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Lynne McNiel Candler

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PROBATE AND TRUSTS

Lynne McNiel Candler*

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THIS Article reviews case law developments in the areas of wills, nontestamentary transfers, intestate succession, estate administration, guardianships, and trusts. The Survey period covers decisions published between October 1, 1993, and September 30, 1994.

I. WILLS

A. WILL CONTESTS

In Estate of Hamill the court considered whether certain beneficiaries under a will forfeited their rights to estate distributions under the no-contest clause of the will. The testatrix, who died in 1969, left her estate to her surviving daughters and four of her grandchildren. The will disin-
herited any beneficiary who contested the will. The mother of one of the
minor grandchildren contested the will on the basis of incapacity. The
court did not appoint an ad litem to represent the minor grandchild's
interests. The court denied the will contest, and the grandchild appealed
the court's ruling after she became an adult. This same grandchild peti-
tioned the court for termination of the temporary administration in 1973.
The temporary administrator objected to the payment of one of the dece-
dent's debts and joined certain other beneficiaries as cross-defendants in
his answer to the grandchild's petition. The other beneficiaries also ob-
jected to the payment of the debt, and the temporary administrator liti-
gated the debt issue for several years before its resolution. A second
grandchild filed a will contest in 1975, but the contest was dismissed for
undisclosed reasons. The second grandchild attempted to disclaim any
interest she had in the estate in 1992, but she later attempted to rescind
the disclaimer and contended that she should receive benefits under the
will. The trial court allowed the second grandchild to rescind her dis-
claimer and later awarded the second grandchild her original gift under
the will. One of the testatrix's daughters filed an application for termina-
tion of the temporary administration and distribution of the estate in
1989, and the temporary administrator filed an accounting of the income
and expenses of the estate. Another grandchild attacked the accounting
and additionally sought a declaratory judgment that the first grandchild
and second grandchild forfeited their interests under the will through the
will contests and that all of the other beneficiaries forfeited their interests
under the will when they opposed payment of the debt. The trial court
terminated the temporary administration in late 1992, and, at the hearing
on the temporary administrator's final accounting, found that the benefi-
ciaries who objected to the payment of the debt did not contest the will
through their objections to payment of the debt. The trial court also
found that the first grandchild did not forfeit her interest through the will
contest since she was a minor and no guardian ad litem was appointed at
the time of the contest. The trial court allowed the second grandchild to
rescind her disclaimer, and then ordered distribution of the estate to each
beneficiary named in the will. The grandchild who sought the declaratory
judgment concerning forfeiture of the other beneficiaries' interests ap-
pealed. The appeals court noted that it must strictly construe the in ter-
rorem clause and avoid forfeiture if possible. The court held that the
first grandchild violated the no-contest provision through her appeal, as
an adult, of the trial court order dismissing the contest her mother filed
on her behalf when she was a minor. The court then held that the sec-

3. Id. at 342. The court, citing Gunter v. Pogue, 672 S.W.2d 840, 842 (Tex. App.—
Corpus Christi 1984, writ ref'd n.r.e.), stated that a beneficiary could only breach the no-
contest clause if his acts fell within the clause's express terms. 866 S.W.2d at 342-43.

4. 866 S.W.2d at 343. The court indicated that it might have held that the original
contest filed by the grandchild's mother would have violated the no-contest clause, even
though no ad litem represented the grandchild's interests, since the record did not reveal
that the grandchild's mother had an interest adverse to the grandchild. Id.
ond grandchild’s purported disclaimer did not meet the requirements of the Probate Code for a valid disclaimer, and thus was ineffective. The court further held that the second grandchild did not violate the no-contest clause when she filed the will contest that later was dismissed. The court finally held that the beneficiaries who objected to the payment of the debt did not violate the no-contest clause of the will.

In May v. Crofts the court examined the issue of whether the trial court should disqualify the attorney for the will proponents when he drafted the testator’s will and supervised its execution. The attorney drafted the testator’s will shortly before the testator’s death. The testator left his estate to his sisters, to the exclusion of his wife. The attorney offered the will for probate and applied for letters testamentary on behalf of the executor named in the will. The court admitted the will to probate, then the testator’s wife filed suit to set aside the probate on the basis that the testator did not have testamentary capacity when he executed the will, that the testator did not execute the will with the requisite formalities, and that the testator executed the will under the undue influence of his sisters. The wife also filed a motion requesting the trial court to disqualify the attorney from representing the will proponents since she intended to call the attorney as a witness. The trial court refused to disqualify the attorney and the wife appealed. The appeals court determined that the wife had not shown that the attorney’s dual role as attorney for the proponents and witness would prejudice her and refused the wife’s motion for writ of mandamus.

5. TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1992) numerated the requirements for a valid disclaimer of property at the time the grandchild attempted to make her disclaimer. The second grandchild did not make, file, and give notice of her purported disclaimer within the statutory time frame in which a disclaimant must file and give notice of the disclaimer.

6. 866 S.W.2d at 344. The court further found that the ineffective disclaimer was not an assignment of the second grandchild’s interest under the will because she did not have donative intent when she executed the ineffective disclaimer. Id. The court found that an assignment must meet the requirements of a gift, which are donative intent, delivery of the property subject to the assignment or gift, and acceptance of the property by the donee or assignee. Id.; see Thompson v. Larson, 793 S.W.2d 94, 96 (Tex. App.—Eastland 1990, writ denied); Grimsley v. Grimsley, 632 S.W.2d 174, 177 (Tex. App.—Corpus Christi 1982, no writ).

7. 866 S.W.2d at 345. The court noted that the record provided information concerning the dismissal of the contest. Id. The court found that the act of filing the contest in itself did not violate the no-contest clause, but added that the no-contest provision at issue did not specifically provide that filing a contest would result in forfeiture of the contesting beneficiary’s interest. Id.

8. Id. at 345-46. The court held that the objection to payment of the debt is not a will contest, but is rather “in pursuance of an obligation under the will to ascertain whether any such debts were properly payable . . . .” Id. at 345. The court further noted that the objecting beneficiaries were cross-defendants, not the initiators of the action to terminate the temporary administration of the estate, and that the no-contest clause at issue specifically excepted defendants from its purview. Id. at 345-46.


10. Id. at 398-99.

In *Estate of Davis* the court held that the defendant must specifically plead the affirmative defense of estoppel due to the acceptance of partial benefits under a will. One of the decedent's granddaughters served as his guardian prior to his death. The guardian sought court approval to make gifts from the decedent's estate prior to his death as a method of minimizing estate and inheritance taxes. The guardian applied to make a gift of $25,000 to the decedent's grandson, who was to receive $50,000 under the will. The application specifically stated that the $25,000 gift was in partial satisfaction of the gift under the will, the grandson signed the application, and the guardian distributed the money to the grandson. Following the decedent's death, the grandson contested the will, alleging lack of testamentary capacity and undue influence. The guardian, who was also the applicant for probate, filed a motion to dismiss the contest on the basis that the grandson lacked standing to contest the will. At the hearing on her motion, the applicant alleged that the grandson could not contest the will because he had accepted benefits under the will through the acceptance of the gift. The trial court agreed and dismissed the contest. On appeal the grandson asserted that the applicant did not affirmatively plead the defense of estoppel in her motion to dismiss the contest. The granddaughter asserted that the basis of her motion to dismiss was lack of standing rather than estoppel and that the grandson could not complain about her failure to plead estoppel since he did not object to the failure prior to proceeding on the motion to dismiss. The appeals court first considered the granddaughter's argument that the grandson did not have standing to contest the will since he had accepted benefits under the will. The court held that the grandson's acceptance of benefits under the will was a form of estoppel, which is an affirmative defense and which the granddaughter must specifically plead. The court then determined that the grandson did not waive his right to complain about her pleading because the grandson objected in writing to the trial court prior to the time the trial court ruled on the motion to dismiss.

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12. 868 S.W.2d at 398-99. The court determined that the primary function of the rule is to direct the attorney's conduct, rather than to serve as a disqualification of the attorney. *Id.* at 399. The court found that the wife failed to establish that the rule prevents the attorney from continuing his representation of the estate and that the wife should not use the rule as a method for depriving the will proponents of representation by the attorney of their choice. *Id.* The dissent would have held that the rule was mandatory and that the attorney could not represent the will proponents since his representation did not fall under one of the five exceptions contained in the rule. *Id.* at 399-400 (Grant, J., dissenting).
13. *Id.* at 320, 322.
14. The Texas Rules of Civil Procedure require the affirmative defense of estoppel to be specifically pled. TEX. R. CIV. P. 94.
15. 870 S.W.2d at 321-22. The court found that the grandson met the statutory definition of a person interested in the estate, but that part of the determination of whether a person is interested in the estate is based upon such issues as acceptance of benefits. *Id.* at 322.
16. *Id.* at 322.
17. *Id.*
In *Stodder v. Evans*18 the court considered pleadings filed in district court to determine if the pleadings alleged a will contest, over which the district court had no jurisdiction.19 The county court of Falls County admitted the decedent's will to probate in 1984. In 1991 a person who alleged that she was the decedent's sole heir mailed a pleading to the county clerk, in which she alleged that the decedent had been declared incompetent many years prior to his death and that he lacked capacity to execute the will. The heir also contended that the executor misrepresented to her that the decedent was still alive, which was why she had not previously filed a cause of action, but the heir did not request that the court set aside the will based on lack of testamentary capacity or fraud.20 The clerk filed the pleading in district court. The executor and other defendants filed a motion for summary judgment, alleging that the heir lacked standing, that the two-year statute of limitations barred the suit, and that the suit constituted a collateral attack on the county court's judgment admitting the will to probate. The district court granted the defendants' summary judgment motion. The appeals court noted that the district court had no jurisdiction over a will contest unless the county court transferred the will contest to the district court,21 but if the alleged causes of action did not constitute a will contest, however, the district court would have jurisdiction over the causes of action.22 The court held that the heir's pleading amounted to a will contest in addition to other causes of action.23 The court reversed the summary judgment because the district court did not have jurisdiction over the action and remanded the case with instructions to the district court to dismiss the action for want of jurisdiction.24

In *Miller v. Woods*25 the court examined the issue of whether the district court had jurisdiction over a will contest.26 The applicant filed her application for probate of the decedent's will in the constitutional county

