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WILLS AND TRUSTS

by
Bob D. Harrison* and Terry R. Abel**

THIS Article reviews cases decided between October 15, 1985, and October 15, 1986, on the topics of wills, life estates, nontestamentary transfers, estate administration, guardianships, and trusts.

I. WILLS

Execution of a Will. Hopkins v. Hopkins1 reaffirms the rule announced by the Texas Supreme Court in Boren v. Boren2 that a will is invalid if the signatures of the attesting witnesses appear only on the self-proving affidavit but not on the will itself. The proponents of the will attempted to distinguish a sequel to the Boren case, Wich v. Fleming,3 in which the Texas Supreme Court refused to assume that the witnesses had not read the self-proving affidavit and were therefore unaware of its significance. The proponents in Hopkins offered affidavits of the witnesses confirming that they had not read the self-proving affidavit and that they intended to attest to the will. The proponents also argued that, because the witnesses were not under oath, the affidavit was invalid, and its language was therefore surplusage. Affirming the probate court's summary judgment denying probate, the Hopkins court refused to accept that Wich in any way qualified the Boren decision.4 The court reiterated that the will and self-proving affidavit are separate documents, since the signatures on one are insufficient to validate the other.5 Further, the court refused to consider extrinsic evidence concerning whether the witnesses had read the self-proving affidavit and, consistent with the Texas Supreme Court ruling in Orrell v. Cochran,6 reaffirmed the rule that proof of an improperly executed self-proving affidavit would not convert the signatures on the affidavit into proper attestations to the will.7 The contestants in Hopkins later joined the proponents and requested the appellate court to reverse and render a decision consistent with an agreement by all

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1. 708 S.W.2d 31 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).
2. 402 S.W.2d 728, 729 (Tex. 1966).
3. 652 S.W.2d 353, 355 (Tex. 1983).
4. 708 S.W.2d at 33.
5. Id.
6. 695 S.W.2d 552, 552 (Tex. 1985).
7. 708 S.W.2d at 33.
parties consenting to the admission of the will to probate. The court stated that although rule 387(a)(1) of the Texas Rules of Civil Procedure\(^8\) authorized the court to recognize agreements made by the parties, the court could not do so if the result would be to admit an invalid will to probate.\(^9\)

Lost Will. The proponent of a lost will in *Hoppe v. Hoppe*\(^10\) overcame the presumption of revocation that arises when a validly executed will is last seen in the decedent’s possession or in a place where the decedent had ready access to it, and cannot be found after the decedent’s death.\(^11\) As a general rule, a proponent may not admit a will to probate unless he proves to the court’s satisfaction that the decedent did not revoke the will.\(^12\) In *Hoppe* the testatrix had executed her will in 1971, in her attorney’s presence, leaving her entire estate to the proponent. The testatrix died in 1979, and in 1983 the proponent sought to admit the will to probate. Although no one could find the will, the proponent alleged that it was last seen in the possession of the testatrix’s attorney, and that someone in the attorney’s office lost or destroyed it. The contestants claimed that the estate should pass by intestacy because the proponent had failed to prove that the will was valid and not revoked. The trial court refused to probate the will, relying on a jury finding that the will was last seen in Mrs. Hoppe’s possession or in a place where she had ready access to it and disregarding a jury finding that the testatrix had not revoked the will. The proponent argued that as a matter of law the will was in the attorney’s possession when it was last seen.

The court considered the concepts of possession or ready access in the context of a testator who places his will in an attorney’s vault for safekeeping with freedom to obtain the will at any time.\(^13\) In this situation the testator does not have a key to the vault or free access to the office at any time, factors indicating that he did not have possession or ready access to the will, but factors that are not in themselves conclusive. The court noted that the testatrix visited the law office many times during the eight years between the


\(^9\) 708 S.W.2d at 32. Contrast this decision with a family settlement agreement not to probate a validly executed will. See Salmon v. Salmon, 395 S.W.2d 29, 32 (Tex. 1965); Cook v. Hamer, 158 Tex. 164, 167, 309 S.W.2d 54, 56 (1958). An agreement to that effect must include an agreement for the distribution of the estate. See Estate of Morris, 577 S.W.2d 748, 756 (Tex. Civ. App.—Amarillo 1979, writ ref’d n.r.e.). If all parties agree to distribute the estate consistently with the terms of an invalid will, the estate passes pursuant to the agreement, rather than under the will. 708 S.W.2d at 32.

\(^10\) 703 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).

\(^11\) This presumption does not arise if the decedent was not the last person seen with the will. Aschenbeck v. Aschenbeck, 62 S.W.2d 326, 327 (Tex. Civ. App.—Austin 1933, writ dism’d w.o.j.).

\(^12\) TEX. PROB. CODE ANN. § 88(b)(3) (Vernon 1980).

\(^13\) 703 S.W.2d at 227. The court relied on Thompson v. Dobbs, 234 S.W.2d 939 (Tex. Civ. App.—Fort Worth 1950, writ ref’d n.r.e.), in which the court held that a will the decedent delivered to the scrivener for safekeeping was not in the decedent’s possession at death. *Id.* at 941. The *Hoppe* court noted, however, that in *Thompson* less than two years had elapsed from the time the decedent signed the will until the decedent’s death and that no evidence indicated that the decedent had seen the scrivener during that time. 703 S.W.2d at 227.
execution of her will and her death. The court refused to impose a narrow
definition of possession or ready access, citing authority in which the court
found that a testator retained sufficient possession or access to invoke the
presumption of revocation when he placed his will in a safe deposit box and
the will was not found at his death. The appellate court in Hoppe upheld
the trial court’s acceptance of the jury finding that the testatrix had posses-
sion of or access to her will, but disagreed with the trial court’s rejection of
the jury finding that she had not revoked her will. The court stressed that
the proponent may rebut the presumption of revocation by clear and con-
vincing evidence, and further determined that sufficient evidence existed to
support the jury finding of nonrevocation.

The court in Coulson v. Sheppard denied probate of a lost will because
the proponent failed to prove the statutory requirement that the decedent
duly executed the will. The proponent met the additional statutory re-
quirements of providing the cause of nonproduction, satisfying the court
that the will could not be produced by any reasonable diligence, and present-
ing a credible witness who had read the will or heard it read to prove the
contents of the will. The proponent offered written depositions of a wit-
tess to the will and the attorney who prepared the will in order to fulfill the
final proof of execution requirement. The court refused to admit this evi-
dence, however, because the proponent did not follow the detailed proce-
dures for written depositions under the Texas Rules of Civil Procedure.
The court then disagreed with the proponent’s contention that the execution
of a codicil republished the will, thereby eliminating the need to prove due

14. 703 S.W.2d at 227.
15. Id.; see also Carter v. Massey, 668 S.W.2d 450, 452 (Tex. App.—Dallas 1984, no writ)
(life insurance policy in employer's possession in insured's control); Davis v. Roach, 138
S.W.2d 268, 270 (Tex. Civ. App.—Austin 1940, writ dism’d judgmt cor.) (testator only had to
ask for his box).
16. 703 S.W.2d at 228-29.
17. Id. at 228. The clear and convincing evidence may not be contradictory, ambiguous,
or equivocal, and must be sufficient to convince an unbiased and unprejudiced mind. Berry v.
Griffin, 531 S.W.2d 394, 396 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref’d n.r.e.).
18. 703 S.W.2d at 229.
19. 700 S.W.2d 336 (Tex. App.—Corpus Christi 1985, no writ).
20. Id. at 338.
21. See TEX. PROB. CODE ANN. § 84 (Vernon 1980).
22. Id. § 85; see also Howard Hughes Medical Inst. v. Neff, 640 S.W.2d 942, 951 (Tex.
App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.) (§ 85 controls proof requirements); In re
Estate of Simms, 442 S.W.2d 426, 432 (Tex. Civ. App.—Texarkana 1969, writ ref’d n.r.e.)
(provides mandatory § 85 requirements).
23. 700 S.W.2d at 337. Rule 208 provides that a party intending to take a deposition
upon questions must serve all parties with written notice 10 days before he takes the deposi-
tion. TEX. R. CIV. P. 208(1) (Vernon Supp. 1987). The notice must provide information
about the lawsuit, the deponent, the officer before whom the deposition is to be taken, and
whether the deposing party will request production of documents or items. Id. Any party
must have the opportunity to serve cross questions. Id. 208(3). The officer must be a person
who is authorized to administer oaths and who will administer the oath, take the testimony of
the deponent, file the deposition, and notify all parties that he has filed the deposition. Id.
208(4). The deposing party must then make the deposition available for inspection by the
deponent or any party. Id. 208(5).
Finally, under the no evidence standard of review, the court held that no evidence of due execution existed. The decedent’s estate in *Gifford v. Bank of the Southwest* passed by intestacy when the bank with which the decedent placed his will was unable to locate the will. Apparently, no one attempted to probate the will as a lost will. Further, no one attempted to sue the bank until the bank located the will, a date well after the statute of limitations had run.

**Will Contest.** In *Mircovich v. Mircovich* the only one of nine siblings excluded from his mother’s will filed a will contest, alleging that his mother lacked testamentary capacity and executed her will under undue influence. The trial court rendered a judgment admitting the will to probate notwithstanding the jury verdict that the decedent lacked testamentary capacity. The appellant argued that his mother attempted, due to an insane delusion or lack of mental capacity, to bequeath to him two shrimp boats he already owned and therefore excluded him as a residuary beneficiary. His brothers’ testimony supported these contentions. The appellate court consequently held that the contestant presented sufficient direct evidence to support the jury’s verdict and reinstated the jury’s finding that the testatrix lacked testamentary capacity. Accordingly, the appellate court invalidated the will, requiring that the court set aside letters testamentary that had been issued.

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24. 700 S.W.2d at 338. The proponent did not introduce the codicil into evidence. *Id.*
25. *Id.* The witness was able to testify that the will was signed, but could not recall if the self-proving affidavit had been signed as required under TEX. PROB. CODE ANN. § 59 (Vernon 1980). 700 S.W.2d at 338. In the absence of a self-proving affidavit, the proponent must prove that the will was properly executed. TEX. PROB. CODE ANN. § 88(b)(2) (Vernon 1980). *Id.* § 59 provides:

> Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two (2) or more credible witnesses above the age of fourteen (14) years who shall subscribe their names thereto in their own handwriting in the presence of the testator.

27. The applicable statute of limitations was four years from the date that the cause of action accrued. TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1964) (repealed 1985) (now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986)). The court held that the widow’s cause of action accrued in 1974, when the estate passed by intestacy, rather than in 1982, when the widow learned that the bank had found her late husband’s will. 712 S.W.2d at 184.
28. 703 S.W.2d 325 (Tex. App.— Corpus Christi 1985, no writ).
29. *Id.* at 325.
30. *Id.* at 327. The instruction to the jury included the previously approved definition of mental ability to make a will. *Id.* at 325. In the jury instruction testamentary capacity meant:

> [T]he person at the time of the execution of the will has sufficient mental ability to understand the business in which he is engaged, and the effect of his act in making the will, and the general nature and extent of his property. He must also be able to know his next of kin and the natural objects of his bounty and their claims upon him. He must have memory sufficient to collect in his mind the elements of the business to be transacted and to hold them long enough to perceive, at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.

