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WILLS AND TRUSTS

by

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THIS Article reviews developments in case law in the areas of wills, nontestamentary transfers, heirship, estate administration, guardianship, and trusts. The Survey period covers decisions published between October 16, 1987, and October 31, 1988.

I. WILLS

Will Construction. The Texas Supreme Court, in Hurt v. Smith,1 construed a will in order to determine the proper sequence of charging legacies with the taxes due on the estate, the appropriate classification of bequests made in the will, and the allocation of income earned on estate property during the period of administration. Huling W. Smith divided his estate among a few friends, some relatives, and three charities. Smith instructed the executor of his estate to pay his “debts, funeral expenses, expenses of [his] last illness, and costs and expenses incurred in the probate of this Will”2 from the bequest to the three charities. The court held that this provision in Smith's Will did not result in charging the estate and inheritance taxes against the charitable bequest.3 The court noted that it had previously held, in Stewart v. Selder,4 that “debts and expenses” include only those debts that the decedent owed at the time of death and expenses incurred during administration of the estate.5 The court next classified the bequests to determine the order in which the bequests would be charged for the state and inheritance taxes.6 The court stated the general rule that estate and inheritance taxes will be charged against bequests in the following order: first, against the personal property residuary estate; second, against the real property residuary; third, pro rata against the general bequests; fourth, pro rata against the demonstrative bequests; and finally, pro rata against the specific bequests. Id.

1. 744 S.W.2d 1 (Tex. 1987).
2. Id. at 3.
3. Id.
4. 473 S.W.2d 3, 10 (Tex. 1971).
5. 744 S.W.2d at 3.
6. Id. The court stated the general rule that estate and inheritance taxes will be charged against bequests in the following order: first, against the personal property residuary estate; second, against the real property residuary; third, pro rata against the general bequests; fourth, pro rata against the demonstrative bequests; and finally, pro rata against the specific bequests. Id.
7. Id. at 4.

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nature of a bequest based on "ritualistic classification." The court determined that the three gifts of cash to Smith's friends were general bequests, but that Smith intended for these cash gifts to be paid before the charitable gift, which the court found to be a specific bequest. The court held that under the construction of this particular will the charitable gift should be used for the payment of estate and inheritance taxes prior to utilizing the money set aside for the three cash gifts. The court also held that any income earned by property during estate administration belonged to the beneficiary who received the property under the will.

In Perfect Union Lodge No. 10 v. Interfirst Bank the Texas Supreme Court affirmed the probate court and the court of appeals in the determination that a will created a testamentary trust for the benefit of the testator's wife during her life. The testator provided for all of his property to pass to his wife "absolutely, for and during her natural life, to have the use and benefit thereof during her said natural life." The will provided for the remainder to go to the Perfect Union Lodge after his wife's death. The will did not name a trustee, although it provided that the independent executors were to administer the property during the wife's life, and the will gave the independent executors all of the powers given to trustees under the Texas Trust Act. The court applied the rules for will construction, looking at the testator's intent as shown by reading the entire document. The court found that from a review of all of the provisions of the will, the testator intended to create a testamentary trust. The court also held that the probate court had jurisdiction over the testamentary trust. The dissent, however, would have found that the will did not create a testamentary trust.

8. Id. The necessary determination for a court to make is whether the testator intended to dispose of property as a particular asset or as part of the general estate. Id. The court then stated the rules for determining the types of bequests when examining various gifts under a will. Id.

9. Id. at 5.

10. Id. at 6.

11. Id.

12. Perfect Union Lodge No. 10 v. InterFirst Bank, 748 S.W.2d 218 (Tex. 1988).

13. Id. at 220. The court also affirmed the lower courts' findings that some unproductive real property in the estate should be sold and that the proceeds should be divided between the widow and the remainder beneficiary. Id. at 221.

14. Id. at 219. The testator stated that this gift was in lieu of his wife's community interest in their homestead property.


