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# Probate and Trusts

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*Lynne McNiel Candler**

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THIS article reviews legislative and case law developments in the areas of wills, nontestamentary transfers, heirship, estate administration, guardianships, and trusts. The Survey period covers decisions published between October 1, 1994, and September 30, 1995, and

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changes to the Probate Code, the Property Code, and other codes and statutes enacted by the Seventy-Fourth Texas Legislature that affect the areas of probate and trusts.

## I. WILLS

### A. WILL CONTESTS

In *Hawkins v. Estate of Volkmann*,[1] the court examined sanctions against a will contestant's attorney.[2] The contestant initially contested the probate of the testator's will. An interested party had offered the will and a codicil to the Menard county court for probate. The presiding judge in the Menard county court was an interested party to the will and he recused himself. The judge appointed to preside in the county judge's place appointed the county judge and another interested person as temporary administrators of the estate. The contestant contested the appointment of the temporary administrators. Following transfer of the proceedings to the district court, the contestant attempted to disqualify the district judge or to have the district judge recuse himself, and afterwards contested most of the actions of the administrators and the district court. The district court determined in a summary judgment proceeding that the contestant was not a party interested in the estate, severed the will contest, and dismissed the contestant. The contestant appealed the summary judgment, and the appeals court upheld the trial court's judgment dismissing the contestant.[3] The contestant, however, continued to file objections to the judge sitting in the case and to the administrators' requests to pay debts. The contestant also alleged that she had standing to contest the matters in a fiduciary capacity rather than in her individual capacity. The trial court, after a hearing that lasted over two months, awarded sanctions against both the contestant and her attorney. The contestant failed to meet the deadline for filing her cost bond on appeal, and she filed no motion for extension of time for filing the appeal bond, hence, the appeals court dismissed her appeal for want of jurisdiction.[4] The contestant's attorney perfected his appeal, but continued to pursue his client's claims, despite the fact that the contestant no longer had an issue before the appeals court. The appeals court affirmed the trial court's granting of sanctions against the attorney, but remanded the case for a redetermination of the amount of the sanctions.[5] The court found that the trial court erred in assessing sanctions against the attorney for all costs and expenses rather than just the costs and expenses associated with

1. 898 S.W.2d 334 (Tex. App.—San Antonio 1994, writ denied).
2. *Id.* at 336-37.
3. The appellate decision was not published. *See In re* Estate of Volkmann, No. 04-92-00532-CV, 04-91-00691-CV, and 04-91-00380-CV (Tex. App.—San Antonio 1992, no writ)(not designated for publication).
4. Hawkins and Snodgrass v. Estate of Volkmann, No. 04-93-00136-CV (Tex. App.—San Antonio 1993, no writ) (not designated for publication).
5. 898 S.W.2d at 337.

the attorney's harassing behavior.[6] The court found that the trial court could not include the costs necessary for maintaining a will contest in the amount of the sanctions.[7]

In *Mackie v. McKenzie*,[8] the court affirmed the trial court's summary judgment in favor of the defendants in an action for legal malpractice arising from a will contest.[9] The testator, who was a medical doctor, died in early 1988, and the trial court shortly thereafter admitted his 1984 will to probate. The testator had executed a will in 1980 in which he left $50,000 plus personal effects to his niece and about $600,000 to his niece's children. The 1984 will gave the niece approximately $200,000 more than the 1980 will, but lowered the amount to each of her two children to $10,000 plus some personal effects. The residue of the testator's estate passed to two charities, Baylor University Medical Center Foundation and Presbyterian Hospital of Dallas. Baylor University Medical Center Foundation had paid an attorney to draft the 1984 will. The niece unsuccessfully attempted to reach a settlement with the two charities after she learned of the Foundation's involvement with preparation of the 1984 will. The niece, however, became concerned when the executor of her uncle's estate filed a declaratory judgment action seeking to have various payments that the testator made to his niece during his lifetime characterized as loans, which would be deducted from the niece's gift under the 1984 will. The niece contacted a lawyer about the declaratory judgment action, and they discussed a contest of the 1984 will. The niece gave the lawyer a retainer to begin work on the matter, and they agreed that the lawyer would receive a contingent fee if he took the case. The lawyer then filed an opposition to the 1984 will based on undue influence by Baylor University Medical Foundation—but the lawyer filed the opposition solely on the part of the niece and did not include her two children. The niece requested the lawyer to amend the pleadings to include her children, but the lawyer failed to do so. The niece later requested that the lawyer write her an opinion letter concerning what she might recover in the will contest. The lawyer refused to write the opinion letter, and the niece terminated his representation. The lawyer filed a motion to withdraw in the case, which the niece did not oppose, and the court entered an order granting the motion to withdraw. On the day following the trial court's order allowing the lawyer to withdraw, the lawyer's associate contacted the niece's son to notify him of a hearing on a motion for partial summary judgment and the deadline for a written response. The niece did not obtain substitute counsel prior to the hearing, and the court granted the motion for summary judgment. The niece later engaged another attorney, and she entered into a settlement with her uncle's estate and the two charities, in which she agreed to withdraw her contest of the

6. *Id.* at 338-39.
7. *Id.* at 338-39.
8. 900 S.W.2d 445 (Tex. App.—Texarkana 1995, writ denied).
9. *Id.* at 452.

1984 will and to accept a sum in payment of her gift under the 1984 will. The niece and her children then sued her first lawyer, his associate, and his law firm for legal malpractice. The trial court granted the defendants' motion for summary judgment. In an order for the niece and her children to prevail on the malpractice claim they would have to establish that they would have prevailed in the will contest except for their lawyer's negligence.[10] The appeals court considered summary judgment evidence concerning the testator's involvement with Baylor Hospital and Presbyterian Hospital during his lifetime, the testator's physical and mental health at the time he executed the 1984 will, and the provisions that the testator made for other relatives and individuals, as well as to other charities with which he was involved.[11] The court noted that the testator's residual gifts to the charities were consistent with his charitable nature and with his close association with the two charities during his life.[12] The court concluded that the summary judgment evidence established as a matter of law that the niece and her children would not have prevailed in their contest of the 1984 will on the basis of undue influence.[13] The appeals court also found that the niece received more under the settlement agreement than she would have received under the 1980 will, which would have been the amount she would have received if she had successfully contested the 1984 will, so the niece suffered no damages.[14]

In *Thompson v. Deloitte & Touche, L.L.P.*,[15] the court determined that family members have no right to prevent a testator from changing his will[16] and that the testator's accountants had no duty to tell the testator's wife and daughter of the changed will.[17] The testator was the majority shareholder in a closely held business. The testator wished to preserve his estate for the benefit of his family and, ultimately, for his two grandchildren. After the testator discussed his wishes concerning his estate with his accountant and other advisors, he had a new will prepared in which he left his company stock in trust for the benefit of his daughter for her lifetime, after which it would pass to her children. The testator also provided in his new will that no member of his family could serve as the president or chief executive officer of the closely held business, and he added a no contest clause to the will. The testator asked his accountant to tell no one about the new will. The testator died two months after he executed his new will, and the will was admitted to probate two weeks after his death. More than two years after the probate of the will, his wife and daughter obtained a copy of the testator's previous will which left his

10. *Id.* at 449.
11. *Id.*
12. *Id.* at 450.
13. *Id.* at 451. The court, citing Rothermel v. Duncan, 369 S.W.2d 917, 923 (Tex. 1963), stated that "a will cannot be set aside on proof of facts which at most do no more than show an opportunity to exercise influence." 900 S.W.2d at 451.
14. 900 S.W.2d at 451.
15. 902 S.W.2d 13 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).
16. *Id.* at 15.
17. *Id.* at 16.

closely held stock to his daughter outright. The testator's wife and daughter filed suit against the testator's accountant because the accountant did not tell the testator's family about the new will. The wife and daughter claimed that the accountant tortiously interfered with their inheritance rights by not revealing the new will. The appeals court found that the wife and daughter could not prevail on their claim of tortious interference because the wife and daughter could not contest the probate court's admission of the will to probate more than two years after the admission.[18] The wife and daughter did not contest the will, but instead asserted that the accountant had a duty to advise them of the new will. The wife and daughter sought recovery of the amounts they would have received under the former will as damages. The court held that the accountant had no duty to advise the wife and daughter of the testator's execution of a new will.[19]

In *Harkins v. Crews*,[20] the court determined, among other things, that the trial court properly rendered a declaratory judgment that a will and its codicils were invalid.[21] The testator executed a will in 1983 and subsequently amended the will with two codicils. The 1983 will left the largest part of his estate to his two children from his first marriage. The testator executed a new will in 1987, in which he left the bulk of his estate to his second wife, and which he also amended by two codicils. In 1990 the testator executed a third will, together with a codicil dated the same date as the third will, in which he left an even larger portion of his estate to his second wife. The second wife destroyed the 1983 will and codicils outside of the testator's presence. Following the testator's death, the second wife filed an application to probate the 1990 will and codicil. The testator's children challenged the 1990 will, alleging, among other things, undue influence and lack of testamentary capacity. The second wife did not offer the 1987 will and its codicils for probate following the will contest, so the children applied to the court for a declaratory judgment that the 1987 will and codicils were invalid. The jury found that the testator lacked testamentary capacity at the time he executed the 1987 will and codicils as well

18. *Id.* TEX. PROB. CODE ANN. § 93 (Vernon 1995) provides that the statutory period for contesting a will expires two years after the date the court admits the will to probate. The court found that the wife and daughter had no inheritance expectancy after the statutory contest period because the probate court order admitting the will to probate was final and conclusive. 902 S.W.2d at 16.

19. 902 S.W.2d at 16. The court found that the accountant had a duty to the testator not to disclose his confidences. *Id.* The court further found that no cause of action exists in Texas for a lost opportunity for preventing a testator from changing his will. *Id.* The court held that the accountant did not damage the wife and daughter by holding the confidences of the testator and by advising him concerning his new will. *Id.* at 17. The court noted that the jury found that the accountant had no accountant-client relationship with either the wife or the daughter concerning the testator's estate and that sufficient evidence existed to support the jury's finding. *Id.* at 18. Finally, the court held that the wife and daughter were not "consumers" as defined in Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. § 17.45(4)(Vernon 1987), so they had no standing to sue the accountant under the Deceptive Trade Practices Act. 902 S.W.2d at 19.

20. 907 S.W.2d 51 (Tex. App.—San Antonio 1995, writ requested).

21. *Id.* at 57.

as the 1990 will and codicil, and further found that the testator executed the 1990 will and codicil under undue influence. The jury also found that the second wife and her attorney, who drew the 1987 will and codicils and the 1990 will and codicil, tortiously interfered with the children's inheritance rights. The children had offered a copy of the 1983 will for probate, and the trial court admitted the 1983 will. The second wife appealed, alleging that the trial court should not have submitted any issues concerning the 1987 will to the jury and should not have entered a declaratory judgment that the 1987 will and codicils were invalid. The appeals court found that the declaratory judgment concerning the 1987 will and its codicils was proper since the judgment finally determined the disposition of the testator's estate and the rights of the parties.[22] The court further held that the second wife had the burden of proving the testator's capacity at the time he executed the 1987 will and codicils[23] and that the jury's finding that the testator did not have capacity when he executed the 1987 and 1990 wills discharged the children's burden of proof that the testator did not revoke the 1983 will.[24] The court, in considering the children's cross-points of error, held that the trial court committed no error in charging the costs of temporary administration against the estate rather than against the second wife,[25] that the second wife and her children filed the 1990 will and codicil in good faith,[26] and that the trial court committed no error in awarding attorney's fees to the proponents of the 1990 will.[27]

### B. WILL CONSTRUCTION

In *Davis v. Shanks*,[28] the court held that the trial court incorrectly granted summary judgment when a term contained in the will was ambig-

22. *Id.* The court found that the trial court had broad powers over the proceeding, that the Declaratory Judgments Act is comprehensive in nature (historical statutes not available), that the probate code mandates the court to consider all applications for probate in a single proceeding, and that the trial court's judgment furthered the public policy of judicial economy. 907 S.W.2d at 57 (relying on TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001 et. seq. (Vernon 1986) and TEX. PROB. CODE ANN. § 83(a) (Vernon 1980)).