Reynolds v. Park, 485 S.W.2d 807, 811 (Tex. Civ. App.—Amarillo 1972, writ ref’d n.r.e.).
previously under the authority of the will.\textsuperscript{31}

A contestant also offered undue influence and lack of testamentary capacity as grounds to invalidate a will in \textit{Hirdler v. Boyd}.\textsuperscript{32} The testatrix in that case executed her will in the presence of her sister, who allegedly influenced the decedent to make an unnatural disposition of her estate. In its instruction to the jury, the trial court stated that “[a] person of sound mind has the legal right to dispose of his property as he wishes; and, \textit{it is immaterial that the jury may feel the disposition of the property should have been different}.”\textsuperscript{33} The court admitted the will to probate, and on appeal the contestants asserted that the italicized constituted an improper comment on the weight of the evidence.\textsuperscript{34} The contestants claimed that this language precluded the jury from considering whether the decedent had made an unnatural disposition of property, an important element in their proof of undue influence. The court noted, however, that an unnatural disposition of property, by itself, is insufficient to establish undue influence, which the contestant must prove to have been present and exercised at the time the testatrix executed her will.\textsuperscript{35} Considering the charge as a whole, the court concluded that the jury received neither a misleading nor an improper instruction.\textsuperscript{36}

Executor's fees were at issue in \textit{Schulte v. Marik},\textsuperscript{37} in which the individual named as alternate or successor independent executor sought to recover attorney's fees from an estate following a will contest. The successor failed in his attempt to disqualify the proponent from being named independent designated executrix. Section 243 of the Texas Probate Code provides that the designated executor is entitled to have necessary expenses, including reasonable attorney's fees, paid from the estate if he has defended or prosecuted any proceeding related to that will in good faith, whether or not he was successful.\textsuperscript{38} Applying a literal reading to the statute, the court had little difficulty disallowing the payment of the attorney's fees to anyone but the designated executrix, and concluded that the statute does not contemplate

\textsuperscript{31} 703 S.W.2d at 327; \textit{see} Cavanaugh v. Cavanaugh, 249 S.W. 264, 265 (Tex. Civ. App.—Amarillo 1923, no writ); \textit{accord In re Fowler’s Estate}, 87 S.W.2d 896, 897 (Tex. Civ. App.—Austin 1935, writ dism’d w.o.j.).
\textsuperscript{32} 702 S.W.2d 727 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.).
\textsuperscript{33} \textit{Id.} at 729 (emphasis by the court).
\textsuperscript{34} \textit{See} TEX. R. CIV. P. 277.
\textsuperscript{35} 702 S.W.2d at 730. In order to prove undue influence, a party must establish: (1) that the undue influence existed and was exerted; (2) that the influence was exerted so as to subvert or overpower the testator’s mind at the time he or she executed her will; and (3) the execution of a will that expresses the intentions of the individual exerting the influence, rather than the intention of the testator. \textit{Rothermel v. Duncan}, 369 S.W.2d 917, 922 (Tex. 1963). In \textit{Novak v. Schellenberg}, 718 S.W.2d 822, 824 (Tex. App.—Corpus Christi 1986, no writ), the court clarified that undue influence is also a species of fraud. \textit{See infra} notes 127-29 and accompanying text.
\textsuperscript{36} 702 S.W.2d at 730. The court further explained that even if the instruction was an improper comment on the weight of the evidence, the instruction was harmless in view of the entire charge to the jury. \textit{Id.} Justice Esquivel dissented. In his view the contestants were prejudiced because the instruction had the practical effect of telling the jury to disregard evidence of the testatrix’s unnatural disposition of her property. \textit{Id.} at 731-32.
\textsuperscript{37} 700 S.W.2d 685 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.).
\textsuperscript{38} TEX. PROB. CODE ANN. § 243 (Vernon Supp. 1987).
payment of attorney's fees to a named alternate or successor executor.\footnote{700 S.W.2d at 687.}

\textit{Estate of Ayala} involved inheritance rights of pretermitted children. In 1953 the decedent executed a will in the United States designating his two sons as the sole beneficiaries of his property in this country. The decedent executed a new will in 1971 in Mexico, leaving all the property he possessed at his death to those same two sons, subject to specific bequests to his wife and four other children. The contestants hereunder, who were two of the other four children, were born after the decedent executed the 1953 will but before he executed the 1971 will. After the probate of each will in its respective country, the contestants filed a will contest in Texas alleging that they were pretermitted children under the Texas Probate Code. Texas Probate Code section 67(a) provides that if a testator has a child or children at the time he executes his last will and testament, and subsequently has additional children, the after-born children shall be entitled to their intestate share of their parent's estate, unless they were "provided for by settlement."\footnote{TEX. PROB. CODE ANN. § 67(a) (Vernon 1980). In addition, § 67(a) does not apply if the surviving spouse is the parent of all of the decedent's children and is the principal beneficiary under the decedent's will. Section 67(b) of the Probate Code addresses the situation in which the testator had no children at the time he executed his will, but dies leaving children who are not provided for or mentioned in the will. \textit{Id.} § 67(b).}

The court initially explained that the Texas statute is intended to guard against the accidental or inadvertent omission of a child from a parent's testamentary plan, rather than to limit a testator's power to control the disposition of his estate.\footnote{702 S.W.2d at 711; see \textit{McQueen v. Stephens}, 100 S.W.2d 1053, 1056 (Tex. Civ. App.—Amarillo 1937, no writ); see also \textit{Pearce v. Pearce}, 104 Tex. 73, 81, 134 S.W. 210, 214 (1911) (failure to include child must be accidental).}

Noting that the statute is inapplicable for children "provided for by settlement," the court then turned to New York law in the absence of Texas cases construing that clause.\footnote{Id.} The court concluded that it must examine the facts of each case and, more importantly, the intent of the testator in order to determine if the testator made a settlement.\footnote{\textit{Id.}} The court defined "settlement" broadly and held that any future provision evincing intent to make alternate arrangements for a particular child will suffice.\footnote{\textit{Id.}} Consistent with this interpretation, the court considered the adequacy and equality of the settlement among the testator's children immaterial.\footnote{702 S.W.2d at 711.} The court concluded that, having made specific bequests to his afterborn children under
the 1971 will, the testator had provided for them by settlement, rendering the Texas statute inapplicable.\textsuperscript{47} The will contest in \textit{Jones v. Jones}\textsuperscript{48} involved the issue of whether a joint will was mutual and contractual as a matter of law. The trial court admitted a subsequent will executed by the survivor to probate, but imposed a constructive trust on the survivor's estate in favor of the beneficiaries under the joint will. The appellate court affirmed the trial court and concluded that the following key elements in finding a joint and contractual will were present: the will provided a comprehensive plan for the disposition of both estates, and the gift to the survivor was not absolute, but was conditioned by the agreement ultimately to leave the combined estate to designated beneficiaries.\textsuperscript{49} The court agreed that the survivor consequently was unable to alter the terms of the contractual will after her husband's death.\textsuperscript{50}

\textit{Will Construction.} The Texas Supreme Court granted a motion for rehearing and reversed its decision in \textit{Kelley v. Marlin},\textsuperscript{51} over the dissents of four justices. \textit{Kelley} involved a declaratory judgment in which the court construed a will provision that designated Marlin the exclusive real estate agent. The will further entitled Marlin to receive a six percent commission upon the widow's sale of any real estate devised to her under her husband's will, and provided that the agent could collect the commission from the sale proceeds. The estate's executor sold real property devised to the widow for ten million dollars and paid a commission to the widow's son from a former marriage instead of to Marlin. Marlin failed in his attempt to recover the commission in the trial court, but the appellate court held that he was entitled to the commission as a conditional beneficiary.\textsuperscript{52} The Texas Supreme Court initially concurred with the trial court, but, on rehearing, withdrew its opinion and addressed the issue of whether Marlin was a conditional beneficiary under the will.\textsuperscript{53} Holding that Marlin was indeed a conditional beneficiary, the court emphasized the mandatory language employed in the will, which, in effect, created an equitable charge on the real estate devised to the widow.\textsuperscript{54} The court did not accept the executor's technical argument that the executor made the sale, not the widow.\textsuperscript{55} The court reasoned that, under the Texas Probate Code, title to the property vested immediately in the widow, subject to the payment of estate debts and to the equitable charge created by the recognition of Marlin as a conditional beneficiary.\textsuperscript{56}
In a well-reasoned dissenting opinion, Justice Wallace, joined by Justices Campbell, Spears, and Ray, pointed out that a commission is not equivalent to a gift and that, in this case, Marlin had not earned a commission by acting as the real estate agent in the sales transaction. Justice Wallace analogized the testator's designation of Marlin as his exclusive real estate agent to a case in which the court held that the testator's appointment of attorneys to handle his estate was merely precatory. Justice Wallace agreed that the court would impose an equitable charge upon a devise, if the devise were conditioned upon the requirement that the devisee pay a legacy to a third person, but he found this reasoning inapplicable under the facts in Kelley. Justice Wallace interpreted the disputed clause as an invalid attempt to force two individuals into an executory personal services contract, as well as an invalid restraint on the widow's right of alienation following the devise of a fee simple estate.

The court underscored the fact that Texas courts will not require magic language to create a trust in *Perfect Union Lodge No. 10 v. InterFirst Bank.* The Texas Supreme Court has held that the controlling tests for creating a trust are language imposing a fiduciary obligation, a clearly identified subject of that obligation, and clearly identified beneficiaries of the trust. Under these tests the testator in *Perfect Union Lodge* created a testamentary trust despite his reference to the executor rather than the trustee. The testator left a life estate to his wife and required that the executors control and manage the estate during her lifetime. The court held that the trustee, because of the obligation to be impartial to both the life tenant and the remaindermen, had to sell under-productive property it had previously refused to sell.

In *Diemer v. Diemer* the Houston court of appeals held that the term

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57. 714 S.W.2d at 307 (Wallace, J., dissenting). The dissent included much of the same reasoning as that in the withdrawn opinion, which had been authored by Justice Campbell.
58. Id.; see Mason & Mason v. Brown, 182 S.W.2d 729, 733 (Tex. Civ. App.—Dallas 1944, writ ref’d w.o.m.).
59. 714 S.W.2d at 307; see also Haldeman v. Openheimer, 103 Tex. 275, 126 S.W. 566 (Tex. 1910) (equitable charge when devisee directed to pay specific legacy); Rubio v. Valdez, 603 S.W.2d 346 (Tex. Civ. App.—Eastland 1980, writ ref’d n.r.e.) (devise subject to specific legacy); Conway v. Estes, 346 S.W.2d 374 (Tex. Civ. App.—Fort Worth 1961, no writ) (devise subject to $1,000 legacy).
60. 714 S.W.2d at 308. Under contract law parties will not be forced into personal fiduciary relationships involving nondelegable duties without mutual consent. See, e.g., Allen v. Camp, 101 Tex. 260, 260-61, 106 S.W. 315, 316 (1908). Generally, duties are nondelegable if they involve personal services, artistic skills or other unique abilities, and close personal relationships, such as the duty owed by an attorney to his client. 714 S.W.2d at 308.
61. 714 S.W.2d at 309-10.
64. 713 S.W.2d at 394. A trustee is required to sell property that has been underproductive for more than a year unless the settlor of the trust has provided otherwise. Property is considered underproductive "if it does not produce an average annual net income, without considering depreciation or obsolescence, equal to at least one percent of its value." Tex. PROP. CODE ANN. § 113.110(a), (b) (Vernon 1984). This duty of the trustee was not discretionary. 713 S.W.2d at 394.
65. 717 S.W.2d 160 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.).
"issue," as used in the will in question, did not include adopted children. The court determined that the testator intended to exclude adopted children because he used the term "issue" in reference to the only one of his children who had an adopted child but no natural children; in reference to the other children he employed the term "descendants." By contrast, his wife's codicil defined children to include legally adopted children and included her adopted grandson even though he was an adult at the time of his adoption.

