Wills and Trusts

Lynne McNiel Candler

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
Lynne McNiel Candler, Wills and Trusts, 47 SMU L. Rev. 1717 (1994)
https://scholar.smu.edu/smulr/vol47/iss4/26

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THIS Article reviews legislative and case law developments in the areas of wills, nontestamentary transfers, heirship, estate administration, guardianships, and trusts. The Survey period covers decisions published between November 1, 1992, and September 30, 1993, as well as changes to the Probate Code, the Property Code, and other codes and statutes enacted by the Seventy-Third Texas Legislature that affect the areas of estate planning and probate.

I. WILLS

A. WILL CONTESTS

In Green v. Earnest 1 the court affirmed a summary judgment in which the trial court found that the decedent did not sign his will as the result of undue influence.2 The decedent's common law wife offered the decedent's last will, which he executed shortly before his death, for probate and the court admitted the will to probate in December 1989. The will appointed the decedent’s wife as independent executrix of the estate and trustee of the testamentary trust for the benefit of the decedent’s sons. The will left one-third of the decedent’s estate to his wife and the other two-thirds equally to his sons, in trust. This testamentary scheme was essentially the same as the decedent’s first will, which he executed in 1986, but differed from a will that the decedent signed in 1988, in which the decedent named a friend as an equal one-fourth beneficiary with the wife and sons and as co-trustee of the sons’ trust. Following the date the court admitted the will to probate, another court found that his wife caused the decedent’s death by shooting him. The friend then filed a will contest, in which he sought to have the 1989 will set aside on the basis that the wife exerted undue influence over her husband to cause him to change his will. The contestant admitted in a deposition that the only evidence that he had of undue influence was based on his opinions and beliefs. His first amended petition alleged that the jury verdict that the wife caused the decedent’s death provided evidence that she exerted undue influence over her husband. The trial court found no undue influence and granted the wife’s motion for summary judgment. The appeals court found that the contestant’s opinions and beliefs about whether the wife exerted un-

---

* B.A., University of Texas at Arlington; M.L.A., J.D., Southern Methodist University. Attorney at Law, Dallas, Texas.
2. Id. at 123.
due influence did not provide sufficient evidence of undue influence. The court found that no evidence existed that the wife unduly influenced the decedent.

In Oechsner v. Ameritrust Texas, N.A., the court found that the trial court did not abuse its discretion in refusing to submit the appellant's requested definition of insane delusion to the jury since the appellant's requested definition varied from the definition established by Texas case law. The decedent and his wife executed wills that had mirror provisions, in which each left his or her property in trust for the survivor, then equally to their children. The decedent's wife later changed her will without telling the decedent. The decedent discovered that his wife had changed her will, leaving her entire estate to the children, following her death. The decedent then changed his will and left his entire estate to a charity. The decedent later executed a codicil in which he left his residence to his housekeeper. The decedent was ninety-three when he executed his new will and codicil. Following his death, his children contested the will and codicil, alleging that the decedent lacked testamentary capacity because he was under an insane delusion and subject to undue influence by the charity and the housekeeper. The jury found that the charity and housekeeper did not exert undue influence and that the decedent was not under an insane delusion at the time he executed the will and codicil. The decedent's son requested the trial court to submit his definition of insane delusion to the jury, which the court refused to do. The trial court did not sign the proposed instruction, nor did it note that it had refused the instruction, but the appeals court found that the son objected to the trial court's proposed instruction and thus preserved the error for appeal. The son wished to add language to the court's instruction that would expand the definition of insane delusion beyond that found in Texas case law. The court of appeals found that the trial court did not abuse its discretion in refusing to expand the definition of insane delusion by submitting the son's proposed instruction. The appeals court also found that it could not consider the son's argument on appeal that the trial court

---

3. Id.
4. Id. The court stated that the fact that the 1989 will returned to the same dispository scheme as the first will indicated that the wife did not exert undue influence. Id. Further, the court found that the fact that the wife shot the decedent shortly after he made the 1989 will does not provide rational or logical evidence that she exerted undue influence in connection with the will. Id.
6. Id. at 135.
7. Id. at 133. The court noted that the son specifically objected to the proposed instruction in a timely manner, that opposing counsel was aware of the objection, and that the court clearly overruled the son's objection. Id.
8. The courts have defined a two-pronged test for insane delusion: the testator believes supposed facts that do not exist and that no rational person would believe. See Lindley v. Lindley, 384 S.W.2d 676, 679 (Tex. 1964); Knight v. Edwards, 153 Tex. 170, 264 S.W.2d 692, 695 (1954); Vance v. Upson, 66 Tex. 476, 1 S.W. 179, 179-80 (1886); Bauer v. Estate of Bauer, 687 S.W.2d 410, 411 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). The son wished to expand the definition to provide that an insane delusion is due to "some organic defect in the brain or some functional disorder of the mind." 840 S.W.2d at 134.
9. 840 S.W.2d at 135.
did not link the ideas of insane delusion and testamentary capacity in its charge since the son failed to object to the charge on this ground. In *Hoffman v. Texas Commerce Bank N.A.* the court held that the trial court did not commit error in denying the contestants’ motions to set aside deemed admissions and in granting summary judgment based on the deemed admissions. The contestants based their contest of the decedent’s will and holographic codicil on the grounds that the decedent lacked testamentary capacity and that the decedent executed the will and codicil as the result of undue influence. The will proponent mailed interrogatories and requests for admissions to the contestants, which gave the contestants thirty days to respond. Some two months later contestants filed a motion to extend the time to file their responses to the interrogatories and admissions and to set aside the deemed admissions. The contestants’ counsel claimed in the motion that the proponent’s counsel had orally agreed to extend the time for response. The proponent then filed a motion for summary judgment and filed a response to the contestants’ motion, in which the proponent’s counsel denied the existence of an oral agreement. The trial court granted the proponent’s motion for summary judgment. The contestants appealed, alleging that the trial court abused its discretion in refusing to grant them additional time to respond to the interrogatories and admissions and that the trial court erred in granting a summary judgment based on the deemed admissions. The appeals court found that the contestants did not show good cause for their failure to answer within the specified time frame by merely alleging an oral agreement with opposing counsel. The court also found that the deemed admissions did not inquire into the decedent’s state of mind by stating opinions concerning the testator’s capacity or undue influence, and even if the deemed admissions did inquire into state of mind, these inquiries are not improper. Thus, the trial court could consider the deemed admissions concerning testamentary capacity and undue influence.

**B. WILL CONSTRUCTION**

In *Johnson v. McLaughlin* the court considered the language of the will concerning payment of debts, taxes, and expenses, and determined that the testator intended that income earned from the residuary estate during the period of administration be available for payment of debts, taxes, and ex-

---

10. *Id.* The court also found that the jury’s answers to questions concerning the decedent’s testamentary capacity at the time that he executed the will and codicil were not against the preponderance of the evidence. *Id.* at 137. The court finally found that the son waived his right to have six jurors, rather than the twelve jurors that the court empaneled, decide the case since the son did not provide the court with a record showing his objection to a trial by twelve jurors or any ruling of the trial court on an objection. *Id.* at 138.


12. *Id.* at 340.

13. *Id.* at 341.

14. *Id.* at 340.

15. *Id.*

16. *Id.* at 341.

17. 840 S.W.2d 668 (Tex. App.—Austin 1992, no writ).
The testator set aside certain liquid assets for the payment of debts, taxes, and expenses prior to her death. The testator's will directed her executor to pay debts, taxes, and expenses as soon as practicable following her death. The testator provided that if the liquid assets were insufficient to meet her obligations, her executor could sell certain parcels of real estate to raise the funds necessary to meet the obligations; she also authorized the executor to borrow money and mortgage other real property to meet the obligations. The testator divided her residuary estate into two trusts, with identical terms and the same beneficiaries. The independent executor named in the will declined to serve and the court appointed a temporary administrator with limited powers. The administration of the estate took approximately six years. The administrator found that the assets that the testator set aside for payment of her obligations were insufficient to cover all of the debts, taxes, and expenses of the estate. The administrator used income earned from estate assets, including assets in the residuary estate, to pay the obligations. The probate court approved the final account and ordered the administrator to distribute the estate according to the terms of the will. One of the beneficiaries of the residuary trusts appealed, asserting that the will did not allow the administrator to use income derived from the residuary estate to pay the estate's obligations. The appeals court first determined that the interest of the beneficiaries of the residuary estate vested at the time of the testator's death. The court next determined that the testator did not explicitly state in her will whether the personal representative could use income to meet estate obligations. The court reviewed the will as a whole and inferred that the testator intended for the personal representative to use income to meet the obligations.

In *Turner v. Adams* the court construed the terms of the testator's will to determine whether a class gift of a remainder interest created a vested or contingent interest and the time for determination of members of the class. The testator gave her husband a life estate in her property, with a

---

18. *Id.* at 675.

19. *Id.* at 671, 673. The court noted that the testator used the words, "I have created two trust estates . . .," in referring to the residuary trusts, which implied that she considered the creation of the trusts complete at the time her will became operative. *Id.* at 672. Further, the court found **TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1994)** to provide that property vests in the beneficiaries immediately upon the testator's death unless the testator specifically provides otherwise in the will. *Id.* at 671-72. The court could find no indication that the testator intended to postpone vesting of title in the beneficiaries. *Id.* at 672. The court also found that a contrary construction of the will would result in violation of the rule against perpetuities, causing the residuary gifts to lapse and pass by intestacy, thus defeating the testator's purposes. *Id.* at 672-73. The court concluded that the testator intended for title to the residuary estate to vest in the residuary beneficiaries at her death. *Id.* at 673.

20. *Id.* at 674.

21. *Id.* at 674-75. Although the court found conflicting language in the will, the court determined that language in the will recognizing that the personal representative might use income to meet estate obligations outweighed language inferring that the personal representative should preserve income for the residuary beneficiaries. *Id.* at 675.

22. 855 S.W.2d 735 (Tex. App.—El Paso 1993, no writ).

23. *Id.* at 737-39.

24. *Id.* at 739-40.
remainder to her nieces and nephews. The testator's husband and several nieces and nephews survived her, but one nephew predeceased the testator's husband. Some years following the testator's death, and prior to the nephew's death, the testator's husband and three of the remainder beneficiaries created a trust for the husband's benefit from the assets of the life estate. Following the nephew's death, the trustees distributed some assets of the trust to the surviving remainder beneficiaries, but made no distribution to the nephew's estate. The nephew's executor asked the court for a declaratory judgment construing the provisions of the testator's will providing the gift of the remainder interest to her nieces and nephews. The trial court found that the deceased nephew's share of the estate lapsed since he did not survive the testator's husband. The nephew's executor appealed, arguing that the trial court incorrectly found that the remainder interest was contingent and that the will created a valid trust. The appeals court first considered whether the remainder gift to the testator's nieces and nephews was a contingent or vested gift. The court concluded that the will contained no provision that required a niece or nephew to survive the testator's husband in order for the gift to vest. Further, the court noted that class gifts ordinarily vest at the time of the testator's death unless the testator provides otherwise in the will. The court found that the remainder gift to the testator's nieces and nephews vested at the time of the testator's death. The court then examined when the determination of the class of remainder beneficiaries should occur. The court found that the testator's will contained a provision for a gift over to the children of a niece or nephew who did not survive her husband, and that the testator must have meant for this survivorship clause to prevent the interest of the deceased nephew from passing to his estate. The court also considered the validity of the trust that the testator's husband and several of the remainder beneficiaries created and particularly considered the distributions of trust assets to nieces and nephews prior to the husband's death. The court concluded that any distributions made to nieces or nephews prior to the husband's death were invalid.

C. WILL EXECUTION

In Triestman v. Kilgore the court, in a per curiam decision in which it denied writ, disapproved of the court of appeals' reasoning about the compe-

---

25. Id. at 737-39.
26. Id. at 738.
27. Id. at 739 (citing Houston v. Schumann, 92 S.W.2d 1086, 1089 (Tex. Civ. App.-Amarillo 1936, writ ref'd)).
28. Id. at 739.
29. Id. at 739-40.
30. Id. at 740. The court concluded that the deceased nephew's interest lapsed to the other class members at his death and affirmed the result of the trial court's construction of the will. Id.
31. Id. at 740-41.
32. Id. The court based its reasoning on its analysis of the nature of the remainder interest given to the nieces and nephews. Id.
33. 838 S.W.2d 547 (Tex. 1992).
tence of witnesses.\textsuperscript{34} The court first stated that the terms "credible witness" and "competent witness" are synonymous.\textsuperscript{35} The court then stated that a witness who does not receive a benefit under the will is a competent witness.\textsuperscript{36} The court found that neither witness to the will in question received a benefit under the will and that the will itself provided some evidence that the witnesses were credible.\textsuperscript{37} The court of appeals improperly did not consider the will as evidence of the witnesses' competence or credibility.\textsuperscript{38}

\textbf{D. MUTUAL WILLS}

In \textit{Kilpatrick v. Harris}\textsuperscript{39} the court considered whether the decedent and her husband executed contractual wills\textsuperscript{40} and whether the trial court correctly imposed a constructive trust on the decedent's estate.\textsuperscript{41} The decedent and her husband executed wills in 1974 in which each gave the other a life estate in his or her property, with the remainder passing to his or her family. The decedent and her husband began making gifts to family members several years prior to the husband's death, with equal gifts made to each side of the family. The decedent was unable to locate her husband's will following his death, and she took all of his property through intestacy. The decedent then executed a new will in which she left half of her estate to her husband's sisters and the other half of her estate to her family, apparently in the belief that her will would provide the dispositive scheme that she and her husband had planned. Following the decedent's death, her executor found the husband's 1974 will and offered it for probate. The executor claimed that the decedent and her husband had contractual wills, while the husband's sisters requested that the court set aside the affidavit of heirship and distribute the husband's estate according to his will. The jury found that the decedent and her husband executed contractual wills and that decedent's last will violated the terms of the agreement that she had with her husband about their dispositive scheme. The trial court imposed a constructive trust on the decedent's estate. The appeals court first determined that evidence supported the jury's finding that the couple executed contractual wills.\textsuperscript{42} The court also found

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 547-48.
\item \textsuperscript{35} \textit{Id.} at 547.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.} The court of appeals held that the will proponent offered no evidence that the witnesses were credible at the time of the execution of the will. \textit{In re Estate of Hutchins}, 829 S.W.2d 295, 299-300 (Tex. App.—Corpus Christi 1992, writ denied). For a discussion of this case, see Lynne M. Candler, \textit{Wills and Trusts, Annual Survey of Texas Law}, 46 SMU L. REV. 1831, 1831-32 (1993).
\item \textsuperscript{38} 829 S.W.2d at 299-300.
\item \textsuperscript{39} 848 S.W.2d 859 (Tex. App.—Corpus Christi 1993, no writ).
\item \textsuperscript{40} \textit{Id.} at 862-65.
\item \textsuperscript{41} \textit{Id.} at 865-66.
\item \textsuperscript{42} \textit{Id.} at 863. The evidence that the jury considered included testimony offered by the couple's accountant and friends that the couple always intended to divide their assets equally between their two families on the death of the survivor, the 1974 wills themselves, which did not contain language specifically stating that they were contractual wills, and the history of equal gifts that the couple made to their families over the years and that the decedent continued after her husband's death. The appeals court determined that the terms of the agreement between the couple were not too indefinite or vague for enforcement. \textit{Id.} The appeals court
\end{itemize}
that the decedent made her later will in an attempt to dispose of the estate in the manner that she and her husband intended, based on her belief that her husband died intestate, and that to probate the husband's 1974 will and the decedent's later will would constitute a fraud on both estates. The court found that the trial court's order concerning the distribution of the husband's estate did not violate the terms of his will.

E. PRIVITY

In *Thomas v. Pryor* the court considered whether a beneficiary named under a will may sue the attorney who prepared the will for malpractice. The attorney prepared the will through a pro bono project. The testator named a friend as the beneficiary of the residuary estate. No witnesses ever signed the will and the probate court refused to admit the will to probate. The friend sued the attorney for malpractice, alleging that the attorney's negligence by having no witnesses sign the will led to the loss of her benefits under the will. The attorney moved for summary judgment, alleging that he owed no duty to the beneficiary since he had no attorney-client relationship with her. The trial court granted the summary judgment and the beneficiary appealed. The appeals court first examined the current state of the law in Texas. The court found that no privity existed between the proposed beneficiary and the attorney and declined to initiate a change in Texas law on the issue. The court also found that public policy supports the privity rule because of the importance of confidential communications between the testator and his attorney.

also upheld the jury's finding that the effect of the decedent's last will would be to distribute three-fourths of the estate to her husband's sisters and one-fourth of the estate to her family, which was clearly not the dispositive scheme that she and her husband envisioned. *Id.* at 864. The court found that the couple's agreement did not breach the statute of frauds because of partial performance, *id.*, and that the law did not require that contractual wills expressly state the existence of the contract at the time the couple executed their wills in 1974. *Id.; see Tex. Prob. Code Ann. § 59A (Vernon 1980), which only applies to contractual wills executed after September 1, 1979.*

43. 848 S.W.2d at 865. The court again referred to the couple's intention that each family would receive half of their joint estate. *Id.*
44. *Id.* at 866. The trial court ordered distribution of one-fourth of the combined estate to each of the husband's sisters, with distribution of the other one-half of the combined estates to the decedent's family in the proportions that the decedent and her husband each set out in their 1974 wills.
45. 847 S.W.2d 303 (Tex. App.—Dallas 1993, writ dism'd by agr.).
46. *Id.* at 303-05.
47. *Id.* at 304-05. The court noted that only a client may hold his attorney liable for malpractice. *Id.* at 304 (citing *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied); *Bell v. Manning*, 613 S.W.2d 335, 339 (Tex. App.—Tyler 1981, writ ref'd n.r.e.)). The court specifically noted that Texas courts have held that an attorney owes no duty to intended beneficiaries of wills or trusts improperly executed or prepared. 847 S.W.2d at 305 (citing *Dickey v. Jansen*, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Berry v. Dodson, Nunley & Taylor*, 717 S.W.2d 716, 719 (Tex. App.—San Antonio 1986, writ dism'd by agr.)).
48. 847 S.W.2d at 305.
49. *Id.*
II. NONTESTAMENTARY TRANSFERS

In Shaw v. Shaw the court determined that joint accounts, designated as "joint with survivorship accounts" on the signature cards, were not survivorship accounts. The decedent changed two of his separate property accounts to joint accounts with his second wife after their marriage. Following the decedent's death his widow changed the accounts to her name, based upon her assertion of survivorship rights. The decedent's daughter, who was independent executrix of her father's estate, challenged her stepmother's actions on the basis that the signature cards did not qualify as survivorship agreements. The trial court held that the signature cards created a survivorship right as a matter of law and granted the widow's motion for partial summary judgment. On appeal the court noted that Probate Code section 439(a) provides that in order for a right of survivorship to exist the party who dies must have signed a written agreement that specifies that the decedent's interest in the account passes to the surviving party or parties to the account. The court found that the words "joint with survivorship" do not substantially follow the statutory language necessary to create a survivorship right. The court reversed the trial court and rendered judgment that the accounts belonged to the estate and not to the decedent's widow.