16. 748 S.W.2d at 221. The court noted that the testator devised the residuary estate to his wife for her life with a remainder to Perfect Union Lodge. The language directing the executors to handle the estate during the wife's life indicated the intent for the executors to manage and control the property more than a typical estate administration would require. Id.

17. Id. at 221. The court held that the interpretation and administration of a testamentary trust is a matter incident to an estate, thus falling within the probate court's jurisdiction under TEX. PROP. CODE ANN. § 5(d) (Vernon Supp. 1989). The court also held that the wife's estate was entitled to part of the proceeds from the sale of the unproductive property since the sale was made prior to the time the trust corpus was distributed under TEX. PROP. CODE ANN. § 113.110(a) (Vernon 1984). 748 S.W.2d at 221.

18. 748 S.W.2d at 222-24 (Ray, J., dissenting). Chief Justice Phillips and Justice Wallace
In Tabassi v. NBC Bank—San Antonio, the court determined that the language allocating debts and taxes was not ambiguous, but that the will instead expressed no intent concerning the allocation of an unknown tax liability. The will directed the executor to pay all taxes and debts out of the residuary estate, without apportionment. The decedent had invested considerable sums, which were separate property, in foreign banks. The decedent was not aware that he owed federal income taxes on the interest earned on these funds. The tax liability, which was substantial, did not surface until after his death. The decedent's wife did not contest that the interest earned by the foreign accounts was community property, but she did contest her community one-half of the tax liability. The wife attempted to show that the will was ambiguous because of the decedent's misunderstanding of community property law. The decedent had always treated income from his separate property as his separate property and had personally paid all taxes on that income. Thus, she contended, when the decedent stated in the will that all of his taxes should be paid from the residuary estate, he intended for all of the community tax liability to be paid from the residuary estate, not just his community one-half of that liability. The court, after applying the well-known tests for determining the testator's intent, found that the will was unambiguous and that "[c]ircumstances that arise after the testator's death and as to which during his lifetime he was completely ignorant may not be allowed to create an ambiguity where one would not otherwise exist."

White v. Moore concerned a will that left the testatrix's estate to her six children and to the survivor or survivors of them, but did not provide for the heirs of any children who predeceased the testatrix to take that child's property. Mattie Lou Moore died in 1976 and her will was admitted to probate a short time after her death. Her son, Herman Moore, one of the six children named in her will, predeceased her. In 1986 Herman Moore's daughter and granddaughter filed suit for a declaratory judgment that they were entitled to one-sixth of the estate, and requested a final accounting and that the estate be closed and distributed. The trial court held that Herman Moore's daughter and granddaughter were not beneficiaries under the will, and the court of

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19. 737 S.W.2d 612 (Tex. App.—Austin 1987, writ ref’d n.r.e.).
20. Id. at 616. The court also held that the decedent's lifetime gifts to his sons from a previous marriage, made from community property, were not constructive fraud. Id. at 617. The decedent’s second wife was aware that he wished to support his sons, she was aware of all of the gifts at the time they were made, and she received financial benefits from her husband, both during his life and under his will, so the court found that no constructive fraud occurred. Id.
21. Id. at 616.
appeals affirmed.\textsuperscript{23} The will contained survivorship language. The court held that survivorship was a condition necessary for taking under the will, and, therefore, Herman Moore and his descendants were not beneficiaries under the will because Herman Moore did not survive the testatrix.\textsuperscript{24}

The Texarkana court of appeals in \textit{In re Estate of Lewis}\textsuperscript{25} reversed the district court and remanded a case for a determination of whether a necessity of administration exists. Harry Lewis, Jr., left his estate to his two daughters for their lives, with the remainder of each daughter's share to her descendants or, if none, to his other daughter. The will named the two daughters as co-independent executrixes. Harriet Lesikar, one of the daughters, brought an action to close the estate and distribute the property under Texas Probate Code section 149B.\textsuperscript{26} The other daughter contested the action based on her determination that the estate could not be distributed until after the deaths of both daughters and that a continuing necessity for administration existed. The court of appeals determined that the will did not create a testamentary trust for the benefit of the two daughters, but instead created two life estates.\textsuperscript{27} The court also found that even if the will had created a testamentary trust for the benefit of the two daughters, the creation of the trust would not prevent the estate from being closed and distributed.\textsuperscript{28} The court stated the general rule that the necessity for further administration ends when the will has been probated and all debts have been paid.\textsuperscript{29} The court found that the need for further administration was not established.\textsuperscript{30}

