1986

Wills and Trusts

David D. Jackson
Hartnett Ford Hartnett

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

Recommended Citation
https://scholar.smu.edu/smulr/vol40/iss1/13

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
WILLS AND TRUSTS

by

David D. Jackson* and Will Ford Hartnett**

THIS Article surveys cases that offer varying degrees of enlightenment concerning wills, nontestamentary transfers, estates, heirship, trusts, and guardianships. The opinions discussed in this Article were published during the twelve month-period ending October 15, 1985. This article also comments on changes that the Sixty-Ninth Texas Legislature made to the Texas Probate and Trust Codes.

I. WILLS

Execution of a Will. The supreme court in Orrell v. Cochran¹ upheld the iron rule set forth in Boren v. Boren² that proponents of a will cannot use signatures contained in a self-proving affidavit to validate the will. The court in Boren had considered whether the proponent of a will could supply signatures of witnesses from an executed self-proving affidavit. Orrell dealt with the attempted similar use of a testator's signature. In both cases the court held that the will and the self-proving affidavit were completely separate instruments,³ and that the execution of a valid will is an absolute prerequisite to the usefulness of the self-proving affidavit.

Despite the general rules that favor testacy over intestacy⁴ and that allow a testator to sign the will on any page,⁵ the supreme court continues to interpret Probate Code section 59⁶ to separate the self-proving affidavit from the will.⁷ The supreme court indicated that the testamentary intent behind a self-proving affidavit is immaterial.⁸ Although the court in Orrell clearly

---

¹ 695 S.W.2d 552 (Tex. 1985).
² 402 S.W.2d 728 (Tex. 1966).
³ Orrell, 695 S.W.2d at 552; Boren, 402 S.W.2d at 729.
⁴ See Shriners Hosp. for Crippled Children v. Stahl, 610 S.W.2d 147, 151 (Tex. 1980); Haile v. Holtzelaw, 414 S.W.2d 147, 922 (Tex. 1967); Briggs v. Peebles, 144 Tex. 47, 52, 188 S.W.2d 147, 150 (1945).
⁶ TEX. PROB. CODE ANN. § 59 (Vernon 1980).
⁷ Section 59 allows the execution of a self-proving affidavit even years after the execution of the will. Id.
⁸ 695 S.W.2d at 552.
reaffirmed the Boren rule, the majority overruled the trial court, the appellate court, and three dissenting justices, who sought to avoid the technicality.9

In another case involving validity of execution under section 59, Muhlbauer v. Muhlbauer,10 the appellate court pondered the issue of a testator’s receiving physical assistance from another person when executing his will. In a lawyer’s office the wife of the blind and crippled testator guided his hand to sign a new will, in which the testator made his wife the sole beneficiary. The court affirmed the trial court’s summary judgment denying probate, on the grounds that the testator had not specifically requested his wife to guide his hand and that the wife therefore did not execute the will at the testator’s direction.11 The court apparently also considered significant the fact that the testator, although physically capable, had not attempted to make a mark prior to the physical assistance.12 Another person, however, may validly execute a will at the testator’s request and on the testator’s behalf without the testator’s making any mark.13

Revocation. Presumed revocation of a will missing by destruction was at issue in McNamara v. Hall.14 In that case a testator, who had poor eyesight, made two copies of his will, placed one copy in an envelope marked “Will,” mailed one copy to the proponent, and apparently mailed the original to the contestant, who did not testify. Because the will was not last seen in the possession of the testator, the testator having mailed the will to the contestant, the proponent’s failure to produce the original did not raise the presumption that the testator destroyed the will with the intent to revoke it.15 Although the contestant did not testify, the appellate court held that circumstantial evidence proved that the will was last in the possession of the contestant.16 Another appellate court reached a similar result in In re Estate of Caples.17 In that case the appellate court reversed the trial court’s instructed verdict denying probate of a copy of a lost will.18 The appellate court held that evidence that the contestant may have surreptitiously removed the will from the possession of the testator sufficiently rebutted the presumption of

9. Id. A lawyer did not prepare the will in question, which was a printed form. Various witnesses testified that the testator had intended to sign the will but, by mistake, signed the self-proving affidavit. The majority deemed these facts irrelevant. Id.
10. 686 S.W.2d 366 (Tex. App.—Fort Worth 1985, no writ).
11. Id. at 377. The relevant portion of § 59 is as follows: “Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence. . . .” TEX. PROB. CODE ANN. § 59 (Vernon 1980).
12. 686 S.W.2d at 377.
14. 678 S.W.2d 578 (Tex. App.—Houston [14th Dist.] 1984, no writ).
15. Id. at 580. For the presumption of revocation of missing wills, see Berry v. Griffin, 531 S.W.2d 394, 395 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref’d n.r.e.); Mingo v. Mingo, 507 S.W.2d 310, 311 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.).
16. 678 S.W.2d at 580.
17. 683 S.W.2d 741 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.).
18. Id. at 742.
revocation so as to require submission to the jury. 19

Contract to Make a Will. In Taylor v. Johnson 20 an appellate court clarified the rather brief provisions of Probate Code section 59A(a). 21 In that case a nephew sued his aunt for anticipatory breach of an oral contract to make a will. The court reiterated the requirement of section 59A(a) that the executed will must describe the contract to make a will. 22 The court held that evidence of an oral contract or of contractual wording in an unexecuted will was immaterial. 23 Moreover, the court stated that a court should not limit the scope of section 59A to probate proceedings. 24

The parties to the oral contract to make a will in Leigh v. Weiner 25 made the contract prior to the effective date of section 59A(a). 26 The court therefore imposed a constructive trust on certain assets the testatrix devised in violation of the contract with her deceased husband. 27 The husband, prior to his death in 1952, conveyed the assets to his wife based on her agreement to devise and bequeath the assets at her death to his children from a prior marriage. Although the widow executed a will in 1953 providing for the agreed disposition, she revoked that will in 1978 and signed a new will disinheriting the stepchildren. 28 The court held that the oral agreement establishing the constructive trust was not subject to the statute of wills, the statute of frauds, or the Texas Trust Act. 29 The court further held that limitations did not bar the suit since the contestant filed the suit within four years after the widow's death. 30

Jurisdiction. The supreme court in Hilburn v. Jennings 31 held that will contestants, by filing a contest to the will, waived any jurisdictional complaint regarding lack of notice of the proponent's application to probate a will. 32 The court reversed the appellate court and affirmed the trial court's probate

19. Id. at 743.
20. 677 S.W.2d 680 (Tex. App.—Eastland 1984, writ ref'd n.r.e.).
21. TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980) provides:
   A contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract.
22. 677 S.W.2d at 682.
23. Id.
24. Id. Note that § 59A(a) is in effect a supplement to the statute of frauds, TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1968).
25. 679 S.W.2d 46 (Tex. App.—Houston [14th Dist.] 1984, no writ).
27. 679 S.W.2d at 49.
28. The widow died five weeks later at the age of ninety-five. Id. at 47.
29. Id. at 48; see Pope v. Garrett, 147 Tex. 18, 21, 211 S.W.2d 559, 561 (1948); Ginther v. Taub, 570 S.W.2d 516, 525 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). Whether this general rule permits a court to impose a constructive trust despite § 59A, however, remains unclear.
30. 679 S.W.2d at 48-49.
31. 698 S.W.2d 99 (Tex. 1985).
32. Id. at 100.
of the will. The supreme court did not discuss the questionable additional holding of the appellate court that the four-year statute of limitations in Probate Code section 73(a) barred probate of the will as a result of the proponent’s failure to arrange timely posted notice of his application. Arguably, however, the filing of the will contest within four years after the testator’s death tolled the statute of limitations, and the posting of notice after the limitations period was immaterial.

Will Contests. Minutes before committing suicide, the testator in Bauer v. Estate of Bauer wrote a holographic will leaving his estate to his girlfriend and stating that his reason for committing suicide was a lack of family love. The testator’s mother contested, alleging lack of testamentary capacity by reason of an insane delusion concerning the family. Citing the Lindley v. Lindley definition of insane delusion as “the belief of a state of supposed facts that do not exist, and which no rational person would believe,” the appellate court held immaterial all evidence concerning the testator’s beliefs about family love, because the jury could not judge such beliefs by objective specific facts. The court reiterated the general rule that evidence of an insane delusion is relevant only if the evidence directly affects the terms of the will.

In Green v. Green the appellate court reversed the trial court’s judgment n.o.v. denying the jury’s finding of undue influence. Following Rothermel v. Duncan, the court distinguished the concepts of testamentary capacity and undue influence. Testamentary capacity tests the existence of intelligent mental power. Undue influence admits the existence of testamentary capacity, but tests another person’s control of such capacity. The court based the reversal upon circumstantial evidence that a person exerted influence to overpower the mind of the testator and obtain execution of the professed will.