23. 907 S.W.2d at 58. The second wife sought to establish that the testator revoked his 1983 will through the execution of the 1987 will and codicils, and the execution of the 1990 will and codicil. The court held that the party who seeks to establish revocation by a subsequent written document has the burden of establishing that the testator had testamentary capacity when he executed the subsequent document. *Id.*

24. *Id.* at 59. The court found that the children established that the testator did not revoke his 1983 will by presenting evidence that the testator did not have testamentary capacity for executing the 1987 and 1990 wills and by proving that the testator did not revoke the 1983 will by physically destroying it. *Id.* The court also found that the codicils to the 1983 will, which the trial court did not admit to probate, did not revoke the 1983 will because the codicils did not contain language specifically revoking the 1983 will. *Id.* at 60.

25. *Id.* at 61.

26. *Id.* at 63-64. The attorney who drafted the 1990 will was also an applicant for probate. He was the successor executor named in the will, and he sought letters testamentary after the second wife declined to serve. The court found that the attorney also acted in good faith. *Id.* at 63.

27. *Id.* at 64.

28. 898 S.W.2d 285 (Tex. 1995).

uous.[29] The testator left his house and all contents except for certain specified items to a friend. The testator left the residue of his estate to other persons. The testator placed certificates of stock valued at more than $200,000 in a bag belonging to the friend. The testator then wrote the friend a letter, to be opened only upon his death, advising the friend where the certificates were and that he intended the friend to have the certificates following his death. The executor asked the trial court for a construction of the will, since both the residuary beneficiaries and the friend claimed the stock certificates. The residuary beneficiaries requested a summary judgment on the basis that, as a matter of law, the contents of the house did not include the stock certificates. The friend offered the letter to show the testator's intent concerning the certificates, but the trial court granted summary judgment in favor of the residual beneficiaries. The appeals court held that the term "contents" was not ambiguous as a matter of law and that the trial court correctly granted summary judgment in favor of the residual beneficiaries.[30] The supreme court determined that the term "contents" was ambiguous at the time of the testator's death and that the trial court should have considered the friend's extrinsic evidence.[31]

In *Calhoun v. Killian*,[32] the court determined that a combined lease/will contained an ambiguity about whether the testator intended for the lessee beneficiaries to receive only the surface interest in the property, or both the surface and the mineral interest.[33] The decedent had not provided in a written lease that she was leasing all of her real property lying north of a certain highway to the lessees for agricultural purposes for a five-year term. The lease also provided that if the lessor died during the term of the lease she intended for a fee simple interest in the real property to vest in the lessees. Following the decedent's death, the lessees filed the deed/will for probate and later requested a determination of the heirs who would receive the estate's mineral interests. The decedent owned mineral interests south of the highway, which everyone agreed passed to her heirs, but the heirs and the surviving lessee disagreed about the mineral interests on the land conveyed under the lease/will. The trial court granted summary judgment in favor of the surviving lessee, finding that the lease/will devised title to the mineral interests to the lessee. The heirs appealed, contending that the lease was ambiguous. The appeals court found that the words "all of the land owned" by the testator were ambiguous, and could include the surface only, or could include the full

29. *Id.* at 286.

30. Davis v. Shanks, No. 06-94-00031-CV (Tex. App.—Texarkana, Aug. 25, 1994), 1994 WL 810057, *rev'd*, 898 S.W. 2d 285 (Tex. 1995).

31. 898 S.W.2d 285, 286. The court noted that the Legislature amended TEX. PROB. CODE ANN. § 58(d) (Vernon Supp. 1995) subsequent to the testator's death to provide that contents could not include titled personal property, such as stock certificates. *Id.* (citing Act of June 19, 1993, 73rd Leg., R.S., ch. 846, § 6, 1993 Tex. Gen. Laws 3337, 3340).

32. 888 S.W.2d 51 (Tex. App.—Tyler 1994, writ denied).

33. *Id.* at 54.

estate.[34] The court noted that it could not determine the decedent's intent by reviewing the four corners of the lease/will.[35]

In *Miller v. Wilson*,[36] the court construed a will to determine the nature of the testator's gift of the family home to his second wife. The testator and his first wife built their family home in 1935. The testator's first wife died intestate in 1951, and her community one-half interest in the home passed to their two children. The testator remarried in 1958 and he and his second wife lived in the family home until his death in 1987. The testator left his second wife a life estate in the family home and gave her the power to sell the home. The testator provided that if his second wife sold the home, she should divide the proceeds with his two children, with each child to receive one-fourth of the proceeds and his second wife to receive one-half of the proceeds. Following the testator's death, his second wife sought a declaratory judgment concerning her interest in the property. The court found that the testator specifically provided for his second wife to have a life estate in the property,[37] and that the life estate was only in the testator's one-half interest in the property.[38] The court further held that the testator intended for his wife to receive one-half of his one-half, or one-fourth, of the proceeds when the house sold.[39]

### C. Contractual Will

In *Estate of Gibson*,[40] the court examined a joint and contractual will and determined that the trial court incorrectly concluded that the surviving party to the joint will had the power to dispose of property in which she received a life estate under the joint will.[41] The testators of the joint will, a husband and wife, executed the will in 1957. The husband later died, and the wife offered the joint will for probate. The wife received a life estate in her husband's property under the terms of the joint will. Following her husband's death, the wife opened nine savings accounts with other parties. The signature cards for each of the savings accounts attempted to create rights of survivorship in the surviving parties.[42] The wife also executed a new will in 1983 in which she attempted to convey

34. *Id.*

35. *Id.* The court also found that the fact that the heirs did not prove that the lessee could not claim the mineral interests under the doctrine of estoppel because the lessee alleged that he mistakenly listed the mineral interests as separate from the surface estate in connection with the probate proceeding. *Id.* at 55. Thus, the court concluded that the trial court could not have entered summary judgment for the heirs based upon an estoppel theory. *Id.*

36. 888 S.W.2d 158 (Tex. App.—El Paso 1994, writ denied).

37. *Id.* at 161, 162.

38. *Id.* The court stated that the testator could not leave his widow more than he owned. *Id.* at 161.

39. *Id.* at 162. The court modified the judgment of the trial court, which awarded the widow one-half of the total proceeds from the sale of the home. *Id.*

40. 893 S.W.2d 749 (Tex. App.—Texarkana 1995, n.w.h.).

41. *Id.* at 752.

42. *See infra* notes 69-74 and accompanying text for a discussion of the nontestamentary transfer issues in Estate of Gibson.

her property differently than under the 1957 contractual will. Following the wife's death her daughter attempted to probate the 1983 will, but the appeals court ruled that the 1957 will was contractual and that the wife received a life estate under the terms of the 1957 will.[43] The trial court then admitted the 1957 will to probate, but ruled that the wife had the right to dispose of the funds in the savings accounts and that the funds in the savings accounts were not part of the estate passing under the 1957 will. The husband's son appealed the trial court's conclusions of law concerning the wife's ability to dispose of the life estate property. The appeals court examined the 1957 will and determined that it did not specifically give the wife the power or right to dispose of the life estate property.[44] The appeals court, however, found that the wife had the power to dispose of her separate property that she acquired after the death of her husband.[45] The appeals court remanded the case for a determination of whether the wife's savings accounts consisted of funds that the wife acquired after her husband's death or funds traceable to assets that the couple owned at the time of the husband's death.[46]

## D. Will Execution

In *Phillips v. Najar*,[47] the court determined that the testator's instruction to another to affix her signature to her will with a rubber stamp complied with the requirements of Probate Code section 59,[48] but even if the rubber stamp did not meet statutory requirements, the testator signed the will by marking "X's" on either side of the rubber stamp.[49] The testator went to a notary's office to execute her will. Two witnesses were present in addition to the notary, the testator, and the individual named as independent executor in the testator's will. The testator was physically unable to sign her name, so she instructed the named independent executor to affix her signature to the will with a rubber stamp. After the named

43. 893 S.W.2d at 751. The appeals court reversed and remanded the trial court's admission of the 1983 will to probate in an unpublished opinion. Gibson v. Gibson, No. 06-92-00054-CV (Tex. App.—Texarkana 1993, no writ).

44. 893 S.W.2d at 752. The court noted that the will did not give the wife the power to convey any part of the life estate property, *id.*, so that the language in the 1957 will was similar to the language in the will examined in Dickerson v. Yarbrough, 212 S.W.2d 975, 979 (Tex. Civ. App.—Dallas 1948, no writ), in which the court found that the survivor had no power to sell or dispose of the estate. 893 S.W.2d at 752.

45. 893 S.W.2d at 752. The court found that the language of the will created an ambiguity about whether the surviving spouse could dispose of property acquired after the death of the first spouse to die. *Id.* Because the language in the will created an ambiguity, the court found that the rule set forth in Knolle v. Hunt, 551 S.W.2d 755 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.), did not apply to the 1957 will. 893 S.W.2d at 752. The court in Knolle v. Hunt determined that a contractual will could control the disposition of after-acquired property if the plain language of the will specifically and unambiguously states the intention of the parties to do so. 551 S.W.2d at 761-62.

46. 893 S.W.2d at 753.

47. 901 S.W.2d 561 (Tex. App.—El Paso 1995, n.w.h.).

48. Tex. Prob. Code Ann. § 59(a) (Vernon 1980) provides that the testator shall sign the will or instruct another person to sign the will in the testator's presence.

49. 902 S.W.2d at 562.

independent executor complied with the testator's wishes, the testator placed an "X" at each end of her stamped signature. The two witnesses initialed next to each "X" and signed the will. The testator stated to the witnesses and the notary that she had read the will and that it expressed her last will and testament. The appellant contended that the document did not meet the requirements found in Probate Code section 59[50] for execution of a will. The court found that if a testator can instruct another person to sign her will at her direction, then the testator may also instruct another person to affix her signature with a rubber stamp.[51] The court further found that even if the signature by rubber stamp were not sufficient for proper execution of the will, the "X's" made by the testator were sufficient for execution of the will.[52]

### E. Holographic Will

In *Matter of Rogers*,[53] the court examined three documents and determined that the first document was a holographic will,[54] that the second document served to revoke the first document,[55] and that the third document did not meet the formal requirements of Probate Code section 63[56] for a valid testamentary instrument.[57] The testator executed a document in 1959, which she titled a codicil to her will. The document was in the testator's handwriting, and she stated her clear intent concerning the distribution of her estate upon her death. The court held that the 1959 document was testamentary in nature.[58] The court then found that the document executed in 1989, which was the latest of the three documents, did not meet the requirements for a formal revocation of a will.[59] The court then examined the handwritten 1988 document, found that the 1988 document specifically purported to revoke all previous wills and codicils, and determined that it could not overturn the trial court's finding that the 1988 document revoked the 1959 will.[60]

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50. Tex. Prob. Code Ann. § 59 (Vernon 1980).

51. 901 S.W.2d at 562.

52. *Id.* The court noted that the appellant did not challenge the testator's marks on the will and that his challenge to the use of the rubber stamp is a challenge to the testator's extra precautions concerning the execution of the will. *Id.*

53. 895 S.W.2d 375 (Tex. App.—Tyler 1994, writ denied).

54. *Id.* at 377.

55. *Id.* at 378.

56. Tex. Prob. Code Ann. § 63 (Vernon 1980) provides that a testator may revoke a written will with a document that is a "subsequent will, codicil, or declaration in writing, executed with like formalities" as the original will.

57. 895 S.W.2d at 377.

