Wills and Trusts

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THIS Article reviews case law developments in the area of wills, heirship, estate administration, guardianships, and trusts. The Survey period covers decisions published between November 1, 1989 and October 31, 1990.

I. WILLS

A. Will Contests

In *Estate of Johnson* the appeals court affirmed the trial court’s admission of a subsequent will to probate and imposition of a constructive trust in favor of the beneficiary of a previously executed joint and contractual will. The decedent and his wife executed a joint, mutual, and contractual will in 1973. The decedent, without his wife’s knowledge, later executed another will in which he disposed of his property differently than under the joint will. The executors under each will offered one will for probate and contested the probate of the other will. The trial court admitted the later will to probate and declared that the executor of the later will held the decedent’s property in a constructive trust for the benefit of the wife. The appeals court determined that the earlier will was joint, mutual, and contractual. The appeals court agreed with the trial court that the later will revoked the testamentary portions of the earlier will, but that the contractual provisions of the earlier will mandated a constructive trust on the decedent’s estate in order to ensure specific performance of the contract in favor of the decedent’s wife.

In *Dickson v. Simpson* the court determined that requiring the decedent’s alleged natural daughter to establish her right to inheritance under Probate...
Code section 42(b)\(^6\) did not deny the natural daughter equal protection.\(^7\) The plaintiff, the alleged natural daughter of the decedent, sought to contest the probate of the decedent's will as an heir of the decedent. The trial court agreed with the decedent's widow that the plaintiff lacked standing to contest the will because the plaintiff had not proven that she could inherit under any of the provisions of section 42(b). The appeals court affirmed the trial court's dismissal of the plaintiff's contest because the plaintiff had not received a court order legitimating her within the four years of the statute of limitations.\(^8\) Finally, the appeals court held that section 42(b) was "substantially related to an important governmental objective"\(^9\) and accordingly did not violate plaintiff's due process under the fourteenth amendment.\(^10\)

The appeals court in *Candelier v. Ringstaff*\(^11\) upheld the trial court's award of attorney's fees and expenses to the unsuccessful will proponent in a will contest.\(^12\) Some months after the trial court announced its decision in the will contest, but before the court entered its judgment, the court allowed the proponent to file a motion for the award of attorney's fees and expenses under Probate Code section 243.\(^13\) Approximately three months after the proponent filed the motion requesting fees and expenses, the court scheduled a hearing on both the proponent's request for fees and expenses and the contestants' motion to enter judgment and to strike the proponent's pleadings for fees and expenses. The appeals court noted the length of time between the date the proponent filed the request and the date the court approved the motion and held that the motion could not have surprised the contestants.\(^14\)

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\(^{6}\) **TEX. PROB. CODE ANN.** § 42(b) (Vernon Supp. 1990). The legislature amended § 42(b) since the time of the decedent's death to allow natural children to establish paternity during probate. Act of June 17, 1987, ch. 464, § 1, 1987 Tex. Sess. Law Serv. 4085, 4086 (Vernon). At the time of the decedent's death, the natural daughter could establish paternity in one of three ways under § 42(b):

- (a) if the child is born or conceived before or during the marriage of the child's father and mother; or
- (b) if the child is legitimated by a court decree as provided in Tex. Fam. Code Ann. § 13.01; or
- (c) if the father executed a statement of paternity.


\(^{7}\) 781 S.W.2d at 727.

\(^{8}\) *Id.* at 725. According to the court the statute of limitations began to run on August 27, 1979, which was the first date on which the plaintiff had a statutory right to a court order establishing paternity under the 1979 amendment to § 42(b). *Id.* The court also determined that the four year general statute of limitations under **TEX. CIV. PRAC. & REM. CODE ANN.** § 16.051 (Vernon 1986) applied to the plaintiff since § 42(b) did not include an express statute of limitations for establishing paternity. 781 S.W.2d at 725.

\(^{9}\) *Id.* at 727.

\(^{10}\) *Id.*

\(^{11}\) 786 S.W.2d 41 (Tex. App.—Beaumont 1990, writ denied).

\(^{12}\) *Id.* at 44.

\(^{13}\) **TEX. PROB. CODE ANN.** § 243 (Vernon Supp. 1990). Section 243 allows a person who defends a will in good faith, whether or not that person is successful, to recover reasonable attorney's fees and necessary expenses from the estate. *Id.*

\(^{14}\) 786 S.W.2d at 43-44. The court noted that the trial court can allow the parties to file trial amendments until the trial court enters a final judgment unless the trial amendment would surprise the opposing party. *Id.* at 43. The contestants did not complain that the amendment surprised them or that they did not have sufficient time to prepare for the hearing.
B. No Contest Clauses

Two courts examined no contest clauses during the Survey period. In *Hazen v. Cooper* the court held that the trial court erred in entering summary judgment denying a beneficiary her right to take under her mother's will merely because she testified against the will's proponents during a will contest. In *Estate of Newbill* the court determined that a beneficiary's challenge of the suitability of the appointment of the named executor in the will was not a contest that triggered the operation of the no contest clause in the will.

C. Will Construction

In *Estate of Robertson v. United States* the Court of Appeals for the Fifth Circuit determined that a devise to the surviving spouse did not qualify for the marital deduction for federal estate tax purposes because the devise required that the spouse survive until the probate of the will. The decedent left her separate property to her two daughters and her remaining property to her husband, unless he did not survive her or he died prior to the time of the probate of the will. The decedent's husband qualified as executor of the estate and filed a federal estate tax return, claiming the marital deduction under Internal Revenue Code section 2056 for all property devised to him.

The contestants also claimed on appeal that the evidence was insufficient to support the recovery of expenses under TEX. PROB. CODE ANN. § 243 (Vernon Supp. 1990), but the contestants failed to include the entire record from the trial court in the record submitted to the appeals court. The court found that the contestants failed to meet their burden of proving reversible error because they did not include in the record the entire statement of facts upon which the trial court relied.

16. 786 S.W.2d at 519.
17. *Id.* at 520-21. The court found that the beneficiary testified without being served with a subpoena. *Id.* at 520. The beneficiary contended, however, that she did not voluntarily testify because the will contestants forced her to do so under threat of subpoena. The beneficiary was one of many witnesses who testified and the will contestants ultimately lost their contest. The court stated that the mere fact that the beneficiary testified at the trial is insufficient to support the summary judgment against the beneficiary. *Id.* The court concluded that summary judgment was incorrect because genuine issues of material fact concerning the validity of the beneficiary's testimony existed. *Id.* at 521.
18. 781 S.W.2d at 729.
19. *Id.* at 729. The beneficiary challenged the appointment of the named executor under TEX. PROB. CODE ANN. § 78(f) (Vernon 1980). The named executor had the burden to prove to the court that he was qualified to serve, so the challenge did not place a greater burden upon the executor than he already had under TEX. PROB. CODE ANN. § 81(a)(7) (Vernon Supp. 1990), which provides that the applicant must state and aver that the named executor is not disqualified by law from receiving letters testamentary. The court found that the challenge to the appointment of the named executor did not fall within the no contest clause because the challenge was not brought in order to vary the terms of the will. 781 S.W.2d at 729. The court also determined that because the beneficiary had not violated the no contest clause by challenging the appointment of the named executor, the beneficiary's good faith and probable cause in bringing the challenge were not in issue. *Id.* at 730.
20. 903 F.2d 1034 (5th Cir. 1990).
22. 903 F.2d at 1038-39.
The Internal Revenue Service disallowed the marital deduction because the interest given to the husband under the will was a nonqualifying terminable interest. An exception to the terminable interest rule provides that an interest is not terminable if conditioned on the spouse's survival for a period of less than six months and if the spouse actually survives beyond the period provided in the will.24 Under Texas law, a will may be probated at any time within four years from the date of death.25 The Fifth Circuit held that since the express provisions of the will were not within the purview of section 2056(b)(3), the estate was not entitled to the marital deduction.26 The court stated that the will provided for the devise to the decedent's husband if he survived her and if he survived until the probate of the will, the second of which could occur more than six months after the decedent's death.27

In Opperman v. Anderson28 the court construed a will and determined that bequests of stock were specific bequests29 and that the sale of the stock prior to the testator's death resulted in the ademption of the bequests of the stock sold.30 The decedent made gifts of stock in three corporations to various beneficiaries in her will. The decedent then devised her residuary estate to one person. Prior to the decedent's death, she sold stock in Pabst Brewing Co. and Houston Natural Gas Corporation, placing the proceeds from the sales in separate bank accounts. The decedent owned shares of Houston Natural Gas Corporation at the time of her death, but the estate redeemed the stock following her death pursuant to a merger agreement. The probate court found that no ademption occurred because the proceeds from the sales of stock made prior to the decedent's death were readily identifiable. The appeals court noted that the decedent expressed her intent that the stock pass to specific beneficiaries under her will only if she owned the stock at the time of her death.31 Because the decedent sold some of the stock prior to her death, the appeals court found that these gifts were adeded even though the proceeds from the sales were readily identifiable.32