Two cases construed wills under the well-established rule of construction that a will speaks from the time of the testator's death and, according to its terms, passes the estate then owned by the testator. The testatrix in In re Hite devised to her husband "an undivided one-half (1/2) of all oil, gas and mineral royalties to which I might be entitled," with the remainder to her son. The court held that this language entitled her husband only to royalty interests existing at the time of her death, not to royalties resulting from the later execution of a lease. The court agreed that a latent ambiguity existed because the testatrix owned a mineral estate with a potential royalty interest at the time of her death, and, although a royalty may be created prior to the creation of an oil and gas lease, the court held that the language used by the testatrix was insufficient to do so.

By contrast, the testatrix in Kokernot v. Denman provided a specific bequest expressly including after-acquired property. She devised to her grandsons, "any and all other real estate . . . which may be owned by me." The court held that this language sufficed to pass after-acquired property despite the absence of the words "at my death." The court noted that it must consider the intent of the testatrix as of the time the will was executed, but her will speaks as of the time of her death, passing, according to its terms, the estate she then possessed. Significantly, the decedent's executor acquired the disputed royalty interest in Hite during estate administration, while the decedent in Kokernot acquired the real property in controversy during her lifetime. These decisions are therefore consistent with the Texas Probate Code, which vests title in devisees as of the moment of a decedent's

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66. Id. at 162. The Texas Supreme Court has noted that the term "issue" usually means blood relationship. See Cutrer v. Cutrer, 162 Tex. 166, 172, 345 S.W.2d 513, 517 (1961).

67. 717 S.W.2d at 162.

68. In re Hite, 700 S.W.2d 713, 717 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); Kokernot v. Denman, 708 S.W.2d 921, 923 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); see Shriner's Hospital for Crippled Children v. Stahl, 610 S.W.2d 147, 150 (Tex. 1980); Henderson v. Ryan, 27 Tex. 670, 674 (1864).

69. 700 S.W.2d 713 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

70. Id. at 714 (emphasis by the court).

71. Id. at 717.

72. Id.; see also Watkins v. Slaughter, 144 Tex. 179, 182, 189 S.W.2d 699, 700 (Tex. 1945) (may create royalty interest by grant or reservation); Barker v. Levy, 507 S.W.2d 613, 617 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (may create royalty interest by grant or reservation).

73. 708 S.W.2d 921 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

74. Id. at 922 (emphasis by the court).

75. Id. at 923.

76. Id.
The testator in Daniels v. Moore granted his wife a life estate in certain real property, and authorized her to sell and convey the property, reinvest the proceeds, and use the property or reinvested proceeds during her lifetime. The court held that this grant of a life estate did not authorize the testator’s wife to make an inter vivos gift of the property. The court reasoned that the testator’s reference to reinvested proceeds evidenced his intent that she retain the estate; a gift of the property would therefore defeat his intent as well as the interests of the remaindermen. Conversely, the testator in Crum v. Taylor Exploration, Inc. utilized broader language in the joint will granting a life estate to his wife, with the remaining property to be divided equally among his children. His wife and son, as co-executors, were empowered to manage, control, and dispose of all property, authority that the court held extended to their ability to convey to the son a fee simple interest in a portion of the life estate. Small differences in wording clearly have a marked impact on the capacity of a life tenant to make conveyances of assets that are subject to the life estate. In Crum the testator referred to the property remaining after the life estate expired, language suggesting that he anticipated inter vivos conveyances of property subject to the life estate. The testator in Daniels, however, spoke of a remainder that included the proceeds from inter vivos conveyances reinvested in the estate, suggesting that he intended the life estate to remain intact.

In Parker v. Henderson the testators of a joint will died of natural causes within four days of each other. Their grandchildren, who were the children of a deceased son, contended that the simultaneous death clause referring to a common accident or catastrophe was inapplicable. The court disagreed, however, relying on the presumption of a common accident included in the will if the testators died within sixty days of each other and the general rule that a testamentary disposition is preferred over intestacy. The will stated

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78. 712 S.W.2d 621 (Tex. App.—Corpus Christi 1986, no writ).
79. Id. at 622.
80. Id.; see Messer v. Johnson, 422 S.W.2d 908, 912 (Tex. 1968).
81. 710 S.W.2d 825 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.).
82. Id. at 827; see Harrell v. Hickerman, 147 Tex. 396, 401, 215 S.W.2d 876, 878 (1948); Edds v. Mitchell, 143 Tex. 307, 312, 184 S.W.2d 823, 825 (1945). The Crum court further held that the testator’s son was a permissible grantee, despite the prohibition in Tex. Prob. Code Ann. § 352 (Vernon Supp. 1987) against a personal representative purchasing estate assets, because this conveyance had been made as an estate distribution pursuant to a long-standing dispositive plan established during the testator’s lifetime. 710 S.W.2d at 827.
83. This difference is underscored by the fact that in Crum the dispositive scheme to equalize the community estate among all eight children had begun during the spouses’ lifetimes and was undoubtedly expected to continue during the lifetime of the survivor as well.
84. 712 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1986, writ granted) [Editor’s Note: The Texas supreme Court reversed this case after this Article went to print. 728 S.W.2d 768 (Tex. 1987)].
85. Id. at 226. By executing a will a testator creates the presumption that he intends to dispose of his assets and does not intend that all or part of them pass by intestacy. Shriner’s Hospital v. Stahl, 610 S.W.2d 147, 151 (Tex. 1980). Consequently, if a will may be construed either way, the construction avoiding intestacy is preferred. Id.; Howard v. McCulley, 686 S.W.2d 650, 652 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).
that all property was devised "unto our surviving children of this marriage,"86 followed by specific devises of land to each son, including the son who predeceased the testators. The testators concluded by stating it was their intent to divide the land equally between their three sons. Granting a summary judgment, the trial court determined that the deceased son's children would inherit his devise pursuant to the anti-lapse statute of the Probate Code.87 The appellate court reversed, relying on the Texas Supreme Court decision in Perry v. Hinshaw,88 in which the court gave the survivorship language its common meaning of living beyond another's life.89 In rendering its decision in Parker, however, the appellate court recognized that a cogent argument construing the will in favor of individual gifts to each son existed,90 supported by the theory that the "surviving children of this marriage" referred to children living at the time the testators signed their will.91 The appellate court in Parker, nevertheless, deferred to the Perry decision as the most recent statement by the Texas Supreme Court interpreting survivorship language.92 Thus, the two surviving sons in Parker inherited the entire estate, to the exclusion of their deceased brother's children.

The court in Gregg v. Jones93 also construed survivorship language. In that case the testatrix passed the residue of her estate to her husband, any surviving children, "or the survivors or survivor of them."94 The court interpreted this language to mean that the bequest passed to surviving class members, and because no class members survived, the residue passed by intestacy.95 The court rejected the argument that the residue should pass to the husband's heirs as survivors of the class members designated under the will and, as in Parker, gave the term "survivor" its usual meaning of an individual who lives after the death of another.96

Property also passed by the law of descent and distribution in Renaud v.  

86. 712 S.W.2d at 225 (emphasis by the court).
87. The trial court offered no explanation for its decision. TEX. PROB. CODE ANN. § 68 (Vernon 1980) protects descendants of a testator by providing that a devise to a child or other descendant who predeceases the testator, leaving surviving descendants, shall not lapse, but shall vest in those surviving descendants.
88. 633 S.W.2d 503 (Tex. 1982).
89. Id. at 505.
90. Individual gifts to descendants that are not conditioned upon survivorship will fall within the scope of the Texas anti-lapse statute. 712 S.W.2d at 226 n.1.
91. Id. at 227. The appellees also convincingly argued that Perry v. Hinshaw could be distinguished on the grounds that in Perry the testator's intent was readily discernable. The testator stated that the surviving siblings were to share and share alike, and the term "surviving" modified both references to brothers and sisters. 633 S.W.2d at 504. In Parker the specific devises to each son did not contain survivorship language, and the testators clearly stated that they intended to divide the land equally between their three sons. 712 S.W.2d at 225. The appellate court conceded that a construction of individual gifts not conditioned by survivorship might readily be made. Id. at 227.
92. 712 S.W.2d at 227.
93. 699 S.W.2d 378 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).
94. Id. at 379 (emphasis by the court).
95. Id.
96. Id. at 379-80; see also Caognard v. Tarnke, 202 S.W. 221, 221-22 (Tex. Civ. App.—Dallas 1918, no writ) (survivor is alive after death of another); BLACK'S LAW DICTIONARY 1297 (5th ed. 1979) (survivor remains alive after others' deaths).
Renaud,\footnote{707 S.W.2d 750 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.).} in which the testator failed to provide for the disposition of a testamentary trust for his daughter if she survived beyond a given date. The presumption against intestacy when an individual makes a will\footnote{For a discussion of the presumption against intestacy see Carr v. Rogers, 383 S.W.2d 383, 384 (Tex. 1964).} is ineffective when the testator does not completely dispose of his property.\footnote{See Haile v. Holtzclaw, 414 S.W.2d 916, 922 (Tex. 1967).} In Renaud the unambiguous terms of the will directed the disposition of trust assets if the beneficiary died prior to the specified date, but, by oversight or by design, did not provide for the contingency that she might live beyond that date. The court refused to find that the testator intended to pass the remaining trust assets to the trust beneficiary and held that the assets would pass by intestacy.\footnote{707 S.W.2d at 755.}

The court based its decision in Stewart v. RepublicBank Dallas, \textit{N.A.}\footnote{698 S.W.2d 786 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.).} on the general rule that a testator’s right to devise his property is subject to the limitations imposed by public policy.\footnote{\textit{Id.} at 787.} The testator provided that if named individuals were appointed guardians of his minor nieces, the nieces would have to forfeit their interests in a testamentary trust. The Fort Worth court of appeals affirmed the trial court’s holding that this clause was void as against public policy, because upholding the clause would cause a forfeiture based on the action of a probate court acting in the minors’ best interests.\footnote{\textit{Id.}}

The court in First Methodist Church \textit{v.} Wright\footnote{706 S.W.2d 720 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).} construed whether language in a will constituted a bequest or merely a statement clarifying the ownership of property. The testatrix prefaced certain clauses in her will by stating, “For the guidance of my Executor . . . and for the purpose of preventing any possible dispute with reference to my estate, I make the following statements . . . .”\footnote{\textit{Id.} at 721.} She then noted that all properties under her possession and control, other than her home, were owned one-half by the remaindermen under her husband’s will, subject to her life estate, and one-half by herself in fee simple. The trial court construed this language as a bequest to her deceased husband’s beneficiaries of one-half of the property she described. The church, as the beneficiary of her residuary estate, appealed, on the basis that the paragraph in question was not a bequest, but was only a statement alerting her executor that she held a life estate in assets under her husband’s will. The appellate court agreed with the church, finding no conveyance language sufficient to constitute a bequest or devise.\footnote{\textit{Id.} at 722.}

Although technical words of conveyance are not required to pass title to property, the will must contain language showing clear testamentary intent that the property is to pass to a named beneficiary. Lawrence \textit{v.} Lawrence, 229 S.W.2d 219, 221 (Tex. Civ. App.—Fort Worth 1950, writ ref’d n.r.e.).
The court held that the language merely explained the status of the assets in the possession of the testatrix. The appellate court therefore reversed, remanding the case for a determination by the trial court of the ownership and distribution of the assets held by the testatrix as required under Texas Probate Code section 378(c).