18. 860 S.W.2d 651 (Tex. App.—Waco 1993, writ denied).
19. *Id.* at 652-53.
20. The heir's causes of action against the executor, individually and in his fiduciary capacity, included fraud, breach of fiduciary duty, and conversion, and the heir requested the imposition of a constructive trust over the assets of the estate. The heir also named the decedent's estate and a charitable foundation created by the decedent as defendants.
21. *Id.* at 652.
22. *Id.* at 653.
23. *Id.* The court inferred a will contest from the request for constructive trust on the estate's assets and the transfer of the assets to the heir, which could only result if the will were set aside. *Id.*
24. 860 S.W.2d at 653. The court also severed the causes of action that did not constitute a will contest and remanded those causes of action to the trial court without instruction because they were inseparable from the will contest. *Id.* The dissent would not have found that the heir's causes of action constituted a will contest and would have found that the statute of limitations barred the heir's allegations. *Id.* at 654 (Vance, J., dissenting). The dissent believed that the heir's request for a constructive trust gave the district court jurisdiction over the heir's causes of action. *Id.* at 654. See the discussion of Qualia v. Qualia, 878 S.W.2d 339 (Tex. App.—San Antonio 1994, writ denied), infra notes 179-84 and accompanying text.
26. *Id.* at 344-46.
court of Liberty County, Texas. Two other parties contested the application and requested the transfer of the case to the Liberty County Court at Law. The county judge granted the transfer. The judge of the county court at law thereafter ordered the cause transferred to district court. After trial, the district court entered a judgment denying probate, which the applicant did not appeal. The applicant instead filed a petition to set aside the district court's judgment based upon lack of jurisdiction, which the district court denied. The applicant then applied for writ of mandamus ordering the district judge to vacate his judgment and transfer the case back to the county court at law. The appeals court first noted that the jurisdiction of a county court is generally the same as that of a probate court. The court then stated that if the county had a statutory county court with probate jurisdiction, the courts with probate jurisdiction have concurrent original jurisdiction with the constitutional county court and the district court has no probate jurisdiction. The court held that the Government Code specifically gives the Liberty County Court at Law concurrent probate jurisdiction with the constitutional county court. The court thus found that the district court has no jurisdiction over probate matters in Liberty County. Because the district court had no probate jurisdiction, the court held that the district court's order denying probate was void and conditionally granted the petition for writ of mandamus.

In Neeley v. Turner the court determined that the trial court incorrectly granted summary judgment for the beneficiary under a will when the contestant submitted some evidence that the testator was of unsound mind and the beneficiary only asserted that no evidence existed that the testator was of unsound mind and that he did not exert undue influence. In 1990 the decedent entered a nursing home while under medication that disoriented her. About three months after she entered the nursing home the decedent made a new will that benefitted her nephew to the exclusion

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27. Id. at 345. The court examined TEX. PROB. CODE ANN. § 4 (Vernon Supp. 1995), TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1995), which provides that in counties that have no statutory probate court, county court at law, or other court with probate jurisdiction, the county court may transfer contested proceedings to district court, and TEX. PROB. CODE ANN. § 5(c) (Vernon Supp. 1995), which provides that the county court shall transfer contested proceedings to the probate court, county court at law, or other statutory court that has the jurisdiction of a probate court rather than to district court if the county has one of these courts. 872 S.W.2d at 345.

28. 872 S.W.2d at 345. See Bailey v. Cherokee County Appraisal Dist., 862 S.W.2d 581 (Tex. 1993). For a discussion of Bailey, see infra notes 86-92 and accompanying text.


30. 872 S.W.2d at 345.

31. Id. The district court had no general grant of jurisdiction, no specific jurisdiction under TEX. GOV'T CODE ANN. § 24.430 (Vernon Supp. 1995), which established the district court involved in this case, and no default jurisdiction under TEX. CONST. art. V, § 8. 872 S.W.2d at 345.

32. 872 S.W.2d at 346.

33. 873 S.W.2d 113 (Tex. App.—Tyler 1994, no writ).

34. Id. at 114.
of other family members. The decedent died in February 1992, and the nephew offered her will for probate a few days later. Eight days after the nephew offered the will for probate, the decedent’s brother filed a will contest. The nephew filed a motion for summary judgment, alleging that the decedent was of sound mind when she signed her will and that no evidence existed that he unduly influenced her. The nephew’s motion contained as an exhibit excerpted deposition testimony of the decedent’s doctor. The brother objected to the form of the evidence submitted with the nephew’s motion and alleged that the nephew had presented little evidence of capacity and no evidence of lack of undue influence. The brother also submitted a letter from the decedent’s doctor that provided evidence that the decedent did not have testamentary capacity when she signed the will. The trial court granted the nephew’s motion for summary judgment. The appeals court held that the letter attached to the brother’s objection raised a fact issue concerning the decedent’s capacity and that the trial court improperly granted summary judgment. The court also held that the trial court erred in granting summary judgment on the issue of undue influence since the nephew presented no evidence that he did not exert undue influence.

B. WILL CONSTRUCTION

In Thomasson v. Kirk the court examined the issue of whether the testator intended to make testamentary gifts to his siblings only if they survived him. At the time the testator made his will, one of his brothers and three of his sisters were living. The testator named his living siblings in his will. The brother and one of the sisters died after the testator made his will, but before the testator’s death. One of the testator’s sisters died during the period of administration of the decedent’s estate. The will provided that each of the siblings living at the time the testator made his will would receive one-sixth of the estate, unless the sibling predeceased the testator or died during the administration of his estate, in which case the share of the deceased sibling would pass to the testator’s nieces and nephews. The probate court construed the will to mean that if any of the siblings were not living at the time of division of the estate, the deceased sibling’s share would pass to the nieces and nephews. The representatives of the estate of the sister who survived the testator, but died prior to distribution of the estate, appealed. The appeals court held that the testator’s language clearly expressed the testator’s intent to give only those siblings who survived him and the distribution of his estate a one-sixth share of his estate.

35. Id.
36. Id.
37. 859 S.W.2d 493 (Tex. App.—Houston [14th Dist.] 1993, writ denied).
38. Id. at 494-96.
39. Id. at 495. The court also found that, pursuant to Tex. Prob. Code Ann. §§ 47(c) and (f) (Vernon Supp. 1995), the testator could legally limit his testamentary gifts to siblings who survived until the conditions he set in his will were met. Id.
In *Barker v. Rosenthal*[^40] the court determined that the will in issue was not ambiguous[^41] and that the estate created under the terms of the will was a fee simple determinable.[^42] The decedent created a testamentary trust for the benefit of her daughter. The will provided that the trust would terminate when the daughter attained age fifty, at which time the daughter would receive the trust estate, with the instructions that she use the trust estate cautiously and will the remains to the decedent's three nephews. The trial court determined that the daughter received the trust estate as a fee simple determinable. The nephews appealed, contending that the will was ambiguous. The appeals court first held that the will was not ambiguous.[^43] The nephews also contended on appeal that the daughter did not receive a fee simple determinable under the will, but rather she received a life estate with the nephews receiving a vested remainder. The court examined *Brack v. Brodbeck*[^44] and *Singer v. Singer*[^45] and concluded that the will created a fee simple determinable[^46] as a matter of law.[^47] The court held that the decedent intended for her daughter to have full power over the property during her life, but that if any of the property remained at her death, the testator directed the disposition of the remaining property to her nephews rather than to her daughter's heirs.[^48]

[^40]: 875 S.W.2d 779 (Tex. App.—Houston [1st Dist.] 1994, no writ).

[^41]: Id. at 781.

[^42]: Id. at 780, 782.

[^43]: Id. at 781. The nephews contended that the will was ambiguous as a matter of law. One of the assertions the nephews made was that the will did not include granting language in the paragraph that provided for termination of the trust when the daughter attained age 50. The court found that the termination paragraph was not a grant, but merely stated the decedent's wishes about how her daughter would use the property. *Id.* The court also found no ambiguity based upon the decedent's alleged intent to maintain the trust estate for the benefit of her blood relatives, since the will contained no evidence of this intent. *Id.* Finally, the court found that the nephews' allegations of ambiguity based upon what was not stated in the will, rather than the actual language of the will, did not create an ambiguity. *Id.*

[^44]: 466 S.W.2d 600, 603 (Tex. Civ. App.—Texarkana 1971, no writ). In *Brack* the court found that the beneficiary received a fee simple determinable since she had the right to use the property during her life, but if any of the property remained on hand at her death, it would pass to persons designated by the testator. *Id.* at 603.

[^45]: 150 Tex. 115, 237 S.W.2d 600, 605 (1951). The court in *Singer* found that the provision for distribution of property following the deaths of the beneficiaries created a fee simple determinable since the will directed the distribution of any of the estate remaining on hand at the deaths of the beneficiaries. *Id.* at 605.

[^46]: The court cited 34 TEX. JUR. 3D Estates § 8 (1984) to define a fee simple determinable as follows:

... a fee that may never terminate or that may be terminated in accordance with the instrument that created the estate. Although an estate in fee simple is granted, the estate may be limited by a subsequent valid provision that the estate shall go over to others on the happening of a certain contingency. The estate, when so limited, is still a fee, for the reason that it will last forever if the contingency does not happen.

[^47]: Id. at 782.

[^48]: Id.
C. Holographic Will

In *Trim v. Daniels* the court held that the decedent's written note on the back of a greeting card was a valid holographic will. The decedent, a practicing attorney, sent his alleged common law wife a greeting card approximately three weeks prior to his death. The decedent signed the inside of the card with his full name, indicated his intent that the back of the card be examined, and wrote that he left everything to the alleged common law wife on the back of the card. The decedent placed his initials under the donative language on the back of the card, then added a note that things should be handled pursuant to an incomplete will. The common law wife filed the card for probate as the decedent's holographic will. Another woman, who also alleged that she was decedent's common law wife, contested the validity of the will and claimed that the decedent died intestate. The contestant also alleged that her son was decedent's son and sole heir. The trial court found that the writing on the greeting card was a valid holographic will, which the decedent executed with testamentary intent. The contestant appealed, alleging that the writing does not name the testator and that the testator cannot be determined, that the initials after the donative language do not identify the testator, and that the note following the initials provide evidence that the testator did not intend the writing to be his will. The contestant did not allege that the handwriting was not the decedent's. The appeals court noted that the decedent was a practicing attorney who had the knowledge to make a will and that the clear meaning of the language on the back of the greeting card was that the decedent intended to give all of his property to the named beneficiary. The court added that the instructional phrase following the decedent's initials did not incorporate the incomplete will by reference and the phrase was precatory, not mandatory. The dissent would have held that the decedent did not have testamentary intent when he wrote the words on the greeting card.

