that the testator had testamentary capacity, a will contestant will have a difficult time showing that the finding was so against the great weight and preponderance of the evidence to be clearly wrong and unjust. In the case of *In re Estate of Trawick*,[5] the testatrix executed her will, naming her niece as the sole beneficiary and executor. Her grandchildren filed a will contest claiming that the testatrix lacked testamentary capacity or was subject to the niece's undue influence. The jury determined that the testatrix had testamentary capacity, and the

2. 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. denied).
3. *Id.* at 802, 812-14.
4. *Id.* at 812-14.
5. 170 S.W.3d 871 (Tex. App.—Texarkana 2005, no pet.) (addressing the testamentary capacity issue "in the interest of justice" even though the contestants had not properly briefed the issue).

grandchildren appealed.[6]

The appellate court affirmed. The court determined that the evidence was factually sufficient to support the jury's finding of testamentary capacity. The court began its analysis by explaining that because the grandchildren contested the will after its admission to probate, they had the burden to show lack of capacity and to show that the jury's finding was against the great weight and preponderance of the evidence. The court recognized that there was some evidence that would tend to show lack of capacity. For example, the testatrix was ninety-two years old, spoke of deceased persons as if they were still alive, sometimes was confused about the date of her beauty-shop appointment, hid items in her home, and sometimes had difficulty recognizing people. But, the court determined that the jury was free to decide that testimony of the lawyer who drafted the will, the attesting witnesses, and notary, along with the testimony of her friends and acquaintances that the testatrix appeared to know what she was doing had greater weight.[7]

C. FORMALITIES

1. Execution

In the case of *In re Estate of Steed*,[8] a computer file on the testator's computer contained a document labeled as the final draft of his will. No signed copy of this will was presented to the court. The jury determined that the testator never executed this will.[9]

On appeal, the court reversed, holding that the jury's finding was against the great weight and preponderance of the evidence. The court recognized the existence of a variety of suspicious circumstances, such as the fact that the hard drives from the testator's computer were removed by the proponents of the alleged will after the testator died and were not recovered until several months later. However, there was testimony from two witnesses and a notary that the testator had executed this will, although the notary's record book did not reflect the execution of the self-proving affidavit. The court's reversal, however, does not mean that this will is valid or that the elements of proving a lost will were satisfied. Instead, the court merely determined that the jury's finding that the testator did not execute the will was improper.[10]

2. Attestation

In re Estate of Iversen[11] reinforces the fact that Texas has not adopted

6. *Id.* at 873.
7. *Id.* at 873, 876-80. The court also rejected the grandchildren's claim that an expert's testimony was improperly admitted because any objections were waived by their failure to object timely. *Id.* at 876.
8. *In re* Estate of Steed, 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. denied).
9. *Id.* at 814.
10. *Id.* at 815-16.
11. 150 S.W.3d 824 (Tex. App.—Fort Worth 2004, no pet.).

the "substantial compliance" standard of the Uniform Probate Code.[12] The probate court admitted the testator's typed, notarized will into probate even though it was unwitnessed. The court determined that the affidavits of two individuals who saw the testator sign the will were sufficient to satisfy the attestation requirement because the will was in "substantial compliance" with Texas Probate Code section 59(a).[13]

The appellate court reversed. The court examined Probate Code section 59(a) and determined that its requirements were straightforward; that is, a non-holographic will must be attested to by at least two witnesses "who subscribe their names thereto in their own handwriting . . . ." The court recognized that the notary could be counted as an attesting witness, but that the will would still be one witness short. The court also explained that the "substantial compliance" language of the Texas Probate Code applies to the form of the self-proving affidavit, not the will itself. Accordingly, the testator died intestate.[14]

3. *Holographic Joint Will*

The court in *In re Estate of Capps*[15] followed the traditional Texas approach of treating non-holographic material to be mere surplusage if it does not impact the dispositive scheme of the testatrix. A handwritten will purported to dispose of two individuals estates. The evidence showed that the substance of the will was entirely in the handwriting of one of these two individuals. The appellate court sidestepped the issue of whether this will was an attested will (that is, whether the signature of a co-testatrix could be considered as the signature of a witness) and determined that the document was the holographic will of the scribing testatrix. The signature of the co-testatrix and the notary, as well as the notary's jurat, were surplusage. Consistent with prior Texas law, non-holographic surplus material did not detract from the holographic character of the will.[16]

D. Self-Beneficiary Wills

Texas Probate Code section 58b was originally enacted in 1997 to void testamentary gifts made to an attorney or someone closely connected to the attorney who prepared the will. Despite the laudable intentions underpinning this statute, it was rather inartfully drawn and has required several amendments over the years. In 2005, the key amendment was to the list of testamentary gifts that are deemed void unless they fall within one of the exceptions (which have not changed).[17] Below is the list of

12. Unif. Prob. Code § 2-503 (1990).
13. *Iversen*, 150 S.W.3d at 825-26.
14. *Id.* at 826.
15. 154 S.W.3d 242 (Tex. App.—Texarkana 2005, no pet.).
16. *Id.* at 243, 246-47. The more interesting, unaddressed question is whether a co-testatrix's signature on a joint will may function as the signature of a witness.
17. Tex. Prob. Code Ann. § 58b (Vernon Supp. 2006).

void gifts assuming that the will was executed on or after September 1, 2005:

- Attorney who prepares the will,
- Attorney who supervises the preparation of the will,
- Parent of the attorney,
- Descendent of the attorney's parent (e.g., child, grandchild, brother, sister, niece, nephew, etc.),
- Employee of the attorney, and
- Spouse of any of the above individuals.[18]

E. Conditional Wills

In re Estate of Perez[19] provides an example of a court giving effect to a condition triggering the effectiveness of a will. The testator's will included the following language: "because I am sick and waiting for a heart surgery, and providing ahead of any emergency, I make the following disposition to be fulfilled in case my death occurs during the surgery."[20] The testator did not die during the surgery. Instead, he died later at his sister's home. The lower court admitted the will to probate and denied the contestants' motion for a summary judgment, which argued that the will was not entitled to probate.[21]

The appellate court reversed. The court explained that the effectiveness of the testator's will was conditioned on his death during the surgery. Because he survived the surgery and died later, the will was ineffective. The court recognized that statements of the reasons why a person is executing a will are normally deemed inducements, not conditions. However, in this case, the testator's language was unambiguous that his will was to be effective only if he died during the surgery.[22]

F. Effect of Divorce

In the case of *In re Estate of Nash*,[23] the testator's will left his entire estate to his wife, but if his wife failed to survive him by thirty days, the entire estate was to pass to his step-daughter. The testator later divorced his wife but did not change his will. The wife outlived the testator by more than thirty days. The trial court determined that the step-daughter was entitled to the testator's estate, because as a result of the divorce, the wife is treated as predeceasing the testator.[24] Thus, the condition of the step-daughter's gift was satisfied; that is, legally, the wife did not outlive the testator by thirty days.[25]

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18. *Id.* § 58b(a).
19. 155 S.W.3d 599 (Tex. App.—San Antonio 2004, no pet.).
20. *Id.* at 601.
21. *Id.* at 600.
22. *Id.* at 601-02.
23. *In re* Estate of Nash, 164 S.W.3d 856 (Tex. App.—Beaumont 2005, pet. granted).
24. *See* Tex. Prob. Code Ann. § 69 (Vernon 2003).
25. *Nash*, 164 S.W.3d at 857.

The appellate court reversed. The court recognized that Texas Probate Code section 69 provides that the divorce causes the will to "be read as if the former spouse failed to survive the testator."[26] However, the court explained that this reading of the will is only with respect to provisions "in favor of the testator's former spouse."[27] Because the alternative gift was not to his wife, the wife was not legally dead with respect to the condition on the step-daughter's gift. Since the wife was biologically alive thirty days after the testator's death, the condition on the step-daughter's gift was not satisfied. The testator's will lacked another alternative gift, thus, the testator's estate passed by intestacy to his mother and brother.[28]

This case shows that a testator who makes a testamentary gift to a spouse should include express instructions in the will regarding the disposition to be made of that property if he or she is later divorced, paying particular attention to gifts that are conditioned on the spouse predeceasing the testator. Alternative gifts, unless to individuals who would also be ex-relatives whom the testator would not want to benefit if a divorce occurred, should state, "If [primary beneficiary] does not survive me by [number] days *or is otherwise unable to take under this provision of my will*, I leave this property to [alternative beneficiary]."

G. Ambiguity

Despite the clarity of language that a testator selects, individuals unhappy with that language may nonetheless claim that the language is ambiguous. For example, in *Rogers v. Veigel Inter Vivos Trust No. 2*,[29] a dispute arose as to whether certain gifts in the testator's will were (1) outright gifts of life estates or (2) gifts in trust of life interests. The court examined the face of the will and found that the testator's words were unambiguous and not susceptible to more than one construction. Thus, extrinsic evidence was not admissible to vary the plain meaning of the testator's language under the seminal Texas Supreme Court holding in *San Antonio Area Foundation v. Lang*.[30] The testator clearly explained that the gifts were for the beneficiaries' "lifetime" and referred to the gifts as granting "a life estate." In addition, the testator created trusts in the will by using trust language and naming trustees.[31]

H. Exoneration

Texas had long followed the doctrine of exoneration; that is, debts on specifically gifted property were paid from other estate assets so that the

26. *Id.* at 861, 858 (quoting Tex. Prob. Code Ann. § 69).
27. *Id.* at 860 (quoting Tex. Prob. Code Ann. § 69(a)).
28. *Id.* at 857, 861. The court may have been attempting to reach the result that it thought the testator would have wanted because relationships between former stepchildren and stepparents can be problematic. The author wonders if the same result would have been reached if the alternative gift had been to one of the testator's relatives or a charity.
29. 162 S.W.3d 281 (Tex. App.—Amarillo 2005, pet. denied).
30. 35 S.W.3d 636, 640 (Tex. 2000).
31. *Rogers*, 162 S.W.3d at 284-87.

beneficiary received the asset unencumbered.[32] The doctrine has been abolished for wills executed on or after September 1, 2005. A specific gift now passes subject to each debt secured by the property that exists on the date of the testator's death.[33]

The statute contains two special rules. First, the testator may expressly provide in the will for the debts against a specific gift to be exonerated. Note, however, that a general provision in the will stating that debts are to be paid is not sufficient. Second, there is a new provision addressing the situation in which a secured creditor elects matured secured claim status as discussed later in this Article.[34]

I. UNDUE INFLUENCE

1. Overturning Jury Determination of Undue Influence

Although difficult, it is possible on appeal to overturn a jury's finding that a testator was subject to undue influence. For example, in the case of *In re Estate of Steed*,[35] the jury determined that the testator's will was invalid because he was subject to undue influence. The appellate court reversed and held that the evidence was factually insufficient to support the jury's finding.[36]