A testatrix’s naming of her attorney as a beneficiary under her will does

33. Id. The reversal effectively overruled similar appellate holdings in Mitchell v. Rutter, 221 S.W.2d 979, 981 (Tex. Civ. App.—Austin 1949, no writ), and Green v. White, 32 S.W.2d 488, 490 (Tex. Civ. App.—Waco 1930, no writ).
34. TEX. PROB. CODE ANN. § 73(a) (Vernon 1980).
36. 687 S.W.2d 410 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).
37. 384 S.W.2d 676 (Tex. 1964).
38. Id. at 679.
39. 687 S.W.2d at 413. The court believed that the concept of family love was too subjective for legal proof. Id.
41. 679 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1984, no writ).
42. Id. at 644.
43. 369 S.W.2d 917 (Tex. 1963).
44. 679 S.W.2d at 643-44.
45. Id. at 644.
46. Id.
47. Id.
not, according to the court in *Dailey v. Wheat*, the court cited the general rule that a person may dispose of his estate to any person that he chooses, and refused to shift the burden of proof concerning undue influence from the contestant to the proponent-attorney. The fact that the proponent-attorney supervised the drafting and the execution of the will apparently was not significant. The court further denied the contestant's allegation that Probate Code section was unconstitutional because in a less populated county the jury would have consisted of twelve jurors instead of six. The court held that a rational basis for the geographical distinction existed.

In *Estate of Murphy* the executor named in a 1959 will contested a 1979 will on the grounds that the co-executors named in the latter will procured it through undue influence, and that the contractual nature of the 1959 will barred any later wills. After a discussion of the concept of undue influence, the factors a court should consider, and the use of circumstantial evidence, the court held that no evidence supported a finding of undue influence over the ninety-nine-year-old testatrix. The court apparently found significant the fact that the 1979 will was virtually identical to the 1959 will, except for the choice of executor. The court also overruled the contestant's claim that the 1979 will was contractually barred, citing the rule that a court must probate a valid subsequent will that revokes a joint will regardless of any contractual intent. The court remanded the case on two grounds. First, the court remanded to determine whether the 1959 will was in fact contractual. Second, the court remanded to determine whether an intervening 1974 will, which the testatrix executed prior to the death of the other contracting party, effectively revoked the 1959 contract. When neither an enforceable contract to the contrary nor fraud exist, either party to a

---

48. 681 S.W.2d 747 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

49. *Id.* at 755.


51. TEX. PROB. CODE ANN. § 5 (Vernon 1980).

52. 681 S.W.2d at 758.

53. *Id.* In a statutory probate court or county court, TEX. PROB. CODE ANN. § 5 (Vernon Supp. 1986) limits the contestant to six jurors; on the same matter in a district court the contestant would receive twelve jurors.

54. 694 S.W.2d 10 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

55. *Id.* at 15.

56. *Id.* A requisite element of undue influence is a disposition in the contested will that the testatrix would not have made but for the undue influence. See *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1983); *Boyer v. Pool*, 154 Tex. 586, 587, 280 S.W.2d 564, 565 (1955).


58. 694 S.W.2d at 16.

59. *Id.* at 15.
contractual will has a right to execute a new will without notice to the other party when both parties are still alive and the other party is sui juris.\textsuperscript{60}

As a possible sequel to Estate of Murphy, in Todd v. Cartwright\textsuperscript{61} the court similarly considered three wills of the testatrix: a contractual 1977 will made with her husband, and 1978 and 1982 wills made subsequent to her husband’s death. The proponent of the contractual 1977 will contested the 1982 will. After probating the 1982 will, the court proceeded to impose a constructive trust over the estate for the benefit of the beneficiaries under the contractual 1977 will.\textsuperscript{62} Although the 1977 will contained no terms specifically describing a contract, the court imputed a contract based on the facts that the husband and wife’s wills were virtually identical, the same witnesses signed them, the same lawyer drafted them, and the couple executed them within three months of each other.\textsuperscript{63} The court also found significant the fact that the wills made provision for the stepchildren of both spouses.\textsuperscript{64} The court apparently also considered oral testimony supporting contractual intent.

\textit{Family Settlement Agreement.} In Gregory v. Rice\textsuperscript{66} the court reversed and remanded due to an improper jury instruction.\textsuperscript{67} The court, however, commented favorably for appellee that circumstantial evidence supported the trial court’s finding of an oral settlement agreement, and that no specific consideration was necessary to make the family settlement agreement valid.\textsuperscript{68} The court overruled appellant’s statute of frauds challenge based on Texas Business and Commerce Code section 8.319,\textsuperscript{69} which deals with securities contracts. By failing to comment on any other requirement of writing, the court apparently held that an oral family settlement agreement may be valid. Arguably, however, a family settlement agreement must be in writing to comply with the statute of frauds, especially if the agreement disposes of real property.\textsuperscript{70}

\textsuperscript{60} Id.; see Magids v. American Title Ins. Co., 473 S.W.2d 460, 464 (Tex. 1971); Freeman v. Freeman, 569 S.W.2d 626, 629 (Tex. Civ. App.—Eastland 1978, no writ).
\textsuperscript{61} 684 S.W.2d 154 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e).
\textsuperscript{62} Id. at 155.
\textsuperscript{63} Id. at 157. A will is not necessarily contractual, however, merely because it is executed jointly and the terms are mutual and reciprocal. Bishop v. Scoggins, 589 S.W.2d 151, 155 (Tex. Civ. App.—Tyler 1979, writ ref’d n.r.e.); Crain v. Mitchell, 479 S.W.2d 956, 958 (Tex. Civ. App.—Fort Worth 1972, writ dism’d); Ellexson v. Ellexson, 467 S.W.2d 515, 520 (Tex. Civ. App.—Amarillo 1971, no writ); Curtis v. Aycock, 179 S.W.2d 843, 847 (Tex. Civ. App.—Waco 1944, writ ref’d w.o.m.).
\textsuperscript{64} 684 S.W.2d at 157. Courts have held mutual bequests to children of prior marriages to be evidence of a contractual will. Trlica v. Bunch, 642 S.W.2d 540, 543 (Tex. Civ. App.—Dallas 1982, no writ); Knolle v. Hunt, 551 S.W.2d 755, 760 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).
\textsuperscript{65} See 684 S.W.2d at 157-58.
\textsuperscript{66} 678 S.W.2d 603 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e).
\textsuperscript{67} Id. at 606.
\textsuperscript{68} Id. at 607; see Wedengartner v. Reichert, 218 S.W.2d 304, 310 (Tex. Civ. App.—Waco 1948, writ ref’d n.r.e.).
\textsuperscript{69} TEX. BUS. & COM. CODE ANN. § 8.319 (Vernon 1968).
Will Construction. The testatrix's statement that a beneficiary "shall have complete charge of my home" and "all contents" created a life estate according to the court in *Taliaferro v. Mayer*. The court reasoned that the right to absolute custody, without the power to dispose of the property, indicated a limited devise. Relying on the strong presumption in Texas against intestacy, the court in *Wilkins v. Garza* held that a lapsed legacy passed through the will's residuary clause and not by intestacy. The court effectively held that a court presumes a lapsed legacy to pass to the beneficiary of the residuary clause unless the testator expresses a contrary intention in the will. Although the residuary clause purported to dispose of those assets not specifically mentioned, the court determined that the testatrix intended to include the lapsed legacy in the residuary clause and to avoid intestacy completely.

In a significant decision the supreme court ruled that the designation of an agent in a will to broker real estate was merely precatory language, and not binding on the estate. In *Kelly v. Marlin* the will provided that Marlin should receive a six percent commission upon the testator's widow's sale of any land devised to her under the will. The executor, with the widow's participation, sold certain land of the estate for ten million dollars. The executor, however, paid a commission to the widow's son from a previous marriage and refused to pay Marlin any commission. The trial court denied Marlin's claim for commission, but the court of appeals reversed and rendered for Marlin on the basis that he was a conditional beneficiary. The supreme court reversed the appellate court and denied the commission.