D. Contractual Will

In *Stephens v. Stephens* the court examined whether to impose a constructive trust over the decedent's estate to enforce the terms of an ear-
The decedent and his wife married in 1971, and they executed a joint and contractual will in 1986. In the joint and contractual will, the decedent and his wife each left his or her estate to the other, with the property passing equally to the decedent’s children and the wife’s children upon the death of the survivor. The decedent filed for divorce in February 1992. Several days before filing for divorce, the decedent executed a new will, in which he left his estate equally to his three children and made no provision for his wife. The wife filed a pleading in the divorce action, in which she also sought a divorce. The decedent died in June 1992, prior to the divorce. The wife filed the 1986 joint and contractual will for probate, and one of the decedent’s sons contested the probate of the 1986 will and filed an application to probate the 1992 will. The county court transferred the cause to district court. Following the transfer, the wife recognized that the court should admit the 1992 will to probate, but requested the imposition of a constructive trust on the estate to effect the terms of the 1986 joint and contractual will. The district court admitted the 1992 will to probate and denied the wife’s request for a constructive trust. The district court found, among other things, that the parties were in the process of divorcing at the time of the decedent’s death, that the wife had knowledge of the 1992 will, and that the wife had not detrimentally relied upon the 1986 will. The district court concluded that although the 1986 will was contractual, the consideration for the contract failed, that the decedent did not defraud the wife through his execution of the 1992 will, and that the judgment reflected the wishes of both the decedent and his wife as reflected in their divorce proceedings. The appeals court noted that either party may revoke a contractual will. The court distinguished the decedent’s revocation of the 1986 will in contemplation of divorce from the situation in which one of the parties to the contractual will had died, the other party received benefits under the will, and the other party then revoked the contractual will. The court noted that, because a constructive trust is an equitable remedy, the trial court had discretion in deciding whether to impose the constructive trust based upon the equity of the situation. The court held that the trial court did not abuse its discretion in determining not to impose a constructive trust, but limited its holding to the facts of the case.

56. Id. at 804-06.
57. Id. at 804.
58. Id. at 805.
59. Id.
60. Id. The court considered the stipulation of the parties that the decedent and his wife would have divorced if the decedent had lived and that, pursuant to TEX. PROB. CODE ANN. § 69 (Vernon 1980), the divorce would have voided the decedent’s testamentary gifts to his wife. 877 S.W.2d at 805.
II. NONTESTAMENTARY TRANSFERS

In *In re Group Life Insurance Proceeds of Mallory* 61 the court determined that former stepchildren could receive life insurance benefits when the insured failed to change the beneficiary designation after divorcing the stepchildren's mother. 62 Following the decedent's marriage in 1991 he changed the beneficiary designation on his group life insurance policy to show his new wife as primary beneficiary with his children and his wife's children to share equally as contingent beneficiaries if his wife predeceased him. The decedent and his wife divorced in 1992 and the court awarded the decedent ownership of his group life policy. The decedent did not change his beneficiary designation following the divorce. The decedent died early in 1993. The life insurance company notified the decedent's ex-wife that she was not entitled to the insurance benefits pursuant to provisions of the Texas Family Code. 63 The decedent's children filed suit for a declaratory judgment that both the primary and contingent beneficiary designations were void and that the children should receive the life insurance benefits as the decedent's heirs. The ex-wife stipulated that she was not entitled to benefits, and the trial court found that the decedent never changed his beneficiary designation and awarded the two stepchildren their equal shares of the insurance proceeds. The appeals court held that the insurance company must pay the proceeds to the contingent beneficiaries since the divorce revoked the primary beneficiary designation. 64

In *McNeme v. Estate of Hart* 65 the court determined that a signature card that indicated survivorship rights and contained the decedent's initials, but no signature, created survivorship rights when it incorporated a deposit agreement by reference. 66 The trial court determined that two of the decedent's bank accounts were probate assets since they did not create survivorship rights in the other joint tenant. The decedent and the other joint tenant signed a signature card for the account at the First National Bank of Monahans. The signature card contained language stating that the account had rights of survivorship. The appeals court held that although the signature card does not contain the exact statutory language for creation of a joint tenancy with right of survivorship, the language on the card was sufficient to create survivorship rights. 67 The appeals court

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61. 872 S.W.2d 800 (Tex. App.—Amarillo 1995, no writ).
62. Id. at 803.
63. *Tex. Fam. Code Ann.* § 3.632 (a)-(c) (Vernon Supp. 1995) provides that a former spouse may not receive insurance benefits if the divorce occurs following the date of the beneficiary designation unless certain exceptions apply. *See Tex. Prob. Code Ann.* § 69 (Vernon 1980), which provides that an ex-spouse may not receive benefits under the decedent's will if the decedent divorces the ex-spouse after making the will.
64. 872 S.W.2d at 803. The court found that *Tex. Fam. Code Ann.* § 3.632(c) (Vernon Supp. 1995) required payment to the contingent beneficiaries after the divorce.
66. Id. at 540-41.
67. Id. at 539-40.
held that the second account at a different Midland bank did not have survivorship rights, but concluded differently on motion for rehearing. The court also considered survivorship issues in *Banks v. Browning* and determined that two account cards clearly indicated the decedent’s intent to create survivorship rights in joint accounts. The decedent died intestate. The decedent and his second wife held community funds in two joint savings accounts. The decedent’s children and grandchildren from his first marriage sued the wife to recover the decedent’s interest in the funds in the two accounts, based upon the allegation that the signature cards did not create survivorship rights. The trial court entered summary judgment for the wife, finding that the cards were written contracts for joint accounts with rights of survivorship. The appeals court examined both signature cards, which the decedent and his wife had signed. Someone had marked each card in the appropriate block to create survivorship rights. The children and grandchildren asserted that someone placed the markings creating the survivorship rights after the decedent signed the cards. The appeals court held that the language on the cards unambiguously created survivorship rights and that it could not consider extrinsic evidence of the decedent’s intent.

### III. INTESTATE SUCCESSION

In *York v. Flowers* the court examined the inheritance rights of a recognized illegitimate daughter. The daughter lived with her adoptive mother and alleged biological father during her childhood. During their marriage, the mother and father bought a tract of real property as community property. The father died intestate in 1944. In 1955 the mother conveyed the real property, except for a life estate, to a third party, who apparently was a relative of the mother, by general warranty deed. In 1992 the daughter attempted to establish that she inherited her alleged father’s one-half interest in the real property. The owner of the real property filed a motion for summary judgment, claiming that the daughter could not inherit from her alleged father, that various statutes of limitation concerning adverse possession barred the daughter’s claim, and that, even if no other statute of limitation barred her claim, the residual

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68. *Id.* at 539.
69. *Id.* at 540-41. Initially the court found that the initials indicating creation of survivorship rights on the signature card did not create a survivorship right. *Id.* at 539. The signature card referenced the bank’s deposit agreement, which contained a definition of survivorship rights, but no party to the account signed the deposit agreement. The dissent would have found that the initials on the Midland signature card created a survivorship right. *Id.* at 540 (Larsen, J., concurring and dissenting). On motion for rehearing the court considered the Midland bank’s amicus brief and found that initials can show that the decedent signed the agreement. *Id.* at 540.
70. 873 S.W.2d 763 (Tex. App.—Fort Worth 1994, writ denied).
71. *Id.* at 765.
72. *Id.* The court also found that marking a block with an “X” is sufficient to indicate one’s intent to establish a joint tenancy with right of survivorship. *Id.*
73. 872 S.W.2d 13 (Tex. App.—San Antonio 1994, writ denied).
74. *Id.* at 14-15.
four-year statute of limitation barred her claim. The trial court granted summary judgment for the property owner. The appeals court held that the trial court erred in granting summary judgment on the first point raised by the land owner because the law is contrary to the owner's argument. The court then held that the adverse possession statutes of limitation did not apply between co-tenants unless one co-tenant clearly held the property adversely to the other co-tenant and repudiated the other co-tenant's title. The court finally determined that the residual four-year statute of limitations did not apply because the daughter's claim concerned her interest in real property.

IV. ESTATE ADMINISTRATION

A. Muniment of Title

In Chovanec v. Chovanec the court held that a fact issue existed concerning a spouse's failure to offer his deceased wife's will for probate within four years of her death and reversed and remanded the trial court's summary judgment denying the will probate as a muniment of title. The decedent died in 1979, and she left her husband all of her property in her will. The husband did not offer the will for probate within four years of the decedent's death as required in the Probate Code. During his marriage the husband received certain real property from his parents, which the husband believed to be his separate property. Title to the property actually was in the names of both the husband and the decedent. Following the decedent's death the husband executed three oil and gas leases covering the real property. The husband executed the first oil and gas lease the year following the decedent's death, but the lessee did not inquire about an estate administration, a will, or any other authority that the husband had to enter the lease. The husband decided to sell the property in 1992 and only learned at that time that the property was also...

75. Id. The court found that the cases and arguments on which the property owner relied no longer reflect the law in Texas. Id. at 15. The court found that the daughter established a material issue of fact with the evidence that she presented concerning her relationship with her alleged father and that the trial court incorrectly granted summary judgment. Id. The court found that the daughter's uncontradicted evidence supported her proceeding under the presumption created in Tex. Fam. Code Ann. § 12.02(a)(5) (Vernon Supp. 1995) to prove her intestate succession rights under Tex. Prob. Code Ann. § 42(b) (Vernon Supp. 1995). Id.


77. 872 S.W.2d at 15 (citing Todd v. Bruner, 365 S.W.2d 155, 156 (Tex. 1963)). The daughter testified that none of the owners of the property had ever indicated to her that they owned all interests in the property. She also testified that, although she knew of the deed, she had never seen it and did not know that it purported to convey full ownership interests in the property.


79. 872 S.W.2d at 16.

80. 881 S.W.2d 135 (Tex. App.—Houston [1st Dist.] 1994, no writ).

81. Id. at 137-38.

held in his wife's name. The husband immediately offered her will for probate and their child filed a motion for summary judgment, requesting the court to deny the will probate since more than four years had passed since the decedent's death. The trial court granted the motion for summary judgment. The appeals court noted that whether the will's proponent defaulted in not offering the will for probate is usually a fact issue. The court further noted that courts have been lenient in allowing probate as a muniment of title if the proponent has an excuse for his failure to probate the will, especially when, as in this case, the probate of the will completes the chain of title to real property. The court held that the husband's testimony created a fact issue and that the trial court improperly granted summary judgment denying probate.