Relying on First Methodist Church v. Wright, the court in Knesek v. Witte held that the testatrix failed to make a testamentary disposition when she directed a partition of property and erroneously described its status in her will. The testatrix had received her husband's entire estate in fee simple pursuant to reciprocal wills in which each had named the other and then the same designated family members, largely her husband's relatives, as beneficiaries. In a will executed subsequent to her husband's death, the testatrix erroneously stated that she had received certain property subject to a life estate, with her husband's relatives as remaindermen. She then directed her executor to partition the property so that the remaindermen under her husband's will would receive their share, as would her devisees and legatees. The court construed the unambiguous terms of the will and clarified that, although the court must derive the intent only from the language used, the court may consider extrinsic evidence of facts and circumstances at the time the testatrix executed her will relating to her situation.

The court agreed that the testatrix in Knesek was mistaken as to the nature of the interest devised to her under her husband's will, but held that this error would not permit the trial court to re-write the will and insert a devise where none existed. The remaindermen to whom the testatrix referred in her will received no assets under her husband's will and, accordingly, they were not entitled to any portion of the partitioned property. Under this construction, the devisees under her will, who were her family members, would receive her entire estate. The court, therefore, reversed the trial court decision in favor of her husband's family, but remanded for a new trial to determine whether the testatrix and her husband had executed the original reciprocal wills pursuant to a contract.

107. 706 S.W.2d at 723. An incorrect statement in a will as to the status of property will not alter its status as between separate or community, or constitute an implied gift or devise. Carriere v. Bodungen, 500 S.W.2d 692, 695 (Tex. Civ. App.—Corpus Christi 1973, no writ).

108. 706 S.W.2d at 722-23. TEX. PROB. CODE ANN. § 378 (Vernon 1980) provides that, “If the court is of the opinion that the estate should be partitioned and distributed, it shall enter a decree which shall state: . . . (c) A full description of all the estate to be distributed.” In order to state the description and to distribute estate assets the trial court must determine the ownership of property listed on the inventory prepared by the estate's executor. 706 S.W.2d at 722-23. The appellate court in Wright remanded the case for this purpose. Id. at 723.

109. 715 S.W.2d 192 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

110. Id. at 196.

111. Id.; see Stewart v. Selder, 473 S.W.2d 3, 7 (Tex. 1971); Houston Bank & Trust Co. v. Lansdowne, 201 S.W.2d 834, 837 (Tex. Civ. App.—Galveston 1947, writ ref'd n.r.e.).

112. 715 S.W.2d at 196.

113. Id. at 199. Mutual wills between a husband and wife, with identity of wording, dispositive plan, and time of execution have often led courts to conclude that the spouses executed their wills pursuant to a contractual agreement. Id. at 198. Note that the statutory requirement that wills expressly state that a contract exists applies only to wills signed on or
husband's death, would have violated their agreement by executing a new will naming different beneficiaries.\textsuperscript{114}

When three of four remainder beneficiaries in \textit{Moody v. Pitts}\textsuperscript{115} conveyed their interests to their mother, who was the life tenant and trustee under her husband's will, the trial court held that the trust failed due to the merger of legal and equitable interests.\textsuperscript{116} The appellate court disagreed with this conclusion because the outstanding vested remainder of the fourth child prevented such a merger.\textsuperscript{117} The testator had named his wife trustee and granted her broad powers of sale and conveyance, coupled with the power to invade the corpus for her support in her accustomed manner of living. The child who had retained her remainder interest sought to have her mother's conveyances of trust property to other children declared void, as a violation of the spendthrift trust clause. Construing the unambiguous terms of the will, the court held that the trustee's conveyances were not in bad faith and did not violate any provision of the trust, particularly if the sales would make the property produce income for the benefit of the life tenant.\textsuperscript{118} The remainder beneficiary's interest was fully protected because the sale proceeds became subject to the life estate.\textsuperscript{119} The sole remainder beneficiary had hoped to receive specific real property in her father's estate and consequently argued that she was entitled to her interest in the life estate as it existed at the time of her father's death and that the trial court had erred in determining that her interest vested instead at the time of her mother's death. The court of appeals affirmed the trial court on this point, because the vested remainder was defeasible if a remainder beneficiary with no descendants pre-deceased the life tenant, or if the trustee consumed the entire life estate under the authority in the will.\textsuperscript{120} The court, therefore, refused to place a constructive trust on the real estate conveyed by the trustee.\textsuperscript{121} In her last argument, the remainder beneficiary alleged that the trustee breached her fiduciary duty when she commingled trust funds with personal funds. The court reminded the remainder beneficiary that her interest was only in the life estate existing at the time of her mother's death, and assured her that the

\textsuperscript{114} See Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621 (1957).

\textsuperscript{115} 708 S.W.2d 930 (Tex. App.—Corpus Christi 1986, no writ).

\textsuperscript{116} Id. at 934. Generally, if legal and equitable interests are held by one person, he holds it free of trust. \textit{Tex. Prop. Code Ann.} § 112.034(b) (Vernon 1984).

\textsuperscript{117} 708 S.W.2d at 934. Due to the outstanding remainder interest, the court did not need to address the statutory exception to the merger doctrine. Legal and equitable interests in a trust may not merge in a beneficiary other than the settlor if the settlor has created a spendthrift trust. \textit{Tex. Prop. Code Ann.} § 112.034(c) (Vernon 1984). The beneficiary's interest in the \textit{Moody v. Pitts} trust was protected under a spendthrift provision.

\textsuperscript{118} 708 S.W.2d at 935.

\textsuperscript{119} Id. at 936-37; \textit{see also} Edds v. Mitchell, 143 Tex. 307, 311, 184 S.W.2d 823, 826 (1945) (proceeds of sale by life tenant remain in estate).


\textsuperscript{121} 708 S.W.2d at 937-38.
life estate would include all commingled funds.\textsuperscript{122}

**Nuncupative Wills.** During his last hospitalization, the decedent in *Kay v. Sandler*\textsuperscript{123} asked his attorney to prepare a new will, but the decedent died before he was able to sign. The appellant offered the draft of the new will as a nuncupative will revoking the prior signed will. For a valid nuncupative will, the Texas Probate Code requires that, when the value of the decedent's estate exceeds thirty dollars, three credible witnesses substantially agree to the oral disposition made by the testator.\textsuperscript{124} The testimony offered by the appellant consisted of testimony by the decedent's attorney, in which the attorney stated that the decedent never declared that he was making an oral will. Additionally, the appellant offered the affidavits of two other witnesses to the effect that the decedent indicated he had made or intended to make a new will after his visit with his attorney. The court held that the appellant had failed to provide three credible witnesses to substantially support the drafted will, and as a matter of law the alleged nuncupative will therefore failed to comply with that requirement of the Probate Code.\textsuperscript{125} Absent a valid nuncupative will the court did not reach the issue, unsettled in Texas law, of whether a nuncupative will revokes a prior written will.\textsuperscript{126}

**II. Life Estates**

Undue influence and fraud in the inducement frequently are key issues addressed in will contests. The court addressed these same issues in *Novak v. Schellenberg*,\textsuperscript{127} in a suit to invalidate an inter vivos conveyance of a life estate. In 1967 the appellant's parents executed a deed of gift of the family farm, conveying an undivided one-third interest in the remainder to the appellant individually and an undivided two-thirds interest in the remainder to the appellant as trustee for her two brothers, and retaining a life estate. In 1981 the appellant's parents executed an instrument conveying their life estate to her, but in 1983 they attempted to set aside both the 1981 conveyance and their earlier appointment of her as trustee.\textsuperscript{128} The appellant argued

\textsuperscript{122} \textit{Id.} at 937; see also General Ass'n of Davidian Seventh Day Adventists, Inc. v. General Ass'n of Davidian Seventh Day Adventists, 410 S.W.2d 256, 259 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (all commingled funds become subject to trust).

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} TEX. PROP. CODE ANN. § 113.082 (Vernon 1984).

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} Id.
that, despite her parents' testimony that they believed they were signing a hospital bill when they signed the instrument conveying the life estate, her parents failed to prove undue influence. She contended that their minds were not subverted to or overcome by her will, an essential element in establishing undue influence. Affirming the trial court's judgment in favor of the appellees, the appellate court clarified that the rule in Texas in a suit to invalidate an instrument is that fraud in the inducement and undue influence are treated as one, with undue influence being merely a species of fraud.\textsuperscript{129}

The elements necessary to establish an oral life estate in real property arose in the context of a divorce in Carley v. Carley.\textsuperscript{130} The appellant and appellee had moved onto a farm owned by the appellant's parents at the parents' request to assist them as needed in the future. In return, the parents promised the couple they could live on the farm for their lifetimes, and that the appellant would receive title at the death of both his parents. Despite the requirement that an interest in land must comply with the statute of frauds,\textsuperscript{131} the court held that the appellant had an enforceable life estate.\textsuperscript{132} The Texas Supreme Court in Hooks v. Bridgewater\textsuperscript{133} determined that an oral interest in real property was enforceable if the transferee paid consideration, in money or in services, took possession of the property, and, with the transferor's consent, made permanent and valuable improvements.\textsuperscript{134} The appellant in Carley promised to care for his parents, moved onto the farm, and built a home on farm property, thus satisfying all three tests. He therefore had a separate property interest in the farm, and, upon divorce, his wife was entitled to reimbursement for one-half of the community funds expended to enhance the value of the appellant's life estate.\textsuperscript{135}

III. Nontestamentary Transfers

Joint Accounts. Isbell v. Williams\textsuperscript{136} involved an interpleader action to resolve the issue of ownership of funds deposited in a savings and loan account as between the named beneficiaries or the executor of the decedent's estate. The decedent had used joint savings account cards to open two accounts naming herself as trustee for two named beneficiaries. Consistent with Probate Code section 439,\textsuperscript{137} the deposit agreement contained a specific survi-

\textsuperscript{129} 718 S.W.2d at 824; see Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963); Curry v. Curry, 153 Tex. 421, 431, 270 S.W.2d 208, 214 (1954); Finch v. McVea, 543 S.W.2d 449, 452 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.).
\textsuperscript{130} 705 S.W.2d 371 (Tex. App.—San Antonio 1986, writ dism'd w.o.j.).
\textsuperscript{131} TEX. BUS. & COM. CODE ANN. § 26.01(b)(4) (Vernon Supp. 1987); see also Truitt v. Wilkinson, 379 S.W.2d 400, 402 (Tex. Civ. App.—Texarkana 1964, no writ) (life estate must be created in accordance with statute of frauds).
\textsuperscript{132} 705 S.W.2d 374. The court disagreed with the appellee's contention that she was entitled to one-half of the current market value of the home. \textit{Id.}
\textsuperscript{133} Id. at 126-27, 229 S.W. at 1116.
\textsuperscript{134} 705 S.W.2d at 374. The court disagreed with the appellee's contention that she was entitled to one-half of the current market value of the home. \textit{Id.}
\textsuperscript{135} 705 S.W.2d 252 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).
\textsuperscript{136} TEX. PROB. CODE ANN. § 439(a) (Vernon 1980). The decedent must have signed a written agreement in order to create a valid survivorship account; the creation of a joint account alone will not lead to the inference that a survivorship agreement existed. \textit{Id.}

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vorship provision, but the right-of-survivorship language referred to the "undersigned as joint tenants." Only the decedent had signed the agreement, rendering the survivorship language irrelevant. Despite the decedent's defective attempt to create a survivorship account, the named beneficiaries contended that they, rather than the executor, were entitled to the funds because the accounts were trust funds for their benefit. The trial court agreed, since the jury found that the decedent intended the funds to pass to the beneficiaries upon her death. The court of appeals reversed and held that the decedent's intent was not controlling. The test for creation of a trust account is found in Probate Code section 436(14), which requires that the settlor establish a trust account by the form of the account and the deposit agreement.

