Wills and Trusts

Gerry W. Beyer

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WILLS AND TRUSTS

Gerry W. Beyer*

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This Article discusses legislative and judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of November 1, 2008 through October 31, 2009. The reader is warned that not all newly enacted statutes and decided cases during the Survey period are presented, and not all aspects of each cited statute and case are analyzed. The reader must read and study the full text of each statute and case before relying on it or using it as precedent. The discussion of most cases includes a moral, that is, the important lesson to be learned from the case. By recognizing situations that have resulted in time-consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

I. THE ESTATES CODE

The 2009 legislature began the process of codifying the current Probate Code into the new Estates Code. Although called a “code,” the Probate Code is not a true “code” because it was enacted in 1955, which was before the 1963 legislature began the process of codifying Texas law into twenty-seven codes. The codification process is supposed to be nonsubstantive and instead is a recodification only. The portion of the Estates Code passed by the 2009 legislature focuses on intestacy, wills, and estate administration. The plan is to add the guardianship provisions in 2011.

2. Id. § 11.
The 2013 legislature will then have the opportunity to make certain everything fits together nicely and that any substantive changes are properly integrated into the Code. The entire Estates Code is then slated to become effective on January 1, 2014.\(^3\)

II. INTESTACY

Although most Texans die intestate,\(^4\) this fact did not lead the legislature to make changes to the Texas law of intestate succession and there are no appellate cases to report.

III. WILLS

A. Testamentary Intent

Although not legally required, it may be prudent practice to have the testator initial or sign each page of the will to demonstrate that he intended each page to be a part of his will. This practice will help the testator avoid the problem that arose in In re Estate of Romancik.\(^5\) In Romancik, the testator signed the third page of his will but did not sign the prior pages. The will left his entire estate to his mother, but the testator’s wife claimed that the testator’s signature on page three was insufficient to demonstrate that he had testamentary intent with respect to the prior pages. Both the trial court and the El Paso Court of Appeals rejected the wife’s claim by holding that the testator’s signature on page three of the will reflected the testator’s testamentary intent.\(^6\)

B. Interpretation and Construction

The testator in the case of In re Estate of Tyner had three children, two biological and one adopted.\(^7\) The testator’s will defined “children” by naming only his two biological children and the term “descendants” to include those two children and their descendants. A later provision further defined “descendants” by indicating that descendants included adopted descendants. The biological child of the testator’s predeceased adopted child argued that this later provision brought her within the scope of the term “descendants.” However, both the trial court and the Tyler Court of Appeals rejected her claim.\(^8\)

The court of appeals studied these two provisions and concluded that

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3. Id. § 12.
4. See, e.g., Where There’s a Will, There’s a Way, YOUR LAW, Spring 1988, at 3 (70% of individuals do not have wills); Isn’t It Time You Wrote a Will?, 50 CONSUMER REP. 103, 103 (1985) (“more than two-thirds of all adult Americans die without wills”); EUGENE SCOTES & EDWARD HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDEENT’S ESTATES AND TRUSTS 13 (4th ed. 1987) (“Despite the reasons for disposing of one’s property by will or even by trust, most Americans die intestate.”).
5. 281 S.W.3d 592 (Tex. App.—El Paso 2008, no pet.).
6. Id. at 594-95, 597.
7. 292 S.W.3d 179 (Tex. App.—Tyler 2009, no pet. h.).
8. Id. at 181-83.
they were unambiguous. The first provision defined the individuals who
would be deemed descendants (that is, the two named biological children
and their descendants). The second provision expanded on the type of
individuals who could qualify as their descendants, that is, both biological
and adopted individuals. Accordingly, a child of the testator’s adopted
child could not fit within the class of individuals encompassed by the term
“descendants” in the testator’s will.

This case teaches that a definition of a term in a will such as “children”
or “descendants” should expressly state which individuals are included as
well as which individuals are not included to avoid construction issues. In
this case, the testator should have included statements such as “X, my
adopted son, is not included in the definition of ‘child’” and “Descendants
of X are not included as my descendants.”

C. CONTRACTUAL WILLS

If a testator desires to make a contractual will, the testator must com-
ply with the requirements of Probate Code section 59A by either (1) stat-
ing that a contract exists and stating the material provisions of the
contract, or (2) executing a written agreement that is otherwise binding
and enforceable. Ray v. McMaster, a case where a husband and his wife
executed reciprocal wills, demonstrates the problem that arises if the ma-
terial provisions of the contract are not stated. The provision at issue
provided:

8. Contract With Spouse. I hereby declare that I have an oral and/or
written agreement with my spouse as to the disposition which may be
made of my property, any property taken under this Will or my
spouse’s property upon the death of either of us. We have identical,
or legally similar Wills, intending thereby to be contractually
bound.

Each will named the other spouse as the primary beneficiary, and if the
spouse predeceased, then a nephew was the beneficiary. After the wife
died, the husband executed a new will naming a niece as the primary
beneficiary. After the husband died, the nephew claimed that the origi-
nal will was contractual and that the husband breached its terms by nam-
ing the niece as the beneficiary. The trial court agreed.

However, the Houston First Court of Appeals reversed. The court of
appeals studied Probate Code section 59A and held that the reciprocal

9. See id. at 183.
10. Id. at 182.
11. Id. at 182-83.
12. Id. at 183.
15. Id. at 348.
16. Id. at 346-47.
17. Id. at 350.
wills did not meet the requirements of the statute.\textsuperscript{18} The nephew asserted that the wills satisfied Probate Code section 59A(a)(2),\textsuperscript{19} which provides that a contract can be established by “provisions of a will stating that a contract does exist and stating the material provisions of the contract.”\textsuperscript{20} The court explained that although the will did state that a contract existed, it failed to state the material provisions of that contract.\textsuperscript{21} The wills did not recite the consideration to support the contract and did not provide that they could be modified or revoked only upon mutual consent.\textsuperscript{22}

### D. In Terrorem Provisions

Dicta in \textit{Calvery v. Calvery}\textsuperscript{23} has caused uncertainty in Texas as to whether a no contest clause would be enforced to cause a beneficiary who contests a will to forfeit his or her gift if the beneficiary (1) had probable cause for bringing the action and (2) was in good faith in bringing and maintaining the action. The 2009 legislature resolved this issue by codifying the good faith–probable cause exception to the enforceability of \textit{in terrorem} provisions in Probate Code section 64.\textsuperscript{24}

Some testators may wish to trigger a forfeiture even if their wills are contested with probable cause and in good faith. Before the new statute, these testators would state their intent, and from that statement, there was a good chance the court would carry out their intent. This approach is now problematic. Perhaps a “reverse” approach would work. For example, “If X does not contest this will, X receives [gift].” Instead of a condition subsequent which takes away something already given if the condition is breached (that is, a forfeiture), this type of provision creates a condition precedent which provides a “reward” if a condition is satisfied.