The supreme court reasoned that the testamentary provision did not contain the traditional words of limitation on a fee simple estate, and that the provision would force the widow to perform a nondelegable duty. After the
court determined that the commission was not a devise, the court characterized the provision as an attempt to force the widow into a fiduciary relationship with Marlin through acceptance of her devise.82 The court held that contract law protects parties from being forced into personal service contracts and fiduciary relationships without the parties' mutual consent.83 The court noted that a testamentary designation of an attorney to represent an estate is also precatory language.84

Despite the Texas presumption against intestacy,85 the court in Kaufhold v. McIver86 construed an unambiguous will as making no provision for the disposition of real property of the testatrix.87 Apparently the testatrix mistakenly left out the residuary clause in her will and provided only for specific bequests of personal effects and devise of her homestead. Given evidence that the testatrix was well-aware that real property was distinct from personal property, the court held that her bequest of personal effects only disposed of her personal property.88 The unmentioned real property therefore passed by intestacy.89 When construing the will the court held that the testatrix's mistake of failing to include a residuary clause was immaterial.90

The presence of ambiguity in a will, however, as demonstrated in Howard v. McCulley,91 allows the examining court to construe the will so as to avoid intestacy. Although the trial court rendered a summary judgment denying probate because of unfulfilled contingencies in the will, the Dallas appellate court seized on a relatively weak ambiguity and allowed probate.92 The appellate court cited the general rule that if the will is open to two constructions the court should interpret the will in such a way as to prevent intestacy.93 The court held that certain ambiguous contingencies were met so as to activate the testate disposition.94

The Dallas appellate court faced a strikingly similar situation in Nash v. Corpus Christi National Bank.95 In that case the appellant challenged a summary judgment of intestacy under a contingent will. The Nash will, however, did not contain any of the ambiguity present in the Howard will,

82. Id.
83. Id. at 412; see Allen v. Camp, 101 Tex. 260, 260, 106 S.W. 315, 315 (1908); Moran v. Wotola Royalty Corp., 123 S.W.2d 692, 694 (Tex. Civ. App.—Fort Worth 1938, writ ref'd).
84. 28 Tex. Sup. Ct. J. at 411.
85. See Shriners Hosp. for Crippled Children v. Stahl, 610 S.W.2d 147, 151 (Tex. 1980); Haile v. Holtzclaw, 414 S.W.2d 916, 922 (Tex. 1967); Briggs v. Peebles, 144 Tex. 47, 52, 188 S.W.2d 147, 150 (1945).
86. 682 S.W.2d 660 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)
87. Id. at 666.
88. Id. at 665.
89. Id. at 666.
90. Id. at 667; see Haile v. Holtzclaw, 414 S.W.2d 916, 922 (Tex. 1967); Carr v. Rogers, 383 S.W.2d 383, 385 (Tex. 1964); Selder v. Stewart, 461 S.W.2d 239, 244 (Tex. Civ. App.—Dallas 1970), aff'd, 473 S.W.2d 3 (Tex. 1971).
91. 686 S.W.2d 650 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
92. Id. at 652.
93. Id.; see Ferguson v. Ferguson, 121 Tex. 119, 122, 45 S.W.2d 1096, 1097 (1931).
94. 686 S.W.2d at 652; for a good discussion of contingent wills, see Bagnall v. Bagnall, 148 Tex. 423, 424-33, 225 S.W.2d 401, 401-07 (1949).
95. 692 S.W.2d 117 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
and the court therefore affirmed the trial court's ruling of intestacy. The testator in Nash provided a disposition only in the event of the simultaneous death of his wife. The appellate court rejected the appellant's allegation that simultaneous death had occurred due to the fact that the wife was dead at the time of the testator's death. The court held that the contingency necessary to validate the will had not occurred.

An appellate court also construed a simultaneous death contingency in Formby v. Bradley. In that case the appellant unsuccessfully, albeit creatively, alleged that simultaneous death had occurred due to the divorced status of the testator and his former wife at the time of the testator's death. Although Probate Code section 69(b) provides that a court should not consider a person who is divorced from the decedent to be a surviving spouse, the court reasoned that a divorce that occurred five years before the testator's death was not simultaneous with his death. Since simultaneous death of the testator and his former wife had not occurred, the contingent alternate provisions in the will were inapplicable, rendering the designation of executor useless. The surviving wife of the testator accordingly sought to exercise her preferential right to have the court appoint her administratrix under Probate Code section 77. Both the trial court and the appellate court disqualified the surviving wife, however, due to conflicts of interest between herself and the heirs, conflicts that arose largely from her effort to characterize certain assets as community property over the heirs' objections.

In two very similar cases, the supreme court reversed the Fort Worth and San Antonio appellate courts and held that certain joint wills were contractual. In Odeneal v. Van Horn and Wiemers v. Wiemers the surviving spouses had probated the joint wills in question upon the death of the first spouse. Subsequently, the surviving spouse or the surviving spouse's beneficiaries filed declaratory judgment actions to free them from any binding effect of the probated wills. The supreme court held that the joint wills were contractual on their faces because both spouses executed the wills and the wills set forth a reciprocal, mirror-image plan to dispose of all of their combined estate. Since both couples executed their wills before September 1, 1986.

96. Id. at 119.
97. Id.
98. Id. For a similar ruling, see Smith v. Williams, 449 S.W.2d 359, 361 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).
99. 695 S.W.2d 782 (Tex. App.—Tyler 1985, writ requested).
100. TEX. PROB. CODE ANN. § 69(b) (Vernon 1980) provides: "A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death."
101. 695 S.W.2d at 784. The court indicated, however, that the court would equate divorce with prior death of the testator's wife if prior death had been a contingency in the will. Id.
102. Id.
103. TEX. PROB. CODE ANN. § 77 (Vernon 1980).
104. 695 S.W.2d at 785.
105. 678 S.W.2d 941 (Tex. 1984).
106. 683 S.W.2d 355 (Tex. 1984).
107. Odeneal, 678 S.W.2d at 942; Wiemers, 683 S.W.2d at 356-57.
1979, the requirement of Probate Code section 59A\(^{108}\) that the wills specifically state the existence of a contract did not apply.\(^{109}\)

Although the parties apparently did not raise the issue, the Odeneal will disposed of all property that the survivor owned upon his or her death.\(^{110}\) The full legal and practical impact of such an attempt to dispose of property acquired by one spouse after the other spouse's death is unclear. Probate of a joint and contractual will, however, effectively renders the surviving spouse incapable of writing a new will.\(^{111}\) Furthermore, a new spouse apparently would have no interest whatsoever in either the community or the separate property of the surviving spouse,\(^{112}\) other than a homestead interest.\(^{113}\)

In Traylor v. Unitedbank Orange\(^{114}\) a statute of limitations and principles of estoppel barred trust beneficiaries from invalidating a testamentary trust for any violation of the rule against perpetuities.\(^{115}\) The court held that the beneficiaries' attempt to invalidate the trust was in effect a will contest, and that the statute of limitations governing will contests barred the suit.\(^{116}\) In addition, the court held that acceptance of trust benefits estopped the beneficiaries from challenging the trust.\(^{117}\)

II. NonTestamentary Transfers

Despite the permissive provisions of Probate Code section 46(b),\(^{118}\) the court in Jameson v. Bain\(^{119}\) reaffirmed the pre-section 46(b) rule of Maples v. Nimitz\(^{120}\) that a partition of community funds, in order to be valid, must occur separately and prior to the creation of a joint tenancy with right of


\(^{109}\) One should keep in mind that, although the supreme court concluded that disposition and mutuality of the wills demonstrated sufficient evidence of contractual intent, § 59A(b) specifies that the mere execution of a joint will containing contractual wording is no longer sufficient to prove a contract. Tex. Prob. Code Ann. § 59A(b) (Vernon 1980) provides: "The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract."

\(^{110}\) 678 S.W.2d at 942.


\(^{112}\) See Perl v. Howell, 650 S.W.2d 523, 525 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); Wallace v. Turriff, 531 S.W.2d 692, 695 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

\(^{113}\) See Vermillion v. Haynes, 147 Tex. 359, 363, 215 S.W.2d 605, 608 (1949); Greene v. White, 137 Tex. 361, 385, 153 S.W.2d 575, 588 (1941).

\(^{114}\) 675 S.W.2d 802 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.).

\(^{115}\) Id. at 805.


\(^{117}\) 675 S.W.2d at 805; see Trevino v. Turcotte, 564 S.W.2d 682, 685-86 (Tex. 1978).

\(^{118}\) Tex. Prob. Code Ann. § 46(b) (Vernon Supp. 1986) provides:

A written agreement between spouses and a bank, savings and loan, credit union, or other financial institution may provide that existing funds or securities on deposit and funds and securities to be deposited in the future and interest and income thereon shall by that agreement be partitioned into separate property and may further provide that the property partitioned by that agreement be held in joint tenancies and pass by right of survivorship.

\(^{119}\) 693 S.W.2d 676 (Tex. App.—San Antonio 1985, no writ).