The court in Sawyer v. Lancaster also addressed the issue of whether a decedent created a valid survivorship account. Affirming a summary judgment in favor of the surviving depositor, the court held that under Probate Code section 439(a) the bank signature card directing payment to the survivor created a rebuttable presumption of joint tenancy with right of survivorship, which the appellant's evidence had not overcome. Absent express language of joint tenancy with right of survivorship, Texas courts have held that "payable to the survivor" language is merely sufficient to raise the presumption that the depositor intended a survivorship account. In Sawyer evidence that the depositor intended to create a convenience account rather than a survivorship account was therefore admissible, but was insufficient to overcome the presumption created by the "payable" language.

In Texas community property may not be used to create a valid joint tenancy with right of survivorship. The couple in First Federal Savings & Loan Association v. Ritenour partitioned their community interests in a certificate of deposit, as permitted by the Texas Probate Code, and established it as a valid survivorship account. Despite the bank's representation to the husband that the bank would place a hold on the account requiring both spouses' signatures for a withdrawal, the wife alone withdrew and dissipated in excess of $11,000. The court held that the husband was a consumer

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138. 705 S.W.2d at 254.
139. Id. at 256.
140. Id. at 257. The decedent's intent would have been the controlling issue prior to the passage of the non testamentary provisions of the Texas Trust Code. See Citizens Nat'l Bank v. Allen, 375 S.W.2d 654, 657 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).
141. TEX. PROB. CODE ANN. § 436(14) (Vernon 1980). The appellate court remanded the case for a determination of the factual issue of whether the form of the account, the deposit agreement, and parol evidence to clarify ambiguities were together sufficient to comply with these statutory requirements. 705 S.W.2d at 257.
142. 719 S.W.2d 346 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
143. TEX. PROB. CODE ANN. § 439(a) (Vernon 1980).
144. 719 S.W.2d at 349.
145. See, e.g., Krueger v. Williams, 163 Tex. 545, 551, 359 S.W.2d 48, 51-52 (1962).
146. 719 S.W.2d at 350.
147. See, e.g., Williams v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966).
148. 704 S.W.2d 895 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).
149. TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1987).
under the Deceptive Trade Practices Act\textsuperscript{150} and sustained actual damages to him of the full amount used by his wife.\textsuperscript{151} First Federal contended that, pursuant to the partition, the husband suffered damages only to the extent of one-half of the total amount. A joint tenant takes full title to the assets, however, by the instrument creating a valid joint tenancy.\textsuperscript{152} As a result, the court held that the husband had full title to all funds in the account and, contrary to his agreement with First Federal, was damaged to the full extent of funds disbursed to his wife.\textsuperscript{153}

The court in \textit{Ashmore v. Carter}\textsuperscript{154} addressed life insurance beneficiary designations and payments. The court held that a trial court determination that life insurance proceeds were community property, payable to the decedent's estate as the designated beneficiary, did not constitute fraud on the decedent's second wife.\textsuperscript{155} The appellant presented no evidence of fraud on appeal, and, in fact, the decedent had made generous provisions for his wife elsewhere.\textsuperscript{156}

Due to an error in the name on the life insurance beneficiary designation, the court in \textit{Oates v. Hodge}\textsuperscript{157} permitted extrinsic evidence that the insured intended to establish the identity of the proper beneficiary.\textsuperscript{158} The court noted that the designation of an individual as the beneficiary raised a presumption that the insured intended that individual to receive the insurance proceeds.\textsuperscript{159} In \textit{Oates} the court found that, after the insured designated Evelyn Hodge, whose actual name was Evelyn Oates, as his beneficiary, the fact of the insured's marriage to another woman was irrelevant, as was the fact that he had signed but not personally filled in the beneficiary's name on the designation form, because the court received no evidence of impropriety in obtaining the decedent's signature.\textsuperscript{160}

Similarly, in \textit{Reyes v. Salinas}\textsuperscript{161} the court awarded the insurance proceeds to the named beneficiary despite the insured's inaccurate designation of his

\textsuperscript{150.} 704 S.W.2d at 900. A consumer is "an individual . . . who seeks or acquires by purchase or lease, any goods or services . . . ." TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1987).
\textsuperscript{151.} 704 S.W.2d at 900.
\textsuperscript{152.} See Calvert v. Wallrath, 457 S.W.2d 376, 379 (Tex. 1970).
\textsuperscript{153.} 704 S.W.2d at 900. In addition, because each joint tenant has the right to withdraw the entire amount in a joint tenancy account, the court reversed the judgment against Mrs. Ritenour for having withdrawn the funds in question. \textit{Id.} at 901.
\textsuperscript{154.} 716 S.W.2d 171 (Tex. App.—Beaumont 1986, no writ).
\textsuperscript{155.} \textit{Id.} at 174.
\textsuperscript{156.} The decedent had designated his wife as the sole beneficiary of his Individual Retirement Account (IRA). The decedent's daughter argued that Internal Revenue Code § 2039(e) prohibits exclusion of IRA proceeds from an estate, but the court correctly pointed out that this Internal Revenue Code provision addresses the exclusion of IRA proceeds from a decedent's gross estate for purposes of calculating the estate's federal tax liability only. 716 S.W.2d at 173.
\textsuperscript{157.} 713 S.W.2d 361 (Tex. App.—Dallas 1986, no writ).
\textsuperscript{158.} \textit{Id.} at 363.
\textsuperscript{160.} 713 S.W.2d at 364.
\textsuperscript{161.} 709 S.W.2d 31 (Tex. App.—Corpus Christi 1986, no writ).
wife as the beneficiary.\textsuperscript{162} The court held that the insured's designation of his wife was descriptive only, when the court could clearly identify the beneficiary.\textsuperscript{163} In two additional insurance cases, named beneficiaries forfeited their rights to life insurance proceeds by willfully causing the deaths of the insured parties.\textsuperscript{164}

IV. ESTATE ADMINISTRATION

\textit{Jurisdiction.} In \textit{Yowell v. Piper Aircraft Corp.}\textsuperscript{165} the Texas Supreme Court addressed the complex issue of probate court jurisdiction in the context of the defendant's contention that a decedent's mental anguish is a matter incident to an estate within the probate court's exclusive jurisdiction, rendering the district court an improper forum in which to litigate the issue. The court had recently determined, in \textit{Seay v. Hall},\textsuperscript{166} that survival claims were not matters incident to an estate under Probate Code section 5A(b).\textsuperscript{167} Reversing the appellate court, the court therefore held that at the time of trial the district court had jurisdiction over the claim for the decedent's mental anguish.\textsuperscript{168} In a footnote, however, the court noted that:

\begin{quote}
[T]he legislature has amended § 5A(b) to add the following sentence.
"In actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district courts." Tex. Prob. Code Ann. § 5A(b) (Vernon Supp. 1986). The district court is still a proper forum for survival actions under this amendment.\textsuperscript{169}
\end{quote}

In this footnote the court observed that the district court is a proper forum rather than \textit{the} proper forum for survival actions.\textsuperscript{170} This footnote may clarify the construction issues raised by the addition to Probate Code section 5A(b), in light of the preceding sentence in that section: "In situations where the jurisdiction of a statutory probate court is concurrent with that of the district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court."\textsuperscript{171}

\begin{itemize}
\item \textsuperscript{162} \textit{Id.} at 33.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{See Seedig v. Dennis}, 701 S.W.2d 354 (Tex. App.—Fort Worth 1986, no writ); \textit{see also} \textit{TEX. INS. CODE ANN.} art. 21.23 (Vernon 1981) (interest ends if beneficiary is accomplice or principal in insured's death).
\item \textsuperscript{165} 703 S.W.2d 630 (Tex. 1986).
\item \textsuperscript{166} 677 S.W.2d 19, 25 (Tex. 1984).
\item \textsuperscript{167} \textit{TEX. PROB. CODE ANN.} § 5A(b) (Vernon Supp. 1987) includes as matters incident to an estate:
\begin{quote}
[T]he probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also include, but are not limited to, all claims by or against an estate, all actions for trial of title to land and for the enforcement of liens thereon, all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the applying of constructive trusts, and generally all matters relating to the settlement, partition, and distribution of estates of wards and deceased persons.
\end{quote}
\item \textsuperscript{168} 703 S.W.2d at 634.
\item \textsuperscript{169} \textit{Id.} n.1.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{TEX. PROB. CODE ANN.} § 5A(b) (Vernon Supp. 1987).
\end{itemize}
While interpreting the legislative addition as vesting exclusive jurisdiction of any action by or against a personal representative in a statutory probate court is possible, the court's language would appear to construe the addition as establishing concurrent jurisdiction with the district court. Further, the court would appear to be observing that, assuming that concurrent jurisdiction did exist in Yowell, the claim for mental anguish was not a matter mandatorily brought in a statutory probate court, because it was not a matter incident to an estate. Unresolved is the construction issue concerning whether a statutory probate court may now exercise its concurrent jurisdiction over a survival claim as an action by or against a personal representative, rather than as an action incident to an estate.

When concurrent jurisdiction clearly exists, the court in Williams v. Scanlan held that deference to the first court to acquire jurisdiction is a judicial imperative. The district court in Williams had acquired jurisdiction over a divorce proceeding that became probate in nature when a temporary guardian of the person and estate of one party was sought in probate court. Agreeing that the probate court had jurisdiction to appoint a temporary guardian of an incapacitated person, the court cited its decision in Pullen v. Swanson, in which it had held that Probate Code section 5A does not completely divest district courts of jurisdiction to hear matters incident to an estate. Because the district court had initially obtained jurisdiction in Williams, and because the probate court could not grant all of the requested relief due to lack of jurisdiction, the court held that the probate court's exercise of jurisdiction over the estate was inappropriate.