The appellate court began its analysis by stating the three-prong test of undue influence adopted by the Texas Supreme Court: (1) the existence and exertion of an influence (2) that subverted or overpowered the testator's mind when he executed the will (3) so that the testator executed a will that he would not have executed but for the influence.[37] The court carefully examined the evidence, including the testator's statements to others that he wrote the will to pacify his wife, the primary beneficiary, to get her off the "warpath," and to curb her spending. But, when coupled with other evidence, such as that the testator was a lawyer and accomplished businessman whose wife often lived over 500 miles away from him, he wrote the will while alone, and he sent it to his wife in the mail, there was insufficient evidence to support a jury finding of undue influence.[38]

2. Summary Judgment of Lack of Undue Influence

A contestant alleging the invalidity of a will due to undue influence must be able to produce evidence that undue influence was exerted. A mere dissatisfaction with the disposition of property is not enough. For example, in *Cotten v. Cotten*,[39] two brothers, Neel and George, disagreed

32. *See* Currie v. Scott, 187 S.W.2d 551 (Tex. 1945).
33. TEX. PROB. CODE ANN. § 71A(a) (Vernon Supp. 2006).
34. *Id.* § 71A(b)-(c); *see* discussion *infra* Part III.J.2.
35. 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. denied).
36. *Id.* at 812.
37. *Id.* at 807 (citing Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963)).
38. *Id.* at 807-10.
39. 169 S.W.3d 824 (Tex. App.—Dallas 2005, pet. denied).

over the validity of their mother's will. At issue in this litigation was whether George exercised undue influence over their mother when she executed her estate-planning documents, including a will, trust, and family limited partnership. The trial court granted summary judgment to George, determining that Neel had failed to raise a genuine issue of material fact on his undue-influence claim.[40]

The appellate court affirmed. The court explained that a court may not infer undue influence by opportunity alone; there must be evidence to show the exertion of undue influence. Evidence showed that their mother was eighty-four years old and had survived a stroke. Although this evidence may show susceptibility to influence, by itself, it is not enough to show undue influence—especially in this case, because the testator was active, had just returned from a trip to Alaska, and was very engaged in the estate-planning process. The court rejected a variety of circumstances Neel raised, explaining that they did not demonstrate undue influence. For example, the court explained that the fact that George's daughter lived with the testatrix did not create a fiduciary relationship between George and his mother. Also, the fact that George benefited more than Neel from the estate plan was easily explained by the strained relationship between Neel and his mother.[41]

J. Waiver

To avoid assertions of waiver, proponents of a will should be certain to plead and obtain findings to support the will, even if they think that the will may have been revoked by a later will. In the case of *In re Estate of Steed*,[42] the probate court was presented with three wills. Two of the wills were the subject of controversy, and the third, the earliest of the wills, was undisputed. The trial court determined that, as a matter of law, the probate of the earliest will was waived. The appellate court reversed and held that there was no support in the record for a waiver. The parties took no action to abandon this will, and because the will was self-proved, it required no action from the jury to validate it.[43]

K. Lost Will

1. *Rebutting Revocation Presumption*

In re Estate of Capps[44] shows that the court may be willing to stretch the evidence to uphold a lost will if the court truly believes that the decedent intended to die testate. In this case, the testatrix's will could not be found, so the will proponents were required to follow the requirements of the Texas Probate Code and prove (1) that the original was duly executed, (2) the reason why the original cannot be produced that satisfies

40. *Id.* at 826.
41. *Id.* at 827-28.
42. 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. denied).
43. *Id.* at 802, 817.
44. 154 S.W.3d 242 (Tex. App.—Texarkana 2005, no pet.).

the court that it cannot be produced by any reasonable diligence, and (3) the contents of the will by testimony of a credible witness who read the will or heard it read.[45] The trial court determined that the proponents proved these three elements, and the contestants appealed.[46]

The appellate court affirmed. The court admitted that the original will was last seen in the testatrix's possession, which raised a presumption that she destroyed it with the intention to revoke. But, the court determined that there was sufficient evidence to rebut the presumption by a preponderance of the evidence. For example, the testatrix arranged for the principal beneficiaries to have copies of the will, at a church meeting she announced her intention to leave her property as set forth in the will, she continued to have affection for the beneficiaries named in the will, and she was the type of person who would have told others if she had revoked the will.[47]

2. *Evidence to Show Will Has Been Lost*

In the case of *In re Estate of Berger*,[48] the beneficiary of an alleged will attempted to prove that the decedent executed a valid attested will. The court granted a summary judgment against the beneficiary, stating that she did not produce sufficient evidence to raise a fact issue regarding the existence of the will. The appellate court reversed.[49]

Rule of Evidence 1004 permits the admission of other evidence of a writing if the original has been lost or destroyed. The court examined evidence, such as the beneficiary's affidavit that she saw the will four days before the decedent's death as well as after the decedent's death. She also remembered seeing the last page of the will and that it contained the notarized signatures of the decedent and two witnesses. The court held that there was more than a scintilla of evidence that the will was lost, which precluded a summary judgment against the beneficiary.[50]

L. Family Settlement Agreements

To be enforceable, a family settlement agreement must explain how the decedent's estate is to be distributed.[51] The problems that result from failing to remember this basic principle are evident from the case of *In re Estate of Halbert*.[52] The testatrix died, leaving behind three instruments with disparate distribution schemes that could be deemed to be her last will. A dispute arose as to which of these documents should be probated as her will. The beneficiaries of each potential will signed a mediated

45. Tex. Prob. Code Ann. § 85 (Vernon 2003).
46. *Capps*, 154 S.W.3d at 243-44.
47. *Id.* at 245-46.
48. 174 S.W.3d 845 (Tex. App.—Waco 2005, no pet.).
49. *Id.* at 846, 849.
50. *Id.* at 849.
51. *See In re* Estate of Morris, 577 S.W.2d 748 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).
52. 172 S.W.3d 194 (Tex. App.—Texarkana 2005, pet. denied).

settlement agreement. Later, however, one of the beneficiaries disputed the validity of the settlement agreement and sought to have it declared unenforceable. The trial court held that the agreement was valid.[53]

The appellate court reversed. The court explained that the agreement not to probate the testatrix's will did not contain an alternative distribution scheme and thus was unenforceable. The court recognized that "[a] family settlement agreement is an alternative method of administration in Texas that is a favorite of the law."[54] However, an agreement not to probate a will must be accompanied by an agreement stating how the decedent's property is to be distributed. The court examined the settlement agreement and found that it contained neither an express nor implied distribution scheme, such as to probate one of the three wills or to have the testatrix's estate pass by intestacy.[55]

III. ESTATE ADMINISTRATION

A. STANDING

A person seeking to establish the right to inherit as a common-law spouse must make careful strategic decisions on how to proceed in order to make certain that he or she is not inadvertently precluded from pursuing the claim. For example, in the case of *In re Estate of Armstrong*,[56] the testator's daughter was appointed as the temporary administratrix of the testator's estate after she submitted an application to which she attached a copy of the testator's will. The alleged common-law wife ("ACLW") contested, asserting that the testator had revoked the will. The daughter agreed and thereafter claimed that the testator died intestate. She sought to be appointed as the administratrix and urged the court to determine heirship. Instead, the probate court appointed a third party as a successor temporary administrator because of the dispute over whether the testator was married to ACLW when he died. After complex procedural maneuvering, the probate court determined in a motion *in limine* that ACLW was not the testator's wife, was not an interested person with standing, and was not able to intervene in the case to dispute the payment of various estate expenses. The court also determined that she was precluded from presenting the issue of her marital status to a jury in the heirship proceeding. The court reasoned that the *in limine* finding that she was not married to the testator was conclusive for purposes of the heirship proceeding.[57]

After a careful review of similar Texas cases, the appellate court held that the probate court's determination of standing at the *in limine* hearing was a collateral matter to the issue of the propriety of the payment of administration expenses. Accordingly, this finding was not conclusive for

53. *Id.* at 195-96.
54. *Id.* at 199.
55. *Id.* at 201.
56. 155 S.W.3d 448 (Tex. App.—San Antonio 2004, no pet.).
57. *Id.* at 449-52.

purposes of the heirship proceeding and ACLW was not barred from seeking a jury trial in the heirship action.[58]

B. JURISDICTION

1. *Testamentary Trusts*

Amendments made in 2003 to Texas Probate Code section 5 caused confusion regarding the jurisdiction of a statutory probate court over testamentary trusts. Section 5(e), effective with regard to actions filed on or after September 1, 2005, makes it clear that a statutory probate court has concurrent jurisdiction with the district court in all actions involving a testamentary trust.[59]

2. *Actions by or against a Trustee*

Several recent cases had held that "[t]he mere fact that a plaintiff happens to be a trustee, however, does not transfer a case into one 'concerning trusts'" thereby giving a statutory probate court jurisdiction over the case.[60] Texas Probate Code section 5(e) was amended to reverse the effect of these cases with respect to an action filed on or after September 1, 2005. The section now provides that the statutory probate court has jurisdiction "in all actions by or against a trustee."[61]

3. *Pre-Contest Request for a Statutory Probate Court Judge*

As amended, Texas Probate Code section 5(b-1) permits a party to a probate case, pending in a constitutional county court, to file a motion for the assignment of a statutory probate court judge even *before* the matter becomes contested. If the matter is actually contested at a later time, the amendment requires the constitutional county court judge to grant the pre-contest motion and prevents the judge from transferring the case to a district court instead.[62]

The amendment also provides that if the constitutional county court judge had previously transferred the case to a district court using authority granted elsewhere (that is, not because of a contest), the party still has the right to have the matter assigned to a statutory probate court judge.[63]

4. *Sale of Property Not Completely Owned by Decedent*

Walker v. Walker[64] confirms that the probate court may issue an order to sell estate property even if an interest in that property is owned by

58. *Id.* at 455.
59. TEX. PROB. CODE ANN. § 5(e) (Vernon Supp. 2006).
60. *See* Mobil Oil Corp. v. Shores, 128 S.W.3d 718, 725 (Tex. App.—Fort Worth 2004, no pet.); *see also* Shell Cortez Pipeline Co. v. Shores, 127 S.W.3d 286 (Tex. App.—Fort Worth 2004, no pet.).
61. TEX. PROB. CODE ANN. § 5(e).
62. *Id.* § 5(b-1).
63. *Id.* § 5(b-1)(2).
64. 152 S.W.3d 220 (Tex. App.—Dallas 2005, no pet.).

someone other than the decedent. A mother, who died with a valid will, left her interest in a home equally to her two daughters (Pattie and Barbara), each of whom had already inherited a one-quarter interest from their father, who had previously died intestate. Pattie served as the independent executor but allegedly breached her fiduciary duties by living in the house without paying rent or compensating the estate for her use of the house. Barbara successfully had Pattie removed as the independent executor and secured the appointment of a third party as a dependent executor ("Executor"). Executor obtained court permission to sell the house. Pattie appealed, raising a variety of jurisdictional issues, including an assertion that the trial court lacked jurisdiction to order the sale of the house.[65]