The court in Ephran v. Frazier also found that no survivorship rights existed in two joint accounts. The decedent and the joint account holder did not mark the box available on either signature card to indicate that the accounts were joint accounts with survivorship rights. The depository agreement for each account contained a definition of joint accounts with rights of survivorship and a statement that the parties agreed that the funds on hand at the death of one joint tenant would become the property of the survivor, but the depository agreements do not indicate that the parties intended for the accounts to have survivorship rights. Following the decedent's death the joint tenant claimed the funds in both accounts.

This area of the law continues to create controversy and confusion, and has been the source of much litigation in the past few years. See, e.g., Stauffer v. Henderson, 801 S.W.2d 858 (Tex. 1990) (holding that the signature card did not create survivorship rights); Kitchen v. Sawyer, 814 S.W.2d 798 (Tex. App.—Dallas 1991, writ denied) (holding that the signature card did not create survivorship rights); Martinez v. Martinez, 805 S.W.2d 873 (Tex. App.—San Antonio 1991, no writ) (holding that the signature card did not create survivorship rights). In an effort to bring some order to this chaos the legislature created a new uniform account form, which contains all of the types of accounts available with brief explanations of each type of account and language clearly sufficient to create rights of survivorship if the parties to the account so intend. Act of May 24, 1993, 73d Leg., R.S., ch. 795, § 2, 1993 Tex. Sess. Law Serv. 3157, 3157-59 (Vernon) (codified at TEX. PROB. CODE ANN. § 439A (Vernon Supp. 1994)). See infra note 284 and accompanying text for further discussion of the new account card.

50. 835 S.W.2d 232 (Tex. App.—Waco 1992, writ denied). This area of the law continues to create controversy and confusion, and has been the source of much litigation in the past few years. See, e.g., Stauffer v. Henderson, 801 S.W.2d 858 (Tex. 1990) (holding that the signature card did not create survivorship rights); Kitchen v. Sawyer, 814 S.W.2d 798 (Tex. App.—Dallas 1991, writ denied) (holding that the signature card did not create survivorship rights); Martinez v. Martinez, 805 S.W.2d 873 (Tex. App.—San Antonio 1991, no writ) (holding that the signature card did not create survivorship rights). In an effort to bring some order to this chaos the legislature created a new uniform account form, which contains all of the types of accounts available with brief explanations of each type of account and language clearly sufficient to create rights of survivorship if the parties to the account so intend. Act of May 24, 1993, 73d Leg., R.S., ch. 795, § 2, 1993 Tex. Sess. Law Serv. 3157, 3157-59 (Vernon) (codified at TEX. PROB. CODE ANN. § 439A (Vernon Supp. 1994)). See infra note 284 and accompanying text for further discussion of the new account card.

51. 835 S.W.2d at 235.
52. TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1993).
53. 835 S.W.2d at 234.
54. Id. at 235 (citing the statutory language found in TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1994)).
55. 835 S.W.2d at 236.
56. 840 S.W.2d 81 (Tex. App.—Corpus Christi 1992, no writ).
The executor claimed the funds as estate funds, alleging that the style of the accounts did not create joint tenancies with rights of survivorship, that the signature cards and depository agreements do not designate the accounts as joint tenancies with rights of survivorship, and that the signature cards do not contain sufficient language to remove the funds from the probate estate. The trial court agreed with the executor and the joint tenant appealed. On appeal the court held that, although the accounts were joint accounts, the signature cards and depository agreements did not create joint tenancies with rights of survivorship.

In *MBank Corpus Christi v. Shiner* the court considered the issue of the bank’s liability in paying the funds on deposit to the joint account holder. The decedent and his sister were joint signatories on a checking account that the decedent opened in 1980. The designation on the account was joint tenancy with right of survivorship, and this account was not at issue in the case. The decedent later opened a certificate of deposit in his name and his sister’s name, but he did not designate the certificate of deposit as a joint tenancy with right of survivorship. Following the decedent’s death his sister requested the bank to deliver the funds in the certificate of deposit to her, which the bank did. The decedent’s two grandchildren later presented an affidavit of heirship to the bank, followed by an order based on a small estate affidavit naming the two grandchildren as the decedent’s distributees. The two grandchildren sued the bank after learning that the bank paid the certificate of deposit to the joint tenant, contending that the certificate of deposit was not a joint tenancy with right of survivorship account. The grandchildren filed a motion for summary judgment and the bank countered with its own motion, asserting that it paid the funds to a joint account holder and that the Probate Code protected it from liability for doing so. The trial court found that the bank breached the certificate of deposit agreement by delivering the funds to the joint account holder and granted summary judgment in favor of the grandchildren. The appeals court found that the certificate of deposit was not a survivorship account and that the decedent’s interest in the account passed to his heirs on his death. The court further found that the bank could distribute the funds to either party to the account despite the death of the other party and that the heirs to an account holder have no right to distribution of the funds unless they present proof of the account holder’s death and the account has no right of survivorship provision. The court determined that the bank could have properly acted by paying the funds either to the decedent’s heirs or to the surviving joint account holder. Because the decedent’s grandchildren did not give the bank written instructions not to distribute the funds to the surviving account holder, the court determined that the bank had no liability for distribution of

58. *Id.*
59. 840 S.W.2d 724 (Tex. App.—Corpus Christi 1992, no writ).
60. *Id.* at 725-27.
61. *Id.* at 726.
62. *Id.* (citing TEX. PROB. CODE ANN. § 445 (Vernon Supp. 1993)).
63. *Id.*
the funds.\textsuperscript{64}

In \textit{Ivey v. Steele}\textsuperscript{65} the court affirmed the trial court's findings that some accounts were joint tenancies with rights of survivorship and others were joint accounts with no survivorship rights.\textsuperscript{66} The decedent opened a co-tenancy account with one woman and several joint accounts with a second woman. Following the decedent's death the two joint account holders qualified as co-executors of the decedent's will. The two co-executors filed a petition for declaratory judgment in which they asked the court to determine the ownership of the accounts. The co-executor who held joint accounts with the decedent filed a motion for summary judgment, claiming that the accounts passed to her as joint tenant with right of survivorship. The other co-executor filed a motion for summary judgment on behalf of the estate, claiming that the accounts were probate assets. The probate court found that eight of the accounts were survivorship accounts and passed to the joint tenant, with the other five accounts passing under the will. The co-executor acting on behalf of the estate appealed. The appeals court found that the eight accounts that the probate court determined were survivorship accounts contained sufficient language creating the right of survivorship.\textsuperscript{67} The appeals court also determined that the five accounts that the probate court determined were probate assets did not create survivorship rights because of the language on the signature cards for these accounts.\textsuperscript{68}

\section*{III. HEIRSHIP}

In \textit{Buster v. Metropolitan Transit Authority}\textsuperscript{69} the court determined that a probate court's determination of appellant's status as a decedent's spouse in a determination of heirship proceeding did not preclude litigation concerning the existence of a common law marriage in a wrongful death action.\textsuperscript{70} The decedent died as the result of injuries she suffered when a bus hit her car. The Metropolitan Transit Authority admitted liability and interpled the settlement funds because the decedent's mother asserted that she was the decedent's only statutory beneficiary, while the decedent's alleged common

\begin{itemize}
  \item \textsuperscript{64} \textit{Id.} at 727. TEX. PROB. CODE ANN. § 448 (Vernon 1980) provides protection from liability to any financial institution that distributes funds pursuant to TEX. PROB. CODE ANN. §§ 444-447. The bank distributed the funds to the decedent's sister pursuant to TEX. PROB. CODE ANN. § 445, so the court determined that the bank had no liability to the decedent's heirs. 840 S.W.2d at 727. The court reversed and rendered judgment in favor of the bank. \textit{Id.}
  \item \textsuperscript{65} 857 S.W.2d 749 (Tex. App.—Houston [14th Dist.] 1993, no writ).
  \item \textsuperscript{66} \textit{Id.} at 751.
  \item \textsuperscript{67} \textit{Id.} The court found that the decedent signed the signature cards on these eight accounts and that the signature cards contained language that clearly created survivorship rights. \textit{Id.}
  \item \textsuperscript{68} \textit{Id.} One of the accounts stated specifically that it was a tenancy in common account, not a joint tenancy with right of survivorship. The signature card for one of the accounts did not have the box designating the account as a joint tenancy with right of survivorship marked. The signature cards for two of the remaining accounts did not have any language creating a right of survivorship other than the designation as joint account with right of survivorship. The language on the signature card for the remaining account did not indicate the type of account.
  \item \textsuperscript{69} 835 S.W.2d 236 (Tex. App.—Houston [14th Dist.] 1992, no writ).
  \item \textsuperscript{70} \textit{Id.} at 237-38.
\end{itemize}
law husband asserted that he should receive the settlement funds. The alleged common law husband filed an application for determination of heirship in the decedent's estate and the probate court found that a common law marriage existed and that decedent's common law husband was her only heir. The court in the interpleader action determined that the transit authority could litigate the issue of the common law marriage. The common law husband appealed, based on his contention that relitigation of the existence of the common law marriage is a collateral attack on the probate court's judgment. The appeals court found that the record failed to demonstrate that the issue of the common law marriage was fully developed in the determination of heirship proceeding and that nothing in the record revealed that the transit authority had its interests represented in the heirship determination. The court also found that the Wrongful Death Act, not the Probate Code, identifies the class of persons who may sue for wrongful death, so the issue of the common law marriage was properly before the court in the interpleader action.

In Turner v. Nesby the court determined that the statute of limitations for a bill of review in an heirship determination had passed prior to the time the appellee filed the bill of review. The appellee, who claimed to be the decedent's illegitimate child, filed a bill of review of the heirship determination more than seven years after the court entered its judgment determining heirship. At the time that the court determined heirship, the appellee could not inherit from his alleged natural father under section 42(b) of the Probate Code. The appeals court first determined that section 42(b), at the time of the decedent's death, was unconstitutional as it applied to the appellee because he could not establish his heirship. The court then determined that although the original application for determination of heirship was defective, the court still had jurisdiction to render judgment. The court finally determined that the statute of limitations for any bill of review resulting from the heirship determination expired four years following the date of the determination.

71. Id. at 237.
72. Id. at 237-38.
73. 848 S.W.2d 872 (Tex. App.—Austin 1993, no writ).
74. Id. at 877-78.
76. 848 S.W.2d at 875.
77. Id. at 876. The jurat on the affidavit attached to the application for determination of heirship incorrectly substituted the word "affidavit" for the word "application."
78. Id. at 877-78. The trial court had determined that the alleged natural son had four years following the revision to TEX. PROB. CODE ANN. § 42(b) to file his bill of review. The court of appeals rejected this argument because the alleged natural son could have directly appealed from the original judgment based on constitutional grounds. 848 S.W.2d at 877. The court of appeals further stressed that the state's interest in orderly administration and distribution of estates bars appellee's claims due to the length of time that had passed from the date of the original determination of heirship to the date appellee filed his bill of review. Id. at 877-78.
In *Matherson v. Pope*\(^7^9\) the court held that paternal collateral relatives may inherit from an illegitimate child.\(^8^0\) The decedent, who died intestate, was single and had no surviving descendants at the time of his death. The decedent's mother was unmarried at the time of his birth, although she later married and her husband raised the decedent from the time that he was small. Prior to the decedent's birth his mother was involved in a relationship with a man who later married her cousin and had four children. The court heard testimony in the determination of heirship proceeding concerning decedent’s relationship with both men and rendered judgment that decedent’s biological father was Pope, the man who later married his mother’s first cousin, and that decedent’s heirs were Pope’s three surviving children and the child of Pope’s deceased child. The decedent’s maternal first cousins appealed the decision on the basis that section 42(b)(1) of the Probate Code\(^8^1\) does not permit the collateral relatives to prove paternity. The appeals court found that the legislature intended to allow collateral relatives to inherit from illegitimate children under the first sentence of section 42(b)(1)\(^8^2\) because of the wording of the last clause of the sentence.\(^8^3\) The appeals court also held that although the probate court did not expressly find that the alleged biological father did not receive the decedent in his home appellants failed either to request the probate court to include this finding or to object to the probate court’s failure to make the finding prior to the appeal.\(^8^4\)

In *McMahan v. Naylor*\(^8^5\) the court found that an alleged biological son incorrectly filed a petition to determine heirship when the decedent died testate and with no intestate estate.\(^8^6\) The decedent executed a will in 1975, in which he named his three children. At the time the decedent executed the will his alleged biological son was almost eighteen years old. The decedent made no reference to the alleged biological son in his will. The decedent died in 1992 and the county court admitted his will to probate. The alleged biological son then filed a petition to determine heirship in order to establish paternity and to claim a share of the estate under the decedent’s will. Decedent’s three children filed a motion for summary judgment in which they

\(^7^9\) 852 S.W.2d 285 (Tex. App.—Dallas 1993, writ denied).
\(^8^0\) Id. at 290.
\(^8^1\) TEX. PROB. CODE ANN. § 42(b)(1) (Vernon Supp. 1993).
\(^8^2\) Id.
\(^8^3\) 852 S.W.2d at 290. The first sentence of TEX. PROB. CODE ANN. § 42(b)(1) (Vernon Supp. 1993) provides that ascendants, descendants, and collateral relatives may inherit from a biological child if any of the four methods listed in the first sentence establish paternity of the child. The court found that collateral relatives may prove paternity under any of the four methods listed in the first sentence of TEX. PROB. CODE ANN. § 42(b)(1). 852 S.W.2d at 290. The court found that collateral relatives do not have the right to establish paternity under the second and third sentences of TEX. PROB. CODE ANN. § 42(b)(1) since the legislature specified that only alleged biological children or persons inheriting through alleged biological children may use this method to establish paternity. 852 S.W.2d at 289.
\(^8^4\) 852 S.W.2d at 290. The appeals court found that the probate court presumptively found that the alleged biological father received the decedent in his home in support of its determination of heirship. Id. at 291.
\(^8^5\) 855 S.W.2d 193 (Tex. App.—Corpus Christi 1993, writ denied).
\(^8^6\) Id. at 194-95.
asserted that the statute of limitations under section 13.01(a) of the Family Code barred the alleged son's petition and his efforts to establish paternity, that a suit to determine paternity does not survive the death of the alleged biological father, and that the alleged biological son incorrectly brought the petition under section 48 of the Probate Code since the decedent had no intestate estate. The appeals court found that, although the alleged biological son may have a valid argument attacking section 13.01(a) of the Family Code, he filed his petition under section 48 of the Probate Code, which applies only to intestate situations. The appeals court affirmed the trial court's summary judgment because the alleged biological son filed an incorrect proceeding based on the facts of the case.

IV. ESTATE ADMINISTRATION

A. JURISDICTION

In Palmer v. Coble Wall Trust Co. the court considered the extent of a statutory probate court's jurisdiction under the provisions of Texas Probate Code section 5A(b) as it existed in 1985. The court found that in 1985 the statutory probate court had concurrent jurisdiction with the district court to consider causes of action filed by independent administrators against temporary administrators. The dissent argued that the legislature did not contemplate a personal representative's case against a former personal representative for the causes of action included in this case.