The court of appeals in \textit{Lowrance v. Whitfield}\textsuperscript{31} held that a remainder interest created under a will was a contingent remainder subject to a condition precedent to vesting.\textsuperscript{32} Wade Miller left his wife a life estate in his separate real property and in his undivided one-half of the community real property, with a remainder to his children. Miller included a condition that the children or their descendants could not take the remainder interest if the children or their descendants should sell or attempt to sell any portion of the

\textsuperscript{23} 747 S.W.2d at 574.
\textsuperscript{24} \textit{Id.} at 575.
\textsuperscript{25} 749 S.W.2d 927 (Tex. App.—Texarkana 1988, writ denied).
\textsuperscript{26} \textsc{Tex. Prob. Code Ann.} § 149B(a), (b) (Vernon Supp. 1989) and § 149(c) (Vernon 1980).
\textsuperscript{27} 749 S.W.2d at 930. The court noted that the will specifically referred to the interests of the two daughters as life estates. \textit{Id.} The court determined that the management powers given to the daughters during their lives were not indications of an intent to create a trust, but were instead the typical powers given to life tenants for the use and management of the life estate. \textit{Id.} The court also noted that the testator created a testamentary trust for his grandchildren, which demonstrated that the testator knew how to create a trust, and his failure to create a trust for his daughters demonstrated his intent to create life estates. \textit{Id.}
\textsuperscript{28} \textit{Id.} at 931. The court noted that the estate could be distributed to the testamentary trustees. \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.} The court also held that the judgment entered by the district court denying an accounting and distribution of the estate was a final order that could be appealed rather than an interlocutory order. \textit{Id.} at 932.
\textsuperscript{31} 752 S.W.2d 129 (Tex. App.—Houston [1st Dist.] 1988, no writ).
\textsuperscript{32} \textit{Id.} at 134.
real property during the wife's lifetime. The wife entered into the execution of mineral leases on two parcels of community property and on one parcel of the testator's separate property. The only child of the testator who survived at the time of the execution of the leases entered into the execution of the leases on the community property tracts, but she refused to execute a lease on the separate property tract. A dispute arose between the parties. The wife alleged that Miller's surviving daughter had a contingent remainder subject to a condition precedent to vesting that she had violated by the execution of the mineral leases, and the surviving daughter and her son alleged that they had a vested remainder in the property. The daughter brought suit for construction of the will and for other relief. The trial court found that the remainder interest was, as a matter of law, contingent. The court of appeals determined that the language creating the remainder interest was ambiguous, and considered the affidavit of the lawyer who drafted the will as extrinsic evidence of Miller's intent. The court held, based on the evidence of the uncontradicted affidavit, that the remainder interest was contingent subject to a condition precedent to vesting. The court found that the contingent remainder beneficiaries had violated the condition precedent to vesting by executing mineral leases, and, thus, they had no right to request an accounting or the appointment of a receiver. The dissent found that the attorney's affidavit contained no indication that the testator intended to prevent the life tenant and the contingent remainder beneficiaries from jointly benefitting from the properties.

Another court of appeals construed a will in connection with the rights of a life tenant in mineral properties in Hudspeth v. Hudspeth. The testator left his wife all of his property, both real and personal, for her life or until her remarriage. The testator specifically stated that his wife was to receive

33. Id. at 133. The attorney stated in his affidavit that Miller did not wish his children to interfere with his wife's use of the land during her life and that this provision was placed in the will in order to prevent any interference. The appeals court found that the attorney's uncontradicted affidavit showed that the testator clearly did not intend for the remainder interest to vest in his children or descendants unless the remainder beneficiaries met the condition not to interfere with the life tenant's use of the land. Id. at 134.

