WILLS AND TRUSTS

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THIS Article reviews case law developments in the area of wills, heirship, estate administration, nontestamentary transfers, guardianships, and trusts. The Survey period covers decisions published between November 1, 1991, and October 31, 1992.

I. WILLS

A. WILL CONTESTS

In *Felderhoff v. Knauf*, the court held that a plaintiff who took a nonsuit could appeal monetary sanctions the trial court imposed prior to the nonsuit. The plaintiff filed a will contest in his mother's estate. The trial court granted sanctions against the plaintiff for discovery abuse. After the trial court granted the sanctions the plaintiff dropped the contest and the trial court dismissed the suit without prejudice, with the exception of the sanctions. The plaintiff filed a motion for rehearing on the sanctions issue, which the trial court overruled. The plaintiff then appealed his sanctions. The court of appeals, in an unpublished opinion, held that the plaintiff could not appeal any sanctions the trial court imposed prior to the nonsuit. The supreme court reversed and remanded the cause to the court of appeals. On remand the court of appeals held that the sanction was not directly related to plaintiff's conduct so that the sanction was excessive.

Two courts considered the availability of a writ of error appeal to challenge the admission of wills to probate. In *In re Estate of Hutchins*, the

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1. 819 S.W.2d 110 (Tex. 1991).
2. Id. at 110.
3. Id.
4. Id. at 111. The court stated that if plaintiffs could not appeal sanctions imposed prior to taking nonsuits then the plaintiffs would have to continue litigation of the case, even if litigation were not appropriate, in order to preserve the ability to appeal sanctions. Id. The court thus held that the plaintiff could appeal the imposition of the sanctions. Id.
5. 828 S.W.2d 272, 273 (Tex. App.—Fort Worth 1992, writ denied). The appeals court determined that much of the sanction award was for expenses the defendants incurred in determining which of the persons that the plaintiff listed in his interrogatories as potential witnesses supported plaintiff's case. Id. at 274. Thus, the sanctions the trial court imposed did not directly relate to plaintiff's offensive conduct, which was the failure to list telephone numbers and addresses of witnesses. Id. Because the sanctions did not relate to the offensive conduct, the amount of the sanctions was excessive. Id.
7. 829 S.W.2d 295.
court held that it had jurisdiction to consider the writ of error appeal. The decedent's daughter, who did not participate in the proceedings in which the will was admitted to probate, brought a writ of error appeal pursuant to Rule 45 of the Texas Rules of Appellate Procedure. The court held that the daughter did not have to appeal by a bill of review or will contest and that it had jurisdiction over the appeal. In *In re Estate of Hilfe* the court determined that it did not have jurisdiction to hear the writ of error appeal. The trial court dismissed a will contest with prejudice because the contestants failed to prosecute their suit diligently and for other failures. The contestants did not file an appeal within the time period for perfecting a regular appeal. After the time period for perfecting an appeal passed, one of the contestants filed an application for writ of error. The appeals court found that the contestant participated at trial, which prevented him from successfully challenging the trial court's action by writ of error.

In *Harrington v. Walker* the court affirmed the trial court's finding that part of the testators' estates passed through intestacy because the wills did not contain language disposing of assets held in trust for the benefit of their son. The testators had mirror-image wills that, on the death of the second of them to die, left their residence and personal effects to their daughter and the residue of their estates in trust for the benefit of their then-living children. The testators defined the term "children" to mean their son, daughter, and grandchildren, but the testators specifically excluded the son's lineal descendants from the definition. The testators' son and daughter, as well as the daughter's two children, survived the testators. The daughter's trust terminated on the death of the survivor and she received her share outright.

8. *Id.* at 297.
9. The Texas Rules of Appellate Procedure permit an appeal of a final judgment by writ of error if the appellant files a written petition with the clerk of the court that rendered the final judgment, if the appellant did not participate in the actual trial, and if the petition states the names and addresses of all adversely affected parties, describes the judgment sufficiently to identify it, and states that the appellant wishes to remove the case to the court of appeals for revision and correction. *TEX. R. APP. P.* 45.
10. See *TEX. PROB. CODE ANN.* § 31 (Vernon 1980).
11. See *TEX. PROB. CODE ANN.* § 93 (Vernon 1980).
12. *In re Estate of Hutchins,* 829 S.W.2d at 297. The court also held that the county court should not have admitted the will to probate because the proponents offered no evidence that the decedent had testamentary capacity when he executed the will and that the witnesses to the will were credible witnesses. *Id.* at 300. The court noted that the writ of error appeal was not a will contest, but was instead a proceeding to set aside the admission of the will to probate. *Id.* The proponents of the will failed to meet their burden of proving that the decedent had testamentary capacity when he made the will and that he executed the will validly. *Id.*
13. 830 S.W.2d 689.
14. *Id.* at 690, 692.
15. *Id.* at 691. The court also found that the application for writ of error failed to name the estate's executor or any other party who would be adversely affected by the writ of error appeal. *Id.* The failure to list the adversely interested parties was an error that defeated the appeals court's jurisdiction. *Id.* The court further found that the contestant brought the writ of error appeal frivolously and imposed sanctions pursuant to *TEX. R. APP. P.* 84. 830 S.W.2d at 692.
17. *Id.* at 936.
The son's trust continued for his lifetime. The testators' son died and their daughter brought a will construction suit to determine the disposition of the son's trust on his death. The daughter contended that the son's trust passed to her. The son's wife, to whom he left his entire estate, contended that the son's trust passed by intestacy. The court determined that the testators intended to dispose of their entire estates. The court could not infer an intent on the part of the testators to leave the residue of the trust estate to their daughter on their son's death because the wills did not contain language to that effect. The daughter could not admit extrinsic evidence of her parents' intent to supply omitted language in the absence of an ambiguity.

In Maurer v. Sayre the court held that the alternate beneficiary of three life insurance policies on the decedent's life had standing to contest the probate of the will. The decedent executed a will in May 1990, in which she established a testamentary trust for the benefit of her minor child. In February 1991 decedent executed life insurance beneficiary designation forms in which she listed the primary beneficiary of the life insurance as the trustee named in her probated will and the contingent beneficiary as her sister. The sister contested the probate of the will. The trial court dismissed the contest on the basis that the sister did not have standing as a person interested in the decedent's estate. The sister appealed. The appeals court determined that the sister had standing to contest the probate because she had a pecuniary interest in the decedent's estate that the admission of the decedent's will to probate would directly affect.

B. Testamentary Capacity and Undue Influence

In Hammer v. Powers the court affirmed the trial court's summary judgment that the testator had testamentary capacity and that the primary beneficiary of the will did not exert undue influence. The primary beneficiary of the testator's will was a young stockbroker who had taken an interest in
the testator and her husband prior to the husband's death in 1988. Following the husband's death the stockbroker helped the testator with her daily business. The testator made a will in 1989 in which she named the stockbroker as co-executor and primary beneficiary. Other beneficiaries of the will contested the will on the basis that the testator lacked testamentary capacity when she executed the will and that she executed the will as the result of undue influence. The trial court determined that the evidence presented proved that the testator had testamentary capacity as a matter of law and that the stockbroker did not unduly influence her. The trial court further held that the contestants could not receive their bequests under the will because the will contained a no-contest clause and they did not file the contest in good faith. The appeals court agreed that the summary judgment evidence presented to the trial court demonstrated that the testator was of sound mind at the time that she executed the 1989 will and that she acted independently of influence by the stockbroker.  

The contestants did not file a response to the motion for summary judgment in a timely manner, although they later alleged that the affidavits presented with the motion for summary judgment were defective. The appeals court held that the contestants waived their right to object to the form of the affidavits when they failed to file a response to the motion for summary judgment in a timely manner. The court also found that, since the contestants did not allege in their pleadings that they made their will contest with probable cause and in good faith, the trial court did not err when it denied them the specific bequests that they would have received under the will if they had not contested it.  

In *In re Estate of Riley* the court upheld a jury finding that the will proponent exerted undue influence over her husband. The decedent remarried a much younger woman shortly after his wife died. The decedent's children did not approve of the marriage and, with the exception of one son, their relationship with their father deteriorated. The decedent had a major heart attack soon after his remarriage and required surgery. The day before the surgery the new wife brought a completed commercially available will form to her husband to sign. The completed will form left all of the decedent's property to his new wife, or, if she did not survive him, then equally to his children. At the time the decedent executed the will he stated, in the presence of witnesses, how he wished to have his estate distributed, which

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27. *Id.* at 671. The court held that the evidence presented with the motion for summary judgment established that the testator had testamentary capacity as a matter of law and that the stockbroker did not unduly influence her. *Id.*

28. *Id.* at 672.

29. *Id.* at 673. The court noted that contestants who bring their contest in good faith and upon reasonable cause will not lose their bequests under the contested will if they prove their good faith. *Id.*; see Calvery v. Calvery, 122 Tex. 204, 212-13, 55 S.W.2d 527, 530 (1932); Gunter v. Pogue, 672 S.W.2d 840, 844 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). These contestants failed to plead or prove that they brought their contest in good faith and with probable cause. Thus, the trial court did not err when it denied them their specific bequests under the will. 819 S.W.2d at 673.

30. 824 S.W.2d 305 (Tex. App.—Corpus Christi 1992, writ denied).

31. *Id.* at 307.
was different than the dispositive provisions of the will. Further, the wife read the will to the decedent after he signed it, but she changed the will's actual language and stated that it provided that she would receive a life estate in the property with the remainder passing to his youngest son, rather than the fee simple interest specified in the will. At trial the children introduced evidence that the new wife prevented them from seeing their father. The jury considered all of the testimony and concluded that the wife exercised undue influence over the testator. They also found that he lacked testamentary capacity. The appeals court held that sufficient evidence existed to support the jury's finding of undue influence and that the wife induced the decedent to sign the will through her fraudulent actions. The court did not consider the jury's finding of lack of testamentary capacity, however, because the fact that undue influence existed demonstrated that the decedent had testamentary capacity, but the finding of undue influence alone was sufficient to deny the will to probate.