In Strawder v. Thomas the court held that the trial court did not have in personam jurisdiction over a Louisiana administratrix when a Texas court

89. TEX. PROB. CODE ANN. § 48 (Vernon 1980).
90. TEX. FAM. CODE ANN. § 13.01(a) (Vernon Supp. 1993).
91. TEX. PROB. CODE ANN. § 48 (Vernon 1980).
92. 855 S.W.2d at 194.
93. Id. at 195.
95. TEX. PROB. CODE ANN. § 5A(b) (Vernon Supp. 1994).
96. 851 S.W.2d at 179.
97. Id. at 182-83. Prior to the decedent's death the probate court appointed the trust company guardian of her estate. The guardian developed an estate plan for the ward, which the probate court approved. Following the ward's death the probate court appointed the trust company as temporary administrator of her estate and thereafter appointed an independent administrator of the estate. The independent administrator sued the trust company in the probate court for negligence, gross negligence, and violation of the deceptive trades practices act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1994), based on the complexity and cost of the estate plan. The probate court entered judgment for the independent administrator. The appeals court reversed and rendered judgment in favor of the trust company, finding that the probate court did not have subject matter jurisdiction over the suit because the causes of action were not appertaining to or incident to the estate. Coble Wall Trust Co. v. Palmer, 848 S.W.2d 696, 701-02 (Tex. App.—San Antonio 1991), rev'd, 851 S.W.2d 178 (Tex. 1992).
98. 851 S.W.2d at 183-85 (Cornyn, J., dissenting).
had not appointed her as administrator of the decedent's estate and she had not filed for ancillary probate of the decedent's estate.\(^{100}\) The decedent died as the result of a pipeline explosion. Following the decedent's death a Louisiana court appointed an administratrix of his estate. The administratrix filed suit individually and as administratrix against the owners of the pipeline in a Texas court. The administratrix never qualified as administratrix of the decedent’s estate in Texas and never initiated an ancillary probate of the decedent’s estate in Texas. The Louisiana court subsequently removed the administratrix and appointed a successor administratrix of the decedent’s estate. The original administratrix alleged that she settled her suit against the pipeline company, although the only copy of the settlement agreement named her in her individual capacity and did not contain signatures on behalf of the pipeline company. The successor administratrix later brought suit against the pipeline company in a Louisiana court. The original administratrix, still reciting her capacity as administratrix of the estate, filed a motion with the Texas court for payment of the settlement funds to the registry of the court pending the outcome of a dispute between her counsel and counsel for the successor administratrix. Some time later, the original administratrix, still alleging her capacity as administratrix, petitioned the Texas court for appointment of an attorney ad litem to represent the decedent’s minor son’s interests in the settlement. The successor administratrix filed an opposition to the motion requesting the deposit of the funds into the court’s registry and filed an intervention in the Texas suit. The successor administratrix attempted to file a nonsuit in the Texas case by facsimile transmission, which the court clerk stamped and entered into the record. The procedural history of the Texas case from that point is quite complicated, but the Texas court ultimately awarded the original administratrix the sum of $400,000 from the successor administratrix for attorney's fees, plus some additional attorney's fees. The attorney ad litem later requested the Texas court to modify the judgment awarding attorney's fees since it did not address the ad litem fees, and the court signed a new judgment, which did not purport to modify the former judgment, but which added language allowing payment of the ad litem's fees. The Texas court denied the successor administratrix's motion for new trial and she appealed. The appeals court determined, among other things, that neither the original administratrix nor the successor administratrix could bring suit in Texas against each other since neither was appointed administratrix by a Texas court.\(^{101}\)

The court in *Coppock & Teltschik v. Mayor, Day & Caldwell*\(^{102}\) held that the statutory probate court had subject matter jurisdiction over a suit against the temporary administrator of an estate because the causes of action had to do with the temporary administrator’s actions while serving as fiduciary and the disposition of one of the estate’s major assets.\(^{103}\) The temporary admin-

\(^{100}\) *Id.* at 64.

\(^{101}\) *Id.*

\(^{102}\) 857 S.W.2d 631 (Tex. App.—Houston [1st Dist.] 1993, writ requested).

\(^{103}\) *Id.* at 636. Further, the plaintiffs challenged the probate court's orders and the actions of the temporary administrator's attorneys. *Id.*
istrator, with the probate court's approval, obtained a loan on behalf of the estate, which he secured with one of the estate's major assets. The lender was a client of the law firm of which the temporary administrator was a partner. The decedent's wife, who had previously served as a temporary administrator of the estate, assigned part of her interest in the estate to her attorneys. The probate court approved the temporary administrator's final account and discharged the temporary administrator from all liability in connection with the administration of the estate. The decedent's wife later filed suit against the lender in district court, and her attorneys filed an interpleader action in her suit. The temporary administrator intervened in the suit and the probate court transferred the case from district court. The probate court granted the temporary administrator's motion for summary judgment. The wife's attorneys, based on their assigned interest in the estate, appealed on several grounds, including the ground that the probate court did not have subject matter jurisdiction over the case. The appeals court found that each action that formed the basis of the suit filed by the wife's attorneys occurred while the temporary administrator was acting in his fiduciary capacity. Because the causes of action directly arose out of the temporary administrator's fiduciary actions, the causes of action were incident to the estate and the probate court had jurisdiction.

B. Executors and Administrators

In *Rooke v. Jenson* the court held that the statute of limitations would not serve as a defense to an executor who undertook her fiduciary position with knowledge that someone had filed a claim prior to the expiration of the statute of limitations against the individual named in the will as the decedent's first choice to serve as executor. The decedent's automobile collided with the plaintiff in 1986. The plaintiff filed suit against the decedent within the two year statute of limitations, but she learned that the decedent had died when she attempted to serve him. The plaintiff then substituted the decedent's widow, who his will named as executor and sole beneficiary, as the defendant. The widow had not offered the will for probate and had not qualified as executor at the time the plaintiff substituted her as defendant. The widow attempted to file the will as a muniment of title, but the plaintiff filed a motion for appointment of a personal representative. The court appointed the decedent's daughter to serve as executor at the daughter's request. The statute of limitations had expired at the time the court appointed the daughter as executor. The plaintiff amended the petition and named the daughter in her capacity as executor as defendant. The daughter moved for summary judgment on the basis that the statute of limitations had elapsed. The trial court granted her motion and the appeals court affirmed.

---

104. Id. at 635.
105. Id. at 636.
106. 838 S.W.2d 229 (Tex. 1992).
107. Id. at 230.
supreme court held that the executor could not assert the defense of limitations since she knew of the existence of the suit and that her mother, the executor named in the will, was the named defendant in the suit in her fiduciary capacity.\textsuperscript{109}

In \textit{In re Estate of Spindor} \textsuperscript{110} the court held that the independent executor properly sought court approval for the partition and distribution of the estates.\textsuperscript{111} The two decedents, a married couple, died within a few months of each other. The husband died first, leaving his property to his wife, who disclaimed it. The independent executor of both estates filed applications in the county court for approval of a partition of the two estates between the couple’s three children, or, alternatively, for the court to order a partition pursuant to the Probate Code.\textsuperscript{112} The county court transferred the estates to the district court, which interpreted the language of the wills and determined that the independent executor did not have the authority to make the proposed partition. The wills provided for equal distribution of the balance of the estates to the three children. The wills further provided that the independent executor was to divide the estate equally. The wills did not contain provisions controlling the resolution of conflicts concerning the division of the estate. The district court transferred the estates back to the county court for a partition of the estates. One of the children appealed. The court of appeals found that the wills did not provide a method of partitioning the estate, so that section 150 of the Probate Code\textsuperscript{113} applied, even though the estates were under independent administrations.\textsuperscript{114} The court held that the independent executor correctly requested the court to approve the proposed partition.\textsuperscript{115} The court also found that the district court correctly interpreted the two wills as providing no method for resolution of conflicts between the executor and beneficiaries over the partition of the state.\textsuperscript{116}

In \textit{Wetsel v. Perry} \textsuperscript{117} the court found that an independent executor must receive personal service of notice of a suit to remove her as executor.\textsuperscript{118} The decedent’s widow, who was not a beneficiary under his will, brought an action to remove the independent executor. The independent executor’s attorney received service of the notice of the removal action, but no service was personally made on the independent executor. The independent executor did not appear at the hearing, at which the court removed her. She then

\textsuperscript{109} 838 S.W.2d at 230. The court made its decision without hearing oral argument, reversed the court of appeals, and remanded the case to the trial court. \textit{Id.}

\textsuperscript{110} 840 S.W.2d 665 (Tex. App.—Eastland 1992, no writ).

\textsuperscript{111} \textit{Id.} at 667.


\textsuperscript{113} \textsc{Tex. Prob. Code Ann.} § 150 (Vernon Supp. 1994).

\textsuperscript{114} 840 S.W.2d at 667.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} On motion for rehearing, the court amended the district court’s order to delete the reference to distribution of undivided interests in the estates since the wills specifically instructed the executor to divide the estates between the three children. \textit{Id.}

\textsuperscript{117} 842 S.W.2d 374 (Tex. App.—Waco 1992, no writ).

\textsuperscript{118} \textit{Id.} at 375. The court’s actions in removing the independent executor without personal service violated her due process rights. \textit{Id.}
appealed. The court of appeals found that Probate Code sections 149C(a)\textsuperscript{119} and 222(b)\textsuperscript{120} contain specific language that require personal service on the personal representative.\textsuperscript{121} The court concluded that the specific language of these two sections overrode the language of Probate Code sections 33\textsuperscript{122} and 34\textsuperscript{123} and required personal service on an independent executor before the court may remove her.\textsuperscript{124}

In \textit{Ward v. Property Tax Valuation, Inc.}\textsuperscript{125} the court held that the trial court erred in granting summary judgment against an independent executor in his individual capacity.\textsuperscript{126} The independent executor entered into a written agreement with the appellee on behalf of the estate for appealing an ad valorem tax assessment. The agreement specifically named the estate as the owner of the property subject to the agreement and the independent executor signed the agreement on behalf of the estate as independent executor. Almost a year after the parties entered the agreement the appellee filed suit against the independent executor individually and in his capacity as executor for payment of fees under the agreement. The trial court granted the appellee’s summary judgment against the independent executor, both individually and as independent executor. The independent executor appealed the summary judgment entered against him individually. The appeals court found that the agreement clearly indicated, as a matter of law, that the appellee could look only to the executor in his fiduciary capacity for payment.\textsuperscript{127}

In \textit{Bernstein v. Portland Sav. \& Loan}\textsuperscript{128} the court found that a judgment entered against an estate was valid against the independent executor.\textsuperscript{129} The jury found that the decedent committed conspiracy, fraud, and conversion and the court entered judgment against the decedent’s estate since he died prior to the trial. The estate appealed on a number of grounds, including the ground that the judgment was void because it held the estate liable for damages. The appeals court agreed that an estate is not a proper party to litigation since it is not a legal entity.\textsuperscript{130} The personal representative participated in the litigation, however, so the judgment bound the personal representative

\begin{itemize}
  \item \footnote{119. \textit{Tex. Prob. Code Ann.} § 149C(a) (Vernon Supp. 1994) has to do with the removal of an independent executor.}
  \item \footnote{120. \textit{Tex. Prob. Code Ann.} § 222(b) (Vernon Supp. 1994) has to do with the removal of a personal representative following notice.}
  \item \footnote{121. 842 S.W.2d at 375.}
  \item \footnote{122. \textit{Tex. Prob. Code Ann.} § 33 (Vernon 1980) has to do with the service of notices in probate actions.}
  \item \footnote{123. \textit{Tex. Prob. Code Ann.} § 34 (Vernon 1980) has to do with service on a party’s attorney.}
  \item \footnote{124. 842 S.W.2d at 375.}
  \item \footnote{125. 847 S.W.2d 298 (Tex. App.—Dallas 1992, writ denied).}
  \item \footnote{126. \textit{Id.} at 299, 301.}
  \item \footnote{127. \textit{Id.} at 300.}
  \item \footnote{128. 850 S.W.2d 694 (Tex. App.—Corpus Christi 1993, writ denied).}
  \item \footnote{129. \textit{Id.} at 700.}
  \item \footnote{130. \textit{Id.} at 699 (citing Henson v. Estate of Crow, 734 S.W.2d 648, 649 (Tex. 1987)). The personal representative of the estate, or the heirs or beneficiaries, if appropriate, would be the proper party or parties to litigation. \textit{See} 850 S.W.2d at 699 (citing Price v. Estate of Anderson, 522 S.W.2d 690, 691 (Tex. 1975)).}
\end{itemize}
even though it incorrectly named the estate.\(^{131}\)

In *Vineyard v. Irvin*\(^{132}\) the court determined that an order of sale of real property under section 338 of the Probate Code\(^{133}\) is a final order subject to appeal\(^{134}\) and that the co-executors did not have to post a supersedeas bond to suspend the order of sale.\(^{135}\) The decedent’s estate owed a debt secured by a deed of trust on real property. The creditor reduced the debt to judgment and filed a claim against the estate. The creditor then filed an application for order of public sale of the real property under Probate Code section 338,\(^{136}\) which the court ordered. The co-executors requested the court to allow them to file a supersedeas bond to postpone the order of sale while they appealed the order. The court did not allow the co-executors to file the bond and they appealed. The court of appeals first found that the order of sale under section 338 differs from a post-judgment writ of execution because the court must enter a separate order allowing the sale of the real property under section 338.\(^{137}\) The court determined that the order of sale is a final order because it conclusively and finally determines that a sale of estate property will occur, as well as the method of the sale.\(^{138}\) The court next determined that the court of appeals might issue a writ of mandamus compelling the trial court to set the amount of a supersedeas bond.\(^{139}\) The co-executors contended on appeal that the requirement of posting bond did not apply to them and that they could suspend the sale without posting bond. The court of appeals examined section 29 of the Probate Code,\(^{140}\) which provides that personal representatives do not have to post bond in appeals unless the appeal personally concerns the personal representative.\(^{141}\) The

\(^{131}\) 850 S.W.2d at 700. The court found that a judgment naming an estate may bind the personal representative if the personal representative appears and acts in the case. *Id.* at 699 (citing *Price v. Estate of Anderson*, 522 S.W.2d at 692; *Dueitt v. Dueitt*, 802 S.W.2d 859, 861 (Tex. App.—Houston [1st Dist.] 1991, no writ)).

\(^{132}\) 855 S.W.2d 208 (Tex. App.—Corpus Christi 1993, no writ).

\(^{133}\) TEX. PROB. CODE ANN. § 338 (Vernon 1980) governs the sale of mortgaged property at the creditor’s request.

\(^{134}\) 855 S.W.2d at 211.

\(^{135}\) *Id.* at 212.

\(^{136}\) TEX. PROB. CODE ANN. § 338 (Vernon 1980).

\(^{137}\) 855 S.W.2d at 210. The court also found that a sale under TEX. PROB. CODE ANN. § 338 (Vernon 1980) requires continuing court supervision under TEX. PROB. CODE ANN. §§ 331-358 (Vernon 1980 & Supp. 1994).

\(^{138}\) 855 S.W.2d at 210-11. The subsequent order confirming the sale would not address the issues decided in the initial order of sale, but merely confirm the details of the sale. The court thus determined that the order of sale is a final order that the executors may appeal. *Id.* at 211.

\(^{139}\) *Id.* at 211. TEX. R. APP. P. 47(d) allows the owner of real property to suspend foreclosure on the real property by posting security. The trial court ordinarily does not have discretion to refuse to set the amount of the supersedeas bond. 855 S.W.2d at 211 (citing *Oldfield v. Lester*, 144 Tex. 1112, 188 S.W.2d 982, 982 (1945); *Elizondo v. Williams*, 643 S.W.2d 765, 767 (Tex. App.—San Antonio 1982, no writ); *Amalgamated Transit Union v. Dallas Public Transit Board*, 430 S.W.2d 107, 120 (Tex. Civ. App.—Dallas 1968, writ ref’d n.r.e.), cert. denied, 396 U.S. 838 (1969).

\(^{140}\) TEX. PROB. CODE ANN. § 29 (Vernon 1980).

\(^{141}\) 855 S.W.2d at 211. The court also relied on *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 480-82 (Tex. 1964). The *Ammex* court determined that the State could suspend judgment without filing a supersedeas bond based upon the general exemption granted to the State for filing bonds under TEX. REV. CIV. STAT. ANN. art. 2276 (Vernon 1971) (repealed).
court chose not to construe section 29 of the Probate Code any more narrowly than its predecessor statute or the current law exempting state and federal agencies from filing bond on appeal and held that the co-executors could suspend the order of sale without posting a supersedeas bond.

In *Bank One Texas, N.A. v. Ameritrust Texas, N.A.*, the court examined the Substitute Fiduciary Act to determine which of two fiduciaries received the right to serve as executor under a decedent's will. The decedent named MBank Dallas as independent executor of his 1986 will. The legislature passed the Substitute Fiduciary Act in 1987. MCorp was a bank holding company that owned all of the stock of MCorp Financial, which owned MBank Dallas, and MVestment Corp., which owned MTrust Corp. MCorp filed appropriate documentation with the banking commissioner in 1987 and thereafter substituted MTrust as fiduciary for MBank Dallas. In 1989 the FDIC became receiver for MBank Dallas and transferred the assets to Deposit Insurance Bridge Bank, N.A. The purchase and assumption agreement between Bridge Bank and FDIC provided for the transfer of all fiduciary appointments to which MBank Dallas was named in will and other documents. Bank One, Texas, N.A. acquired Bridge Bank later in 1989. Ameritrust Corporation purchased all of the stock of MVestment Corp. and MTrust Corp. in 1990, based on a purchase agreement the parties entered in October 1989. Ameritrust then filed an instrument of assumption with the banking commissioner, in which it assumed all of the liabilities and obligations under MCorp's documentation in connection with the substitution of fiduciary appointments. The decedent died in October 1989, prior to the time Ameritrust entered the purchase agreement with MCorp. Ameritrust filed an application for probate and for issuance of letters testamentary and the probate court admitted the will to probate. Ameritrust asked the probate court to declare that Ameritrust was the proper executor under the Substitute Fiduciary Act. Bank One answered and

---


145. 855 S.W.2d at 212.
146. 858 S.W.2d 516 (Tex. App.—Dallas 1993, writ denied).
148. 858 S.W.2d at 519-21.
149. *Tex. Rev. Civ. Stat. Ann.* art. 548h (Vernon Supp. 1994). The act provides that, under certain conditions, a subsidiary trust company may serve as substitute fiduciary for an affiliate bank named in the will or trust agreement. In order to serve the bank holding company that owns the trust company and affiliated banks must file an irrevocable undertaking of responsibility of acts and omissions of the trust company with the banking commissioner. *Id.*
150. *Id.*
counterclaimed, urging that it was the proper executor at the time of the
decedent’s death due to the purchase and assumption agreement between
FDIC and Bank One. The probate court granted summary judgment for
Ameritrust and denied Bank One’s motion for summary judgment. The
appeals court found that Ameritrust was the proper executor by reading the
will and the statute together. The court also found that the Substitute
Fiduciary Act is constitutional.