The appellate court affirmed. Pattie claimed that Executor had no authority to sell the house and that the trial court lacked jurisdiction to issue an order to sell the house because only one-half of the house was in the mother's estate. The court examined the Texas Probate Code and case law and found nothing to support Pattie's claim that all joint owners must join in a partition request in order for the court to have jurisdiction to issue an order of sale. The court explained that the probate court's jurisdiction extended to the one-half interest that their mother did not own under Probate Code section 5A(b) because the partition action was incident to her estate.[66]

5. *Transfer to District Court from County Court*

When a district court receives a case transferred from a county court, the district court has jurisdiction to determine only the *contested* issues, not all issues remaining in the case. The importance of remembering this principle is shown by *Krumnow v. Krumnow*.[67] The testator's will was admitted to probate in a constitutional county court, and the executor duly qualified as the personal representative. Later, an application was filed to remove the executor from office and to have a successor appointed. The county court transferred the case to the district court under Texas Probate Code section 5(b). Initially, the district court declined to remove the executor but later removed the executor and appointed a successor. Subsequently, the executor filed a motion to have this order vacated, and the district court scheduled a hearing to resolve all matters involving the testator's will and inter vivos trust, including the appointment of a receiver. The district court denied the executor's motion and appointed a receiver. The executor appealed.[68]

The appellate court first examined whether the district court had jurisdiction to issue its orders. The court agreed that the district court had jurisdiction over whether the executor should be removed from office be-

65. *Id.* at 221-22.
66. *Id.* at 223-25.
67. 174 S.W.3d 820 (Tex. App.—Waco 2005, pet. filed).
68. *Id.* at 824-25.

cause this was a contested matter under Probate Code section 5(b) and was thus eligible for transfer from the county court to the district court. However, the district court lacked jurisdiction to appoint a successor personal representative. The district court had jurisdiction to resolve only the contested matter (whether to remove the executor), after which the case should have returned to the county court for further proceedings (the appointment of a successor personal representative). Accordingly, the court vacated the district court's appointment of a successor personal representative.[69]

C. Appellate Jurisdiction

1. *Bill of Review*

The trial court in *In re Estate of Davidson*[70] denied a bill of review under Probate Code section 31, but did not sever it from the underlying will contest. The moving party appealed. The appellate court dismissed the appeal and held that it lacked jurisdiction because the order denying the bill of review was not a final and appealable order. The court explained that the ultimate issue was whether the court's order admitting the will to probate should be set aside. In addition to the bill-of-review pleading, the will contestants also filed a traditional will contest under Probate Code section 93, which had not yet been decided.[71] Because the issues overlapped and the court had not yet ruled on all issues, the ruling on the bill of review was not a final and appealable order as required by *Crowson v. Wakeham*.[72]

2. *Conflicting Probate Applications*

The will proponents in the case of *In re Estate of Gomez*[73] attempted to probate the testator's will, which was executed in 1991. The contestants claimed that the testator executed a new will in 2000 that revoked the 1991 will. The proponents responded that the 2000 will was invalid because the testator lacked testamentary capacity and was subject to undue influence. The probate court agreed with the proponents that the 2000 will was invalid, but did not rule on the validity of the 1991 will. The contestants appealed but then sought to abate the appeal. The appellate court ordered briefing on the issue as to whether the probate court's order was appealable.[74]

The court held that the probate court's order was not appealable. The court began its analysis by quoting the test for determining whether a probate court order is appealable as set forth by the Texas Supreme Court in *Crowson v. Wakeham*:

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69. *Id.* at 825, 830.
70. 153 S.W.3d 301 (Tex. App.—Beaumont 2004, pet. denied).
71. *Id.* at 302, 304.
72. *Id.*; Crowson v. Wakeham, 897 S.W.2d 779, 783 (Tex. 1995).
73. *In re* Estate of Gomez, 161 S.W.3d 615 (Tex. App.—San Antonio 2005, no pet.).
74. *Id.* at 615-16.

> If there is an express statute . . . declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory.[75]

The *Gomez* court explained that Texas Probate Code section 83(a) governs the procedure to be followed if there is a second application for the probate of a will and the original application has not yet been heard; that is, "the court shall hear both applications together and determine what instrument, if any, should be admitted to probate."[76] This provision is an example of an "express statute" in the *Crowson* test and "controls the finality of a judgment when two competing will applications are pending because it dictates the procedure to be followed by the trial court."[77] Because the probate court had not yet ruled on the validity of the 1991 will, the court held that the judgment denying the application to probate the 2000 will was not yet appealable.[78]

D. Venue

1. Survival and Wrongful-Death Actions

In *Gonzalez v. Reliant Energy, Inc.*,[79] the Supreme Court of Texas makes it clear that venue for wrongful-death and survival actions is determined according to Texas Civil Practice and Remedies Code section 15.007, not the Texas Probate Code. In this case, the decedent was killed in a work-related accident in Fort Bend County. When he died, the decedent's residence was in Hidalgo County. Accordingly, under Texas Probate Code section 6, administration of the decedent's estate was opened in Hidalgo County. The court held that the proper venue for the administrator's wrongful-death claim was in Harris County—the county in which the decedent's employer had its principal place of business—because the venue provisions of Texas Civil Practice and Remedies Code section 15.007, which deals with actions by or against a personal representative for personal injury, death, or property damage, trump the applicable venue provisions of the Texas Probate Code.[80]

The court extensively analyzed the jurisdictional and venue provisions of the Probate Code. The court explained that the plain language of section 15.007 provides that its method of venue determination is superior to

75. *Crowson*, 897 S.W.2d at 783.
76. *Gomez*, 161 S.W.3d at 616 (quoting Tex. Prob. Code Ann. § 83(a) (Vernon 2003)).
77. *Id.*
78. *Id.* at 617.
79. 159 S.W.3d 615 (Tex. 2005). On the same day, the Supreme Court of Texas resolved a conflicting lower-court case involving similar facts by conditionally granting mandamus directing a probate court to vacate its order that had granted a transfer motion under Probate Code section 5B. *In re* Terex Corp., 159 S.W.3d 630 (Tex. 2005).
80. *Gonzalez*, 159 S.W.3d at 617, 621.

the Probate Code venue provisions. Accordingly, section 15.007 limits the statutory probate court's discretionary authority under Probate Code section 5B to transfer to itself a wrongful-death, personal-injury, or property-damage case in which a personal representative of an estate pending in that court is a party unless the county where the probate court is located would also be a county of proper venue under Civil Practice and Remedies Code section 15.002.[81]

2. *Multiple Residences*

Texas Probate Code section 6(a) provides that, for the administration of an estate, venue is in the county where the decedent resided if the decedent had a domicile or fixed place of residence in Texas.[82] In *In re Estate of Steed*[83] the decedent had several residences. The appellate court, following earlier Texas case law, explained that the Probate Code section, although perhaps inartfully written, provides that venue is in the county of the decedent's domicile at the time of death. The court held that "venue is established based on the domicile of the decedent and that the multiple residence authorization for venue . . . does not apply to the probate venue statute."[84] The court also explained that a domicile determination requires that the decedent (1) made it an actual residence and (2) intended to make it a permanent home.[85]

E. Survival Action

1. *Standing and Capacity*

The relevant facts of the Texas Supreme Court cases of *Austin Nursing Center, Inc. v. Lovato*[86] and *Lorentz v. Dunn*[87] are similar. Before the statute of limitations ran on a decedent's negligence claim, the plaintiff petitioned to be appointed as the decedent's personal representative. Before being appointed, the plaintiff filed a survival action, which falsely stated that she had already been properly appointed by the court. The plaintiff was later appointed; however, by that time, the statute of limitations had already run. In both cases, the trial courts dismissed the survival actions, holding that the plaintiffs did not have standing when they filed the cases. The plaintiffs appealed.[88]

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81. *Id.* at 620-22. The result in this case appears to have been codified by the 2003 Texas Legislature in House Bill 4, which amended Probate Code sections 5A, 5B, and 607 to provide that venue of an action by or against a personal representative for personal injury, death, or property damage is determined under section 15.007. Tex. H.B. 4, 78th Leg., R.S. (2003).

82. Tex. Prob. Code Ann. § 6(a) (Vernon 2003).

83. 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. denied).

84. *Id.* at 804.

85. *Id.*

86. 171 S.W.3d 845 (Tex. 2005).

87. 171 S.W.3d 854 (Tex. 2005).

88. *Lorentz*, 171 S.W.3d at 855; *Austin*, 171 S.W.3d at 846.

The appellate courts reached different results. In *Austin*, the court held that the plaintiff had standing to bring the suit because her appointment after the statute-of-limitations expired related back to filing of the original complaint, which was within the statute of limitations period.[89] On the other hand, the *Lorentz* court determined that the plaintiff lacked standing because she had not been appointed either when she filed the survival action or when the statute of limitations had run. Once appointed, her standing did not relate back to the time of filing.[90]

The Supreme Court of Texas affirmed *Austin* and reversed *Lorentz*.[91] The court stressed the distinction between standing and capacity, both of which are required before a person may properly bring a lawsuit. The court stated that, "[t]he issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a 'justiciable interest' in its outcome, whereas the issue of capacity is 'conceived of as a procedural issue dealing with the personal qualifications of a party to litigate.'"[92] Standing deals with whether the plaintiff is "personally aggrieved," whereas capacity refers to the "legal authority to sue" even if the party has no justiciable interest.[93]

Although the court recognized the long line of Texas cases holding that a decedent's estate is not a legal entity that can sue or be sued, the court nonetheless stated that "in a survival action, the decedent's estate has a justiciable interest in the controversy sufficient to confer standing."[94] The court then reasoned that, because the estate had standing to sue, the plaintiff acquired the capacity to assert the survival claim after she was appointed as the estate's personal representative. The court explained that her late-acquired capacity cured her failure to have capacity before the statute of limitations expired.[95]

Surprisingly, the court was not greatly concerned about the false statements made by the plaintiffs in their pleadings. The court merely said that the trial court has the discretion to address the misrepresentations.[96]

Traditionally, in Texas, an estate is not a legal entity that can sue or be sued.[97] The Supreme Court of Texas has now made an exception for survival actions by granting a decedent's estate standing to sue even though no one has been appointed as the decedent's personal representative. These decisions will make it easier for lawsuits to be filed very close to

89. Lovato v. Austin Nursing Ctr., Inc., 113 S.W.3d 45, 53-55 (Tex. App.—Austin 2003), *aff'd* 171 S.W.3d. 845 (Tex. 2005).

90. Lorentz v. Dunn, 112 S.W.3d 176, 179 (Tex. App.—Fort Worth 2003), *rev'd* 171 S.W.3d 854 (Tex. 2005).

91. *Lorentz*, 171 S.W.3d at 855; *Austin*, 171 S.W.3d at 846.