In *Kenney v. Estate of Kenney* the court affirmed the trial court's finding that the testator lacked testamentary capacity at the time she executed a will in August 1990. The testator, who suffered from cancer for at least two years prior to her death, executed a will in July 1990, in which she left her entire estate to her children. One week before her death in August 1990 the testator executed a new will, in which she left her estate to her husband of thirty-five years, if he survived her, otherwise to her children. The children offered the July 1990 will for probate and the trial court admitted that will to probate shortly after the testator's death. Almost three months later, the testator's husband filed an application that sought to have the trial court set aside the probate of the July will and admit the August will to probate. The trial court heard evidence at the hearing on the husband's application from one of the witnesses to the will and from the notary who notarized the self-proving affidavit that the testator was alert and conscious when she signed the August will, although she was very ill. The husband testified that the testator was able to recognize people and that she was alert and able to understand that she was making a will on the day that she signed the will, as well as the day before and the day after she signed the will. The testator's daughter-in-law testified that the testator talked to her on the day she signed the will and that she seemed to know what she was doing.

The testator's son, who was the proponent of the July will, however, offered testimony that he visited with his mother on the day she signed the August will and that she could not remain awake, nor could she talk much with him. The son also testified that he had not seen his mother read for two weeks before her death and that she had trouble remembering things for three weeks before her death. One of the testator's daughters testified that her mother was unable to stay awake during the last two weeks of her life.

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32. *Id.*
33. *Id.*
34. 829 S.W.2d 888 (Tex. App.—Dallas 1992, no writ).
35. *Id.* at 893.
and that she took a lot of medication during that time. Another daughter testified that her mother took liquid morphine regularly during the last ten days of her life and that the drug made her mother hallucinate, affected her memory, and made her drowsy. Another daughter testified that her mother was confused and could not stay awake; this daughter also testified that she believed that no one could discuss the will with her mother because her mother could not stay awake long enough to discuss anything. The appeals court determined that the trial court could reasonably have determined that the testator lacked testamentary capacity at the time she signed the August will and that the trial court's finding was not against the preponderance of the evidence.\textsuperscript{36}

In \textit{Watson v. Dingler}\textsuperscript{37} the court affirmed the trial court's conclusion that the decedent executed his last will as the result of undue influence.\textsuperscript{38} The decedent, who owned and operated an automobile sales lot, died as the result of brain cancer. During his illness his ex-wife, who lived with decedent after their divorce, provided most of his care. The decedent's sister also assisted in his care. About two months before his death the decedent, his sister, and his ex-wife visited an attorney's office in connection with the preparation and execution of a will. The decedent left his ex-wife certain items, including his house, and left the bulk of his estate to his daughter from a previous marriage. The decedent left each of his three children from another marriage nominal gifts under the will. The decedent suffered increasing paralysis and an inability to talk during the last two months of his life. The decedent also behaved in an increasingly paranoid manner, partially as the result of some of the medication he took. A few days prior to his death decedent argued with his ex-wife and she moved out of the house. The decedent's daughter from his first marriage moved in with decedent on the day the ex-wife moved out.

The next day the daughter took decedent to the attorney to make a new will, in which she received all of decedent's estate except for nominal gifts to his other three children. The decedent's condition worsened and he entered the hospital approximately one week later. The doctor informed the daughter that her father had only three or four days to live following his admission to the hospital. The daughter obtained her father's signature to a document that allowed her to write checks on his bank accounts. Decedent shortly thereafter fell into a coma from which he never awoke. Five days following decedent's death the daughter filed an application to probate his last will. Decedent's ex-wife and his other three children challenged the probate on the grounds of undue influence and lack of testamentary capacity. A bank

\textsuperscript{36} Id. The court also held that the fact that no record was made of the hearing in which the July will was admitted to probate did not cause the husband harm because that hearing was in an uncontested probate matter. Id. at 893. The husband had the opportunity to set aside the probate of the July will at the hearing on his application for probate of the August will, at which the parties developed fully the issue of the testator's revocation of her July will through execution of her August will in the presence of a court reporter. Id. at 894.

\textsuperscript{37} 831 S.W.2d 834 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

\textsuperscript{38} Id. at 838.
also filed a contest to the daughter's appointment as independent executor, alleging that the daughter attempted to defraud the bank and to misappropriate or convert decedent's funds. The trial court concluded that decedent executed his last will as the result of his daughter's undue influence and that the will should not be admitted to probate. The appeals court held that the evidence presented at the hearing supported the trial court's decision, both legally and factually. The court also held that it could not review the trial court's failure to admit the August will to probate because no interested person offered the August will for probate.

C. WILL CONSTRUCTION

In *Pine v. Salzer* the court examined a will in which the decedent left assets designated as her "separate assets" to specified individuals and her community estate to her surviving spouse. All of the beneficiaries named in the decedent's will agreed that the assets listed as her separate assets were in fact community property. The decedent's spouse, who served as administrator of her estate, petitioned the probate court for a declaratory judgment and moved for summary judgment claiming that he should receive all of the property specifically bequeathed to the other beneficiaries since that property was community property and since the decedent left all of her community estate to her spouse. The named beneficiaries also filed a motion for summary judgment in which they requested that the probate court award them the decedent's one-half of the community assets that she listed in her will as separate assets. The probate court entered a summary judgement in favor of the decedent's spouse and the other named beneficiaries appealed, asserting that the probate court erred in granting the spouse's motion for summary judgment. The appeals court examined the listing of assets that the decedent specifically gave to beneficiaries other than her spouse, then determined that the decedent's statement that the assets were separate assets, when they were in fact community assets, did not make her bequest void. The court reversed and remanded the cause to the probate court.

In *Loehr v. Kincannon* the court examined a joint will that contained an
invalid restraint on alienation.\textsuperscript{47} The testators left a fee simple interest in all of their property, both real and personal, to the survivor of them, but, in the event the husband survived his wife, the will contained a provision that attempted to prevent him from selling real property that he received under the will. Following the wife's death the joint will was admitted to probate. The husband thereafter sold some real property to appellee, who then sought a declaratory judgment from the trial court requesting the court to find that the will provision created an unenforceable restraint on alienation. The appellee filed a motion for summary judgment, which the trial court granted. On appeal the appellants raised two points of error, that the joint will was contractual in nature and that the will was ambiguous. The appeals court noted that the appellants did not raise either of these issues when they responded to the motion for summary judgment, but, even so, their failure to raise the issues was irrelevant because the trial court correctly found that the will provision created an unenforceable restraint against alienation.\textsuperscript{48}

D. Revocation

In \textit{Goode v. Estate of Hoover}\textsuperscript{49} the court examined the issue of whether the substitution of the first page of a will constituted revocation of the will, resulting in intestacy.\textsuperscript{50} The decedent executed a three page self-proved will in 1982. The first page of the will disposed of all of the decedent's estate to his wife and sisters. The attorney who drafted the will retained a copy of the executed will in his files. At some point after the decedent executed his will the decedent or someone else replaced the first page of the will with a page in which the decedent left all of his estate to his wife. Following the decedent's death, one of his sisters offered a copy of his 1982 will for probate. The decedent's wife filed an opposition to probate and sought letters of administration in his estate. Both the sister and the wife filed motions for summary judgment. The trial court granted the sister's motion for summary judgment, found that the decedent properly executed his 1982 will and that he never revoked that will, and admitted the will to probate. The decedent's wife died approximately one month following the trial court's judgment and her executor appealed, alleging that the decedent destroyed his will with the intent of revoking it when he attached the replacement first page and that the decedent died intestate. On appeal the court noted the sister had the burden of proving that the decedent did not revoke his will.\textsuperscript{51} The court stated that only the testator can change or revoke his will.\textsuperscript{52} The court concluded that the testator did not intend to revoke his will, even if he replaced the first page of the will, because the testator left the attestation clause and

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  \item \textsuperscript{47} \textit{Id.} at 446.
  \item \textsuperscript{48} \textit{Id.} The court also found that the will clearly and unambiguously gave the survivor a fee simple interest in all of the property, \textit{id.}, and that the attempted restraint on alienation was void. \textit{Id.} at 447.
  \item \textsuperscript{49} 828 S.W.2d 558 (Tex. App.—El Paso 1992, writ denied).
  \item \textsuperscript{50} \textit{Id.} at 558.
  \item \textsuperscript{51} \textit{Id.} at 559; see \textsc{Tex. Prob. Code Ann.} § 88(b)(3) (Vernon 1980).
  \item \textsuperscript{52} \textit{Goode}, 828 S.W.2d at 559.
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self-proving affidavit intact. Further, by substituting the first page, the testator did not make the changes to the will in a manner provided by law, so that the original will was valid and entitled to probate.