34. Id. at 134. The remainder beneficiaries had alleged that the restriction on the sale of property applied to them in the will was a violation of the rule against restraint on alienation. The court of appeals found that the rule against restraint on alienation did not apply in this case because the remainder interest was contingent. Id. The remainder beneficiaries also alleged that the life tenant had committed waste through the execution of the mineral leases. The court found that Miller's daughter had joined in the execution of leases on two of the properties, so she could not complain about waste by the leasing of those properties. Id. The court next determined that the life tenant, who served as independent executrix of Miller's estate, had the authority to enter into a lease on the separate property tract during the administration of the estate "for the purpose of preserving and protecting the assets of the estate." Id. at 135.

35. Id. at 136.

36. Id. at 137 (Duggan, J., dissenting). The dissent further noted that the life tenant could not have executed the leases without joinder of the remainder beneficiaries, and that the refusal of the remainder beneficiaries to enter into the leases would have resulted in interference with the life tenant's use and enjoyment of the property. Id.

37. 756 S.W.2d 29 (Tex. App.—San Antonio 1988, no writ).
“all rents, revenues and income of every kind and character.” The testator's children alleged that the life tenant was consuming royalties and bonuses to which they should be entitled as the remainder beneficiaries. The court noted that royalties and bonus payments on mineral leases ordinarily belong to the remainder interest, not to the life estate, but that a testator can give a life tenant the right to more than a mere life estate. The court held that the testator gave his wife the right to all income from the real estate with no obligation for setting aside royalties and bonus payments for the benefit of the remainder beneficiaries. The remainder beneficiaries also claimed that the trial court erred in finding that their cause of action for the royalties and bonuses was barred by res judicata and collateral estoppel based on a 1950 judgment, but the court of appeals agreed with the trial court.

Joint Wills. In Jackson v. Stutt the court determined that a joint will, which Tommie and Uleta Jackson executed in 1958, was not a mutual will. Uleta Jackson died soon after the execution of the joint will and Tommie Jackson probated the joint will as Uleta's will. The joint will left all of the property to the survivor on the death of the first spouse to die. The will then provided for the distribution of the estate to the couple's five children on the death of the survivor. Tommie Jackson later remarried, and, in 1985, he executed a new will that left his property in trust for his second wife and the children of his second marriage. The trial court admitted the 1985 will to probate, but imposed a constructive trust on the estate in favor of the beneficiaries of the 1958 will based on the determination that the 1958 will was a joint contractual will. The court of appeals analyzed the 1958 will to determine if both prongs of the test for contractual wills were present. The court found that the 1958 will left all of the estate of the first spouse to die to the survivor fully and absolutely and that the dispositive scheme in place at the death of the surviving spouse was not a joint disposition of the couple's estate. The court reversed the trial court.