92. *Austin*, 171 S.W.3d at 848 (quoting CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1559, at 441 (2d ed. 1990)).

93. *Id.* at 848-49.

94. *Id.* at 850.

95. *Id.* at 851-53.

96. *Lorentz*, 171 S.W.3d at 856; *Austin*, 171 S.W.3d at 853.

97. *Austin*, 171 S.W.3d at 849.

the expiration of the statute of limitations because it is not necessary for the plaintiff to secure the prior appointment of a personal representative.

2. Tolling of Statute of Limitations

If the heirs are minors, survival actions may be heard many years after the decedent's death because the statute of limitations is tolled. For example, in *County of Dallas v. Sempe*,[98] a prisoner was killed by a fellow inmate during a jailhouse fight. His children brought a survival action alleging that the prisoner's death was the result of the jail being overcrowded. The County claimed that the children lacked standing to bring the survival action. The appellate court explained that because the children waited until more than four years from the date of the prisoner's death to sue, they were not required to allege that there was no administration pending and that none was necessary. In addition, they were not required to file suit within the four-year period for instituting probate proceedings. The statute of limitations on the prisoner's claim had not run when he died and was tolled during the children's minority.[99]

3. Standing of Heir

An heir may bring a survival action if (1) an administration of the decedent's estate is not pending and (2) no administration is necessary.[100] However, to avoid the type of litigation that occurred in *Pratho v. Zapata*,[101] it may be better practice to have a personal representative appointed to bring the action. In *Pratho*, the decedent died from a heart attack. His heirs asserted that a doctor's failure to diagnose his heart condition hastened his death. The suit was, however, not brought by the personal representative of the decedent's estate, which is normally the case. Instead, the decedent's widow and children brought the action. The jury determined that the doctor was negligent. However, the court granted a judgment notwithstanding the verdict in favor of the doctor on the survival claim (the decedent's pain and suffering before death) because his widow lacked standing. His widow appealed.[102]

The appellate court reversed. Typically, the personal representative of a decedent's estate is the proper person to bring a survival action.[103] However, the court explained that the widow had standing in this case because (1) an administration of the decedent's estate was not pending and (2) no administration was necessary.[104] It was true that the widow had requested letters of administration, but her request was not granted until two months after the jury's verdict. The court held that an estate is not pending until a personal representative is actually appointed. Thus,

98. 151 S.W.3d 291 (Tex. App.—Dallas 2004, pet. granted).
99. *Id.* at 294, 296-97.
100. 157 S.W.3d 832, 839 (Tex. App.—Fort Worth 2005, no pet.).
101. *Id.*
102. *Id.* at 835-36.
103. *See* Shepherd v. Ledford, 962 S.W.2d 28, 31 (Tex. 1998).
104. *Pratho*, 157 S.W.3d at 840-41.

at the time of the trial, the decedent's estate was not pending, and there was no personal representative who could have brought the suit.[105]

The court was not troubled by the fact that, after the trial but before the judgment, the widow received administration letters. The court determined that the trial court should have granted her post-trial motion to change the plaintiff, even though she filed the motion outside the statute of limitations. The amended petition would relate back to the earlier petition because the widow had pleaded and proved standing as an heir at the time of trial.[106]

The court was, however, initially concerned with the widow's compliance with the requirement that no probate was necessary. She made conflicting assertions. At trial, she stated that no administration was necessary (that is, estate debts were paid, and there was an agreement regarding the distribution of estate assets). However, in her application for letters in probate court, she asserted that a necessity existed. The court determined that the conflicting assertions were not relevant—what was important was the situation that *actually* existed at the time of trial. The evidence showed that, at the time of the trial, no need for an administration of the decedent's estate existed—the debts had been paid, and the heirs had agreed to a distribution of his estate.[107]

F. Temporary Administration

For the estates of decedents who die on or after June 17, 2005, the person appointed as a temporary administrator has a longer time to file bond with the county clerk. Under prior law, the filing had to be done on the date of the order. Now, the appointee has until the third business day after the date of the order.[108] "Business day" is defined as a day "other than a Saturday, Sunday, or holiday recognized by [Texas]."[109]

G. Former Guardianship Property

In re Guardianship of Bayne[110] explains that once the estate guardian for a deceased ward transfers property to the personal representative of the ward's estate, the guardian can no longer regain control of the property. In this case, the court ordered the guardian to transfer the ward's property to the independent executor after the ward's death. The guardian complied. Later, however, the guardian obtained an order from the trial court requiring the executor to re-transfer some of the ward's prop-

105. *Id.* at 839-40.

106. *Id.* at 847. This principle was later confirmed by the Supreme Court of Texas in *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845 (Tex. 2005). *See supra* text accompanying notes 86-97.

107. *Id.* at 840-41. A concurring justice in a lengthy opinion advocated that "[t]he requirement that heirs must plead and prove no administration is pending and none is necessary should not be applied to statutory survival actions." *Id.* at 855.

108. Tex. Prob. Code Ann. § 131A(d) (Vernon Supp. 2006).

109. *Id.*

110. 171 S.W.3d 232 (Tex. App.—Dallas 2005, pet. denied).

erty to the guardian. The appellate court held that the trial court had no authority to issue this order. The court examined the Texas Probate Code and was unable to locate a provision that would permit the trial court to issue such an order. Accordingly, the appellate court vacated the order.[111]

H. Appraisers

Texas Probate Code section 248 was amended to require that good cause be shown before a court may appoint appraisers, either on the court's own motion or upon the application of an interested party.[112]

I. Homestead

Amendments to Texas Probate Code sections 271 and 272 make it clear that the homestead may be set aside and delivered only to the surviving spouse or minor children.[113] Under the prior wording of the statute, the homestead could arguably be set aside for unmarried children remaining with the family of the decedent. These amendments finally bring the statutes into conformity with the 115-year-old Texas Supreme Court case of *Zwernemann v. Von Rosenburg*,[114] which held that similar language in a prior version of the statute was contrary to the Texas Constitution.[115]

J. Claims of Creditors

1. *Procedure in Independent Administration*

The trial court in the case of *In re Guardianship of Bayne*[116] ordered the independent executor to pay a specified debt. The appellate court vacated the order because the creditor had not followed the procedures specified in the Texas Probate Code. The creditor neither filed a claim with the executor nor filed suit against the executor. The appellate court explained that the trial court's order was an "unwarranted intrusion into the independent administration of the estate."[117]

2. *Secured Claims*

Because of the repeal of the common-law doctrine of exoneration by Texas Probate Code section 71A, discussed above,[118] Probate Code section 306 was amended to address the situation in which a secured creditor elects matured secured claim status.[119] First, the personal representative

111. *Id.* at 234-35, 238-39.
112. Tex. Prob. Code Ann. § 248. Note that this change was included in two enacted bills (SB 347 and H.B. 3434) but with slightly different language.
113. Tex. Prob. Code Ann. §§ 271-72.
114. 13 S.W. 485 (Tex. 1890).
115. *Id.* at 486.
116. 171 S.W.3d 232 (Tex. App.—Dallas 2005, pet. denied).
117. *Id.* at 237-38.
118. *See supra* text accompanying notes 33 and 34.
119. Tex. Prob. Code Ann. § 306(c-1) (Vernon Supp. 2006).

is required to collect from the beneficiary the amount of the debt and pay that amount to the secured creditor. If there is more than one beneficiary of the encumbered property, each pays a pro-rata share of the debt.[120]

Second, if the personal representative is unable to collect enough money to pay off the debt, the property is sold. The proceeds of the sale are first used to pay the debt and any expenses associated with the sale. If there is a surplus, it will be divided pro-rata among the beneficiaries of the specific gift. If there is a deficiency, the creditor has an unsecured claim for that amount.[121]

3. *Class 2 Claims*

With regard to the estates of decedents who die on or after September 1, 2005, an amendment to Texas Probate Code section 322 expanded Class 2 claims.[122] Class 2 claims now include not only the administration expenses triggered by the decedent's death, but also the unpaid expenses awarded in a guardianship of the decedent. This change prevents these expenses from losing the priority status they enjoyed under Probate Code section 805 while the decedent-ward was alive.[123]

K. Successor Personal Representative

An order appointing a successor personal representative should set bond the Probate Code requires. *Ayala v. Mackie*[124] shows the type of problem that may arise if this is not done. The probate court denied the applicant's motion to be named as a successor executor of an ancillary estate and appointed Mackie instead. An appeal ensued.[125]

The appellants first argued that the probate court abused its discretion in determining that there was a continuing need for administration and the appointment of a successor personal representative. The appellate court disagreed because a review of the evidence revealed a complicated estate administration including a host of lawsuits and appeals.[126]

The court then reviewed the probate court's determination that the applicant was unsuitable to serve as a personal representative under Probate Code section 78(e). The court held that the probate court's denial was not an abuse of discretion because there was evidence of conflicts of interest.[127]

The court, however, agreed with the appellants that the probate court improperly appointed Mackie because the order did not set bond, and Mackie did not file bond.[128] Although the probate court did not abuse its

120. *Id.*
121. *Id.*
122. Tex. Prob. Code Ann. § 322 (Vernon 2005).
123. Tex. Prob. Code Ann. § 805(4)(b) (Vernon 2003).
124. 158 S.W.3d 568 (Tex. App.—San Antonio 2005, pet. granted).
125. *Id.* at 570-71.
126. *Id.* at 571.
127. *Id.* at 572.
128. *Id.* at 573; *see* Tex. Prob. Code Ann. §§ 195, 194, 181(c) (Vernon 2003).

discretion in appointing Mackie, the failure to require a bond made the probate court's order voidable. The court remanded the case to the probate court for further proceedings, presumably for setting bond as required by the Probate Code.[129]

L. Surety Liability

Sierad v. Barnett[130] emphasizes that a surety who wishes to escape liability for the evil acts of a personal representative should make its best case at the trial level because of the difficulty of overturning a finding of liability on appeal. After the intestate's death, the court appointed his daughter as the administrator and required the posting of bond. After a complicated series of events and legal actions, the court determined that the daughter had breached her fiduciary duties and rendered a judgment against her and her surety. The surety appealed.[131]

The surety argued that the evidence was insufficient to show that the daughter's acts and omissions caused economic loss to the trust. The trial court enumerated a list of a dozen ways in which the daughter had wasted or converted estate assets, such as living in the intestate's house without paying rent and not making the mortgage payments. The appellate court reviewed the evidence supporting the trial court's conclusions and held that the findings were not so contrary to the overwhelming weight of the evidence so as to be clearly wrong or unjust. Accordingly, the court agreed with the trial court that the surety was liable.[132]