D. Holographic Wills

In Hoover v. Sims33 the court upheld the district court's order denying a bill of review brought to set aside an order admitting a holographic will to

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24. Id. § 2056(b)(3).
26. 903 F.2d at 1037.
27. Id. at 1038-39.
29. Id. at 10.
30. Id. at 11.
31. See id. The testator specifically stated in her will that the gifts were of stock, if any, that she owned at the time of her death. See id. at 9.
32. Id. at 11. The court affirmed the trial court's determination that the proceeds from the redemption of Houston Natural Gas Corporation stock made after the decedent's death were not adeded and passed under the specific bequest in the decedent's will. The court also reversed the trial court's holding that the gifts of stock sold prior to the decedent's death were adeded and rendered judgment that the proceeds from those sales would pass under the will's residuary clause. Id.
33. 792 S.W.2d 171 (Tex. App.—Houston [1st Dist.] 1990, writ denied).
probate. The appellant alleged in his bill of review that the will was not wholly in the decedent's handwriting because someone other than the decedent had written a name on the will. On appeal the appellant maintained that the sworn bill of review provided conclusive proof that the will was not wholly in the decedent's handwriting because the will proponent offered no opposing proof. The court disagreed, finding that the bill of review alleged no facts, but instead stated a conclusion of law. The dissent noted that the record contained no evidence proving that the holographic will was wholly in the decedent's handwriting, although Probate Code section 84(b) requires the sworn testimony or affidavits of two witnesses proving the authenticity of the testator's handwriting. The dissent would have reversed and remanded the case to the trial court for testimony establishing the authenticity of the handwriting.

E. Testamentary Capacity and Undue Influence

In Estate of Jernigan the court found that sufficient evidence existed that the decedent had testamentary capacity and that he was not under undue influence when he executed his will. The decedent was ninety years old at the time he signed his will. The decedent's son-in-law met with the lawyer who drafted the will and told the lawyer what the decedent wished to include in his will. After drafting the will, the lawyer met with the decedent and discussed the will paragraph by paragraph. The decedent did not sign the will that day, but later returned to sign the will after considering it. The will left one-fourth of the decedent's estate to each of the his three surviving children, with the remaining one-fourth to be divided equally among the children of his only deceased child. The witnesses and notary testified that the decedent knew that he was signing his will and that no one exerted undue influence over him. Two days after the decedent died, his brother filed an application for administration of the estate and subsequently contested

34. See id. at 173.

35. The appellant also contended that the will failed to dispose of all of the decedent's property, so that he was entitled to receive that property through intestacy. Id. at 174.

36. Id. at 173. The court also found that the trial court correctly construed the will to dispose of all of the decedent's property. Id. at 174. The appellant failed to meet his burden of showing substantial error in the trial court's order construing the will to leave five bank accounts to Eagle Lake Community Hospital when the appellant only offered evidence to show that the decedent died in a Houston hospital. The appellant offered no evidence at all to show why the devise of a house would not include its contents.

37. TEX. PROB. CODE ANN. § 84(b) (Vernon 1980).

38. 792 S.W.2d at 175 (Dunn, J., dissenting). The majority also noted that no one testified concerning the decedent's handwriting. Id. at 173.

39. Id. at 175-76. The dissent would have found that the appellant had the burden to show only that the record lacked the proof necessary to admit a holographic will, which the appellant did in his bill of review. Id. at 175. Once the appellant established that proof, the district court and the appeals court should have reviewed the record for statutory compliance. If the handwriting had been proven according to TEX. PROB. CODE ANN. § 84(b) (Vernon 1980), the appellant would have had the higher burden of proof that the majority thrust upon him, according to the dissent. See 792 S.W.2d at 175.

40. 793 S.W.2d 88 (Tex. App.—Texarkana 1990, no writ).

41. Id. at 90.
the probate of the will on grounds of lack of testamentary capacity, undue influence, and forgery. The court disagreed, finding sufficient evidence that the testator had testamentary capacity, that he did not execute the will under undue influence, and that sufficient evidence existed that the decedent signed a valid will that could be admitted to probate.\textsuperscript{42} Finally, the court found that the trial court’s conclusion that the decedent’s signature was not a forgery was not against the great weight and preponderance of the evidence.\textsuperscript{43}

In \textit{Smallwood v. Jones}\textsuperscript{44} the court affirmed the judgment n.o.v. of the probate court, finding that no more than a scintilla of evidence supported the jury’s finding of undue influence.\textsuperscript{45} The testator left eighty percent of her estate to one of her sisters and the remainder to her son. The testator executed the will during a lengthy illness that, within a short time following a stay at the sister’s house, ultimately led to her death. The testator’s two sisters provided most of her care during her illness, since her son lived in a different city. The son contested the probate of the will on the basis that the sister exerted undue influence over the testator. The jury found that the testator had testamentary capacity, but that she executed her will under the undue influence of her sister. The probate court entered a judgment n.o.v. and ordered the probate of the will. The appeals court determined that no evidence supported the jury’s finding of undue influence and affirmed the probate court.\textsuperscript{46}

\textbf{F. Revocation}

In \textit{Pearce v. Meek}\textsuperscript{47} the court found that the proponent of an alleged will, decedent’s step-daughter, failed to overcome the presumption that the decedent destroyed the will with the intention of revocation.\textsuperscript{48} The proponent testified that the decedent had shown her his will some fourteen years prior to his death and stated that he did not intend to change the will. The proponent did not see the decedent again after he had shown her his will. The

\textsuperscript{42} Id. at 89. The court found that sufficient evidence existed to support the trial court’s judgment admitting the will even though the trial court did not accept the will into evidence during the will contest. \textit{Id.}\ The proponent offered the original will as evidence during the trial, but the court ruled that admission of the will was unnecessary. \textit{Id.}\ The attorney who drafted the will, the two witnesses and the notary public all gave testimony during the will contest.

\textsuperscript{43} Id. at 90. The contestant relied on the fact that the decedent signed his first name beginning with a lower case letter rather than a capital letter. The proponent introduced other documents in which the decedent had signed his name in the same manner as he had signed the will.

\textsuperscript{44} 794 S.W.2d 114 (Tex. App.—San Antonio 1990, no writ).

\textsuperscript{45} Id. at 119.

\textsuperscript{46} Id. at 117. The court noted that a trial court can enter a judgment n.o.v. under \textit{TEX. R. Civ. P.} P. 301 (West Supp. 1990) only if a directed verdict would have been proper and if no evidence supports the jury’s finding.

\textsuperscript{47} 780 S.W.2d 289 (Tex. App.—Tyler 1989, no writ).

\textsuperscript{48} Id. at 291. When a testator had possession of his will at the time that any other person last saw the will and the will cannot be located after the decedent’s death, a rebuttable presumption arises that the testator destroyed the will with intent of revocation. \textit{Id.}\ (citing Pipkin v. Dezendorf, 618 S.W.2d 924, 925 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.)).
decedent remarried and, according to testimony offered at trial, he and his new wife destroyed the will during a family argument. No one found a will after the decedent's death. The trial court found that the decedent destroyed the will with the intention of revocation, and the appeals court affirmed. The trial court also found that the decedent and the proponent's mother had executed mutual wills prior to the mother's death, but that these wills were not contractual. The appeals court found that the mother's will and similar provisions in the decedent's alleged will did not show an intent between the parties to dispose of their combined estates as one estate on the death of the survivor and that the proponent failed to meet her burden of proving a testamentary contract.

II. Heirship

In an order determining heirship, the appeals court in Brown v. Gerson ordered the trial court to delete two paragraphs that stated that the decedent did not own an interest in real property at the time of her death. The relator in the mandamus proceeding complained that the trial court failed to follow the appeals court's judgment entered in a previous appeal of the case. The relator, who is the decedent's daughter, brought an application to determine heirship. The trial court entered a judgment denying the application, and the relator appealed. The appeals court, in an unpublished opinion, reversed and remanded the case with instructions to the trial court to enter judgment declaring the decedent's heirs and their respective shares of the estate. The trial court then entered judgment declaring the heirs and their respective shares, but decreed that the decedent did not own any property at the time of her death. The relator and others, however, had introduced evidence sufficient to show that the decedent had an interest in real property at the time of her death. Rather than appeal the trial court's order, the relator filed a petition for writ of mandamus, which the appeals court originally denied, but later allowed. The appeals court determined that the trial court erred in not finding that the decedent owned property when the evidence introduced established that she did. The dissent noted that the appeals court should not have granted leave to file writ of mandamus.