58. *Id.* at 377. The court noted that the use of the term "codicil" to describe the document did not change its testamentary nature. *Id.*

59. *Id.* The 1989 document was a typewritten document that contained various dates, but the earliest date on the document was in September 1989. The parties stipulated at trial that the 1989 document was not a valid testamentary instrument. The appeals court thus held that the 1989 document did not revoke the 1959 will because the testator did not execute it with the requisite formalities. *Id.*

60. *Id.* at 378. On motion for rehearing, the court held that the appellant could not raise for the first time the issue of whether the 1988 document was in the testator's handwriting, especially since the appellant had previously stipulated that the 1988 document

In *Estate of Johnson*,[61] the court affirmed the trial court's determination that an alleged holographic will was not in the decedent's handwriting.[62] The decedent's sister offered the alleged holographic will, under which she was the only beneficiary, for probate, and she sought appointment as administrator of the decedent's Texas estate. The decedent's son contested the probate on the bases that the will was not in the decedent's handwriting and that he was the decedent's sole heir. The trial court found that the alleged will was not wholly in the decedent's handwriting and that no witness signed the alleged will. The trial court concluded that since the will was not wholly in the decedent's handwriting and it was not witnessed, the decedent did not execute the purported will with the requisite formalities for the execution of a valid will. The appeals court determined that the trial court, as the finder of fact, properly based its findings of facts and conclusions of law upon the evidence submitted.[63]

### F. Gift in Lieu of Will

In *Molnari v. Palmer*,[64] the court affirmed the trial court's judgment that the grantor did not sign a deed as the result of undue influence.[65] Because the grantor and his wife, who was in poor health, wished to ensure that title to their farm would pass to the wife's grandchildren, they hired an attorney to prepare a deed transferring the farm to the wife's grandson, as trustee for the benefit of the wife's daughter and grandchildren. The grantors retained life estates in the property. The grandson had accompanied the grantors to the attorney's office, and he was present when the grantors signed the deed. The grandson did not record the deed until the day of his grandmother's funeral, several weeks after the execution of the deed. Following his wife's death the grantor attempted to have the deed set aside alleging failure of consideration, or, alternatively, fraud and undue influence. The trial court gave instructed verdicts on the issues of failure of consideration and undue influence and submitted the issues of fraud and mental capacity to the jury. The jury found in favor of the grandson. The appeals court found that, although the grandson made the initial appointment with the lawyer, took the grantor to the lawyer's

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was a holographic will that was invalid because of interlineations by persons other than the testator. *Id.* at 378-79.

61. 886 S.W.2d 869 (Tex. App.—Beaumont 1994, n.w.h.).

62. *Id.* at 873.

63. *Id.* The sister argued that she met her burden of proof in establishing that the purported will was in the decedent's handwriting because she provided testimony of two witnesses, another of the decedent's sisters and herself. The appeals court stated that this testimony amounted to opinion evidence since neither of the sisters saw the decedent execute the purported will. *Id.* at 872. The appeals court found that the trial court properly considered the testimony as raising a factual issue only, rather than establishing that the will was in the decedent's handwriting as a matter of law. *Id.* at 872. The trial court considered several exhibits containing undisputed samples of the decedent's handwriting, as well as the testimony of the decedent's sisters, in making its findings of fact and conclusions of law.

64. 890 S.W.2d 147 (Tex. App.—Texarkana 1994, n.w.h.).

65. *Id.* at 148-50.

office, and was present when the grantors signed the deed, he took all of these actions at the request of the grantor, so he did not exert undue influence.[66] The court also found that no evidence existed that the grandson brought any external pressure on his grandparents to sign the deed.[67] The court finally found that the facts and circumstances surrounding the execution of the deed showed the grantors' intention to make a gift of the property, so that no consideration was necessary.[68]

## II. NONTESTAMENTARY TRANSFERS

In *Estate of Gibson*,[69] the court examined signature cards from several of the decedent's savings accounts and determined that the cards created valid rights of survivorship.[70] The signature cards on the savings accounts stated that the parties to the accounts held the accounts "as joint tenants with right of survivorship and not as tenants in common and not as tenants by the entirety."[71] The signature cards also stated that any deposits to each account by any party to the account would result in a pro rata gift to the other parties to the account, with delivery at the time of the deposit. The signature cards did not contain the specific language found in Probate Code section 439(a),[72] but the court found that the language on the signature cards satisfied the requirements found in *Chopin v. InterFirst Bank Dallas*[73] for creating valid survivorship rights.[74]

## III. HEIRSHIP

In *Crowson v. Wakeham*,[75] the Texas Supreme Court adopted a test for determining whether a probate order is interlocutory or final[76] and held that the time period for filing an appeal in the instant case began when the trial court severed the appellant's cause of action from the remaining issues, not from when the trial court entered an order finding that the appellant was not an heir of the decedent.[77] Following the decedent's death, a party filed a will for probate, claiming it was the decedent's will. A woman who alleged that she was the decedent's common law wife then

66. *Id.* at 149. The court noted that the grantor testified that he did not rely on his grandson's advice. *Id.*

67. *Id.* at 150.

68. *Id.* The court noted the testimony of the attorney who prepared the deed and the grandson that the grantors intended the deed to be a gift in lieu of a will. *Id.*

69. 893 S.W.2d 749 (Tex. App.—Texarkana 1995, n.w.h.).

70. *Id.* at 753. For a discussion of the issues concerning the contract will in this case, *see supra* notes 40-46 and accompanying text.

71. 893 S.W.2d at 753.

72. TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1995).

73. 694 S.W.2d 79 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

74. 893 S.W.2d at 753. The court cited Stauffer v. Henderson, 801 S.W.2d 858 (Tex. 1990), for the proposition that the language found in TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1995) is not the exclusive method for creating survivorship rights. 893 S.W.2d 753.

75. 897 S.W.2d 779 (Tex. 1995).

76. *Id.* at 783.

77. *Id.*

filed a will contest. Other heirs of the decedent later intervened, contesting the will and contesting the alleged common law marriage. One of the heirs filed an application for determination of heirship, in which she alleged that the decedent had a will in which he left all of his estate to his mother, who predeceased him, so that an heirship determination was necessary to ascertain who should receive the decedent's property. The original will applicant withdrew the alleged will and took a nonsuit, leaving only the heirship determination. The other heirs moved for a partial summary judgment finding that no common law marriage existed, and the trial court entered a partial summary judgment against the alleged common law wife. The alleged wife filed a motion for reconsideration, which the trial court denied, and the trial court, some two months later, severed the partial summary judgment from all other issues in the heirship determination. The alleged wife filed an appeal that was timely from the date of the severance order, but that was not timely from the date of the partial summary judgment. The court of appeals, on its own motion, requested all parties to submit briefs concerning whether the partial summary judgment order was final or interlocutory. The court of appeals then determined that it had no jurisdiction over the appeal because the alleged wife did not timely perfect the appeal. The supreme court noted that the trial court's conclusions concerning the alleged wife's claims did not dispose of all of the issues concerning the heirship determination.[78] The court held that the partial summary judgment against the alleged wife, whether under the rule that it adopted in this case or under prior case law, was interlocutory in nature and that the alleged wife could not appeal until the trial court severed her cause from the other proceedings.[79]

In *Smith v. Little*,[80] the court reversed a summary judgment based on the statute of limitations and public policy.[81] The appellant was adopted before she reached one year of age, but the appellant's adoptive mother never told appellant her natural mother's name. Following her adoptive mother's death, the appellant sought to gather information on her natural family and learned the name of her natural mother from Hope Cottage. In 1989, prior to the time Hope Cottage gave appellant her birth records, appellant found a scrap of paper which she believed listed her natural mother and father. The information from Hope Cottage later listed the same woman as appellant's natural mother. When appellant learned that her alleged natural mother was dead, she contacted her alleged natural uncle about obtaining family medical records. The alleged uncle maintained that he did not know of appellant's birth and that he could not believe that she was the natural daughter of his sister. Appellant's natu-

78. *Id.* at 782-83. The court acknowledged that its previous decisions created ambiguity and uncertainty as to when an order became appealable and determined to adopt a test for making a determination. *Id.* at 783.

79. *Id.* at 783.

80. 903 S.W.2d 780 (Tex. App.—Dallas 1995, writ granted).

81. *Id.* at 788.

ral mother died in 1969, survived by two children of her marriage and her own mother. Following the natural grandmother's death in 1982, the uncle served as executor of his mother's estate. The uncle distributed the estate and filed an affidavit closing administration of the estate almost two years following his mother's death. In 1991, almost eight years after her alleged grandmother's estate closed, appellant filed suit against the uncle for fraud, breach of fiduciary duty, conspiracy, and gross negligence, asking for damages equal to the amount that she would have received as a beneficiary of her alleged grandmother's estate, as well as punitive damages, attorney's fees, and interest. Appellant alleged that the uncle and other relatives knew of her existence and intentionally excluded her from division of her grandmother's estate. The uncle sought a summary judgment, which the trial court granted, based upon the statute of limitations and public policy concerning finality of estates. The appeals court found that fact issues existed concerning when the appellant knew or should have known about the wrongful deprivation of her inheritance rights[82] and about when appellant should have known about the identity of her natural mother and about her exclusion as a beneficiary of the estate.[83] The court upheld the trial court's conclusions that appellant had no remedies for constructive trust, accounting and partition because of public policy interests in the finality of distributing estates.[84] The court remanded the case for additional proceedings on the appellant's claims for fraud, breach of fiduciary duty, conspiracy, negligence, and gross negligence.[85]

## IV. ESTATE ADMINISTRATION

### A. CLAIMS

In *Lake v. Lake*,[86] the court determined that the beneficiaries under a will should not receive credit for social security benefits paid for the decedent's minor child's benefit against a claim filed by the minor child's mother for child support payments.[87] The decedent and his ex-wife divorced in 1976, and as part of the agreement incident to the divorce, decedent agreed that the child support obligations under the agreement would continue after his death. The decedent died in 1989 while his youngest child was still a minor. In 1991 the ex-wife sued the beneficiaries under the decedent's will for recovery of the decedent's child support obligations, and the trial court entered a take nothing judgment against the ex-wife. The ex-wife appealed, and the appeals court reversed and rendered judgment for child support obligations, but remanded the case for a determination of whether any credit for social security benefits

82. *Id.* at 786.
83. *Id.* at 787.
84. *Id.* at 788.
85. 903 S.W. 2d at 788.
86. 899 S.W.2d 737 (Tex. App.—Dallas 1995, n.w.h.).
87. *Id.* at 741.

applied.[88] The trial court found that the beneficiaries should receive a credit for social security benefits paid, which exceeded the amount the ex-wife should have received under the divorce agreement. On appeal for the second time, the court held that no credit for payment of social security benefits should apply.[89]

In *Olson v. Commission for Lawyer Discipline*,[90] the court found that the attorney's death rendered his appeal moot[91] and that the judgment against the deceased attorney was not an enforceable claim against his estate.[92] The trial court granted a summary judgment to the Commission for Lawyer Discipline and suspended the attorney's license for five years, with the first year as an active suspension and the remaining term as a probated suspension. The trial court further ordered the attorney to reimburse the State Bar for its costs in connection with the action against him, commencing with the date his active suspension ended. The attorney died after perfecting his appeal. The attorney's wife made a motion to substitute herself in the attorney's place, and the appeals court granted her motion, but requested both parties to submit briefs concerning whether the attorney's death rendered his appeal moot. The court found that the sole nature of the trial action was a determination of whether the attorney violated any of the Texas Disciplinary Rules of Professional Conduct[93] and, if so, the sanctions for his conduct.[94] Because the attorney was deceased, the court reasoned that any outcome from the appeal would have no effect.[95] The court also found that because the trial court tied the attorney's duty to reimburse the State Bar to his probationary period, the State Bar would have no claim for the reimbursement against the attorney's estate.[96]

In *Carter v. Kahler*,[97] the court considered the presentation and classification of a claim from a medical malpractice judgment against the decedent.[98] The probate court granted letters testamentary in the decedent's estate on January 8, 1991. On February 19, 1991, less than six months after the original grant of letters testamentary, the appellants in this case

88. Lake v. Lake, No. 05-92-02111-CV, 1993 WL 342588 (Tex. App.—Dallas 1993, no writ)(not designated for publication).

89. *Id.* at 741. The court noted that social security survivor benefits existed at the time the decedent and his ex-wife divorced and that the parties did not address social security benefits in their otherwise comprehensive divorce agreement. *Id.* Because the agreement did not address a credit or offset for social security survivor benefits, the court held that the beneficiaries under the will would not receive a credit. *Id.* The court also held that the trial court did not err in its refusal to allow the ex-wife's claim for attorney's fees because the issue of attorney's fees was beyond the subject of the remand. *Id.*

90. 901 S.W.2d 520 (Tex. App.—El Paso 1995, n.w.h.).