IV. TRUSTS[133]

A. Statute of Frauds

1. Lack of Writing

Ayers v. Mitchell[134] demonstrates the problems that arise when a trust is not properly documented in a writing. Mother, Father, Daughter, and Son opened a joint bank account consisting of funds contributed by Mother and Father. Over time, Daughter obtained sole control over these funds and refused to return them to Father after Mother's death. The trial court determined that Mother and Father had created an irrevocable oral trust with Daughter as the trustee and thus agreed with Daughter that Father could not regain the funds. The appellate court reversed.[135]

The court began its analysis with Texas Property Code section 112.004, which provides that a trust must be in writing unless it satisfies the oral

129. *Id.*
130. 164 S.W.3d 471 (Tex. App.—Dallas 2005, no pet.).
131. *Id.* at 475-76.
132. *Id.* at 477-79.
133. Unless otherwise stated, all statutory changes impacting trusts discussed in this section took effect on January 1, 2006.
134. 167 S.W.3d 924 (Tex. App.—Texarkana 2005, no pet.).
135. *Id.* at 926.

trust exception for personal property. For an oral trust of personal property to be enforceable, there must be a transfer of trust property to a trustee who is neither the settlor nor a beneficiary, provided the transferor expresses trust intent either at or before the time of the transfer.[136] The court reviewed the facts and determined that Father had not made a completed transfer of the bank account funds, and thus no trust existed even though Father had expressed the requisite trust intent.[137]

The court recognized that the Trust Code does not define the term "transfer." After examining cases dealing with the ownership of funds in multiple-party accounts, the court held that a transfer "must divest the [settlor] of all dominion and control over the trust *res*."[138] Father did not transfer the funds because he remained on the account and thus had the right to make withdrawals at any time. In addition, there was evidence of several occasions on which Father directed the use of the funds in the account.[139]

2. *Lost Trust Instrument*

A settlor should locate a safe repository for the trust instrument so that it is not lost, inadvertently destroyed, or concealed. The problems that may result if this is not done are reflected in the case of *In re Estate of Berger*.[140] A beneficiary of an alleged trust attempted to prove that the decedent created an inter vivos trust but was unable to produce the trust instrument. The court granted a summary judgment against the beneficiary stating that she did not produce sufficient evidence to raise a fact issue regarding the existence of a trust. The appellate court reversed.[141]

The court recognized that a trust of real property requires "written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent."[142] However, Rule of Evidence 1004 permits the admission of other evidence related to the contents of a writing if the original has been lost or destroyed. The court examined evidence such as the beneficiary's affidavit that she saw the trust instrument both before and after the decedent's death and was able to recall significant details about the first page of the document, including a listing of the trust property, the identity of the beneficiary, and the trust purpose. Consequently, the court concluded that there was sufficient evidence to raise a fact issue regarding the existence of a trust, which precluded a summary judgment.[143]

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136. *Id.* at 928.
137. *Id.* at 928-30.
138. *Id.* at 929.
139. *Id.* at 929-30. In dicta, the court explained that even if Father had created a trust, it would have been revocable, and the evidence established its revocation. For example, Father's filing this lawsuit and asking for his money would have revoked any trust that he may have created. *Id.* at 930.
140. 174 S.W.3d 845 (Tex. App.—Waco 2005, no pet.).
141. *Id.* at 846, 849.
142. *Id.* at 847 (quoting TEX. PROP. CODE ANN. § 112.004 (Vernon 1995)).
143. *Id.* at 847-48.

B. Effect of Divorce

The 2005 Texas Legislature added sections 471-473 to the Probate Code (not the Trust Code) to address what happens if the settlor and beneficiary of a revocable trust are divorced and the settlor fails to amend the trust to address this change in circumstance.[144]

1. Effective Date

The new provisions apply only if the settlor creates the trust on or after September 1, 2005 and the divorce occurs thereafter.[145] Thus, the property interest of spouse-beneficiaries of pre-September 1, 2005 trusts will not be affected by a subsequent divorce, even if that divorce is after the legislation's effective date.

2. Types of Trusts Covered

Only written revocable trusts are covered by the new provisions.[146] The ex-spouse remains the beneficiary of an irrevocable trust and of a revocable oral trust.

3. Effect of Divorce or Annulment

a. Provisions Statutorily Revoked

If the settlor of a written revocable trust divorces a beneficiary of that trust to whom the settlor was married before or at the time of trust creation, the following trust provisions in favor of the ex-spouse are automatically revoked:

- Beneficiary of a revocable disposition or appointment,
- Donee of a general or special power of appointment, and
- Designation as a fiduciary (e.g., trustee, personal representative, agent, or guardian).[147]

b. Effect of Statutory Revocation

Any property interest that is automatically revoked passes as if the ex-spouse executed a valid disclaimer of that interest under Texas law. If a fiduciary designation is automatically revoked, the trust instrument is read as if the ex-spouse died immediately before the dissolution of the marriage.[148]

144. Tex. Prob. Code Ann. §§ 471-73 (Vernon Supp. 2006).
145. Act of June 17, 2005, 79th Leg., R.S., ch. 551, § 8, 2005 Tex. Gen. Laws 551.
146. Tex. Prob. Code Ann. § 472.
147. *Id.* § 472(a).
148. *Id.* § 472(b).

4. Exceptions

The automatic revocation of provisions in favor of the ex-spouse discussed above does *not* occur if one or more of the following instruments provides otherwise:

- A trust executed after the divorce,
- A court order,
- Express language in the trust, or
- Express language of a contract relating to the division of the marital estate entered into before, during, or after the marriage.[149]

5. Bona Fide Purchaser Protection

A bona fide purchaser from the ex-spouse of trust property or a person who receives a payment from the ex-spouse that is traceable to the trust does not have to return the property or payment and is not liable for that property or payment.[150]

6. Duty of Ex-Spouse to Return Improper Receipts

If the ex-spouse receives property or a payment from a trust to which the ex-spouse is not entitled, the ex-spouse has a duty to return the property or payment and is personally liable to the person who is entitled to that property or payment.[151]

C. Non-Waivable Trust Code Provisions

Under former Trust Code section 111.002, the terms of the trust prevailed over conflicting Trust Code rules except that the settlor could not waive certain self-dealing duties of corporate trustees. New section 111.0035 greatly expands the list of non-waivable items and provides detailed rules with regard to the waiver of certain trustee duties.[152]

1. Trust Purposes

The settlor may not change the restriction in Trust Code section 112.031 that a trust may not be created for an illegal purpose or require the trustee to commit a criminal or tortious act or an act that is contrary to public policy.[153]

2. Self-Dealing Duties of Corporate Trustees

Consistent with prior law, the settlor may not waive certain self-dealing duties for corporate trustees regarding the buying, selling, and lending of

149. *Id.* § 472(a).
150. *Id.* § 473(a).
151. *Id.* § 473(b).
152. Tex. Prop. Code Ann. § 111.0035 (Vernon Supp. 2006).
153. *Id.* § 111.0035(b)(1); *see id.* § 112.031.

trust property under Trust Code sections 113.052 and 113.053.[154]

3. Trustee Exculpation

In a new section, discussed below, the rules regarding trustee exculpation are recodified and expanded.[155] The settlor is prohibited from restricting the limitations on exculpation imposed by this section.[156]

4. Statute of Limitations

The settlor may not shorten the periods of limitation for commencing a judicial proceeding regarding a trust.[157]

5. Trustee's Duty to Account for Irrevocable Trusts

The settlor may not limit the duty of a trustee of an irrevocable trust to respond to a beneficiary's demand for an accounting under Trust Code section 113.151, provided that the beneficiary is either (1) entitled or permitted to receive trust distributions or (2) would receive a distribution from the trust if the trust terminated at the time of the demand.[158]

Note that the settlor may restrict the trustee's duty to account in other situations, such as (1) if the trust is revocable or (2) if the beneficiaries of the irrevocable trust are remote (that is, they are not eligible for current distributions or a distribution if the trust were to terminate).[159]

6. Trustee's Duty of Good Faith

The settlor may not limit the trustee's duty to act in good faith and in accordance with the purposes of the trust.[160]

7. Trustee's Duty to Inform Beneficiaries

Generally, the settlor may not limit the trustee's duty under a new section, discussed below, to keep the beneficiaries informed about the administration of the trust and the material facts that the beneficiaries need to protect their interests.[161] There are three important exceptions—that is, three situations in which the settlor may limit the trustee's duty to inform the beneficiaries:

- The trust is revocable,
- The beneficiary of an irrevocable trust is under age twenty-five, or
- The beneficiary of an irrevocable trust is remote—that is, the beneficiary is not eligible for current distributions or a distribution if the trust

154. *Id.* §§ 113.052(b), 113.053.
155. *See infra* text accompanying notes 223-24.
156. TEX. PROP. CODE ANN. § 111.0035(b)(3) (Vernon Supp. 2006).
157. *Id.* § 111.0035(b)(4).
158. *Id.* § 111.0035(b)(5)(A).
159. *Id.*
160. *Id.* § 111.0035(b)(5)(B).
161. *See infra* text accompanying notes 207-09.

were to terminate.[162]

8. Court's Power

The settlor may not restrict the power of a court to take action or exercise jurisdiction. The statute provides a non-exclusive list of powers included in this restriction:

- Modify, terminate, or take other action with regard to the trust under Trust Code section 112.054,
- Remove a trustee under Trust Code section 113.082,
- Exercise jurisdiction over the trust under Trust Code section 115.001,
- Determine matters related to the trustee's bond (e.g., require, dispense with, modify, or terminate the bond), and
- Adjust or deny compensation to a trustee who committed a breach of trust.[163]

D. Fiduciary Duty Jury Instruction

In *Sterling Trust Co. v. Adderley*,[164] a complex securities-fraud case, the Supreme Court of Texas addressed the propriety of a jury instruction regarding breach of fiduciary duty under former Trust Code section 113.059.[165] The instruction failed to reflect the possibility that the standard of care may be modified by agreement. Because the instruction did not account for contractual modifications, the court determined that it was overly broad and consequently defective.[166]

E. Definition of "Settlor"

The Trust Code's definition of settlor was revised to make it clear that a person who contributes property to the trust is encompassed within the term. [167] In other words, the Trust Code provisions affecting a person who *creates* a trust apply equally to a person who *contributes* property to an existing trust.[168]

F. Definition of "Breach of Trust"

The Trust Code now defines the term "breach of trust" as "a violation by a trustee of a duty that the trustee owes to a beneficiary."[169]

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162. Tex. Prop. Code Ann. § 111.0035(b)(5).
163. *Id.* § 111.0035(b).
164. 168 S.W.3d 835 (Tex. 2005).
165. *See* Tex. Prop. Code Ann. § 111.0035 (Vernon Supp. 2006) (recodifying the substance of former § 113.059).
166. *Sterling*, 168 S.W.3d at 847.
167. Tex. Prop. Code Ann. § 111.004(14) (Vernon Supp. 2006).
168. *Id.*
169. *Id.* § 111.004(25).