C. CLAIMS AGAINST THE ESTATE

In Kuenstler v. Trevino the court affirmed the executor’s obligation to
pay a claim to the creditor on a note secured by a truck that the decedent
purchased shortly before his death, but found that the decedent’s attempted
gift of the vehicle was ineffective. The decedent purchased the
truck through a down payment and a loan. The decedent purported to give
the truck to another person through a gift deed, which did not recite
whether the donee would assume the liability on the debt. The decedent
made the first payment on the note and the donee made the next two pay-
ments. The decedent then died and the donee advised the executor at the
funeral that she would continue to make the payments on the note. The
donee failed to continue the payments, however, and the bank repossessed
the vehicle. The donee filed a petition with the probate court for a declar-
atory judgment against the estate and the bank, in which she alleged that she
owned the truck and that the estate had the obligation to pay the note. The
bank filed a claim and petitioned the court to order the executor to pay the
amount remaining on the note. The trial court denied the estate’s motion for
summary judgment and found that the decedent gave the truck to the donee
and that the estate was liable on the note. The trial court ordered the execu-
tor to pay the amount due on the note and to transfer title on the vehicle to
the donee. The executor appealed. The appeals court first found that the
executor could not appeal the trial court’s order denying her motion for
summary judgment because it was an interlocutory order. The court next
found that the decedent could not give the donee all interest in the truck

151. 858 S.W.2d at 519-20. The will named MBank Dallas and its successors as executor.
The court found that MTrust was successor to MBank Dallas through the Substitute Fiduci-
ary Act, TEX. REV. CIV. STAT. ANN. art. 548h, §§ 2(d) and 2(g) (Vernon Supp. 1994). The
court found that on the date of the substitution agreement, in 1987, MBank transferred a
valuable property right in connection with the decedent’s will to MTrust. 858 S.W.2d at 520.
Bank One had contended that MBank had no property interest in connection with its appoint-
ment under the will in 1987, but the court did not find this argument persuasive. Id.
152. TEX. REV. CIV. STAT. ANN. art. 548h (Vernon Supp. 1994).
153. 858 S.W.2d at 521. The court found that the decedent had constructive notice that
the legislature enacted the act and of its provisions. Id. The decedent could have revised his
will to change executor had he so chosen, but, by not doing so, he in effect allowed the substi-
tution under the act. Id. The court also found that another court, in In re Estate of Touring,
775 S.W.2d 39 (Tex. App.—Houston [14th Dist.] 1989, no writ), had previously found the
statute constitutional. 858 S.W.2d at 521.
155. Id. at 719.
156. Id. at 718.
157. Id. at 717.
since his interest was subject to the indebtedness. Finally, the court held that the trial court had jurisdiction to order the executor to pay the debt even though the estate was under independent administration.

In *In re Estate of Wallock* the court determined that the trial court erred in classifying a claim filed more than three years after the original grant of letters testamentary as a class 7 claim. The decedent was a general partner in a partnership formed to acquire real property. The partnership and each of the partners executed a non-recourse note to finance the purchase of the real estate. The decedent and his wife died at or about the same time and the court probated their wills together. The court appointed independent co-executors of the two estates, who served for about two years. Two of the executors resigned, and the court converted the estates to dependent administration and appointed the remaining executor as administrator of the estates. Within six months after the court originally granted letters of administration in the dependent administration the bank from which the partnership acquired the financing from the property filed an authenticated secured claim against both estates. The bank filed its claim as a preferred debt and lien against the partnership property. The dependent administrator allowed and the court approved the claim. One of the former general partners, which had withdrawn from the partnership and filed for reorganization under chapter 11 of the Bankruptcy Code during the pendency of the administration of the estates, conveyed part of the real property to the bank in satisfaction of the debt. The former partner claimed that the decedent defaulted and amended the bank's claim to an unsecured claim and requested that the court retain the classification as a class 7 debt. The dependent administrator allowed the claim and the court approved the claim as a class 7 claim under section 322 of the Probate Code.

Other creditors of the estates appealed the court's decision. The appeals court first found that the other creditors could appeal by writ of error. The court then determined that the former partner could not acquire the status of the bank's claim through subrogation. The court held that the former partners

---

158. *Id.* at 718. The court could find no evidence that the decedent intended to make future payments on the note after the date of the gift. *Id.*

159. *Id.* at 718-19.

160. 846 S.W.2d 536 (Tex. App.—Corpus Christi 1993, no writ).

161. *Id.* at 541.


163. The former partner argued subrogation, contribution, and indemnity.

164. TEX. PROB. CODE ANN. § 322 (Vernon Supp. 1994). Claims presented more than six months after the court originally granted letters of administration or testamentary are class 8 claims. *Id.*

165. 846 S.W.2d at 540. The court noted that an appellant may proceed by writ of error if the appellant is a party to the suit who brings the writ within six months of the judgment, but who did not participate at the trial, and the face of the record plainly reflects the error. *Id.* at 539. The court found that the creditors brought the writ within six months of the order and that they were interested parties. *Id.* at 540. The court then determined that the other creditors did not participate at the trial since the only action that they had taken was filing claims and that the court did not hold a hearing prior to approving the former partner's claim. *Id.*

166. *Id.* The court first found that the trial court vacated its order approving the bank's claim when it approved the former partner's claim and that it had no jurisdiction to do so. *Id.*
should have an accounting to allocate profits and losses to fix the amount of the claim, so the trial court erred in approving the full amount of the claim.\textsuperscript{167}

In \textit{Ertel v. O'Brien}\textsuperscript{168} the court found that a corporate co-executor breached its fiduciary duty by not paying a timely presented unsecured claim.\textsuperscript{169} The decedent and his wife leased an airplane on a monthly lease with an obligation to purchase the airplane at the end of the lease term. The decedent notified the lessor that he intended to transfer the aircraft to a corporation in which he held an ownership interest. The decedent and the corporation never entered a written agreement for the transfer of the aircraft. A partnership in which the decedent was a partner made monthly payments on the airplane from the time that the decedent informed the lessor of the transfer until several months following the decedent's death. The court appointed the decedent's wife and the bank as co-executors and the bank assumed all of the decedent's records and managed the estate. The lessor demanded payment of the purchase price for the airplane, or, in the alternative, the execution of a new lease-purchase agreement, within six months after the court issued letters testamentary. The bank failed to pay the lessor anything on the lessor's claim, although it subsequently paid itself more than $126,000 in unsecured claims and paid other unsecured creditors more than $50,000. The bank resigned as co-executor, after which the lessor sued the bank and the decedent's wife individually and as co-executors of the estate for failure to pay the claim and for breach of the lease.\textsuperscript{170} The trial court found that the bank did not breach its fiduciary duty to the lessor, but that the bank was negligent in failing to enter an agreement transferring the airplane to the corporation. The trial court also found that the bank did not breach its fiduciary duty by failing to set aside funds to pay the claim in the event the corporation breached the contract. The lessor appealed on the basis that the trial court incorrectly found that the bank did not breach its fiduciary and statutory duties. The appeals court noted that a higher standard of care applies to a corporate fiduciary than to an individual because of its professional status\textsuperscript{171} and found that the bank breached its fiduciary and statutory duties by not paying the lessor's claim.\textsuperscript{172} The appeals court further found that the lessor presented his claim in a timely manner and that the executor should have paid this

---

\textsuperscript{167} Id.
\textsuperscript{168} 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).
\textsuperscript{169} Id. at 21.
\textsuperscript{170} The lessor also sued the corporation based on the conversation with the decedent concerning the transfer of the airplane and the obligation to the corporation. The trial court found that statute of frauds barred the lessor's claims against the corporation.
\textsuperscript{171} Id. at 20.
\textsuperscript{172} Id. at 21. The court also found that the trial court erred in its determination that the
claim either when the executor paid the other unsecured creditors or upon the termination of the lease.173

In Goins v. League Bank & Trust174 the court determined that a bank timely filed a claim in an estate and that the bank elected to proceed under section 306(a)(2) of the Probate Code175 in connection with the claim.176 The bank filed an authenticated claim with the administrator of the decedent’s estate. The administrator, who was the decedent’s wife, did not respond to the claim, and the bank filed suit against the administrator.177 The bank made a motion for summary judgment, which the trial court granted, then later amended. The administrator appealed, claiming that the trial court granted relief to the bank that the bank had not requested in its motion for summary judgment. The trial court ordered the clerk to classify the bank’s claim as a matured, secured claim, fixed as a preferred debt and lien against the real property under section 306(a)(2) of the Probate Code.178 The bank requested the court to enter judgment on the claims docket as a matured, secured claim, which the court of appeals found sufficient to show that the bank elected to proceed under section 306(a)(2) of the Probate Code179 and that the trial court granted the relief the bank requested under its election.180

D. ESTATE DISTRIBUTIONS

In Cullen Center Bank & Trust v. Texas Commerce Bank, N.A.181 the court held that the marital trust should receive both income and principal earned on an account the co-executors established to protect the marital trust from estate and inheritance taxes.182 The original co-executors of the decedent’s estate brought a declaratory judgment for construction of the will since the decedent purported to bequeath more than 100% of his estate in the will and its codicils. The court determined that the testamentary marital

bank’s negligent handling of the lessor’s claim did not constitute a breach of fiduciary duty. Id.

173. Id. The court found that if the estate did not have adequate funds to pay all of the claims of the same class as the lessor’s claim, the bank should have paid the claims pro rata. Id. The court also found that the bank failed to act in good faith when it determined that the corporation had assumed the obligation and that the claim was no longer valid. Id. Even if the bank had acted in good faith, however, the bank could not use the good faith as a defense to breach of fiduciary duty. Id. at 22 (citing Slay v. Burnett Trust Co., 143 Tex. 621, 187 S.W.2d 377, 377 (1945)).


175. TEX. PROB. CODE ANN. § 306(a)(2) (Vernon 1980).

176. 857 S.W.2d at 631.

177. The administrator and her husband executed a promissory note secured by a deed of trust. The decision is unclear whether the administrator was sued solely in her individual capacity, see 857 S.W.2d at 629, or both individually and as administrator of the estate. See id. at 630.

178. TEX. PROB. CODE ANN. § 306(a)(2) (Vernon 1980). This section provides that a claimant must state whether it requested to have the claim, once allowed and approved, fixed as preferred debt and lien against the real property that secures the indebtedness.

179. Id.

180. 857 S.W.2d at 631.

181. 841 S.W.2d 116 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

182. Id. at 126.
trust should receive 26% of the decedent’s estate. The will provided that the decedent’s widow should receive all of the income from the marital trust during her lifetime. The trial court determined, as part of the will construction, that the marital trust should receive its percentage of the estate without liability for estate and inheritance taxes, and any penalties and interest on estate tax. The co-executors elected to pay the estate tax in installments under section 6166 of the Internal Revenue Code.\textsuperscript{183} The co-executors wished to preserve the marital deduction for the marital trust, since the marital deduction resulted in a significant tax savings to the estate.\textsuperscript{184} The co-executors consulted with several experts and decided to create an account to receive the marital trust’s share of each dollar used to pay taxes or penalties or interest on the taxes.\textsuperscript{185} The co-executors delivered all of the income earned on the account set aside for the marital trust to the trust in 1986, 1987, and 1988. The co-executors determined to make the same distribution in 1989, but did not do so, apparently because of their involvement with litigation concerning the estate. The co-executors again did not distribute income earned on the account in 1990. No one paid taxes on the account’s income for 1989 and 1990, resulting in a large deficiency to Internal Revenue Service. As a condition of the settlement agreement reached by the parties to the litigation the co-executors resigned. The trustees of the marital trust applied to the court for partial distribution of the estate, requesting distribution of the funds in the account set aside for the benefit of the marital trust and all income earned on the account. One of the other beneficiaries of the estate objected to the distribution. The probate court approved the distribution and the objecting beneficiary appealed. The appeals court first refused to consider the appellant’s points of error concerning the amount of the distribution to the marital trust because the will construction action finally disposed of these points of error years before.\textsuperscript{186} The court then addressed points of error concerning various findings of fact.\textsuperscript{187} The court noted that the appellant did not challenge the trial court’s conclusions of law that the trustees were requesting a distribution of the property the will gave to the trust and that all principal and income earned on the account belonged to the marital trust.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{183} I.R.C. § 6166 (1986).
\item \textsuperscript{184} The decedent’s net estate was worth almost $85 million, of which almost half would go to taxes without the marital deduction. The marital deduction significantly lowered size of the taxable estate.
\item \textsuperscript{185} The co-executors deposited 26 cents in the account for each 74 cents they paid in estate and inheritance taxes, or in interest and penalties on the estate and inheritance taxes.
\item \textsuperscript{186} 841 S.W.2d at 121.
\item \textsuperscript{187} Id. at 122-26. The court found that uncontroverted evidence supported the trial court’s findings concerning the establishment of the account set aside for the marital trust, the manner in which the co-executors set up the account and transferred funds into the account, and the distributions from the account between 1986 and 1988. Id. at 122-23. The court also found that the objecting beneficiary admitted that the principal of the account is the property of the marital trust, so that the trial court did not err in making that finding of fact. Id. at 123.
\item \textsuperscript{188} Id. at 126.
\end{itemize}
V. GUARDIANSHIPS

In *Henry v. LaGrone* the court determined that the trial court abused its discretion by refusing to allow the transfer of a pending case to a statutory probate court in another county. Tarrant County Probate Court No. 2 appointed guardians of the person of the elderly ward in 1988. The court found that no guardianship of the ward's estate was necessary since all of the ward's property was held in trust for her benefit. The guardians of the person reported in their 1990 annual report to the court that the trustee had informed the nursing home in which the ward resided that she had no assets. The court appointed an attorney ad litem to look into the extent of the trust's assets. The attorney ad litem found that the trustee still held assets for the benefit of the ward and that the trustee may have breached his fiduciary duty to the ward. The attorney ad litem further recommended that the court allow a suit for removal of the trustee. The court ordered the trustee to pay the attorney ad litem's fees, which the trustee refused to do. The attorney ad litem filed motions for contempt to compel the trustee to pay the fees. The trustee moved to have the cause transferred from the Tarrant County court to a court of competent jurisdiction in the county in which both the trustee resided and the ward's real property was located. The probate court denied the trustee's motion. The attorney ad litem then filed an application to appoint a guardian of the ward's estate and the probate court appointed him as guardian of the estate. The trustee filed a petition for declaratory judgment in the district court of the county in which he resided, requesting the court to approve the trust and affirm transfers that the ward made to the trustee. The guardians of the person and estate filed a motion to transfer venue to Tarrant County, which the district court denied. The probate court entered an order transferring the district court suit to the probate court and commanding the district clerk to deliver all pleadings and orders concerning the district court action within ten days. The trustee filed an application for a writ of prohibition in the district court, which the district court granted and which prohibited the transfer of the cause from the district court to the probate court. The guardians then filed application for writ of mandamus, in which they requested the appeals court to order the district court to withdraw the writ of prohibition and the district clerk to transfer the cause of action. The court of appeals determined that the probate court properly ordered the transfer of the cause of action.

---

189. 842 S.W.2d 324 (Tex. App.—Amarillo 1993, no writ).
190. *Id.* at 328.
191. *Id.* at 326-28. The court analyzed the four conditions that must exist to allow a statutory probate court to transfer a cause of action to the probate court under *Tex. Prob. Code Ann.* § 5B (Vernon Supp. 1993). The court first found that the court exercising the power to transfer was a statutory probate court and that a cause of action was pending in a district court, thus meeting the first and third conditions. 842 S.W.2d at 326. The court then found that the second condition, that an estate is pending in the statutory probate court at the time of the transfer, existed after the ad litem applied to the probate court for the appointment of a guardian of the ward's estate. *Id.* at 326-27. Finally, the court found that the relief that the trustee requested in his declaratory judgment cause of action was appertaining to or incident to the estate pending in the probate court, satisfying the last condition. *Id.* at 327.
In *Hunter v. NCNB Texas National Bank* \(^{192}\) the court considered the issue whether probate homestead protection applies to guardianship estates.\(^{193}\) The ward executed a revocable living trust in 1985 and later conveyed her homestead property to the trustee by warranty deed. The trust provided for the ward during her lifetime and terminated upon her death, with the assets to be distributed to her estate. The ward’s daughter returned to live at the residence in 1987 in order to care for her mother and the ward’s sister. The trial court established a guardianship for the ward in 1988, naming the ward’s son as guardian of both the person and estate of the ward. The son moved the ward into a nursing home, but the ward’s daughter and sister continued living in the residence. The ward entered into a one year lease of the residence with the trustee for 1989, but she refused to pay rent or sign a new lease for 1990. The daughter alleged that she had a homestead interest in the residence. The trustee filed a petition for declaratory judgment in which it requested the trial court to determine whether the residence was a part of the trust estate and subject to the Trustee’s administration, or the daughter’s homestead. The trial court severed the daughter’s cross action against the guardian and counterclaim against the trustee and determined that the daughter had no homestead interest in the residence property. The court of appeals first found that the trial court did not abuse its discretion when it severed the homestead issue from other issues.\(^{194}\) The court then considered the daughter’s claim that she had a homestead interest in the property.\(^{195}\) The court determined that the daughter could have no homestead interest in the property under sections 271 and 272 of the Probate Code\(^{196}\) until the death of the ward.\(^{197}\)

---

\(^{192}\) 857 S.W.2d 722 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

\(^{193}\) *Id.* at 726.

\(^{194}\) *Id.* at 725. The court found that the trial court considered the daughter’s counterclaim on the homestead issue and that the remaining claims did not involve the issues or facts. *Id.*

\(^{195}\) *Id.* at 726. The daughter based her claim on Tex. Prob. Code Ann. § 271 (Vernon Supp. 1994), which provides that the court may set aside exempt property for the benefit of the decedent’s surviving spouse, minor children, and unmarried children living with the family, and Tex. Prob. Code Ann. § 272 (Vernon Supp. 1993), which provides that the executor or administrator of the decedent’s estate shall deliver the homestead to the surviving spouse, if any, or to the guardian of minor children and to unmarried children residing with the family. The daughter argued that Tex. Prob. Code Ann. § 108 (Vernon 1980), which provides that Probate Code provisions applicable to decedent’s estates shall also apply to guardianships unless they are inconsistent with guardianship provisions, should apply to Tex. Prob. Code Ann. §§ 271-272 (Vernon Supp. 1994), thus giving her a homestead interest in the property.