38. Id. at 32 (emphasis added by the court).
39. Id. at 31.
40. Id. at 32.
41. Id. at 33. The trial court determined that the 1950 judgment involved the same question of the right to the royalties and bonus payments and involved the same parties. The concurring opinion would not have found the 1950 judgment res judicata. Id. at 34 (Cadena, J., concurring).
42. 737 S.W.2d 597 (Tex. App.—Fort Worth 1987, writ denied).
43. Id. at 600.
44. Id. at 599. In a contractual will the gift to the survivor is, first, conditional and not absolute and, second, the will disposes of the joint estate of the first to die and the survivor remaining on hand at the death of the survivor in a common dispositive scheme. See Jones v. Jones, 718 S.W.2d 416, 418 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); Fisher v. Capp, 597 S.W.2d 393 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).
45. Id. at 600. Tommie Jackson and his second wife were married for many years and they had children together. The court stated that it could find no authority for finding that a contractual will can control the disposition of property that the survivor acquires after the death of the first to die, whether that property is community property acquired with a subsequent spouse or separate property. Id.
46. Id. On rehearing, the court also held that Tommie Jackson was not estopped from
Lost Wills. The Beaumont court of appeals, in *Lewis v. White*, held that a jury's finding that a will proponent diligently attempted to locate a lost will was against the great weight and preponderance of the evidence. After the decedent's death in 1980, application was made to probate a 1959 will in which the decedent left everything to his wife, who had died after the decedent, but before the will was admitted to probate. The decedent's brother subsequently filed an application to set aside the probate of the 1959 will and to admit a later holographic will that had been lost. In the holographic will the decedent left all of the property he acquired before his marriage to the brother and all of the property he acquired after his marriage to his wife. The jury found that the decedent had executed a valid holographic will after the date of the 1959 will, which he never revoked, and that the brother diligently attempted to locate the later will. Witnesses presented evidence that they had read the holographic will, and the notary who notarized the will testified at trial. The evidence provided by these witnesses satisfied two of the three elements necessary for probating a lost will: showing that the lost will was properly executed and substantially proving the contents of the lost will. The evidence concerning the proponent's efforts for locating the lost will was contradictory at best. The proponent attempted to show that someone other than the decedent had the opportunity to destroy or remove the will, but the proponent did not show that he had himself diligently searched for the will. The appeals court, therefore, found that the jury's finding that the proponent had diligently attempted to locate the lost will was against the great weight and preponderance of the evidence.

Undue Influence. In *Gaines v. Frawley* the court affirmed the trial court's judgment that the testatrix executed the will as the result of undue influence exerted over her. Lois Frawley, the testatrix, and her first husband were married for many years prior to his death in 1972. The Frawleys had two

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47. 747 S.W.2d 45 (Tex. App.—Beaumont 1988, writ dism'd).
48. *Id.* at 47.
49. TEX. PROB. CODE ANN. § 85 (Vernon 1980) sets forth the three elements necessary for proving a lost will:
   A written will which cannot be produced in court shall be proved in the same manner as provided in the preceding Section for an attested written will or an holographic will, as the case may be, and the same amount and character of testimony shall be required to prove such will as is required to prove a written will produced in court; but, in addition thereto, the cause of its nonproduction must be proved, and such cause must be sufficient to satisfy the court that it cannot by any reasonable diligence be produced, and the contents of such will must be substantially proved by the testimony of a credible witness who has read it or heard it read.
50. 747 S.W.2d at 47.
51. 739 S.W.2d 950 (Tex. App.—Fort Worth 1987, no writ).
52. *Id.* at 951.
sons who were very close to their mother until the time of her death. Approximately five years after Frawley's death the testatrix met Gaines, who moved in with her after knowing her for only a short time. At the time Gaines moved in with the testatrix he was married to his seventh wife, from whom he was later divorced. Gaines and the testatrix lived together until her death in 1980. In November 1979 Gaines and the testatrix executed wills in which each benefitted the other.

The testatrix was seriously ill for the last few years of her life and her health was failing rapidly at the time she executed the will. After Gaines moved in with the testatrix she became submissive to him. Both the testatrix and Gaines drank heavily. Gaines had a violent temper and the testatrix was afraid of him.

Gaines claimed on appeal that no evidence to support the jury's finding of undue influence existed or, alternatively, that the evidence was factually insufficient to support the jury's finding. The appeals court noted that in determining whether no evidence existed, it should consider only the evidence that supports the jury's finding, and that if the court finds any probative evidence that supports the jury's finding on the "no evidence" point, the court must overrule the point of error. The court then noted that it must consider all of the evidence in the case to determine whether the evidence was factually insufficient to support the jury's finding. The elements necessary for finding undue influence, as set out by the Texas Supreme Court in Rothermel v. Duncan, are as follows:

1) the existence and exertion of influence;
2) the effective operation of such influence so as to subvert or overpower the mind of the testatrix at the time of the execution of the testament; and
3) the execution of a will which the testatrix would not have executed but for such influence.