G. Acts Not Deemed Acceptance of Trust by Trustee

Trust Code section 112.009 was expanded to permit a person named as a trustee to engage in certain conduct without having those acts be considered acts of acceptance.[170]

1. Preservation of Trust Property

The named trustee may act to preserve the trust property without such actions being deemed acceptance if the named trustee gives notice of the rejection to either (1) the settlor, if living and competent, or (2) all beneficiaries then entitled to receive trust distributions from the trust, if the settlor is deceased or incapacitated. The named trustee must give this notice within a reasonable time after acting to preserve the trust property.[171]

2. Inspection and Investigating Trust Property

The named trustee may inspect and investigate trust property for any purpose, including determining the potential liability of the trust under environmental laws, without having those acts being deemed acceptance.[172]

H. Pet Trusts

Traditionally, a trust in favor of specific animals failed for a variety of reasons, such as for being in violation of the rule against perpetuities because the measuring life was not human or for being an unenforceable honorary trust because it lacked a human or legal entity as a beneficiary who would have standing to enforce the trust. To get around this problem, pet owners who wanted to assure that their pets were properly cared for after they died created a traditional trust, which indirectly provided pet care by naming the person providing care to the pet as the trust's actual beneficiary and by instructing the trustee to pay for the pet's expenses (and perhaps a fee), according to the pet owner's directions, as long as the beneficiary takes proper care of the pet.[173]

With the enactment of Trust Code section 112.037, Texas joins the growing number of states that authorize statutory pet trusts.[174] This type of trust is a basic plan and does not require the pet owner to make as many decisions regarding the terms of the trust. The statute "fills in the gaps," so that a simple provision in a will such as, "I leave $1,000 in trust for the care of my dog, Rover," may be effective.

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170. *Id.* § 112.009.
171. *Id.* § 112.009(a)(1).
172. *Id.* § 112.009(a)(2).
173. *See generally* Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 Santa Clara L. Rev. 617 (2000).
174. Tex. Prop. Code Ann. § 112.037 (Vernon Supp. 2006).

1. Authorization

The statute permits the pet owner to create a trust to provide for the care of an animal alive during the settlor's lifetime (that is, not animals born after the settlor's death).[175]

2. Termination

The trust ends when the last surviving animal for which the trust was created dies.[176]

3. Enforcement

The settlor may appoint a person to enforce the trust. If the settlor does not appoint an enforcer, the court may appoint someone. Any person having an interest in the animal's welfare may request the court to appoint a person to enforce the trust or remove a person previously appointed.[177]

4. Use of Property

a. General Rule

Property in the trust may be used only for the care of the animal unless the exception discussed below applies.[178]

b. Exception

If the court determines that the value of the trust property exceeds the amount required for the care of the animals, the court may authorize the trust property to be used in a different manner. In priority order, the following is the list of ways in which the court may allow the excess property to be used:

- As specified by the settlor in the trust,
- If the settlor is still alive, to the settlor,
- If the settlor is deceased and died testate, to those under the terms of the settlor's will, or
- If the settlor is deceased and died intestate, to the settlor's heirs.[179]

5. Rule Against Perpetuities

Instead of exempting pet trusts from the rule against perpetuities, the legislature created a special rule for determining measuring lives. The measuring lives include:

- The human beneficiaries of the trust;
- The humans named in the trust instrument, even if not beneficiaries;

175. *Id.* § 112.037(a).
176. *Id.*
177. *Id.* § 112.037(b).
178. *Id.* § 112.037(c).
179. *Id.* § 112.037(d)-(e).

- If the settlor is living when the trust becomes irrevocable, the settlor of the trust; or
- If the settlor is not living when the trust becomes irrevocable, the individuals who would have inherited the settlor's property had the settlor died intestate when the trust became irrevocable.[180]

I. SPENDTHRIFT TRUSTS

Trust Code section 112.035 was expanded to clarify the rules applicable to spendthrift trusts. The key change helps assure that a surviving spouse does not lose spendthrift protection under a bypass trust under specified circumstances. The new language provides that "[a] beneficiary of [a] trust [is] not considered to be a settlor, to have made a voluntary or involuntary transfer of the beneficiary's interest in the trust, or to have the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust, merely because the beneficiary . . . holds or exercises" the following powers as a trustee or in another capacity:

- A presently exercisable "power to consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary, if the power is [either] (i) exercisable only on consent of another person holding an interest adverse to the beneficiary's interest; or (ii) limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary;"
- A presently exercisable power to "appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate;"
- "[A] testamentary power of appointment;" or
- A presently exercisable *Crummey* withdrawal power.[181]

J. DEVIATION

Trust Code section 112.054 was liberalized to permit the court to modify trusts in a greater number of situations than had previously been the case.[182] Under both the old and new versions of this section, the court may exercise its deviation powers if the purposes of the trust have been fulfilled, have become illegal to fulfill, or have become impossible to fulfill.[183] The only additional ground under prior law was if "because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust."[184] The new version of section

180. *Id.* § 112.037(f).
181. *Id.* § 112.035(f).
182. TEX. PROP. CODE ANN. § 112.054 (Vernon Supp. 2006).
183. *Id.*
184. Act of June 19, 1983, 68th Leg., R.S., ch. 567, § 2, 1983 Tex. Gen. Laws 3332, 3343 (amended 2005) (current version at TEX. PROP. CODE ANN. § 112.054(a)(2) (Vernon Supp. 2006)).

112.054 permits deviation in many additional situations including the following:

- If "because of circumstances not known to or anticipated by the settlor, the order will further the purpose of the trust;"[185]
- If "modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration."[186]
- If deviation is "necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions[.]"[187] The court may give this order retroactive effect, but whether retroactivity will be recognized for tax purposes is problematic because recognition is a matter of federal, not state, law.
- If all beneficiaries have expressly consented to the deviation or are deemed to have consented via virtual representation (section 115.013(c)) or through a guardian ad litem (Section 115.014).[188] This provision legislatively overrules the Texas Supreme Court case of *Frost National Bank of San Antonio v. Newton*,[189] in which the court held that "a court cannot go beyond the face of the [trust] to make an ad hoc and speculative assessment of which purposes the [settlor] considered 'primary' and which he considered merely 'incidental.'"[190]
- If deviation is not inconsistent with a material purpose of the trust, provided that all beneficiaries have expressly consented to the deviation or are deemed to have consented via virtual representation (section 115.013(c)) or through a guardian ad litem (section 115.014).[191]

When exercising its deviation power, the court is no longer bound to follow the settlor's actual intent. Instead, the court only has to conform to the settlors "probable" intention.[192]

K. Division and Combination of Trusts

Section 112.057 previously allowed a trustee to divide or merge trusts with identical terms only if it was appropriate to achieve significant tax savings. The 2005 Texas Legislature expanded this section by removing the tax limitation and by providing that a division or combination may be done so long as "the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the original trust."[193]

185. Tex. Prop. Code Ann. § 112.054(a)(2).
186. *Id.* § 112.054(a)(3).
187. *Id.* § 112.054(a)(4).
188. *Id.* § 112.054(d).
189. 554 S.W.2d 149 (Tex. 1977).
190. *Id.* at 154.
191. Tex. Prop. Code Ann. § 112.054(a)(5)(B).
192. *Id.* § 112.054(b).
193. *Id.* § 112.057(a).

L. Options

The 2005 legislature added section 113.003 to grant the trustee authority to deal with options. These powers include the following:

- To "grant an option involving a sale, lease, or other disposition of trust property . . . ; [and]
- [To] acquire and exercise an option for the acquisition of property."[194]

The trustee may take these actions with respect to options even if they are exercisable beyond the duration of the trust.[195]

M. Distributions to a Minor or an Incapacitated Beneficiary

Two changes were made to section 113.021 of the Property Code, which address distribution options if the beneficiary lacks legal capacity and the trust instrument does not provide distribution instructions. The first change is technical—the reference to a minor's custodian was updated to reflect the enactment of the Texas Uniform Transfers to Minors Act in 1995.[196] The second change gives the trust another distribution option—to manage "the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution."[197] Although the beneficiary would actually lack capacity to make a withdrawal, the beneficiary's guardian would have capacity. In addition, the trustee may continue to manage the property until the beneficiary reaches the age of majority or regains capacity, thereby avoiding the need for a guardianship.[198]

N. Distribution Methods

Section 113.027 of the Property Code was added to provide the trustee with guidance regarding the distribution of trust property and the division or termination of a trust. Distributions may be made in the following ways:

- Divided interests,
- Undivided interests,
- Allocation of assets in proportionate shares, or
- Allocation of assets in disproportionate shares.[199]

The trustee may value the trust property to make the distributions and then adjust the distribution, division, or termination to take account of the resulting differences in valuation.[200]

194. *Id.* § 113.003.
195. *Id.*
196. *Id.* § 113.021(a)(4).
197. *Id.* § 113.021(a)(6).
198. *Id.* § 113.021(a).
199. *Id.* § 113.021(1), (2).
200. *Id.* § 113.027(3), (4).

This authorization of non-pro-rata distributions was designed to remedy a potentially significant federal income tax problem that could result if the trust instrument did not expressly authorize this type of distribution. Under a 1969 Revenue Ruling, a non-pro-rata distribution is treated as a pro-rata distribution, which is followed by exchanges between the beneficiaries.[201] These exchanges could then subject the beneficiaries to capital-gains tax.

O. Beneficiary's Right to Prohibit Trustee from Suing

In a provision effective on June 17, 2005, the Texas Legislature created a method for a trust beneficiary to prevent a trustee from bringing certain lawsuits that the trustee would otherwise institute to comply with the trustee's fiduciary duties.[202] A trustee may not prosecute or assert a claim for damages if all of the following conditions are met:

- The claim is one for *damages*—that is, the claim is not for some other remedy,
- The potential defendant is not a beneficiary of the trust,
- The trustee is not bringing the action in the trustee's individual capacity, and
- Each beneficiary gives written notice to the trustee of the beneficiary's opposition to the trustee's pursuing the claim.