\(^{197}\) 857 S.W.2d at 726. The court also found that the daughter had no homestead protection from creditors under Tex. Const. art. XVI, § 50 (Vernon 1993), which did not provide the daughter with a homestead interest in the property because no issue existed concerning the forced sale of the property to settle debts. 857 S.W.2d at 726. The court further overruled the daughter’s argument that she had an inheritance right in the property that she would lose if the trustee sold the property on the basis that the daughter did not have a right under the will until its probate. *Id.* (citing Tex. Prob. Code Ann. § 94 (Vernon 1980)).
VI. TRUSTS

A. CONSTRUCTIVE TRUSTS

In *Intertex, Inc. v. Kneisley* the court held that one judgment creditor did not acquire title to real property under the foreclosure of a constructive trust when the rights of other judgment lienholders were not before the court that imposed the constructive trust. The court in *Exploration Co. v. Vega Oil & Gas Co.* did not impose a constructive trust because it could find no fraud. In *Cherokee Water Co. v. Advance Oil & Gas Co.* the court held that the two year statute of limitations applied to actions for a constructive trust arising from the sale of gas. In *Grace v.*
the court did not impose a constructive trust because it found neither evidence of a confidential relationship between the parties nor fraud. The court, in *McAlpin v. Sanchez*, held that the trial court correctly imposed a constructive trust over two oil leases but found that the trial court improperly determined the interests of the parties under the constructive trust.

**B. Resulting Trusts**

In *Savell v. Savell* the court determined that the donor of property grafted a resulting trust on the gift by orally informing the donees that he intended the gifts to take effect upon his death. The appellant brought suit against her brothers and the co-trustees of her mother's testamentary trust for partition of real property. The appellant's father intervened, asserting that he had a life estate in the property subject to the suit. After two trials the trial court entered summary judgment for the appellant's father, brothers, and the co-trustees, finding that only the appellant's father had a present interest in the property. The appellant's mother left her interest in the real property in question in trust for the benefit of her husband for his

since it did not file suit within two years of receiving clear title to the property and since it was aware of the gas production in 1982. *Id.* at 135.

205. 853 S.W.2d 92 (Tex. App.—Houston [14th Dist.] 1993, no writ).

206. *Id.* at 97. The cause of action arose when a purchaser of property from the FSLIC attempted to obtain a wastewater capacity reservation. The owners and original developers of the property failed to make payments and a bank foreclosed. The bank engaged a company to continue the development, but the bank later failed and the FSLIC acquired the property. When the purchaser from FSLIC attempted to obtain his wastewater reservation for the property, the company hired by the bank asserted that only it had the right to obtain the reservation and that the new owner of the property could not obtain the wastewater capacity assignment from FSLIC. The city granted the owner of the property the right to obtain the wastewater capacity reservation. The company hired by the bank then sued the new owner alleging several causes of action, including interference with a property right and a business expectancy, and asking for the imposition of a constructive trust. The trial court entered summary judgment for the owner of the property. On appeal, the appellants asserted that the new owner of the property held the sewer water capacity allocation in constructive trust. The court stated that, in order for a constructive trust to apply, a confidential or fiduciary relationship must exist between the parties and that no such relationship existed. *Id.*

207. 858 S.W.2d 501 (Tex. App.—Corpus Christi 1993, writ denied).

208. *Id.* at 507. The court found that the terms of an oral agreement between a landman and a geologist concerning the development of certain mineral properties supported the imposition of the constructive trust. *Id.* The landman acquired one lease for himself and one for his wife following the expiration of the primary term of the lease when it was held for the benefit of a group of investors under an oral agreement. The geologist and the other investors petitioned the trial court for a judgment declaring the parties' rights in connection with the leases and requested the imposition of a constructive trust over the leases. The trial court held that the landman breached duties to his partner and the other investors and imposed a constructive trust over the leases in favor of all of the investors. *Id.*

209. *Id.* at 507-08. The trial court entered a judgment reflecting the interests of the investors under a Joint Operating Agreement, which only became effective upon completion of a producing well. The court of appeals held that the trial court should have determined the interests of the parties under the oral partnership agreement, which was in effect prior to completion of a producing well. *Id.* at 508.


211. *Id.* at 839.

212. The first trial ended in a mistrial and the second trial ended with a hung jury.
lifetime. The appellant’s father deeded his undivided interest in the properties to his children in 1980. The father told his family members at the time that he executed the deeds that he intended for the deeds to become operative at his death. The father retained possession of the property and paid for all taxes and repairs on the property. Although the deeds recited consideration, everyone, including the appellant, admitted that the donees paid no consideration for the property. The appeals court noted that the purpose of a resulting trust is to prevent unjust enrichment due to failure of an express trust.\(^{213}\) The court looked at the facts surrounding the execution of the deeds and determined that the appellant’s father clearly intended to retain his interest in the property until his death.\(^{214}\) The court thus found that the father engrafted a trust upon the deeds by his statements to family members.\(^{215}\)

In *Masterson v. Hogue*\(^{216}\) the court did not find a resulting trust because the persons alleging the resulting trust failed to present any summary judgment evidence to rebut a presumption of gift.\(^{217}\) The decedent acquired property at times after 1947, apparently with his parents’ assistance. Following his death, the decedent’s mother, who has since died, and his two siblings alleged that the decedent held the property in a resulting trust because his parents assisted in the purchase of the assets. The appeals court noted that a presumption of gift arises when parents assist a child to purchase property held in the child’s name and that only clear and convincing evidence will overcome the presumption.\(^{218}\) The family members offered no summary judgment evidence supporting their allegation of a resulting trust and, in fact, the trial court deemed that they admitted that the parents gratuitously assisted their son without expectation of reimbursement. The appeals court held that the failure of the family members to respond to the requests for admissions in a timely manner constituted a judicial admission, so that they were deemed to have admitted that the parents’ assistance with the purchase of various assets were gifts to their son.\(^{219}\)

**C. STANDBY TRUST**

In *In re Estate of Canales*\(^{220}\) the court held that grantors do not have to execute standby trust agreements with the same formalities with which they

---

\(^{213}\) 837 S.W.2d at 839.

\(^{214}\) *Id.* The court found that the testimony of the other children and other family members provided clear and convincing evidence that the father intended to retain ownership and possession of the property. *Id.*

\(^{215}\) *Id.* The court also found that the appellant did not have a present possessory interest in the property since her father orally retained a life estate in his interest in the property and since he was the life beneficiary of the testamentary trust that owned the remaining undivided interest in the property. *Id.* at 840. Because the appellant did not have a present possessory interest in the land her suit for partition was premature. *Id.*

\(^{216}\) 842 S.W.2d 696 (Tex. App.—Tyler 1992, no writ).

\(^{217}\) *Id.* at 697.

\(^{218}\) *Id.* (citing Bogart v. Somer, 762 S.W.2d 577 (Tex. 1988)).

\(^{219}\) *Id.*

\(^{220}\) 837 S.W.2d 662 (Tex. App.—San Antonio 1992, no writ).
execute their wills and that section 58a of the Probate Code permits unfunded standby trusts to receive estate assets. The decedent signed his will and a revocable trust agreement in 1982. The trust agreement established a trust for the grantor's life then to trusts for his three children. The trust agreement also established the three trusts for the benefit of the grantor's children. The trustee of the trusts acknowledged receipt of $1.00 in cash and the property listed on Schedule A to the trust agreement. Schedule A never contained a list of property. The grantor died about two months after he executed his will and the trust agreement. The executor filed a petition for final accounting, distribution and closing of the estate, resignation of trustee, and release and discharge of executor and trustee approximately three years after the decedent's death. Two of the children answered and filed counterclaims, and the county court transferred the estate to the district court. The district court found that the will and both sets of trusts under the trust agreement were valid and that the children had received benefits under the will and trust, so that they could not contest the dispositive provisions of the documents. One of the sons appealed. The appeals court first found that the trust for the grantor's benefit was funded and did not fail. The court then found that a testator must execute a standby trust before or at the same time he executes his will. The court next determined that section 58a of the Probate Code does not specifically state whether a grantor must fund a trust executed prior to or at the same time as his will, but determined that funding is not necessary if the trust agreement meets the statute's other requirements. The court concluded that unfunded standby trusts that comply with Probate Code section 58a may receive estate assets.

D. PROCEDURAL MATTERS

In Hedley Feedlot, Inc. v. Weatherly Trust the court held that beneficiaries of a trust were not necessary parties to the suit. The co-trustee purchased cattle, feed, and related materials and services from a feedlot. The trust lost several thousand dollars on its investment, as well as the anticipated profits. The trust sued the feedlot for violation of the Texas Deceptive

---

221. Id. at 665.
222. TEX. PROB. CODE ANN. § 58a (Vernon 1980).
223. 837 S.W.2d at 667.
224. Id. at 664.
225. Id. at 665 (citing TEX. PROB. CODE ANN. § 58a (Vernon 1980)). This section does not require that the trust be executed with the same formalities as a will. Further, TEX. PROP. CODE ANN. § 112.004 (Vernon 1984) does not require witnesses to a grantor's signature on trust agreements.
226. TEX. PROB. CODE ANN. § 58a (Vernon 1980).
227. 837 S.W.2d at 666. The court noted that the legislature could have specifically required funding if it chose to do so, but it did not. Id.
228. TEX. PROP. CODE ANN. § 58a (Vernon 1980).
229. 837 S.W.2d at 667. The court reversed the part of the trial court's order that found that the will and trust agreement were valid as a matter of law because the executor's motion did not make that assertion. Id. at 668.
230. 855 S.W.2d 826 (Tex. App.—Amarillo 1993, writ requested).
231. Id. at 833.
Trade Practices Act\textsuperscript{232} for misrepresenting the characteristics and quality of the goods and services. The trial court entered judgment against the feedlot and the feedlot appealed. The feedlot first alleged that the trust was not a consumer as defined by the Deceptive Trade Practices Act.\textsuperscript{233} The appeals court held that the trust was a consumer within the meaning of the act.\textsuperscript{234} The court next found that the beneficiaries of the trust were not necessary parties.\textsuperscript{235} Finally, the court held that the co-trustee could properly invest in cattle.\textsuperscript{236}

In \textit{Wohler v. La Buena Vida In Western Hills, Inc.}\textsuperscript{237} the court held that a petition naming as defendant the trustee individually and as trustee was sufficient to bind trust assets.\textsuperscript{238} The court further found that service was effective because the address on the citation listed the trustee individually and as trustee and because the petition alleged a cause of action against the trustee both individually and as trustee.\textsuperscript{239} Finally, the court held that the beneficiaries of the trust were not necessary parties to the suit because their interests were not adverse to the interests of the trustee.\textsuperscript{240} A homeowners association sued the trustee individually and in her capacity as trustee to foreclose its lien on a lot that the trustee owned for the trustee's failure to pay assessments. The court entered a default judgment against the trustee, individually and in her fiduciary capacity. A third party purchased the property at the sheriff's sale and the district court paid the remaining sums, after payment of the assessment and costs to the homeowners association, to the trustee as trustee. The trustee negotiated the district clerk's check. The trustee then appealed, alleging that the petition made no claim against the trust and that service was defective.

In \textit{Werner v. Colwell}\textsuperscript{241} the court considered whether the trial court correctly entered judgment against an employee benefit trust when the trustee was not named a party to the suit and determined that the trustee, by testifying at the trial in her fiduciary capacity, allowed the court to enter judgment

\textsuperscript{232} TEX. BUS. \& COM. CODE ANN. §§ 17.46(b)(5), (b)(7) (Vernon 1987).
\textsuperscript{233} TEX. BUS. \& COM. CODE ANN. § 17.45(4) (Vernon 1987).
\textsuperscript{234} 855 S.W.2d at 832. The court did not agree with the feedlot's contention that the trust bought the cattle for an investment rather than for use as a consumer. \textit{Id.}
\textsuperscript{235} \textit{Id.} at 833. The court noted that the feedlot did not provide a copy of the trust agreement with the record, so that the court had to presume that the trial court correctly considered the language of the trust document in determining that the beneficiaries were not necessary parties. \textit{Id.} The court found that the beneficiaries did not complain about the co-trustee's representation and they did not assert that the co-trustee had a conflict of interest with them. \textit{Id.}
\textsuperscript{236} \textit{Id.} at 834. The court examined TEX. PROP. CODE ANN. § 113.056(b) (Vernon Supp. 1994), which provides that a trustee may invest in every type of property in which ordinarily prudent persons would invest. 855 S.W.2d at 833-34. The court found that the trustee could clearly invest in cattle. \textit{Id.} at 834.
\textsuperscript{237} 855 S.W.2d 891 (Tex. App.—Fort Worth 1993, no writ).
\textsuperscript{238} \textit{Id.} at 893.
\textsuperscript{239} \textit{Id.}
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} 857 S.W.2d 75 (Tex. App.—Waco 1993), rev'd, 37 Tex. Sup. Ct. J. 208, No. D-4260, 1993 WL 483536 (Nov. 24, 1993) (reversing the judgment against the trustee in her fiduciary capacity because she was neither named in the suit nor served process in her capacity as trustee).
against her in her fiduciary capacity by implied consent. An employee sued her employer and its sole shareholders for injuries that she suffered on the job. The employer was not a subscriber to workers' compensation, but the corporation did have an employee benefit trust. The employee did not name the trustee of the employee benefit trust in her petition. The trustee of the plan appeared at trial and testified in her capacity as trustee. The trustee's attorney objected at trial that she was not named as a party to the suit in her fiduciary capacity, but the trial court never ruled on the objection. The appeals court found that the trial court tried the issue of the trustee's liability by consent since the trustee's attorney did not obtain a ruling about his objection and since the trustee testified about the benefit plan.

E. Privity

In Thompson v. Vinson & Elkins the court held that no privity existed between the attorneys for a testamentary trustee and the beneficiaries of the trust and that it would not depart from the privity requirement in finding a breach of contract. The decedent left her residuary estate in trust for the benefit of her husband during his life, then to her niece and nephew. The decedent's husband and accountant served as initial co-trustees, with the accountant continuing as sole trustee following the husband's death. The accountant engaged Vinson & Elkins to represent him in connection with distribution of the trust assets. The bulk of the trust estate was stock in a closely held corporation, which Vinson & Elkins represented, owned in large part by the husband's family members, whom Vinson & Elkins also represented. The decedent's niece and nephew felt that the trustee and the corporation, aided by Vinson & Elkins, attempted to undermine the value of their interest in the trust through attempting to acquire the stock at its net book value, as determined by the trustee. The niece and nephew sued the trustee, the law firm, and others for causes of action arising out of the transaction. The niece and nephew specifically alleged that the law firm engaged in professional negligence, violated a confidential relationship that it had with them, breached its fiduciary duty to them, converted their property, violated the Deceptive Trade Practices Act, and breached its contract with them. The trial court granted summary judgment to Vinson & Elkins and the niece and nephew appealed. On appeal, they contended for the first time that the law firm engaged in conspiracy with the other defendants against them. The appeals court found that it could not consider this issue because they did not present it to the trial court. The court also found that the niece and nephew did not present a cause of action having to do with interference with their inheritance rights in their pleadings, so it also could not consider this

---

242. 857 S.W.2d at 78.
243. Id.
244. 859 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1993, writ requested).
245. Id. at 621.
246. Id. at 622.
248. 859 S.W.2d at 621.
The court found that the niece and nephew raised the issue of breach of contract in their pleadings, but they did not submit any evidence of contract in their response to the law firm's motion for summary judgment, so the court could not consider this issue on appeal. The court found that no privity existed between the law firm and the niece and nephew to support their claim for professional negligence. The court also found that the niece and nephew did not have a negligence cause of action against the law firm because they were not its clients.

F. Trustees

In Neuhaus v. Richards the court considered the effect of an exculpatory provision in a trust instrument and section 113.003 of the Trust Code on allegations of willful misconduct by the trustees. The grantors established several trusts for the benefit of the children and grandchildren in 1976 and funded the trusts with stock in McAllen State Bank. In July 1982 First City Bancorporation bought all of the stock of McAllen State Bank in a stock exchange. The co-trustees of two of the trusts retained the First City stock in the trusts despite declining values and the beneficiaries' requests. The stock in one of the trusts lost almost all of its value and the trustees

---

249. Id.
250. Id.
251. Id. The court noted that for a professional negligence claim privity depends upon the existence of a contractual relationship between the attorney and client. Id. (citing Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)). The court found that Vinson & Elkins submitted summary judgment proof that it had no privity with the niece and nephew. 859 S.W.2d at 621. The niece and nephew also admitted that they had no privity with the law firm, but asked the court to expand the concept of privity. Id. at 622. The appeals court refused to do so, relying on its reasoning in Dickey, 731 S.W.2d at 583.
252. 859 S.W.2d at 623. The court further found that the law firm owed no fiduciary duty to the niece and nephew because it represented neither the niece and nephew nor the decedent's estate or trust. Id. The court declined to expand the fiduciary relationship that a law firm owes to an executor and trustee to extend to the beneficiaries of the estate or trust. Id. at 624. The trial court also correctly granted summary judgment in favor of the law firm on the niece and nephew's cause of action for violation of a confidential relationship. Id. The niece and nephew both admitted that they had never consulted the law firm. The court found that the niece and nephew did not have a valid cause of action against the law firm for conversion through its advice to a third party, who then allegedly converted their property. Id. Further, the niece and nephew could not make a claim under the Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon 1987 & Supp. 1994), because they were not consumers within the meaning of TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987). In addition the court held that summary judgment denying the Deceptive Trade Practices Act claims was proper because the summary judgment evidence showed that Vinson & Elkins' acts were not a producing cause of damages. 859 S.W.2d at 625. Finally, the court rejected the claim of the niece and nephew that the trial court erred by granting summary judgment because of outstanding discovery issues. Id. at 626. The court noted that the niece and nephew had more than a year to conduct their discovery before the law firm filed its motion for summary judgment and more than fifteen months to do so before the court entered the summary judgment. Id. The niece and nephew did not present motions to compel to the trial court for a ruling, according to the record, although they did file the motions, nor did they request a hearing on the motions or submission dates for the motions.
254. Id. at 75-77.
255. TEX. PROP. CODE ANN. § 113.003 (Vernon 1984).
256. 846 S.W.2d at 77-79.
delayed the sale of the stock in the other trust until it had lost significant value. The beneficiaries of the two trusts sued the co-trustees based upon alleged mismanagement of the First City stock. The trial court granted summary judgment against the beneficiaries. The appeals court first examined the duty of a trustee to manage trust property and the gloss that an exculpatory clause may put upon the duty. The court then closely examined the exculpatory provisions of the trust agreement and determined that the first exculpatory provision in the agreement was ambiguous. The court interpreted the ambiguous clause to require the trustees to sell the stock if prudent to do so. The court further found that the exculpatory provision would have no effect to relieve the trustees' liability for bad faith actions or actions adverse to the beneficiary. The court determined, based on its examination of the second exculpatory provision of the trust agreement, that the trustees have liability for willful misconduct or dishonesty. The court next examined section 113.003 of the Trust Code to determine whether it granted protection to the trustees for failure to sell the First City stock. The court first determined that the First City stock is a different asset than the original gift of McAllen State Bank stock. The court narrowly construed section 113.003 of the Trust Code to determine that the language exculpating a trustee from selling property added to the trust means only property added by gift, not property that the trustee received in

257. The beneficiaries alleged that the co-trustees breached their fiduciary duty under both Tex. Prop. Code Ann. § 113.003 (Vernon 1984) and the trust agreement through the co-trustees' failure to sell the First City stock. The beneficiaries alleged that the co-trustees not only failed to exercise ordinary prudence, but also committed willful misconduct through their inaction. The beneficiaries also asserted causes of action against the law firm in which one of the co-trustees was a member for malpractice based on negligent representation of the trust, as well as against the law firm, another of its members, and a co-trustee for civil conspiracy to lead to the breach of fiduciary duty. Finally, the beneficiaries asserted a cause of action against the law firm, the other member of the firm, and a co-trustee for violation of the Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. §§ 17.41-.63 (Vernon 1987 & Supp. 1994).