### IV. ESTATE ADMINISTRATION

#### A. Jurisdiction

The jurisdiction provisions of Probate Code sections 4, 5, and 5A were repealed and replaced with new sections 4A–4H.\textsuperscript{25} For the most part, the rules remain the same, and were merely reorganized to make them easier to understand. However, there are some significant changes, which are noted below:

\begin{itemize}
\item 18. \textit{Id.} at 347-49.
\item 19. \textit{Id.} at 348, 349.
\item 21. \textit{Ray}, 296 S.W.3d at 349.
\item 22. \textit{Id.} at 348.
\item 23. See 55 S.W.2d 527, 530 (Tex. 1932, opinion adopted).
\item 24. \textsc{Tex. Prob. Code Ann.} \S 64 (Vernon Supp. 2009). Section 64 only applies to the estates of decedents who died on or after the date of enactment, that is, June 19, 2009. Thus, the existence of this exception remains unclear with respect to estates of testators who included no contest provisions in their wills and died before June 19, 2009.
\item 25. Act of June 1, 2009, 81st Leg., R.S., ch. 1351, \S 12(b), (h), 2009 Tex. Gen Laws 4273, 4275 (repealing \textsc{Tex. Prob. Code Ann.} \S\S 4-5A).
\end{itemize}
A detailed definition of the types of actions included within the penumbra of a "probate proceeding" or "probate matter" was added to clarify the types of issues that a court with jurisdiction over a case may resolve.\(^{26}\) The jurisdictional statutes no longer use the phrase "appertaining to an estate or incident to an estate."\(^{27}\) The jurisdiction of a county court at law exercising probate jurisdiction was expanded to include the interpretation and administration of a testamentary trust, if the will creating the trust was admitted to probate in that court.\(^{28}\)

If a probate action is contested in a county with no statutory probate court or county court at law exercising probate jurisdiction, and that action is transferred to a district court, the district court may hear any matter related to the probate proceeding brought subsequently.\(^{29}\) The district court may, either on its own or upon the motion of an interested party, determine that the matter is not contested and transfer it to the constitutional county court that has jurisdiction.\(^{30}\)

If a probate action is contested in a county with no statutory probate court or county court at law exercising probate jurisdiction, and a statutory probate judge is assigned to hear the case, then any other contested matter filed after the assignment must also be assigned to the same statutory probate judge.\(^{31}\)

If a probate action filed in the constitutional county court is contested in a county with a county court at law exercising probate jurisdiction and only the contested matter is transferred to that county court at law, the county court at law must now return the case to the constitutional county court once the contested matter is resolved.\(^{32}\)

A statutory probate court now has jurisdiction, concurrent with the district court, over a wider range of matters such as actions involving inter vivos trusts and matters involving powers of attorney.\(^{33}\)

**B. WILL CONTEST STATUTE OF LIMITATIONS**

Probate Code section 93 lays out the statutorily-mandated time period to contest a will that has been admitted to probate.\(^{34}\) Failure to contest the will in a timely manner will be fatal to even a winning argument, as shown in *Stoll v. Henderson.*\(^{35}\) In *Stoll*, the testatrix executed a will and codicil, then revoked those documents and executed another will that provided for a significantly different disposition of her property. Subse-


\(^{29}\) Id. § 4D(g) (Vernon Supp. 2009).

\(^{30}\) Id.

\(^{31}\) Id. § 4D(h).

\(^{32}\) Id. § 4E(b) (Vernon Supp. 2009).

\(^{33}\) Id. §§ 4GH (Vernon Supp. 2009).

\(^{34}\) Id. § 93 (Vernon 2003).

\(^{35}\) 285 S.W.3d 99 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.).
Wills and Trusts

36. Id. at 100-02.
37. Id. at 102.
38. Id. at 102, 105.
39. See id. at 106.
40. Id. at 105-06.
41. See Hawes v. Nicholas, 10 S.W. 558, 560 (Tex. 1889) ("A written declaration, properly executed, as effectually revokes a will from the date of its execution as does its destruction.").
43. TEX. PROB. CODE ANN. §§ 81(a)(8), 89A (Vernon Supp. 2009). Section 81(a)(8) governs applications for letters testamentary, and section 89A governs applications to probate a will as a muniment of title. TEX. PROB. CODE ANN. §§ 81(a)(8), 89A.
44. TEX. PROB. CODE ANN. §§ 81(a)(8), 89A.
45. 285 S.W.3d 149, 152 (Tex. App.—Dallas 2009, no pet.).
46. 897 S.W.2d 779, 783 (Tex. 1995).
misssal order and then determined that the executor’s counterclaim against the creditor was part of the same phase of the proceeding.\(^{47}\) Accordingly, the court had no jurisdiction to consider the appeal.\(^{48}\) As the court in \textit{Crowson} recommended, to resolve doubt, a party wishing to appeal should seek a severance order and, assuming it is granted, file a timely appeal.\(^{49}\)

The decision in \textit{In re Estate of Washington} demonstrates that an award or denial of attorney’s fees is a final and appealable order.\(^{50}\) In that case, a removed executor unsuccessfully petitioned the trial court for attorney’s fees from the estate.\(^{51}\) The Texarkana Court of Appeals determined that it had jurisdiction to hear the former executor’s appeal, and that a request for attorney’s fees was a claim against the decedent’s estate.\(^{52}\) Probate Code section 312(d) provides that a court’s order approving or disapproving the request has “the force and effect of [a] final judgment[.]”\(^{53}\) Accordingly, the trial court’s order was final and appealable.\(^{54}\)

\section*{E. Bill of Review}

\textit{Buck v. Estate of Buck} provides a detailed and important examination of the use of a bill of review in a probate proceeding.\(^{55}\) \textit{Buck} dealt with a grandson who wanted to overturn the probate of his grandmother’s will and instead probate an alleged later will, in which he was named the sole beneficiary. After enduring considerable questionable behavior by the grandson, the probate court sanctioned him by striking his pleadings and imposing other sanctions.\(^{56}\) The grandson then filed a bill of review to set aside the sanctions and a motion to admit the later will to probate. The probate court denied both motions, the grandson appealed, and the Corpus Christi Court of Appeals affirmed.\(^{57}\)

The court explained that the purpose of a bill of review is to revise and correct errors, not to set aside a probate court’s orders, decisions, or judgments.\(^{58}\) The court enumerated the three elements of a bill of review under Probate Code section 31.\(^{59}\) First, the applicant must be an interested person.\(^{60}\) The grandson was an interested person because he had a

\begin{itemize}
\item \(^{47}\) \textit{Pollard}, 285 S.W.3d at 151-52.
\item \(^{48}\) \textit{Id.} at 152.
\item \(^{49}\) \textit{See Crowson}, 897 S.W.2d at 783.
\item \(^{50}\) 289 S.W.3d 362 (Tex. App.—Texarkana 2009, pet. denied).
\item \(^{51}\) \textit{Id.} at 365.
\item \(^{52}\) \textit{Id.} at 365-66.
\item \(^{53}\) \textit{Id.} (quoting \textsc{Tex. Prob. Code Ann.} § 312(d) (Vernon 2003)).
\item \(^{54}\) \textit{Id.}
\item \(^{55}\) 291 S.W.3d 46 (Tex. App.—Corpus Christi 2009, no pet. h.).
\item \(^{56}\) \textit{Id.} at 50-52.
\item \(^{57}\) \textit{Id.} at 50-52, 60.
\item \(^{58}\) \textit{Id.} at 52 (quoting Nadolney v. Taub, 116 S.W.3d 273, 278 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).
\item \(^{59}\) \textit{Id.} at 53.
\item \(^{60}\) \textit{Id.}
\end{itemize}
pecuniary interest that was affected by the probate action. Second, the applicant must file the bill of review within two years, which the grandson had done. Third, the applicant must prove that the probate court made a substantial error, which was the crux of this case.