With similar reasoning, the court in Speer v. Stover held that dominant jurisdiction was vested in the probate court because that court had acquired jurisdiction over a suit with which the district court had concurrent jurisdiction before suit was filed in the district court. The court rejected the contention that the suit for specific performance properly belonged in the district court because the estate involved had not yet had an administrator appointed. The court observed that, consistent with the rule that jurisdiction in a probate matter vests upon the opening of probate, the probate court acquired jurisdiction at the time an application for letters of administration was filed, not several months later when the order appointing the administrator was entered. Further, the court held that the suit for spe-
specific performance seeking the conveyance of real property belonging to an estate being administered through probate proceedings is properly heard in the probate court as a matter incident to an estate.\textsuperscript{183} The subject matter of the suit clearly related to the settlement, partition, and distribution of the estate of a deceased person. For purposes of the determination of whether the matter was incident to an estate, the failure to name the estate as a party to the suit was irrelevant.\textsuperscript{184}

Irrespective of which court first acquires jurisdiction, the Texas Probate Code requires that in counties without a statutory probate court, county court at law, or other statutory court exercising probate jurisdiction, contested probate matters shall be transferred to the district court on the motion of any party.\textsuperscript{185} The court in InterFirst Bank v. Henderson\textsuperscript{186} accordingly reversed the trial court's refusal to transfer probate proceedings involving a will contest to district court.\textsuperscript{187}

**Standing.** The supreme court remanded to the trial court the issue of whether the bank in InterFirst Bank v. Henderson had standing as a testamentary trustee to contest the probate of a second will.\textsuperscript{188} Texas courts had previously characterized an "interested person" in the context of the Probate Code\textsuperscript{189} as a party, other than a creditor, entitled to share in the estate, absolutely or contingently,\textsuperscript{190} and as a party with a pecuniary interest that would be affected by the probate or defeat of the will.\textsuperscript{191} Alternatively, the court observed that other jurisdictions have distinguished between the roles of executor and trustee on the basis that the executor merely possesses and administers assets prior to distribution, while a trustee receives legal title to assets and, in that respect, stands in the same position as a legatee under the will.\textsuperscript{192} Without deciding the issue, the court cited with approval an analysis by a Montana court granting standing to a trustee only if the interests of the beneficiaries represented by the trustee were adversely affected by a subse-

\textsuperscript{183} Id. at 738.  
\textsuperscript{184} Id. The court noted that a plea for alternative relief, in itself not a matter incident to an estate, was within the probate court's jurisdiction if the primary claim was a matter incident to an estate. Further, the court pointed out that a county court sitting as a probate court had no monetary jurisdictional limitations and could therefore provide the same relief as a district court. *Id.*  
\textsuperscript{185} TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1987).  
\textsuperscript{186} 719 S.W.2d 641 (Tex. App.—El Paso 1986, no writ). The trial court had denied a motion to transfer the probate proceedings to district court and had entered an order dismissing the will contest. Subsequently, the appellate court denied the bank's application for a writ of mandamus to require the transfer, on the grounds that the bank's recourse was an appeal from a final judgment. InterFirst Bank v. Fields, 706 S.W.2d 157, 158 (Tex. App.—El Paso 1986, no writ).  
\textsuperscript{187} 719 S.W.2d at 643.  
\textsuperscript{188} Id.  
\textsuperscript{189} TEX. PROB. CODE ANN. § 3(r) (Vernon 1980) defines interested persons as: "[H]eirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered . . . ." The validity of a will admitted to probate may be contested within two years by "any interested person." *Id.* § 93 (Vernon 1980).  
\textsuperscript{190} Appleby v. Tom, 170 S.W.2d 519, 520 (Tex. Civ. App.—El Paso 1942, no writ).  
\textsuperscript{191} Logan v. Thomason, 146 Tex. 37, 41-42, 202 S.W.2d 212, 215 (1947).  
\textsuperscript{192} 719 S.W.2d at 643.
quent will.193

Appealability. Prior to the final distribution in an estate administration, certain probate court orders may be appealable by adjudicating substantial rights of various parties.194 Such appealable orders include the declaration of heirship and the denial of an application to probate a will.195 The court in *Grounds v. Lett,*196 however, held that a probate court’s orders concerning venue and jurisdiction in a suit affecting title to land were interlocutory and appealable upon final judgment.197 An order construing only certain portions of a will without disposing of all parties and issues and an order denying a motion for summary judgment were also held to be interlocutory in *Bogs v. Bogs.*198 By contrast, an appeal in a probate matter is authorized if the judgment finally disposes of and is conclusive of the issue for which that portion of the proceeding was brought.199 The partial summary judgment in *Kay v. Sandler*200 admitting into probate the decedent’s signed will, and effectively denying probate to the nuncupative will submitted by appellant, resolved all issues in the will contest and therefore constituted a final, appealable judgment.201

Damages. In a case of first impression, the Texas Supreme Court in *Yowell v. Piper Aircraft Corp.*202 held that loss of inheritance damages in wrongful death cases are recoverable.203 The court noted that these damages compensate heirs for the pecuniary loss they suffer to the extent the decedent would have accumulated assets they would have inherited at his natural death.204 Because a decedent’s estate has no cause of action for the loss of future earnings, the court reasoned that loss of inheritance damages did not afford plaintiffs a double recovery.205 The court defined loss of inheritance damages in Texas as: "[T]he present value that the deceased, in reasonable probability, would have added to the estate and left at natural death to the statutory wrongful death beneficiaries but for the wrongful act causing the

195. See Mossler v. Johnson, 565 S.W.2d 952, 954 (Tex. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.).
196. 718 S.W.2d 38 (Tex. App.—Dallas 1986, no writ).
197. Id. at 39.
201. 718 S.W.2d 872 (Tex. App.—Houston [14th Dist.] 1986, no writ).
202. Id. at 874. Appellant had also requested the appointment of a temporary administrator pending the will contest. Although the summary judgment did not address this issue, the court took judicial notice of its decision in Kay v. Sandler, 704 S.W.2d 430 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.), in which this issue had been resolved. See infra notes 237-42 and accompanying text. For a discussion of the requirements for a nuncupative will, see supra notes 123-26 and accompanying text.
203. 703 S.W.2d 630 (Tex. 1986).
204. Id. at 633.
205. Id.
premature death." While prejudgment interest is recoverable in wrongful
death cases, the court denied such interest for unaccrued damages such as
loss of inheritance. In *Yowell* the court also reversed the appellate court's
denial of damages for loss of society, companionship, and affection. In so
doing, the court extended its holding in *Sanchez v. Schindler*, which recog-
nized a parent's right to recover the loss of companionship and society at
the death of a minor child. In *Cavnar v. Quality Control Parking, Inc.* the
court extended the *Sanchez* decision to all wrongful death beneficiaries,
including parents of deceased adult children.

**Orders/Judgments.** In *Andrews v. Koch* the Texas Supreme Court held
that a probate court, after authorizing a contract for the sale of estate prop-
erty that included an easement, may later enter a nunc pro tunc order to
reform the administrators' deed to include the easement. Reversing the
appellate court, the court determined that the error omitting the easement
from the administrators' deed was clerical rather than judicial, and the error
was thus permissibly reformed by a nunc pro tunc order.

A court order approving an inventory is not effective to alter the owner-
ship of property, nor is an inventory conclusive evidence of title. The
court, therefore, in *Balaban v. Balaban* held that the probate inventory
including certain real property in a decedent's intestate estate did not estop
his son from questioning title to that property. The court also determined
that in his trespass to try title action against his siblings to establish title to
the property in question, the acceptance of benefits from the estate did not
estop the decedent's son.  

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206. *Id.* at 633. The court clarified that a wrongful death beneficiary would be denied loss
of inheritance damages if, in the jury's opinion, the decedent would not have accumulated
assets, or would have outlived the beneficiary. *Id.* Justice McGee dissented from the recovery
of loss of inheritance damages on the grounds that such damages are too speculative. *Id.* at
636 (McGee, J., dissenting).

207. *Id.* at 636.

208. *Id.* at 635-36.

209. 651 S.W.2d 249 (Tex. 1983).

210. *Id.* at 254.

211. 696 S.W.2d 549 (Tex. 1985).

212. *Id.* at 551.

213. 702 S.W.2d 584 (Tex. 1986).

214. *Id.* at 586.

215. *Id.* The court distinguished between clerical errors that do not result from judicial
reasoning or determination and judicial errors that involve the exercise of the court's judg-
ment. *Id.* at 585.

216. See *Smith v. Buss*, 135 Tex. 566, 571, 144 S.W.2d 529, 532 (1940); *Anderson v. An-


218. 712 S.W.2d 775 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

219. *Id.* at 780.

220. *Id.* The court noted that the decedent's son had accepted only those benefits due to
him and was therefore not estopped from asserting title. See *Carle v. Carle*, 149 Tex. 469, 472,
234 S.W.2d 1002, 1004 (1950).
Statute of Limitations. In *Klein v. Dimock,* 221 companion cases concerning a decedent’s execution of two wills, the court characterized an application to probate an earlier will as a will contest, subject to a two-year statute of limitations, 222 and conversely determined that an application to probate a later will was not a contest of the prior will, but was a proceeding under Probate Code section 83(b), 223 governed by the four-year statute of limitations. 224 The decedent in *Klein* had, in 1961, executed a joint will with his wife, which was duly probated upon her death. Thereafter, in 1981, the decedent executed a second will, revoking the joint will and modifying the first dispositive scheme. Following the decedent’s death, the probate court admitted the 1981 will to probate. In the same year, the appellants filed a suit to contest the 1981 will, but the appellants did not file an application to probate the 1961 will until more than two years later, nor did they implead all necessary and indispensable parties within two years. Appealing the trial court determination that the two-year statute of limitations barred the will contest, the appellants contended that their action was a proceeding described in Probate Code section 83(b), pertaining to a second application to probate a will after a first will has been admitted to probate, and as such was governed by the four-year statute of limitations. The appellate court disagreed, affirming the trial court decision to dismiss, on the ground that the appellants’ action was a direct attack on the later will, governed by the two-year limitations period for will contests. 225 The court pointed out that the probate of a later will has been held to be a section 83(b) proceeding rather than a contest of the prior will, because the probate of a later will, if it revokes all others, has the incidental effect of revoking the probate of the prior will. 226 The application to probate an earlier will, however, as an attempt to set aside a later will revoking all prior wills, was clearly a direct attack on the later will in the nature of a will contest, governed by a two-year limitations period. 227

Executors and Administrators. The executor of an estate in Texas has both the right to possession of estate assets and the duty to recover such possession. 228 When the mother of one of two decedents in *Bloom v. Bear* 229 re-
fused to deliver the decedents' personal property to their respective executors, claiming a lien on the property to secure payment of storage fees, the executors sought to enforce their right to possession by court order. Upon the probate judge's refusal to comply, the appellate court held that the executors' right to possession was enforceable by court order and agreed to compel the judge to sign such an order by the issuance of a writ of mandamus, if necessary.\textsuperscript{230} In \textit{Price v. Estate of Schwartz}\textsuperscript{231} charitable estate beneficiaries sought the removal of the independent executor, the return of $49,000 in attorney's fees paid to the executor by the estate, and damages for the waste of monetary assets. Following the resignation of the executor, the probate court reduced his fee to $6,339.12, but denied an award of damages. Affirming, the appellate court agreed with the charitable beneficiaries that, during the three years in which the executor served, he should have invested estate cash totalling approximately $90,000 in some form of interest-bearing account, but held that there was no definite limit on the amount of time and circumstances under which cash may remain uninvested.\textsuperscript{232} The beneficiaries also sought and recovered their attorney's fees and costs. The court in \textit{Roberts v. Schooler-Gordon Funeral Directors, Inc.}\textsuperscript{233} noted that an executor must pay reasonable funeral expenses from an estate based on the theory that a member of a decedent's family may contractually bind the estate for funeral expenses\textsuperscript{234} or, absent a contract, such expenses are recognized for payment under Probate Code section 322\textsuperscript{235} and given a Class 1 statutory priority.