49. 780 S.W.2d at 291.
50. Id. at 292.
51. Id. at 294.
52. 782 S.W.2d 226 (Tex. App.—Beaumont 1989, no writ).
53. Id. at 230.
54. Id.
55. Id. at 229. The court noted that an adverse witness's testimony supported the relator's evidence that the decedent died owning real property. Id. at 228. Because the court found the record so clear, it concluded that the fact that the decedent died owning an interest in real property was established as a matter of law. Id. at 229.
56. Id. at 230 (Burgess, J., dissenting). The dissent stated that the appeals court did not consider the issue concerning title to real property on the original appeal and that the trial court complied with the appeals court's original order by entering a judgment determining heirship. Id. The dissent noted that the majority may have granted the petition in order to correct its decision in the original appeal. Id.
In *Thompson v. Lawson* 57 the court examined the issue of the effect of an ineffective disclaimer under Texas Probate Code section 37A. 58 The decedent had three children from a previous marriage at the time he married his second wife. The decedent and his second wife then had two children of their own. The decedent died testate, leaving all his property to his second wife. The widow filed a partial disclaimer in the probate court under which she disclaimed some of the cash and real property. The plaintiffs, decedent’s three children from his first marriage, claimed that they were entitled to three-fifths of the property that the widow disclaimed, and the trial court granted their motion for summary judgment. The appeals court found that a question of fact existed as to whether the widow executed the partial disclaimer after she had taken possession and exercised control over the disclaimed property, which would render the disclaimer ineffective. 59 The plaintiffs contended that even if the disclaimer were ineffective, it operated as an assignment of the property to all five of the decedent’s children because the five children would have received the property if the widow had predeceased the decedent. The court held that an ineffective disclaimer must satisfy the provisions of Probate Code section 37B 60 in order to be an assignment and, moreover, that an assignment that results from an ineffective disclaimer is a gift. 61 The court further held that because issues of fact existed as to whether the disclaimer was effective and whether the widow intended to make a gift of the property to the decedent’s three children from his first marriage, the trial court’s entry of summary judgment was incorrect. 62

III. STATE ADMINISTRATION

A. Temporary Administration

In *Nelson v. Neal* 63 the Texas Supreme Court affirmed the appointment of a temporary administrator. 64 The decedent, a California resident, and others died in a plane crash in Bowie County, Texas, on December 31, 1985. The widow of one of the other men on the plane filed suit for wrongful death against the decedent’s estate in federal court. Shortly before the two year statute of limitations ran, the widow applied to have the court appoint a temporary administrator under Texas Probate Code section 131A 65 for the

57. 793 S.W.2d 94 (Tex. App.—Eastland 1990, writ denied).
59. Id. at 96. TEX. PROB. CODE ANN. § 37A provides that a disclaimer is ineffective if it is made after the beneficiary takes possession or exercises dominion and control over the property.
60. TEX. PROB. CODE ANN. § 37B (Vernon Supp. 1990). Section 37B provides that a person making the assignment may assign the property to any person. The assignment is a gift and is not a disclaimer or renunciation. Id. § 37B(d).
61. 793 S.W.2d at 96. The widow stated in an affidavit that she had donative intent only toward her two sons.
62. Id. at 97.
63. 787 S.W.2d 343 (Tex. 1990).
64. Id. at 344, 346.
purpose of receiving service of process in the federal court case. The widow did not allege in the verified application that the decedent died intestate, but rather that she was unaware that the decedent had a will.

The probate court appointed a temporary administrator and the appeals court affirmed the probate court. The supreme court found that the widow alleged facts sufficient to establish an immediate necessity for administration of the decedent’s estate. The widow alleged in the verified application that other judgment creditors could reach proceeds from a liability insurance policy covering the crash before she could serve her claim on the estate’s personal representative. The appeals court determined that the proceeds of the insurance policy were an asset of the decedent’s estate that could support an ancillary administration in Texas. The appeals court further determined that the widow’s wrongful death claims for herself and for her children were two separate claims against the estate, thus showing a necessity for administration. The supreme court agreed and considered the issue whether the decedent died testate in Texas. The widow alleged in her application that she did not know whether the decedent died with a will. Probate Code section 131A provides that the application for a temporary administration must include all of the information required by Probate Code section 82(b), including the allegation that the decedent died intestate. A majority of the supreme court nevertheless held that the widow’s allegation that she did not know whether the decedent died with a will was sufficient to meet the requirements of the Probate Code concerning the verified application.

The majority also held that the widow met her burden of proof showing the necessity for administration in the contested hearing on the appointment of the temporary administrator because the probate court’s order granting the temporary administration was prima facie evidence of the necessity. The dissent argued that the probate court should have voided the appointment of the temporary administrator because the widow could not swear in

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67. 787 S.W.2d at 344.
68. 764 S.W.2d at 327.
69. See id.
70. 787 S.W.2d at 345.
71. Id. at 345-46. The decedent died testate and his will was admitted to probate in California. The decedent’s brother served as executor of the decedent’s estate. The California probate court sealed the probate records in the estate, and the widow claimed that she could not determine whether the decedent died testate or intestate.
73. TEX. PROB. CODE ANN. § 82(b) (Vernon Supp. 1990). Section 82 lists the requirements for an application for letters of administration “when no will . . . is alleged to exist.” Id. Section 82(b) provides that the application must state that the decedent died intestate. Id.
74. 787 S.W.2d at 346. The majority determined that the widow was unable to prove intestacy because the California court had sealed the decedent’s probate records. Id. The majority did not explain why they determined that the widow met the requirements of the Probate Code in her application when she stated, on the face of the application, that she could not swear that the decedent died intestate.
75. Id. The court found that neither party offered any evidence at the hearing, so the court could review only the prima facie evidence of the probate court’s order. Id.
her application that the decedent died intestate.\textsuperscript{76}

B. Executors and Administrators

Three courts considered the removal of independent executors during the Survey period.\textsuperscript{77} In \textit{Baker v. Hammett}\textsuperscript{78} the court reversed an order removing an independent executrix because the district court removed the executrix for a reason other than any statutory reason.\textsuperscript{79} In \textit{Geeslin v. McElhenney}\textsuperscript{80} the court upheld the probate court’s removal of an independent executor for gross mismanagement and misconduct.\textsuperscript{81} In \textit{Sales v. Pass-}

\footnotesize{\textsuperscript{76} Id. at 346-48 (Phillips, C.J., dissenting, joined by Gonzalez and Hecht, JJ.) The dissent noted the discrepancy between the majority’s finding that the widow failed to swear that the decedent died intestate and its determination that her allegation was sufficient because she could not determine the status of the estate from the California court records. \textit{Id.} at 347. The dissent noted that the widow could and should have inquired further with the estate’s counsel concerning the identity of the executor or administrator of the estate. \textit{Id.} The dissent further noted that appointment of the temporary administrator was not void at the time of service of process in the federal suit, but was instead voidable. \textit{Id.} at 347-48. The dissent would have held that the widow failed to meet her burden to prove the necessity of administration at the contested hearing, so that the probate court should have removed the temporary administrator at the time of the contested hearing. \textit{Id.} at 348. The court appointed the temporary administrator on December 23, 1987. The temporary administrator received process in the federal suit on January 11, 1988. The contested hearing occurred on January 13, 1988. The dissent noted that \textit{TEX. PROB. CODE ANN.} § 131A(i) (Vernon Supp. 1990) allows the temporary administrator to act to the extent of the powers granted by the probate court in the time between appointment and the contested hearing. 787 S.W.2d at 347. Since the administrator received service of process prior to the contested hearing, the dissent would have held that no reason existed for the temporary administration to continue at the time of the hearing. \textit{Id.} at 348.

\textsuperscript{77} \textit{Id.} at 346-48.

\textsuperscript{78} \textit{Id.} at 346-48.

\textsuperscript{79} \textit{Id.} at 346-48.

\textsuperscript{80} \textit{Id.} at 346-48.

\textsuperscript{81} \textit{Id.} at 346-48.}

more the court affirmed the probate court's determination not to remove an appointed co-independent executor who a beneficiary alleged to be a convicted felon.

In Gatesville Redi-Mix, Inc. v. Jones the appeals court affirmed the trial court’s finding that an independent executor had no authority to execute a long-term lease because the will did not provide the executor with that authority and the lease was not in the best interests of the estate. Prior to her death the decedent leased the surface of a portion of her real estate to Gatesville Redi-Mix, Inc. The lease had a primary term of five years with an option for the lessee to extend the term for an additional ten years. The decedent named her son independent executor in her will, and he apparently fully completed his duties as executor by July 1975, approximately a year and a half after the decedent’s death. In September 1981, following the expiration of the primary term of the lease on the surface, but during the option period, the son, acting as independent executor, signed a new lease with the lessee. The five year primary term of the new lease began in March 1986, at the end of the option period of the first lease, and the lease provided for an additional ten year option. The independent executor died in March 1985; the other beneficiaries of the estate were unaware of the new lease until after the independent executor’s death. The beneficiaries refused the lessee’s first payment and all subsequent payments tendered under the new lease. The lessee sued to enforce the lease and the beneficiaries counterclaimed for use of the land after the expiration of the original lease, restoration costs, and attorney’s fees. The court entered an instructed verdict for the beneficiaries and allowed the jury to determine the compensation for use of the land, costs for restoration of the land, and attorney’s fees. The lessee appealed the trial court’s ruling that the independent executor did not have authority to execute the lease. The appeals court held that the same rule applying to an

appeals court found that the probate court justifiably removed the executor; it also upheld the probate court’s order limiting the amount of executor’s commissions that the removed executor could receive. 788 S.W.2d at 687.