There are two types of substantial errors. The first type occurs when the court "acted in direct derogation of a specific, non-discretionary, provision of the probate code." The grandson alleged that under Probate Code section 83(a), the court should have considered both probate applications on the merits rather than imposing discovery sanctions which resulted in taking one application out of contention. The appellate court rejected this argument by determining that this provision does not trump discovery rules because to do so would prevent the probate court from sanctioning discovery abuse. The Probate Code does not contain a provision indicating that section 83 prevails over the Texas Rules of Civil Procedure. Without such a specific mandate, the Civil Procedure rules control.

The second type of substantial error occurs when the court improperly performs a discretionary act. The grandson alleged that the probate court's act of dismissing his pleadings, that is, imposing the "death penalty" sanction, was an improper act. The court reviewed the record and concluded that the probate court did not abuse its discretion by acting without reference to guiding rules and principles when it dismissed the grandson's pleadings.

### F. Setting Aside Probate of Will as a Muniment of Title

A person who does not want a will admitted to probate as a muniment of title should object during the probate action rather than waiting until a later time. Otherwise, the result will be like that in the case of *In re Estate of Jones*. After the testator died, her husband probated her will as a muniment of title. Almost two years later, the testator's daughter filed an application to set aside the probate, alleging that some of the devised property was not in the testator's estate at the time of her death and also that unpaid debts existed at the time of probate. The trial court rejected the daughter's application, and the Dallas Court of Appeals affirmed.

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61. See id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id. at 54.
67. Id.
68. Id.
69. Id. at 55.
70. Id.
71. Id. at 60.
72. 286 S.W.3d 98 (Tex. App.—Dallas 2009, no pet. h.).
73. Id. at 99, 102.
The court explained that the daughter’s action was not a will contest governed by the two-year statute of limitations in Probate Code section 93, because she was not attempting to show that the testator’s will was invalid.\footnote{Id. at 100.} The court also determined that the daughter did not show that the trial court made a substantial error by admitting the will to probate, and thus, she was not entitled to a bill of review under Probate Code section 31.\footnote{Id. at 100-01.} The allegation that unpaid debts may have existed would not have caused the trial court’s order to be a substantial error, because the court referenced Probate Code section 89C, which also allows a will to be probated as a muniment of title “for other reason” if it determines that there is no necessity for an administration.\footnote{Id. at 101 (quoting TEX. PROB. CODE ANN. § 89C(a) (Vernon 2007)).}

G. Removal of Executor

The Supreme Court of Texas, in \textit{Kappus v. Kappus}, made an important distinction between a court’s discretion to refuse to appoint a named executor and a court’s discretion to remove an executor already in office.\footnote{284 S.W.3d 831 (Tex. 2009).} The beneficiaries’ mother (the testator’s ex-wife) moved to have the independent executor removed from office because he shared ownership of certain estate property with his deceased brother and allegedly had a conflict of interest with the beneficiaries. The mother argued that he could not adequately represent the estate while seeking to retain his own share of the property. The trial court, however, denied the motion.\footnote{Id. at 833-834.}

The Tyler Court of Appeals reversed, explaining that great deference is given to the testator’s choice of an independent executor.\footnote{In re Estate of Kappus, 242 S.W.3d 182, 190-92 (Tex. App.—Tyler 2007, pet. granted), rev’d, Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009).} However, the named executor may be removed for the reasons specified in Probate Code section 149C.\footnote{Id.} In this case, the estate and the executor were in conflict regarding a 4.86% interest in the property because both claimed ownership to this property.\footnote{Id. at 839.} The court concluded that the existence of this conflict required the trial court to remove the executor.\footnote{Kappus v. Kappus, 284 S.W.3d 831, 839 (Tex. 2009).}

The Texas Supreme Court reversed.\footnote{Id. at 835.} The supreme court examined section 149C and pointed out that “conflict of interest,” either actual or potential, is not one of the listed grounds for removal.\footnote{Id. at 835-38.} The supreme court explained that being in a conflict situation is not the same as misapplication, embezzlement, gross misconduct, gross mismanagement, or being incapacitated.\footnote{Id. at 835-38.}
The supreme court noted that a trial court has broad discretion to disqualify a person as being "unsuitable" pre-appointment, but once a person is appointed, the only grounds for removal are expressly stated in the statute.\textsuperscript{86} Because the mother did not prove one of the enumerated removal grounds, the removal was improper.\textsuperscript{87}

H. Independent Administration

\textit{Eastland v. Eastland} demonstrates that being a beneficiary of an estate or having other dealings with the decedent or the decedent's estate is not sufficient, in and of itself, to make the beneficiary unsuitable to serve as a personal representative.\textsuperscript{88} The court appointed the named successor as independent executor after the primary independent executor died.\textsuperscript{89} The successor's brother, a beneficiary, appealed, claiming that the court should not have appointed this successor. The brother alleged that the successor was unsuitable for the position because the successor, a lawyer, had provided legal advice to the primary executor, his mother, and that some of this advice could have involved transactions that were a breach of his fiduciary duties. In addition, he alleged that the successor was involved in many matters regarding the estate.\textsuperscript{90} The Houston Fourteenth Court of Appeals reviewed the evidence and determined that none of these conflicts amounted to "a conflict of interest involving ownership claims by him of estate property adverse to the clear pronouncements of the will or to the best interests of the estate."\textsuperscript{91}

Another issue in \textit{Eastland} involved the validity of the probate court's appointment of the successor executor even though the notice requirements of Probate Code section 220(a) were not followed.\textsuperscript{92} The appellate court held that section 220(a) applies only to dependent administrations and not to independent administrations.\textsuperscript{93} The court explained that although the term "personal representative" in section 220(a) would encompass an independent executor, section 3(aa) states that the expansive definition "shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates except as expressly provided by law."\textsuperscript{94} Section 220(a) does not expressly include independent executors, and thus, the section was inapplicable.\textsuperscript{95} In addition, the court explained, under existing cases it is clear that removal—and hence appointment of an independent executor—is control with respect to the settlement of the estate.\textsuperscript{96} The court's decision is also

\begin{itemize}
\item \textsuperscript{86} \textit{Id.} at 835.
\item \textsuperscript{87} See \textit{id.} at 839.
\item \textsuperscript{88} 273 S.W.3d 815 (Tex. App.—Houston [14th Dist.] 2008, no pet.).
\item \textsuperscript{89} \textit{Id.} at 817.
\item \textsuperscript{90} \textit{Id.} at 817-19, 828.
\item \textsuperscript{91} \textit{Id.} at 828.
\item \textsuperscript{92} \textit{Id.} at 818, 822.
\item \textsuperscript{93} See \textit{id.} at 826.
\item \textsuperscript{94} \textit{Id.} at 821.
\item \textsuperscript{95} \textit{Id.} at 825.
\item \textsuperscript{96} See \textit{id.} at 823-25.
\end{itemize}
supported by the legislative purpose behind independent administrations, which is for the courts to take a “hands-off” approach unless the Probate Code provides otherwise.97