The appeals court first found that evidence of the existence and exertion of undue influence existed. The court next determined that Gaines exercised sufficient influence over the testatrix at the time she executed her will to overpower her wishes. Finally, the court determined that the testatrix

53. Id. at 952; see Larson v. Cook Consultants, Inc., 690 S.W.2d 567, 568-69 (Tex. 1985); International Armament Corp. v. King, 686 S.W.2d 595, 597 (Tex. 1985); In re King's Estate, 150 Tex. 662, 664-65, 244 S.W.2d 660, 661-62 (1951).
54. 739 S.W.2d at 952; see In re King's Estate, 150 Tex. at 664-65, 244 S.W.2d at 661-62.
55. 739 S.W.2d at 952; see Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965).
56. 369 S.W.2d 917, 922 (Tex. 1963); see Wood v. Stute, 627 S.W.2d 539, 541 (Tex. App.—Fort Worth 1982, no writ).
57. 739 S.W.2d at 953 (quoting 369 S.W.2d at 922).
58. Id. at 953-54. In finding the existence and exertion of undue influence, the court looked at the relationship between the testatrix, her sons, and Gaines. Id. at 953, based on Rothermel, 369 S.W.2d at 923. The factors set forth in Rothermel for finding undue influence, and the factors that the jury was instructed they could consider in determining whether undue influence existed, are as follows: "the opportunities existing for exerting such influence; the circumstances surrounding the drafting and execution of the testament; the existence of a fraudulent motive; and whether the testatrix has been habitually subjected to the control of another." 739 S.W.2d at 953 (citing Rothermel, 369 S.W.2d at 923).
59. 739 S.W.2d at 954. The court noted that the issue whether the undue influence was
would not have made the disposition of her estate that she made in the will if Gaines had not exerted the undue influence.\textsuperscript{50}

\textbf{Testamentary Intent.} The court, in \textit{Straw v. Owens},\textsuperscript{61} found that a signed, handwritten list of property descriptions and names, which contained no testamentary language, was not a will as a matter of law.\textsuperscript{62} The writing contained some illegible words, including some that the proponent claimed read “Will of November 5.” The legible handwriting contained no words evidencing testamentary intent, and the court affirmed the probate court’s summary judgment denying probate because the document was not a will.\textsuperscript{63}

\textbf{Employee Benefits.} The Texas Supreme Court, in \textit{Allard v. Frech},\textsuperscript{64} held that a nonemployee spouse’s community interest in a qualified private retirement plan was part of her estate and passed under the terms of her will.\textsuperscript{65} The Allards married in 1945 and, shortly afterwards, Mr. Allard became an employee of General Dynamics where he worked until his retirement in 1982. Mrs. Allard died in 1983. During his employment Mr. Allard contributed community funds to a retirement plan. Upon retirement Mr. Allard selected a benefit option that would provide him retirement benefits for life, with guaranteed payments for ten years. Mrs. Allard did not sign the option selection card. Mrs. Allard left her estate to her adult child and grandchildren. Mrs. Allard’s independent executrix filed an Inventory, Appraisal, and List of Claims that included the community one-half of Mr. Allard’s retirement benefits, as well as the community one-half of some funds in bank

\begin{footnotes}
\textsuperscript{50} Id. at 955. The testatrix had always been close to her two sons, her daughter-in-law, and her grandchildren, and she remained very close to them until the time of her death. The only real property that the testatrix owned was the home and surrounding acreage that she and her first husband had owned and the two burial plots where she and her first husband were buried. One of the sons lived on the same tract of land as the home. The testatrix left all of this real property to Gaines in her will. The court found that the will made an unnatural disposition of the testatrix’s property under these facts. \textit{Id.}

\textsuperscript{61} 746 S.W.2d 345 (Tex. App.—Fort Worth 1988, no writ).

\textsuperscript{62} \textit{Id.} at 346.