82. 786 S.W.2d 35 (Tex. App.—El Paso 1990, writ dism’d by agr.).

83. Id. at 37. A beneficiary of the estate sought to have the co-independent executor removed after appointment because the co-independent executor was a convicted felon. TEX. PROB. CODE ANN. § 78 (Vernon 1980) disqualifies a convicted felon from serving as an executor or administrator of an estate. The beneficiary received notice of the hearing wherein the court appointed the co-independent administrator, but the beneficiary failed to contest the appointment at that time. The beneficiary instead sought removal of the co-independent administrator following appointment. The appeals court noted that after appointment an executor may be removed only under TEX. PROB. CODE ANN. § 149C or § 222 (Vernon 1980 & Supp. 1990). 786 S.W.2d at 36. The court noted that § 222 might not apply to independent administrations, but that § 149C expressly applies to independent administrations. Id. at 37. Section 149C allows removal of the executor if the executor “is sentenced to the penitentiary,” TEX. PROB. CODE ANN. § 149C(a)(6) (Vernon Supp. 1990), which indicates that the executor must be sentenced after appointment to fall under this section of the Probate Code. The court determined that § 149C applies subsequent to appointment as executor. 786 S.W.2d at 37. The court also found that the probate court had jurisdiction to consider removal of the co-independent executor, but that the probate court committed harmless error by not doing so. Id.

84. 787 S.W.2d 443 (Tex. App.—Waco 1990, writ denied).

85. Id. at 446.
independent executor's sale of real property should apply to a lease. The lessee relied upon Probate Code section 361 as authority for the independent executor to lease the property, but the appeals court found that the lease did not meet the best interests of the estate.

In *Anderson v. Oden* the court held that the county court properly allowed reimbursement of an executor and his brother when no one objected to the reimbursement prior to the time that the court ordered the reimbursement. The decedent left a holographic will in which she named one of her sons executor. The decedent's undivided one-half interest in a parcel of real property constituted the largest single asset in her estate. The decedent's five children owned the other undivided one-half of the real property through inheritance from their father. Prior to the decedent's death, two of her sons, including the son named executor in the will, paid past due ad valorem taxes on the property. These same two sons paid the decedent's funeral expenses, expenses of her last illness, and the costs of estate administration. Following the decedent's death, one of the five children assigned the appellant his undivided one-fifth interest in the property. The two sons applied for reimbursement for the taxes paid prior to the decedent's death and the other prior expenses they had paid. The two sons, however, did not present their application for reimbursement in the manner specified by the Probate Code.

The trial court determined that the expenses were necessary, that the estate did not have sufficient funds to reimburse the two sons, and that the two sons should be reimbursed from the proceeds of the sale of the decedent's one-half interest in the real property. The appellant did not contest the reimbursement prior to the time of the trial court's order. The appellant contended on appeal that the application for reimbursement of the two sons did not meet the requirements of the Probate Code and, thus, the court invalidly ordered reimbursement. The appeals court held that the appellant did not preserve a complaint for appellate review because he did not object to

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86. *Id.* at 445. If a will does not authorize the independent executor to sell real property, the sale must be made under the same conditions that would result in a probate court's order of sale in a dependent administration. See *id*.

87. TEX. PROB. CODE ANN. §§ 361 (Vernon 1980) allows personal representatives to apply to the court for leases longer than one year; the court may allow the lease if the lease would serve the estate's best interests.

88. 787 S.W.2d at 445, 446. The court specifically noted that the independent executor entered the lease seven years following the decedent's death, the time that title to the property vested in the beneficiaries under TEX. PROB. CODE ANN. §§ 37 (Vernon Supp. 1990), and that the lease would not begin until eleven years after title vested in the beneficiaries. 787 S.W.2d at 445. Additionally, the court noted that the lease term could be extended at the lessee's option to twenty-six years after title to the property vested in the beneficiaries, even though the estate had no necessity for the lease at the time the executor entered into the lease. *Id.* The court accordingly held that the lease was not in the best interests of the estate. *Id.* at 446.

89. 780 S.W.2d 463 (Tex. App.—Texarkana 1989, no writ).

90. *Id.* at 466.

91. TEX. PROB. CODE ANN. §§ 301 (Vernon 1980) provides that an affidavit must support written claims against an estate. TEX. PROB. CODE ANN. §§ 317 (Vernon 1980) provides that a personal representative of an estate must file an affidavit with his claim against the decedent within six months of issuance of letters testamentary or letters of administration.

the reimbursement prior to the trial court’s order.\textsuperscript{93}

In \textit{Whitaker v. Huffaker}\textsuperscript{94} the court determined that the decedent’s two children did not have a claim for a breach of fiduciary duty against their attorney as executor of their father’s estate because the probate court had not appointed an executor.\textsuperscript{95} The decedent’s two children and his surviving spouse began arguing concerning the separate and community nature of the decedent’s estate immediately following his death. Attorneys for the children and the widow suggested a settlement between the parties to save expense and avoid litigation. The parties entered into a preliminary settlement agreement wherein they agreed to probate the decedent’s will as a muniment of title. The widow and the children gave their attorneys wide power to gather and manage estate assets pending a final settlement. Some time later the parties entered a final settlement. The two children subsequently revoked the powers of attorney under which the attorneys operated and consulted another attorney because of their dissatisfaction with the settlement of the estate. The children sought to recover from their attorney, alleging a breach of duty as an executor of the estate. The appeals court held that the trial court properly granted summary judgment against the children on this issue because the probate court never appointed an executor.\textsuperscript{96}

In \textit{Rice v. Gregory}\textsuperscript{97} the court found that sufficient evidence existed that the executor converted property that did not belong to the estate\textsuperscript{98} and that the trial court thus correctly entered judgment against the executor both individually and in his capacity as the independent executor.\textsuperscript{99} The decedent received a life estate in corporate stock under the terms of her mother’s will. The decedent’s mother left the remainder interest in the corporate stock equally to the decedent’s brother and sister. The decedent may have been under the impression that she and her siblings entered into a verbal agreement to disregard the mother’s will and allow the decedent to own the stock outright. The jury concluded that the siblings did not enter into such an agreement and that the executor, individually and in his capacity as execu-

\textsuperscript{93} 780 S.W.2d at 466. The court found the appellant’s complaint that the four year statute of limitations barred the claims for reimbursement was meritless. \textit{id.} at 467. The sons paid all of the expenses for which they sought reimbursement in 1984 and 1985. The sons filed their application for reimbursement in 1987. Accordingly, the four years of the statute had not run at the time the sons filed the application for reimbursement.

\textsuperscript{94} 790 S.W.2d 761 (Tex. App.—El Paso 1990, writ denied).

\textsuperscript{95} \textit{id.} at 764.

\textsuperscript{96} \textit{id.} The court additionally held that the fact that the widow and two attorneys did not attach new affidavits to their amended summary judgment motions did not result in fatal error. \textit{id.} at 763. The court noted that the trial court should consider all affidavits in connection with amended motions, that the children did not claim about the lack of new affidavits in the trial court, and that the pleadings and depositions included in the amended motions supported the summary judgment even without considering the affidavits. \textit{id.} at 763-64. The court also held that the trial court properly granted summary judgment against the children in their claim for breach of contract against their stepmother because the initial settlement agreement did not provide for distributions to the children, and for their claim that the two attorneys and the stepmother conspired to defraud the children of their inheritance. \textit{id.} at 764-66.

\textsuperscript{97} 780 S.W.2d 384 (Tex. App.—Texarkana 1989, writ denied).

\textsuperscript{98} \textit{id.} at 387.

\textsuperscript{99} \textit{id.} at 389.
tor, converted the stock when he distributed it to individuals other than the decedent’s brother. The court found that the brother properly brought suit against the executor in his fiduciary capacity because the executor had not closed the estate administration pursuant to Probate Code section 151 or section 152 prior to the time the brother brought the action. The court found that the executor converted the property individually and as executor and that the estate was jointly liable with the executor for the conversion.