B. Claims Against the Estate

In Bailey v. Cherokee County Appraisal Dist. the court determined that ad valorem taxes that accrued during the administration of the estate constituted claims against the estate and that the probate court had exclusive jurisdiction over the claims. The decedent died intestate in 1973, survived by his wife and his two sons. The decedent and his wife owned land located in Cherokee County as community property. The decedent's wife served as dependent administrator of his estate. The decedent's wife failed to pay property taxes on the Cherokee County property for the years 1976 through 1986, and the taxing authorities filed suit in district court against the wife and the sons, jointly and severally, requesting a personal judgment for the taxes, plus interest and fees. The estate continued under administration during the years in which the taxes were not paid and at the time of the suit. The district court ordered foreclosure of the tax liens, but denied personal judgment against the wife and sons. The court of appeals reversed and remanded the case, holding that personal judgment against the wife and sons was appropriate. The Texas Supreme Court held that ad valorem taxes that accrued during estate administration were claims against the estate. The court further held that the heirs had no personal liability for the taxes. The court then determined that because the unpaid taxes represented a claim against the decedent's estate, the county court at law, not the district court, had

83. 881 S.W.2d at 137.
84. Id.
85. Id. at 137-38.
86. 862 S.W.2d 581 (Tex. 1993).
87. Id. at 582, 586.
89. 862 S.W.2d at 583; see San Antonio Sav. Ass'n v. Beaudry, 769 S.W.2d 277, 281 (Tex. App.—Houston [14th Dist.] 1989, writ denied); Oldham v. Keaton, 592 S.W.2d 938, 945 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).
90. 862 S.W.2d at 584. The court examined the taxing authorities' argument that the property immediately vested in the heirs, so the heirs should be personally liable on the taxes, and determined that the administrator of the estate held legal title to the property and thus was liable for payment of the taxes. Id.
The court held that the estate was liable for the payments of the ad valorem taxes during the period of estate administration, that the heirs had no personal liability for the taxes, and that the county court at law had exclusive jurisdiction over the claim for unpaid taxes.92

In Cornerstone Bank, N.A. v. Randle93 the court examined whether an assignee of the State of Texas may recover for payment of inheritance taxes to the State either directly from the decedent's surviving spouse, who occupied the decedent's separate property residence as his homestead, or by foreclosing on the surviving spouse's homestead interest.94

Under the terms of her will the decedent left all of her property to her son and named her son independent executor. The decedent's husband survived her and continued to live in her separate property residence under his constitutional95 and statutory96 homestead rights. The son, as independent executor, borrowed money from the bank for taxes and administration expenses and gave the bank a deed of trust on the residence. The son later defaulted on payment of the note, and bank bought the son's remainder interest from the trustee at public sale. The son also failed to pay inheritance tax to the State of Texas on his mother's estate. The bank paid the tax to preserve its investment in the remainder interest and received an assignment of the State's claim for the tax, including a lien on the estate's property. The bank filed suit against the husband, in which it sought to foreclose the husband's homestead right in the residence and recover reimbursement for payment of the inheritance tax. The trial court granted the husband's motion for summary judgment against the bank. The appeals court first determined that the husband had no personal liability for payment of the inheritance tax because he

91. Id. at 585. The court cited TEX. PROB. CODE ANN. § 5(c) (Vernon Supp. 1995) as the basis for its determination that the district court has no jurisdiction over probate matters in counties with statutory courts that exercise probate jurisdiction. 862 S.W.2d at 585. The court disagreed with the taxing authorities' contention that the district court had jurisdiction since a court can have jurisdiction only if the probate matter is pending in the district court at the time the cause of action is filed. Id. The court finally found that the county court at law had dominant jurisdiction over other courts with concurrent jurisdiction. Id. at 586.

92. 862 S.W.2d at 586. The dissent would have found that no reason existed for the continued administration of the estate. Id. at 587 (Gonzales, J., dissenting). Further, the dissent believed that the claim for unpaid ad valorem taxes did not represent a claim against the estate since the decedent did not owe the taxes at the time of his death. Id. at 587, 588. Because the property passed to the heirs immediately upon the decedent's death pursuant to TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1995), the dissent would have found that the two sons had personal liability for the taxes. Id. at 588 (Gonzales, J., dissenting). TEX. TAX CODE ANN. § 32.07 (Vernon 1992 & Supp. 1995) provides that the person owning or acquiring property on January 1 of the year for which the ad valorem taxes are imposed has a personal obligation for payment of the tax. The dissent also would have found that the district court had jurisdiction over the claim for unpaid taxes since the taxing authority's claim was actually against the heirs individually and not against the estate. 862 S.W.2d at 589 (Gonzales, J., dissenting).

93. 869 S.W.2d 580 (Tex. App.—Dallas 1993, no writ).

94. Id. at 582, 584-87.

95. TEX. CONST. art. XVI, § 52.

96. TEX. PROB. CODE ANN. § 284 (Vernon 1980).
did not acquire property subject to taxation.\textsuperscript{97} The court then determined that no lien attached to the husband’s homestead right in the property since the husband was not personally liable for the inheritance tax.\textsuperscript{98} The appeals court affirmed the trial court’s summary judgment in favor of the husband.\textsuperscript{99}

In \textit{Howe State Bank v. Crookham}\textsuperscript{100} the court held that the county court in which the estate administration was pending held exclusive jurisdiction over a claim against the estate.\textsuperscript{101} The decedent executed a promissory note, due one year from the date of the note, and payable to the bank, in 1989. A certificate of deposit secured the promissory note. The decedent died approximately two and one-half months before the due date of the note. The county court in Grayson County admitted the decedent’s will to probate and appointed his wife and daughter as co-executors nine days before the due date of the note. The co-executors did not pay the note on the due date. Almost a year later the county court converted the administration into a dependent administration and appointed the wife and daughter as co-administrators with will annexed. Several months later the bank filed an authenticated claim with the co-administrators and requested that they treat the note as a matured, secured claim. The co-administrators almost immediately rejected the claim and filed a memorandum of rejection with the county court. The bank filed suit on the claim in district court in Grayson County. The co-administrators filed a plea to jurisdiction as well as their answer. The district court found that it had no jurisdiction and the bank appealed. The appeals court held that the bank filed suit on its claim under Probate Code section 313,\textsuperscript{102} which states that the claimant may file suit in the court of original probate jurisdiction or in any other court of proper jurisdiction.\textsuperscript{103} The bank alleged that the district court was a court of proper jurisdiction. The appeals court examined sections 5 and 5A of the Probate Code,\textsuperscript{104} as well as \textit{Bailey v. Cherokee County Appraisal Dist.},\textsuperscript{105} and

\textsuperscript{97} 869 S.W.2d at 586. \textit{TEX. TAX CODE ANN.} § 211.108 (Vernon 1992) provides that any person who acquires property subject to the inheritance tax is personally liable for payment of the tax to the extent of the value of the property acquired. The bank contended that the husband acquired the homestead property as the result of his wife’s death. The court found that although the value of the homestead property is included in determining the amount of the inheritance tax, 869 S.W.2d at 586, the husband had a vested homestead right prior to his wife’s death, so he did not acquire the homestead interest as the result of her death. \textit{Id.} at 586.

\textsuperscript{98} 869 S.W.2d at 586. The court also held that neither the state inheritance tax nor the federal estate tax are taxes on property for purposes of \textit{TEX. CONST.} art. XVI, § 50, so the bank could not foreclose on the husband’s homestead interest. 869 S.W.2d at 587.

\textsuperscript{99} 869 S.W.2d at 587.

\textsuperscript{100} 873 S.W.2d 745 (Tex. App.—Dallas 1994, no writ).

\textsuperscript{101} \textit{Id.} at 750.

\textsuperscript{102} \textit{TEX. PROB. CODE ANN.} § 313 (Vernon 1980).

\textsuperscript{103} 873 S.W.2d at 746.

\textsuperscript{104} \textit{TEX. PROB. CODE ANN.} §§ 5, 5A (Vernon Supp. 1995).

\textsuperscript{105} 862 S.W.2d 581 (Tex. 1993). \textit{See supra} notes 86-92 and accompanying text for a discussion of \textit{Bailey}.
concluded that only the county court in which the probate cause was pending had jurisdiction to hear a claim.\textsuperscript{106}

C. \textit{Res Judicata}

In \textit{Coble Wall Trust Co. v. Palmer}\textsuperscript{107} the court examined a \textit{res judicata} defense in a cause of action filed in a probate case.\textsuperscript{108} The probate court appointed the trust company guardian of the estate of the decedent, who was then elderly and incompetent. The decedent owned significant amounts of real property with a high appraised value, but very little cash and liquid assets. The trust company, in conjunction with the beneficiaries under the decedent's will, and with the approval of the probate court, implemented an estate plan designed to provide liquidity to the estate for payment of the projected estate and inheritance taxes, as well as administration expenses, and to reduce the total taxes through making gifts to the beneficiaries during the decedent's life. The beneficiaries, with their attorneys, reviewed and approved the estate plan prior to the probate court's approval. The decedent died soon after the probate court's approval of the estate plan, and the court appointed the trust company temporary administrator for the purpose of implementing the estate plan. The court later appointed a permanent independent administrator of the estate. The independent administrator and the beneficiaries objected to the guardian's final account, which documented the transactions implementing the estate plan. The probate court held a hearing on the objections, including objections to the amount of the guardian's fees and expenses and the valuation of assets. The probate court approved the final account and discharged the guardian. The independent administrator and beneficiaries did not appeal the probate court's order. The independent administrator and beneficiaries later objected to the trust company's final account as temporary administrator, and the probate court again held a hearing on the matter, after which it approved the final account. The independent administrator and beneficiaries again did not appeal the probate court's order. The independent administrator and the beneficiaries sold the majority of the real property, which was security for debt obtained to pay taxes and administration expenses, to a party that defaulted on the loan. Due to lack of liquidity in the estate, the independent administrator and heirs did not meet their quarterly payment obligations on the loan and the lending institution posted the land for foreclosure. The independent administrator and beneficiaries sought an injunction against the foreclosure, which the probate court granted. The lending institution appealed that order, and the appeals court, in \textit{San

\begin{footnotesize}
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\item[106.] 873 S.W.2d at 747-50.
\item[107.] 859 S.W.2d 475 (Tex. App.—San Antonio 1993, writ denied).
\item[108.] Id. at 479-81.
\end{itemize}
\end{footnotesize}
Antonio Savings Ass'n v. Palmer, reversed the probate court. The independent administrator then brought suit in the probate court against the president of the trust company and the trust company, as the former temporary administrator, alleging negligence, gross negligence, and violations of the deceptive trades practices act. The probate court entered judgment based on the jury's verdict for the independent administrator. The appeals court did not consider the res judicata defense that the trust company argued, both at the trial level and on appeal. The Texas Supreme Court held that the probate court had subject matter jurisdiction over the case and reversed the court of appeals. On remand, the appeals court found that the independent administrator did not appeal the orders approving the final accounting of the guardian and the final accounting of the temporary administrator, which followed hearings at which the independent administrator raised all of the allegations contained in the later causes of action. The appeals court held that the orders approving the final accounts, which the independent administrator and beneficiaries did not appeal, served as res judicata to all of the causes of action the independent administrator later raised.