I. ATTORNEY’S FEES

Appellate courts are reluctant to overturn a trial court’s failure to award attorney’s fees when such an award is discretionary without a clear showing that the judge abused his or her discretion.98 For example, in In re Estate of Washington, the trial court removed the wife as the dependent executor of her husband’s estate.99 The wife then asked the court to order her husband’s estate to reimburse her for the attorney’s fees she incurred in defending (1) the removal action and (2) an action to amend or construe a provision of her husband’s will. The trial court denied both requests, and the wife appealed.100

The Texarkana Court of Appeals began by explaining that the wife’s request for attorney’s fees did not fall within the purview of the portion of Probate Code section 243 which requires the court to award fees if the fees are incurred either to (1) probate the will or (2) preserve, safe-keep, or manage the estate.101 The action to amend or construe the will was not an attack on the will.102 Instead, it was an action to correct an alleged scrivener’s error.103 Likewise, defending a removal action is not an action to preserve, safe-keep, or manage the estate.104 Consequently, an award of attorney’s fees was discretionary.105 The court of appeals affirmed, holding that the trial court did not abuse its discretion when it denied the wife’s request for attorney’s fees.106

J. NOTATION OF PROBATE MATTERS

Throughout the Probate Code, references to noting probate matters in the “minutes” of the court were replaced with references to the “judge’s probate docket.”107

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97. Id. at 825.
99. Id. at 364-65.
100. Id.
101. Id. at 367-68.
102. Id. at 368.
103. Id.
104. Id. at 369.
105. Id. at 368.
106. Id. at 371.
K. Economic Contribution

The legislature made a significant change to the way a marital estate that makes an economic contribution to property owned by another marital estate determines the amount of its claim for reimbursement with respect to the benefited estate upon the death of a spouse. Essentially, the prior scheme was based on a complex statutory formula for determining economic contribution. Amendments to Family Code sections 3.401-3.410 adopt instead an equitable reimbursement approach and provide a laundry list of elements that the court may consider in determining the reimbursement amount.

V. TRUSTS

A. Creation

1. Fraud and Undue Influence

A trial court's finding of fraud, duress, or undue influence will be difficult to set aside on appeal, as demonstrated in Cooper v. Cochran. Both the trial court and the Dallas Court of Appeals agreed that an inter vivos trust was invalid because the settlor was induced to enter into the trust by fraud, duress, and undue influence. With regard to the fraud claim, the evidence showed that the settlor placed property into the trust for the beneficiary in exchange for the beneficiary's promise to take care of the settlor (grandmother). Further, the evidence revealed that the grandson never intended to take care of the settlor.

Regarding the duress and undue influence assertions, the evidence revealed that the grandson told the settlor that "she would never see the light of day" and that he would "put her in an insane asylum" if she did not sign the trust. This, coupled with the fact that the settlor was elderly, living alone, and needed assistance, was sufficient evidence to support the trial court's finding of duress and undue influence.

2. Deceased Person as Beneficiary

Complex land transactions can trigger disputes many decades later. Accordingly, great care needs to be taken to be sure "simple" mistakes

110. 288 S.W.3d 522, 532 (Tex. App.—Dallas 2009, no pet. h.) (restating Cooper v. Cochran, 272 S.W.3d 756 (Tex. App.—Dallas 2008, no pet. h.), which was withdrawn after the court learned that Cooper filed for bankruptcy during the pendency of the appeal rendering the court's original opinion void).
111. Id. at 532-34.
112. Id. at 532.
113. Id. at 533.
114. Id.
115. See id.
are not made, such as naming a deceased person as the beneficiary of a trust, as was done in Longoria v. Lasater.116 In 1924, a partition agreement and decree created a trust of real property in favor of named beneficiaries. A disagreement arose over a 1950 deed that covered the same property: did the 1950 deed (1) continue the 1924 trust or (2) create a new trust? The San Antonio Court of Appeals determined that because one of the beneficiaries of the 1924 trust died prior to the 1950 deed, his portion of the property was not covered by the 1950 deed.117 The court relied on established Texas law, as well as the Restatement (Second) of Trusts, and held that a person cannot be a beneficiary of a trust if that person dies prior to the date of trust creation.118 Therefore, the 1950 deed did not create a trust with regard to the predeceased beneficiary’s portion of the 1924 trust, and the appellants could not prevail because the alleged trustees held the property either free of trust or as a resulting trust.119

B. Trustees

In Ditta v. Conte, the Texas Supreme Court held that a person dissatisfied with the conduct of a trustee may bring suit for removal no matter how long it has been since the alleged improper conduct occurred.120 The probate court in Ditta removed the trustee from office, and the trustee appealed, claiming that the removal action was barred by the four-year statute of limitations governing breach of fiduciary-duty claims because the underlying reason for the removal was for an alleged breach of duty. The Houston First Court of Appeals agreed that the removal action was barred because it was brought more than four years after the accrual of the removal action.121

The supreme court reversed, holding that “no statutory limitations period restricts a court’s discretion to remove a trustee.”122 “A limitations period, while applicable to suits seeking damages for breach of fiduciary duty, has no place in suits that seek removal rather than recovery.”123 The supreme court studied Trust Code section 113.082(a), which grants a court broad discretion to remove a trustee for certain enumerated conduct as well as for any “other cause” the court finds sufficient to justify removal.124 The supreme court stressed that a decision to remove “turns on the special status of the trustee as a fiduciary and the ongoing relationship between trustee and beneficiary, not on any particular or discrete act of the trustee.”125

117. Id. at 159-60, 166.
118. Id. at 166-67.
119. Id. at 168.
120. 298 S.W.3d 187, 192-93 (Tex. 2009).
121. Id. at 189.
122. Id. at 192-93.
123. Id. at 188.
124. Id. at 191.
125. Id.
C. JURISDICTION

_Gammill v. Fettner_ reminds litigants that in counties with both a statutory probate court and a district court, trust litigation may proceed in either court, since they have concurrent jurisdiction. In _Gammill_, testamentary trust litigation occurred in a district court, but because there was also a statutory probate court in the county, appellants in the case claimed that the district court lacked jurisdiction.

The Houston Fourteenth Court of Appeals began its analysis by explaining that under Trust Code section 115.001(d) and Probate Code section 5(e) (now section 4H), the statutory probate court had concurrent jurisdiction. Thus, the district court had the ability to hear the case, even though the statutory probate court also had jurisdiction and the case was appertaining or incident to a decedent’s estate.