C. Family Allowance

In Churchill v. Churchill the court upheld the probate court’s award of a family allowance to the decedent’s surviving spouse. The co-executors of the decedent’s estate appealed the award of a $30,000 family allowance. They contended that the decedent provided adequately for his spouse under his will, the spouse had to elect whether to receive the family allowance or her benefits under the will, the spouse had adequate separate property to provide for her needs, and no evidence existed that she had inadequate separate property to provide for her needs. The appeals court found the will neither explicitly nor implicitly limited the surviving spouse’s rights to the statutory family allowance. The court also found that the spouse did not have to elect to receive her benefits under the will or, in the alternative, to receive the family allowance because the award of the family allowance would not thwart the testator’s intent in the will. The court also found the surviving spouse entitled to a family allowance since she lacked adequate separate property to provide for her support in the year immediately following her husband’s death. Finally, the court held that the amount of the

100. The decedent included the stock in her will and left most of it to her sister. She also left some of the stock to her husband, who served as executor, to her husband’s two children from a former marriage and to her brother’s two daughters. The executor distributed the stock pursuant to the bequests in the decedent’s will rather than under the terms of the decedent’s mother’s will.

101. TEX. PROB. CODE ANN. § 151 (Vernon 1980).

102. TEX. PROB. CODE ANN. § 152 (Vernon 1980).

103. 780 S.W.2d 384, 388. The court also found that the trial court correctly awarded prejudgment interest from a single date because evidence showed that the executor converted the stock both before and after the selected date. Id. The court found that the conversion could have occurred as early as the date the executor filed the inventory in the estate because he included all of the stock in the inventory. Id. The court also upheld the jury’s finding that the executor willfully acted in a wrongful manner when he converted the stock. Id.

104. Id. at 389. The court found that joint liability especially applies when, as here, the decedent purported to give more than her life estate in her will. Id. The court also upheld the trial court’s award of attorney’s fees, including the fees for the conversion issue that would not ordinarily result in attorney’s fees, because the executor failed to object to the testimony concerning attorney’s fees at trial. Id.

105. 780 S.W.2d 913 (Tex. App.—Fort Worth 1989, no writ).

106. Id. at 917.

107. Id. at 915.

108. Id.

109. Id. at 916. The dissent would have found that the spouse was not entitled to a family allowance because she gave her daughter a house, which was her separate property, following her husband’s death. Id. at 917. The house generated $300 per month in rental income and
family allowance was not excessive under the circumstances.\textsuperscript{110}

\textbf{D. Claims Against the Estate}

In \textit{Wesley v. Pickard}\textsuperscript{111} the court held that the decedent's former spouse was not entitled to receive contractual alimony following the decedent's death.\textsuperscript{112} The consent judgment in the divorce contained a contract for alimony payments. The contract provided four reasons for termination of the alimony, but none included the death of the former husband. The parties added a handwritten interlineation, however, that stated that alimony due and unpaid through a specified date, which occurred more than two years prior to the husband's death, would be an obligation of his estate. The trial court ordered the temporary administrator of the estate to pay the former wife contractual alimony for the time after the decedent's death. The temporary administrator appealed, and the appeals court found that the trial court erred in finding that the contract required payment after the date of the decedent's death.\textsuperscript{113}

Two courts examined secured claims in the context of independent administration.\textsuperscript{114} In \textit{Texas Commerce Bank-Austin, N.A. v. Estate of Cox}\textsuperscript{115} the court found that Probate Code section 306\textsuperscript{116} does not apply to independent administration.\textsuperscript{116}

\begin{itemize}
  \item \textsuperscript{110} The dissent would have had the spouse sell the house in order to provide for her support during the year following her husband's death. \textit{id.}
  \item \textsuperscript{111} 780 S.W.2d at 917.
  \item \textsuperscript{112} 783 S.W.2d 589 (Tex. App.—Houston [1st Dist.] 1990, no writ).
  \item \textsuperscript{113} \textit{Id.} at 592.
  \item \textsuperscript{114} The appeals court stated that the reasonable interpretation of the handwritten addition to the contract was that the decedent's estate would only be obligated through the date given in the interlineation. \textit{id.} at 591-92. Since the decedent survived that date, his estate had no obligation to his former wife.
  \item \textsuperscript{115} Texas Commerce Bank-Austin, N.A. v. Estate of Cox, 783 S.W.2d 16 (Tex. App.—Austin 1989, writ denied); Joffrion v. Texas Bank of Tatum, 780 S.W.2d 451 (Tex. App.—Texarkana 1989, writ dism'd by agr.).
  \item \textsuperscript{116} TEX. PROB. CODE ANN. § 306 (Vernon 1980). Section 306 provides the methods under which creditors present secured claims in a dependent administration. Section 306(a) provides that the creditor should specify the method in which the claim should be handled by the personal representative:
  \begin{itemize}
    \item \textsuperscript{(1)} Whether it is desired to have the claim allowed and approved as a matured secured claim to be paid in due course of administration, in which event it shall be so paid if allowed and approved; or
    \item \textsuperscript{(2)} Whether it is desired to have the claim allowed, approved, and fixed as a preferred debt and lien against the specific property securing the indebtedness and paid according to the terms of the contract which secured the lien, in which event it shall be so allowed and approved if it is a valid lien; provided, however, that the personal representative may pay said claim prior to maturity if it is for the best interest of the estate to do so.
  \end{itemize}
  \textit{Id.} § 306(a). If a creditor presents the claim as a preferred debt and lien against the secured property, the creditor cannot make a claim against assets of the estate other than the collateral. \textit{Id.} Section 306(e) provides as follows:
  \begin{itemize}
    \item \textsuperscript{(1)} When an indebtedness has been allowed and approved under Paragraph (2) of Subsection (a) hereof, no further claim shall be made against other assets of the estate by reason thereof, but the same thereafter shall remain a preferred lien against the property securing same, and the property shall remain security for the debt in any distribution or sale thereof prior to final maturity and payment of the debt.
  \end{itemize}
\end{itemize}
The creditor foreclosed on a piece of real property when the independent executor failed to make payment on the note in question. The creditor used the proceeds from the foreclosure sale and from certificates of deposit also used as collateral on the note to offset the indebtedness. When the creditor sought an accounting from the probate court, the probate court found that the creditor did not have standing. The creditor appealed, and the appeals court found that the creditor did not elect to have the debt treated as a preferred debt and lien because section 306 does not apply to independent administrations, that the creditor could pursue the deficiency resulting from the foreclosure against the independent executor, and, accordingly, that the creditor had standing as an interested party to demand an accounting.\textsuperscript{118} In \textit{Joffrion v. Texas State Bank of Tatum}\textsuperscript{119} the appeals court considered whether Probate Code section 306\textsuperscript{120} applies to independent administrations and reached the same conclusion\textsuperscript{121} as the court in \textit{Estate of Cox}.\textsuperscript{122} The supreme court, however, later vacated the court of appeals' opinion and remanded the case to the trial court to enter judgment pursuant to the parties' settlement agreement.\textsuperscript{123}

In \textit{San Antonio Savings Association v. Palmer}\textsuperscript{124} the court held that the transfer of real property to a specially created corporation in exchange for corporate stock and mortgage bonds was proper under Probate Code sections 230\textsuperscript{125} and 234\textsuperscript{126} and that the Probate Code accordingly did not require a report of sale and resulting confirmation of sale.\textsuperscript{127} Prior to decedent's death, the probate court appointed a guardian of her estate because the decedent was no longer able to care for herself. The decedent had few liquid assets, but owned a large tract of land in San Antonio. The guardian determined that once the decedent died, her estate would be unable to pay estate and inheritance taxes without a forced sale of the real property. The guardian worked with the persons who would be the ward's heirs and their respective attorneys and developed an estate plan under which the decedent's estate would obtain the liquidity to pay the taxes and still retain the