D. Executors and Administrators

In Elick v. Woods the court determined that the personal representatives of a decedent's estate had the authority to wind up the professional corporation's affairs, sell the assets, and dissolve the corporation. The decedent was the sole shareholder in a professional corporation that provided legal services. The decedent's stock in the professional corporation

110. Id. at 803.
111. TEX. BUS. & COM. CODE ANN. §§ 17.41-.46 (Vernon Supp. 1995).
112. Coble Wall Trust Co. v. Palmer, 848 S.W.2d 696 (Tex. App.—San Antonio 1992). The appeals court reversed the trial court and rendered judgment on the grounds that the probate court did not have subject matter jurisdiction over the suit. Id. at 703, 710.
114. 859 S.W.2d at 479. The court found that the independent administrator could not collaterally attack the orders through the causes of action alleged in the suit against the trust company and its president. Id. The probate court heard evidence concerning the trust company's fees, as well as the effectiveness and expense of the estate plan, at the hearings on the final accounts, and the probate court heard all of the allegations that the independent administrator later brought against the trust company and its president in the hearings on the final accounts. See id. at 480.
115. Id. at 480-81. The court further found that the jury's findings did not support the independent administrator's claims of violations of the Deceptive Trades Practices Act, id. at 481, and that no evidence existed to support the jury's findings that the trust company and its president breached a fiduciary duty to the estate and its beneficiaries during the administration of the estate and that the breach resulted in damages to the estate and beneficiaries. Id. at 482.
117. Id. at 461.
was partly separate property and partly community property. The de-ec-
dent left his separate property to his children and his community property to his wife. The decedent and his wife died together in an airplane crash. One of the decedent's daughters, who was also an attorney, alleged that she should immediately receive her one-twelfth ownership interest in the decedent's stock, and that, since none of the other beneficiaries of the two estates were attorneys, the corporation should redeem all of the re-
remaining stock from the estates. The daughter relied upon article 1528e, section 14, of the Revised Civil Statutes for her argument that only she could serve as an officer or director of the corporation and that the cor-
poration must purchase or redeem all shares other than those that re-
presented her share of her father's interest. The trial court held that the professional corporation stock was an asset of the two estates and that the administrators of the two estates had the sole right to control the stock during the period of estate administration, including the right to serve as officers, directors, and shareholders of the corporation for pur-
poses of winding up corporate affairs and selling assets or stock of the corporation. The trial court found that the administrators could not pro-
vide legal services during their administration of the stock. The trial court further found that the attorney daughter was not a shareholder of the corporation and that she did not have the right to compel the per-
sonal representatives of the two estates to sell corporate stock to her or to the corporation itself. The appeals court examined article 1528e, section 14 and determined that the statute specifically allowed for a personal representative to wind up a professional corporation's affairs, sell the as-
sets or the stock, and dissolve the corporation.

In O'Dinniley v. Golden the court ordered the trial judge to rule on a surviving child's motion for appointment as successor personal repre-
sentative. The decedent died testate in 1986. His wife served as in-
dependent executor of the estate until her death in June 1992. The decedent's daughter determined that the estate owed two or more claims and that causes of action on behalf of the estate required the appoint-
ment of a personal representative. The daughter filed a motion for ap-
pointment as successor personal representative. The decedent's son and only other surviving heir waived his right to appointment and requested that the court appoint his sister personal representative. The court held a hearing on the motion in July 1992 and took the motion under advise-
ment. In late August 1992 the court set the estate for a final hearing and distribution in November 1992. The daughter filed an amended motion for appointment as successor personal representative, along with a pro-

119. Id.
120. 859 S.W.2d at 461. The court found that the legislature could not have intended to vest all ownership interests in a beneficiary or heir who happened to practice the same profession as the decedent, to the exclusion of the other beneficiaries or heirs. Id.
121. 860 S.W.2d 267 (Tex. App.—Tyler 1993, no writ).
122. Id. at 270.
posed order appointing her. The daughter also objected to the final distribution of the estate since she had provided evidence on the continuing need for estate administration at the July 1992 hearing. The daughter sought a writ of mandamus in November 1992 to compel the court to appoint her as successor personal representative. The judge responded and stated that he would appoint the daughter. The daughter filed another motion to set a hearing on her motion for appointment, but the court did not rule on the motion. The daughter again sought mandamus relief. The appeals court held that the judge had not ruled on the motion within a reasonable period of time and that the daughter did not have a remedy at law for the judge's failure.\textsuperscript{123} The court ordered the judge to rule on the daughter's motion for appointment of personal representative, but declined to order the court to appoint the daughter successor personal representative.\textsuperscript{124}

In \textit{Allison v. FDIC}\textsuperscript{125} the court examined the issue of whether a judgment creditor of the beneficiaries of an estate had standing to seek removal of the independent administrator.\textsuperscript{126} A brother and sister were the only two beneficiaries of the decedent's estate. Their mother served as successor independent administrator of the estate from 1986 until the court removed her in October 1992. The decedent's will provided that her estate would be held in trusts for the benefit of the beneficiaries until the brother attained age thirty, which occurred in July 1992. The FDIC held a judgment against the brother and sister, as well as against a partnership of the brother and sister. At the time of her appointment as successor administrator, the mother believed that her only duties would be to resolve tax issues and deliver the estate to the trustees of the trusts. The trustees, however, resigned and no other trustee agreed to serve. The mother liquidated the estate assets and moved them to a bank in Liechtenstein, presumably in an effort to keep the assets from the brother's and sister's creditors. The mother later brought the assets back into the United States and invested them in annuities. The FDIC alleged that the purchase of annuities amounted to a conspiracy between the mother, brother and sister to hinder or defraud the FDIC as the brother's and sister's creditors and sought to remove the mother as independent administrator. In May 1992 the trial court granted the FDIC's requested restraining order and later enjoined the independent administrator from dissipating the estate. The trial court, following a hearing, removed the mother as independent administrator in October 1992. The mother contended on appeal that the FDIC did not have standing to seek her removal. The appeals court, basing its decision upon construction of the language of Probate Code section 3(r),\textsuperscript{127} determined that the FDIC did

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} 861 S.W.2d 7 (Tex. App.—El Paso 1993, writ dism'd by agr.).
\textsuperscript{126} \textit{Id.} at 9-10.
\textsuperscript{127} \textsc{Tex. Prob. Code Ann.} § 3(r) (Vernon 1980).
not have standing as an interested person in the decedent's estate and, thus, could not seek removal of the independent administrator.128

In *McLendon v. McLendon*129 the court considered the alleged breach of fiduciary duty award by independent co-executors of the decedent's will.130 The decedent's husband, son, and grandson built a successful business enterprise, consisting of a general partnership and a limited partnership, over many years. The decedent's husband died in 1982 and the decedent was actively involved in the business, along with the grandson, from the time of her husband's death to her own death in 1985. The probate court appointed the grandson and a long-time employee independent co-executors of the decedent's will. Following the decedent's death, the partners amended the partnership agreements of both partnerships. The son and grandson, who were general partners of both partnerships, the independent executor of the husband's estate, and the co-executors of the decedent's estate signed the partnership amendments. The amendments provided that the general partner could expel any partner that questioned any management decisions made by the general partner. One of the grandson's two sisters sued the co-executors for mismanagement of the decedent's estate and contested the validity of the partnership amendments. The co-executors notified the sister that she lost her interest in the estate under the terms of the *in terrorem* clause contained in the will. The other sister intervened and the two sisters alleged that the co-executors breached their fiduciary duty and requested the removal of the co-executors, punitive damages, attorney's fees, and an accounting and distribution of the estate. The sisters further sought, among other things, a ruling that they had not violated the terms of the *in terrorem* clause. The jury found that the co-executors breached their fiduciary duties and awarded the sisters actual damages and punitive damages against their brother. The jury further awarded attorney's fees to the sisters. The probate court entered a judgment based on the verdict for the sisters and awarded them attorney's fees. The probate court did not enter judgment concerning the applicability of the *in terrorem* clause. The appeals court held that evidence existed to support the jury's finding that the brother breached his fiduciary duty,131 and further determined that the evidence presented was sufficient to support the jury's finding of breach of fiduciary duty.132 The appeals court held that the evidence supported the jury's finding of exemplary damages.133 The court also found

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128. 861 S.W.2d at 10.
129. 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied).
130. *Id.* at 669-71.
131. *Id.* at 670.
132. *Id.* at 671. The sisters' expert testified that the partnership amendments reduced the value of their interests in the partnerships and eliminated their ability to terminate the partnerships. The brother's expert testified that the partnership interests increased in value following the amendments to the agreements. The appeals court noted the difference of opinion between the experts and concluded that it could not substitute its judgment for the jury's finding. *Id.*
133. *Id.* at 672.
that the probate court had discretion to award attorney's fees to the sisters.\textsuperscript{134} Upon consideration of the sisters' cross-points the court determined that the amendments to the partnership agreements were not invalid,\textsuperscript{135} that the trial court did not abuse its discretion in failing to remove the co-executors,\textsuperscript{136} and that the claims brought by the sisters did not fall within the purview of the will's in terrorem clause.\textsuperscript{137}

In \textit{Lawyers Surety Corp. v. Larson}\textsuperscript{138} the court determined that Probate Code section 245\textsuperscript{139} permits the payment of attorney's fees by the surety of an administrator removed for his failure to perform his duties properly.\textsuperscript{140} A wife and her husband both died intestate within four months of each other. The court appointed one of their sons as administrator of both estates. Lawyers Surety served as surety on the son's bond in each estate. The son filed inventories in each estate, which the court approved. One of the decedents' daughters objected to the inventories after their approval and requested new inventories. The administrator filed amended inventories in each estate, which the court approved. The administrator also filed a joint annual account for the two estates, which he amended some two months after filing. The daughter filed a second complaint and requested the court to remove the administrator and appoint a successor. The court held a hearing on the daughter's motion and found that the son had mismanaged the property of the estates and had violated several statutory duties. The court removed the son and appointed the daughter as successor administrator. The daughter posted her bonds and then brought suit against the former administrator for breach of duty. The daughter claimed damages against the surety company. The parties agreed to dismiss the claims for damages, but the claim for attorney's fees and costs proceeded to trial. The court awarded almost $12,000 in fees and costs in each estate. The surety company appealed. The appeals court first held that any alleged nonconformity in the daughter's bonds did not preclude her from pursuing a cause of action to recover costs for correcting the improprieties conducted by the former administrator.