E. MUNIMENT OF TITLE

In Buckner v. Buckner the court reviewed a judgment admitting a will to probate as a muniment of title more than four years after the decedent's death. The decedent died in 1983. Under the terms of the decedent's will, he left his surviving spouse a one-half interest in certain real property that he owned and his son and daughter-in-law the other one-half interest. The daughter-in-law, who had equal access to the decedent's will with the widow and the son, requested the son to probate the will on numerous occasions following the decedent's death. The son and widow did not want to probate the will and dissuaded the daughter-in-law. The son represented to his wife on numerous occasions that the property was their property without probate and that no need existed to probate the will. The son and daughter-in-law, who had been married for more than thirty years at the time of the decedent's death, had marital problems and the son acknowledged that he wished for his wife to share in the property following his mother's death, but only if his wife were married to him at the time of his mother's death. The son acknowledged that he understood that his wife would own an undivided one-fourth of the property if the will were admitted to probate and that he wanted the property to stay in his family. The daughter-in-law finally offered the will for probate more than four years following the decedent's death. The widow and son contested the probate. The jury found that the daughter-in-law was not in default for failing to offer the will for probate within four years following the decedent's death because her husband defrauded her concerning the effect of the probate. The probate court admitted the will to probate as a muniment of title following the jury's verdict. The son and mother appealed, alleging, among other things, that no evidence or insufficient evidence existed to support the jury's verdict. The appeals court noted that the son's representations to his wife concerning the effect of the probate constituted a legal opinion that under most circumstances would not support an action for fraud, but that one exception to this rule is when a confidential relationship exists between the parties. The

53. Id. at 560.
54. Id.
55. 815 S.W.2d 877 (Tex. App.—Tyler 1991, no writ).
56. TEX. PROB. CODE ANN. § 73(a) (Vernon 1980) provides that a will may not be admitted to probate more than four years after the death of the decedent unless the will proponent can prove that he or she were not in default for not offering the will for probate at an earlier date. Because letters testamentary or of administration may not be granted more than four years after the decedent's death in most instances, see TEX. PROB. CODE ANN. §§ 73(a), 74 (Vernon 1980), the only manner in which the will may be admitted to probate is as a muniment of title. See TEX. PROB. CODE ANN. § 89 (Vernon Supp. 1993).
57. Buckner, 815 S.W.2d at 878-82.
58. Id. at 880. The court stated that the marital relationship is one that is a fiduciary or confidential relationship. Id.
court concluded that sufficient evidence existed to support the jury's finding that the son materially misrepresented the facts to his wife. The court also found that the daughter-in-law relied on her husband's misrepresentations to her own detriment since she could not receive her undivided one-fourth interest in the property unless the will were admitted to probate.

II. HEIRSHIP

In Cahill v. Lyda the supreme court held that an attorney ad litem who represented unknown heirs during an appeal should be compensated for reasonable attorney's fees and expenses. The underlying cause of action was a suit to establish title to a tract of real property by adverse possession. The plaintiff brought the suit against the record title holders and unknown heirs. The trial court appointed an attorney ad litem to represent the unknown heirs. The parties all agreed to sell the tract of land and to place the proceeds from the sale in the registry of the court. The trial court found that the plaintiff failed to establish her ownership by adverse possession and awarded title to the property to the record title holders and unknown heirs. The trial court ordered payment of the ad litem's fees from the portion of the sales proceeds set aside for the unknown heirs. The plaintiff appealed and the court of appeals reversed the trial court in an unpublished opinion. The court of appeals charged the cost of the appeals against the unknown heirs and refused to award the ad litem attorney's fees on the remand. The supreme court ruled that the plaintiff did not establish her ownership of the property by adverse possession and reversed and remanded the cause to the court of appeals.

In Northwestern National Casualty Co. v. Doucette the court considered whether the subsequent adoption of the decedent's natural son by the son's

59. Id. at 882. The court noted that the son did not himself know Texas law concerning intestate succession, but that the son nevertheless made the statements to his wife with the intent to prevent her from offering the will for probate. Id. at 881-82.
60. Id. at 882.
61. 826 S.W.2d 932 (Tex. 1992) (per curiam).
62. Id. at 932, 933.
63. Rhodes v. Cahill, 802 S.W.2d 643, 646 (Tex. 1990) (op. on mot. for reh'g).
65. Cahill, 826 S.W.2d at 933 (citing TEX. R. CIV. P. 244). The court also noted that an ad litem must fully represent the unknown heirs and also represent their interests on appeal, if necessary. Id. (citing Executors of the Estate of Tartt v. Harpold, 531 S.W.2d 696, 698 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.)). The court stated as follows: "[u]nder the court of appeals' holding, an attorney ad litem seeking to protect on appeal a verdict favorable to his unknown clients would receive no compensation for any unsuccessful post-trial work. This result effectively makes the attorney ad litem's fees contingent upon success at the appellate court level." Id. The court thus held that the attorney ad litem in this case should receive reasonable fees and expenses incurred during the appellate process. Id.
66. 817 S.W.2d 396 (Tex. App.—Fort Worth 1991, writ denied).
stepfather prevented the child from being an heir of the decedent. Dece-
dent and his natural son’s mother were married at the time of the son’s birth, but they subsequently divorced. The son’s mother remarried and the son’s stepfather adopted the son some five years following the mother’s and stepfa-
ther’s marriage. The adoption took place in Arizona. The decedent married again and had a daughter with his second wife. The decedent died intestate in 1984, and decedent’s second wife and daughter filed a joint application for declaration of heirship and for issuance of letters of administration. The second wife and daughter stated in their application that decedent was only married once, to the second wife, that he was never divorced, that he only had one child, the daughter, and that he was not survived by parents or collateral kin. The daughter disclaimed her interest in the decedent’s estate after she and her mother filed the application. The probate court appointed the second wife independent administrator of the decedent’s estate and found that the wife and daughter’s allegations and statements included in the application were true. The natural son later filed a declaration of heirship and sought partition of the decedent’s estate. The probate court determined that the natural son was an heir of the decedent, removed the second wife as administrator of the estate because she had defrauded the court in her repre-
sentations concerning the decedent’s heirs, and appointed the son as succes-
sor administrator of the estate. In a second trial, the probate court found that the second wife and her bonding company owed the son damages and interest. In a third trial the probate court found that the daughter’s dis-
claimer was effective. The bonding company and the wife and daughter ap-
pealed the probate court’s findings. On appeal the court held that the
natural son’s adoption in Arizona did not affect his right of inheritance in
Texas. In B.C.S. v. D.A.E. the court considered whether the adoption of minor
children affects their inheritance rights from a natural half-sibling. The
natural mother had two children by her first marriage. Shortly before the
mother and her first husband divorced, an adoption decree terminated their
parental rights to their two children. The mother married a second time and
again had two children, including the decedent. The mother again divorced,
remarried, and had a child, the appellant, who was born in 1982. The dece-
dent died as the result of an automobile accident in 1984. The trial court
found that the two children from the mother’s first marriage, although they

67. Id. at 397.
68. Id. at 398. The court relied on Martinez v. Gutierrez, 66 S.W.2d 678, 682-83 (Tex. Comm’n App. 1933, holding approved), to reach its conclusion that, although Arizona law controls the natural son’s adoption, Texas law controls the descent and distribution of the
decedent’s estate. Northwestern Nat’l Cas. Co., 817 S.W.2d at 399. The court also held that the probate court did not err in awarding the son prejudgment interest in excess of the face amount of the surety bond rather than limiting the judgment to the amount of the penal sum
named in the bond. Id. at 399-400. The court further found that the daughter’s disclaimer met the statutory requirements for a disclaimer found in Tex. Prob. Code Ann. § 37A (Vernon Supp. 1993) and that the probate court did not err in determining that the daughter’s disclaimer was valid and irrevocable. Northwestern Nat’l Cas. Co., 817 S.W.2d at 401.
70. Id. at 929-30.
were subsequently adopted by others, were siblings of the half blood of the decedent and, thus, were heirs of the decedent. The appeals court affirmed.\textsuperscript{71} The court noted that the Legislature has provided that an adopted child may still inherit from the natural parent and through the natural parent\textsuperscript{72} and stated that the Legislature could have specified that an adopted child could not inherit from other children of the natural parent.\textsuperscript{73}

In \textit{Espiricueta v. Vargas}\textsuperscript{74} the court affirmed the trial court’s finding of paternity in a determination of heirship proceeding.\textsuperscript{75} The decedent, a minor child, died as the result of severe burns she received in an apartment fire. At the time the decedent was born, her mother was married, but the mother had not lived with her husband for some time. Prior to the decedent’s birth, her mother had lived with another man, who was listed as the decedent’s father on her birth certificate and, subsequently, on her death certificate. The alleged father had acknowledged his paternity to hospital officials at the time of the decedent’s birth and he knew he was listed as her father on her birth certificate. Following decedent’s death, her mother divorced her husband and the divorce decree stated that the decedent was born during the marriage. The husband assigned all of his interest in the decedent’s estate to the mother. The mother and the alleged natural father both filed applications for appointment as administrator of decedent’s estate, which consisted mostly of a personal injury cause of action. The trial court, in the determination of heirship proceeding, found that the alleged father was indeed decedent’s natural father and assigned one-half of the decedent’s estate each to the mother and the natural father. The mother appealed. The appeals court first determined that the statement contained in the divorce decree finding that the decedent was born during her mother’s marriage did not constitute a decree of paternity.\textsuperscript{76} The court next determined that the trial court correctly presumed the natural father to be the decedent’s father.\textsuperscript{77} The court found that the trial court did not abuse its discretion in determining that the alleged natural father was in fact the biological father rather than the mother’s husband because of the evidence presented at the trial.\textsuperscript{78}