\textit{Temporary Administrators}. The Texas Probate Code affords a judge broad discretion in appointing a suitable person to serve as the temporary administrator of an estate.\textsuperscript{236} The court of appeals in \textit{Kay v. Sandler}\textsuperscript{237} affirmed the trial court's appointment of the primary beneficiary of a disputed will as the


\begin{footnotes}
\item[229] 706 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1986, no writ).
\item[230] \textit{Id.} at 148.
\item[231] 711 S.W.2d 700 (Tex. App.—Corpus Christi 1986, no writ).
\item[232] \textit{Id.} at 702. The executor testified that he intended to disburse the cash to the beneficiaries when a neighbor found a purported codicil to the decedent's will. The codicil was in dispute for the entire time during which the executor served.
\item[233] 712 S.W.2d 646 (Tex. App.—Amarillo 1986, no writ).
\item[234] \textit{Id.} at 647 (citing Goeth v. McCollum, 94 S.W.2d 781, 783 (Tex. Civ. App.—San Antonio 1936, no writ)). If a contract exists, an interest charge for the extension of credit, with statutory limitations, may be agreed to, but the 15\% charge in \textit{Roberts} was denied due to lack of evidence at trial as to its reasonableness or propriety. 712 S.W.2d at 648.
\item[236] \textit{Id.} § 131(a) (Vernon 1980) provides that, in the event the decedent's estate requires the immediate appointment of a personal representative, the county judge "shall, by written
temporary administratrix, holding that the proponent of a will in a will contest is not, as a matter of law, disqualified from serving. Case law addressing whether a person is suitable under the Probate Code to serve as a temporary representative has distinguished between a situation in which the representative asserts a claim that is incompatible or adverse to the interest of the estate, in which case he may be disqualified, from a situation such as Kay, in which the conflict is limited to a resolution of which of the parties, including the administrator, will ultimately be awarded the estate assets. The court rejected the contention that the beneficiary in Kay was unsuitable because her position as temporary administratrix afforded her the opportunity to use estate funds in the will contest. The court reasoned that the many restrictions placed upon the actions of an administrator under the Probate Code and the requirement of a bond would prevent this use of estate funds.

The court of appeals again underscored a judge’s broad discretion in appointing a suitable person to act as temporary administrator in Cravey v. Hennings, in which the contestant in a will contest asserted that, as the primary beneficiary under the will, she was entitled to preference in the selection of the administrator. Probate Code section prioritizes the persons qualified to receive letters testamentary or of administration, and, absent a designated executor or surviving spouse, lists the principal devisee or legatee in preferential order for the grant of letters. The court logically pointed out, however, that this section is inapplicable to the appointment of a temporary administrator because the ascertainment of the principal beneficiary does not occur until the conclusion of the will contest, at which time a temporary administrator would no longer be required. Thus, the only requirement for the appointment of a temporary administrator is that the party be suitable. Having chosen one of several qualified persons to serve,
the judge had not abused his discretion in failing to appoint the appellant.  

Claims. The court in Donaldson v. Taylor classified appellee's claim alleging breach of warranties and breach of contract in the repair of the structure of her home as an unliquidated claim rather than as a claim for money, and recognized that the appellee was not required to present the claim against the estate of the original contractor within six months from the grant of letters of administration. The court also upheld the individual judgment against the decedent's son, the sole distributee of the estate, based on the right of a creditor to sue a distributee in proportion to the amount of the estate the distributee has received.

V. GUARDIANSHIPS

Having had the bank appointed as guardian of her son's estate, the appellant in Moore v. First City Bank later unsuccessfully sought the bank's removal. The issue she presented on appeal was whether the bank was entitled to the award of attorney's fees granted by the probate court under Probate Code section 242. That section provides, in part: "Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safe-keeping, and management of the estate, . . . and all reasonable attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court." Affirming the probate court, the court disagreed with the contention that the suit did not involve the preservation, safe-keeping, or management of the estate. The court held that a guardian should not be required to bear its own costs in an ill-founded removal action, particularly in light of testimony showing the professional manner in which the bank had served the ward's interests. In Hart v. Hart the court upheld the trial court judgment that a guardian or next friend does not have standing to maintain a divorce action on behalf of a mentally incompetent ward.

247. 705 S.W.2d at 371.
249. Id. at 718; see also Tex. Prob. Code Ann. § 298(a) (Vernon 1980) (claims for money against estate postponed if not presented within six months from grant of letters of administration).
250. 713 S.W.2d at 718; see Tex. Prob. Code Ann. § 269 (Vernon 1980).
251. 707 S.W.2d 286 (Tex. App.—Fort Worth 1986, no writ).
253. Id.
254. 707 S.W.2d at 287.
255. Id. The court explained that to hold otherwise might well have a chilling effect on the willingness of others to serve in a fiduciary capacity. Id.
256. 705 S.W.2d 332 (Tex. App.—Austin 1986, writ ref'd n.r.e.).
257. Id. at 332. The court noted, however, that few Texas cases have addressed this issue, but that the holding is consistent with the majority of states and with the one Texas opinion most clearly on point. Id. at 332-33; see also Dillion v. Dillion, 274 S.W. 217, 220 (Tex. Civ. App.—Amarillo 1925, no writ).
VI. TRUSTS

Constructive Trusts. In two recent cases involving constructive trusts, Texas courts have had to address federal statutes in reaching their decisions. In *Towne v. Towne* the decedent agreed that his first wife would own his Veterans Administration Life Insurance policy as a part of their property division upon divorce. Unknown to his first wife, or to the court, two months prior to entering into the property settlement agreement approved by the court the decedent had designated his future wife as beneficiary of the policy, the proceeds of which were subsequently paid to her upon his death. Despite the fact that legal title to the proceeds had clearly vested in his second wife, the trial court determined that the decedent had committed fraud, and it imposed a constructive trust upon the proceeds in favor of the first wife. On appeal, the second wife argued that the constructive trust and the property settlement agreement restricting the decedent’s right to change beneficiaries violated a federal statute protecting the decedent’s absolute right to alter beneficiary designations at any time. The appellant relied upon the decision in *Ridgway v. Ridgway* in which the United States Supreme Court refused to impose a constructive trust on the proceeds of a policy issued to a serviceman under the Serviceman’s Group Life Insurance Act of 1965. The serviceman in *Ridgway* had similarly failed to honor his divorce agreement by altering his beneficiary, yet the Court reasoned that the constructive trust was inconsistent with the federal statute’s language that payments should “not be liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.” In its *Ridgway* decision the Court was careful to distinguish a situation in which a decedent wrongfully divests his wife of an interest in her own property, citing with approval its prior *Yiatchos v. Yiatchos* decision in which the court described the doctrine of fraud as an “exception to the regulatory imperative.” The court in *Towne* found that the decedent had likewise attempted to divest his first wife of an interest in her own property, and explained that had she known of his change in the beneficiary designation, she could have demanded to receive other property

258. 707 S.W.2d 745 (Tex. App.—Fort Worth 1986, no writ).
261. 38 U.S.C. § 3101 (1982). The trial court in *Ridgway* had also refused to impose a constructive trust, reasoning that to do so would interfere with the federal act, and would be impermissible under the supremacy clause of the United States Constitution. See 707 S.W.2d at 747.
262. 454 U.S. at 60.
263. 38 U.S.C. § 770 (1982). Although the statutes in *Towne* and *Ridgway* differ, their operative language is the same.
265. *Ridgway*, 454 U.S. at 58 (citing *Yiatchos*, 376 U.S. at 307). In *Yiatchos* the decedent purchased government savings bonds with community funds, payable at death to his brother. Refusing to allow the bonds to be used as a vehicle to deprive the wife of her community property rights, the Court remanded the case for a determination of whether the decedent had “committed fraud or breach of trust tantamount to fraud.” 376 U.S. at 309.
incident to their divorce.\textsuperscript{266} In affirming the imposition of a constructive trust on the insurance proceeds, the court refused to elevate the federal interest in permitting a soldier to designate his own beneficiary over the commission of fraud.\textsuperscript{267}

The court in \textit{In re Lodek}\textsuperscript{268} faced the issue of whether a constructive trust imposed on a debtor's homestead was an equitable lien avoidable under the Bankruptcy Code as a judicial lien.\textsuperscript{269} Holding that the lien was not a judicial lien that would be avoidable, the court distinguished an equitable lien arising out of a constructive trust as an interest in a specific piece of property created under Texas law at the time the property was wrongfully taken.\textsuperscript{270} The creditor's interest in that property therefore precedes the judicial proceedings formally declaring the equitable lien and does not constitute a judicial lien under the terms of the Bankruptcy Code.\textsuperscript{271}

The statute of frauds did not bar the imposition of a constructive trust in \textit{Hamblet v. Coveney},\textsuperscript{272} in which the appellee, who was having difficulty with her mortgage payments, agreed to sell her home to her niece and her niece's husband for a given sum, to be paid mostly in cash, with a promissory note for the difference. Because of appellants' difficulty in obtaining financing, the appellee further agreed to sign a contract and closing documents listing only the cash amount as the total purchase price. After the appellants failed to execute the promissory note, they asserted the statute of frauds\textsuperscript{273} as a defense to the appellee's suit to impose a constructive trust. The court, however, held that "a constructive trust based on a prior confidential relationship and unfair conduct or unjust enrichment is an exception to this rule."\textsuperscript{274} The fact that the appellee had knowingly made false statements to the lending institution was held to be an inadequate defense by the appellants in light of their own comparable conduct.\textsuperscript{275} The court had little difficulty finding the requisite prior confidential relationship based on the appellee's close relationship with her niece and her trust and reliance on her niece's husband over the years,\textsuperscript{276} as well as the element of unjust enrichment or unfair conduct on the part of appellants.\textsuperscript{277} The court affirmed the imposition of a

\begin{itemize}
\item \textsuperscript{266} 707 S.W.2d at 748-49.
\item \textsuperscript{267} Id. at 749.
\item \textsuperscript{268} 61 Bankr. 66 (Bankr. W.D. Tex. 1986).
\item \textsuperscript{269} See 11 U.S.C. § 522(f) (1982).
\item \textsuperscript{270} 61 Bankr. at 68. A constructive trust arises at the time legal title to property wrongfully acquired passes. \textit{See} Meadows v. Bierschwale, 516 S.W.2d 125, 133 (Tex. 1974).
\item \textsuperscript{271} 61 Bankr. at 68.
\item \textsuperscript{272} 714 S.W.2d 126 (Tex. App.—Houston [1st Dist.] 1986, no writ).
\item \textsuperscript{274} 714 S.W.2d at 130; \textit{accord} Ginther v. Taub, 675 S.W.2d 724, 728 (Tex. 1984); Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977).
\item \textsuperscript{275} 714 S.W.2d at 130. As pointed out by the appellants, it is against federal law to falsify loan documents for the purpose of influencing a federal savings and loan association, pursuant to 18 U.S.C. § 1014 (1982). Aside from the jury's questionable finding that the appellee's knowingly false statements were not made to influence the lender, the court refused to allow the appellants to enrich themselves unjustly as a result of wrongful conduct they not only engaged in, but also initiated. 714 S.W.2d at 130.
\item \textsuperscript{276} 714 S.W.2d at 129.
\item \textsuperscript{277} The court upheld the jury's finding of constructive fraud. \textit{Id.} at 132.
\end{itemize}
constructive trust on the real property owned by both appellants, despite the fact that the jury found no wrongdoing on the part of the appellee’s niece, because the niece had been unjustly enriched by the fraudulent conduct of her husband.278 The court enforced the constructive trust by impressing a second lien on the real property, a manner of enforcement permitted in equity, rather than causing a division of the property in kind.279

A party seeking the equitable remedy of a constructive trust must himself be willing to do equity.280 The appellee in Velchoff v. Campbell281 sought the imposition of a constructive trust on oil and gas leases he alleged his broker obtained through knowledge learned in the course of their fiduciary relationship. The court required the appellee to have paid the broker his compensation for services. In a decision turning on a point of procedure, the court held that appellee had satisfied this requirement through requests for admissions that were deemed admitted due to untimely filed responses.282 The court therefore affirmed summary judgment granting the constructive trust.283