\textsuperscript{134} \textit{Id.} at 673. The sisters did not segregate their attorney's fees between those for which they could recover and those for which they could not. Normally, a party may not receive attorney's fees for claims that are not recoverable. The court, citing Steward Title Guar. Co. \textit{v. Sterling}, 822 S.W.2d 1, 11 (Tex. 1991), found that an exception to this rule exists if the fees arise out of the same events and are so interrelated that the same facts prove or deny the claims. \textit{McLendon}, 862 S.W.2d at 673. The court found that the facts of this case fell within the exception to the rule requiring segregation of attorney's fees and that the probate court did not abuse its discretion through not requiring segregation of the fees. \textit{Id.} at 674.

\textsuperscript{135} 862 S.W.2d at 677.

\textsuperscript{136} \textit{Id.} at 678.

\textsuperscript{137} \textit{Id.} at 679. The court found that the sisters' alleged causes of action against the co-executors in their fiduciary capacity and for a declaratory judgment about the validity of the partnership amendments did not constitute a will contest and thus did not violate the in terrorem clause. \textit{Id.}

\textsuperscript{138} 869 S.W.2d 649 (Tex. App.—Austin 1994, no writ).

\textsuperscript{139} \textsc{Tex. Prob. Code Ann.} § 245 (Vernon Supp. 1995).

\textsuperscript{140} 869 S.W.2d at 654.
The court next held that Probate Code section 245142 allows a successor personal representative to recover attorney's fees for both the removal of a personal representative and bringing the estate into statutory compliance. The court also determined that sufficient evidence supported the probate court's award of attorney's fees.

In Oadra v. Stegall the court determined the ownership of two accounts established by the decedent. The decedent, using his funds, established a savings account styled in his name and his mother's name as co-trustees. The signature card for the account named the beneficiaries of the account as the decedent, his son, his daughter, and her two children. The decedent and his mother also established a smaller account, again with the decedent's funds. Shortly after the decedent's death, his mother closed the trust account and moved the funds into a new account in her name only. The trial court found that the funds in both accounts belonged to the decedent's estate. The appeals court reversed the trial court's conclusion as to the trust account and held that the decedent's mother owned the funds in the trust account. The Texas Supreme Court held that the funds in the trust account belonged to the decedent's estate. On remand the appeals court first determined that the two-year statute of limitations did not bar the estate's claims for damages. The court then determined that the jury correctly found that the decedent did not make a gift of the trust funds to his mother because the mother failed to prove by clear and convincing evidence that the decedent intended to make a gift and that the decedent delivered the funds to her. The court finally held that the decedent funded the trust account solely with his funds and that his mother contributed no funds to the account. 

141. Id. at 651. The daughter voluntarily posted amended bonds prior to the trial. The court found that the probate court's approval of the bonds gave the daughter her authority to pursue the cause of action. Id. The court also noted that the proper forum for attacking the bonds was the probate court, whether in an action for removal or a request for a replacement bond. Id.


143. 869 S.W.2d at 652. The surety company urged the court to accept its contention that the successor administrator could only recover attorney's fees incurred through forcing the prior personal representative to comply with his statutory duties. The court declined to accept the surety company's argument. Id. at 652-53.

144. Id. at 654.

145. 871 S.W.2d 882 (Tex. App.—Houston [14th Dist.] 1994, no writ).

146. Id. at 886.


149. 871 S.W.2d at 887. The court held that the statute of limitations did not apply because the estate did not have to file suit to recover funds that actually belonged to the estate. Id.

150. Id. at 892.

151. Id. at 894. The mother signed the signature care as a grantor of the trust, but the court found that the jury had sufficient evidence presented to establish that the mother did not contribute any funds to the account. Id.
In *Garcia v. Garcia*\(^{152}\) the court considered the allowance of attorney's fees in an action removing an executor.\(^{153}\) The testator died in 1976. One of the testator's sons served as independent executor until his subsequent death, except for a brief period when a daughter served as temporary administrator for purposes of canceling deeds from the testator to the son serving as executor. After the executor's death, the court appointed another son as successor executor. The second son attempted to convert the principal and interest of savings bonds held in the testator's name and also failed to file accountings with the court. The wife of the deceased son filed an application to compel an accounting of the estate in 1986, which was the only accounting the successor executor filed and which did not balance. The wife filed a motion to remove the successor executor in 1990, which the court granted because the successor executor failed to file fiduciary income tax returns, pay ad valorem taxes or estate taxes, and make final settlement of the estate. The court also found that the successor executor grossly mismanaged the estate. The court appointed a successor administrator and ordered the executor to deliver the assets of the estate to the administrator. The administrator also failed to file a court-ordered inventory and accounting until after the wife of the first son filed a motion to have the administrator removed for his failure to file the reports. The court held a hearing concerning the objections to the accounting and payments to the successor executor for his services as executor, as well as payments to the successor executor for attorney's fees for defending his fiduciary position, and for payment of the first son's wife's attorney's fees. The court allowed both sides their attorney's fees and also allowed the successor executor compensation for his services. The first son's wife then attempted to surcharge the successor executor for losses incurred during the time he served as executor, but the trial court rejected the application for surcharge, concluding that the wife did not controvert the evidence the successor executor gave concerning the savings bonds. The wife appealed. The appeals court held that the trial court incorrectly placed the burden of proof on the applicant for surcharge rather than on the successor executor, and remanded the case to the trial court so that the successor executor would have the opportunity to produce evidence concerning his expenses and account for the estate's finances during the time he served.\(^{154}\) The appeals court held that the successor executor defended his removal in good faith and that the trial court correctly awarded him his attorney's fees in connection with the removal action.\(^{155}\)

\(^{152}\) 878 S.W.2d 678 (Tex. App.—Corpus Christi 1994, no writ).

\(^{153}\) Id. at 679-81.

\(^{154}\) Id. at 680.

\(^{155}\) Id. The court remanded the issue of all other attorney's fees, *id.*, but held that the first son's wife could not have her attorney's fees surcharged against the successor executor individually. *Id.* at 680-81.
In *Estate of Townes v. Townes* the court determined that a son breached his fiduciary duty to his mother when he took funds from his mother's accounts and converted them for his own use. One of the decedent's sons cared for her and assisted her with her financial matters following the death of his uncle, who had assisted the decedent following her husband's death. The son was a signatory on a bank account and a brokerage account. During the years that her son assisted the decedent, the son distributed over $440,000 from the decedent's accounts to or for the benefit of himself. The decedent also distributed significant funds to two of the decedent's other surviving children. Following the decedent's death the probate court appointed the son executor of her estate. The son died shortly after his mother, however, and two of the decedent's other surviving children qualified as co-administrators of her estate. After reviewing the decedent's records the co-administrators sued the estate of the son who had assisted his mother for breach of fiduciary duty, fraud, conversion of property, and unjust enrichment. The probate court, based upon the jury's findings, entered a take nothing judgment against the co-administrators. The appeals court held that the evidence presented to the jury did not overcome the presumption that the son's withdrawal of funds from his mother's account was a breach of fiduciary duty. The court also held that no evidence existed to support the jury's finding that an implied agreement existed between the decedent and her son concerning distributions of account funds to him. Finally, the court held that the son converted the funds through his withdrawals, but that the evidence supported the jury's finding that his wife did not convert the funds.

**V. GUARDIANSHIPS**

In *Garland v. Garland* the court held that a statutory probate court has jurisdiction over guardianship proceedings for an adult incompetent child. The proposed ward, who was twenty-two years old when his father filed the application for guardianship in the probate court, had Down's syndrome. The ward's parents divorced when he was sixteen and the family district court appointed his mother as his managing con-

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156. 867 S.W.2d 414 (Tex. App.—Houston [14 Dist.] 1994, writ denied).
157. *Id.* at 418, 419-20.
158. *Id.* at 418. The court held, therefore, that the probate court erred when it failed to enter a judgment n.o.v. for the co-administrators. *Id.*
159. *Id.* at 419.
160. *Id.* at 420. The dissent would have affirmed the judgment except for one of the withdrawals, made while the decedent was in a coma. *Id.* at 420 (Morse, J., dissenting). The dissent expressed concern over placing the presumption of unfairness on the son's estate when both the son and his mother, the only two persons who might have known of an agreement, were deceased. *Id.* at 421. The dissent felt that this presumption could present an impossible burden of proof for the son's estate. *Id.* The dissent would have affirmed the probate court's judgment except in connection with the last withdrawal the son made, while the decedent was in a coma, and the dissent would have rendered judgment against the son's estate in the amount of the last withdrawal. *Id.* at 427.
161. 868 S.W.2d 847 (Tex. App.—Dallas 1993, no writ).
162. *Id.* at 850.
servator. The family district court also ordered the father to continue child support payments beyond the ward's age of majority due to his condition. The father filed an application with the probate court, seeking appointment as guardian of the ward's estate. The mother contested the application and asserted that the probate court had no jurisdiction over the matter since the family district court had exclusive continuing jurisdiction. The probate court dismissed the guardianship proceeding based upon a lack of jurisdiction. The appeals court held that the Probate Code\textsuperscript{163} granted exclusive jurisdiction over guardianship matters to the probate court.\textsuperscript{164} The court held that the family district court's continuing jurisdiction over the father's support of the ward did not vest the family district court with jurisdiction over the guardianship proceedings.\textsuperscript{165}

In \textit{Youngs v. Choice}\textsuperscript{166} the court considered the probate court's rulings on actions for removal of the guardian and partition of real property.\textsuperscript{167} The court appointed the ward's granddaughter permanent guardian of the person and estate of the ward in 1988. In 1989 the guardian sued her mother, the ward's daughter, for partition of property that the ward and daughter owned, reimbursement, rents, waste of the property, and taxes. The daughter's answer requested that the probate court deny the partition and either terminate the guardianship or remove the guardian. The guardian served the daughter with discovery, including requests for admissions. The probate court informed the daughter on at least two occasions that she must respond to all discovery and that the court would sanction her if she did not. The daughter, who represented herself without counsel, did not respond to the discovery. The probate court granted partial summary judgments granting the partition of the real property and denying termination of the guardianship or removal of the guardian. The appeals court first held that it could not review the daughter's allegation that the initial appointment of the guardian violated the ward's due process rights.\textsuperscript{168} The court next held that the probate court did not err in its failure to remove the guardian since the daughter did not respond to the requests for admissions, which resulted in deemed admissions.\textsuperscript{169}