\textsuperscript{63} \textit{Id.} The court also held that the appellant was not entitled to notice of an order reinstating a summary judgment. \textit{Id.} at 347. The appellees submitted one motion for summary judgment, which was based upon the lack of testamentary intent in the handwritten document offered for probate. The probate court held a hearing on the motion on August 11, 1986. The probate court judge signed an order sustaining the summary judgment on January 26, 1987, but subsequently withdrew his signature in order to consider the matter further. The probate court judge again signed the same order on March 10, 1987. The court of appeals found that the appellant had notice of the only hearing on the motion for summary judgment, and that neither party requested an additional hearing. \textit{Id.} at 346-47. The court noted that the fact that the probate judge withdrew his signature to allow himself additional time to consider the matter had actually benefited the appellant. \textit{Id.} at 347.

\textsuperscript{64} 754 S.W.2d 111 (Tex. 1988).

\textsuperscript{65} \textit{Id.} at 114.
\end{footnotes}
accounts. After trial the probate court entered an order awarding the estate one-half of Mr. Allard’s retirement benefits and one-half the funds in the joint savings account. The court of appeals affirmed.

On appeal, the supreme court first considered whether to extend its holding in Valdez v. Ramirez to these facts. The court held that the court of appeals had correctly distinguished Valdez from the facts presented in Allard. The court of appeals distinguished Valdez on the basis that the retirement benefits involved in that case were from a federal plan determined under a federal statutory scheme, whereas the retirement benefits involved in Allard were from a private retirement plan. Neither the court of appeals nor the supreme court considered the preemptive effect of the Employee Retirement Income Security Act of 1974 (ERISA). The supreme court held that benefits under the retirement plan were probate assets. The supreme court also agreed with the court of appeals and refused to adopt the terminable interest rule adopted in California. On motion for rehearing, Chief Justice Phillips concurred with the majority, but stated that he only did so because Mr. Allard did not raise the federal preemption issue in a timely manner. On motion for rehearing, three justices joined in a lengthy dissent in which they discussed federal preemption and equitable policies for holding that retirement benefits should not be divested from an employee spouse.

66. The supreme court affirmed the decisions of the probate court and the court of appeals that the funds in a joint savings account were part of the estate. Id. at 115. The savings account contained a notation that it was a joint tenancy with right of survivorship account, but the courts held that the account contained community funds that had not been partitioned between the spouses and that they were not the subject of a spousal gift. Id. at 114-15. The court held in Valdez that the joint survivor retirement benefits that a retired civil service employee received under the federal Civil Service Retirement Act, 5 U.S.C. §§ 8331-8348 (1982), were subject to the employee’s contract with the federal government and not to Texas intestacy law. 574 S.W.2d at 751.

67. 754 S.W.2d at 114. Under application of the terminable interest rule the community property interest of the nonemployee spouse terminates at the death of either spouse. Id. (citing Waite v. Waite, 6 Cal. 3d 461, 99 Cal. Rptr. 257, 492 P.2d 13 (1972); Benson v. Los Angeles, 60 Cal. 2d 355, 33 Cal. Rptr. 257, 384 P.2d 649 (1963); Matter of Estate of Allen, 108 Cal. App. 3d 614, 166 Cal. Rptr. 653 (1980)). The supreme court noted that a 1986 amendment to the California Family Law Act, CAL. CIv. CODE ANN. § 4800.8 (West Supp. 1987), abolished the terminable interest rule. 754 S.W.2d at 114. This amendment, however, specifically has to do with division of community property retirement benefits upon divorce. CAL. CIv. CODE ANN. § 4800.8 (West Supp. 1987).

68. 574 S.W.2d 748 (Tex. 1978).

69. 754 S.W.2d at 113-14. The court held in Valdez that the joint survivor retirement benefits that a retired civil service employee received under the federal Civil Service Retirement Act, 5 U.S.C. §§ 8331-8348 (1982), were subject to the employee’s contract with the federal government and not to Texas intestacy law. 574 S.W.2d at 751. 70. 754 S.W.2d at 114.

71. 735 S.W.2d 311, 314-15 (Tex. App.—Fort Worth 1987), aff’d, 754 S.W.2d 111 (Tex. 1988).