258. 846 S.W.2d at 74-75. The court found that the language that the grantor includes in a trust agreement may override the statutory duty of a trustee under Tex. Prop. Code Ann. § 113.056(a) (Vernon Supp. 1994), but that courts will narrowly construe exculpatory clauses. 846 S.W.2d at 74-75.

259. 846 S.W.2d at 75. The court felt that the language left an uncertainty whether the trustees still had the duty to manage the property prudently, although the agreement relieved the trustees of the obligation to sell assets. Id.

260. Id. at 76.

261. Id. (citing InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ)).

262. 846 S.W.2d at 76. The court found that the beneficiaries alleged willful misconduct in their pleadings, so the trial court erred in granting summary judgment to the trustees, who did not offer evidence to show no willful misconduct. Id. at 77.

263. Tex. Prop. Code Ann. § 113.003 (Vernon 1984) provides that a trustee may retain property that is part of the initial trust corpus or that is added to the trust, without liability for loss or depreciation in value.

264. 846 S.W.2d at 77-79.

265. Id. at 78. The court reasoned that Tex. Prop. Code Ann. § 113.016(5) (Vernon 1984) suggests that restrictions in a trust agreement against sale of stock does not apply to stock acquired in a stock exchange, so that the statutory protection for a trustee who does not sell an initial trust asset does not apply to the First City stock. Id.

exchange for other assets or purchased.267

VII. LEGISLATIVE UPDATE

A. WILLS

The legislature added new subsections (c) and (d) to section 58 of the Probate Code to clarify whether the gift of an item of personal property includes the contents found within the item and whether a devise of real property includes personal property located on the real property.268 Unless the testator specifically states that a legacy of an item of personal property, such as a cedar chest, includes any contents of the item, the legacy does not include the contents of the item.269 Additionally, the devise of real property does not include a gift of personal property located on the real property unless the testator specifically provides that the devise include the personal property.270 The legislature amended section 58a of the Probate Code to validate devises or bequests to any trust, whether the trust were established before, on the same date as, or after the testator signed the will.271 The legislature amended section 67 of the Probate Code, which provides for disposition of a testator's estate to pretermitted children, to include gifts the testator made either in his or her will in trust for the benefit of the child or outside the will with the intent that the gift take effect at the testator's death.272

The legislature made three amendments to section 68 of the Probate Code.273 Amended section 68(a) now provides that the descendants of a deceased devisee must survive the testator by 120 hours in order to take property devised to the devisee.274 The legislature further amended section 68(a) to clarify that the class gift provision does not apply to descendants of

267. Id. at 79. The court held that the trial court should not have granted summary judgment based upon an application of TEX. PROP. CODE ANN. § 113.003 (Vernon 1984), since it does not apply to the First City stock. 846 S.W.2d at 79. The court also found that the trial court improperly granted summary judgment on the causes of action based upon the co-trustees' breach of fiduciary duty through willful misconduct. Id.


269. Id. (codified at TEX. PROP. CODE ANN. § 58(c) (Vernon Supp. 1994)).

270. Id. The legislature added definitions for "[c]ontents," which refers to "tangible personal property," and "[t]itled personal property," which is "personal property represented by a certificate of title . . . or [other] designation that signifies ownership." Id. (codified at TEX. PROP. CODE ANN. § 58(d) (Vernon Supp. 1994)).

271. Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 7, 1993 Tex. Sess. Law Serv. 3340, 3343-44 (Vernon) (codified as amended at TEX. PROP. CODE ANN. § 58a (Vernon Supp. 1994)). Section 58a previously provided that a devise or bequest to an inter vivos trust was valid only if the trust was established prior to or concurrently with the execution of the will in which the devise or bequest was made. TEX. PROP. CODE ANN. § 58a (Vernon 1980).


274. Id. (codified as amended at TEX. PROP. CODE ANN. § 68(a) (Vernon Supp. 1994)).
a class member who died prior to the date the testator executed the will.\textsuperscript{275}
Amended section 68(e) now provides that the inclusion of language in a will that indicates that class members must survive the testator in order to be beneficiaries under the will shall prevent the application of section 68(a).\textsuperscript{276}

The legislature added new section 69A to the Probate Code to provide that no court may prohibit a person from executing a new will or codicil.\textsuperscript{277} New section 70A to the Probate Code clarifies whether the gift of securities in a will includes additional securities the testator subsequently acquired as the result of the ownership of the securities bequeathed under the will.\textsuperscript{278} The legislature clarified that a devise of securities does not include cash distributions, such as cash dividends, that accrued before the date of the testator’s death unless the testator clearly states otherwise in the Will.\textsuperscript{279}

\section*{B. Non Testamentary Transfers}

The legislature amended sections 436(3) and (5) of the Probate Code to add definitions relating to multiple party accounts.\textsuperscript{280} Amended Probate Code section 439(b) provides that a P.O.D. account will be owned by and payable to the P.O.D. payee or payees, if the party who died signed a written agreement establishing the P.O.D. account.\textsuperscript{281} The legislature also amended Probate Code section 439(c) to delete any reference to intent and to provide that trust accounts will be paid to the persons designated as beneficiaries on the trustee’s death, if the trustee signed a written account agreement.\textsuperscript{282} The legislature created a new type of multiple party account, the “convenience account,”\textsuperscript{283} and created a new uniform account card, which contains all of

\begin{footnotes}
\textsuperscript{275} Id.
\textsuperscript{276} Id. (codified as amended at TEX. PROB. CODE ANN. § 68(e) (Vernon Supp. 1994)).
\textsuperscript{277} Act of April 30, 1993, 73d Leg., R.S., ch. 120, § 1, 1993 Tex. Sess. Law Serv. 269, 269 (Vernon) (codified at TEX. PROB. CODE ANN. § 69A (Vernon Supp. 1994)). The legislature defined “court” to mean a “constitutional county court, district court, or statutory county court, including a statutory probate court.” Id. (codified at TEX. PROB. CODE ANN. § 69A(b) (Vernon Supp. 1994)).
\textsuperscript{278} Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 10, 1993 Tex. Sess. Law Serv. 3340, 3345 (Vernon) (codified at TEX. PROB. CODE ANN. § 70A (Vernon Supp. 1994)). Securities of the same company acquired because of an action taken by the company, and securities of another company acquired because of a merger, reorganization, or other distribution by the company or a successor to the company, with the exception of any securities the testator acquired through the exercise of a purchase option or reinvestment plan, would be part of the devise unless the testator specified otherwise. Id. (codified at TEX. PROB. CODE ANN. § 70A(a)(1)-(2) (Vernon Supp. 1994)).
\textsuperscript{279} Id. (codified at TEX. PROB. CODE ANN. § 70A(b) (Vernon Supp. 1994)).
\textsuperscript{280} Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 25, 1993 Tex. Sess. Law Serv. 3340, 3351 (Vernon). This section amended TEX. PROB. CODE ANN. § 436(3) to add brokerage firms to the definition of “financial institutions” and TEX. PROB. CODE ANN. § 463(5) to add convenience accounts to the definition of “multiple-party accounts.” Id.
\textsuperscript{282} Id. at 3351-52 (codified as amended at TEX. PROB. CODE ANN. § 439(c) (Vernon Supp. 1994)).
\textsuperscript{283} Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 27, 1993 Tex. Sess. Law Serv. 3340, 3352 (Vernon); Act of May 24, 1993, 73d Leg., R.S., ch. 795, § 1, 1993 Tex. Sess. Law Serv. 3157, 3157 (Vernon) provide identical language for adding new TEX. PROB. CODE ANN.
the types of accounts available with a brief explanation of each type of account, that financial institutions may use.²⁸⁴

C. Heirship

The legislature amended section 44 of the Probate Code to provide that the decedent or the recipient of an inter vivos gift or nontestamentary transfer designate in writing that the gift or transfer is an advancement of the recipient's intestate share of the decedent's estate in order for the gift or transfer to be considered in the intestate distribution of the estate.²⁸⁵ If the recipient does not survive the decedent, the distribution of the intestate estate would not include the inter vivos gift.²⁸⁶ The legislature amended section 45 of the Probate Code to provide that community property of a deceased spouse will pass to the surviving spouse if the deceased spouse has no surviving children or other descendants, or if all of the deceased spouse's surviving children or other descendants are also children or other descendants of the surviving spouse.²⁸⁷

D. Estate Administration

The legislature significantly amended section 37A of the Probate Code, which provides for disclaimers of property.²⁸⁸ The first revision provides that a disclaimer relates back to the death of the decedent for all purposes.


²⁸⁵ Id.
²⁸⁶ Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 33, 1993 Tex. Sess. Law Serv. 3340, 3354 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 45 (Vernon Supp. 1994)). If the deceased spouse has any surviving children or other descendants who are not also children or other descendants of the surviving spouse, the decedent's community property interests will pass to his children or other descendants. Id. (codified as amended at TEX. PROB. CODE ANN. § 45(b) (Vernon Supp. 1994)).

and disclaimed property is not subject to any creditor of the disclaimant.\textsuperscript{289} The second revision provides for the acceleration of future interests to the effective date of the disclaimer.\textsuperscript{290} Third, the legislature amended section 37A(b) of the Probate Code to provide the same deadline for notice of the disclaimer to the legal representative of the transferor as for filing the disclaimer under section 37A(a) of the Probate Code.\textsuperscript{291} Finally, the legislature added new section 37A(f) to enable a surviving spouse to make a qualified disclaimer under section 2518 of the Internal Revenue Code\textsuperscript{292} for property passing from the deceased spouse without affecting other transfers, including residuary transfers of the disclaimed property, to or for the benefit of the surviving spouse.\textsuperscript{293}

The legislature amended section 47(d) of the Probate Code to provide that the 120-hour survivorship rule will apply to real property as well as to personal property and to community property with rights of survivorship.\textsuperscript{294} The legislature created new section 89A, which provides for probate of a will as a muniment of title.\textsuperscript{295} The legislature amended section 145(q)\textsuperscript{296} and added section 154A(i)\textsuperscript{297} of the Probate Code to protect judges from personal liability for the appointment of independent executors and independent

\begin{footnotesize}
\begin{enumerate}
\item[297.] Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 16, 1993 Tex. Sess. Law Serv. 3340,
administrators or from the acts or omissions of independent executors and independent administrators.

The legislature has now provided a method through which a surviving spouse may collect a decedent’s final paycheck by affidavit when no administration is pending in the deceased spouse’s estate. The legislature has provided a method of allowing the surviving spouse or anyone who may act on behalf of the decedent’s minor children to have exempt property set aside prior to the filing of the inventory, appraisement, and list of claims of the decedent’s estate and to have the court fix the amount of the family allowance prior to the filing of the inventory, appraisement, and list of claims of the decedent’s estate. The legislature has also increased the allowance in lieu of a homestead from $10,000 to $15,000 and the allowance in lieu of other exempt property from $1,000 to $5,000.

The legislature added new section 378B to the Probate Code to provide for allocation of income and expenses during the administration of the decedent’s estate. Unless the testator’s will provides otherwise, the principal of the estate will bear estate administration expenses, debts, funeral expenses, estate taxes, and other related expenses, but the personal representative may allocate fees and expenses of attorneys, accountants, and other professional advisors, court costs, and other similar expenses between income and principal. The personal representative will determine income earned during the estate administration in the same method as a Trustee under the Trust Code and distribute the income in the manner set forth in new section 378B. The legislature provided for distribution of income to the beneficiaries of the estate, based on the type of devise or bequest in sections 378B(c)-(g).

The legislature amended section 233 of the Probate Code to provide that a

3348 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 154A(i) (Vernon Supp. 1994)).
298. Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 17, 1993 Tex. Sess. Law Serv. 3340, 3348 (Vernon) (codified at TEX. PROB. CODE ANN. §§ 160(b)-(c) (Vernon Supp. 1994)). The person or entity who delivers the paycheck to the spouse in reliance on the affidavit has no liability for the delivery of the funds to the surviving spouse. Id. (codified at TEX. PROB. CODE ANN. § 160(b) (Vernon Supp. 1994)). The ability of the surviving spouse to collect the final paycheck does not affect the disposition of the funds represented by the paycheck. Id. (codified at TEX. PROB. CODE ANN. § 160(c) (Vernon Supp. 1994)).
personal representative may enter into a contingent fee contract for up to one-third of the damages or settlement amount, subject to court approval. The legislature amended section 406 of the Probate Code to provide that a court may close an estate administration without a final accounting if no interested party has filed a complaint with the court and if the court does not know the whereabouts of the personal representative or heirs. The legislature amended section 333 of the Probate Code to give courts guidance in determining whether to order the sale of assets of estates that will likely lose value or that will be expensive or disadvantageous for the personal representative to maintain in the estate.

The legislature amended section 137 of the Probate Code to provide that title to a homestead may be transferred by a small estate affidavit if the homestead is the only real property owned by the decedent's estate.

New section 129A of the Probate Code provides that if attempts to make service under Part 4 of the Probate Code are unsuccessful, service may be made under Rule 109 or Rule 109a of the Texas Rules of Civil Procedure by publication or substituted service.

Annual accounts and final accounts must now contain statements that the personal representative has filed all tax returns due during the accounting period and has paid all taxes due, as well as


308. Id. at 3358 (codified at TEX. PROB. CODE ANN. § 233(c) (Vernon Supp. 1994)). If the personal representative does not receive court approval prior to entering the contract, the contract is void. Id. The legislature also provided courts with guidance in determining whether the contract, entered under either § 233(b) or § 233(c), is reasonable and should be approved. Act of May 20, 1993, 73d Leg., R.S., ch. 848, § 1, 1993 Tex. Sess. Law Serv. 3358, 3358-59 (Vernon) (codified at TEX. PROB. CODE ANN. § 233(d) (Vernon Supp. 1994)).

309. Act of May 25, 1993, 73d Leg., R.S., ch. 898, § 1, 1993 Tex. Sess. Law Serv. 3561, 3561-62 (Vernon) (codified at TEX. PROB. CODE ANN. § 406(d) (Vernon Supp. 1994)). The court may order the close of the estate at any time after four years from the last date that the clerk issues letters testamentary or letters of administration. Id. The legislature also amended § 406(a) of the Probate Code to provide that the court has discretion to order the personal representative to appear and present the final account unless an interested party complains. If the court receives a complaint from an interested party, it must order the personal representative to appear and present the final account. Act of May 25, 1993, 73d Leg., R.S., ch. 898, § 1, 1993 Tex. Sess. Law Serv. 3561, 3561 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 406(a) (Vernon Supp. 1994)).


311. Act of May 27, 1993, 73d Leg., R.S., ch. 594, § 1, 1993 Tex. Sess. Law Serv. 2253, 2253-54 (Vernon) (codified at TEX. PROB. CODE ANN. § 137(c) (Vernon Supp. 1994)). The heirs must record the affidavit in the deed records of the county in which the real estate is located. Id. at 2253. The heirs may sell the property and the purchaser may rely on the recorded affidavit, although the purchaser will be subject to claims of the decedent's creditors. Id. Any heirs not included in the recorded affidavit may recover from those heirs that received consideration for the sale of the homestead. Id.


as the date of payment and the entity to which the personal representative paid the taxes. If the personal representative filed any tax returns or paid any taxes after the due date, the personal representative must include a description of and the reasons for the delinquency on both annual accounts and the final account. The legislature added a new chapter to the Probate Code entitled "Informal Probate." The applicant may file a will for informal probate at least thirty days after the decedent's death, but within four years of the date of the decedent's death. The executor or successor executor named in the will, or a devisee or legatee named in the will, are persons who may apply for informal probate.

The proper venue for the application is the county of the testator's domicile at the time of death or in the county in which estate assets are located. An informal probate is proper if the estate has no known debts, or if all debts are properly secured or the creditor has notified all of the estate's creditors by certified or registered mail of the filing of the application, if the applicant files an affidavit provided by a disinterested witness of the facts necessary to probate a will under sections 88(a) and 88(b) of the Probate Code, and if no one has filed an application for probate under any other sections of the Probate Code.