91. *Id.* at 525.

92. *Id.*

93. TEX. DISCIPLINARY R. PROF. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN. title 2, subtitle G (Vernon Supp. 1995).

94. 901 S.W.2d at 523.

95. *Id.*

96. *Id.* at 525.

97. 902 S.W.2d 85 (Tex. App.—Houston [1st Dist.] 1995, writ requested).

98. *Id.* at 86-87.

filed a medical malpractice suit against the estate through its independent executor. The appellants obtained a judgment against the estate on February 19, 1993, at which point the contingent claim against the estate became a liquidated rather than a contingent claim. On April 20, 1993, the probate court granted letters of administration in the decedent's estate and allowed the estate administration to change from independent to dependent. The appellants contended that they perfected the requirement of legal exhibition of their claim when they filed suit against the independent executor and that their claim should be a class seven claim. The probate court determined that the claim was a class eight claim, rather than a class seven claim. The appeals court held that, in the case of a contingent claim, filing suit on the claim is the same as legally exhibiting the claim, so that the probate court should have classified the claim as a class seven claim since the appellants filed suit against the executor within six months of the original grant of letters testamentary.[99]

### B. PUBLISHED NOTICE

In *Gilbert v. Jennings*,[100] the court held that a publisher's affidavit concerning the publication of notice may be filed after the estate is closed if the publication itself was timely.[101] The decedent died in January 1989, and the local newspaper published the notice to creditors concerning his estate in April 1989, but no one filed the publisher's affidavit concerning the publication at that time. Following the decedent's death, a creditor sued the decedent's widow on a deficiency following a foreclosure during the decedent's lifetime. The widow filed a motion for summary judgment, and the creditor responded, alleging that no record of published notice existed in the probate proceeding. The widow filed the publisher's affidavit and a copy of the published notice the day after the creditor filed his response to her motion for summary judgment. She obtained a certified copy of the affidavit and notice and filed the copy in the record in the summary judgment case. The trial court granted summary judgment in favor of the widow. In his appeal the creditor alleged that the trial court should not have granted summary judgment since the widow did not serve his counsel with a copy of the affidavit and notice. The court found that the affidavit was of public record and could be filed at any time before judgment.[102] The court further observed that the Texas Rules of Civil Procedure[103] do not require service of public records filed in a

99. *Id.* at 87.

100. 890 S.W.2d 116 (Tex. App.—Texarkana 1994, writ denied).

101. *Id.* at 117.

102. *Id.* TEX. R. CIV. P. 166a(c) provides that certified public records may be filed prior to the hearing or thereafter, but before judgment, with the court's permission. Because the certified copy of the affidavit was on file prior to the hearing on the motion for summary judgment, the court found that the trial court could properly consider the evidence. 890 S.W.2d at 117.

103. TEX. R. CIV. P. 166a(d) does not require service of public records, although it requires service of other discovery products not on file in the pending action. TEX. R. CIV.

case.[104]

## C. JURISDICTION

In *Carroll v. Carroll*,[105] the court examined the issue of whether a party properly brought an action in district court when the independent administration in the decedent's estate was still pending in county court.[106] The testator and her husband executed a joint and mutual will in 1960 in which they left a life estate in their property to the survivor, with the remainder to three named individuals. A farm was part of the joint estate subject to the will. The testator's husband died in 1965, and the testator offered the will for probate. The testator soon thereafter moved into a nursing home which was owned by one of her nephews. The county court appointed the nephew as the testator's guardian in 1978, and the nephew filed an inventory, appraisement, and list of claims in the guardianship several months later. The testator lived in the nursing home until her death in 1986. Almost a year after the testator's death, the guardian filed an application in the guardianship proceeding requesting the court to allow him to sell the farm. The nephew also filed a claim on behalf of the nursing home, alleging that the testator's estate owed the nursing home more than the purported value of the farm. The county court granted the nephew's application, and the nephew sold the farm to his brother, as trustee for the benefit of the nursing home, in order to satisfy the debt. The county court confirmed the sale a few weeks later. A few months later one of the beneficiaries of the joint and mutual will filed the will for probate, and the court appointed the applicant independent executor. No further probate actions took place in either the guardianship or the decedent's estates. In 1991 the beneficiaries of the joint and mutual will filed an action in the district court, in which they sought a declaratory judgment that they owned the farm pursuant to the will and sought a removal of cloud on the property's title, cancellation of the guardian's deed, damages and attorney's fees. The district court declared that the county court's order of sale and decree confirming the sale, as well as the guardian's deed, were void, and that the beneficiaries under the will owned the farm. The district court also awarded the beneficiaries damages and attorney's fees. The appeals court found that the county court and the district court had concurrent jurisdiction over the subject matter in this case.[107] The court stated that the district court was the more ap-

P. 21 requires each party to serve pleadings and motions, but it does not require service of public records filed in the action.

104. 890 S.W.2d at 117. The court held that the creditor did not preserve error for review concerning the widow's failure to serve a copy of the affidavit since he did not object to the affidavit at the hearing, and he did not move for the court's permission to file a response. *Id.*

105. 893 S.W.2d 62 (Tex. App.—Corpus Christi 1994, n.w.h.). See *infra* notes 135-38 and accompanying text for a discussion of the guardianship issues in this case.

106. *Id.* at 66-67.

107. *Id.* at 66 (citing TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1995)).

propriate forum for this case since it involved title to real property.[108] The court held that the primary issues involved the determination of title to the farm and that distribution of probate assets was incidental to the relief that the beneficiaries sought, so the district court had jurisdiction.[109]

### D. Settlement Agreements

In *Bryant v. Flint*,[110] the court held that the decedent's wife was liable to his estate for part of his income tax liability.[111] The decedent and his wife were in the process of obtaining a divorce at the time of his death. The decedent left his entire estate to his children. The decedent's wife filed a declaratory judgment action asking for her share of community assets, reimbursement for payments she made for her husband's separate debts, and a family allowance. The executor and beneficiaries of the decedent's estate and the wife entered into an agreed judgment settling the dispute, under which the wife received certain property and abandoned her claims for reimbursement and for her share of the community property. The wife also agreed to pay one-half of any income tax liability for any of the years of the marriage, limited to a cap of $75,000. The IRS audited the couple's joint tax returns for three of the years of their marriage and assessed a liability of more than $167,000. The wife requested that IRS determine that she was an innocent spouse in connection with some of her husband's tax shelters, and IRS later absolved her of all liability for the tax. The wife relied upon the IRS determination to refuse to pay the estate any part of the income tax liability. The trial court found that the wife owed one-half of the income tax liability under the terms of the agreed judgment. On appeal the court examined the evidence supporting the trial court's judgment, including the wife's knowledge that IRS was auditing the joint tax returns at the time she signed the agreed order and the fact that the wife listed the tax shelters under audit as community property in the inventory that she filed in the divorce proceeding.[112] The court found that the wife agreed to be responsible for one-half of any taxes, up to the cap of $75,000, when she signed the agreed order, and that the IRS determination that she was not responsible for any of the taxes as an innocent spouse did not relieve her of her responsibility to pay the estate for her share of the taxes under the settlement.[113]

108. 893 S.W.2d at 66. The court further noted that the county court had no jurisdiction to consider a claim against the estate because of the independent administration. *Id.* (citing Klein v. United States, 539 F.2d 427, 432 (5th Cir. 1976)); Tex. Prob. Code Ann. § 145(h) (Vernon 1980). Because the county court did not have jurisdiction over the claims alleged in the beneficiaries' action, the court found that the district court had jurisdiction. 893 S.W.2d at 66-67.

109. *Id.* at 67.

110. 894 S.W.2d 397 (Tex. App.—Houston [1st Dist.] 1995, n.w.h.).

111. *Id.* at 400-01.

112. *Id.* at 400.

113. *Id.* at 400-01.

In *Tinney v. Willingham*[114] the court determined that the trial court signed a judgment that purported to be an agreed judgment, although the judgment conflicted with the terms of the parties' settlement agreement.[115] Several of the parties filed claims in the decedent's estate, which the independent executor rejected. The claimants then filed suit on the claims and the parties thereafter agreed to settle the claims. The parties dictated the terms of the settlement agreement that they reached into the record in open court.[116] Almost one year later the claimants made a motion for judgment, asking the court to sign and enter their proposed judgment, which they had attached to her motion. The independent executor objected to the proposed judgment, noting specific items on which the judgment did not conform with the settlement agreement. The trial court nevertheless signed the judgment and later denied the executor's motion for new trial without a hearing. The appeals court found that the trial court altered the settlement reached by the parties when it signed and entered a judgment conflicting with the settlement agreement.[117] The court found that the trial court's judgment was unenforceable and reversed and remanded the case.[118]

## E. Due-on-Sale Clause

In *Howell v. Murray Mortgage Co.*,[119] the court affirmed a summary judgment that a due-on-sale clause contained in a deed of trust remained in force against the administrator of the decedent's estate.[120] The decedent executed a deed of trust in 1984 to secure the renewal of purchase money debt on his residence. The deed of trust contained a due-on-sale clause, which provided that the decedent must pay the full amount of the indebtedness upon sale of the residence. The decedent died in 1986 and his brother qualified as administrator of the decedent's estate. The administrator determined that the claims against the estate were greater than the personal property of the estate, and he sought permission from the probate court to sell the decedent's real property, including the residence subject to the deed of trust. The administrator entered into a contract to sell the residence on an assumption, with the administrator agreeing to finance the equity in the house. The administrator requested the mortgage company to execute a waiver of the acceleration clause under the deed of trust, but the mortgage company refused to do so. The sale of the residence property never closed because of the mortgage com-

114. 897 S.W.2d 543 (Tex. App.—Fort Worth 1995, n.w.h.).
115. *Id.* at 544-45.
116. *See* Tex. R. Civ. P. 11.
117. 897 S.W.2d at 544. The court noted that the trial court must sign and enter a judgment that exactly complies with the terms of the settlement. *Id.* (citing Wyss v. Bookman, 235 S.W. 567, 569 (Tex. Comm'n App. 1921, holding approved)); Vickrey v. American Youth Camps, Inc., 532 S.W.2d 292, 292 (Tex. 1976); Arriaga v. Cavazos, 880 S.W.2d 830, 833 (Tex. App.—San Antonio 1994, no writ).
118. 897 S.W.2d at 545.
119. 890 S.W.2d 78 (Tex. App.—Amarillo 1994, writ denied).
120. *Id.* at 83, 84.

pany's refusal to waive the acceleration clause. The administrator sought to have the probate court enter a declaratory judgment finding that the due-on-sale clause did not apply to him, as well as an injunction requiring the mortgage company to release the restrictions on sale of the property. The probate court entered summary judgment in favor of the mortgage company. On appeal, the court found nothing in law or public policy to require a release from the due-on-sale clause.[121] The court further found that the administrator was successor to the decedent, who was the original borrower,[122] and that the due-on-sale clause was a covenant that bound the administrator as successor.[123] The court held that the due-on-sale clause did not unreasonably restrict the probate court's power over administrations.[124] The court finally held that the due-on-sale clause was not an undue restraint on alienation.[125]

### F. Muniment of Title

In *Estate of McGrew*,[126] the court upheld the admission of a will to probate as a muniment of title almost fifteen years after the testator's death.[127] At the time of the testator's death, his widow could not locate his original will. She applied for and received letters of administration in the decedent's estate. Soon thereafter, the widow's sister-in-law remembered that she had borrowed the will for the purpose of using it as a model for her own will. The sister-in-law returned the will to the widow, who then applied for probate of the will in another county. The testator's daughter opposed the probate of the will and ultimately won her will contest on appeal. The widow sold some real estate that was community property, one-half of which was included in the testator's estate. Several years later the purchaser conveyed the real estate to a third party. The testator's widow died in 1989, and in 1990 the testator's daughter notified the current owners of the real estate that she claimed an intestate interest in the property. The owners somehow obtained the testator's will and offered it for probate as a muniment of title. The county court admitted the will to probate as a muniment of title and the daughter appealed. The appeals court first determined that the present owners were not in default for failure to offer the will for probate ear-

121. *Id.* at 83. The court stated that although the administrator "has the absolute right to administer the estate and dispose of the property, . . . this right does not extend to extinguishing a creditor's right to be paid upon the sale of the estate property." *Id.*

122. *Id.* at 84.