A trustee who does not prosecute or assert a claim under this provision is protected from the liability that might otherwise attach for failing to pursue the claim.[203]

P. Duty of "Good Faith"

The 2005 Texas Legislature codified the trustee's common-law duty to administer the trust in good faith.[204]

Q. Bond

Section 113.058 was revised to grant the court the authority to excuse a non-corporate trustee from the requirement of giving bond, even if the settlor did not waive bond in the trust instrument.[205]

R. Duty to Inform Beneficiaries

The 2005 Texas Legislature codified the common-law duty of the trustee to fully disclose to the beneficiaries all material facts that might affect their rights.[206] Section 113.060 provides that the trustee must keep the beneficiaries reasonably informed regarding (1) the administration of the

201. Rev. Rul. 69-486, 1969-2 C.B. 159.
202. Tex. Prop. Code Ann. § 113.028 (Vernon Supp. 2006).
203. *Id.* § 113.028(a), (c).
204. *Id.* § 113.051.
205. *Id.* § 113.058.
206. *See* Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996) (citations omitted) (stating the common-law duty).

trust and (2) the material facts that the beneficiary needs to protect his or her interests.[207]

The settlor may, however, limit this duty if the trust is revocable or if the beneficiary is either (1) under age twenty-five or (2) remote—that is, the beneficiary is not eligible for current distributions or a distribution if the trust were to terminate.[208]

S. Substitute Fiduciary Act

The ability of corporations to rely on transactions made in compliance with the Substitute Fiduciary Act and related Texas statutes was enhanced by *Wood v. Victoria Bank & Trust Co., N.A.*[209] The settlors named a particular corporation as trustee of their trusts. After a series of corporate buyouts, mergers, and the formation of subsidiary trust companies, a new corporation became the trustee of these trusts. Despite compliance with the Substitute Fiduciary Act,[210] the beneficiaries of these trusts objected when the trust company was sold to a third party. The trial court ruled against the beneficiaries, who subsequently appealed.[211]

The appellate court affirmed. The court explained that the beneficiaries received proper notice of the fiduciary substitution under the Act and failed to object. The court also denied the beneficiaries' claims that the Act was designed for use only as a consolidating tool. Rather, the court explained that the Act does not require the fiduciary substitution to result in a consolidation, and the court was unwilling to read into the Act a requirement not evident from the plain language of the statute. The court also examined legislative history and found nothing to support the beneficiaries' claims. Accordingly, the court determined that it was acceptable for the Act to be used to de-consolidate, as well as consolidate, fiduciary appointments.[212]

The court also rejected the application of the common-law principle that a trustee may not resign or transfer the office as trustee for a monetary consideration. The court explained that the transfers in this case were statutorily authorized and that the corporate entities involved complied with the applicable statutes.[213]

T. Removal of Trustee

Section 113.082 of the Texas Property Code was revised to change an outdated reference from an "incompetent" trustee to an "incapacitated" trustee. In addition, a repetitive statement that the court has the discre-

207. Tex. Prop. Code Ann. § 113.060 (Vernon Supp. 2006).
208. *Id.* § 111.0035(b)(5).
209. 170 S.W.3d 885 (Tex. App.—Corpus Christi 2005, pet. denied).
210. Tex. Fin. Code Ann. §§ 274.101-.203 (Vernon 1998) (substantially similar to pre-codification version of the Act).
211. *Wood*, 170 S.W.3d at 887-89.
212. *Id.* at 888-91.
213. *Id.* at 892-93.

tion to remove a trustee was deleted.[214]

U. Multiple Trustees

The rules regarding how multiple trustees may exercise trust powers were revised and expanded.[215]

1. *Majority May Act*

Consistent with prior law, cotrustees who are unable to reach a unanimous decision may act by a simple majority; common law had required unanimity.[216]

2. *Vacancies*

Also consistent with prior law, the remaining trustees may act for the trust when a vacancy occurs.[217]

3. *Duty of Cotrustee to Participate*

Section 113.085(c) codifies the cotrustee's duty to participate in trust administration.[218] However, a cotrustee is excused from this duty under the following circumstances:

- The cotrustee is unavailable (for instance, the cotrustee is absent, ill, disqualified, or is temporarily incapacitated). If a cotrustee is unavailable and prompt action is necessary to achieve the trust's purposes or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.[219]
- The cotrustee has complied either with applicable law or the terms of the trust in delegating the performance of a trust function. To use this exception, the cotrustee must (1) communicate the delegation to *all* the other cotrustees and (2) file the delegation in the trust records.[220]

4. *Duty to Exercise Reasonable Care*

A cotrustee must "exercise reasonable care to (1) prevent [another] cotrustee from committing a *serious* [but not minor] breach of trust, and (2) compel a cotrustee to redress a *serious* [but not minor] breach of trust."[221] The Code provides no guidance on how a court should determine whether a breach is serious or minor—whether it is the amount of money involved, the moral depravity of the breach, or some other factor.

214. Tex. Prop. Code Ann. § 113.082 (Vernon Supp. 2006).
215. *Id.* § 113.085.
216. *Id.* § 113.085(a).
217. *Id.* § 113.085(b).
218. *Id.* § 113.085(c).
219. *Id.* § 113.085(d).
220. *Id.* § 113.085(c)(2).
221. *Id.* § 114.006(b) (emphasis added).

5. Liability

a. Non-Joining Cotrustee

A cotrustee who does not join in an action of another cotrustee is not liable for the cotrustee's action unless the non-joining cotrustee breached his duty to exercise reasonable care.[222]

b. Dissenting-But-Joining Cotrustee

A cotrustee who joins in an action at the direction of the majority of the trustees is not liable for the action if both of the following are true:

- The cotrustee exercised reasonable care, and
- The cotrustee gave *written* notice of the dissent to *any* cotrustee at or before the time of the action.[223]

V. Delegation of Duties to Cotrustees

During this Survey period, the rules regarding when a cotrustee may delegate duties to another cotrustee were also codified. The subsection grants a cotrustee the right to delegate the performance of a duty, unless the settlor specifically directed that a particular trust function be performed jointly. The cotrustee may revoke a delegation at any time, unless the cotrustee expressly made the delegation irrevocable.[224]

W. Common Trust Funds

The Texas Legislature fixed an outdated reference in the common trust fund statute to the Uniform *Gifts* to Minors Act to reflect the Texas passage of the Uniform *Transfers* to Minors Act, which occurred in 1995.[225]

X. Trust Protectors

The Texas Legislature modernized section 114.003 of the Property Code to reflect the increased use of trust protectors.[226]

1. Authorization

The settlor may grant a trustee or a third party the "power to direct the modification or termination of the trust."[227]

2. Duty of Trustee

Normally, the trustee must follow the instructions of the trust protector. However, the trustee does not have to follow those instructions under the following circumstances:

222. *Id.* § 114.006(a).
223. *Id.* § 114.006(c).
224. *Id.* § 113.085(e).
225. *Id.* § 113.171(a) (emphasis added).
226. *Id.* § 114.003.
227. *Id.* § 114.003(a).

- The protector's instruction is manifestly contrary to the terms of the trust, or
- The trustee knows that the instruction would constitute a serious breach of the protector's fiduciary duty to the beneficiaries.[228]

3. *Duty of Protector*

A protector is presumed to be a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. However, a beneficiary who is also a protector is excluded from this presumption.[229]

4. *Liability of Protector*

A protector is liable for any loss that results from a breach of the protector's fiduciary duty.[230]

Y. Exculpation of Trustee

The 2005 Texas Legislature recodified the rules regarding the ability of a settlor to exculpate the trustee for breach of duty from section 113.059 of the Property Code to newly created section 114.007.[231] The new section makes it clear that, except for the restrictions imposed by section 111.0035,[232] the settlor may include terms exculpating the trustee as follows:

- To relieve the trustee from a duty or restriction imposed by (1) the Trust Code or (2) common law, and
- To direct or permit the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by (1) the Trust Code or (2) common law.[233]

Z. Remedies for Beach of Trust

In newly created section 114.008, the Texas Legislature compiled the available remedies for a breach of trust that has either occurred or might occur in the future. The remedies, as listed below, were most likely available under prior law either through the Trust Code or common law:

- Compel the trustee to perform the trustee's duty or;
- Enjoin the trustee from committing a breach of trust;
- Compel the trustee to redress a breach of trust (e.g., by paying money or restoring property);
- Order an accounting;

228. *Id.* § 114.003(b).
229. *Id.* § 114.003(c).
230. *Id.*
231. *Id.* § 114.007.
232. *See supra* text accompanying notes 152-63.
233. Tex. Prop. Code Ann. § 114.007(c) (Vernon Supp. 2006).

- Appoint a receiver to take possession of the trust property and [to] administer the trust,
- Suspend the trustee;
- Remove the trustee under Section 113.082;
- Reduce or deny trustee compensation;
- Void an act of the trustee;
- Impose a lien or a constructive trust on [the] trust property;[234] or
- Trace trust property that was improperly disposed of and recover the property or its proceeds.

Note that the latter three remedies are not available if granting the remedy would injure a person (other than a beneficiary) who (1) acted without knowledge of the trustee's improper conduct or (2) dealt with the trustee in good faith and for value.[235]

AA. JURISDICTION

1. Generally

The 2005 Texas Legislature clarified the court's involvement with an ongoing trust by revising section 115.001(c) of the Property Code. This section now explains that the court may intervene in the administration of a trust to the extent that an interested person or an applicable law invokes the court's jurisdiction.[236] This involvement, however, does not result in the trust being subject to continuing judicial supervision unless the court so orders.[237]

2. Section 142.005 Management Trusts

Subsection (d) of section 115.001 was amended to make it clear that the district court's jurisdiction over trusts is not exclusive if another court creates a section 142.005 management trust.[238] Likewise, section 142.005(d) was revised to provide that a court that creates a section 142.005 trust "has continuing jurisdiction and supervisory power over the trust, including the power to construe, amend, revoke, modify, or terminate the trust."[239]

BB. NECESSARY PARTIES TO A TRUST ACTION

Section 115.011 of the Property Code was revised to eliminate confusion regarding the persons who are necessary parties to a trust action. As previously written, anyone who was designated by name in the instrument creating the trust could arguably be a necessary party, even if that person had absolutely no interest in the trust. For example, a named trus-

234. *Id.* § 114.008(a)(1)-(9).
235. *Id.* § 114.008(b).
236. *Id.* § 115.001(a), (b).
237. *Id.* § 115.001(c).
238. *Id.* § 115.001(d).
239. *Id.* § 142.005(d).

tee who refused to serve and a beneficiary named in the non-trust portion of a will creating a testamentary trust could both have fallen within the scope of necessary parties. The amendment provides that only a *beneficiary* who is designated by name is a necessary party and that only a trustee *who is serving at the time the action is filed* is a necessary party.[240]

CC. Guardian Ad Litem

Under new section 115.014(c), a guardian ad litem may now consider the general benefit accruing to the living members of the represented person's family.[241]

DD. Attorney's Fees

Hachar v. Hachar[242] reminds litigants that any party involved in trust litigation should seek an award of attorney's fees under Trust Code section 114.064 because the court has the authority to award fees even in favor of the losing party if the court believes that it is equitable and just to make such an award. After reviewing a complex factual background, the trial court awarded attorney's fees from the trust in favor of both the trustee and the beneficiaries who were involved in litigation against each other. The beneficiaries argued that the court's award in favor of the trustee was inappropriate because the trustee was not the prevailing party in the lawsuit. The appellate court, however, held that the trial court could make the award because Trust Code section 114.064 permitted the court to make an award that was "equitable and just."[243] There is no limitation that an award of reasonable and necessary attorney's fees be made only in favor of a prevailing party.[244]