\textsuperscript{71} Id. at 929, 930.
\textsuperscript{72} Id. at 930; see \textsc{Tex. Fam. Code} \textsc{Ann.} § 15.07 (Vernon Supp. 1992).
\textsuperscript{73} 818 S.W.2d at 930.
\textsuperscript{74} 820 S.W.2d 17 (Tex. App.—Austin 1991, writ denied).
\textsuperscript{75} Id. at 18, 21.
\textsuperscript{76} Id. at 19. The court found that the statement in the divorce decree that the decedent was born during the mother’s marriage was not res judicata to the determination of heirship proceeding because the natural father was not a party to the divorce proceeding. Id.
\textsuperscript{77} Id. at 20. The court found that the trial court made this presumption under \textsc{Tex. Fam. Code} \textsc{Ann.} § 12.02(a)(4) (Vernon Supp. 1993). \textit{Espiricueta}, 820 S.W.2d at 21.
\textsuperscript{78} 820 S.W.2d at 21. The mother had stipulated that the alleged natural father was the biological father. Further, the mother had not lived with her husband for more than two years prior to the decedent’s birth, although she lived with the natural father prior to the decedent’s birth. The natural father told hospital personnel at the time of the decedent’s birth that he was her father and he signed the birth certificate, which stated that he was the father. Finally, the mother called the natural father prior to the decedent’s death to advise him of his child’s injuries and she provided his name to the coroner as the name of the decedent’s father for purposes of the death certificate.
In *Curry v. Williman* the court held that natural parents may inherit from their children who have been equitably adopted by others. The decedent, who was severely retarded as the result of negligence at the time of her birth, lived with her father and his second wife following her parents' divorce. The decedent's mother had no contact with the decedent following the divorce, although she opposed the stepmother's legal adoption attempt. The decedent's father predeceased her and the stepmother was appointed as decedent's guardian. At decedent's death, her full brother and three half-siblings filed an application for determination of heirship in which they sought to divide the decedent's estate between themselves. Decedent's mother filed a motion for summary judgment in which she claimed one-half of decedent's estate. The trial court granted the mother's motion and determined that the mother should receive one-half of the estate, the full brother should receive one-fifth of the estate, and each half-sibling should receive one-tenth of the estate. The decedent's brother and half-siblings appealed, alleging that the stepmother equitably adopted the decedent, which resulted in the termination of the natural mother's inheritance rights. The court found that equitable adoption protects the inheritance rights of the equitably adopted child. The court noted that the supreme court has previously refused to hold that persons who stand in the relationship of equitably adoptive parents may inherit from an equitably adopted child; thus the natural mother may still inherit from her child. The court also found that even if a fact issue existed as to whether the stepmother equitably adopted the decedent, the issue was not a genuine issue of material fact that would preclude summary judgment.

### III. ESTATE ADMINISTRATION

#### A. Executors and Administrators

In *Bandy v. First State Bank, Overton* the court considered the issue of whether a bank in which a decedent has deposits and to which the decedent owes a debt has the right to setoff the decedent's bank accounts against the amount of the debt without first presenting a claim for the debt to the administrator. The decedent died intestate. At the time of his death, the decedent had several certificates of deposit and a checking account on deposit at the bank. The decedent also owed the bank debt obligations evidenced by several promissory notes. One week following the decedent's death the county court appointed two temporary co-administrators of decedent's estate. The co-administrators were given the responsibility for managing decedent's businesses, which included two clubs, a grocery store, and

79. 834 S.W.2d 443 (Tex. App.—Dallas 1992, writ denied).
80. Id. at 444.
81. Id. at 444-45.
82. Id. at 445 (citing Heien v. Crabtree, 369 S.W.2d 28, 30 (Tex. 1963)).
83. Id.
84. Id.
85. 835 S.W.2d 609 (Tex. 1992).
86. Id. at 611.
two farms. During the temporary administration the temporary administrators endorsed a total of five of decedent's certificates of deposit to the bank for payments on decedent's notes. At the expiration period for the temporary administration, it was not renewed. Some three weeks later the county court appointed a permanent administrator of decedent's estate.

During the period of time in which the estate had no administrator the bank setoff sums in decedent's checking account against the amount then due on one of the promissory notes. Following his appointment, the permanent administrator requested and received the sums then on deposit in the decedent's checking accounts. A few days after the permanent administrator's appointment, one of the two former temporary administrators endorsed a certificate of deposit and received the full amount of the certificate. The certificate of deposit was payable either to the decedent or to the former temporary administrator. The administrator subsequently determined that the bank still held two certificates of deposit payable to the decedent. The administrator sought and obtained an *ex parte* order from the county court ordering the bank to release the two certificates and any other of decedent's assets held by the bank. The administrator then demanded payment of the certificates from the bank. After refusing to comply with the demand, the bank setoff the proceeds of one of the two remaining certificates of deposit against another note when the note came due and issued a new certificate of deposit in the estate's name with the funds in the certificate in excess of the amount of the note payment. The bank submitted two sworn claims to the administrator, one of which requested retroactive approval of one setoff and the other of which requested payment on a loan that the decedent had co-signed. The administrator rejected both claims. The bank later setoff from another certificate of deposit the amount of the deficiency on the note that the decedent had co-signed, after the sale of the collateral. The administrator sued the bank on the basis that the bank converted the certificates of deposit.\(^{87}\) The bank answered that the temporary administrators had endorsed the certificates of deposit that it received during the period of temporary administration, that it properly paid to the temporary administrator the certificate of deposit that she had endorsed as joint owner, and that it had an equitable right to setoff the other certificates of deposit against debts the estate still owed to the bank. The trial court, without a jury, found that the bank converted all of the certificates of deposit and awarded actual and punitive damages. The appeals court, in an unpublished opinion, reversed the trial court on the basis that the bank had an equitable right to setoff the debts against the decedent's funds on deposit at the bank. The appeals court further held that the bank correctly paid the jointly owned certificate of deposit to the joint owner. The supreme court determined first that, even if the temporary co-administrators acted beyond their power in endorsing the certificates of deposit to the bank, the bank was not liable for relying on the

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\(^{87}\) The administrator also alleged that the bank's actions resulted in significant cash flow problems for the estate and that, as a result, the estate had to sell certain real property at a severely depressed price.
temporary administrator's authority to act for the estate.\textsuperscript{88} The supreme court held that the temporary administrators’ payment of the certificates of deposit to the bank was appropriate and that the bank did not convert the certificates, nor did it setoff the certificates against the decedent’s debt.\textsuperscript{89} The supreme court further held that the bank was not liable for paying the jointly owned certificate of deposit to the joint owner.\textsuperscript{90} The court held that the bank did not convert the funds represented by the jointly owned certificate of deposit, nor did it setoff the funds represented by the certificate of deposit against decedent’s debts.\textsuperscript{91} The court further held that the bank had an equitable right to setoff its unmatured claims against the decedent’s funds on deposit whether or not the estate was solvent or insolvent at the time of the setoff and that the bank had the right to setoff the certificates of deposit against the decedent’s debts.\textsuperscript{92} The court also held that, since the administrator provided no proof that the bank wrongfully took possession of joint accounts, the bank acted within its rights in exercising its equitable right of setoff against the certificates of deposit and the checking account.\textsuperscript{93} The dissent strongly disagreed with the majority opinion and stated that the majority erred in adopting a position that would protect banks that already have protection and interfere with proper administration of many estates.\textsuperscript{94}

In \textit{Monson v. Betancourt}, the court conditionally granted a writ of mandamus ordering the county court to appoint a co-executor.\textsuperscript{95} The decedent’s will named his two children to serve as co-independent executors. The trial court admitted the will to probate and appointed the decedent’s daughter to serve as executor. The trial court refused to appoint the decedent’s son to

\begin{itemize}
\item \textsuperscript{88} 835 S.W.2d at 614. The court also found that the administrator did not prove that the temporary administrators acted beyond the scope of their authority. \textit{Id.} The administrator provided the trial court with no evidence that the temporary administrators paid notes that the decedent made for nonbusiness purposes. \textit{Id.} at 615.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.} at 616-17. The court found that pursuant to TEX. PROB. CODE ANN. § 445 (Vernon Supp. 1993) the bank could properly pay the certificate of deposit to the joint owner. 835 S.W.2d at 616. The court further found that the bank was not liable for its payment of the funds held in the certificate of deposit to the joint owner because it was not under written notice from anyone entitled to give notice that withdrawals from the certificate of deposit should not be made, as provided in TEX. PROB. CODE ANN. § 448 (Vernon 1980). 835 S.W.2d at 616. The court found that the administrator’s notice to the bank was defective because the administrator did not make his first demand in writing and the court issued its order concerning the accounts more than a month after the bank paid the certificate of deposit to the joint owner. \textit{Id.}
\item \textsuperscript{91} 835 S.W.2d at 616-17.
\item \textsuperscript{92} \textit{Id.} at 622. The court noted the claims procedures and the bank’s options under the claims procedures set forth in TEX. PROB. CODE ANN. § 306 (Vernon 1980). 835 S.W.2d at 617. The court then analyzed case law developed in other jurisdictions concerning the bank’s right to setoff. \textit{Id.} at 618-22.
\item \textsuperscript{93} \textit{Bandy}, 835 S.W.2d at 622.
\item \textsuperscript{94} \textit{Id.} at 622-26 (Gammage, J., dissenting). The dissent stated that the majority’s view that offset would not harm a solvent estate was incorrect because of the underlying assumption that the solvent estate’s assets were liquid. \textit{Id.} at 625. The dissent would require a bank to prove that an estate is insolvent in order to avail itself of the equitable right of offset. \textit{Id.} at 626.
\item \textsuperscript{95} 818 S.W.2d 499 (Tex. App.—Corpus Christi 1991, no writ).
\item \textsuperscript{96} \textit{Id.} at 500.
\end{itemize}
serve as co-executor on the basis that the estate did not require two persons
to serve as executor and that the son was not present at the hearing. The
trial court received evidence at the hearing that both children were qualified
to serve as executors. After the hearing the son filed his appointment of
registered agent and asked the trial court to reconsider its order. The trial
court still refused to appoint the son co-executor and both children filed a
petition for writ of mandamus with the appeals court. The appeals court
found that the trial court erred by refusing to appoint the son as co-executor
because he was qualified to serve as executor and he appointed a registered
agent to receive service for him since he was not a Texas resident.97