D. TERMINATION

Shortly after a trust terminated, the trustee in _Myrick v. Enron Oil & Gas Co._ executed an oil and gas lease covering a portion of the trust property that had been negotiated before the trust ended. The trustee later distributed this property to the trust’s beneficiary after the beneficiary signed a document releasing the trustee from any liability for its acts as a trustee up to the time of the distribution. The beneficiary later sued the trustee, alleging it had breached its fiduciary duties by entering into the lease. The trustee responded by claiming that it had the authority to enter into the lease by pointing to both an exculpatory clause in the trust and the release which the beneficiary had signed with full knowledge of the allegedly improper lease. The trial court granted summary judgment in favor of the trustee, holding that the lease was proper and that the beneficiary’s claims were barred by the trust’s exculpatory clause, the beneficiary’s release, and the statute of limitations. The beneficiary appealed.

The El Paso Court of Appeals affirmed. The court focused on Trust Code section 112.052, which provides that “the trustee may continue to exercise the powers of the trustee for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate beneficiaries.” The court explained that because of litigation involving the trust, the trustee could not immediately distribute the property. Thus, entering into the previously negotiated

126. 297 S.W.3d 792, 798-801 (Tex. App.—Houston [14th Dist.] 2009, no pet. h.).
127. _Id._ at 798-99.
128. _Id._ at 798-801.
129. _Id._ at 801.
130. 296 S.W.3d 724, 725-26 (Tex. App.—El Paso 2009, no pet. h.).
131. _Id._ at 726.
132. _Id._ at 725-26.
133. _Id._ at 729.
134. _Id._ at 728 (quoting TEX. PROP. CODE ANN. § 112.052 (Vernon 2007)).
135. _Id._ at 728
lease only two months after the trust’s termination and before the litigation was resolved was not in breach of the trustee’s duties. In fact, the trustee had a duty to continue managing the property and to seek the best possible result for the beneficiary. Nonetheless, to avoid later disputes, a trustee should wrap up the trust as promptly as possible, making as few major investments as is reasonably prudent during the “gap” period.

E. In Terrorem Provisions

To be consistent with new Probate Code section 64, the legislature enacted Trust Code section 112.038, which provides that a no-contest clause is unenforceable if “(1) probable cause exists for bringing the action; and (2) the action was brought and maintained in good faith.” The unenforceability of in terrorem provisions under these circumstances cannot be changed by the settlor under new Trust Code section 111.0035(b)(6).

F. Disclaimers

The list of individuals who may disclaim a trust interest was modified to include an independent administrator. Although the Probate Code defines “independent executor” to include “independent administrator” in section 3(q), no similar definition exists in the Trust Code, which triggered uncertainty as to whether an independent administrator could disclaim a trust interest.

G. Grant of Discretion

The legislature added Trust Code section 113.029(a) to codify the common-law rule that regardless of the extent of discretion the settlor grants to a trustee, the trustee must always act “in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” Thus, even if the settlor provides that the trustee’s discretion is “absolute” or “uncontrolled,” the trustee’s actions must still comport with fiduciary standards and are reviewable by the court.

H. Savings Provision for Non-HEMs Distributions

Tax problems may result if a non-settlor beneficiary is also the trustee of a trust and is given the power to make self-distributions that are not limited by an ascertainable standard relating to health, education, sup-

136. Id.
137. Id. The court did not rule on the validity of the trust’s exculpatory clause or the beneficiary’s release because it determined that the lease was not in breach of the trustee’s duties. Id.
139. Id. § 111.0035(b)(6) (Vernon Supp. 2009).
140. Id. § 112.010(c)(3), (c-1) (Vernon Supp. 2009).
143. See id.
port, or maintenance. A settlor may create this problem inadvertently by giving the trustee-beneficiary unrestricted discretion or limiting distributions to a standard that is not ascertainable, such as for the trustee-beneficiary’s comfort, benefit, or well-being.

To remedy this problem, the legislature provided that in such situations, the trustee-beneficiary’s power to distribute is “cut back” to an ascertainable standard relating to health, education, support, or maintenance.144 Likewise, the trustee-beneficiary’s power to distribute is restricted so that distributions cannot be made to satisfy a legal obligation of support that the trustee-beneficiary personally owes to another person.145

If there are other trustees besides the beneficiary, a majority of the remaining trustees may exercise the power to make discretionary distributions to the “limited” trustee-beneficiary without regard to the cut-back.146 If there is no trustee who is not free of restrictions, the court may appoint a special fiduciary with authority to exercise the power.147

The automatic cut-back will not apply if one of the following circumstances exists:

- The trust was created and became irrevocable before September 1, 2009.148
- The settlor is the beneficiary-trustee.149
- The settlor expressly indicated that the cut-back provisions of this section do not apply.150
- The trustee-beneficiary is the settlor’s spouse, and a marital deduction was previously allowed for in the trust.151
- The settlor may amend or revoke the trust.152
- Contributions to the trust qualify for the gift tax annual exclusion.153

I. Homestead in Trust

The legislature provided that if a settlor transfers property to a “qualifying trust” (basically a revocable inter vivos trust) that otherwise would qualify as the homestead of the settlor or the beneficiary had it not been transferred into the trust, this property may still qualify as the settlor’s or beneficiary’s homestead if the person occupies and uses it as his or her

144. Id. § 113.029(b)(1).
145. Id. § 113.029(b)(2).
146. Id. § 113.029(c).
147. Id.
148. Act of May 26, 2009, 81st Leg., R.S., ch. 672, § 10(a), 2009 Tex. Gen Laws 1497, 1500. If the trust was created before September 1, 2009 but did not become irrevocable until September 1, 2009 or thereafter, the cut-back will apply. See id.
150. Id. §113.029(b).
151. Id. § 113.029(d)(1).
152. Id. § 113.029(d)(2).
153. Id. § 113.029(d)(3).
Accordingly, the homestead does not lose the creditor protection it normally would have, merely because the homestead property is being held in trust form.