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  \item \textsuperscript{163} TEX. PROB. CODE ANN. § 5(c) (Vernon Supp. 1995) and TEX. PROB. CODE ANN. § 606 (Vernon Supp. 1995) grant jurisdiction to the statutory probate court over guardianship matters.
  \item \textsuperscript{164} 868 S.W.2d at 849.
  \item \textsuperscript{165} \textit{Id.} at 850. The court noted that TEX. FAM. CODE ANN. § 14.051 (Vernon Supp. 1995) provides for continuing support obligations for a disabled adult child and that the family district court would have continuing jurisdiction over the support obligation. 868 S.W.2d at 850. The court determined, however, that the ward was no longer a child within the meaning of TEX. FAM. CODE ANN. § 11.01(1) (Vernon Supp. 1995), so the probate court had exclusive jurisdiction over the guardianship proceedings. 868 S.W.2d at 850.
  \item \textsuperscript{166} 868 S.W.2d 850 (Tex. App.—Houston [14th Dist.] 1993, writ denied).
  \item \textsuperscript{167} \textit{Id.} at 852-54.
  \item \textsuperscript{168} \textit{Id.} at 852-53. The court held that the daughter did not raise this claim in a timely manner, \textit{id.} at 852, and that she did not forward the record of the guardianship proceedings from the trial court. \textit{Id.} at 853.
  \item \textsuperscript{169} \textit{Id.} at 853. The probate court, based upon the deemed admissions, granted the guardian's motion for summary judgment. The appeals court held that the probate court's action was proper. \textit{Id.}
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court then held that the probate court properly granted the summary judgment on the issue of the partition of the real property.\textsuperscript{170} The court finally held that the probate court’s determination that the unanswered requests for admission were deemed admitted and that the assessment of attorney’s fees against the daughter for the motion for sanctions were reasonable.\textsuperscript{171}

VI. TRUSTS

A. Constructive Trusts

In \textit{Newman v. Link}\textsuperscript{172} the court imposed a constructive trust over an award of attorney’s fees to the guardian ad litem who represented a minor child.\textsuperscript{173} In \textit{Bransom v. Standard Hardware, Inc.}\textsuperscript{174} the court determined that the homestead provisions of the Texas Constitution\textsuperscript{175} do not prevent the imposition of a constructive trust over the proceeds of the

\textsuperscript{170} \textit{Id.} at 853-54. The daughter did not respond to the requests for admissions. The probate court thus deemed that the daughter admitted that she jointly owned the land with the ward, that the land could be partitioned, and that a partition would not disturb her homestead rights. The probate court specifically ordered that the partition protect the daughter’s homestead rights. The appeals court held that the probate court had no issue of material fact before it and could order partition by summary judgment. \textit{Id.} at 854.

\textsuperscript{171} \textit{Id.} The court found that the daughter did not bring forward an Order of Sanctions for appellate review. \textit{Id.}

\textsuperscript{172} 866 S.W.2d 721 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

\textsuperscript{173} \textit{Id.} at 725-26. The appellant represented the father of an injured child in a personal injury case. The trial court appointed the appellee as guardian ad litem to represent the interests of the child. The parties settled the case and the trial court awarded appellee part of his fees from the defendant and part from the father’s attorney. The trial court provided, in an amended judgment approving the settlement agreement, that it awarded part of the ad litem’s fees against the father’s attorney in part because the father’s attorney had almost allowed the dismissal of the case for want of prosecution, the ad litem’s vigorous representation of the child’s interests led to the settlement, and the ad litem expended a great amount of time in efforts that the father’s attorney should have undertaken. The appellant did not object to the court’s order at the hearing on the settlement agreement and did not appeal from the judgment approving the settlement agreement. The appellant failed, however, to pay the appellee any of his portion of the ad litem fees. The appellant filed an action against appellee based on the award of ad litem’s fees. The appellant answered, alleging the affirmative defense of estoppel and the affirmative defense of fraud, and counterclaimed for, among other things, conversion, unjust enrichment, fraud, and constructive trust. The jury awarded the appellee damages for mental anguish, as well as the actual damages in the amount of the ad litem’s fee and punitive damages. The appeals court held that the evidence presented conclusively established that the appellant converted the ad litem’s fees, that his actions amounted to constructive fraud, and that the conversion resulted in unjust enrichment. \textit{Id.} at 726. The appeals court held that recovery was not statutorily barred. The appeals court also held that the appellant acted with malice and upheld the punitive damages. \textit{Id.} at 727.

\textsuperscript{174} 874 S.W.2d 919 (Tex. App.—Fort Worth 1994, writ denied).

\textsuperscript{175} TEx. CONST. art. XVI, § 50.
sale of the homestead.\textsuperscript{176} In \textit{Mauriceville Nat'l Bank v. Zernia}\textsuperscript{177} the court upheld the imposition of a constructive trust over a contractor's account held for the benefit of subcontractors.\textsuperscript{178}

In \textit{Qualia v. Qualia}\textsuperscript{179} the court determined that the district court had jurisdiction over a claim of conversion and for imposition of a constructive trust over the assets of a decedent's estate.\textsuperscript{180} The decedent died testate, and the county court of Val Verde County admitted her will to probate and appointed an independent executor. The county court later entered an order discharging the executor and closing the estate. Two of the beneficiaries of the estate filed a motion to reopen the estate for an accounting. The county court transferred the cause to the county court at law, which granted the motion for sixty days, after which the estate again

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\item[176.] 874 S.W.2d at 928. An officer and director of a hardware store embezzled approximately $480,000 during the period that she also served as controller and bookkeeper of the store. The hardware store sued the ex-officer and her husband for recovery of the embezzled funds and for punitive damages. The trial court entered judgment against the ex-officer, which was not part of this appeal, and her husband, which was the subject of this appeal, awarding the hardware store actual damages, punitive damages, and prejudgment interest against the husband. The trial court also imposed a constructive trust on the proceeds from the sale of the couple's homestead, which the couple had deposited in the registry of the court. The appeals court held that the evidence did not prove that the husband had constructive knowledge of his wife's fraud and reversed the trial court's award of actual damages based on actual or constructive fraud. \textit{Id.} at 926. The court then determined that the trial court's judgment for actual damages was based in part on unjust enrichment, which the husband did not appeal. \textit{Id.} at 927. The husband could not challenge the award based on unjust enrichment because he had not presented such a point of error. \textit{Id.} The court, however, held that unjust enrichment alone could not support a judgment for punitive damages and reversed the award of punitive damages. \textit{Id.} at 927-28. The court then held that the trial court correctly imposed a constructive trust over the proceeds from the sale of the couple's homestead because the homestead exemption could not be used to protect stolen funds. \textit{Id.} at 928; see Curtis Sharp Custom Homes, Inc. v. Glover, 701 S.W.2d 24, 29 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (Akin, J., dissenting); Pace v. McEwen, 617 S.W.2d 816, 818 (Tex. Civ. App.—Houston [14th Dist.], no writ); Baucum v. Texas Oil Corp., 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.). The court found that the stolen funds used to reduce the principal on the debt of the homestead did not obtain homestead characteristics. 874 S.W.2d at 928, citing First State Bank v. Zelesky, 262 S.W.190, 192 (Tex. Civ. App.—Galveston 1924, no writ); Smith v. Green, 243 S.W. 1006, 1008 (Tex. Civ. App.—Amarillo 1922, no writ). The court further found that the husband's innocence of fraud or constructive fraud did not prevent the imposition of a constructive trust. \textit{Bransom}, 874 S.W.2d at 928. The court acknowledged that the result it reached differed from that of the majority in \textit{Curtis Sharp Custom Homes}. \textit{Id.} (citing \textit{Curtis Sharp}, 701 S.W.2d at 28).

\item[177.] 880 S.W.2d 282 (Tex. App.—Beaumont 1994, no writ).

\item[178.] \textit{Id.} at 288. The contractor owed the bank monies, which, upon the contractor's default, the bank withdrew from an account that the contractor held for the benefit of his subcontractors. The subcontractors sued the bank and the trial court entered judgment for the subcontractors. The bank appealed. The appeals court found that the bank had knowledge that the contractor used the account to hold funds pending payment to subcontractors and that the bank nevertheless refused to honor checks drawn on the account even after receiving written notice of the nature of the account. \textit{Id.} The court found that evidence presented to the jury supported its finding that the bank had knowledge of the subcontractors' beneficial interest in the funds on deposit in the account and that unjust enrichment would result if jury permitted the bank to keep the funds from the account. \textit{Id.}

\item[179.] 878 S.W.2d 339 (Tex. App.—San Antonio 1994, writ denied).

\item[180.] \textit{Id.} at 342. \textit{But cf.} Stodder v. Evans, 860 S.W.2d 651 (Tex. App.—Waco 1993, writ denied), \textit{supra} notes 18-24 and accompanying text.
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closed by operation of law. The beneficiaries filed suit in district court less than two weeks after the estate closed the second time, in which they alleged that the executor mismanaged the estate, breached his fiduciary duty, tortiously interfered with their inheritance rights, and converted estate assets. The beneficiaries further requested the imposition of a constructive trust. The district court granted summary judgment in favor of the executor based on lack of subject matter jurisdiction. The appeals court first determined that the district court had concurrent jurisdiction with the county court under the Texas Constitution over probate matters. The court held that district courts have original jurisdiction over trusts, except for the jurisdiction given statutory probate courts. Because the pleadings concerned conversion and the imposition of a constructive trust, and because no probate proceedings were pending at the time of the suit, the district court had jurisdiction over the suit.184

B. Revocable Trusts

In Runyan v. Mullins the court considered whether the grantor’s instructional letter concerning a trust amendment, taken with other documents the grantor did not sign, served to amend the trust agreement. The grantor and his wife executed a trust agreement in 1978, which provided for the division into two trusts, the Survivor’s Trust and the Decedent’s Trust, on the death of the first of them to die. The grantor’s wife died in 1983. The Survivor’s Trust provided that the grantor could amend or revoke the trust during his life by a written instrument that he delivered to the trustee. The grantor amended the Survivor’s Trust in 1985. In July 1991 the trustee sent a letter to the trust’s attorney requesting that the attorney draw a trust amendment and stating the terms of the amendment, which included eliminating gifts to certain beneficiaries and substituting other beneficiaries. The trustee wrote the grantor about the proposed trust agreement in August 1991. The trustee’s letter to the grantor did not contain the terms of the trust amendment, but instead referenced the July letter to the attorney. The trustee stated that he had enclosed a copy of the July letter to the attorney and a copy of his letter to the grantor with the letter. The trustee requested that the grantor sign the copy of the August letter indicating his approval of the trust amendment. The trustee failed, however, to include a copy of either the July letter to the attorney or his August letter to the grantor. The trustee later forwarded a copy of the August letter to the grantor for the grantor’s signature approving the trust amendment, but still did not forward a copy of the July letter to the attorney. The grantor signed a copy of the letter as the trustee requested, but never signed and dated a copy of the July letter.