In *Collins v. Baker*98 the court conditionally granted a writ of mandamus
compelling the county court to vacate orders that prevented the independent
executrix from fulfilling her duties.99 The county court admitted the dece-

dent's will to probate and appointed the decedent's daughter independent
executrix as provided in the decedent's will. The executrix filed her oath and
the inventory, appraisement and list of claims of the estate. Subsequently,
one of the beneficiaries under the will petitioned the court to order the
maker to pay the next payment under a promissory note, which was the
primary asset of the estate, to the registry of the court. The court ordered
the maker to make all future note payments to the registry of the court. The
county court later ordered the independent executrix to make certain pay-
ments and to deposit additional estate monies into the registry of the court,
and ordered the clerk to make a partial distribution of a gift under the will to
a beneficiary. The independent executrix filed a petition for writ of manda-

mus alleging that the county court had no authority to assume responsibility
for controlling the administration and settlement of the estate. The appeals
court found no authority in the Probate Code100 for the county court to
assume the administration of the decedent's estate in contravention of the
terms of the decedent's will.101 The court noted that the county court had in
effect transformed an independent administration to a dependent administra-
tion through its orders.102

B. JURISDICTION

In *Palmer v. Cole Wall Trust Co.*103 the court considered the extent of a

97. *Id.* The court indicated that the trial court did not have discretion to refuse to ap-
point a qualified person named to serve as executor or co-executor in the decedent's will. *Id.*
98. 825 S.W.2d 555 (Tex. App.—Houston [14th Dist.] 1992, no writ).
99. *Id.* at 555, 557.
100. The Texas Probate Code provides that a testator may state in his will that "no other
action shall be had in the county court in relation to the settlement of his estate than the
probating and recording of his will, and the return of an inventory, appraisement, and list of
claims of his estate." *TEX. PROB. CODE ANN.* § 145(b) (Vernon Supp. 1993). The decedent
provided for appointment of his daughter as independent executor in his will, so that the only
action that should have been taken in the county court would have been admitting the will to
probate, recording the will, and receiving the filed inventory, appraisement, and list of claims.
825 S.W.2d at 555.
101. *Collins,* 825 S.W.2d at 556-57.
102. *Id.* at 557.
statutory probate court’s jurisdiction in 1985 under the provisions of Texas Probate Code section 5A(b), as it then existed. The probate court appointed the trust company guardian of the estate of an incompetent ward. The guardian developed an estate plan for the ward and, upon application by the guardian, the probate court approved the estate plan. Following the ward’s death the probate court granted letters of temporary administration to the trust company for the purpose of completing the estate plan. Soon thereafter the court appointed the permanent independent administrator of the estate. The independent administrator decided that the estate plan that the trust company had developed was exceedingly complex and caused the estate to pay exorbitant fees to the trust company. The independent administrator of the estate brought suit in the statutory probate court against the trust company as the estate’s former temporary administrator and the president of the trust company for negligence, gross negligence, and violations of the deceptive trades practices act, including breach of fiduciary duty. The jury found for the independent executor and the probate court entered judgment for the independent executor. The court of appeals reversed and rendered judgment in favor of the trust company for the reason that the probate court did not have subject matter jurisdiction over the suit.

The supreme court noted that section 5A(b) of the Probate Code provides the subject matter jurisdiction of statutory courts. The court of appeals had applied the 1985 amendment to section 5A(b) and determined that the probate court did not have subject matter jurisdiction over the case because the causes of action were not “appertaining to” or “incident to” the estate.

The supreme court reversed the court of appeals because it found that the statutory probate court had concurrent jurisdiction with the district court since the cause of action was filed by the independent administrator against the temporary administrator.

The dissent did not agree that the 1985 amendment contemplated a case against a former personal representative for the causes of action included in this case.


105. 36 Tex. Sup. Ct. J. at 120.


112. Id. at 123. The 1985 amendment specifically stated that the statutory probate courts would have concurrent jurisdiction with the district courts over actions by or against personal representatives of estates. Act of June 15, 1985, 69th Leg., R.S., ch. 875, § 1, 1985 Tex. Gen. Laws 2996. The case falls within the 1985 amendment because it is a case brought by a personal representative against the previous personal representative of the estate. 36 Tex. Sup. Ct. J. at 123.

In *Naranjo v. Naranjo*\(^ {114} \) the court found that the trial court did not have jurisdiction to set aside the conveyance of the decedent's deceased spouse's one-half interest in real property since the spouse's estate was not a party to the action.\(^ {115} \) The decedent and her husband conveyed real property to one of their sons in a recorded warranty deed that reserved to themselves the use of the property for their lives. The decedent's husband predeceased her by many years. Following the decedent's death, her executor brought suit to have the conveyance set aside. The estate of the decedent's husband was not a party to the action. The trial court set aside the deed altogether. On appeal the court found that since the husband's estate was not a party to the action, the trial court could only set aside the conveyance of the decedent's one-half interest in the property.\(^ {116} \)

In *Bruflat v. Rodeheaver*\(^ {117} \) the court affirmed the probate court's decision that the probate court did not have jurisdiction to issue a writ of mandamus to the county clerk ordering the clerk to file a family settlement agreement in the real property records of the county.\(^ {118} \) The appellant attempted to file a family settlement agreement in the real property records of Harris County. The county clerk refused to file the document because it did not comply with recording requirements. The appellant filed a petition for writ of mandamus with the probate court, in which he requested the court to order the county clerk to file the settlement agreement. The county clerk asserted that the probate court did not have jurisdiction over the filing because filing the instrument is not an action brought by the estate's personal representative in the capacity of personal representative and that filing the agreement is not incident to the estate. The probate court found that it lacked jurisdiction to issue the writ of mandamus to compel the county clerk to file the agreement. On appeal the court found that the mandamus action was not incident to the settlement of the decedent's estate.\(^ {119} \)

In *Eppenauer v. Eppenauer*\(^ {120} \) the court held that a district court had concurrent original jurisdiction with the county court over an action to remove an independent executor.\(^ {121} \) Appellant filed the application to probate her husband's will in the County Court of Presidio County. Presidio County does not have a statutory probate court, county court at law, or other statutory court with the jurisdiction of a statutory probate court. The county court admitted the will to probate and appointed appellant independent executrix. The appellees thereafter filed an action in the county court to re-

\(^{114}\) 815 S.W.2d 882 (Tex. App.—Beaumont 1991, writ denied).

\(^{115}\) *Id.* at 884.

\(^{116}\) *Id.* The court noted that the husband's one-half interest in the property vested in the grantee following the husband's death in 1972. The court further noted that even if the husband's estate had been made a party to the action, any cause of action as to his one-half of the property would be barred by the statute of limitations. *Id.* The court also held that the trial court properly set aside the deed as to the decedent's one-half interest in the property. *Id.*


\(^{118}\) *Id.* at 824-25.

\(^{119}\) *Id.*

\(^{120}\) 831 S.W.2d 30 (Tex. App.—El Paso 1992, n.w.h.).

\(^{121}\) *Id.* at 34.
quire appellant to post a bond and subsequently filed a motion in the county court to transfer to the district court the pending motion to compel bond. The county court transferred the action and the appellants then sought to have the district court remove the independent executrix, which the district court did. The former independent executrix appealed, asserting that the district court did not have jurisdiction to remove her from her position since the county court did not transfer the removal action to the district court. The appeals court determined that the district court had concurrent jurisdiction with the county court over the removal action.122

C. Estate Administration

In In re Estate of Ortiz123 the court examined the reasonableness of attorney’s fees and funeral expenses.124 The decedent, a Mexican citizen, died as the result of an automobile accident in Victoria County. A funeral home spoke with the decedent’s family in Mexico and handled all of the funeral arrangements. The family contacted the Mexican Consular in Corpus Christi, who hired an attorney to represent the family. Almost two months after the decedent’s death the probate court appointed the director of the funeral home as temporary administrator of the decedent’s estate. The director did not provide notice to the decedent’s family. The temporary administrator filed an application with the court for approval of a contract with an attorney to represent the estate in recovering damages that resulted from the decedent’s death. The court approved the contract with the attorney. The court later approved the inventory filed in the estate, which listed as the estate’s only asset the claim against the insurance company. The inventory listed the claim filed by the funeral home for funeral expenses as the only claim against the estate. The temporary administrator signed a release agreement with the insurance company for one of the other drivers involved in the automobile accident for $25,000. The attorney for the family and the Mexican Consular also signed a similar release agreement as representatives of the family. Soon thereafter the court appointed the temporary administrator the permanent administrator, ordered the $25,000 paid to the registry of the court, and ordered that no withdrawals could be made from the insurance proceeds without a written court order. The court then signed orders approving payments of the claims of the doctor and the hospital that treated the decedent following the accident, as well as payments to the funeral home and the attorney who negotiated with the insurance company. The family, through the Mexican Consular and their attorney, protested the payments to the funeral home and the attorney at the hearing. The trial court found that the amount of the funeral home’s claim was reasonable and that the amount of the attorney’s fees awarded to the attorney who negotiated with the insurance company was that specified in the employment contract that the court had previously approved. The family appealed. On appeal the court found

122. Id.
123. 815 S.W.2d 858 (Tex. App.—Corpus Christi 1991, no writ).
124. Id. at 860-63.
that the evidence supported the award of attorney’s fees\(^\text{125}\) and the payment of the funeral home.\(^\text{126}\)

In *Tinney v. Team Bank*\(^\text{127}\) the court considered the appeal of a suit on a promissory note.\(^\text{128}\) In 1983 J.I. Harvey, who is now deceased and whose executor was Team Bank, executed a promissory note payable to Charles W. Tinney, also deceased. A vendor’s lien deed of trust secured payment of the note. Following Tinney’s death, Harvey negotiated with Tinney’s independent executor, in the executor’s individual capacity, and others to purchase a truck stop. As part of the negotiations, Harvey attempted to get the independent executor to release the lien securing payment of the 1983 promissory note. Harvey executed the contract for the purchase of the truck stop in consideration of the release of the note. The independent executor later sued Harvey on the note. Harvey died after the suit was brought. The trial court found that the consideration was sufficient to support the contract for the truck stop and that the result was the release of the indebtedness. The court of appeals disagreed because no evidence existed that Tinney’s estate received any consideration for the discharge of indebtedness.\(^\text{129}\) The appeals court also found that Harvey knew that he made the agreement to purchase the truck stop with the independent executor individually, that part of the negotiations was the release of an obligation due to the estate, that none of the sales proceeds from the purchase of the truck stop were to go to the estate, and that Harvey should have known that he and the independent executor were negotiating the transaction to the detriment of the estate.\(^\text{130}\) Because the estate never received consideration for release of the note, the appeals court held that the estate’s independent executor should recover the principal amount of the note, plus prejudgment interest as set forth in the note,\(^\text{131}\) and reversed and remanded the cause for a new trial.\(^\text{132}\)