123. *Id.*

124. 890 S.W. 2d at 86. The court stated as follows:

> The probate courts are empowered to preside but they are not empowered to rewrite loan agreements and require lenders to finance the sale of estate property. Such power would certainly facilitate the sale of estate property and would be of benefit to heirs but it is not within the power of the probate court.

*Id.*

125. *Id.* at 87.

126. 906 S.W.2d 53 (Tex. App.—Tyler 1995, writ denied).

127. *Id.* at 55-56.

lier.[128] The court noted that the present owners of the property did not acquire it until some ten years after the testator's death, and they did not learn of the daughter's alleged interest in the property until thirteen years after the testator's death.[129] The court also held that whether the testator's wife defaulted in failing to offer the will for probate or whether the wife waived her rights under the will since she did not offer the will for probate was irrelevant.[130] The daughter alleged at the trial level that her father destroyed his will with the intent to revoke it, but the court found that she offered insufficient proof of revocation.[131]

## V. GUARDIANSHIPS

In *Sarny Holding, Ltd. v. Letsos*,[132] the court considered whether the incorrect listing of the plaintiff in judgment in a filed abstract of judgment perfected a lien on the judgment debtor's property.[133] The guardian of the estate of an incompetent person obtained a money judgment in 1973. The guardian abstracted the judgment, filed the abstract in the appropriate county records, and recorded subsequent abstracts in 1982 and again in 1992. Each abstract contained the guardian's name in the style of the case, but stated that the estate of the incompetent ward obtained the judgment. The original judgment debtor sold the property and ultimately the appellant received the property. The appellant attempted to remove the cloud from the title of the property and requested the trial court to declare that the heirs of the ward had no interest in the property. The trial court granted summary judgment for the heirs of the ward. The appellant alleged on appeal that the abstract of judgment was insufficient because it incorrectly listed the ward's name, rather than the guardian's name, as the plaintiff in judgment. The court held that the county clerk properly indexed the abstract.[134]

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128. *Id.* TEX. PROB. CODE ANN. § 73(a) (Vernon 1980) provides that a court may admit a will to probate more than four years following the testator's death if the party making the application for probate did not default in failing to offer the will within four years from the date of death.

129. 906 S.W.2d at 56. The daughter alleged that the present owners should have offered the will for probate as soon as they knew of her claim, but she offered no authority supporting her allegation. The court held that the present owners did not default by failing to offer the will for probate earlier. *Id.*

130. *Id.*

131. *Id.* at 57. The daughter claimed that her father had signed two original wills, one being on plain paper and one on tissue paper. The proponents offered the tissue paper will for probate. The daughter alleged that the tissue paper will was a copy and that her father must have destroyed the plain paper copy with the intent to revoke his will, but she offered no evidence of revocation. The court also considered the daughter's allegation that the will was illegible due to markings that the sister-in-law put on the will when drafting her own will, but the court held that the will was legible and that the sister-in-law fully explained each of her markings. *Id.* at 58.

132. 896 S.W.2d 274 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

133. *Id.* at 274-76.

134. *Id.* at 275-76. The court noted that a purchaser would be on notice of a judgment against the seller since the abstract correctly listed the defendant in judgment. *Id.* at 276. The dissent would have held that the abstract did not create a valid lien since it improperly listed the plaintiff in judgment. *Id.* at 276-77 (Hutson-Dunn, J., dissenting).

In *Carroll v. Carroll*,[135] the court held that a guardian had no power to sell real property of the estate more than a year following the ward's death.[136] The guardian, who was the ward's nephew, also was an owner of a nursing home in which the ward resided for more than twenty years prior to her death. More than eleven months following the ward's death the guardian filed an application to sell real property belonging to the ward's estate. The guardian also filed a claim from his nursing home, alleging that the ward's estate owed the nursing home more than the value of the real property. The court entered an order allowing the sale of the real estate, and the guardian sold the real estate to his brother, as trustee for the nursing home. The court confirmed the sale. Several years later the beneficiaries under the ward's will filed suit against the guardian for cancellation of the deed, removal of cloud on the title to the real property, damages, and attorney's fees. The trial court entered judgment in favor of the beneficiaries of the ward's will. On appeal the court noted that the only powers that a guardian has after the ward's death are the powers required to settle and close the guardianship.[137] The court also found that a probate court only has the authority to require the guardian to make a final accounting of the ward's estate following the death of the ward, and that the probate court has no authority to allow or confirm the sale of any of the ward's property following the ward's death.[138]

## VI. TRUSTS

### A. Trusts and Trustees

In *Anzilotti v. Gene D. Liggin, Inc.*,[139] the court determined that an alleged trustee did not meet his burden of proof establishing that a trust existed.[140] An individual, apparently in his individual capacity, entered into a contract with a construction company for renovation of an existing structure. The individual also entered into a letter agreement with an architect in connection with the renovation. The letter agreement recited that the individual was acting as trustee for a subsequently formed corporation. The construction contract provided that any claims arising from the contract would be subject to arbitration. The construction company sued the individual and his subsequently formed corporation on the contract, and the individual and corporation counterclaimed. The individual and his corporation also named the architect as a third party defendant to

135. 893 S.W.2d 62 (Tex. App.—Corpus Christi 1994, n.w.h.). For a discussion of the estate administration issues in this case, *see supra* notes 105-09 and accompanying text.

136. *Id.* at 68.

137. *Id.*

138. *Id.* The court also held that the district court's judgment was not a collateral attack on the county court's approval and confirmation of the sale of the property since the county court's orders were void. *Id.* (citing Jones v. Wynne, 133 Tex. 436, 129 S.W.2d 279, 283 (1939)).

139. 899 S.W.2d 264 (Tex. App.—Houston [14th Dist.] 1995, n.w.h.).

140. *Id.* at 268.

the counterclaims. The architect denied the claims and submitted his own claim for services rendered. The parties submitted their claims to arbitration, and the arbitrator found that the individual and his corporation should receive nothing from either the construction company or the architect and that the individual and his corporation owed the construction company and the architect substantial damages plus attorney's fees. The individual appealed, partly on the basis that he should have no individual liability since he was acting as a trustee. The court noted that the notation of the fiduciary capacity in the letter agreement provided evidence that the individual intended to avoid individual liability.[141] The court added, however, that the alleged trustee has the burden of proving that he has no individual liability,[142] and the individual did not meet his burden of proof.[143]

In *Davis v. Ward*,[144] the court determined that an attorney who contracted with a trust beneficiary for legal services in return for a portion of the beneficiary's recovery could not intervene in a case between the successor trustee and a bank.[145] The beneficiary engaged an attorney to represent him in connection with the trustee's alleged breach of fiduciary duties and losses sustained when the trustee pledged trust assets for her personal loans. The bank offset the trust assets when the trustee defaulted, which led to the beneficiary's concerns. The beneficiary sued the trustee and the bank. The trustee resigned and appointed as successor trustee another trust beneficiary, who then proceeded to pursue the cause of action against the original trustee and the bank. The bank interpleaded the amount that it contended were the trust funds on deposit. The successor trustee requested the court to distribute the interpled funds to the trust. The bank, the original trustee, and the successor trustee entered into a settlement agreement, under the terms of which the bank would pay the successor trustee additional funds in settlement of all claims. The beneficiary who originally sued was not a party to the settlement agreement. Under the terms of the settlement agreement, the bank paid no funds directly to the beneficiary. The trust agreement specifically provided that the trustee could accumulate or distribute trust income and could distribute trust principal to the beneficiaries on a per stirpes basis. The trial court entered a judgment approving the settlement agreement and specifically recited in the judgment that the beneficiary had no standing to make a claim against the bank and that the successor trustee had the power to enter the settlement agreement. The trial court later ordered distribution of the interpled funds plus the settlement funds to the successor trustee. At the final hearing on the matter, the court dismissed the beneficiary's claims and denied the intervention of the beneficiary's

141. *Id.* at 267 (citing TEX. PROP. CODE ANN. § 114.084(b) (Vernon 1984)).
142. 899 S.W.2d at 267-68 (citing Nacol v. McNutt, 797 S.W.2d 153, 155 (Tex. App.—Houston [14 Dist.] 1990, writ denied)).
143. 899 S.W.2d at 268.
144. 905 S.W.2d 446 (Tex. App.—Amarillo 1995, writ denied).
145. *Id.* at 451.

attorney. The attorney appealed the denial of his intervention, alleging that the trial court improperly approved the settlement agreement. On appeal the court determined that the trustee had discretion whether to distribute any of the recovery to the beneficiary and that the beneficiary had no present right to the recovery.[146] The court noted that the trial court determined that only the trustee could enter the settlement agreement and that the beneficiary, and thus his attorney, had no right to enter the settlement agreement.[147]

### B. Resulting Trusts and Constructive Trusts

In *Young v. Fontenot*,[148] the court considered the issues of resulting trust[149] and constructive trust.[150] The appellant alleged that he entered an oral agreement with two other men that he would provide services in connection with establishing a club in exchange for stock in the corporation that would own the club. At the time the men entered the agreement the corporation was not in existence. The men agreed that the appellant would not receive any stock issued in his name because a third party, who had agreed to assist the men in obtaining a liquor license for the club, would not participate if the appellant participated. The other men allegedly agreed to issue stock to the appellant at a later date. The other two men formed the corporation and issued stock to themselves. They then formed another corporation with the sole purpose of receiving profits from the corporation that owned the club. More than two years after the alleged oral agreement the appellant requested one of the other men to issue the stock; when the other man failed to issue the stock, the appellant filed suit. The trial court granted summary judgment in favor of the other two men, but did not specify the grounds on which it issued the judgment. The appellant's trial pleadings requested the imposition of a resulting trust on the stock of the corporations because he had earned the stock through the services that he rendered to the corporations. The appeals court noted that a resulting trust is an equitable remedy used to prevent unjust enrichment[151] and that it arises when someone other than the one who has actually paid for the property takes title to the property.[152] The court found that the appellant alleged that he earned stock in return for services he provided, that the other men issued the stock in their names to entice the third party to assist them with the liquor license, and that the other men did not disprove the appellant's factual allega-

146. *Id.*

147. *Id.* Because the beneficiary received no recovery from the bank and because the beneficiary could not force a distribution from the trust, the beneficiary received no funds from which the attorney's contingent fee could be paid. *See id.* at 450-51.

148. 888 S.W.2d 238 (Tex. App.—El Paso 1994, writ denied).

149. *Id.* at 242.

150. *Id.* at 242-43.

151. *Id.* at 242 (citing Nolana Dev. Ass'n v. Corsi, 682 S.W.2d 246, 250 (Tex. 1984)).