Section 504 sets forth the contents of the application for informal probate. The applicant must furnish notice of the intent to file the will for
informal probate and a copy of the will by either registered or certified mail to every person named in the will, as well as to the testator's spouse and children.\textsuperscript{323} In addition to the will and the affidavit of a disinterested person, the applicant must file a sworn inventory of all of the testator's assets, along with fair market values of the assets, with the application.\textsuperscript{324} The court may issue limited letters testamentary to the applicant for the purpose of transferring title to the testator's assets, but the limited letters must list the specific assets or a certified copy of the inventory must be attached to the letters.\textsuperscript{325} Section 508 sets forth the determinations the court must make in order to admit the will to informal probate, as well as the determinations that preclude informal probate.\textsuperscript{326} Section 509 details the effect of informal probate on title to the estate's assets.\textsuperscript{327} Section 510 contains the statute of limitations for contesting a will admitted to informal probate.\textsuperscript{328}

\begin{itemize}
\item Section 504(b)(Vernon Supp. 1994)), as well as for waiver of notice. \textit{Id.} at 2796 (codified at TEX. PROB. CODE ANN. § 506(d) (Vernon Supp. 1994)). The applicant must file either original returned notices or the return receipts with the application. \textit{Id.} at 2795 (codified at TEX. PROB. CODE ANN. § 505(c) (Vernon Supp. 1994)).
\item Id. at 2796 (codified at TEX. PROB. CODE ANN. § 506 (Vernon Supp. 1994)). The inventory must contain all information required by TEX. PROB. CODE ANN. §§ 250-251 (Vernon 1980 & Supp. 1994) and must identify any community assets. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 506(b) (Vernon Supp. 1994)). The court clerk will submit the will to the court more than ten days after the applicant files the application and the court may determine whether to admit the will for informal probate. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 506(c) (Vernon Supp. 1994)). If the court does not admit a will to informal probate any interested person may submit an application for formal probate. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 506(d) (Vernon Supp. 1994)).
\item Id. (codified at TEX. PROB. CODE ANN. § 507 (Vernon Supp. 1994)). The limited letters testamentary expire one year after the date the court admits the will for informal probate. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 507(d) (Vernon Supp. 1994)).
\item Id. at 2796-97 (codified at TEX. PROB. CODE ANN. § 508 (Vernon Supp. 1994)). Section 508 also considers self-proved wills and wills admitted to probate in other states. \textit{Id.} at 2797 (codified at TEX. PROB. CODE ANN. § 508(c)-(d) (Vernon Supp. 1994)).
\item Id. (codified at TEX. PROB. CODE ANN. § 509 (Vernon Supp. 1994)). Persons who transfer property or make payment under the terms of an informally probated will benefit from the same release of liability as if they had transferred property or made payment to a personal representative. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 509(a) (Vernon Supp. 1994)). Persons who acquire property under the terms of the will may be liable to persons or creditors with a superior claim to the property, but only to the extent of the value of the property acquired. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 509(b) (Vernon Supp. 1994)). A person may file a show cause action in the court that admitted the will to informal probate if the person made a written demand, sent by registered or certified mail, for property to which that person is entitled under the terms of the will, and the person holding the property refuses or fails to deliver the property within thirty days of the demand. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 509(c) (Vernon Supp. 1994)).
\item Id. (codified at TEX. PROB. CODE ANN. § 510 (Vernon Supp. 1994)). The statute of limitations for contesting the validity of a will admitted to informal probate is two years, \textit{Id.} (codified at TEX. PROB. CODE ANN. § 510(a) (Vernon Supp. 1994)), except for a contest for forgery or fraud, which is two years after the discovery of the forgery or fraud, \textit{Id.} (codified at TEX. PROB. CODE ANN. § 510(b) (Vernon Supp. 1994)), or for a person who is a minor or incompetent at the time the will is admitted to informal probate, which is two years after the date the minor or incompetent's disabilities are removed. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 510(c) (Vernon Supp. 1994)).
\end{itemize}
Part 2 of the new Informal Probate chapter allows emergency intervention to provide for funeral or burial expenses or for the protection of the decedent’s personal property stored in rented accommodations. An applicant may file an application with the clerk of the court of the county of the decedent’s domicile for emergency intervention between the thirtieth day and the ninetieth day following the decedent’s death. Any person qualified to serve as an administrator of the decedent’s estate may apply for emergency intervention. Section 522 lists the contents of the application for emergency intervention, which must include facts showing the necessity for the court to issue an emergency intervention order. The court may order an employer, financial institution, or individual that possesses any of the decedent’s funds to pay any of those funds to the funeral home for funeral and burial expenses, but not to exceed $5000. An applicant’s authority under an emergency intervention order terminates on the earlier of the ninetieth day following the date the court issued the order or the qualification of the personal representative of the decedent’s estate.

E. Guardianships

The legislature created a new chapter to the Probate Code to consolidate the guardianship provisions formerly found throughout the Probate Code, as well as to add new guardianship provisions. New section 601 contains definitions relating to guardianships. Section 602 sets forth the policy behind and the purpose of guardianships, defines the two types of guardianships as limited guardianships and full guardianships, and specifies that the court shall design the type guardianship for the individual ward that will best allow the ward to develop or maintain independence and maximum self

---

330. Id. (codified at TEX. PROB. CODE ANN. § 520 (Vernon Supp. 1994)). The purpose of the application is to request the court to provide for payment of funeral or burial expenses or for the protection and storage of the decedent’s personal property that is located in rented accommodations. Id.
331. Id. (codified at TEX. PROB. CODE ANN. § 521 (Vernon Supp. 1994)). For a list of persons qualified to serve as administrator, see TEX. PROB. CODE ANN. § 77 (Vernon 1980).
332. Id. (codified at TEX. PROB. CODE ANN. § 522(a) (Vernon Supp. 1994)). If the applicant makes the application in order to provide for the funeral or burial of the decedent, the applicant must attach to the application any written instructions the decedent left concerning his funeral or burial. Id. (codified at TEX. PROB. CODE ANN. § 522(b) (Vernon Supp. 1994)). If the decedent left no written instructions, the applicant must provide the funeral and burial of the decedent unless the court permits the applicant to cremate the decedent’s body. Id.
333. Id. (codified at TEX. PROB. CODE ANN. § 523(a) (Vernon Supp. 1994)). The clerk may only issue certified copies of the emergency intervention order until the earlier of ninety days after the date after the court issued the order or the qualification of a personal representative of the decedent’s estate. Id. (codified at TEX. PROB. CODE ANN. § 523(b) (Vernon Supp. 1994)). Any person who acts in accordance with and reliance on a certified copy of the emergency intervention order is not liable for those acts. Id. (codified at TEX. PROB. CODE ANN. § 523(c) (Vernon Supp. 1994)).
334. Id. (codified at TEX. PROB. CODE ANN. § 524 (Vernon Supp. 1994)).
336. Id. at 4084-86 (codified at TEX. PROB. CODE ANN. § 601 (Vernon Supp. 1994)).
reliance. Section 603 provides that provisions of the Probate Code that apply to decedents' estates also apply to guardianship estates unless in conflict with specific guardianship provisions and that any references to an "incompetent person," a "person of unsound mind," or a "habitual drunkard" means an "incapacitated person."  

The jurisdiction of county courts over guardianship estates remains unchanged, while the legislature expanded the probate court’s jurisdiction to include continuing jurisdiction, following the ward’s death, over cases initiated during the ward’s life between successor guardians and former guardians. The probate court may now transfer a contested guardianship of the person of a minor to another court of competent jurisdiction in which a suit affecting the parent-child relationship is pending. The provisions and the provisions relating to the duties and records of the clerk have not changed from prior law. The provisions relating to the issuance, contents, and service and return of citations remain largely unchanged from prior law, although the legislature clarified the provisions relating to the service of notice.

The legislature made several amendments to the sections of the Probate Code dealing with the trial. Section 642 provides that any person may begin or contest guardianship proceedings except persons who have an interest adverse to the proposed ward. A court may now consider motions and applications filed on routine matters in existing guardianships without a formal hearing. The provisions concerning the appointment of a guardian ad litem are basically the same, except for the clarification that the court may appoint the guardian ad litem to represent the best interest of the "incapacitated person." The court must appoint an attorney ad litem to represent the proposed ward, as well as an interpreter, if necessary. The legislature

---

337. *Id.* at 4086 (codified at Tex. Prob. Code Ann. § 602 (Vernon Supp. 1994)).
341. *Id.* at 4088 (codified at Tex. Prob. Code Ann. § 609 (Vernon Supp. 1994)). The probate court will retain jurisdiction over the guardianship of the estate. *


Section 633 added a requirement that conservators or anyone else who has care and control of a minor must receive citation. *Id.* at 4094-95 (codified at Tex. Prob. Code Ann. § 633(d) (Vernon Supp. 1994)). The legislature changed the notice provisions to provide that either the county clerk or the applicant may give notice by certified mail. *Id.* at 4095 (codified at Tex. Prob. Code Ann. § 633(e) (Vernon Supp. 1994)). The proposed ward’s spouse, parents, siblings, and children, as well as the administrator or operator of the nursing home or residential facility in which the proposed ward resides, and any person that the applicant knows to hold a power of attorney given by the proposed ward, must receive notice of the guardianship application. *Id.* at 4095 (codified at Tex. Prob. Code Ann. § 633(e)(1)-(2) (Vernon Supp. 1994)).

listed the duties of the attorney ad litem in section 647. Each statutory probate court must now operate a court visitor program to assess the conditions of wards and proposed wards.\footnote{350}

Letters of guardianship will now expire sixteen months after issuance unless the guardian has filed and the court has approved the annual accounting in a guardianship of the estate or the guardian's annual report in a guardianship of the person.\footnote{351} The clerk may reissue the letters if the court has approved the accounting or the report.\footnote{352} The court may now authorize up to five percent of the ward's income as compensation to the guardian of the person.\footnote{353} The court may charge the cost of the guardian ad litem and court visitor against the ward's estate or against the county, if the ward is indigent.\footnote{354} The court shall review each guardianship annually to determine whether to continue, modify, or terminate the guardianship.\footnote{355}

A guardian has no personal liability to third parties merely through his attorney ad litem shall have access to copies of all relevant records in the case, including medical, psychological, and intellectual tests. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 646(a) (Vernon Supp. 1994)). An attorney, in order to qualify to serve as an attorney ad litem, must complete a guardianship law and procedure course and the State Bar must certify the attorney, \textit{id.} (codified at TEX. PROB. CODE ANN. § 646(b) (Vernon Supp. 1994)), unless the attorney served as an attorney ad litem in a guardianship proceeding prior to September 1, 1993. \textit{Id.} (codified at TEX. PROB. CODE ANN. §§ 646(c) (Vernon Supp. 1994)).

\footnote{350} \textit{Id.} (codified at TEX. PROB. CODE ANN. § 647 (Vernon Supp. 1994)). The attorney ad litem, prior to the hearing, must interview and discuss with the proposed ward the law and facts of the case, the proposed ward's legal options, and the grounds on which the applicant seeks the guardianship. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 647(a) (Vernon Supp. 1994)). The attorney ad litem must also review the application for guardianship, the current medical records, and all relevant medical, psychological, and intellectual tests prior to the hearing. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 647(b) (Vernon Supp. 1994)).

\footnote{351} \textit{Id.} at 4097-98 (codified at TEX. PROB. CODE ANN. § 648 (Vernon Supp. 1994)). The court, either on its own motion or upon the request of an interested party, may appoint a court visitor to evaluate the proposed ward or ward in a written report at any time prior to the appointment of a guardian or during a guardianship. \textit{Id.} at 4097 (codified at TEX. PROB. CODE ANN. § 648(b) (Vernon Supp. 1994)). The report must include the following information: a description of the proposed ward's degree of capacity and incapacity, including the medical history, if available and if the court does not waive the requirement for the medical history; a list of treating physicians and the medical prognosis, if appropriate; a description of the ward or proposed ward's living conditions; a description of the ward or proposed ward's social, intellectual, physical, and educational condition; a statement that the court visitor has personally visited or observed the proposed ward; a statement of the date of the guardian's most recent visit to the ward, if the court has appointed a guardian; a recommendation for any changes needed in the guardianship or proposed guardianship, including removal of an existing guardian or denial of a guardianship; and any other information the court requires. \textit{Id.} at 4097-98 (codified at TEX. PROB. CODE ANN. § 648(c) (Vernon Supp. 1994)).

\footnote{352} \textit{Id.} at 4099 (codified at TEX. PROB. CODE ANN. § 659 (Vernon Supp. 1994)).

\footnote{353} \textit{Id.} at 4100 (codified at TEX. PROB. CODE ANN. § 665 (Vernon Supp. 1994)).

\footnote{354} \textit{Id.} at 4101 (codified at TEX. PROB. CODE ANN. § 669 (Vernon Supp. 1994)).

\footnote{355} \textit{Id.} (codified at TEX. PROB. CODE ANN. § 672 (Vernon Supp. 1994)). Statutory probate courts shall review a report prepared by a court investigator pursuant to TEX. GOV'T CODE ANN. § 25.0025 (Vernon Supp. 1994), review a report prepared by a court visitor, or conduct a hearing. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 672(b) (Vernon Supp. 1994)). A court other than a statutory probate court may make its annual determination as appropriate, considering the court's caseload and resources. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 672(c) (Vernon Supp. 1994)). The court must file its written determination concerning the guardianship with the clerk. \textit{Id.} (codified at TEX. PROB. CODE ANN. § 672(d) (Vernon Supp. 1994)).
status as guardian. The ward will retain all civil and legal rights and powers except those rights and powers the court designated as legal disabilities by specifically granting the powers and rights to the guardian. Courts must now appoint a guardian for a person other than a minor after considering the circumstances and best interests of the ward. The court must apply a best interest test prior to approving a minor's selection of guardian. A court may now appoint an attorney ad litem to represent the interests of the proposed ward through litigation of the ward's claim if the ward's parent or another close relative could not otherwise qualify as guardian because of the proposed guardian's own interest in the claim.

The legislature merged all application provisions formerly required for permanent and limited guardianships into section 682. A court shall appoint an attorney ad litem or a court investigator to investigate and file an application for guardianship, if necessary, if probable cause exists that someone who does not have a guardian is incapacitated. Courts must now find by clear and convincing evidence that the proposed ward is incapacitated and all other allegations contained in the application for guardianship. Proposed wards must personally appear at the hearing on the application for guardianship unless the court finds, on the record, that the personal appearance is not necessary. The attorney ad litem must receive the relevant medical records and results of tests prior to the appointment of the guardian unless the proposed ward is a minor, missing person, or person who must have a guardian in order to receive government funds, or the court finds on the record that no current or relevant records exist. The court may not grant a guardianship for anyone other than a minor or mentally retarded person without a letter, filed in the proceeding, from a licensed physician dated not earlier than 120 days prior to the date of the hearing that states

357. Id. (codified at TEX. PROB. CODE ANN. § 673 (Vernon Supp. 1994)).
358. Id. (codified at TEX. PROB. CODE ANN. § 675 (Vernon Supp. 1994)).
359. Id. at 4102 (codified at TEX. PROB. CODE ANN. § 677 (Vernon Supp. 1994)).
363. Id. at 4105 (codified at TEX. PROB. CODE ANN. § 683 (Vernon Supp. 1994)).
364. Id. at 4105-06 (codified at TEX. PROB. CODE ANN. § 684 (Vernon Supp. 1994)).
365. Id. at 4106 (codified at TEX. PROB. CODE ANN. § 685 (Vernon Supp. 1994)). The court must inquire into the proposed ward's ability to feed, clothe, and shelter himself and to manage property or his financial affairs. Id. (codified at TEX. PROB. CODE ANN. § 685(c) (Vernon Supp. 1994)).
366. Id. (codified at TEX. PROB. CODE ANN. § 686 (Vernon Supp. 1994)).
that, in the physician's opinion, the proposed ward is incapacitated and describes the extent of the incapacity. The court must consider the preference of the incapacitated person concerning the appointment of the guardian.

The legislature has freed the courts to grant custom guardianships, based upon the incapacitated person's ability. If the court finds that the proposed ward has the ability to care for himself and manage his property, the court must dismiss the application for guardianship. Upon the court's determination that the proposed ward has no ability to care for himself or to manage his property, the court shall include its determination as a finding of fact and appoint a guardian of the person, the estate, or both, with full authority. If the court finds that the proposed ward has the ability to perform some, but not all, of the tasks necessary to provide for his own care or to manage his property, the court may appoint a guardian with powers limited to those tasks that the proposed ward cannot do for himself. The order appointing the guardian must include the court's findings of fact and set forth the specific powers, limitations, or duties of the guardian.

Courts may now appoint private professional guardians if properly certified. A private professional guardian must apply annually to the clerk for certification, provide the clerk with the information set forth in section 697(a), and pay an application fee. The county clerk must obtain a criminal history record from the Texas Department of Public Safety or the FBI for any private professional guardian or any person who represents the ward's interests as guardian on behalf of a private professional guardian.

All guardians shall file annual accounts within sixty days of the due date.

367. Id. at 4106-07 (codified at TEX. PROB. CODE ANN. § 687 (Vernon Supp. 1994)). The court may, in its discretion, order an independent medical evaluation of the proposed ward. Id. (codified at TEX. PROB. CODE ANN. § 687(b) (Vernon Supp. 1994)). If the proposed ward is a mentally retarded person, a physician or psychologist licensed by the State or certified by the Texas Department of Mental Health and Mental Retardation shall examine the proposed ward unless the proposed ward has been examined within six months prior to the date of the hearing. Id. at 4107 (codified at TEX. PROB. CODE ANN. § 687(c) (Vernon Supp. 1994)).