**D. Marital Property Characterizations**

In *Beck v. Beck*\(^\text{133}\) the court determined that the 1980 amendment to arti-

\(^{125}\) *Id.* at 863. The family’s attorney had begun negotiations with the insurance company prior to the appointment of the temporary administrator. The final settlement amount was the same as that the family’s attorney had negotiated. Further, the estate’s attorney had attempted to garnish the insurance proceeds to secure payment of the funeral home bill prior to the time he filed the application for appointment of the funeral home director as temporary administrator. When the attorney filed the application on behalf of the funeral home director, he did not serve notice on either the family’s attorney or the Mexican Consular, although he knew that both of them were actively involved on the family’s behalf. The court nevertheless determined that the evidence that the administrator did not need to hire the attorney did not outweigh the trial court’s finding that the fees were reasonable. *Id.*

\(^{126}\) *Id.*

\(^{127}\) 819 S.W.2d 560 (Tex. App.—Fort Worth 1991, writ denied).

\(^{128}\) *Id.* at 561-65.

\(^{129}\) *Id.* at 562-63. The court found that the trial court erred when it refused to allow the independent executor to testify that Harvey had not paid the note. *Id.* at 563.

\(^{130}\) *Id.* at 564.

\(^{131}\) *Id.*

\(^{132}\) 819 S.W.2d at 565 (op. on mot. for reh’g). The court remanded the issue of attorney’s fees for the independent executor of Tinney’s estate. *Id.*

cicle XVI, section 15, of the Texas Constitution retroactively applies to premarital agreements entered into before the date of the amendment. The decedent and his spouse entered into a premarital agreement shortly before their marriage in 1977. The agreement provided that income from separate property would remain the separate property of the spouse who owned the property rather than being community property. The wife derived significant income from her separate property. Following the husband's death, his son was appointed independent executor. The son sued the wife in his individual capacity and as independent executor for one-half of the income generated by her separate property during the marriage. The son sought a declaratory judgment that the premarital agreement was unenforceable under the Texas Constitution as it existed at the time the parties entered the agreement. Both the son and the wife filed motions for partial summary judgment on the issue of the validity of the premarital agreement. The trial court granted summary judgment in favor of the wife and the court of appeals affirmed on the basis that the agreement constituted an exchange of each spouse's community property interest in the future income from separate property. The supreme court determined that the 1948 amendment to the Texas Constitution did not allow the future partition of income earned from separate property and that the agreement was not enforceable under the Texas Constitution as it existed at the time the parties entered the agreement. The court noted that the 1980 amendment to the Constitution allows persons about to marry to partition property between themselves. The court examined the legislative intent behind the 1980 amendment and determined that the legislature intended to validate existing premarital agreements that contained partition provisions. The court held that the legislature and Texas citizens intended the 1980 amendment to apply retroactively to premarital agreements in existence at the time of the amendment, including the agreement at issue in this case. The concurring opinion stated that the courts should use the doctrine of implied validation conservatively and only in cases in which the intent for retroactive applica-


135. 814 S.W.2d at 749.


139. Id.

140. Beck, 814 S.W.2d at 747.


142. 814 S.W.2d at 747.

143. Id. at 748. The court, in making this determination, applied the doctrine of implied validation, which previously had not been adopted by Texas courts, but which Professor McKnight proposed as a basis for applying the 1980 amendment to premarital agreements already in effect when the amendment was passed. Id. at 747-48. See Joseph W. McKnight, The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Inter-spousal Transactions, 13 St. Mary's L.J. 449, 474-75 (1982).

144. 814 S.W.2d at 749. The court made its decision based on the public policy in favor of enforcing premarital agreements. Id.
tion of a law is unmistakable.\textsuperscript{145}

In \textit{Pearce v. Pearce}\textsuperscript{146} the court considered the issue of reimbursement to the community estate for efforts expended by the deceased spouse on behalf of his separate estate.\textsuperscript{147} Soon after the decedent and his wife married they entered into a trust agreement concerning the decedent's separate property, which was placed into the trust. The trust agreement specifically stated that the assets held in trust were the decedent's separate property and that any income or increase in value of the trust assets would remain the decedent's separate property. The agreement further stated that the wife would have no community property rights or other rights in the property unless the parties later modified the agreement in writing. Following the decedent's death, his wife filed suit against the decedent's son, individually and in his capacities as trustee of the trust created under the trust agreement and independent executor of the decedent's estate. The wife sought to have the trust agreement declared unenforceable because it resulted from fraud and unconscionability. The wife also sought to have her one-half of the community estate awarded to her and to receive reimbursement to the community estate for the decedent's efforts expended on his separate property held in the trust. The trial court first found that the trust agreement was not unconscionable as a matter of law. The other issues were submitted to the jury, who found that the wife executed the trust agreement of her own free will, that the community estate was entitled to reimbursement for the decedent's efforts expended on his separate property, and that the decedent's estate was not entitled to any reimbursement from the community estate. The trial court entered a take nothing judgment in favor of the wife, who appealed. The appeals court first determined that the trust agreement amounted to a post-nuptial agreement,\textsuperscript{148} that the trial court did not err in refusing to find the agreement unconscionable,\textsuperscript{149} and that the agreement was thus valid and legally enforceable.\textsuperscript{150} The appeals court next determined that since the trust agreement did not mention reimbursement, which is an equitable right rather than a property right, the wife did not waive the right to reimbursement to the community estate for the decedent's efforts in improving his separate property.\textsuperscript{151} The court found, however, that although the record reflected some evidence that the community estate should receive reimbursement, the amount of the jury award was some $500,000 more than the evidence showed the decedent's efforts on behalf of his separate property were worth.\textsuperscript{152}

\textsuperscript{145} \textit{Id.} at 750 (Cook, J., concurring).
\textsuperscript{146} 824 S.W.2d 195 (Tex. App.—El Paso 1991, writ denied).
\textsuperscript{147} \textit{Id.} at 197-201.
\textsuperscript{148} \textit{Id.} at 198. The trust agreement was a post-nuptial agreement because it was an agreement entered after marriage that changed the character of marital property. \textit{See id.}
\textsuperscript{149} \textit{Id.} at 199.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 200.
\textsuperscript{152} \textit{Id.} Because some evidence existed, the trial court erred in granting the son's motion for judgment notwithstanding the verdict. \textit{Id.}
\textsuperscript{153} \textit{Id.} at 201. The court also found that the trial court erred by not granting the wife's
IV. NONTESTAMENTARY TRANSFERS

In *Union National Bank v. Ornelas-Gutierrez* the court examined a Treasury-bill custodial agreement that included “pay on death” (P.O.D.) language and concluded that the P.O.D. designation placed on receipts that the bank issued to the owner of the funds created a written contract. The decedent utilized the services of the bank as a broker for purchasing Treasury-bills (T-bills). The bank purchased the T-bills from the Federal Reserve Bank and held the T-bills for the decedent in the bank’s T-bill account at the Federal Reserve Bank. The bank identified the decedent’s specific T-bills through a special number and provided the decedent only with a receipt, signed by a bank officer, identifying the T-bills held for the decedent. The bank placed the terms and conditions of the custodial agreement on the back of the receipt, but the decedent did not sign the receipt, nor was he required to do so. On two later occasions the decedent requested the bank to alter the terms of the custodial agreement to name P.O.D. beneficiaries. A bank officer altered the custodial receipt, and signed and delivered the altered receipt to the decedent on each occasion. Following the decedent’s death the bank allowed one of the P.O.D. beneficiaries to order the sale of the T-bills and the reinvestment of the proceeds through a new custodial agreement with the bank for the benefit of the two P.O.D. beneficiaries. The temporary administrator of the decedent’s estate claimed that the P.O.D. designation was insufficient to give the named beneficiaries ownership of the T-bills on the decedent’s death and that the T-bills should be part of the decedent’s estate. The court first concluded that the decedent’s relationship with the bank was a brokerage-custodial relationship rather than that of an account holder. The court then determined that the beneficiary designation on the receipt the decedent received from the bank was sufficient to meet the requirements of the Probate Code and that the two named beneficiaries were entitled to ownership of the T-bills on the decedent’s death.