\textsuperscript{117} Id. 783 S.W.2d at 19.
\textsuperscript{118} Id.
\textsuperscript{119} 780 S.W.2d 451 (Tex. App.—Texarkana 1989, writ dism'd by agr.).
\textsuperscript{120} TEX. PROB. CODE ANN. § 306 (Vernon 1980).
\textsuperscript{121} 780 S.W.2d at 453. The facts in \textit{Joffrion} closely parallel those in \textit{Estate of Cox}. The secured creditor foreclosed on the real property when the independent executor failed to pay off the note on the due date. The creditor then sought recovery of the deficiency against the independent executor, but the independent executor rejected the claim for the deficiency. The trial court granted judgment in favor of the creditor in the amount of the deficiency and attorney's fees; the independent executor appealed.
\textsuperscript{122} 783 S.W.2d 16 (Tex. App.—Austin 1989, writ denied).
\textsuperscript{123} 792 S.W.2d 456 (Tex. 1990).
\textsuperscript{124} 780 S.W.2d 803 (Tex. App.—San Antonio 1989, writ denied).
\textsuperscript{125} TEX. PROB. CODE ANN. § 230 (Vernon 1980). Section 230 provides the duties that a personal representative has in connection with the estate. Section 230(b) specifically lists the duties and powers that a guardian has in connection with the ward's estate.
\textsuperscript{126} TEX. PROB. CODE ANN. § 234 (Vernon 1980). This section enumerates powers that a personal representative can exercise with and without court supervision.
\textsuperscript{127} 780 S.W.2d at 808.
real property. The guardian obtained the probate court’s approval of the plan approximately three weeks prior to the decedent’s death. The plan called for the creation of a corporation to own all of the decedent’s real property. In exchange for the transfer of the real property to the corporation, the corporation issued the guardianship estate preferred and common stock in the corporation and general mortgage bonds issued by the corporation. The corporation also executed a deed of trust on the real property to secure the mortgage bonds. The guardian approached San Antonio Savings Association about purchasing the mortgage bonds. The ward died prior to the time San Antonio Savings agreed to purchase the bonds and the guardianship proceeding terminated pending the filing of a final account. The court appointed the trust company that served as guardian as temporary administrator of the decedent’s estate and specifically gave the temporary administrator the power to complete the previously approved estate plan. San Antonio Savings then issued a commitment letter in which it agreed to purchase the mortgage bonds from the decedent’s estate in cash. The deed of trust previously executed by the corporation secured payment on the bonds. The probate court authorized the bond sale and the parties consummated the sales transaction. Subsequently, the estate failed to pay the initial interest payment on the bonds and San Antonio Savings demanded payment. When the estate again failed to make the interest payment, San Antonio Savings posted the property for foreclosure. The heirs and the independent administrator of the estate, who was an individual and not the trust company that served as guardian and temporary administrator, sought to enjoin the foreclosure. The probate court, in a summary judgment, found void the guardian’s transfer of the real property to the corporation, the temporary administrator’s sale of the mortgage bonds to San Antonio Savings, and the debt that the decedent’s estate incurred in connection with the sale of the bonds. The probate court issued a permanent injunction against San Antonio Savings enjoining the foreclosure or attempted foreclosure of the property, because the guardian did not file a report of sale reporting the transfer of the real property to the corporation and the temporary administrator did not file a report of sale reporting the sale of the mortgage bonds to San Antonio Savings. Because the guardian and the temporary administrator did not file reports of sale, the probate court did not enter orders confirming the sales. The appeals court disagreed and found that the transfer of real property to the corporation and the sale of the mortgage bonds were not the types of transactions that Probate Code sections 331 through 358\textsuperscript{128} contemplated.\textsuperscript{129} The guardian and the temporary administrator fully apprised the probate court of the proposed actions prior to taking those actions and received court approval to do so. The probate court knew the sales price and the purchaser prior to the sale of the mortgage bonds. The appeals court

\textsuperscript{128}Tex. Prob. Code Ann. §§ 331-358 (Vernon 1980 & Supp. 1990). These sections allow personal representatives to sell estate property under proper court supervision. The court supervision and the procedural steps outlined in these sections protect the estate.

\textsuperscript{129}780 S.W.2d at 807.
found that requirement of a report of sale and the resulting decree confirming the sale would be "superfluous." Additionally, the court found that the transfer of the real property to the corporation in exchange for stock and mortgage bonds was not a sale, but an exchange, and that Probate Code section 234(a)(1) applied to the exchange. The court found that because the transfer of real property was an exchange duly authorized by the court, the guardian did not have to file a report of sale or seek an order confirming the sale. Although the temporary administrator of the decedent's estate did not make a report of the sale and seek an order confirming the sale, the appeals court held that the probate court's approval of the guardianship estate's final account, which included information concerning the sale of the bonds, served as confirmation of the bond sale. The court further held that the probate court erred in granting summary judgment to the decedent's heirs and the independent administrator. Finally, the court held that the heirs and independent administrator could not challenge the lien and the debt because of equitable estoppel.

E. Jurisdiction

In Owens v. Moore the court held that it lacked jurisdiction to issue a writ of mandamus. The executor of the estate in question filed a plea to the jurisdiction in Harris County district court, contending that the court had no jurisdiction because an ancillary probate proceeding was pending in Val Verde County court. The appeals court noted that the claims pending in the Harris County district court had not been brought before the Val Verde court. The court also noted that it did not possess jurisdiction to issue a writ of mandamus because the parties could receive an adequate remedy through the appeal process. The court found that the Harris County court did not interfere with the jurisdiction of the Val Verde court and that

130. Id.
131. Tex. Prob. Code Ann. § 234(a)(1) (Vernon 1980) provides that a personal representative may "purchase or exchange property" upon application to the court and a court order approving the action.
132. 780 S.W.2d at 808.
133. Id.
134. Id. at 809.
135. Id. The court found that the guardian's transfer of the real property to the corporation, execution of the deed of trust to secure payment on the bonds, and the temporary administrator's sale of the bonds to San Antonio Savings were all valid acts under the Probate Code. Id.
136. Id. at 809. The majority stated that the heirs and independent administrator presented a "case of estoppel by election . . . based on the principle that a person will not be permitted to accept the beneficial part of a transaction and repudiate the disadvantageous part." Id. The heirs and independent administrator sought to retain both the money San Antonio Savings paid for the mortgage notes and the real property. The majority found this unconscionable. Id. at 810. Justice Cadena, in a concurring opinion, criticized the majority's conclusion that the case was one of estoppel because the facts failed to show any elements of estoppel. Id.
137. 778 S.W.2d 151 (Tex. App.—Houston [1st Dist.] 1989, no writ).
138. Id. at 153.
139. Id. at 152.
140. Id. at 152 n.1.
the Val Verde court did not acquire jurisdiction over the controversy pending in the Harris County court; therefore, no conflict existed between the jurisdiction of the two courts.141

F. Bills of Review

Two courts examined bills of review during the Survey period.142 In Ortega v. First Republic Bank Fort Worth, N.A.143 the court held that the petitioners were not entitled to a bill of review as a matter of law.144 In McDonald v. Carroll145 the court found that the lower court erred in entering summary judgment against the petitioner's bill of review when the bill of review contained evidence of all essential elements necessary to prove that the original judgment was in error.146

141. Id.
142. Ortega v. First Republic Bank Fort Worth, N.A., 792 S.W.2d 452 (Tex. 1990); McDonald v. Carroll, 783 S.W.2d 286 (Tex. App.—Dallas 1989, writ denied).
143. 792 S.W.2d 452 (Tex. 1990).
144. Id. at 456. The petitioners were two adopted daughters of Eva Duane Jackson. Jackson's grandfather established a trust in his will for the benefit of Jackson's children. In 1963, nine years following the testator's death, the trustee of the testamentary trust sought a declaratory judgment as to whether Jackson's adopted children were beneficiaries of the trust. The trial court in the 1963 proceeding, affirmed by the court of appeals, determined that only Jackson's natural children were beneficiaries of her grandfather's testamentary trust. Jackson's adopted children filed a bill of review and declaratory judgment action more than twenty years after the first ruling. The Texas Supreme Court noted that a party to a previous action brings a bill of review to set aside the judgment when the original judgment may no longer be appealed due to the passage of time. Id. at 453 (citing Transworld Fin. Serv. Corp. v. Briscoe, 722 S.W.2d 407, 407 (Tex. 1987)). To obtain a bill of review, the petitioner must prove that he has a valid claim or defense that he was unable to make at the first trial because of the other party and without the petitioner being at fault or negligent. 792 S.W.2d at 453. The supreme court found that the adopted children did not have a meritorious defense because the earlier decision found that the testator intended to include only natural born children of his granddaughter as beneficiaries of the trust. Id. at 454. The court also found that the adopted children failed to prove that the other party to the proceeding prevented the guardian ad litem appointed to represent them from making the defense and that the guardian ad litem did not fully represent their interests. Id. at 454-55. Finally, the court found that the 1963 judgment served as res judicata to their contentions that they are contingent remainder beneficiaries of the testamentary trust. Id. at 456.
145. 783 S.W.2d 286 (Tex. App.—Dallas 1989, writ denied).
146. Id. at 288. The petitioner was the only son of the decedent, who was also survived by her husband, the petitioner's step-father. The step-father served as administrator of the decedent's estate. The administrator's final account showed community property worth $157,561.25. The final settlement, also filed with the probate court, showed that the son received $42,293.88 and the administrator received $115,267.37. The probate court entered an order closing the estate and discharging the administrator. Less than two years later, the son filed a statutory bill of review, alleging that he was entitled to one-half of the community estate under TEX. PROB. CODE ANN. § 45 (Vernon 1980) as his mother's sole heir. The probate court denied the son's motion for summary judgment and granted the administrator's motion for summary judgment. The appeals court found that a statutory bill of review under TEX. PROB. CODE ANN. § 31 (Vernon 1980) is a proper method of questioning the probate court's order closing the estate and that to rule otherwise would destroy the effect of § 31. See 783 S.W.2d at 287. The court next determined that the son did not release his claims against the estate by signing a release and receipt stating that his distribution completely satisfied his interest in the estate because the release was without consideration. Id. Finally, the court found that the probate court's order approving the distribution of the estate was in error because it did not follow the distribution provisions of TEX. PROB. CODE ANN. § 45 (Vernon 1980). 783 S.W.2d at 288.
IV. Guardianship