152. 888 S.W.2d at 242 (citing Tricentrol Oil Trading, Inc. v. Annesley, 809 S.W.2d 218, 220 (Tex. 1991); *Nolana Dev. Ass'n*, 682 S.W.2d at 250, and Cohrs v. Scott, 338 S.W.2d 127, 130 (Tex. 1960)).

tions.[153] The appellant also sought the imposition of a constructive trust over stock that the other men held in a third corporation. The appellant alleged that the others agreed to hold his stock in trust, that the others issued the shares to one of them, and that the man who held the stock refused to convey the stock to the appellant. The court held that the trial court improperly entered summary judgment on the constructive trust issue.[154]

In *Connell v. Connell*,[155] the court considered, in the divorce context, the issues of constructive trust[156] and resulting trust.[157] The wife sought a divorce from her husband, whom she alleged had benefitted friends by assignments and gifts of community property. The wife alleged that her husband and some of his friends had committed constructive fraud against her by all of her husband's business dealings after their separation. The appeals court found that a fiduciary relationship exists between a married couple and that each spouse must follow the fiduciary duty when transacting business with community assets.[158] The court found that the wife did not prove any constructive fraud on the part of her husband or any third party, so the trial court correctly determined not to submit the issues of constructive fraud and constructive trust to the jury.[159] The court further held that the trial court appropriately directed a verdict on the resulting trust issue since the wife failed to prove that her husband purchased property with community funds in another's name.[160]

In *Marineau v. General American Life Ins. Co.*,[161] the court held that the trial court properly imposed a constructive trust over a portion of life insurance proceeds.[162] An agent for a life insurance company embezzled funds from the company over a period of four years. The agent purchased a policy on his own life, payable to his wife, and paid the premiums on the policy from an account into which he deposited the embezzled funds. The agent committed suicide, and his wife requested payment of the full face value of the insurance policy. The agent's wife conceded that the agent had embezzled funds. The insurance company filed for a declaratory judgment seeking imposition of a constructive trust over the insurance proceeds and seeking a determination of its rights and the

153. 888 S.W.2d at 242.

154. *Id.* at 243. The court noted that a constructive trust is also an equitable remedy used to prevent unjust enrichment. *Id.* at 242 (citing Meadows v. Bierschwale, 516 S.W.2d 125, 131 (Tex. 1974)).

155. 889 S.W.2d 534 (Tex. App.—San Antonio 1994, writ denied).

156. *Id.* at 541-43.

157. *Id.* at 544.

158. *Id.* at 541. The court also noted that any third party who wittingly participates in any breach of fiduciary duty involving the community estate may also have committed constructive fraud. *Id.*

159. *Id.* at 543. Because the wife failed to prove constructive fraud, the trial court could not have imposed a constructive trust over property held by any of the husband's friends or business contacts. *Id.*

160. 889 S.W. 2d at 544.

161. 898 S.W.2d 397 (Tex. App.—Fort Worth 1995, writ denied).

162. *Id.* at 400.

wife's rights in the proceeds. An accountant testified concerning the proportion of the agent's true deposits to his embezzled deposits to the account from which the agent paid the insurance premiums. The trial court used the proportion determined by the accountant to determine the amount of the insurance proceeds that the insurance company should recover pursuant to the constructive trust. The wife appealed, alleging that the trial court improperly placed upon her the burden of proving the proportion of embezzled funds used for paying the premiums. The appeals court noted that the party that seeks recovery of embezzled funds has the initial burden of tracing the funds to specific property.[163] The court stated that once the party seeking recovery meets its initial burden of proof, the burden shifts to the other party to prove that the purchase of the specific property came from the purchaser's own funds, not embezzled funds.[164] The court held that the trial court properly concluded the wife had the burden of proving what part of the insurance premiums were paid with her husband's own funds, rather than embezzled funds.[165]

## VII. LEGISLATIVE UPDATE

### A. WILLS

The legislature amended subsections (c) and (d) to section 58 of the Probate Code to clarify the meaning of the terms "contents"[166] and "titled personal property."[167] The legislature also amended section 69 of the Probate Code, which voids provisions in a will that relate to a former spouse once the marriage ends, to include annulment as well as divorce unless the testator specifically provides otherwise in the will.[168]

### B. ESTATE ADMINISTRATION

#### *1. Probate Courts*

The legislature created a statutory probate court in Denton County.[169] New section 15.007 of the Civil Practices and Remedies Code provides

163. *Id.* (citing Meyers v. Baylor Univ., 6 S.W.2d 393, 394 (Tex. Civ. App.—Dallas 1928, writ ref'd)). If the party seeking recovery of the funds traces the funds successfully, the funds become subject to a constructive trust. 898 S.W.2d at 400; Moseley v. Fikes, 126 S.W.2d 589, 597 (Tex. Civ. App.—Fort Worth 1939), *aff'd*, 151 S.W.2d 202 (Tex. Comm'n App. 1941, judgm't adopted).

164. 898 S.W.2d at 400.

165. *Id.*

166. Act of May 24, 1995, 74th Leg., R.S., ch. 642, § 1, 1995 Tex. Sess. Law Serv. 6197, 6197 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 58(c) (Vernon Supp. 1996)). The legislature amended the meaning of "contents" to include "titled personal property." *Id.*

167. *Id.* (codified as amended at TEX. PROB. CODE ANN. § 58(d) (Vernon Supp. 1996)). The legislature added tangible personal property represented by a "certificate of ownership," (such as a stock certificate) to the definition of "titled personal property." *Id.*

168. Act of May 24, 1995, 74th Leg., R.S., ch. 642, § 2, 1995 Tex. Sess. Law Serv. 6197, 6198 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 69 (Vernon Supp. 1996)).

169. Act of May 19, 1995, 74th Leg., R.S., ch. 328, §§ 1-3, 1995 Tex. Sess. Law Serv. 4851, 4851-52, 4856 (Vernon) (codified as amended at TEX. GOV'T CODE ANN. §§ 25.0631-32, 25.0635 (Vernon Supp. 1996)).

that the venue found in the Civil Practices and Remedies Code controls over the venue provisions of the Probate Code and relates to suits by or against a fiduciary for wrongful death, personal injury, or property damages.[170] The legislature also provided a procedure by which practicing lawyers who are present may elect a special judge to hold court for any Dallas County probate judge who fails or refuses to hold court.[171]

### 2. *Miscellaneous Estate Administration Revisions*

The legislature amended Probate Code section 137, which concerns small estate affidavits, to clarify or correct some of the existing language and to set forth the requirements for a small estate affidavit.[172] An independent executor now may file an affidavit closing an estate if no pending litigation concerning the estate exists.[173] The legislature also amended the emergency administration procedures.[174] Probate Code section 520 now provides that an applicant may file for emergency procedures to protect the decedent's personal property in the county in which the property is located.[175] The legislature added new section 521A to the Probate Code to set forth the requirements for emergency intervention.[176] The revision to Probate Code section 522 serves to clarify the existing language, but also adds a provision that the applicant may not have the decedent's remains cremated unless the decedent left specific written instructions permitting cremation.[177] The legislature added Probate Code section 522A to set forth the contents for an application for emergency intervention for access to the decedent's personal property.[178] The legislature also added some clarification to section 523 concerning the court's order of emergency intervention relating to gaining access to

170. Act of May 8, 1995, 74th Leg., R.S., ch. 138, § 1, 1995 Tex. Sess. Law Serv. 1752, 1755 (Vernon) (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. § 15.007 (Vernon Supp. 1996)).

171. Act of May 4, 1995, 74th Leg., R.S., ch. 95, § 1, 1995 Tex. Sess. Law Serv. 1575, 1575-76 (Vernon) (to be codified at TEX. GOV'T CODE ANN. § 25.0596 (Vernon Supp. 1996)).

172. Act of May 24, 1995, 74th Leg., R.S. ch. 642, § 3, 1995 Tex. Sess. Law Serv. 6197, 6198-99 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 137 (Vernon Supp. 1996)).

173. *Id.* § 5 at 6200-01 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 151 (Vernon Supp. 1996)).

174. *Id.* §§ 6-11 at 6201-05 (Vernon) (codified at TEX. PROB. CODE ANN. §§ 520, 521A, 522, 522A, 523, & 524 (Vernon Supp. 1996)).

175. *Id.* § 6 at 6201 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 520 (Vernon Supp. 1996)).

176. *Id.* § 7 at 6201 (Vernon) (codified at TEX. PROB. CODE ANN. § 521A (Vernon Supp. 1996)). An applicant may request emergency intervention only if no one has filed for probate of the decedent's will or for administration of the decedent's estate and if the applicant either needs funds to pay for the decedent's funeral and burial or needs to gather the decedent's personal property from rented premises and cannot otherwise enter the premises. *Id.*

177. Act of May 24, 1995, 74th Leg., R.S. ch. 642, § 8, 1995 Tex. Sess. Law Serv. 6202 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 522 (Vernon Supp. 1996)).

178. *Id.* § 9 at 6203 (Vernon) (codified at TEX. PROB. CODE ANN. § 522A (Vernon Supp. 1996)).

the decedent's personal property.[179] Section 523, as amended, allows the person holding the decedent's personal property at the expiration of the emergency intervention order to distribute the property to the decedent's heirs or to certain creditors of the decedent.[180] The legislature added new section 525 to the Probate Code, which provides for interested persons to petition the court to limit the surviving spouse's rights to handle burial or cremation arrangements if good cause exists showing that the surviving spouse may have wilfully caused or aided in an act that resulted in the decedent's death.[181]

*3. Claims*

The legislature enacted significant changes to the claims procedures for estates of decedents dying after January 1, 1996.[182] Independent executors now clearly must follow the same notice procedures as dependent personal representatives, as well as approve, classify, and pay, or, alternatively, reject, claims following the order of priority and classification followed by the personal representative and court in a dependent administration.[183] The legislature also overruled *Texas Commerce Bank v. Estate of Cox*[184] and *Joffrion v. Texas Bank*[185] in new section 146(b), which provides that secured creditors that elect "preferred debt and lien" in an independent administration may not pursue a deficiency against other estate assets.[186]

Estate representatives must now give actual notice to secured creditors within two months after receiving letters.[187] Estate representatives may now give actual notice to unsecured creditors stating that the creditor must present a claim within four months of the notice or the claim will be barred.[188] Creditors may present claims to the estate's representative at any time during the estate administration unless the statute of limitations bars the claim or the four month bar statute[189] bars the claims, which

179. *Id.* § 10 at 6203-04 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 523 (Vernon Supp. 1996)).

180. *Id.* § 11 at 6204-05 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 524 (Vernon Supp. 1996)).

181. *Id.* § 12 at 6205 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 525 (Vernon Supp. 1996)).

182. Act of May 27, 1995, 74th Tex. Legislature, R.S., ch. 1054, 1995 Tex. Sess. Law Serv. 9367, 9367-85 (Vernon).

183. *Id.* § 1, 1995 Tex. Sess. Law Serv. 9367, 9368 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 146(a) (Vernon Supp. 1996)).

184. 783 S.W.2d 16 (Tex. App.—Austin 1989, writ denied).

185. 780 S.W.2d 451 (Tex. App.—Texarkana 1989), *judgment vacated*, 792 S.W.2d 456 (Tex. 1990) (pursuant to motion of dismissal).

186. Act of May 27, 1995, 74th Legislature, R.S., ch. 1054, § 1, 1995 Tex. Sess. Law Serv. 9367, 9367-68 (Vernon) (codified as added at TEX. PROB. CODE ANN. § 146(b) (Vernon Supp. 1996)).

187. Act of May 27, 1995, 74th Legislature, R.S., ch. 1054, § 3, 1995 Tex. Sess. Law Serv. 9367, 9369-70 (Vernon) (codified as added at TEX. PROB. CODE ANN. § 295 (Vernon Supp. 1996)).

188. *Id.* § 2 at 9368-69 (Vernon) (codified as added at TEX. PROB. CODE ANN. § 294 (Vernon Supp. 1996)).