368. Id. at 4107 (codified at TEX. PROB. CODE ANN. § 689 (Vernon Supp. 1994)).


370. Id. (codified at TEX. PROB. CODE ANN. § 693(a) (Vernon Supp. 1994)).

371. Id. (codified at TEX. PROB. CODE ANN. § 693(b) (Vernon Supp. 1994)).

372. Id. (codified at TEX. PROB. CODE ANN. § 693(c) (Vernon Supp. 1994)).

373. Id. (codified at TEX. PROB. CODE ANN. § 693(d) (Vernon Supp. 1994)).

374. Id. at 4109 (codified at TEX. PROB. CODE ANN. § 696 (Vernon Supp. 1994)).

375. Id. (codified at TEX. PROB. CODE ANN. § 697(a) (Vernon Supp. 1994)).

376. Id. (codified at TEX. PROB. CODE ANN. § 697(b) (Vernon Supp. 1994)).

377. Id. at 4109-10 (codified at TEX. PROB. CODE ANN. § 698 (Vernon Supp. 1994)). The county clerk may not release or disclose the criminal history record to anyone except on court order or with consent of the person who is the subject of the investigation. Id. (codified at TEX. PROB. CODE ANN. § 698(b) (Vernon Supp. 1994)). The court has exclusive use of the criminal history record, which is privileged and confidential. Id. The court may use the information only for the purpose of determining whether to appoint, remove, or continue the appointment of a private professional guardian. Id. at 4110 (codified at TEX. PROB. CODE ANN. § 698(c) (Vernon Supp. 1994)).
unless the court extends the time for filing the account. The guardian shall attach an affidavit to the annual account stating that the account contains an accurate accounting, that the guardian has paid the bond premium for the next accounting period, that the guardian has filed all tax returns due during the accounting period, and that the guardian has paid all taxes the ward owed during the accounting period, including the amount of taxes, the date the guardian paid the taxes, and the name of the entity to which the guardian paid the taxes. If the guardian failed to file a tax return or pay taxes due during the accounting period, the guardian must include a description of the taxes and the reasons for the failure to file the return or pay the taxes. The court now has discretion to remove a guardianship estate from the court’s active docket without a final accounting and appointing a successor guardian, three years after a minor reaches the age of majority or the death of a deceased ward if no one has filed a complaint concerning the estate with the court. Money held under safekeeping arrangements may not be distributed to the guardian without a court order, at any time prior to approval of the final account.

A court may now appoint a spouse, parent, or child as successor guardian if the spouse, parent, or child previously could not serve because of a litigation conflict, upon the removal of the conflict. A guardian of the person must file with the written application to resign as guardian, a report stating the condition of the ward. The court may remove a guardian without notice if the court has clear and convincing evidence provided under oath that the guardian has misapplied, embezzled, or removed from Texas, or is about to misapply, embezzle, or remove from Texas, all or any part of the guardianship estate or that the guardian has cruelly treated the ward or neglected to educate or maintain the ward. The court may reinstate the guardian removed under an ex parte order if the court determines that the removal was inappropriate.

The guardian of an adult may expend guardianship funds under court

379. Id. at 4419 (codified at TEX. PROB. CODE ANN. § 741(e) (Vernon Supp. 1994)).
380. Id. (codified at TEX. PROB. CODE ANN. § 741(f) (Vernon Supp. 1994)). The legislature amended TEX. PROB. CODE ANN. § 405(b) earlier in the session to include substantially the same provisions relating to information concerning the filing of tax returns and payments of taxes during the accounting period. Act of May 29, 1993, 73d Leg., R.S., ch. 712, § 6, 1993 Tex. Sess. Law Serv. 2790, 2793-94 (Vernon) (codified at TEX. PROB. CODE ANN. § 405 (Vernon Supp. 1994)).
381. Act of May 30, 1993, 73d Leg., R.S., ch. 957, § 1, 1993 Tex. Sess. Law Serv. 4084, 4122-23 (Vernon) (codified at TEX. PROB. CODE ANN. § 750(a) (Vernon Supp. 1994)). A court may also remove a guardianship estate from its docket without a final accounting for a ward whose whereabouts are unknown for four or more years after the court lost contact with the ward, if no one has complained. Id. at 4123 (codified at TEX. PROB. CODE ANN. § 750(b) (Vernon Supp. 1994)).
382. Id. at 4123-24 (codified at TEX. PROB. CODE ANN. § 753 (Vernon Supp. 1994)).
383. Id. at 4125 (codified at TEX. PROB. CODE ANN. § 759(h) (Vernon Supp. 1994)).
384. Id. at 4125-26 (codified at TEX. PROB. CODE ANN. § 760 (Vernon Supp. 1994)).
385. Id. at 4126 (codified at TEX. PROB. CODE ANN. § 761(6)-(7) (Vernon Supp. 1994)).
386. Id. at 4127 (codified at TEX. PROB. CODE ANN. § 762 (Vernon Supp. 1994)).
order to provide care for the incapacitated person. A guardian, except for the guardian of a minor under age 16, or the guardian of a person who require emergency or respite care, may not admit the ward to an in-patient psychiatric facility or to a residential facility operated by the Texas Department of Mental Health and Mental Retardation without first applying for admission under the Health and Safety Code, or applying to the court.

A guardian of the estate may now enter contingency fee agreements for one-third of the recovery, plus expenses, and the court may approve contingent fee agreements in excess of one-third of the recovery under certain conditions. A guardian may now expend more than $5000 during an accounting period without prior court approval, if the expenditure is made to a nursing home in which the ward resides and if the court ratifies the expenditure. A parent who is the guardian of the person of a minor ward may not use either income or principal of the guardianship estate for the ward's support, education, or maintenance unless the court orders the expenditure based upon clear and convincing evidence that the ward's parents are unable to provide adequately for the ward's support. A guardian may now expend up to $12,000 per year from government funds paid to the ward's estate without court approval, if the expenditures are for the support, maintenance, or education of the ward or the ward's dependents. A guardian may now retain assets included in the estate at the creation of the guardianship if the guardian's decision to retain the assets is reasonably prudent.

387. Id. at 4128 (codified at TEX. PROB. CODE ANN. § 770 (Vernon Supp. 1994)). If the ward has decision-making ability and agrees to live in a public or private residential facility, the guardian may apply for residential care and services on behalf of the ward. Id. (codified at TEX. PROB. CODE ANN. § 770(a) (Vernon Supp. 1994)). The guardian must report the ward's condition to the court at least annually. Id. If the ward resides in a residential care facility the guardian's report on the ward's condition must contain a statement concerning the necessity for continued care in the facility. Id.

388. Id. (codified at TEX. PROB. CODE ANN. § 770(c) (Vernon Supp. 1994)).

389. Id. (codified at TEX. PROB. CODE ANN. § 770(d) (Vernon Supp. 1994)).


392. Act of May 30, 1993, 73d Leg., R.S., ch. 957, § 1, 1993 Tex. Sess. Law Serv. 4084, 4129 (Vernon) (codified at TEX. PROB. CODE ANN. § 772(c) (Vernon Supp. 1994)). The legislature provided courts with guidelines to follow in considering whether to allow the guardian to enter a contingent fee agreement in excess of one-third of the recovery. Id. (codified at TEX. PROB. CODE ANN. § 772(d) (Vernon Supp. 1994)).

393. Id. at 4130 (codified at TEX. PROB. CODE ANN. § 776 (Vernon Supp. 1994)).


396. Id. at 4136-37 (codified at TEX. PROB. CODE ANN. § 812 (Vernon Supp. 1994)).
Courts may now create a management trust for the benefit of the ward upon application by the guardian and upon the court's finding that the creation of the trust is in the ward's best interest. The management trust must contain the following terms: the sole beneficiary of the trust is the ward; the trustee may distribute income or principal for the ward's health, support, maintenance, or education; the trustee must add to principal any net income not distributed for the ward's benefit; the trustee does not have to post bond; and the trustee may receive reasonable compensation for services upon court approval.

If the ward is a minor the trust must terminate on the earlier of the death of the ward or the ward's eighteenth birthday, unless the court orders the termination of the trust at a later date, which may not extend past the date the ward attains age 25. If the ward is an incapacitated adult the trust must terminate on the earlier of the date that the court determines that the guardianship is no longer necessary or on the ward's death.

The legislature added new provisions relating to temporary guardianships, guardianships for nonresidents, receiverships for minors and other incapacitated persons, payment of claims without creation of a guardianship, sale of property of a minor, and nonresident guardians. The legislature amended section 127A of the Probate Code to allow any person to file an application for temporary guardianship of the estate of any missing person whom the police or other law enforcement agency be-
lieve to be the victim of violence. 409 If the court finds that no administration of the community estate is in the best interest of an incompetent spouse and that the competent spouse is not disqualified to serve as guardian, the court will not order a guardianship. 410

F. TRUSTS

The legislature made several amendments to the Trust Code 411 relating to environmental laws. 412 The legislature first added the definition of environmental law to the Property Code. 413 A trustee or a potential trustee may now inspect trust property in order to determine the potential application of any environmental law to the property. 414 A trustee may take any action on the property that the trustee reasonably believes will correct any potential or actual violation of an environmental law. 415 A trustee shall have no liability to beneficiaries for acting or failing to act or for a loss in value of the property in connection with inspecting property or attempting to remedy any potential or actual violation of environmental laws unless the trustee acts in bad faith or with gross negligence. 416 A trustee may reimburse himself or pay for expenses incurred in connection with the inspection of the property or attempting to remedy potential or actual violations of environmental laws directly from trust assets, whether income or principal or both. 417

409. Act of May 29, 1993, 73d Leg., R.S., ch. 712, § 1, 1993 Tex. Sess. Law Serv. 2790, 2790-92 (Vernon) (codified as amended at TEX. PROP. CODE ANN. § 127A (Vernon Supp. 1994)). The applicant must not be a suspect in the disappearance of the missing person. Id. at 2791 (codified at TEX. PROP. CODE ANN. § 127A(g)(4) (Vernon Supp. 1994)). The temporary guardian must post bond and shall have the same authority to manage the financial affairs of the missing person under court supervision as would any other temporary guardian. Id. at 2792 (codified at TEX. PROP. CODE ANN. § 127A(h)(1) (Vernon Supp. 1994)). The temporary guardianship of the missing person’s estate shall continue until the confirmation of the death of the missing person, a court declares the missing person dead under applicable statutes, the return of the missing person, the location of the missing person, or the purpose for the guardianship no longer exists. Id. (codified at TEX. PROP. CODE ANN. § 127A(h)(2) (Vernon Supp. 1994)).


413. Id. at 3352 (codified at TEX. PROP. CODE ANN. § 111.004(24) (Vernon Supp. 1994)).

414. Id. (codified at TEX. PROP. CODE ANN. § 113.025 (Vernon Supp. 1994)). A potential trustee will not constructively accept a trust merely through inspecting the property. Id.

415. Id. (codified at TEX. PROP. CODE ANN. § 113.025(b) (Vernon Supp. 1994)).

416. Id. at 3352-53 (codified at TEX. PROP. CODE ANN. § 114.001(d) (Vernon Supp. 1994)).

417. Id. at 3353 (codified as amended at TEX. PROP. CODE ANN. § 114.063 (Vernon Supp. 1994)). A potential trustee may also receive reimbursement from trust assets for reasonable expenses incurred in connection with inspection of trust property, if a court orders reimbursement or if the potential trustee has contracted for reimbursement with the personal representative of the settlor’s estate, the current trustee, the settlor, the settlor’s attorney-in-fact, or anyone who has the power to appoint a trustee under the terms of the trust agreement or will, and the trust instrument or will names the potential trustee, or the potential trustee has received a written request to serve as trustee from a person entitled to appoint a trustee. Id. (codified at TEX. PROP. CODE ANN. § 114.063(c) (Vernon Supp. 1994)).
The legislature amended section 113.109 to provide that the proceeds from a deferred payment right will be considered income up to five percent of the value of the deferred payment right, with the value of the right determined annually, and any excess proceeds will be allocated to principal.418 The legislature imposed all of the statutory and common law duties of a trustee upon any life tenant who is given the power to sell and reinvest any property held in the life tenancy, with respect to the sale and investment of the property.419 The legislature guaranteed the homestead ad valorem tax exemption for homestead property transferred to a trust for the benefit of the trustor or the trustor's spouse.420 The legislature added section 113.053(g) to the Property Code to allow corporate fiduciaries to invest funds held in a fiduciary capacity in mutual funds, even if the corporate fiduciary or an affiliate provides compensated services to the fund.421

G. DURABLE POWER OF ATTORNEY ACT

The Durable Power of Attorney act repeals section 36A of the Probate Code and adds sections 481-506 to the Probate Code, to be set aside into a new chapter, in which is gathered all information concerning the power of attorney.422 Probate Code section 482 defines a durable power of attorney as a written instrument that designates an attorney in fact or agent, that the principal has signed, that contains words conveying the principal's intent that the power survives the principal's incapacity or becomes effective upon the principal's incapacity, and that the principal acknowledges before a notary public or other officer authorized to take acknowledgments.423 Unless the instrument contains a termination date, the power of attorney does not


419. Act of May 28, 1993, 73d Leg., R.S., ch. 846, § 34, 1993 Tex. Sess. Law Serv. 3340, 3354 (Vernon) (codified at TEX. PROP. CODE ANN. § 5.008 (Vernon Supp. 1994)). A life tenant has no duty to sell real property subject to the life tenancy and will have no trustee duties in connection with any retained property, although common law duties will still apply to the life tenant. Id. (codified at TEX. PROP. CODE ANN. § 5.008(b) (Vernon Supp. 1994)).

420. Act of May 30, 1993, 73d Leg., R.S., ch. 854, § 1, 1993 Tex. Sess. Law Serv. 3367, 3367-68 (Vernon) (codified as amended at TEX. TAX CODE ANN. § 11.13(j) (Vernon Supp. 1994)) defines a residence homestead as residential property owned by individuals or a qualifying trust, which is a trust that allows the trustor or the trustor's spouse the use of the property as his or her principal residence rent free. Id. The legislature added TEX. TAX CODE ANN. § 25.135, which specifies that the ownership interest in a qualifying trust shall be listed as the name of the trustor. Act of May 30, 1993, 73d Leg., R.S., ch. 854, § 3, 1993 Tex. Sess. Law Serv. 3367, 3368 (Vernon) (codified at TEX. TAX CODE ANN. § 25.135 (Vernon Supp. 1994)). Finally, the legislature provided that the qualifying trust and each trustor will be jointly and severally liable for ad valorem taxes for the homestead property. Act of May 30, 1993, 73d Leg., R.S., ch. 854, § 4, 1993 Tex. Sess. Law Serv. 3367, 3368 (Vernon) (codified at TEX. TAX CODE ANN. § 32.07 (Vernon Supp. 1994)).

421. Act of May 26, 1993, 73d Leg., R.S., ch. 933, § 1, 1993 Tex. Sess. Law Serv. 3953, 3953 (Vernon) (codified at TEX. PROP. CODE ANN. § 113.053(g) (Vernon Supp. 1994)).


423. Id. at 103 (codified at TEX. PROP. CODE ANN. § 482 (Vernon Supp. 1994)). The legislature made no provision for witnesses to the power of attorney as required under TEX. PROP. CODE ANN. § 36A (Vernon Supp. 1994).
lapse due to passage of time.\textsuperscript{424} Section 484 provides that actions taken by
the attorney in fact under the power of attorney at any time that the principal is under disability shall have the same effect as if the principal were not disabled.\textsuperscript{425}

Section 485 provides that if a court appoints a guardian of the principal’s estate following the execution of a durable power of attorney, the agent’s powers under the document terminate and the agent must deliver all assets of the ward in the agent’s possession to the guardian, as well as account to the guardian in the same manner as the agent would account to the principal if the principal terminated the power of attorney.\textsuperscript{426} Section 486 provides that the principal’s revocation of the power of attorney, the principal’s death, or the qualification of a guardian of the estate of the principal does not terminate the power of attorney as to the agent or any person who acts in good faith reliance on the power of attorney, if the agent or other person has no actual knowledge of the revocation, death, or appointment of a guardian of the principal’s estate.\textsuperscript{427} If the agent executes an affidavit that he did not have actual knowledge of termination of the power of attorney at the time he exercised the power, the affidavit will provide conclusive proof of the nontermination of the power at the time of the act.\textsuperscript{428} Similarly, if the agent executes an affidavit stating that the principal is incapacitated or disabled, the affidavit shall provide conclusive proof of the principal’s incapacity or disability.\textsuperscript{429} Section 488 provides that unless the document creating the power of attorney specifies otherwise, the revocation of the power of attorney is not effective to any third party who relies on the power who has not received actual notice of revocation.\textsuperscript{430} Section 489 provides that a durable power of attorney for any real property transactions must be recorded in the county in which the real property is located if the transactions require the execution of any instrument that must be recorded.\textsuperscript{431}

Section 490 provides a statutory form for a durable power of attorney.\textsuperscript{432} Sections 491-504 provide rules of construction concerning the powers contained in the statutory form.\textsuperscript{433} The agent may exercise the powers listed in sections 491-504 in connection with property or interests the principal has at the time of execution of the power of attorney or acquires thereafter, as well as in connection with property located in any state, and whether or not the

\textsuperscript{424} Id. (codified at TEX. PROB. CODE ANN. § 483 (Vernon Supp. 1994)).
\textsuperscript{425} Id. at 103-04 (codified at TEX. PROB. CODE ANN. § 484 (Vernon Supp. 1994)).
\textsuperscript{426} Id. at 104 (codified at TEX. PROB. CODE ANN. § 485 (Vernon Supp. 1994)).
\textsuperscript{427} Id. (codified at TEX. PROB. CODE ANN. § 486 (Vernon Supp. 1994)).
\textsuperscript{428} Id. (codified at TEX. PROB. CODE ANN. § 487(a) (Vernon Supp. 1994)).
\textsuperscript{429} Id. (codified at TEX. PROB. CODE ANN. § 487(b) (Vernon Supp. 1994)).
\textsuperscript{430} Act of April 15, 1993, 73d Leg., R.S., ch. 49, § 1, 1993 Tex. Sess. Law Serv. 103, 104 (Vernon) (codified at TEX. PROB. CODE ANN. § 488 (Vernon Supp. 1994)).
\textsuperscript{431} Id. (codified at TEX. PROB. CODE ANN. § 489 (Vernon Supp. 1994)).
\textsuperscript{432} Id. at 104-05 (codified at TEX. PROB. CODE ANN. § 490 (Vernon Supp. 1994)).
\textsuperscript{433} Id. at 106-13 (codified at TEX. PROB. CODE ANN. §§ 491-504 (Vernon Supp. 1994)). The legislature also assigned section numbers 501-504 to the new Informal Probate Chapter. Act of May 29, 1993, 73d Leg., R.S., ch. 712, § 7, 1993 Tex. Sess. Law Serv. 2790, 2794-95 (Vernon). For a discussion of informal probate, see supra notes 316-34 and accompanying text.
principal executed the power of attorney in Texas.\textsuperscript{434}