A. Removal of Guardian

In *Mireles v. Alvarez* 147 the appeals court reversed the trial court's decision that the appointment of a guardian was proper and rendered judgment removing the guardian. 148 A 1981 automobile accident left the ward physically and mentally incompetent. The ward's husband filed a lawsuit for damages resulting from the 1981 accident, in which he alleged damages both for his wife as her next friend and for himself. The husband later applied for appointment as his wife's guardian, and the court granted letters of guardianship. The ward's mother subsequently filed a petition seeking removal of the husband as the wife's guardian and requesting that she be named guardian. The trial court denied the mother's petition and she appealed. The appeals court analyzed Probate Code section 110, 149 which provides grounds for disqualification of a person as guardian. 150 Probate Code section 110(d) provides that a person cannot qualify to serve as guardian if that person is a party to a lawsuit that directly affects the welfare of the proposed ward. 151 The appeals court, however, erred in analyzing section 110, which applies only prior to appointment. The court should have analyzed Probate Code section 222, 152 which addresses the removal of a guardian after appointment. Section 222 does not include as a ground for removal the guardian being party to a lawsuit affecting the ward. 153 Additionally, the court failed to acknowledge that Rule 173 of the Texas Rules of Civil Procedure 154 anticipates a guardian bringing a legal action, which affects both the ward and the guardian and in which the guardian may have an interest adverse to the ward. Instead, Rule 173 mandates the appointment of a guardian ad litem to represent the ward's interests in the lawsuit.

B. Limited Guardianship

In *Eddins v. Estate of Sievers, NCM* 155 the appeals court affirmed the trial court's ruling denying a limited guardianship and continuing a full guardianship. 156 The court first discussed the standard for granting a limited guardianship, 157 then discussed the record. 158 The court found that even though some evidence demonstrated that the ward could perform some, although

147. 789 S.W.2d 947 (Tex. App.—San Antonio 1990, writ denied).
148. Id. at 948.
149. TEX. PROB. CODE ANN. § 110 (Vernon 1980).
150. 789 S.W.2d at 948.
151. TEX. PROB. CODE ANN. § 110(d) (Vernon 1980).
153. Id.
155. 789 S.W.2d 706 (Tex. App.—Austin 1990, no writ).
156. Id. at 707.
157. Id. TEX. PROB. CODE ANN. § 130G(c) (Vernon Supp. 1990) provides that the applicant must prove each element necessary for the creation of a limited guardianship by clear and convincing evidence. The applicant must also submit a plan setting forth all duties and powers of the limited guardian. Id. § 130H.
158. 789 S.W.2d at 707.
not all, of the tasks required to care for himself, sufficient evidence also sup-
ported the continuation of the full guardianship.159 The court also found that the applicant failed to provide a plan for the limited guardianship.160

C. Jurisdiction

In Gutierrez v. Estate of Gutierrez161 the court held that the probate court loses all jurisdiction over a guardianship except for the settlement of the guardianship estate following the death of the ward.162 In this case a successor guardian brought suit in June 1987 against the previously removed guardian for costs of the removal action and damages resulting from the previous guardian’s breach of fiduciary duty. The ward died in April 1988, prior to the time the previous guardian was served by substituted service. In October 1988 the trial court granted a default judgment against the previous guardian. The previous guardian appealed, alleging that the trial court lost jurisdiction in the guardianship due to the death of the ward. The appeals court agreed with the appellant, stating that, upon the death of the ward, the trial court lost all jurisdiction in the guardianship except for requiring the guardian to file a final account and settle the guardianship estate.163

V. Trusts

A. Creation of Trust

The federal district court, in Thompson v. Sundholm,164 found that a father did not create an express trust for his two children under Texas law by delivering a check to their mother.165 The cashier’s check involved was made out to a third party and endorsed in such a manner that the funds were subsequently deposited in accounts for the children. The check was not endorsed to the mother as custodian for the children, nor did the father introduce any evidence that the third party intended to create a trust for the benefit of the children. The father was not the maker, payee, or endorser of the check. The court found that the father did not create an express trust under Texas Property Code section 112.001(2)166 by his delivery of the check to the mother.167

159. Id.
160. Id.
161. 786 S.W.2d 112 (Tex. App.—San Antonio 1990, no writ).
162. Id. at 113.
163. Id. The court held the default judgment void because the trial court lacked subject matter jurisdiction to render judgment following the death of the ward. Id.
165. Id. at 150.
166. TEX. PROP. CODE ANN. § 112.001(2) (Vernon 1984).
167. 726 F. Supp. at 150. The court also found that the delivery of the check to the mother failed to create a gift to the minor children under the Texas Uniform Gifts to Minors Act, TEX. PROP. CODE ANN. § 141.001 et seq. (Vernon 1984). 726 F. Supp. at 150. The court reasoned that the check was not endorsed to the mother as custodian for the minor in the manner prescribed by § 141.004(d) and that the gift was to two minors, whereas a gift under the Texas Uniform Gift to Minors Act must be to only one minor under § 141.003(e). 726 F. Supp. at 150.
In *Marshall v. Marshall* the court found that the grantor failed to create a valid trust because he did not deliver the stock certificates that were to comprise the trust corpus to the trustees. The trust agreement, which purported to create an irrevocable trust, stated that the grantor transferred certain property, listed on an attached schedule, to the trustees. The schedule recited that the grantor transferred 5000 shares of stock to the trustees. The grantor neither delivered the shares to the trustees, nor endorsed the certificates and forwarded them to the corporation for reissuance to the trustees. The grantor later sought to dissolve the trust, but the trustees brought an action for declaratory judgment to find the trust valid. The appeals court affirmed the trial court's finding that the grantor failed to create a valid trust because he failed to deliver any property to the trustees.

### B. Beneficial Interests

In *Furnace v. Furnace* the court held that when shareholders in a corporation sold their stock they lost their beneficial interests in a mineral trust formed by the corporation for the benefit of its shareholders. The corporation created the trust to hold the mineral interests acquired by the corporation when it purchased real property. The shareholders of the corporation were all members of one family. In 1980 one of the brothers determined that he and his children should sell their corporate stock in order to minimize family discord. At a shareholders meeting during which the shareholders discussed the sale, this brother stated that the sale of the stock would not result in a loss of beneficial interest in the trust. One of his brothers disagreed, but no one actually read the trust agreement to determine its meaning. The nephew who purchased the stock continued to make distributions from the trust to the family members who had sold him their stock for approximately four years. After four years the nephew reviewed the trust agreement and determined that the former shareholders were no longer beneficiaries of the trust. The former shareholders brought this action to determine their beneficial interests. The jury found that the beneficial interests in the mineral trust belonged to shareholders in the corporation as an incident of ownership of the stock, and the appeals court held that this finding was not against the great weight and preponderance of the evidence.

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168. 786 S.W.2d 493 (Tex. App.—Texarkana 1990, no writ).
169. Id. at 494.
170. Id. The appeals court cited TEX. PROP. CODE ANN. § 112.001(2) (Vernon 1984) for the proposition that the transfer of property to another as trustee creates a valid *inter vivos* trust. 786 S.W.2d at 493. The court found that because the grantor neither delivered the stock certificates to the trustees nor surrendered the stock certificates to the corporation for reissuance to the trustees, the grantor did not deliver the stock certificates to the trustees. Id. at 494.
171. 783 S.W.2d 682 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd w.o.j.).
172. Id. at 685-86. The court determined that the jury did not unjustly or erroneously find that the shareholders sold their beneficial interests in the mineral trust when they sold their shares in the corporation. Id. at 686. The trust agreement stated in three places that it was created for the benefit of present and future shareholders.
173. Id. at 685.
C. Charitable Trust

In *Nacol v. State* the court held that two members of a charitable organization had the same basic interests in enforcing a public charitable trust as did members of the general public. For this reason, the members of the organization had no standing to intervene in a suit for the appointment of a receiver for the organization when the attorney general represented the interests of the general public. The court determined that the organization was a public charitable trust under article 4412a of the Texas Revised Civil Statutes because of the stated charitable purposes in the organization’s articles of incorporation.