\(^{120}\) 615 S.W.2d 690, 695 (Tex. 1981).
survivorship.\textsuperscript{121} Although section 46(b) arguably permits a one-step partition whereby a signature card or other account agreement may simultaneously create a partition and a joint tenancy with right of survivorship,\textsuperscript{122} the court in Jameson insisted that the partition must come first.\textsuperscript{123} For the simple reason that the parties signed the partition agreement on one side of the signature card after they had signed the side that established the survivorship account, the court held the partition invalid and therefore ineffective to activate the survivorship provision.\textsuperscript{124}

In sharp contrast, however, the court also held that partition was unnecessary to pass community funds to a surviving spouse if the spouses placed the funds in a revocable trust account with a spouse as trustee and the surviving spouse as beneficiary.\textsuperscript{125} Strangely, the court relied on section 439(c)\textsuperscript{126} to distinguish survivorship rights in joint accounts from trust accounts.\textsuperscript{127} Section 439(c), however, imposes no significantly greater burden for establishing survivorship rights in a joint account than in a trust account.\textsuperscript{128} Any requirements for valid partition should arguably apply equally to a joint account and a trust account. As the parties did not carry the case to the supreme court, however, this curious dichotomy remains unchallenged.

The lack of an executed signature card in Magee v. Westmoreland\textsuperscript{129} prevented the establishment of a right of survivorship to a certificate of deposit payable jointly to the decedent and the claimant, even though the funds used to acquire the certificate of deposit indirectly came from a checking account that did provide for survivorship rights.\textsuperscript{130} The court emphasized the absolute requirements of Probate Code sections 46(a)\textsuperscript{131} and 439(a)\textsuperscript{132} of a signed written agreement for creation of survivorship rights.\textsuperscript{133}

According to the court in Chopin v. InterFirst Bank Dallas\textsuperscript{134}, however, not even an executed signature card providing for payment at the depositor's death to a survivor can establish survivorship rights if the card fails to specify ownership in the survivor.\textsuperscript{135} The court held that instructions on the signature card to pay the funds to the survivor did not vest ownership in the survivor.\textsuperscript{136} The key factor to the court was the absence of words describing

\textsuperscript{121} 693 S.W.2d at 678-79.
\textsuperscript{122} McKnight, Family Law: Husband and Wife, Annual Survey of Texas Law, 36 Sw. L.J. 97, 105 (1982).
\textsuperscript{123} 693 S.W.2d at 678-79.
\textsuperscript{124} \textit{Id.} at 679.
\textsuperscript{125} \textit{Id.} at 680.
\textsuperscript{126} TEX. PROB. CODE ANN. § 439(c) (Vernon 1980).
\textsuperscript{127} 693 S.W.2d at 680-81.
\textsuperscript{128} TEX. PROB. CODE ANN. § 439(c) (Vernon 1980).
\textsuperscript{129} 693 S.W.2d 612 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).
\textsuperscript{130} \textit{Id.} at 616.
\textsuperscript{131} TEX. PROB. CODE ANN. § 46(a) (Vernon Supp. 1986).
\textsuperscript{132} \textit{Id.} § 439(a) (Vernon 1980).
\textsuperscript{133} 693 S.W.2d at 615-16.
\textsuperscript{134} 694 S.W.2d 79 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).
\textsuperscript{135} \textit{Id.} at 84.
\textsuperscript{136} \textit{Id.} The signature card signed by both depositors read as follows: "If there be more than one depositor upon the endorsement of any depositor the bank is hereby authorized to
a joint tenancy or a right of survivorship. The court further held that the mere creation of a joint account was not evidence of a depositor's inter vivos gift to the survivor.

III. ESTATE ADMINISTRATION

*Jurisdiction.* A definitive delineation of probate court jurisdiction continues to elude Texas courts. In a fascinating about-face in Texas jurisprudence, the Texas legislature's one-sentence addition to Probate Code section 5A(b) partially overruled the Texas Supreme Court's resounding, unanimous opinion in *Seay v. Hall.* Justice Kilgarlin, in his thorough opinion in *Seay v. Hall,* analyzed the legislative history of the sixty-third through the sixty-sixth legislative sessions and pertinent legal commentaries to reach a conclusion that Probate Code section 5A confined probate court jurisdiction to matters in which the controlling issue was the settlement, partition, or distribution of an estate. Since survival and wrongful death actions do not directly relate to the traditional settlement, partition, or distribution of an estate, Justice Kilgarlin reasoned that the legislature did not intend statutory probate courts to have any jurisdiction over survival and wrongful death actions. Justice Kilgarlin concluded that the proper forum for survival and wrongful death actions, "[a]bsent the legislature's express mandate," was in state district courts.

Responding promptly to this cue, the sixty-ninth legislature tacked onto section 5A(b) a single, innocuous-sounding sentence: "In actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district courts." The legislature apparently intended to rectify a part of the law set forth in *Seay.* The addition, however, only increases the jurisdictional confusion.

The focus of the supreme court in *Seay* was whether survival and wrong-

---

138. 694 S.W.2d at 84; *see* Kennedy v. Beasley, 606 S.W.2d 1, 3 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
140. 677 S.W.2d 19 (Tex. 1984).
141. TEX. PROB. CODE ANN. § 5A (Vernon 1980).
143. 677 S.W.2d at 25. *Piper Aircraft Corp. v. Yowell, 674 S.W.2d 447* (Tex. App.—Fort Worth 1984, writ granted), contrasts an action for wrongful death and a survival action as follows: TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon 1940) confers a wrongful death action upon the surviving husband, wife, child, and parents of a decedent; a survival action, however, is a common law action for damages that the decedent and his estate sustain as a result of the defendant's actions. 674 S.W.2d at 454.
144. 677 S.W.2d at 25.
ful death actions were incident to an estate, because a statutory probate court has jurisdiction only of matters incident to an estate.  In light of Seay courts can use two approaches to analyze the addition to section 5A(b). The simplest and clearest approach is to view the addition only as an alteration of the result in Seay without changing the normal incident to an estate analysis. Under this approach the legislature merely wished to allow parties to bring certain suits not traditionally incident to an estate, such as survival actions, in statutory probate court. Although wrongful death actions are not intrinsically actions by or against personal representatives, the death of a plaintiff or a defendant prior to the filing of the wrongful death action would automatically make the suit by or against a personal representative. Courts could determine statutory probate court jurisdiction based either on the "incident to an estate" test or on a new "action by or against a personal representative" test. The addition was thus a simple and direct response to Justice Kilgarlin's cue, because the addition's only effect was to allow statutory probate courts the possibility of hearing actions by or against personal representatives. The problem with this approach, however, is the blunt fact that the legislature placed the addition in section 5A, which deals with the definition of matters incident to an estate, instead of in section 5, which deals with the basic jurisdiction of the various courts. Logically, the reason that the legislature placed the addition in section 5A was to avoid the creation of a new jurisdictional test as suggested in this first approach.

The broad second approach is to view the addition, not just as an alteration of the result in Seay, but as an alteration of the definition of matters incident to an estate. This approach expands the Seay jurisdictional analysis, but does not create another one. The problem with this approach is that not only would the legislature have opened the statutory probate court doors to all actions by or against personal representatives, but the legislature would also have taken the radical step of potentially placing such actions within the exclusive jurisdiction of statutory probate courts. Taken in conjunction with the preceding sentence in section 5A(b), which provides that "[i]n situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in a district court," the addition may conceivably mean that, in counties with statutory probate courts, parties must bring any action whatsoever, by or against a personal representative, exclusively in a statutory court rather than in a district court. Thus, although the literal intent of the addition was simply to overrule Seay and allow permissive filing of actions by or against personal representatives in statutory probate court, construction of the addition in light of the total context of section 5A may transform what was nonjurisdiction in Seay into exclusive jurisdiction. Such a broad

146. 677 S.W.2d at 23.
147. Id. at 24.
148. Obviously the two tests would overlap.
149. TEX. PROB. CODE ANN. § 5A(b) (Vernon Supp. 1986).
construction would cause great confusion among Texas lawyers in a myriad of areas, including forcible entry and detainer, eminent domain, personal injury, and other matters ordinarily heard outside of probate court. The authors prefer the first approach because that approach narrowly construes the intent and effect of the addition and avoids the potential uproar of the second approach.\textsuperscript{150}

The addition to section 5A(b) increases the confusion already surrounding construction of the sentence immediately preceding the addition. Numerous courts have held that this sentence bestows exclusive jurisdiction in the statutory probate court to hear matters incident to an estate, and that a district court may not hear such matters.\textsuperscript{151} The court in \textit{First State Bank v. Bishop},\textsuperscript{152} however, construed this sentence to allow concurrent jurisdiction in the statutory probate court and the district court to hear matters incident to an estate.\textsuperscript{153} The statutory probate court therefore did not have exclusive jurisdiction of matters incident to an estate, but only dominant jurisdiction.\textsuperscript{154} One could bring suit on rejected claims against an administrator in either district court or the statutory probate court, because sections 313\textsuperscript{155} and 5A(b), construed together, clearly established concurrent jurisdiction in those two courts.\textsuperscript{156} The court emphasized, however, that by a plea in abatement any party could have a suit dealing with matters incident to an estate transferred from district court to the statutory probate court.\textsuperscript{157} The court thus held that jurisdiction remained with the district court unless and until a party's plea in abatement challenged jurisdiction.\textsuperscript{158} Although the case turned upon waiver of procedural defects, the impact of the case lies in the court's finding of concurrent jurisdiction.