J. Charitable Trusts

1. Relocation

The legislature enacted Trust Code section 113.029 to remedy the “orphan trust” problem, which is described in the analysis of S.B. 666 as follows:

The “orphan trust” or charitable foundations[,] set up by donors who have no heirs or other family that they wish to carry out their wills, are often entrusted to lawyers or local banks who will keep the money invested in the local community. However, when an attorney retires or local banks are sold to multinational financial institutions, the foundations are no longer run by the people and banks familiar with the donors’ specific wishes. The corporate trustees have wide latitude to change the way the trust operates[,] and to decide which charities will receive grants[,] and thus the danger of distorting or altogether ignoring the donor’s intent is increased with each transaction. Banks give fewer and smaller charitable gifts from the trusts they manage, all the while increasing the foundation’s assets[,] and increasing administrative fees that the banks charge to foundations for the services they provide. Additionally, banks as trustees will often provide grants which serve their own interests[,] but that do not honor the donor’s favorite causes.... The consequences of charitable funds being moved and used as assets and revenue streams for large financial institutions is that communities that stood to benefit from the philanthropy of their citizens are denied the good works and good will of the original donors.155

The statute provides that the location of a charitable trust’s administration cannot be changed to an out-of-state location other than as (1) the settlor provided in the trust or as (2) the court approves under the procedure set forth in the statute.156

A trustee who wants to move the location out of Texas must first give proper notice.157 If the settlor is alive and competent, the trustee must consult with the settlor and submit the selection to the attorney general.158 If the settlor is dead or incapacitated, then the trustee must propose a new location and submit the proposal to the attorney general.159

The trustee must then file an action in the appropriate court to get permission to move the trust administration out of Texas.160 The court

157. Id. § 113.029(c).
158. Id. § 113.029(c)(1).
159. Id. § 113.029(c)(2).
160. Id. § 113.029(d).
may not authorize a relocation unless it finds that the charitable purposes of the trust will not be impaired by the move.\(^{161}\)

The statute grants the attorney general the power to enforce this section.\(^{162}\) If a trustee does not comply with the statute, the court may remove the trustee and appoint a new trustee.\(^{163}\) The court may also charge the costs of the removal, including reasonable attorney's fees, against the removed trustee.\(^{164}\)

2. **Venue**

By including proceedings the attorney general may bring against a charity for breach of fiduciary duty, the legislature expanded the attorney general's ability to have venue in charitable trust matters in Travis County.\(^{165}\) Prior to this change, this section applied only to actions against a fiduciary or managerial agent of a charitable trust and not to the charity itself.\(^{166}\)

3. **Attorney's Fees**

Property Code section 123.006 was added specifically to clarify the circumstances in which the attorney general is or may be entitled to recover court costs and reasonable attorney's fees.\(^{167}\)

K. **Exercise of Powers by Multiple Trustees**

The legislature expanded the ability of co-trustees to act if a co-trustee is unable to participate in the performance of a trustee function.\(^{168}\) In addition to the previous reasons for the need for prompt action, such as to carry out the purposes of the trust and to avoid injury to the trust property, the following two reasons were added: (1) to achieve the efficient administration of the trust and (2) to avoid injury to a beneficiary.\(^{169}\)

L. **Attorney ad Litem**

A court now has the power to appoint an attorney ad litem to represent any interest that the court considers necessary.\(^{170}\) The attorney ad litem is entitled to reasonable compensation for his or her services.\(^{171}\)
M. Guardian Ad Litem

The legislature made it clear that a guardian ad litem in a trust proceeding is entitled to reasonable compensation for his or her services as determined by the court.\(^\text{172}\) The compensation is to be taxed as costs in the proceeding.\(^\text{173}\)

N. Deferred Compensation, Annuities, and Similar Payments

Trust Code section 116.172 provides guidance for a trustee when allocating receipts from deferred compensation plans, annuities, and similar arrangements such as IRAs.\(^\text{174}\) Generally, each year receipts are allocated to income until they total four percent of the asset’s fair market value. Amounts in excess of four percent are allocated to principal. This plan, however, is problematic given Revenue Ruling 2006-26, which indicates that if this type of provision controls, the qualified plan or IRA may not qualify for marital deduction treatment.\(^\text{175}\) Accordingly, the legislature amended section 116.172 to include a marital deduction savings clause that, in summary, requires the trustee to determine the internal income of these assets that qualify for the marital deduction.\(^\text{176}\)

O. Section 867 Management Trusts

The legislature made a variety of enhancements to Probate Code section 867 management trusts. Here are some of the significant changes:

- The court must appoint an attorney ad litem and, if necessary, may also appoint a guardian ad litem to represent the interests of the person who is alleged to be incapacitated.\(^\text{177}\)
- A non-financial institution trustee may be appointed if the value of the trust is $150,000 or less.\(^\text{178}\) Previously, the threshold was only $50,000.\(^\text{179}\)
- A non-financial institution trustee may be appointed even if the value of the trust exceeds $150,000 if there is no financial institution in the geographic area that is willing to serve as the trustee.\(^\text{180}\)
- The court may award compensation to the attorney who represents a person seeking the creation of a management trust.\(^\text{181}\)
- The trustee is no longer limited to receiving compensation on an annual basis but may receive compensation at more frequent intervals as approved by the court.\(^\text{182}\)

\(^{172}\) Id. § 115.014(d).
\(^{173}\) Id.
\(^{174}\) Id. § 116.172 (Vernon 2007 & Supp. 2009).
Wills and Trusts

A procedure was established to permit the court to order the transfer of funds in a management account to a subaccount of a pooled income trust such as the Master Pooled Trust, which is operated by The Arc of Texas.183

VI. OTHER ESTATE PLANNING MATTERS

A. Community Property Survivorship Agreements

In perhaps the most shocking case in this Survey article, Holmes v. Beatty, the Texas Supreme Court ruled that community property held by joint tenants automatically has the survivorship feature even if that feature is not expressly stated or intended by the spouses.184 In Holmes, a husband and wife held investment accounts with the designation “JT TEN.” The spouses signed the agreement but did not indicate whether the account had, or did not have, the survivorship feature. The appellate court held that these accounts did not have the survivorship feature because they did not include an express statement of the survivorship feature as required by Probate Code section 452.185

In a significant departure from established Texas law, the supreme court determined that holding community property as joint tenants automatically includes the survivorship feature and that the designation “JT TEN” is an acceptable abbreviation.186 In so deciding, the supreme court relied on the common law under which joint tenancies carried with them the survivorship feature.187 However, the supreme court disregarded long-established Texas law which requires that the survivorship be expressly stated.188

The supreme court based its conclusion on the allegedly “weaker” language of Probate Code section 452, which does not require the survivorship language to be stated in “substantially” the same manner provided in the statute as does Probate Code section 439.189 The supreme court explained that “[p]recedent, trade usage, and seminal treatises make clear that joint tenancies carry rights of survivorship.”190

Also in Holmes, the supreme court held that merely changing the form in which community property with survivorship rights is held is not suffi-

183. Id. § 868C (Vernon Supp. 2009); see also id. §§ 910-916 (Vernon Supp. 2009) (creating new Subpart I and governing the establishment of pooled trust subaccounts).
184. 290 S.W.3d 852, 857-59 (Tex. 2009).
185. Id. at 854, 857.
186. Id. at 857.
187. Id. at 858.
188. Id.; Tex. Prob. Code Ann. § 452 (Vernon 2003) (requiring community property survivorship agreements to contain an express statement of the survivorship feature). But cf. Tex. Prob. Code Ann. § 46(a) (Vernon 2003) (stating that survivorship in separate or individual property cannot be inferred from the mere fact that the property is held in joint ownership); Stauffer v. Henderson, 801 S.W.2d 858, 865 (Tex. 1990) (holding that extrinsic evidence cannot be used to show a right of survivorship for joint bank accounts between non-spouses).
189. Holmes, 290 S.W.3d at 858.
190. Id.
cient to revoke the survivorship agreement. In *Holmes*, the married couple owned stocks that clearly stated the spouses were holding them as joint tenants with rights of survivorship. However, the spouses did not sign the certificates. The appellate court held that their failure to sign the certificates resulted in an invalid community property survivorship agreement because Probate Code section 452 requires the agreement to be signed by both spouses.