In Ford v. Long284 and Thompson v. Mayes285 the courts employed constructive trusts to prevent individuals from benefiting from their unlawful acts of murder. The victim in Ford v. Long, the appellant’s wife, had left her estate to her sister. When her sister, the appellee, sued for partition of the decedent’s real property, including her home and furniture, the appellant asserted his homestead right in the property and his right to use the furniture as exempt property. Affirming the imposition of a constructive trust, the court cited the long-standing rule that, in equity, a person may not be allowed to benefit from his own wrong.286 The constructive trust did not violate the Texas Constitution by depriving the appellant of property lawfully acquired, but merely precluded him from enjoying property taken as the survivor of the community.287

The facts in Thompson v. Mayes288 were far more unusual. A constructive trust was imposed on the interest of a devisee under his father’s will based on the jury finding that the devisee had intentionally murdered his father, although the devisee had never been indicted for the murder and the evi-

278. Id. at 130-31. The Texas Supreme Court has held that the interest of a knowing or unknowing beneficiary of fraud, whether or not he has personally committed the fraud, may be impressed with a constructive trust. See Ginther v. Taub, 675 S.W.2d 724, 728 (Tex. 1984).
281. 710 S.W.2d 613 (Tex. App.—Dallas 1986, no writ).
282. Id. at 615; see Tex. R. Civ. P. 169.
283. 710 S.W.2d at 615.
284. 713 S.W.2d 798 (Tex. App.—Tyler 1986, writ ref’d n.r.e.).
286. 713 S.W.2d at 799; see also Pope v. Garrett, 147 Tex. 18, 24, 211 S.W.2d 559, 560 (1948).
287. 713 S.W.2d at 799. TEX. CONST. art. I, § 21 provides that “No conviction shall work corruption of blood, or forfeiture of estate . . . .” Appellant had contended that the use of a constructive trust was constitutionally impermissible.
dence against him was circumstantial. The appellant\textsuperscript{289} asserted the same constitutional defense as had the appellant in \textit{Ford}, and was equally unsuccessful.\textsuperscript{290} The court also rejected a limitations defense, noting that a suit in equity to prevent unjust enrichment was not governed by the two-year statute of limitations applicable to actions for injury done to the person of another.\textsuperscript{291} The appellee and appellant, the decedent's only children, had signed an "Agreement as to Finality of Judgment" in a prior suit to probate their father's will, waiving the right to appeal that suit and agreeing that the judgment probating the will was final. This agreement, however, did not bar a subsequent suit seeking the creation of a constructive trust, and the filing of the second suit did not cause the appellee to have unclean hands, which would deny a recovery in a court of equity.\textsuperscript{292} Res judicata did not bar the later suit since the suit to probate the decedent's will involved a different subject matter, theory of recovery, operative facts, and measure of recovery than the action to impose a constructive trust.\textsuperscript{293} The court explained that the initial suit addressed the authenticity of the will and proof of the testator's death, while the later action focused on whether appellant had wrongfully and intentionally taken his father's life.\textsuperscript{294}

\textit{Spendthrift Trusts.} An exception to the spendthrift trust rule, a claim for the support of the beneficiary's children, was recognized in \textit{First City National Bank v. Phelan}.\textsuperscript{295} Consistent with the Texas Family Code,\textsuperscript{296} an amended divorce decree ordered the trustees of a testamentary spendthrift trust, of which the appellant was an income beneficiary, to pay income directly to the appellee for the support of his minor children. Several years later, the appellee obtained a judgment against the appellant for the unsatisfied portion of his child support obligations. The court in \textit{First City} affirmed the trial court order that the total outstanding child support payments be satisfied

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\textsuperscript{289} The appellant, a devisee under his father's will, committed suicide subsequent to the filing of the action seeking the imposition of a constructive trust. His mother, individually and as the executrix under her son's will, was substituted as the defendant and served as the appellant hereunder.

\textsuperscript{290} 707 S.W.2d at 955; see \textsc{Tex. Const.} art. I, \S 21; see also \textsc{Tex. Prob. Code Ann.} \S 41(d) (Vernon 1980).


\textsuperscript{292} 707 S.W.2d at 954. By filing the second suit, the appellee had not challenged the judgment probating her father's will. \textit{Id.}

\textsuperscript{293} \textit{Id.} at 955. Note that district courts have jurisdiction over suits applying constructive trusts. \textsc{Tex. Prob. Code Ann.} \S 5A(b) (Vernon Supp. 1987).

\textsuperscript{294} 707 S.W.2d at 955.

\textsuperscript{295} 718 S.W.2d 402, 406 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); see also A. Scott, \textsc{The Law of Trusts} \S 157.1 (1939).

\textsuperscript{296} \textsc{Tex. Fam. Code Ann.} \S 14.05(c) (Vernon 1975) provides: The court may order the trustees of a spendthrift or other trust to make disbursements for the support of the child to the extent the trustees are required to make payments to a beneficiary who is required to make support payments under this section. If disbursement of the assets of the trust is discretionary in the trustees, the court may order payments for the benefit of the child from the income of the trust, but not from the principal.
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from the trust net income due to the appellant, even if the effective collection of that sum took place after the youngest child had attained age eighteen.\textsuperscript{297}

Charitable Trusts. The attorney general in \textit{Blocker v. State}\textsuperscript{298} sought to nullify the distribution of certain real property from a charitable corporation, upon dissolution, to the estate of one of its founders. Three of the four directors who had authorized this distribution were beneficiaries under the deceased founder's will. The appellants asserted that their actions were in compliance with the Texas Non-Profit Corporation Act,\textsuperscript{299} which provides that upon dissolution the assets were to be applied first to satisfy liabilities and obligations of the corporation, then returned or transferred in accordance with the requirements of conditional donations, if any, then, to the extent assets were donated only for charitable purposes, distributed to similar charitable corporations, and finally, absent provisions in the articles and by-laws addressing distributive rights of members, distributed to any persons or organizations, charitable or otherwise, pursuant to an adopted plan of distribution.\textsuperscript{300} With no express requirement limiting the donation of the real property to charitable purposes only, and no condition of return, the appellants contended that they were free to select any recipient of the property upon dissolution. The trial court disagreed, however, and held that the distribution by the directors, essentially to themselves, constituted a breach of fiduciary duty, to be remedied by the imposition of a constructive trust and by forming a new charitable organization with similar purposes, through the application of the \textit{cy pres} doctrine.\textsuperscript{301} In a case of first impression, the appellate court examined whether a charitable gift with no express limitation on use will be deemed to have been made for the charitable purposes of the donee.\textsuperscript{302} If so, the distribution upon dissolution of the donee organization must be made in compliance with the section requiring a conveyance to an organization similar in purpose. The court cited with approval California\textsuperscript{303} and Nebraska\textsuperscript{304} Supreme Court decisions agreeing with this viewpoint, as

\textsuperscript{297} 718 S.W.2d at 406. The court relied on the Texas “turnover statutes,” designed to permit a judgment creditor to reach the property of a judgment debtor when such property interests include the future right to receive money, which cannot be readily attached or levied upon. \textit{Id.} at 405; see Tex. Rev. Civ. Stat. Ann. art. 3827a (repealed 1985) (now codified at Tex. Civ. Prac. & Rem. Code § 31.002 (Vernon 1986)).

\textsuperscript{298} 718 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.).


\textsuperscript{300} Id. An amendment to the Act effective September 1, 1985, and applicable to corporations formed after that date, requires that the assets remaining upon dissolution, after payment of debts and the return of conditionally held property, are to be distributed only to tax-exempt organizations pursuant to a plan of distribution adopted as provided in the Act, unless the articles of incorporation provide otherwise. Court distributions are to be made in a manner that will best accomplish the general purposes for which the corporation was formed. \textit{Id.} art. 1396-6.02A (Vernon Supp. 1987).

\textsuperscript{301} 718 S.W.2d at 412. The appellate court defined \textit{cy pres} as the court's equitable power to carry out a testator's general charitable purpose when the effectuation of his particular intent is impossible, impractical, or illegal. \textit{Id.} at 411 n.1.

\textsuperscript{302} \textit{Id.} at 413.

\textsuperscript{303} \textit{In re Los Angeles County Pioneer Soc'y}, 40 Cal. 2d 852, 257 P.2d 1, 6, cert. denied, 346 U.S. 888 (1953).

\textsuperscript{304} \textit{In re Harrington's Estate}, 151 Neb. 81, 36 N.W.2d 577, 582 (1949).
well as a Texas Supreme Court opinion on another issue, stating that a gift to a charitable organization is presumed to be a charitable gift to be held in trust for that organization's charitable purposes, regardless of whether the donor stated a purpose for the initial gift.\footnote{Boyd v. Frost Nat'l Bank, 145 Tex. 206, 220, 196 S.W.2d 497, 505 (1946).} The appellate court consequently concluded that:

Property transferred unconditionally to a non-profit corporation, whose purpose is established as or determined to be a public charity or an educational facility, is nevertheless subject to implicit charitable or educational limitations \textit{defined by the donee's organizational purpose} and within the meaning of the statute, where no express limitation to the contrary is stated in the transfer; i.e., the transferred property is deemed a gift to the charitable purposes and objects of the corporation. No technical words or further manifestations of general charitable intent are necessary in order to create such a trust.\footnote{718 S.W.2d at 415 (emphasis in original).}

Accordingly, the court held that the directors had breached their fiduciary and statutory duty to distribute assets remaining upon dissolution to charitable organizations similar in purpose and affirmed the trial court imposition of a constructive trust and application of the \textit{cy pres} doctrine to transfer the assets to a new, but similar, organization.\footnote{Id. at 416. The use of a constructive public charitable trust is an accepted remedy for the breach of a fiduciary relationship. See Slay v. Bennett Trust, 143 Tex. 621, 640, 187 S.W.2d 377, 388 (1945); Horton v. Harris, 610 S.W.2d 819, 822 (Tex. Civ. App.—Tyler 1980, writ ref’d n.r.e.); Harvey v. Casebeer, 531 S.W.2d 206, 206 (Tex. Civ. App.—Tyler 1975, no writ).}

The charitable foundation in \textit{Gregory v. MBank Corpus Christi, N.A.},\footnote{716 S.W.2d 662 (Tex. App.—Corpus Christi 1986, no writ).} required to make annual distributions under the Internal Revenue Code, announced grants to multiple charitable organizations to be made in trust pending the disposition of federal court litigation filed by the appellant. Due to unexpected delays of over five years in the federal litigation, the dismissal of which was being appealed, the foundation and the bank as its trustee petitioned the trial court to permit modification of the trusts in order to facilitate distributions to the designated charitable beneficiaries.\footnote{The Texas Trust Code permits a court to modify the terms of a trust upon the petition of a trustee or beneficiary if the purposes of the trust have been fulfilled or have become impossible or illegal to fulfill or if, due to circumstances the settlor did not know or anticipate, “compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust.” TEX. PROP. CODE ANN. § 112.054(a)(2) (Vernon Supp. 1987).} The appellant challenged the trial court decision to make the trusts revocable on the grounds that the trial court lacked jurisdiction and erred in denying his intervention as a necessary and indispensable party. The appellate court concurred that the trial court lacked jurisdiction over the suit to modify the trust as a declaratory judgment action because there was no justiciable controversy among the parties, but pointed out that proceedings to modify a trust as provided under the Texas Trust Code do not require a justiciable controversy.\footnote{716 S.W.2d at 666.} The appellate court also observed that the appellant's pres-
ence was unnecessary in an action scrutinized by the court and in which the attorney general appeared on behalf of the public and agreed to and joined in the foundation's request.311

311. Id.