Clearly, the sentence could not logically refer to situations involving con-

\textsuperscript{150} Subsequent to the Survey period, through dictum in the footnote of a withdrawn opinion, Yowell \textit{v.} Piper Aircraft Corp., 29 Tex. Sup. Ct. J. 164, 166 (Jan. 22, 1986), withdrawn, 29 Tex. Sup. Ct. J. 188 (Feb. 5, 1986), the supreme court indicated that the addition did not vest the statutory probate court with exclusive jurisdiction of all actions by or against a personal representative, but only established concurrent jurisdiction with the district court. The court withdrew the opinion upon motion of all parties.

\textsuperscript{151} Piper Aircraft Corp. \textit{v.} Yowell, 674 S.W.2d 447, 456 (Tex. App.—Fort Worth 1984, writ granted); Seay \textit{v.} Hall, 663 S.W. 2d 468, 472 (Tex. App.—Dallas 1983), \textit{aff'd in part and rev'd in part on other grounds,} 677 S.W.2d 19 (Tex. 1984); Adams \textit{v.} Calloway, 662 S.W.2d 423, 426 (Tex. App.—Corpus Christi 1983, no writ); Boman \textit{v.} Howell, 618 S.W.2d 913, 916 (Tex. Civ. App.—Fort Worth 1981, no writ); Thomas \textit{v.} Tollon, 609 S.W.2d 859, 861 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

\textsuperscript{152} 685 S.W.2d 732 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

\textsuperscript{153} Id. at 736.

\textsuperscript{154} Id.

\textsuperscript{155} TEX. PROB. CODE ANN. § 313 (Vernon 1980).

\textsuperscript{156} 685 S.W.2d at 736.

\textsuperscript{157} Id. For a discussion of dominant/concurrent jurisdiction, see Curtis \textit{v.} Gibbs, 511 S.W.2d 263, 267 (Tex. 1974).

\textsuperscript{158} 685 S.W.2d at 736; \textit{see also} Pullen \textit{v.} Swanson, 667 S.W.2d 359, 364 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (§ 5A(b) did not divest district court of jurisdiction to hear matters incident to estate even though an estate hearing was pending in statutory probate court); 17 M. \textsc{Woodward} & \textsc{E. Smith}, \textsc{Probate and Decedents' Estates} § 10, at 17-18 (Texas Practice Supp. 1985) (§ 5A(b) directs parties to bring certain actions in statutory probate court rather than district court, although this direction does not expressly deprive district courts of jurisdiction).
current jurisdiction if the statutory probate court in reality had exclusive jurisdiction and the district court had no jurisdiction. Although numerous cases\(^\text{159}\) contradict *First State Bank*, the supreme court's refusal of a writ for this case is some indication of approval. Furthermore, the supreme court's reference in *Seay* to dominant jurisdiction\(^\text{160}\) implies a determination against exclusive jurisdiction of statutory probate courts.

Similarly, the court in *Smith v. Smith*\(^\text{161}\) held that contestants can originally file contested probate matters in district court even though the estate is pending in a constitutional county court.\(^\text{162}\) The court noted that Texas Probate Code section 5(b)\(^\text{163}\) controlled the district court's jurisdiction.\(^\text{164}\) Although section 5(b) provides for transfer to district court, the section does not mention original filing in district court. Nevertheless, the court in *Smith* effectively held that transfer from a county court was not a prerequisite to jurisdiction in the district court.\(^\text{165}\) Apparently, the court felt that, if a contested probate matter can be transferred to district court, it can be filed there in the first place.

Once a constitutional county court has transferred administration to a district court under section 5(b), according to the court in *Weldon v. Hill*\(^\text{166}\) the district court has full jurisdiction to hear all matters incident to the estate, including those matters not within the jurisdiction of the county court.\(^\text{167}\) Although section 145(h)\(^\text{168}\) prohibits any further proceedings in the county court after the probate and filing of an inventory, the court construed section 5(b) to provide that the district court upon transfer could hear the proceeding as if the beneficiary had originally filed the contest in the district court.\(^\text{169}\) The court also held that section 145(h) does not apply to district courts.\(^\text{170}\) Moreover, as in *First State Bank*, the court affirmed that the dis-


\(^{160}\) 677 S.W.2d at 21, 24.

\(^{161}\) 694 S.W.2d 426 (Tex. App.—Tyler 1985, writ ref'd n.r.e.).

\(^{162}\) *Id.* at 430.

\(^{163}\) TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1986).

\(^{164}\) 694 S.W.2d at 430.

\(^{165}\) *See id.* Illustrating the continual confusion over concurrent jurisdiction, the court expressly overruled its contrary holding in Nichols v. Prejean, 673 S.W.2d 394, 396 (Tex. Civ. App.—Tyler 1984, no writ). 694 S.W.2d at 430.

\(^{166}\) 678 S.W.2d 268 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

\(^{167}\) *Id.* at 275.

\(^{168}\) TEX. PROB. CODE ANN. § 145(h) (Vernon 1980) provides:

> When an independent administration has been created, and the order appointing an independent executor has been entered by the county court, and the inventory, appraisement, and list aforesaid has been filed by the executor and approved by the county court, as long as the estate is represented by an independent executor, further action of any nature shall not be had in the county court except where this Code specifically and explicitly provides for some action in the county court.

\(^{169}\) 678 S.W.2d at 275.

\(^{170}\) *Id.* at 274.
strict court had concurrent jurisdiction with the district court sitting in probate and that the failure of the appellant to file an effective plea in abatement waived any challenge to jurisdiction.\textsuperscript{171} Contrary to First State Bank, however, the court in Weldon declared that the transfer upon a plea in abatement was not automatic; the court first had to determine that the proceedings involved the same parties and the same controversy.\textsuperscript{172} Since the declaratory judgment sought in Weldon was completely different from any relief sought in the pending probate proceeding, transfer upon plea in abatement was improper.\textsuperscript{173} The court cited Curtis v. Gibbs\textsuperscript{174} for support, as did the court in First State Bank, although that court held that transfer, upon objection, was automatic.\textsuperscript{175} The contradictory holdings are distinguishable, however, in that First State Bank involved a statutory probate court and the effect of section 5A(b), while Weldon involved a district court sitting in probate, where section 5A(b) was inapplicable.

Disqualification of Executor. In a case of first impression, the court in Smith v. Christley\textsuperscript{176} construed Probate Code section 78(c)\textsuperscript{177} to disqualify a convicted felon from serving as executor, even though he was in the process of appealing the conviction.\textsuperscript{178} The court reasoned that the position of independent executor was not subject to extensive court administration, and that allowing a person convicted of a felony to serve as executor could adversely affect third parties.\textsuperscript{179} The court also relied on section 149C(a)(5),\textsuperscript{180} which allows removal of an independent executor if a court sentences him to prison.

Claims. Although the Probate Code imposes no formal requirements for presentation of claims to independent executors,\textsuperscript{181} and requires no particular form of presentation prior to suit on a claim,\textsuperscript{182} all claims against an independent administration ultimately will be subject to classification under

\textsuperscript{171} Id. at 278.
\textsuperscript{172} Id. at 277.
\textsuperscript{173} Id. at 278.
\textsuperscript{174} 511 S.W.2d 263, 267 (Tex. 1974).
\textsuperscript{175} 685 S.W.2d at 736.
\textsuperscript{176} 684 S.W.2d 158 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).
\textsuperscript{177} TEX. PROB. CODE ANN. § 78 (Vernon 1980) provides:

\begin{quote}
No person is qualified to serve as an executor or administrator who is: . . . (c) a convicted felon, under the laws either of the United States or of any state of territory of the United States, or of the District of Columbia, unless such person has been duly pardoned, or his civil rights restored, in accordance with law
\end{quote}

\textsuperscript{178} 684 S.W.2d at 160.
\textsuperscript{179} Id.
\textsuperscript{180} TEX. PROB. CODE ANN. § 149C(a)(5) (Vernon 1980) allows the probate court to remove an independent executor when “he becomes incompetent, or is sentenced to the penitentiary, or from any other cause becomes legally incapacitated from properly performing his fiduciary duties.”