189. *Id.*

extends the period for presentation of claims beyond six months.[190] The personal representative may now petition the court after six months from receiving letters to order payment of allowed and approved claims if the personal representative states in the application that it has no knowledge of any additional enforceable claims.[191]

The legislature added a definition for "matured secured claims"[192] and provided remedies for holders of secured claims in dependent administrations that elect preferred debt and lien status.[193] If the court allows the remedy of foreclosure, the secured creditor seeking the foreclosure must file an application that describes the property, the amount of the outstanding debt, the amount of the matured debt, and any other debts secured by the property of which the secured creditor is aware.[194] Before proceeding with foreclosure, the secured creditor must serve the personal representative and any other known secured creditor with citation,[195] and the court must find that a default has occurred.[196] Any interested person may appeal the order of foreclosure.[197] If the secured creditor cannot sell the property at foreclosure because the minimum price is too high, the creditor may apply to the court for a modification of the sales price.[198]

### C. GUARDIANSHIPS

The legislature enacted significant changes to the Guardianship Code.[199] The legislature revised Probate Code section 676(d) to provide that the court will appoint as guardian of a minor child the person designated in the parent's will or other written document, unless the court finds that the designated person is deceased, is disqualified, refuses to

190. *Id.* § 5 at 9370-71 (Vernon) (codified as added at TEX. PROB. CODE ANN. § 298 (Vernon Supp. 1996)).

191. *Id.* § 21 at 9379-80 (Vernon) (codified as added at TEX. PROB. CODE ANN. § 320(d) (Vernon Supp. 1996)).

192. *Id.* § 9 at 9373 (Vernon) (codified as added at TEX. PROB. CODE ANN. § 306(c) (Vernon Supp. 1996)).

193. Act of May 27, 1995, 74th Leg., R.S., ch. 1054, § 9, 1995 Tex. Sess. Law Serv. 9373-75 (codified as amended at TEX. PROB. CODE ANN. § 306(e)-(k) (Vernon Supp. 1996)). A holder of a preferred debt and lien may apply to the court for an order of sale of the property and apply the proceeds to the matured debt, or for an order requiring a sale of the property free of the lien and apply the proceeds to the payment of the entire debt, or order foreclosure. *Id.* at 9373 (codified as amended at TEX. PROB. CODE ANN. § 306(e) (Vernon Supp. 1996)).

194. *Id.* at 9374 (codified TEX. PROB. CODE ANN. § 306(f) (Vernon Supp. 1996)).

195. *Id.* (codified as amended at TEX. PROB. CODE ANN. § 306(g) (Vernon Supp. 1996)).

196. *Id.* (codified at TEX. PROB. CODE ANN. § 306(i) (Vernon Supp. 1996)). The court also has discretion to set a minimum foreclosure sales price for the property. *Id.*

197. *Id.* at 9375 (codified at TEX. PROB. CODE ANN. § 306(j) (Vernon Supp. 1996)).

198. Act of May 17, 1995, 74th Leg., R.S., ch. 1054 § 9, 1995 Tex. Sess. law Serv. 9375 (codified as amended at TEX. PROB. CODE ANN. § 306(k) (Vernon Supp. 1996)).

199. *See* Act of May 17, 1995, 74th Leg., R.S., ch. 304, 1995 Tex. Sess. Law Serv. 4569, 4569-73 (Vernon); Act of May 24, 1995, 74th Leg., R.S., ch. 642, § 13, 1995 Tex. Sess. Law Serv. 6197, 6206 (Vernon); Act of May 27, 1995, 74th Leg., R.S., ch. 1039, 1995 Tex. Sess. Law Serv. 9252, 9252-87 (Vernon).

serve, or would not serve in the child's best interest.[200] The legislature added a provision that the surviving parent of an adult incapacitated person may designate a guardian in a will or other written document, if the parent served as guardian while living.[201] The legislature also added the requirements for the written declaration that parents may use to appoint guardians for their children, including a sample form.[202] Courts shall not require bonds for guardianship programs operated by counties with a population in excess of 2.5 million.[203]

The legislature enacted comprehensive legislation that removed inconsistent references to incapacitated persons within the Probate Code and other codes, and made substantive changes to the Guardianship Code.[204] The legislature replaced Probate Code section 3(p) to provide a definition of "incapacitated person" and added section 3(mm) to define "ward."[205] References formerly made to minors or incompetent persons now refer to incapacitated persons.[206] In addition, references to guardians no longer appear in Probate Code sections 195(a) and 222(a) and (b).[207] The legislature also enabled personal representatives of decedent's estates to deliver property to the guardian of the estate of an incapacitated person.[208]

The legislature amended Probate Code section 601 to add the definition of a "court investigator."[209] New section 633 contains the provisions

200. Act of May 17, 1995, 74th Leg., R.S., ch. 304, § 1, 1995 Tex. Sess. Law Serv. 4569, 4569 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 676(d) (Vernon Supp. 1996)).

201. *Id.* § 2 at 4570 (codified as added at TEX. PROB. CODE ANN. § 677(b) (Vernon Supp. 1996)).

202. *Id.* §3 at 4570-72 (codified at TEX. PROB. CODE ANN. § 677A (Vernon Supp. 1996)).

203. Act of May 24, 1995, 74th Leg., R.S., ch. 642, § 13, 1995 Tex. Sess. Law Serv. 6197, 6206 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 702 (Vernon Supp. 1996)).

204. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, 1995 Tex. Sess. Law Serv. 9252 (Vernon).

205. *Id.* § 4 at 9253 (codified as amended at TEX. PROB. CODE ANN. §§ 3(p), (mm) (Vernon Supp. 1996)).

206. *Id.* § 1 at 9252 (codified at TEX. HEALTH & SAFETY CODE ANN. § 594.036(b) (Vernon Supp. 1996)); *id.* § 2 at 9252 (codified at TEX. HUM. RES. CODE ANN. § 48.021 (Vernon Supp. 1996)); *id.* § 3 at 9252 (codified at TEX. CIV. STAT. ANN. art 6687b (Vernon Supp. 1996)); *id.* § 5 at 9253-55 (codified at TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1996)); *id.* § 6 at 9256 (codified at TEX. PROB. CODE ANN. § 53(b) (Vernon Supp. 1996)); *id.* § 7 at 9256-57 (codified at TEX. PROB. CODE ANN. § 78 (Vernon Supp. 1996)); *id.* § 8 at 9257 (codified at TEX. PROB. CODE ANN. § 137(a) (Vernon Supp. 1996)); *id.* § 9 at 9258 (codified at TEX. PROB. CODE ANN. § 145(i) (Vernon Supp. 1996)); *id.* § 10 at 9258-59 (codified at TEX. PROB. CODE ANN. § 149C (Vernon Supp. 1996)); *id.* § 11 at 9259 (codified at TEX. PROB. CODE ANN. § 154A (Vernon Supp. 1996)); *id.* § 13 (codified at TEX. PROB. CODE ANN. § 222(a), (b) (Vernon Supp. 1996)).

207. Act of May 27, 1995, ch. 1039, § 12, 1995 Tex. Sess. Law Serv. 9252, 9259 (Vernon) (codified at TEX. PROB. CODE ANN. § 195(a) (Vernon Supp. 1996)); *id.* § 13 (codified at TEX. PROB. CODE ANN. § 222(b)(5) (Vernon Supp. 1996)).

208. *Id.* § 14 at 9261 (codified at TEX. PROB. CODE ANN. § 405A (Vernon Supp. 1996)).

209. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, §15, 9252, 9265 (Vernon) (codified at TEX. PROB. CODE ANN. § 601 (Vernon Supp. 1996)).

for notice and citation in guardianship proceedings.[210] New section 642(c) provides that courts shall determine the standing of persons with interests adverse to a proposed incapacitated person or ward by motion in limine.[211] The legislature amended the procedures for hearings by submission in uncontested proceedings.[212]

The legislature amended section 646, which concerns the requirements for appointment as an attorney ad litem.[213] New section 648(f) clarifies that the court visitor program does not apply to guardianships created solely to receive funds from governmental sources.[214] New section 648A provides a list of the duties of a court investigator.[215] The legislature clarified provisions relating to the renewal of letters of guardianship to provide that the annual accounting refers only to guardianships of the estate, to add a reference to the annual report for guardianships of the person, and to provide the date to which the renewal dates back, unless the court has changed the accounting period.[216] New subsection 660(b) provides that the order appointing the guardian will provide the powers and duties that the guardian will have after receiving letters of guardianship.[217]

The legislature clarified provisions relating to the compensation of guardians to provide for compensation for temporary guardians, to set a cap on aggregate compensation of the guardian of the person and the guardian of the estate, and to exclude certain governmental benefits from the definition of "gross income" for purposes of determining guardian compensation.[218] New section 665A provides that the court may set the amount of fee payments to attorneys and other professionals appointed to represent the proposed ward's interests and order payment from the proposed ward's estate or from county funds if the ward is indigent.[219] New section 665B provides that the court may order payment from the proposed ward's estate of compensation of an attorney who represented an applicant who brought a guardianship proceeding.[220] New section 665C contains the language formerly found in section 772(b)-(e) and re-

210. *Id.* § 18 at 9266-67 (codified at TEX. PROB. CODE ANN. § 633 (Vernon Supp. 1996)).

211. *Id.* § 20 at 9268 (codified at TEX. PROB. CODE ANN. § 642(c) (Vernon Supp. 1996)).

212. *Id.* § 21 at 9268-69 (codified as amended at TEX. PROB. CODE ANN. § 644 (Vernon Supp. 1996)).

213. *Id.* § 22 at 9269-70 (codified as amended at TEX. PROB. CODE ANN. § 646 (Vernon Supp. 1996)).

214. Act of May 27, 1995, 74th Leg., R.S., ch. 1039 § 23, 9270 (codified at TEX. PROB. CODE ANN. § 648(f) (Vernon Supp. 1996)).

215. *Id.* § 24 at 9270 (codified at TEX. PROB. CODE ANN. § 648A (Vernon Supp. 1996)).

216. *Id.* § 25 at 9270-71 (codified as amended at TEX. PROB. CODE ANN. § 659(c), (d) (Vernon Supp. 1996)).

217. *Id.* § 26 at 9271 (codified at TEX. PROB. CODE ANN. § 660(b) (Vernon Supp. 1996)).

218. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 27, 9252, 9272-73 (codified as amended at TEX. PROB. CODE ANN. § 665 (Vernon Supp. 1996)).

219. *Id.* § 28 at 9273-74 (codified at TEX. PROB. CODE ANN. § 665A (Vernon Supp. 1996)).

220. *Id.* (codified at TEX. PROB. CODE ANN. § 665B (Vernon Supp. 1996)).

lates to contingent fee arrangements with attorneys and reimbursement for costs the guardian incurred in connection with collecting a debt or obligation.[221] Section 669 now provides that an applicant shall bear the cost of the guardianship proceeding if a court investigator recommends that no guardianship is necessary.[222]

A minor age 12 or older may select a guardian or successor guardian, with court approval.[223] Section 684(a) sets forth what the court must find by clear and convincing evidence and what the court must find by preponderance of the evidence before establishing a guardianship.[224] New section 687 sets forth what a medical certificate must contain in a proceeding seeking guardianship of an allegedly incapacitated adult.[225] The legislature revised section 692 to delete provisions relating to the order appointing a guardian and added language about the dismissal of an application for guardianship.[226] Section 693 lists the findings of fact that the court must make and specific language that the court must include in the order establishing the guardianship.[227] New section 694A, which relates to the restoration of the ward, contains the language formerly found in section 694(d).[228] The legislature expanded the scope of section 702, which relates to the guardian's bond, to include guardianships of the estate as well as of the person and to provide that the guardian of the estate of a minor ward must post a bond even if the parent directed otherwise by will.[229]

The guardian of the person must annually return a sworn written report detailing receipts and disbursements, whether or not a guardian of the estate exists.[230] If the guardian does not timely file the annual report, or any other account, exhibit or report, the court may revoke the letters of guardianship, fine the guardian up to $1,000, or both.[231] If a guardian

221. *Id.* (codified at TEX. PROB. CODE ANN. § 665C (Vernon Supp. 1996)).

222. *Id.* § 29 at 9274-75 (codified at TEX. PROB. CODE ANN. § 669(b) (Vernon Supp. 1996)).

223. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 31, 1995 Tex. Sess. Law Serv. 9252, 9275-76 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 680 (Vernon Supp. 1996)).