In *Kitchen v. Sawyer* the court upheld the trial court’s finding that the signature card at issue did not create a joint tenancy with right of survivorship.
ship\textsuperscript{160} and that extrinsic evidence concerning the intent of the parties to create a survivorship account was inadmissible.\textsuperscript{161} The decedent deposited $80,000 in the form of a certificate of deposit at a savings institution. The decedent signed the signature card at the time of the deposit and the other named account holder signed the signature card at a later time. Neither the savings institution nor either account holder marked any box on the signature card to indicate the ownership of the account. Following the decedent's death, the other account holder filed a declaratory judgment action for determination of the ownership of the certificate of deposit. The savings institution interpled the funds. The trial court found that the signature card formed a joint tenancy without a survivorship right and that the proceeds of the certificate of deposit were assets of decedent's estate. The joint account holder appealed. On appeal the court noted that the Probate Code\textsuperscript{162} does not permit the inference to arise that a joint account is a survivorship agreement merely because it is a joint account.\textsuperscript{163} The court found that the signature card did not meet the requirements of Probate Code § 439(a)\textsuperscript{164} to create a right of survivorship.\textsuperscript{165} The court further held that the surviving joint account holder could not offer extrinsic evidence of the intent of the parties to create a survivorship right at the time of creation of the joint account.\textsuperscript{166}

In \textit{Oadra v. Stegall}\textsuperscript{167} the court analyzed an account signature card and revocable trust agreement.\textsuperscript{168} The decedent and his mother opened an account with a cashier's check, payable to the two of them as co-trustees. Both signed a signature card for a revocable trust in their capacities as co-trustees. The decedent's mother signed the back of the signature card, which contained the terms and conditions of the revocable trust and which required only the signature of the grantor of the trust. The beneficiaries of the trust were the decedent, his two children, and his two grandchildren. The terms and conditions of the trust listed on the signature card provided that the grantor could revoke the trust at any time prior to the grantor's death. Following the decedent's death, his mother removed the funds from the trust account and opened a new account with the funds. The beneficiaries of the trust filed suit to determine ownership of the funds and the trial court

\begin{itemize}
  \item 160. Id. at 801.
  \item 161. Id.
  \item 162. TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1992).
  \item 163. \textit{Kitchen}, 814 S.W.2d at 800.
  \item 164. TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1992).
  \item 165. 814 S.W.2d at 801.
  \item 167. 828 S.W.2d 460 (Tex. App.—Houston [14th Dist.] 1992, writ granted) (op. on mot. for reh'g).
  \item 168. Id. at 461-64.
\end{itemize}
awarded one-fourth of the funds each to decedent's daughter, decedent's two grandchildren, and decedent's mother. Decedent's mother appealed, contending that she was entitled to all of the funds. On appeal the court found that the account created by decedent and his mother was a trust account.\textsuperscript{169} The court next determined that the decedent's mother continued to be trustee following her son's death and, pursuant to the terms of the Probate Code,\textsuperscript{170} she was also the beneficial owner of the account.\textsuperscript{171} The court further bolstered this determination with language from the signature card and trust agreement itself, which provided that the grantor could revoke the agreement at any time.\textsuperscript{172}

V. GUARDIANSHIPS

In \textit{Conoco, Inc. v. Ruiz}\textsuperscript{173} the court held that the plaintiff's mental incompetency tolled the statute of limitations in a personal injury action until the appointment of a guardian of the incompetent plaintiff's person and estate.\textsuperscript{174} The plaintiff and his wife filed two suits against Conoco and other defendants following the accident that resulted in the plaintiff's disability. Both suits were dismissed, one for discovery abuse and one for want of prosecution, prior to the time the plaintiff's wife sought appointment as his guardian. The county court in the county in which the plaintiff and his wife resided found that the plaintiff was incompetent and had been incompetent since the accident that formed the basis for the personal injury actions. Following her appointment as guardian, the wife again filed a wrongful injury action against Conoco. Conoco attempted to have the suit dismissed because it was brought more than two years following the date of the accident. The trial court refused to dismiss the case and ultimately awarded a significant sum in damages to the guardian on behalf of the plaintiff. Conoco appealed the trial court's decision. On appeal the court found that since the plaintiff had been of unsound mind since the date of the accident, his incompetency tolled the statute of limitations until the appointment of a guardian.\textsuperscript{175}

\textsuperscript{169} \textit{Id.} at 465; see \textit{TEX. PROB. CODE ANN.} § 436(14) (Vernon 1980), which provides the definition for a trust account.

\textsuperscript{170} \textit{TEX. PROB. CODE ANN.} § 438(c) (Vernon 1980).

\textsuperscript{171} \textit{Oadra}, 828 S.W.2d at 465.

\textsuperscript{172} \textit{Id.} at 467. Only the decedent's mother signed the trust agreement as grantor, although the jury found that she was not a grantor. The court concluded that the language of the trust agreement with the bank controlled and the jury's finding thus was not dispositive. \textit{Id}. The court also found that the decedent's mother should be awarded attorney's fees and held that the decedent's daughter and his estate should recover nothing for attorney's fees. \textit{Id}. The court further ordered the decedent's daughter to pay the attorney ad litem's fees. \textit{Id}. Finally, the court reversed the trial court's award of pre- and post-judgment interest to the decedent's daughter and his estate. \textit{Id}


\textsuperscript{174} \textit{Id.} at 122.

\textsuperscript{175} \textit{Id.} \textit{TEX. CIV. PRAC. & REM. CODE ANN.} § 16.001(a)(2) (Vernon Supp. 1993) provides that a person of unsound mind is under a legal disability for tolling the two-year statute of limitations that otherwise would apply under \textit{TEX. CIV. PRAC. & REM. CODE ANN.} § 16.003 (Vernon 1986). The court reversed the decision of the trial court in connection with
In *Allison v. Walvoord*, a mandamus proceeding, the court considered whether persons who have filed suit against a potential ward have standing to contest the appointment of a limited guardian, whose sole responsibilities as guardian would be to defend the suits. Plaintiffs filed two suits against the proposed ward, in which they sought significant sums of money. Following depositions in both cases the plaintiffs determined that they needed to take the proposed ward's deposition again for additional discovery. The proposed ward's wife filed an application for temporary guardianship, in which she alleged that the proposed ward was unable to manage himself or his property in connection with the litigation. The plaintiffs in the two suits filed objections to the wife's application. The wife asserted that the plaintiffs did not have standing to contest the limited guardianship, but the trial court found that the plaintiffs did have standing to contest the appointment. The trial court further ordered the proposed ward to submit to an examination and the wife to answer interrogatories and requests for production. Further, the trial court granted the plaintiffs' request for a jury trial on the appointment of the guardian. The wife filed a petition for writ of mandamus instructing the trial court to vacate its orders. The court found that the plaintiffs did not have standing to contest the appointment of the limited guardian because they were not relatives or persons interested in the well-being of the proposed ward.

In *Massey v. Galvan* the court held that a step-mother had no legal right to bind her minor step-children either when she entered a contract with a personal injury attorney to pursue a wrongful death claim resulting from her husband's death or when the suit was actually filed. The children lived with the step-mother and their father at the time of his death. Approximately three weeks following the father's death, the step-mother contracted with the personal injury attorney for him to represent her and the step-children in the wrongful death cause of action. Less than two months following the father's death, the natural mother gave up her guardianship rights to the children. Within one month of that time, the step-mother filed the wrongful death suit, and within another month, the probate court appointed the step-mother guardian of the estate of her step-children. The step-mother never sought the probate court's approval to pursue the wrongful death cause of action on behalf of her step-children. Within two months from the date the step-mother filed the wrongful death suit one of the defendants offered to settle and the personal injury attorney accepted the offer on behalf of the step-mother and the children. The probate court later removed the step-mother as guardian and appointed the children's natural mother as guardian of their estates. The natural mother contended that the personal injury at-

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venue issues that Conoco raised on appeal and ordered the transfer of the cause of action to Harris County. *Conoco, Inc.*, 818 S.W.2d at 128.

177. *Id.* at 625.
178. *Id.* at 627.
179. 822 S.W.2d 309 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
180. *Id.* at 319.
torney had only the step-mother's interests in mind in accepting the settlement. An arbitration panel apportioned the award among the step-mother and the children. The district court awarded the settlement in line with the recommendations of the arbitration panel. The district court also refused to enforce against the minors' award the attorney's fees contained in the contingent fee contract the step-mother entered. The appeals court upheld the trial court's decision concerning the attorney's fees because the step-mother was not a next friend of the children since their natural mother was their natural guardian at the time the step-mother entered into the contract with the personal injury attorney. 181 If the step-mother had been appointed as guardian of the children's estates at the time she entered the contingent fee contract, she would have had the right to bind them if the probate court approved of the contract. 182

In Rodriguez v. Gonzalez 183 the court determined that the guardian of the estates of minor children should receive the funds recovered in their behalf in a medical malpractice suit. 184 The guardian, who was the minors' grandmother, filed the malpractice suit as their next friend. The grandmother settled the suit on the minors' behalf and the defendants paid the settlement into the court's registry. The grandmother thereafter filed her application for guardianship of the estates of the minors and the county court appointed her guardian. The guardian then filed an application to take possession of the settlement. The guardian ad litem appointed to represent the minors in the malpractice suit filed a motion in the district court to create a trust for the minors with the settlement proceeds. 185 The guardian filed a plea in abatement to the ad litem's application. At the subsequent hearing, the guardian proved her qualification as guardian and that the county court had granted her application for possession of the settlement proceeds. The district court, however, granted the ad litem's application for creation of the trust. On appeal the court found that the guardian should receive the proceeds from the settlement since a duly qualified and appointed guardian should have custody and control of the ward's estate. 186

In Archer v. FDIC 187 the court affirmed the trial court's summary judgment in favor of FDIC in an action brought by a former ward for the bank's negligent payment of guardianship funds to the guardian. 188 After the mi-

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181. Id. at 319.
182. Id. The court stated that only the children's natural mother had the right to bind them contractually at the time the step-mother entered into the contingent fee agreement. Id.
183. 830 S.W.2d 799 (Tex. App.—Corpus Christi 1992, no writ).
184. Id. at 801.
185. The Texas Property Code allows the creation of a trust for the benefit of minors if the minors are not represented by a guardian in a suit and if the trust would be in the minors' best interest. TEX. PROP. CODE ANN. §§ 142.001-142.005 (Vernon 1984).
186. 830 S.W.2d at 801; see Decker v. Wiggins, 421 S.W.2d 189, 191-92 (Tex. Civ. App.—Fort Worth 1967, no writ); TEX. PROP. CODE ANN. §§ 230, 232 (Vernon 1980). The court also noted that the current amount of the guardian's bond was too low to protect the interests of the minors and encouraged the county court to raise the bond to cover the assets of the estate. 830 S.W.2d at 801.
187. 831 S.W.2d 483 (Tex. App.—Houston [14th Dist.] 1992, no writ).
188. Id. at 483, 485.
nor ward reached majority the probate court ordered that all guardianship funds on deposit at various banks should be delivered to the ward. First Republic Bank issued a check payable to the guardianship estate and the guardian and delivered the check to the guardian's attorney. The attorney sent the check to the guardian by certified mail, return receipt requested. The guardian signed the return receipt, which her attorney received back in the mail, then she endorsed the check and converted the funds for her own use. The ward sued First Republic Bank and several other banks. The other banks had made checks payable to the ward, but had delivered the checks to the guardian, who forged the ward's signature and converted the funds. FDIC intervened in the suit as receiver for First Republic Bank. The trial court entered summary judgment against the ward and the ward appealed. The appeals court construed Probate Code Section 409189 strictly and determined that the guardian received the check prior to her discharge and while she still served in her capacity as guardian of the estate.190 Further, the guardian signed a receipt for the check when she signed the certified mail return receipt and when she endorsed and cashed the check.191 The court concluded that the guardian and the bank met the requirements of Probate Code Section 409192 under the facts of this case.193