\textsuperscript{181} See Bunting v. Pearson, 430 S.W.2d 470, 472 (Tex. 1968); State v. Traylor, 374 S.W.2d 203, 204-05 (Tex. 1963); 17 M. WOODWARD & E. SMITH, supra note 158, § 501, at 412-13 (Texas Practice 1971).
\textsuperscript{182} El Paso Nat'l Bank v. Leeper, 538 S.W.2d 803, 806 (Tex. Civ. App.—El Paso 1976, writ ref’d n.r.e.).
A criterion for designation of a class 4 claim under section 322 is presentation to the representative within six months after his appointment. In *Alterman v. Frost National Bank* a claimant sent a letter within six months after the decedent's death to the independent executor indicating the amounts claimed on notes signed by the decedent. Both parties agreed that the letter, if a claim, was legally exhibited so as to fall within class 4. The court resolved the key issue, whether the letter to the independent executor constituted a claim, in favor of the claimant. The court held that the Probate Code required no particular form of claim against an independent executor, and that a simple itemization of debts sufficed as a claim under section 322.

In a split decision the supreme court in *Hofer v. Lavender* construed the Texas survival statute and the Wrongful Death Act to allow the estate of a decedent to obtain an award of exemplary damages against the estate of a deceased tortfeasor. The supreme court construed the Texas survival statute broadly to allow the estate of the wronged decedent to recover exemplary damages for virtually any malicious injury from the wrongdoer's estate. Thus, under the Texas survival statute, the death of either plaintiff or defendant apparently will not affect claims for exemplary damages.

**Jury.** The court in *Maddox v. Surber* held that the Probate Code provides no right to jury trial to determine probate venue. The general venue statute applies to all civil proceedings, including probate proceedings, in the absence of a conflict with a specific statutory provision. The court determined that Probate Code section 21 did not add to or conflict with the
Appealability. In Lurie v. Atkins\(^{201}\) the court held that an order allowing interim fees to a temporary administrator was interlocutory and not appealable.\(^{202}\) The court concluded that the fee was an advance.\(^{203}\) Allowance of the fee did not become a final, appealable judgment until approval of the final account.\(^{204}\)

Surviving Spouse Versus Estate. With a succinct opinion in Anderson v. Gilliland\(^{205}\) the supreme court has neatly dispatched the irksome issue of a surviving spouse's reimbursement to her deceased spouse's estate for improvements to her separate land. The supreme court ruled once and for all that the proper measure for a claim for reimbursement for money spent by one estate for improvements to another estate is the enhanced value of the benefited estate.\(^{206}\) With this conclusion the supreme court overruled both the position taken in several courts that the proper measure of reimbursement was enhancement or cost, whichever was less,\(^{207}\) and the position that the proper measure of reimbursement was cost, regardless of enhancement.\(^{208}\) This opinion will apply to divorce as well as probate cases.

In Smith v. Smith\(^{209}\) an appellate court reaffirmed the presumption installed in Family Code section 5.02\(^{210}\) that the assets of a decedent's estate are community property.\(^{211}\)

In Hunter v. Clark\(^{212}\) another appellate court provided an excellent discussion of homestead rights and waiver of homestead. The court inquired whether a premarital agreement waived homestead rights pursuant to Family Code section 5.45,\(^{213}\) and ruled against waiver because the wording of the premarital agreement did not provide the clear and convincing evidence that section 5.45 requires to prove waiver.\(^{214}\) The agreement included no express

\(^{200}\) 677 S.W.2d at 228.
\(^{201}\) 678 S.W.2d 510 (Tex. App.—Houston [14th Dist.] 1984, no writ).
\(^{202}\) Id. at 511.
\(^{203}\) Id.
\(^{204}\) Id. Annual accounts are subject to correction until approval of the final account. See In re Higginbotham's Estate, 192 S.W.2d 285, 289 (Tex. Civ. App.—Tyler 1946, no writ); Cartledge v. Billalba, 154 S.W.2d 219, 226 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.).
\(^{205}\) 684 S.W.2d 673 (Tex. 1985).
\(^{206}\) Id. at 675.
\(^{209}\) 684 S.W.2d 426 (Tex. App.—Tyler 1985, writ ref'd n.r.e.).
\(^{210}\) TEX. FAM. CODE ANN. § 5.02 (Vernon 1975) provides: "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."
\(^{211}\) 694 S.W.2d at 433; accord Maples v. Nimitz, 615 S.W.2d 690, 691 (Tex. 1981); Latham v. Allison, 560 S.W.2d 481, 484 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).
\(^{212}\) 687 S.W.2d 811 (Tex. App.—San Antonio 1985, no writ).
\(^{214}\) 687 S.W.2d at 817. The Texas Supreme Court has defined clear and convincing evidence as "that measure or degree of proof which will produce in the mind of the trier of fact a
reference to homestead or more general language that could include homestead. The court further held that, even if the terms did support waiver, the lack of legal representation of the surviving spouse prevented such waiver from being informed consent as required under section 5.45.215.

IV. Heirship

Appealability. A summary judgment determining all heirs is a final judgment subject to appeal, according to the court in Estate of Wright. A trial court’s subsequent determination that the summary judgment was not final cannot reopen the heirship determination if the summary judgment did, in fact, completely adjudicate heirship. Also, the fact that the heirship proceeding was part of general estate proceedings did not necessitate a severance for appeal or in any way affect the right of appeal under Probate Code section 55(a). Conversely, in Haynes v. Edwards a partial determination of heirship for purposes of establishing standing in a will contest was not a final judgment. Proving his status as an heir through adoption by estoppel, the contestant established his standing in a preliminary hearing. Upon appeal of the preliminary heirship determination the supreme court reversed the holding of the court of appeals that the preliminary heirship determination was a final judgment. The court reasoned that the heirship determination was, in effect, a judgment overruling the proponent’s motion to dismiss the contest for lack of interest in the estate. As a mere preliminary to the contest of the will the heirship determination was therefore interlocutory.

Inheritance by Illegitimates. The temporarily slumbering clash between Probate Code section 42(b) and the equal protection clause of the fourteenth amendment to the United States Constitution has once again erupted, but the United States Supreme Court may resolve the conflict this year. In Reed v. Campbell an illegitimate daughter sought to inherit a portion of her intestate father’s estate. The daughter claimed a right to inherit on the basis of her father’s recognition of her as his child. Following a line of recent

firm belief or conviction as to the truth of the allegations sought to be established.” State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).

215. 687 S.W.2d at 813.

216. 676 S.W.2d 161 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.).

217. Id. at 163.

218. TEX. PROB. CODE ANN. § 55(a) (Vernon 1980).

219. 698 S.W.2d 97 (Tex. 1985).

220. Id. at 98.

221. Id.

222. Id.; cf. Fischer v. Williams, 160 Tex. 342, 347, 331 S.W.2d 210, 213 (1960) (holding that overruling motion to dismiss for failure to state an interest was interlocutory).

223. TEX. PROB. CODE ANN. § 42(b) (Vernon 1980) (paternal inheritance).


225. 682 S.W.2d 697 (Tex. App.—El Paso 1984, writ ref’d n.r.e.), cert. granted, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985) (No. 85-755); see also In re Estate of Castaneda, 687 S.W.2d 465, 466 (Tex. App.—San Antonio 1985, no writ) (holding that neither § 42(b) nor § 3(b) allow inheritance by a recognized illegitimate child).
Texas cases, the court held that recognition was not a method of legitimation allowed by section 42(b) and that the court would only recognize the three methods stated in section 42(b). The Texas Supreme Court refused to grant a writ, but the United States Supreme Court has agreed to hear the case.

A likely concern of the United States Supreme Court is whether the denial of inheritance by recognition is a violation of equal protection. In Johnson v. Mariscal the court of appeals decided that section 42(b) did not provide for inheritance by recognition, but held that section 3(b) did allow such inheritance. The Texas Supreme Court refused to grant writ on the basis that the appellant did not properly present the question of whether a father may recognize an illegitimate child in any manner other than that provided in section 42 of the Texas Probate Code. The United States Supreme Court refused to grant certiorari.

Since the United States Supreme Court did not consider any of the cases holding against recognition, and in light of the writ history of Johnson, the Court may reverse Reed and allow inheritance by recognition based on an equal protection rationale. The Court may decide that denial of inheritance to an illegitimate child that the father had recognized is unreasonably discriminatory when a child will always inherit from the mother. Alternatively, the Court may simply focus on the constitutionality of section 42(b) as of 1976, the year the decedent died, which was prior to the amendments to section 42(b) in 1977 and 1979. No doubt the Court will have to deal with the opinion of the Texas Supreme Court in Davis v. Jones, which upholds the constitutionality of section 42(b) as amended in 1979.


227. 682 S.W.2d at 699. The three methods found in TEX. PROB. CODE ANN. § 42(b) (Vernon 1980) are: birth or conception before or during the marriage of the parents; court decree as provided by TEX. FAM. CODE ANN. § 13.08 (Vernon Supp. 1986) legitimating the birth; or father's execution of a statement of paternity as provided by id. § 13.22 or a similar statement from another jurisdiction.