224. *Id.* § 33 at 9277-78 (codified as amended at TEX. PROB. CODE ANN. § 684 (Vernon Supp. 1996)).

225. *Id.* § 35 at 9278-79 (codified at TEX. PROB. CODE ANN. § 687 (Vernon Supp. 1996)).

226. *Id.* § 38 at 9280-81 (codified as amended at TEX. PROB. CODE ANN. § 692 (Vernon Supp. 1996)).

227. *Id.* § 39 at 9281-82 (codified as amended at TEX. PROB. CODE ANN. § 693 (Vernon Supp. 1996)).

228. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 41, 1995 Tex. Sess. Law Serv. 9284 (Vernon) (codified at TEX. PROB. CODE ANN. § 694A (Vernon Supp. 1996)).

229. *Id.* § 42 at 9284-85 (codified as amended at TEX. PROB. CODE ANN. § 702 (Vernon Supp. 1996)).

230. *Id.* § 44 at 9252, 9285 (codified as amended at TEX. PROB. CODE ANN. § 743(a) (Vernon Supp. 1996)). The legislature also added new subsections (e)-(i) to § 743, which relate to the court's approval of the annual report, waiver of filing fees and costs for the annual report, and the timing of the annual report. *Id.* § 45 at 9286 (codified at TEX. PROB. CODE ANN. § 743(e)-(i) (Vernon Supp. 1996)).

231. *Id.* § 46 at 9286 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 744 (Vernon Supp. 1996)).

dies while serving as guardian, the guardian's personal representative has the duty to account for and deliver the guardianship estate to the successor guardian.[232] The court may order a guardian who has resigned to deliver all of the guardianship estate in the former guardian's possession to the successor guardian.[233] If the court removes a guardian, it may immediately appoint a successor guardian while not releasing the removed guardian from its bond or discharging the removed guardian until approval of the removed guardian's final account.[234] Only a guardian of the estate may file suit on behalf of the ward.[235] A guardian must make a report to the court within thirty days after lending money of the guardianship estate, unless the court orders the loan.[236]

If a court orders the creation of a management trust for the benefit of the ward the trust will have the same cause number as the guardianship proceeding.[237] The court may grant the trustee of a management trust the same powers granted to a trustee under Subtitle B, Title 9, Property Code.[238] If the trustee of a management trust resigns or otherwise ceases to serve as trustee the court may appoint a corporate fiduciary as successor trustee.[239] Neither the guardian of the estate nor the surety for the guardian of the estate have any liability for the acts or omissions of the trustee of the management trust.[240] Prior to distribution of the assets at the termination of the management trust, the trustee must file an accounting with the court providing the same information as required for a guardian's accounting.[241]

Applications for temporary guardianships must be sworn and the court may appoint a temporary guardian if anyone contests an application for appointment of a temporary guardian, for making a temporary guardianship permanent, or for the appointment of a permanent guardian.[242] The managing conservator of a minor child who does not have a guardian, as

232. *Id.* § 48 at 9287 (codified as amended at TEX. PROB. CODE ANN. § 759(a) (Vernon Supp. 1996)).

233. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 49, 1995 Tex. Sess. Law Serv. 9287 (Vernon) (codified at TEX. PROB. CODE ANN. § 760(g) (Vernon Supp. 1996)).

234. *Id.* § 50 at 9287 (codified at TEX. PROB. CODE ANN. § 761(e) (Vernon Supp. 1996)). The court may also order the removed guardian to deliver all of the guardianship estate in the removed guardian's possession to the successor guardian. *Id.* (codified at TEX. PROB. CODE ANN. § 761(f) (Vernon Supp. 1996)).

235. *Id.* § 52 at 9289 (codified as amended at TEX. PROB. CODE ANN. § 773 (Vernon Supp. 1996)).

236. *Id.* § 56 at 9291 (codified as amended at TEX. PROB. CODE ANN. § 862 (Vernon Supp. 1996)).

237. *Id.* § 57 at 9252, 9291 (codified as amended at TEX. PROB. CODE ANN. § 867 (Vernon Supp. 1996)).

238. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 59, 1995 Tex. Sess Law Serv. 9292 (Vernon) (codified at TEX. PROB. CODE ANN. § 868(c) (Vernon Supp. 1996)).

239. *Id.* § 60 at 9292 (codified at TEX. PROB. CODE ANN. § 869A (Vernon Supp. 1996)).

240. *Id.* § 62 at 9292 (codified as amended at TEX. PROB. CODE ANN. § 872 (Vernon Supp. 1996)).

241. *Id.* § 63 at 9292 (codified as amended at TEX. PROB. CODE ANN. § 873 (Vernon Supp. 1996)).

242. *Id.* § 64 at 9252, 9293 (codified as amended at TEX. PROB. CODE ANN. § 875(c), (k) (Vernon Supp. 1996)).

well as the child's parent, may apply to the court for permission to sell property belonging to the minor without the necessity for a guardianship, so long as the property has a value less than $25,000.[243] The legislature also repealed sections located outside the guardianship provisions of the Probate Code that relate to guardianships.[244]

### D. TRUSTS

The legislature amended Trust Code provisions relating to the attorney general's involvement in proceedings related to charitable trusts.[245] The legislature revised the provisions concerning notice to the attorney general of proceedings involving charitable trusts by adding a provision that the parties must notify the attorney general of any new causes of action alleged in or parties added to a proceeding in which the attorney general previously waived participation or declined to intervene.[246] The legislature added a definition of "fiduciary or managerial agent" to Property Code section 123.001[247] and changed the references in Property Code section 123.005, which concerns the venue of proceedings against a fiduciary for its breach of fiduciary duty, to "fiduciary or managerial agent" from "trustee."[248] The legislature also provided that certain charitable organizations[249] may serve as trustee of a trust of which the organization is itself a beneficiary or which benefits another charitable organization if serving as trustee furthers the purpose of the charitable organization.[250]

The legislature amended the Trust Code definition of "interested person" in an attempt to clarify when a person might have standing in con-

243. Act of May 27, 1995, 74th Leg., R.s., ch.1039, § 6B, 1995 Tex. Sess. Law Serv. 9252, 9294 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 889(a) (Vernon Supp. 1996)).

244. *Id.* § 73 at 9296-97 (repealing TEX. PROB. CODE ANN. §§ 3(n) (definition of "habitual drunkard"), 3(y) (definition of "persons of unsound mind"), 110 (persons disqualified to serve as guardians), 111 (notice and citation on guardianship application), 112A (reports in application for guardianship), 118 (minor's selection of guardian), 123A (continuation or modification of guardianship), 127A (guardianship of missing person), 157 (incompetent spouse), 159 (recovery of competency), 236 (expenditures for ward's education and maintenance), 236A (sums allowed parents for minor ward's education and maintenance).

245. Act of May 12, 1995, 74th Leg., R.S., ch. 172, §§ 1-4, 1995 Tex. Sess. Law Serv. 3144, 3144-46 (Vernon) (codified as amended at TEX. PROP. CODE ANN. § 123 (Vernon Supp. 1996)).

246. *Id.* § 3 at 3145 (codified at TEX. PROP. CODE ANN. § 123.003(b) (Vernon Supp. 1996)). *See also id.* § 1 at 3144 (codified as amended at TEX. PROP. CODE ANN. § 115.011 (Vernon Supp. 1996)) (changes the reference section under which the attorney general receives notice to TEX. PROP. CODE ANN. ch. 123).

247. *Id.* § 2 at 3144-45 (codified at TEX. PROP. CODE ANN. § 123.001(4) (Vernon Supp. 1996)).

248. *Id.* § 4 at 3146 (codified as amended at TEX. PROP. CODE ANN. § 123.005 (Vernon Supp. 1996)).

249. Charitable corporations defined in I.R.C. §§ 501(c)(3), 170(c) (1986).

250. Act of May 18, 1995, 74th Leg., R.S., ch. 914, § 21, 1995 Tex. Sess. Law Serv. 7956, 8119 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Vernon Supp. 1996)).

nection with proceedings involving a trust.[251] The legislature also amended Property Code section 113.111 to place regular payments from income as charges against income rather than principal.[252]

### E. Uniform Transfers to Minors Act

The legislature adopted the Uniform Transfers to Minors Act, which replaces the Texas Uniform Gifts to Minors Act.[253] A person may transfer any type of property to a custodian for the benefit of a minor.[254] The custodian may accept lifetime gifts,[255] as well as gifts under a will or trust instrument,[256] from a guardian with court approval,[257] or from obligors who hold property for the minor or owe a liquidated sum to a minor who has no guardian.[258] The legislature included a statutory form for creating a transfer to the custodian.[259] The legislature limited liability for both the custodian[260] and the minor.[261] Custodial accounts created under the Texas Uniform Transfers to Minors Act will terminate when the minor attains age 21.[262] The Texas Uniform Transfers to Minors Act applies to transfers made after September 1, 1995.[263]

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251. Act of May 24, 1995, 74th Leg., R.S., ch. 642, § 14, 1995 Tex. Sess. Law Serv. 6197, 6206 (Vernon) (codified as amended at Tex. Prop. Code Ann. § 111.004 (Vernon Supp. 1996)).

252. *Id.* § 15 at 6206-06 (codified as amended at Tex. Prop. Code Ann. § 113.111 (Vernon Supp. 1996)). The legislature moved subpart (8) from subsection (b), which relates to charges against principal, to subsection (a), which relates to charges against income. *Id.* (codified as amended at Tex. Prop. Code Ann. § 113.111(a)(8) (Vernon Supp. 1996)).

253. Act of May 27, 1995, 74th Leg., R.S., ch. 1043, § 1, 1995 Tex. Sess. Law Serv. 9310, 9310-32 (Vernon) (codified at Tex. Prop. Code Ann. ch. 141).

254. *Id.* § 1 at 9310 (codified at Tex. Prop. Code Ann. § 141.002(5) (Vernon Supp. 1996)).

255. *Id.* § 1 at 9312 (codified at Tex. Prop. Code Ann. § 141.005 (Vernon Supp. 1996)).

256. *Id.* (codified at Tex. Prop. Code Ann. § 141.006 (Vernon Supp. 1996)). The personal representative or trustee may appoint a custodian if the will or trust agreement does not name a custodian or if all persons designated as custodian cannot serve for any reason. *Id.* (codified at Tex. Prop. Code Ann. § 141.006(c) (Vernon Supp. 1996)).

257. *Id.* § 1 at 9312-13 (codified at Tex. Prop. Code Ann. § 141.007 (Vernon Supp. 1996)).

258. Act of May 27, 1995, 74th Leg., R.S., ch. 1043, § 1, 1995 Tex. Sess. Law Serv. 9312, 9313 (Vernon) (codified at Tex. Prop. Code Ann. § 141.008 (Vernon Supp. 1996)).

259. *Id.* § 1 at 9315 (codified at Tex. Prop. Code Ann. § 141.010(b) (Vernon Supp. 1996)).

260. *Id.* § 1 at 9318-19 (codified at Tex. Prop. Code Ann. §141.018(a), (b)(1) (Vernon Supp. 1996)). The custodian shall have no personal liability unless the custodian enters a contract without revealing the custodial capacity and the custodianship or unless the custodian personally is at fault for committing a tort while serving as custodian or for breach of an obligation having to do with the custodial property. *Id.* (codified at Tex. Prop. Code Ann. § 141.018(b)(1) (Vernon Supp. 1996)).

261. *Id.* § 1 at 9319 (codified at Tex. Prop. Code Ann. § 141.018(b)(2) (Vernon Supp. 1996)).

262. *Id.* § 1 at 9321 (codified at Tex. Prop. Code Ann. § 141.021 (Vernon Supp. 1996)).

263. Act of May 27, 1995, 74th Leg., R.S., ch. 1043, § 1, 1995 Tex. Sess. Law Serv. 9312, 9321 (Vernon) (codified at Tex. Prop. Code Ann. § 141.022 (Vernon Supp. 1996)).