The supreme court reversed, explaining that the accounts from which the stocks were issued were held as joint tenants and had the survivorship feature. The only ways for the spouses to terminate the survivorship feature was through a subsequent written agreement or by disposing of the assets. The mere fact that the stock was issued out of the account in certificate form did not act as a disposition of the property covered by the agreement.

**B. CONVENIENCE SIGNERS ON ACCOUNTS**

The Legislature enacted new provisions to authorize convenience signers on accounts that are not expressly labeled as convenience accounts. A person who opens a single-party or multiple-party account that is not expressly deemed a convenience account under section 438A now has the option of indicating a convenience signer who has the ability to make withdrawals but does not have ownership or survivorship rights. The Uniform Single-Party or Multiple-Party Account Form was modified to provide for convenience signers on all types of accounts.

**C. JOINT ACCOUNTS**

*Nipp v. Broumley* serves as a reminder that a person opening a joint account must trust the other party, because regardless of who owns the funds in the account, any party can withdraw all of the funds. In *Nipp*, the decedent, using her own funds, opened certificates of deposit (CDs) payable to herself or her son. Shortly before the decedent’s death, as she was entering the hospice, her son cashed three of the CDs worth approximately $76,000. The decedent’s daughter subsequently claimed that the CDs were part of the decedent’s estate. The trial court held that the son owned the funds in the CDs because the son had the right to withdraw the funds.

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191. *Id.* at 861-62.
192. *Id.* at 860.
193. *Id.* at 862.
194. *Id.* at 861; see also *Tex. Prob. Code Ann.* § 455 (Vernon 2003).
195. *Holmes*, 290 S.W.3d at 862.
197. *Id.* § 438B(a)-(b)(1).
198. *Id.* § 439A (Vernon Supp. 2009).
199. 285 S.W.3d 552, 558-60 (Tex. App.—Waco 2009, no pet. h.).
200. *Id.* at 555.
The Waco Court of Appeals reversed.\textsuperscript{201} The court explained that the right to withdraw is very different from ownership rights.\textsuperscript{202} Each party to a joint account has the right to withdraw the funds under Probate Code section 445.\textsuperscript{203} However, ownership of account funds is based on a party’s net contributions under Probate Code section 438(a) unless there is clear and convincing evidence to the contrary.\textsuperscript{204}

The son claimed that the decedent had gifted the CDs to him during her lifetime.\textsuperscript{205} The court examined the basic elements of an inter vivos gift—present donative intent, delivery, and acceptance—and determined that the decedent did not have the intent to make a gift of the funds even though she allowed the son to use the CDs as collateral for loans.\textsuperscript{206} The decedent retained control over the CDs, keeping them in a lock box in her home until the son took them just days before her death and never allowed the son to withdraw any of the funds.\textsuperscript{207}

D. Designations of Guardian

The legislature has authorized a one-step execution procedure for both a declaration of guardian by a parent for his or her children\textsuperscript{208} and a self-designation of guardian before the need arises.\textsuperscript{209} Instead of using the traditional self-proving affidavit, which requires a “double” set of signatures, statutory language may now be used that combines the execution, attestation, and affidavit under one set of signatures.\textsuperscript{210} This optional execution method permits a streamlined execution procedure so that the declarant and the witnesses need to sign only once.

E. Anatomical Gifts

The legislature enacted the 2006 version of the Uniform Anatomical Gift Act as Chapter 692A of the Health and Safety Code, replacing the 1968 version enacted in 1969 (Texas never adopted the 1987 version of the Uniform Act).\textsuperscript{211} The revision modernizes the law regarding anatomical gifts and makes it easier for a donor to make a gift. Significant changes include the following:

- A donor card no longer needs two witnesses under most circumstances.\textsuperscript{212}

\textsuperscript{201} Id. at 561.
\textsuperscript{202} Id. at 558.
\textsuperscript{203} Id. at 556.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 558
\textsuperscript{206} Id. at 558-59.
\textsuperscript{207} Id. at 559.
\textsuperscript{208} Tex Prob. Code Ann. § 677A(a), (c) (Vernon 2009)
\textsuperscript{209} Id. § 679(a), (c) (Vernon 2009).
\textsuperscript{210} Id. §§ 677A(a), (c), 679(a), (c).
• The methods by which a donor may make an anatomical gift before death now include (1) an authorization of the gift in a donor registry and (2) any form of communication made by the donor to two adults, one being a disinterested witness, during terminal illness or injury.²¹³

• In addition to procedures for making an anatomical gift, there are procedures for refusing to make an anatomical gift.²¹⁴

• The decision of an adult or emancipated minor to be a donor or to refuse to be a donor is strengthened. Absent subsequent revocation or a contrary indication, all other persons are barred from making, amending, or revoking the (potential) donor's decision.²¹⁵

• The list of priority persons authorized to make an anatomical gift of a decedent's body has been expanded to include (1) an agent who could have made the gift immediately preceding the decedent's death, (2) adult grandchildren, (3) grandparents, (4) "an adult who exhibited special care and concern for the decedent," and (5) hospital administrators.²¹⁶ An agent who could have made the gift immediately preceding death now has top priority for making the anatomical gift decision; the remaining added classes have a lower priority than a spouse, adult child, parent, or adult sibling.²¹⁷ Furthermore, whereas prior law prohibited an anatomical gift over the known opposition of a member of the same or a higher priority class, the new law allows for a majority of members of the priority class who are "reasonably available" to make an anatomical gift over the minority's objection.²¹⁸

• There are no provisions allowing a donor to specify the physician to perform procedures to make an anatomical gift.²¹⁹

• When a person makes an anatomical gift of his or her entire body, the family does not have a right to use of the donor's body for purposes of a funeral.²²⁰

• It is now a class A misdemeanor to (1) sell or purchase a body part for transplant or therapy if removal of the body part is intended to occur after the person's death, or (2) intentionally alter, falsify, conceal, or destroy a document of gift in exchange for financial gain.²²¹

• The Department of State Health Services is required to create the Dawson Donate Life-Texas Registry, a statewide Internet regis-

²¹³ Id. §§ 692A.005, 692A.007.
²¹⁴ Id. § 692A.007.
²¹⁵ Id. §§ 692A.007(d), 692A.008(a).
²¹⁶ Id. § 692A.009(a).
²¹⁷ Id.
²¹⁸ Id. § 692A.009(b).
try of organ, tissue, and eye donors.\textsuperscript{222} When there is a conflict between the measures required by an advanced medical directive and the measures necessary to ensure medical suitability of organs for transplant or therapy, the prospective donor or the donor's agent and the attending physician must confer to resolve the conflict.\textsuperscript{223} If a resolution cannot be reached, the ethics or medical committee of the health care facility must initiate an expedited review of the matter.\textsuperscript{224}