D. Successor Fiduciaries

In *NCNB Texas National Bank v. Cowden* the Fifth Circuit examined the role of successor corporate fiduciaries following the failure of a commercial bank and the sale of the bank’s assets, including its trust and estate accounts, to another bank. When the forty banks owned or controlled by First RepublicBank Corporation failed in July 1988, NCNB acquired the deposits, assets, liabilities and other obligations of the failed banks from a bridge bank formed by FDIC to serve as First RepublicBank’s temporary successor. The purchase and assumption agreement between the bridge bank and NCNB included the transfer of the trust department of First RepublicBank Midland to NCNB. The agreement specifically provided that NCNB would immediately, without any additional action, assume the role as successor fiduciary of the estates and trusts managed by First RepublicBank Midland. Among the estates and trusts under administration at that time were the Estate of B.T. Cowden and five trusts with Cowden family members as beneficiaries. None of the trust instruments provided for the succession as Trustee in the event of the failure of First RepublicBank Midland, although each instrument provided for the resignation and appointment of a successor trustee. When NCNB attempted to make distributions

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174. 792 S.W.2d 810 (Tex. App.—Houston [14th Dist.] 1990, no writ).
175. *Id.* at 812.
176. *Id.*
177. TEX. REV. CIV. STAT. ANN. art. 4412a (Vernon 1976).
178. 792 S.W.2d at 812. The articles of incorporation stated that the purposes for the organization included to “operate exclusively for charitable” and other purposes, and to promote research for finding the “cause, cure and prevention of Multiple Sclerosis. . . .” *Id.*
179. 895 F.2d 1488 (5th Cir. 1990).
180. The FDIC chartered an interim bridge bank to receive the deposits, assets, liabilities and other obligations of the forty failed banks and entered into separate purchase and assumption agreements with the bridge bank for each of the forty failed banks. On the same day, the FDIC and the bridge bank entered into an agreement with NCNB for NCNB to purchase the deposits, assets, liabilities and other obligations of the failed banks.
181. As the court noted in the text of its opinion and accompanying footnote, the trust department of First RepublicBank Midland served as executor or administrator of some eighteen estates and as trustee of some nine hundred trusts, with total assets under administration of approximately $430 million. 895 F.2d at 1491 n.4. The trust departments of the other failed banks that NCNB acquired had a combined total of approximately $50 billion under administration in more than 1,000 decedent and guardianship estates, 17,000 individual trusts and 9,000 employee benefit and corporate trusts. *Id.* at 1493.
from three of the Cowden trusts, the beneficiaries refused to recognize NCNB's ability to do so. NCNB and FDIC subsequently brought this action to determine whether NCNB was the successor to First RepublicBank Midland's fiduciary appointments. The district court held that NCNB was the successor trustee to First RepublicBank Midland in the Cowden trusts.\(^{182}\) On appeal, the Fifth Circuit first determined that neither FDIC nor the bridge bank could transfer First RepublicBank's fiduciary appointments to NCNB under Texas law.\(^{183}\) The court next focused on whether Congress granted FDIC authority to transfer fiduciary appointments to a bridge bank and ultimately to a successor bank in the bridge bank statute.\(^{184}\) The court concluded that Congress granted this authority\(^{185}\) and that the bridge bank statute thus preempted Texas law.\(^{186}\) The court further concluded that any federal preemption resulting from application of the bridge bank statute is narrow, affecting successor fiduciary appointments only when FDIC utilizes a purchase and assumption agreement for maintaining and continuing the failed bank's operations.\(^ {187}\)

### E. Constructive Trust

In *University of Texas Medical Branch v. Allan*\(^ {188}\) the court held the anticipated settlement of an insurance claim an asset of a bankrupt's estate, but, due to the bankrupt's pre-petition assignment of the anticipated insurance proceeds, the funds were subject to a constructive trust in favor of the hospital assignee.\(^ {189}\) The insurance company paid a claim directly to the hospital after the patient executed an assignment of insurance proceeds to the hospital at the time of surgery. The insurance company later determined that the surgical procedure was not necessary and requested that the hospital return the funds. The hospital returned the funds and sought recovery directly from the patient. The patient filed suit against the insurance company and

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183. 895 F.2d at 1496. The court found that Texas law prohibits the delegation or transfer of fiduciary responsibilities unless the will or trust agreement specifically provides the fiduciary with the authority to do so. *Id.* at 1495. In the absence of such authority, successor fiduciaries succeed according to statute. *Tex. Prop. Code Ann.* § 115.001 (Vernon 1984) provides that a state district court has jurisdiction to appoint a successor trustee upon application by an interested person under § 113.083(a). *Tex. Prop. Code Ann.* § 154A(a) (Vernon 1980) provides for the appointment of a successor independent administrator.
185. 895 F.2d at 1498-1501. The Fifth Circuit found four reasons for concluding that Congress gave FDIC the scope to transfer fiduciary appointments to successor banks. *Id.* at 1499. First, the court found that Congress would be unlikely to authorize the transfer of fiduciary accounts without transferring the fiduciary appointments and corresponding duties and responsibilities. Next, the court found that a fiduciary appointment could itself be considered an asset subject to transfer to a successor bank. Third, other federal courts have approved FDIC's transfers of rights held by failed banks to successor banks even though those rights would not have been transferable under applicable state law. Finally, the court found that the bridge bank statute clearly states Congressional intent that FDIC have the ability to transfer all parts of a failed bank's business and operations to a newly created bridge bank. *Id.*
186. *Id.* at 1501.
187. *Id.* at 1503.
188. 777 S.W.2d 450 (Tex. App.—Houston [14th Dist.] 1989, no writ).
189. *Id.* at 454.
later filed a voluntary petition in bankruptcy. Following the patient’s discharge in bankruptcy, the insurance company entered into a settlement with the patient on her claim. The hospital intervened and the insurance company interpled the settlement funds. The trial court entered summary judgment in favor of the patient and the hospital appealed. The appeals court determined that although the patient, and ultimately the bankruptcy trustee, retained the legal title to the insurance claim, the equitable title belonged to the hospital because of the assignment.\textsuperscript{190} The court found that the claim belonged to the bankruptcy estate subject to a constructive trust in favor of the hospital; the discharge in bankruptcy did not deprive the hospital of its equitable interest in the insurance proceeds.\textsuperscript{191}

In \textit{Welder v. Welder}\textsuperscript{192} the court affirmed the trial court’s judgment notwithstanding the verdict that the husband did not hold a portion of his separate real property in constructive trust for his wife.\textsuperscript{193} The court found no evidence that the husband engaged in any wrongdoing concerning the properties or that he would be unjustly enriched by retaining his separate property.\textsuperscript{194} The court also found, based upon the jury’s findings, that the husband did not make a gift of any part of the real property to his wife, nor did he represent to his wife that they owned the real property jointly.\textsuperscript{195}

In \textit{Powers v. McDaniel}\textsuperscript{196} the court considered the issue of the statute of limitations in a constructive trust case. The plaintiff attempted to recover title to acreage and a trailer house that she contended she had purchased and allowed her son to use. The son took title to the property in his own name, lived on the property for several years, paid the ad valorem taxes on the property, and ran cattle on the property. When the son died, the plaintiff found that title to the property was in her son’s name rather than her own. The mother sued her son’s widow individually and as executrix of the son’s estate to recover title to the property. The trial court entered a directed verdict against the plaintiff, citing the expiration of the statute of limitations. The appeals court first noted that the statute of limitations in a constructive trust situation begins running at the inception of the constructive trust.\textsuperscript{197} The court then stated the rule that a fraudulent concealment of facts will toll the statute of limitations until discovery of the fraudulent concealment or until the beneficiary of the constructive trust could have discovered the fraudulent concealment had the beneficiary used reasonable diligence.\textsuperscript{198} The court found that the plaintiff failed to plead facts sufficient to toll the

\begin{footnotes}
\item 190. \textit{Id.}
\item 191. \textit{Id.} The court also stated that the patient would be unjustly enriched if allowed to retain the proceeds; equity thus imposed a constructive trust on the insurance proceeds. \textit{Id.} at 455.
\item 192. 794 S.W.2d 420 (Tex. App.--Corpus Christi 1990, no writ).
\item 193. \textit{Id.} at 434. This appeal results from a divorce decree.
\item 194. \textit{Id.}
\item 195. \textit{Id.}
\item 196. 785 S.W.2d 915 (Tex. App.--San Antonio 1990, writ denied).
\item 197. \textit{Id.} at 918. The son bought the acreage in question in 1969 and began living on the property at that time. The plaintiff claimed that she bought the property with her son’s assistance and that she had no knowledge that he had taken title to the property in his name.
\item 198. \textit{Id.}
\end{footnotes}
statute of limitations\textsuperscript{199} and affirmed the trial court's directed verdict against
the plaintiff.\textsuperscript{200}

\textsuperscript{199} Id. at 919. The court examined the plaintiff's pleadings to determine whether she
alleged a fiduciary relationship sufficient to toll the statute of limitations. The court based its
analysis of the pleadings on the supreme court's description of the discovery rule in Woods v.
William M. Mercer, Inc., 769 S.W.2d 515, 517-18 (Tex. 1988). The court found that the
plaintiff's pleadings alleged only that she trusted and relied upon her son and stated that,
although the jury in the trial court found that a confidential relationship existed in 1973, no
evidence of the confidential relationship existed prior to 1969. 785 S.W.2d at 919. The court
also found that the plaintiff did not establish that her son concealed facts from her, which
would have triggered the tolling of the statute of limitations, nor did the plaintiff expend any
effort to determine facts concerning the title to the property while her son was alive. Id.

\textsuperscript{200} Id. at 920.