VI. TRUSTS

A. CONSTRUCTIVE TRUSTS

In Weaver v. Stewart194 the court determined that the trial court incorrectly granted summary judgment on the issue of a constructive trust because a fact issue existed concerning the confidential relationship between the parties.195 The appellant first met the appellee in 1988, when the appellant engaged the appellee's services as a real estate agent for the purpose of locating waterfront property. The two worked together for some time without locating an appropriate property. Appellant later located a property in which she was interested and contacted appellee to request appellee's assistance in submitting a contract. Appellee attempted to dissuade appellant from purchasing the property and ultimately refused to submit a contract on appellant's behalf. Appellant engaged the services of another agent, who determined that a contract had already been submitted on the property and, later, that the buyers under the first contract had purchased the property. Appellee and her husband purchased the property. Appellant brought suit against appellee and her husband, as well as appellee's real estate company,

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189. The Texas Probate Code provides that until the court orders the discharge of the personal representative any money due to the ward or estate may be delivered to the personal representative, who shall sign a receipt, and the payor or obligor will no longer have a legal obligation for payment. TEX. PROB. CODE ANN. § 409 (Vernon 1980).
190. Archer, 831 S.W.2d at 485.
191. Id.
192. TEX. PROB. CODE ANN. § 409 (Vernon 1980).
193. 831 S.W.2d at 485.
194. 825 S.W.2d 183 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
195. Id. at 185-86.
under several theories, including constructive trust. The trial court granted summary judgment in favor of appellee. On appeal the court held that the trial court erred in granting summary judgment on the constructive trust issue because the existence of a confidential relationship between the parties was a fact issue that a jury should decide. The dissent would have upheld the trial court’s summary judgment on the constructive trust issue because no facts existed to show that the parties had a confidential relationship prior to the transaction that resulted in this suit.

B. Spendthrift Trusts

In Daniels v. Pecan Valley Ranch, Inc. the court considered the issue of whether a structured settlement annuity resulting from a personal injury suit is subject to the judgment creditors of the annuitant. The annuitant suffered personal injuries and entered into a structured settlement that provided monthly payments for life and lump sum payments at specified intervals. One lump sum payment, in the amount of $50,000, was due to the annuitant on November 16, 1990. On October 1, 1990, the appellee obtained a deficiency judgment against the annuitant in the amount of $57,934, plus interest. On October 4, 1990, appellee filed an application for writ of garnishment against the annuity payments; the insurance company received the writ on October 9, 1990. On November 11 the insurance company stopped payment on the $51,000 check that it had mailed to the annuitant for the November monthly payment and the lump sum payment. On November 15 the appellant received the check, cashed part of it, and deposited the rest in his account, but the check was subsequently dishonored. The insurance company and the parties all filed many motions and responses in several different courts, but the final outcome at the trial level was that the appellee and the insurance company received a judgment in their favor allowing the payment of the $51,000, plus an additional $2000 in monthly checks, to appellee. The trial court held that an annuity policy that makes payments pursuant to the structured settlement is not exempt from creditors either as an insurance policy or a spendthrift trust. On appeal the court determined that the annuity policy was not a spendthrift trust and that the assets were not exempt from garnishment. The court further held that the annuity was not exempt as a life insurance policy since it was not a life insurance policy.

196. Id. at 186. The court also held that the trial court erred in granting summary judgment on all causes of action because the appellees had merely moved for summary judgment on the constructive trust issue. Id. at 185.

197. Id. at 187 (Murphy, J., dissenting).


199. Id. at 375.

200. Id. at 379. The court based this conclusion on the fact that the insurance company owed the annuitant no duty except to make the payments to him at the times stipulated. The insurance company had no duty to hold separate assets for the benefit of the annuitant or to preserve premiums for his benefit, so probably no trust existed at all, but if a trust did exist, it was a passive trust and not a spendthrift trust. Id.

201. Id. at 380.
C. TRUSTEES

In Rauch v. Patterson the court examined the issue of the duty that a trustee owes to a business invitee to trust premises. Three trustees managed a beach house, which was an asset held in trust. An independent contractor fell through the stairway of the beach house while carrying a refrigerator up the stairs. The independent contractor sued one of the trustees individually and received a judgment in his favor. The trustee appealed, asserting, among other things, that he had no individual liability and that he should not have been sued individually, but rather in his capacity as trustee. The court found that the appellant held legal title to the property as trustee and that he had the use and possession of the trust property. The court also found that the appellant called the appellee from time to time to make repairs to the property and that the appellant had never informed appellee that he was not owner of the property. Appellant thus owed appellee a duty to maintain the premises in a reasonably safe condition or to warn appellee of any known danger.

D. DISTRIBUTIONS FROM TRUSTS

In First National Bank v. Arrow Oil & Gas, Inc. the court held that a bank could not setoff funds held in trust for the benefit of working interest and royalty interest owners for a debt that the operating company owed the bank. The operating company received a check, payable only to it, for the June 1987 gas runs on a particular well. The operating company placed the check in its mineral account. Before the operating company could issue checks to the various working interest and royalty owners, the bank took the amount of the deposit for the well to offset a debt that the operating company owed to the bank. A working interest owner and others notified the bank that the monies on deposit were held for the benefit of others, but the bank refused to return the funds. The bank later filed a declaratory judgment action in which it requested the trial court to find that it did not convert the funds wrongfully. The trial court entered a summary judgment in favor of the beneficiaries of the account on the basis that, although the bank was unaware that the monies on deposit were held for the benefit of others, the equitable exception to the bank’s right of setoff prevented the bank from offsetting the

202. Id.
203. 832 S.W.2d 57 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
204. Id. at 59.
205. Id. The appellant cited cases showing lack of control of non-owners of the property, but the court found that these cases were not on point. Id.
206. Id.
207. Id.
208. 818 S.W.2d 159 (Tex. App.—Amarillo 1991, no writ).
209. See id. at 163.
210. The trial court based this exception on National Indemnity Co. v. Spring Branch State Bank, 162 Tex. 521, 348 S.W.2d 528 (1961), in which the court held that, even if a bank has no knowledge that some or all of the funds are being held for the benefit of third parties, the bank
funds on deposit against the debt the operating company owed to the bank. The appeals court agreed.\textsuperscript{211}

In \textit{Kolpack v. Torres}\textsuperscript{212} the court held that the trial court erred in ordering the trustee of a discretionary trust to make child support payments to the beneficiary's child because the trial court did not first obligate the beneficiary to pay the child support.\textsuperscript{213} The trial court found that the beneficiary of a discretionary distribution trust was the father of a minor child. The child's mother then made a claim for child support and joined the trustee as well as the father. The trial court ordered the father to pay $105 per month in child support and the trustee to pay $348 per month. The trustee appealed. On appeal the court considered the issue of whether the trial court could impose a duty on the trustee to make distributions of trust income for child support when the trial court did not first impose the child support obligation on the beneficiary-parent.\textsuperscript{214} The court considered provisions of the Texas Family Code\textsuperscript{215} and determined that the trial court may only order distributions from a discretionary distribution trust if the beneficiary-parent is first obligated to make the child support payments.\textsuperscript{216}

In \textit{O'Malley v. Stratton}\textsuperscript{217} the court construed the language creating a testamentary trust to determine the ownership of accrued but undistributed income upon termination of the trust.\textsuperscript{218} The testator created several testamentary trusts in her will, including the one in issue. The testator later amended the provisions of this testamentary trust by codicil. The will and codicil together provided that all of the income of the trust would be distributed to the testator's sister during the sister's life, then would be distributed to the sister's son until the earlier of January 1, 1990, or his death, when the trust was to terminate and be distributed to other persons. A dispute arose between the nephew and the remainder beneficiaries concerning oil and gas royalty income earned prior to January 1, 1990, but not paid to the trust until after that date. The appeals court considered the language concerning the trust contained in the will and codicil and concluded that the testator intended for her nephew to receive all accrued income as of January 1, 1990, whether or not the trustee had actually received the income as of that date.\textsuperscript{219}

\begin{footnotesize}
\begin{enumerate}
\item may not setoff the funds held for the benefit of the third parties against the depositor's debt. 818 S.W.2d at 531.
\item 818 S.W.2d at 162-63.
\item 829 S.W.2d 913 (Tex. App.—Corpus Christi 1992, writ denied).
\item Id. at 916.
\item Id. at 915.
\item The Texas Family Code provides that a court may order the trustee of a trust to make distributions for child support to the extent that the trustees must make distributions to the beneficiary-parent, but if the trust has a discretionary distribution standard, the court may only order the trustee to distribute income, not principal, for child support. \textsc{Tex. Fam. Code Ann.} § 14.05(c) (Vernon 1986).
\item 829 S.W.2d at 916.
\item 831 S.W.2d 35 (Tex. App.—El Paso 1992, no writ).
\item Id. at 35-38.
\item Id. at 38.
\end{enumerate}
\end{footnotesize}