The appellate court next considered whether the court's award of attorney's fees in favor of the beneficiaries was appropriate. The court explained that "[u]nreasonable fees cannot be awarded, even if the court believes them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees."[245] To this end, the trustee contended that the amount awarded was neither (1) equitable and just nor (2) reasonable and necessary. The appellate court disagreed, finding that the trial court's determination that the fees satisfied both conditions was not in error.[246]

The appellate court also held that the trial court did not abuse its discretion in not awarding conditional appellate attorney's fees. The court explained that the award of appellate attorney's fees is not required and that the trial court may have originally decided against awarding such

240. *Id.* § 115.011(b)(2), (4). The other ways that a party may qualify as a necessary party were not changed by the amendment.
241. *Id.* § 115.014(c).
242. 153 S.W.3d 138 (Tex. App.—San Antonio 2004, no pet.).
243. *Id.* at 142 (quoting Tex. Prop. Code Ann. § 114.064 (Vernon 1995)).
244. *Id.* at 141-42.
245. *Id.* at 142.
246. *Id.* at 143.

fees to discourage an appeal which, given the "tortured history" of the case, would be a reasonable thing to do.[247]

EE. Uniform Principal and Income Act

1. *Trustee's Power to Adjust*

Before this Survey period, the trustee could not make an adjustment that would diminish the income interest of a trust that requires all of the trust income to be paid at least annually to a spouse and for which an estate or gift tax marital deduction would be allowed if the trustee did not have the power to adjust.[248] The 2005 Texas Legislature removed this restriction. The removal was triggered by the issuance of a Treasury Regulation, which provides that an adjustment that meets the regulation's requirements does not disqualify a trust for QTIP treatment even if it reduces trust income.[249]

2. *Deferred Compensation, Annuities, and Similar Payments*

As originally enacted in 2003, Trust Code section 116.172, which explains how deferred, compensation, annuity, and similar payments are allocated, contained "garbled language" that made the section "almost impossible to administer."[250] The 2005 Texas Legislature revised this language to reflect what the drafters of the 2003 legislation intended.[251]

FF. Appointment of Receiver

Krumnow v. Krumnow[252] explains how the appointment of a receiver as a remedy in a trust situation is justified only in extreme cases—if this remedy appears to be the only way to preserve or protect the property in litigation. In *Krumnow*, a district court appointed a receiver on its own motion, without notice to the fiduciary holding the property, to take control over various properties involved in a will and inter vivos trust dispute. The appellate court determined that the court abused its discretion in issuing this order. The court explained that "[r]eceivership is an extraordinarily harsh remedy and one that courts are particularly loathe to utilize."[253] The court noted that both the trust and estate property were currently being managed by a fiduciary; thus, there was no great emergency or imperious necessity for a receiver. Rather, the status of the property could be maintained by a less drastic remedy such as a restraining order or temporary injunction.[254]

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247. *Id.* at 144.
248. Glenn M. Karisch, *2005 Texas Legislative Update: Changes in Trust Probate & Guardianship Law*, June 26, 2005, *available at* http://www.texasprobate.com/05leg/2005legupdate.pdf.
249. *Id.* (discussing Treas. Reg. § 1.643(b)-1 (2004)).
250. *Id.*
251. *Id.*; *see* Tex. Prop. Code Ann. § 116.172 (Vernon Supp. 2006).
252. 174 S.W.3d 820 (Tex. App.—Waco 2005, pet. filed).
253. *Id.* at 828.
254. *Id.* at 830.

GG. Attorney General's Involvement with Charitable Trusts

1. Notice Time

Effective September 1, 2005, a party initiating a proceeding involving a charitable trust must give the attorney general a longer time to respond before a hearing. Notice must now be given no less than twenty-five days, rather than ten days, before the hearing.[255]

2. Exempt Proceedings

To prevent the attorney general's office from being unnecessarily bombarded with notices, the 2005 Texas Legislature exempted the following proceedings from the notice requirement:

- An uncontested application that exclusively seeks to admit a will to probate. The exception applies regardless of whether the application is to probate the will as a muniment of title or is coupled with a request for the appointment of a personal representative.[256]
- All proceedings except those under Probate Code section 83 (applications pertaining to a second application to probate a will) from the notice requirement. This second exception is poorly worded, and its true impact is problematic. It is likely, however, that this result, triggered by the use of a double-negative, was not the legislature's intent. It is likely that the legislature actually meant to exempt second applications under section 83 from the notice requirement.[257]

HH. Probate Code Section 867 Management Trusts[258]

1. Proper Applicants

During the Survey period, the list of persons who may apply for the creation of a section 867 management trust was expanded.[259] Under prior law, only guardians, guardians ad litem, and attorneys ad litem could petition the court for the creation of a management trust. The statute now provides the following comprehensive list of proper applicants:

- Guardians of the estate, person, or estate and person;
- Ad litems, attorneys, or guardians, who are appointed to represent the ward or the ward's interests;
- "[A] person interested in the welfare of an alleged incapacitated person who does not have a guardian of the estate;" and[260]

255. Tex. Prop. Code Ann. § 123.003(a) (Vernon Supp. 2006).
256. *Id.* § 123.003(a)(1).
257. *Id.* § 123.003(c)(2).
258. The changes discussed in this section apply to an application filed on or after September 1, 2005. Non-substantive and clarifying changes to the provisions governing section 867 management trusts are not reviewed.
259. Tex. Prob. Code Ann. § 867 (Vernon Supp. 2006).
260. *Id.* § 867(a-1).

• Ad litems, attorneys or guardians, who are appointed to represent an alleged incapacitated person, or the person's interests, who does not have a guardian.

2. Creation of Trust for Incapacitated Person Without a Guardian

The 2005 Texas Legislature authorized the court to create a section 867 trust for an incapacitated person not already subject to a guardianship.[261] The statute now permits the court to do so it if finds that the following are true after conducting a proper hearing:

• The person is incapacitated. The court must use the same procedures and evidentiary standards as required in a hearing for the appointment of a guardian in making its determination of incapacity.[262]

• The creation of the trust is in the person's best interests. If the court determines that the person is incapacitated but that the creation of the trust is not in the person's best interests, the court may appoint a guardian without the necessity of a separate proceeding.[263]

An application to create a trust for an incapacitated person must be filed in the same court in which a guardianship proceeding is pending for the same incapacitated person.[264]

3. Venue

A new section provides that if a proceeding for the appointment of a guardian for an alleged incapacitated person is not pending on the date that the application is filed, venue is determined in the same manner as venue for the appointment of a guardian under Probate Code section 610.[265]

4. Presumption of Incapacity

The 2005 Texas Legislature restored a provision removed in 2003, which provided that a person who has a temporary guardian under section 875 may *not* be presumed to be incapacitated.[266] This makes sense because temporary guardianship proceedings do not have all of the safeguards of a formal guardianship.

V. OTHER ESTATE-PLANNING MATTERS

A. JOINT ACCOUNTS

A.G. Edwards & Sons, Inc. v. Beyer[267] demonstrates that although extrinsic evidence may not be used to prove the survivorship feature of a

261. *Id.* § 867(b-1).
262. *Id.* § 867(b-3).
263. *Id.* § 867(b-4).
264. *Id.* § 867(b-2).
265. *Id.* § 867A.
266. *Id.* § 874.
267. 170 S.W.3d 684 (Tex. App.—El Paso 2005, pet. filed) (litigants with the surname of Beyer are not related to the author of this article).

joint account so as to claim the funds in the account itself, such evidence may be used to show the depositor's intent in an action against the financial institution. Father and Daughter established a joint account with rights of survivorship. For tax reasons, the account was converted into a single-party account in Father's name. Later, Father told his broker over the telephone that he wanted Daughter's name added back to the account. The broker prepared documents reflecting the change and delivered them to Daughter, who gave them to Father to sign. Daughter left the documents with the broker's receptionist. Later, the broker could not locate the new joint-account agreement despite a diligent search. Before Father could sign a replacement agreement, he lapsed into a coma and died. A dispute arose over whether the balance of the funds in the account, over $1 million, belonged to Daughter or passed to Father's six children by intestacy. Daughter settled the dispute with her siblings by agreeing to share the account equally with them.[268]

Daughter then sued the brokerage firm for the difference between the balance in the account and the one-sixth share she received. The jury determined that the brokerage firm was liable under six theories. Daughter elected to recover under contract. The brokerage firm appealed.[269]

On appeal, the brokerage firm argued that the trial court improperly admitted extrinsic evidence of Father's intent for the account to have the survivorship feature. The court recognized that Texas courts consistently hold that, in the absence of a written agreement as described in Probate Code section 439(a), extrinsic evidence is inadmissible to prove rights of survivorship against the depositor's estate.[270] However, Daughter was not seeking a recovery from Father's estate or against a party to the joint account. Instead, she was attempting to recover from the brokerage firm for losing the survivorship agreement and thereby breaching its contract with Daughter and Father to create a joint account with rights of survivorship.[271] Therefore, the appellate court affirmed.

B. Durable Power of Attorney

In *Hardy v. Robinson*,[272] the principal signed a statutory durable power of attorney. In the "special instructions" section, he explained that he wanted certain litigation in which he was involved to continue with the proceeds held in trust for his sons. The principal died within hours of signing the power of attorney. The trial court held that this language was

268. *Id.* at 687-90.

269. *Id.* at 690.

270. *Id.* at 691 (citing Stauffer v. Henderson, 801 S.W.2d 858, 865 (Tex. 1990)).

271. *Id.* at 690. The court also held that (1) the parol evidence rule did not bar the admission of the extrinsic evidence, (2) Daughter's agreement with her siblings did not act to waive her contract claim against the brokerage firm, and (3) the trial court's award of appellate fees should have been made contingent on an unsuccessful appeal by the brokerage firm. *Id.* at 693-96.

272. 170 S.W.3d 777 (Tex. App.—Waco 2005, no pet.).

sufficient to create a trust.[273]

The appellate court reversed. The court first examined the document and found that it was a statutory durable power of attorney under Probate Code section 482. Consequently, under long-standing Texas law, it had to be strictly construed. Strictly construed, the principal's special instructions granted his agent powers that he might not otherwise have had the right to exercise, but the language did not act to create a trust.[274]

The court also held that the principal did not create an oral trust. Although an oral trust of personal property is enforceable under certain circumstances, there was no evidence that the trust was funded, that is, that the principal actually transferred his rights in the lawsuit to the agent as a trustee. The court also explained that the only evidence of trust intent was the special instructions in the power of attorney, which granted the agent the power to create a trust but did not itself create a trust.[275]

C. ANATOMICAL GIFTS

Over the past several years, there has been considerable debate as to whether a statement indicating that a person is an organ donor on a driver's license would be effective. The law has changed several times. The 2005 Texas Legislature restored the effectiveness of the driver's license statement after being deauthorized most recently in 1997.[276]

273. *Id.* at 778-79.
274. *Id.* at 779-81.
275. *Id.* at 781-82.
276. TEX. TRANSP. CODE ANN. §§ 521.401-.405 (Vernon Supp. 2006).