230. TEX. PROB. CODE ANN. § 3(b) (Vernon 1980) defines "child."

231. 626 S.W.2d at 738.

232. 626 S.W.2d at 738.


236. 626 S.W.2d 303, 308 (Tex. 1982).
Adoption by Estoppel. The equitable doctrine of adoption by estoppel continues in Texas regardless of the ongoing dispute over statutory legitimization of illegitimate children. In In re Estate of Castaneda and Edwards v. Haynes the courts reiterated the essential element of a promise, agreement, or contract to adopt. Evidence of recognition and support of alleged children were insufficient to prove such element in In re Castaneda. Prolonged custody, use of the decedent's name, and treatment as a natural child were insufficient to prove the essential element in Edwards.

Equitable Conversion. The case of Parson v. Wolfe presents an intriguing example of some of the vagaries that occur when an intestate individual's estate descends and passes under Probate Code section 38. In Parson the surviving husband and sister of the intestate decedent squared off as to who would inherit separate realty that the decedent, prior to her death, had contracted to sell. Section 38(b)(2) provided that the husband would inherit the property outright if it were personalty; if, however, the property were realty, he would share it with his sister-in-law. Since the contract contained no contingencies and the purchaser could enforce the contract by specific performance, the court held that the contract had equitably converted the interest of the decedent in the land into personalty. Although legal title remained in the decedent, the purchaser held equitable title. The decedent was effectively a secured creditor. Thus, because of the contract, the decedent's sister inherited none of the proceeds from the sale of the separate realty.

V. Trusts

Constructive Trusts. Proof of a confidential relationship between the appellee and his live-in girlfriend, whom the appellee ultimately married, was suffi-
cient to justify imposition of a constructive trust in *Johnston v. Mabrey.*

The appellee had conveyed his separate house to the appellant, allegedly as trustee. Upon their subsequent divorce the appellant claimed the house as her property. The court cited the general rules that parol evidence can engraft a constructive trust over real estate even though the deed is absolute on its face, and that a confidential relationship based on a social, domestic, moral, or personal relationship was sufficient to justify a constructive trust. The fact that the relationship may have been meretricious did not, according to the court, mean that the relationship could not at the same time have been a confidential one.

Likewise, proof of a confidential relationship between the appellee and her neighbors was sufficient in *Kostelnik v. Roberts* to justify imposition of a constructive trust. As in *Johnston,* the appellee and her husband transferred property to the appellants allegedly as trustees. The purpose in this case, however, was to defraud the state of Medicaid benefits. When the appellee's husband died, she asked the neighbors to return the property, but they refused. The court held that the close personal relationship between the appellee and the neighbors had led to a confidential relationship, which justified a constructive trust. Although the neighbors argued under the clean hands doctrine that the court should not in effect aid the appellee to defraud the state, the court held that the neighbors could not assert that doctrine because they had not been injured by the fraud. In dictum the court further commented that the imposition of a constructive trust over the transferred property would defeat the transferees' assertion of a homestead right in the property, since the transferees wrongfully obtained the property.

In an important case, *Ginther v. Taub,* the supreme court described the broad scope of constructive trusts and imposed such a trust on a mineral lease, which the appellees had assigned to the appellant, because of an intermediary attorney's fraud. Although the appellant had not directly defrauded the appellees, he was a knowing beneficiary of the attorney's

---

249. 677 S.W.2d 236 (Tex. App.—Corpus Christi 1984, no writ).
251. 677 S.W.2d at 239; accord Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962); Hudspeth v. Stoker, 644 S.W.2d 92, 94 (Tex. App.—San Antonio 1982, writ reff'd).
252. 677 S.W.2d at 240.
253. 680 S.W.2d 532 (Tex. App.—Corpus Christi 1984, writ reff'd n.r.e.).
254. Id. at 535.
255. Id. at 535-36; accord Omohundro v. Matthews, 161 Tex. 367, 380-81, 341 S.W.2d 401, 410 (1960). Note, however, that the court apparently did not consider a public policy argument. See Wiggins v. Bisso, 92 Tex. 219, 222-25, 47 S.W. 637, 638-40 (1898) (discussion of public policy grounds for refusal to enforce an agreement with illegal purpose).
257. 675 S.W.2d 724 (Tex. 1984).
258. Id. at 727-28.
fraudulent misrepresentations. The attorney had represented both the appellees and the appellant. The appellant was thus effectively made a party to the fiduciary relationship between the attorney and the appellees. The supreme court further commented that a court can impose a constructive trust on a beneficiary of fraud, even though the beneficiary did not commit the fraud.  

As an appellate court pointed out in *Fuqua v. Taylor*, however, a court will not impose a constructive trust merely because a fiduciary relationship exists between the parties and the fiduciary has gained some financial advantage. To justify imposing a constructive trust, the transaction that the complainants seek to undo must have been specifically within the scope of the parties' fiduciary relationship. When a fiduciary is involved in many business dealings with a complainant, as in *Fuqua*, not all transactions will fall within the fiduciary relationship. In this case the fiduciary was a geologist and the complainants were investor/joint venturers.

Similarly, in *Winchester Oil Co. v. Glass* the court refused to impose a constructive trust on a mineral lease when the parties were merely casual business associates. Although business dealings in the past may have created a fiduciary relationship, the court reasoned, the fiduciary relationship extended only to those dealings and had nothing to do with the alleged drilling agreement in this case. That one businessman trusts another and relies on his oral agreement, the court held, is not sufficient to establish a constructive trust.

*Andrews v. Andrews* is another example of an increasing number of cases establishing fiduciary duties between parties in nonmarital or premarital relationships. In *Andrews* an engaged couple agreed to acquire a house together, but at the closing the man secretly removed his fiancee's name, placing title to the house solely in his name. Upon a subsequent divorce the court imposed a constructive trust over half of the house for the wife's benefit, holding that the husband had breached a premarital fiduciary relationship. The court offered the interesting definition of a constructive trust as "the formula through which the conscience of equity finds expression." Obviously, despite even ironclad rules of law such as the statute of frauds, a persuasive lawyer can use a vehicle such as a constructive trust to achieve virtually any result by successfully appealing to a judge's sense of equity and by arguing what the law should be.

---

259. *Id.* at 728; see *Pope v. Garrett*, 147 Tex. 18, 24-25, 211 S.W.2d 559, 562 (1948).

260. 683 S.W.2d 735 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

261. *Id.* at 738.

262. *Id.*

263. 683 S.W.2d 35 (Tex. App.—Texarkana 1984, no writ).

264. *Id.* at 39.

265. *Id.*

266. *Id.*; see *Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966).

267. 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ).

268. *Id.* at 174.

269. *Id.* at 173.
**Trust Administration.** In an unusual case, *Jernigan v. Jernigan*, the court allowed trust beneficiaries who were not parties to a suit between their trustee and another beneficiary to appeal the agreed judgment entered in the suit. Generally, appeal is available only to parties of record. In this case, however, because the judgment directly and adversely affected the non-party beneficiaries, the court held that they were entitled to appeal to protect their interests. Apparently, the effect of the agreed judgment, which denied the plaintiff's cause of action, satisfied the appellant-beneficiaries, but the award of attorney's fees as a settlement to the plaintiff from their portion of the trust dissatisfied them. Thus, appellants did not attempt to reopen the entire judgment based on lack of necessary parties, but sought to invalidate the award of attorney's fees. The nonparty beneficiaries prevailed and the court denied the award because of plaintiff's failure to plead for attorney's fees and the lack of statutory or trust authorization to award attorney's fees.

The court in *Ballenger v. Ballenger* dissolved a temporary injunction preventing trustees from making distributions to themselves. The court reasoned that the complaining beneficiary had an adequate remedy in damages against the trustees and that the injunction excessively interfered with the sole discretion that the trust agreement provided to the trustees.

In another dispute between a trustee and a beneficiary, *Beaty v. Bales*, the court held that the trustee could use trust land without charge as partial compensation for his services. Furthermore, the trust agreement, which specified that compensation would equal the statutory amount, did not limit the trustee's compensation to the five percent commission that Probate Code section 241(a) provides to executors and administrators because the statute also includes a reasonableness standard.