\section*{F. Signatures on Advance Directives}

\subsection*{1. Digital and Electronic Signatures}

The legislature has authorized new methods for a declarant, the witnesses, and the notary to sign medical powers of attorney, directives to physicians, and out-of-hospital do-not-resuscitate orders: digital and electronic signatures. A digital signature is "an electronic identifier intended by the person using it to have the same force and effect as the use of a manual signature."\textsuperscript{225} The digital signature is sufficient if it meets the following requirements under Health & Safety Code section 166.011(a)(1) and is made on or after January 1, 2010: (1) uses an algorithm approved by the Department of State Health Services (formerly known as the Texas Department of Health); (2) is unique to the person using it; (3) is capable of verification; (4) is under the sole control of the person using it; (5) is linked to data in a manner that invalidates the digital signature if the data is changed; (6) persists with the document and not by association in separate files; and (7) is bound to a digital certificate.\textsuperscript{226}

An electronic signature is "a facsimile, scan, uploaded image, computer-generated image, or other electronic representation of a manual signature that is intended by the person using it to have the same force and effect of law as a manual signature."\textsuperscript{227} The electronic signature is sufficient if it meets the following requirements under Health & Safety Code section 166.011(a)(2) and is made on or after January 1, 2010: (1) is capable of verification; (2) is under the sole control of the person using it; (3) is linked to data in a manner that invalidates the electronic signature if the data is changed; and (4) persists with the document and not by association in separate files.\textsuperscript{228}

\subsection*{2. Notarization as Substitute for Attestation}

In lieu of signing in the presence of two witnesses, the declarant may now sign the directive and have the signature acknowledged before a no-

\textsuperscript{222} Id. § 692A.020.
\textsuperscript{223} Id. § 692A.021(b).
\textsuperscript{224} Id. § 692A.021(c).
\textsuperscript{225} Id. § 166.002(5-a) (Vernon Supp. 2009).
\textsuperscript{226} Id. § 166.011(a)(1).
\textsuperscript{227} Id. § 166.002(5-b).
\textsuperscript{228} Id. § 166.011(a)(2).
G. Malpractice Outside of Estate Planning Context

The Supreme Court of Texas held in Smith v. O'Donnell that a decedent's claim for legal malpractice, regardless of whether it involves the planning of the decedent's estate or some other legal matter, survives and, thus, the decedent's personal representative may bring the claim. In Smith, the executor sued the decedent's former attorneys for malpractice in advising the decedent in his capacity as the executor of his predeceased wife's estate. The lower court ruled in favor of the attorneys, basing its judgment on the fact that the decedent's executor and estate lacked privity of contract with the attorneys. The supreme court granted a petition for review without reference to the merits, vacated the lower court's judgment, and remanded so the lower court could take into account the holding in Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.

On remand, the San Antonio Court of Appeals began its analysis by holding that Belt was not limited to estate planning malpractice actions. Accordingly, the court explained that the executor stepped into the decedent's shoes and could bring whatever malpractice action the decedent could have brought while alive, even if it did not involve the planning of the decedent's estate. The court relied on language in Belt providing that "legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate." The court then examined the evidence and concluded that although there was no evidence that the attorneys acted with malice or breached fiduciary duties, there was a triable issue as to what damages were attributable to the attorneys' acts. The court remanded the case to the trial court to determine whether the attorneys' acts amounted to malpractice, and the attorneys appealed.

The Texas Supreme Court affirmed. The supreme court agreed with the court of appeals that the executor is in the same position as the decedent. If the decedent had not died, the decedent could have brought

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229. Id. §§ 166.032(b) (directives to physicians); 166.082(b) (out-of-hospital do-not-resuscitate orders); 166.154(b) (medical powers of attorney).
231. Id. at 419-20.
232. Id. at 420.
235. Id.
236. Id. at 143 (quoting Belt, 192 S.W.3d at 785).
237. Id. at 146, 147, 150.
238. Id. at 151.
239. Smith, 288 S.W.3d at 420-21.
240. Id. at 424.
241. Id. at 421.
the malpractice action, and thus the executor may bring the action on the
decedent's behalf. The supreme court explained that the concerns
about third-party malpractice suits (e.g., by disgruntled beneficiaries) do
not apply in this type of case as the estate's suit is the same as the one the
client could have brought; the attorney-client relationship is not jeopard-
ized by the attorney considering the impact on a third party.

VII. CONCLUSION

The new cases and legislation address a wide array of issues, some very
narrow and some with potentially broad impact. This article has already
discussed the practical application of the cases and statutes. It is also
important to understand some overarching principles that transcend indi-
vidual cases and statutes and form a pattern. Here are some examples of
patterns this author detected:

- The Texas Supreme Court has shown an increased interest in
cases relating to estate planning by deciding four significant cases
during the Survey period.
- Courts may ignore the law to do what they think yields a correct
result in a case at bar even though doing so sets bad precedent.
- Texas courts are increasingly willing to sanction a breach of fidu-
ciary duty or allow a malpractice claim to proceed.
- A practitioner may reduce the chance of litigation by taking pre-
cautions which are not legally necessary.
- Requirements for the effectiveness of techniques or validity of
documents change rapidly.

242. Id. at 421-23. The court did not address whether the attorneys' actions constituted
malpractice. See id. at 419. A two-judge dissent asserted that this case falls under the
Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996), rule, which precludes a malpractice action by
a non-client (e.g., an unhappy beneficiary) against the decedent's attorney for malpractice
because of lack of privity. Id. at 427-28.
243. See, e.g., Ditta v. Conte, 298 S.W.3d 187 (Tex. 2009); Holmes v. Beatty, 290 S.W.3d
852, 857-59 (Tex. 2009); Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009); Smith v.
244. See Holmes, 290 S.W.3d at 857-59 (statutory requirement of express survivorship
language to create community property survivorship agreement ignored).
245. See Ditta, 298 S.W.3d 187 (no statute of limitation on action to remove executor);
Smith, 288 S.W.3d 417 (survival of malpractice claims).
246. See, e.g., In re Estate of Romancik, 281 S.W.3d 592 (Tex. App.—El Paso 2008, no
pet.) (testator should sign each page of the will); In re Estate of Tyner, 292 S.W.3d 179
(Tex. App.—Tyler 2009, no pet. h.) (testator should state exclusions when defining terms,
not just inclusions).
247. See e.g., TEX. HEALTH & SAFETY CODE ANN § 166.011 (Vernon Supp. 2009) (digi-
tal and electronic signatures on advance directives); id. at §§ 166.032(b), 166.082(b), &
166.154(b) (elimination of witnessing requirement on advance directives if notarized); id.
§ 692A.005 (witnesses no longer needed for most anatomical gift documents); Tex. Prob.
CODE ANN. §§ 81(a)(8), 89A (Vernon Supp. 2009) (contents of probate application); id.
§ 64 (codifying good faith/probable cause exception to the enforceability of no contest will
clauses).