181. TEX. CONST. art. V, § 8.
182. 878 S.W.2d at 341.
183. Id. at 341-42 (citing TEX. PROP. CODE ANN. § 115.001 (Vernon 1984)).
184. 878 S.W.2d at 342.
185. 864 S.W.2d 785 (Tex. App.—Fort Worth 1993, writ denied).
186. Id. at 786, 788-90.
The trustee mailed the trust amendment to the grantor on September 9, 1991, and requested to meet with the grantor to discuss and execute the trust amendment. The grantor had a stroke on September 18, 1991, and died on October 1, 1991, without executing the trust amendment. The trustee filed an interpleader action to determine the interests of the beneficiaries named prior to the 1991 trust amendment and those named in the 1991 trust amendment. The trial court entered summary judgment for the beneficiaries of the 1991 amendment. The appeals court first held that summary judgment was appropriate because no issue of material fact existed. The beneficiaries of the 1991 amendment alleged that the grantor executed and delivered a written instrument to the trustee sufficient to amend the trust when he signed the copy of the trustee’s August letter. The beneficiaries of the trust as it existed prior to the 1991 amendment alleged that the signature on the letter was insufficient to amend the trust. The appeals court held that the grantor did not amend the trust through his execution of the August letter, but merely expressed a possible intent to amend the trust.

In *Soto v. First Gibraltar Bank, FSB* the court considered whether the bank had the power to offset funds from a trust account for amounts that the trustee/grantor of a revocable inter vivos trust owed to the bank. A couple established a trust account for the benefit of their daughter in 1989. Both parents served as trustees of the trust and retained the right either to revoke the trust or withdraw funds from the account, if both acted in concert. Money from the mother’s savings account initially funded the trust account. The couple established the account with the intent that neither could withdraw funds without the other’s consent as a protection for their daughter due to their marital troubles. The mother never received a deposit agreement and she was unaware of the bank’s right to offset. The father overdrew his bank account at the bank that held the trust account, and the bank offset funds from the trust account to cover the overdraft. The mother sued the bank for damages, breach of bailment agreement, and conversion. The trial court found that the bank could offset the funds. The appeals court held that the trust account was a Totten, or tentative trust. The court held that creditors may reach the assets of a tentative trust to satisfy obligations of a trustee/settlor. The court also held that Texas authorities
holding that banks may not offset funds held for the benefit of other persons do not apply to tentative trusts.194

C. SPENDTHRIFT TRUST

In Dierschke v. Central Nat'l Branch195 the court considered whether the trustee of a spendthrift trust could partition property owned by spendthrift trusts without the approval of the beneficiaries.196 The trustee and his wife owned an undivided one-half interest in real property, with the trustee owning the other undivided interest in five trusts for the benefit of his children. The bank held a lien on the couple's one-half interest in the land. The trustee and his wife, pursuant to a bankruptcy reorganization plan, entered into a partition agreement with the bank in 1989. The trustee also signed the agreement in his capacity as trustee of the five trusts. The agreement provided that any party to the agreement could demand partition after providing notice to the other owners. When the trustee and his wife defaulted on their reorganization plan, the bankruptcy stay was lifted and the bank foreclosed on its lien. The bank obtained title to one-half of the land by trustee's deed in 1991. The bank then attempted to enforce the partition agreement. The trial court entered judgment for the bank and ordered the land partitioned. The trustee appealed on the basis that he could not have legally entered the partition agreement on behalf of the trusts because of the terms of the trust instrument. The trustee specifically alleged that the bank was aware of the spendthrift provisions of the trusts and that the trustee did not have authority to enter the partition agreement without the consent or ratification of the beneficiaries. The trustee also alleged that the trial court abused its discretion because partition of the property resulted in an economic loss to the beneficiaries. The appeals court reviewed both the nature of partition and the nature of spendthrift trusts before reaching its decision.197 The court held that the trustee had the ability to partition the land under the Trust Code198 absent other provisions in the trust document and that a trust's spendthrift provisions apply only to the beneficiary, not to the trustee.199 The court held that the beneficiaries had no right to notice of the partition since the partition affected only the right to possession, not title to the property.200 The court also held that the parti-

194. Id. at 403. See National Indemn. Co. v. Spring Branch State Bank, 162 Tex. 521, 348 S.W.2d 528, 529 (1961); Western Shoe Co. v. Amarillo Nat'l Bank, 127 Tex. 369, 94 S.W.2d 125, 128-29 (1936). The court concluded that since the couple owned the funds held in the tentative trust, the bank could offset the funds. Soto, 868 S.W.2d at 403. The court held that the couple’s intent to make a gift to their daughter did not change the bank’s ability to deal with the account under the terms of the signature card. Id. at 404.
195. 876 S.W.2d 377 (Tex. App.—Austin 1994, no writ).
196. Id. at 379-82.
197. Id. at 379-80.
198. TEX. PROP. CODE ANN. § 111.002(a) (Vernon 1984).
199. 876 S.W.2d at 380. The court further found that the trusts had no other provisions that prevented the trustee from partitioning the property. Id. at 380-81.
200. Id. at 381. The court further found that the trustee represented the beneficiaries' interest, thus the beneficiaries were parties to the partition agreement. Id.
tion caused no harm to the beneficiaries because since the trusts saved the money of litigation over the partition and since they retained the same amount of property following the partition as they had before.  

D. FIDUCIARY DUTY

In Johec v. Clayburne, the court determined that the terms of a trust document and the conduct of the parties may modify the trustee's fiduciary duty. The grantor of the trusts in question decided to develop ranch land that he owned, and he entered into a development agreement with a developer. The grantor wished to retain a life income interest in the development, and leave the remainder to his daughters. The grantor consulted his accountant, who formed a corporation for the grantor, which purchased portions of the property from the grantor. The accountant served as president of the corporation. The corporation bought the property through notes secured by a deed of trust on the property. The grantor then created trusts for the benefit of his two daughters and contributed one-half of the corporate stock to each trust. The accountant also served as trustee of the trusts. The developer and the corporation agreed that the developer would manage the development of the property. When the state's economy entered a downturn in the mid-1980s, the developer failed to pay ad valorem taxes on the property. The accountant developed a plan to buy out the developer's interest in phases, with the grantor's full knowledge. The financing for the purchase of the developer's interest was arranged by a partnership consisting of the accountant and other shareholders of her accounting firm. The partnership received an interest in the notes in addition to actual interest for providing the financing. In addition, the corporation agreed to pay a monthly fee to the partnership, pay all marketing and development expenses, all accounting fees of the accounting firm, and the delinquent ad valorem taxes. The daughters did not learn about the trusts until after the grantor's death, when the daughters met with the accountant. The daughters sued the accountant and the other members of her firm, alleging conspiracy and breach of fiduciary duty. The jury found in favor of the daughters and awarded actual damages and punitive damages against the accountant, the other members of her firm, and the firm itself. The appeals court examined the terms of the trust instrument and the trial court's instruction about fiduciary duty to determine if the trustee breached her duty to the beneficiaries.

201. Id. at 382.
203. Id. at 520.
204. Id. at 518-19. The trial court instructed the jury that a trustee has the following duties: "(1) the duty not to self-deal, (2) the duty of fidelity, (3) the duty to exercise reasonable skill and care, (4) the duty to preserve trust property, and (5) the duty to enforce claims of the trust." Id. at 518.
tions of the parties. The court held that the conduct of the parties showed their intention that the provision of the trust agreement to modify the trustee’s duty of fidelity. The court then determined that the failure to include instructions on modification of the duty of fidelity resulted in an improper judgment.

E. Section 142 Trust

In Aguilar v. Garcia the court held that the trial court could not modify the terms of a trust created under Property Code section 142 in a manner not prescribed by the legislature. Thirteen minor plaintiffs received awards under a toxic tort action. The defendants paid the initial installments into the registry of the court. The defendants owed additional installments in 1995 and 2000. The ad litem sought to have the funds placed in section 142 trusts for the benefit of the minors. The trial court agreed, but attempted to limit the trustee’s ability to make distributions from the trusts beyond the statutory restrictions. The trial court held a second hearing on the order authorizing the trusts, at which the ad litem requested that the court follow the statutory language regarding trust agreements. A trust officer at the institution that the judge named as the trustee testified that his institution was not willing to accept the trusts with the modifications specified by the trial judge. Counsel for the institution testified that section 142 trusts must comply strictly with the terms of the statute. The trial court denied the ad litem’s motion for ap-

205. Id. at 519. The trust agreement provided that the trustee could conduct business with “any person, firm, corporation or any trustee under any other trust.” Id. The accountant argued that this provision gave her permission to self-deal. The appeals court held that the language was broad enough to support the trustee’s reading, but that it was not specific enough to show that the grantor intended to modify the duty of fidelity. Id. The court held that the evidence presented at trial demonstrated that the grantor had full knowledge of the accountant’s self-dealing, and that the grantor specifically consented to the accountant as serving both as trustee and accountant for the corporation. Id. In addition, the court held that evidence supported the grantor’s implied consent to the partnership’s role in the purchase of the developer’s interest. Id. at 520. The court thus held that the grantor’s actions following the execution of the trust instrument indicated that the grantor intended that the broad language of the trust instrument modify the trustee’s duty of fidelity. Id. The court declined to construe the language of the trust agreement strictly since the conduct of the parties evidenced the intention of the parties to modify the duty of fidelity. Id.

206. 863 S.W.2d at 520.

207. Id. at 522. The court found ample evidence of self-dealing, which the court held was interrelated with the duty not to self-deal, but determined that the jury would have reached a different verdict if the trial court had instructed them concerning the trust instrument’s modification of the trustee’s duty of fidelity. Id. at 521-22.

208. 880 S.W.2d 279 (Tex. App.—Houston [14th Dist.] 1994, no writ).

209. TEX. PROP. CODE ANN. § 142.001-.007 (Vernon 1984).

210. 880 S.W.2d at 281.

211. The trial court wished to limit the trustee’s ability to disburse trust funds for medical care only to those situations in which the minor’s parents had no other means, including insurance, to provide the medical care. TEX. PROP. CODE ANN. § 142.005(b)(2) (Vernon 1984) provides that the trustee “may disburse amounts of the trust’s principal, income, or both as the trustee in his sole discretion determines to be reasonably necessary for the health, education, support, or maintenance of the beneficiary.” Id.
proval of full statutory powers in the trusts and ordered that the trustee may not make distributions in accordance with the statute until the minors reached age eighteen. The ad litem sought mandamus against the trial court to compel it to modify the trusts to comply with the statute. The appeals court held that the trial court’s order violated the mandatory terms of the statute and held that it had no discretion to do so. The appeals court also held that mandamus was the only relief available to the ad litem and minor beneficiaries.213

212. 880 S.W.2d at 281.
213. Id.