**Trust Revocation.** In a peculiar twist of events, a doctor sued a trustee bank in *Bailey v. Arlington Bank & Trust Co.* to revoke the irrevocable trust he

---

270. 677 S.W.2d 137 (Tex. App.—Dallas 1984, no writ).
271. Id. at 140.
272. See Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965); Grohn v. Marquardt, 487 S.W.2d 214, 215-16 (Tex. Civ. App.—San Antonio 1972, writ ref’d n.r.e.).
273. 677 S.W.2d at 140. Note that TEX. PROP. CODE ANN. § 115.011(d) (Vernon 1984) specifically allows trust beneficiaries to intervene in virtually any suit that would adversely affect their trust interest.
274. 677 S.W.2d at 139.
275. Id. at 140-42. Note, however, that attorneys' fees may now be awarded with the recent addition of TEX. PROP. CODE ANN. § 114.064 (Vernon Supp. 1986).
276. 694 S.W.2d 72 (Tex. App.—Corpus Christi 1985, no writ).
277. Id. at 79.
278. Id.
279. 677 S.W.2d 750 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.).
280. Id. at 756.
281. TEX. PROP. CODE ANN. § 241(a) (Vernon 1980).
282. 677 S.W.2d at 757. The court also held that the trial court does not have to audit the accounting as required by Texas Trust Act, ch. 148, § 24(A), 1943 Tex. Gen. Laws 232, 238, repealed by Act of May 24, 1983, ch. 576, § 6, 1983 Tex. Gen. Laws 3729, 3730. 677 S.W.2d at 754.
283. 693 S.W.2d 787 (Tex. App.—Fort Worth 1985, no writ).
had set up at the bank for his son. The doctor claimed that his wife exerted duress and undue influence to cause him to create the trust. Apparently the sole wrongful action of the wife was to claim that she was going to sell all of his family property and spend the proceeds after his death. To thwart this unpleasant result he had placed the family property in trust for his son. The court defined duress as "the threat to do some act which the threatening party has no right to do." The court directed a verdict against duress because the threatened action was not imminent and would be the lawful right of his wife upon his death. The court next defined undue influence as dominion and control another exercises over the mind of a person executing legal instruments such as to overcome that person's free agency and free will. The court held that no undue influence existed because no one forced or even requested the doctor to sign the trust agreement, which he signed in conscious opposition to the wife's will.

The Bailey case is, however, only a miniature version of duPont v. Southern National Bank. Justice Goldberg began his opinion as follows: "This case illustrates once again the unfortunate verity that the family, although ideally a nurturer of love and affection, often succumbs to the corrosive influence of avarice and financial calculation. We chronicle today an attempt at economic filicide involving one of America's most renowned and wealthy families—the duP Mounts." In duPont a father sought to revoke a multi-million dollar Texas trust that he had set up for the benefit of himself, his wife, and his son. He sought to rescind the irrevocable trust on the basis of mistake and frustration of purpose resulting from an erroneous tax strategy. The court held that the trust's real purpose had been to protect his assets from his wife upon a divorce. The wife, in fact, was unable to receive any significant assets upon their divorce. The husband also unsuccessfully sought to remove the trustees on the ground of hostility, but the court declined on the basis that he, not the trustees, had generated the hostility. The husband further unsuccessfully challenged the reimbursement of the trustees' litigation costs from the trust, but the court, not surprisingly, allowed full reimbursement. Finally, the husband challenged the trustees' allocation of litigation costs to income rather than principal. The court upheld the trustees' exercise of discretion, holding that when an income beneficiary causes the litigation expenses the trustees should pay the expenses from income.

\[\text{284. } \text{Id. at 788.}\]
\[\text{285. } \text{Id. at 789.}\]
\[\text{286. } \text{Id.}\]
\[\text{287. } \text{Id. Although the court analyzed duress and undue influence as separate concepts, duress is logically a subset of undue influence. See Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963).}\]
\[\text{288. } 771 \text{ F.2d 874 (5th Cir. 1985).}\]
\[\text{289. } \text{Id. at 877.}\]
\[\text{290. } \text{Id. at 884.}\]
\[\text{291. } \text{Id. at 885.}\]
\[\text{292. } \text{Id. at 886.}\]
\[\text{293. } \text{Id. at 887-88; accord Brisacher v. Tracy-Collins Trust Co., 277 F.2d 519, 524 (10th Cir. 1960); Cleveland v. Second Nat'l Bank & Trust Co., 149 F.2d 466, 470 (6th Cir.), cert.}\]
VI. Guardianships

Few guardianship issues reach the appellate level, because they tend to be more emotional than legal and the parties generally settle at the trial court level. Also, the incentive to appeal is smaller than in other cases, because generally only the ward has an immediate interest in the proceedings. Estate and trust matters, however, usually have multiple parties fighting over their imminent concerns.

As with the filing of contested probate matters in *Smith v. Smith*, the court in *Maxwell v. Mason* held that a contestant could file a contested guardianship matter originally in a district court, even though a guardianship proceeding was already pending in a constitutional county court. The court noted that the constitutional county court in question automatically transferred all contested matters to district court pursuant to Probate Code section 5(b). The court then determined that to require original filing of a suit in a county court that would immediately transfer the suit to a district court would be pointless. Any person may file a contest under Probate Code section 113 to the appointment of a guardian, according to the court in *Guardianship of Schellenberg*. If the allegations in the contest are sufficient to raise a fact issue, the trial court must allow the contestant to present evidence on the contest to a jury.

VII. Legislative Developments

Out of 1040 bills passed by the sixty-ninth Texas legislature, only ten were amendments to the Probate Code and only three made changes to the Trust Code.

*Probate Code.* The most significant amendment to the Probate Code was the one sentence addition to section 5A(b), discussed in connection with the *Seay* case. Next in importance was House Bill 2034, which drastically

---

294. 694 S.W.2d 426 (Tex. App.-Tyler 1985, writ ref'd n.r.e.). See supra notes 161-65 and accompanying text.

295. 682 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

296. Id. at 644.

297. Id. at 643. The court observed that the statute gives the district court concurrent jurisdiction with the county court. Id.

298. Id.

299. TEX. PROB. CODE ANN. § 113 (Vernon 1980).

300. 694 S.W.2d 50, 52 (Tex. App.—Corpus Christi 1985, no writ).

301. Id. at 52. Note that § 113 gives standing to any person whatsoever to contest or institute any proceeding in any guardianship. TEX. PROB. CODE ANN. § 113 (Vernon 1980).


304. See supra notes 140-51 and accompanying text.

altered section 131 and created a new section 118A. The legislature gutted section 131, and inserted extensive language concerning temporary guardianships. The legislature, however, left temporary administrations hanging, particularly with regard to notice of appointment to interested persons and perpetuation of the appointment. Thus, the three Dallas County Probate Courts found necessary the unusual step of jointly issuing their own rules for temporary administrations. The enactment of section 118A offers a new concept in guardianship law. Under section 118A, a person may, in advance of possible incompetency, appoint a guardian subject to court qualification, or he may absolutely disqualify other individuals as his guardian.

The legislature deleted from section 149B(a) the provision allowing an interested person to request a distribution in an independent administration at any time after the expiration of twelve months from the date that the court created the independent administration. The waiting period for a distribution under section 149B(a) is now three years. Nevertheless, provision 7 in section 149A(a) indicates that an interested person may still bring pressure to close an independent administration after only a fifteen-month waiting period.

The legislature amended section 352 to permit an executor to purchase estate assets if so empowered in the will. The legislature further amended section 352 to allow a personal representative to carry out an executory contract that the decedent or the ward signed prior to incompetency, apparently even if the executory contract was with the personal representative.

The legislature additionally enacted amendments to change definitions.

307. Id. § 118A.
309. Id. § 2, 1985 Tex. Sess. Law Serv. at 6731-33.
310. TEX. PROB. CODE ANN. § 36A (Vernon 1980).
311. Id. § 149B(a) (Vernon Supp. 1986).
313. Id.
314. TEX. PROB. CODE ANN. § 149A(a) (Vernon 1980).
315. Id. § 352 (Vernon Supp. 1986).
317. Id.
to allow secured creditors to initiate heirship proceedings,\(^\text{319}\) and to increase to $15,000 the amount of cash assets the county clerk can receive and invest in lieu of a guardianship.\(^\text{320}\) The legislature also enacted sections dealing with suits by executors, administrators, and guardians,\(^\text{321}\) and differentiating between the effect of assignment and disclaimer.\(^\text{322}\)

**Trust Code.** Senate Bill 517\(^\text{323}\) added a significant new section to the Trust Code and amended four old sections. Under the new section 114.064\(^\text{324}\) a court may now award costs and attorney's fees for any proceeding under the Trust Code, apparently to any party. This statute permits an unusually broad allowance of litigation expenses. Section 113.022, as amended,\(^\text{325}\) allows the current beneficiary to occupy trust land and also allows the trust to acquire a home for a current beneficiary. The legislature amended section 113.057\(^\text{326}\) to permit corporate trustees, if empowered in the trust agreement, to deposit with themselves trust funds of trusts created prior to January 1, 1988. The legislature also added authorization to a trustee to make certain investments relating to United States Government obligations\(^\text{327}\) and to bank trustees to receive compensation for brokerage services rendered to their trusts.\(^\text{328}\)

---


\(^{324}\) TEX. PROP. CODE ANN. § 114.064(a) (Vernon Supp. 1986) provides as follows: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."