72. 29 U.S.C. §§ 1001-1461 (Supp. III 1985). ERISA specifically preempts state law concerning pensions, id. § 1144(a), although an exception exists if an area is exclusively within the police power of the state. American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979).

73. 754 S.W.2d at 114.

74. Id. at 114-15. Under application of the terminable interest rule the community property interest of the nonemployee spouse terminates at the death of either spouse. Id. (citing Waite v. Waite, 6 Cal. 3d 461, 99 Cal. Rptr. 257, 492 P.2d 13 (1972); Benson v. Los Angeles, 60 Cal. 2d 355, 33 Cal. Rptr. 257, 384 P.2d 649 (1963); Matter of Estate of Allen, 108 Cal. App. 3d 614, 166 Cal. Rptr. 653 (1980)). The supreme court noted that a 1986 amendment to the California Family Law Act, CAL. CIv. CODE ANN. § 4800.8 (West Supp. 1987), abolished the terminable interest rule. 754 S.W.2d at 114. This amendment, however, specifically has to do with division of community property retirement benefits upon divorce. CAL. CIv. CODE ANN. § 4800.8 (West Supp. 1987).

75. 754 S.W.2d at 116 (Phillips, C.J., concurring). Justice Ray also wrote a concurring opinion, in which he discussed the provisions in TEX. PROB. CODE ANN. § 450(a)(1) & (3) (Vernon Supp. 1989) that allow the nontestamentary transfer of retirement benefits as well as his opposition to the terminable interest rule. 754 S.W.2d at 115-16 (Ray, J., concurring).

76. 754 S.W.2d at 116-20 (Spears, J., dissenting and concurring, joined by Wallace and
II. NONTENTAMENTARY TRANSFERS

Employee Benefit Plans. The District Court for the Northern District of Texas, in *Profit Sharing Plan v. MBank Dallas, N.A.*,77 found that a profit-sharing plan did not meet the requirements of section 205 of ERISA78 because the plan did not explicitly state the requirement that a nonemployee spouse provide written, notarized consent to the naming of a beneficiary other than himself or herself for benefits under the plan.79 David D. Steere, who participated in his employer's profit-sharing plan, designated his estate as the beneficiary of benefits from the plan, and the benefits were paid to MBank, the executor of his estate, after his death. Steere's widow immediately notified MBank and the Profit Sharing Plan that she was entitled to benefits under the plan because she had never consented to the designation of a beneficiary other than herself. The Profit Sharing Plan brought suit for a declaratory judgment for determination of who should receive the benefits. The court first determined that ERISA section 205(b)(1)80 requires that a plan designed to avoid the payment of one-half of the benefits available under the plan to the surviving spouse in a qualified preretirement survivor annuity must explicitly provide for written spousal consent waiving the rights to a qualified preretirement survivor annuity.81 The plan stated the requirement that the spouse consent to a designation of a beneficiary other than the spouse, but did not specify the manner in which the spouse was to give the consent. The court found that Steere had complied fully with the procedure for making an effective beneficiary designation, so that Steere's estate was beneficiary of all benefits that his widow was not entitled to receive.82 The court then held that a plan that does not specifically state that

79. 683 F. Supp. at 595.
81. 683 F. Supp. at 594.
82. *Id.* MBank and the beneficiaries of Steere's estate contended that all benefits other than the qualified preretirement survivor annuity should be paid to the estate. Mrs. Steere contended that she was entitled to all the benefits because the designation of the estate as
the spouse sign a written, notarized consent to the designation of another beneficiary must provide a qualified preretirement survivor annuity to the surviving nonemployee spouse.\textsuperscript{83}

\textbf{Contract.} In \textit{Hibbler v. Knight}\textsuperscript{84} the court found that a contract that attempted to dispose of a decedent's entire estate to his wife was not a testamentary instrument.\textsuperscript{85} The decedent's daughter had made application to probate a copy of a will, the original of which could not be located, that the decedent executed prior to the time of his remarriage. The decedent's second wife filed a cross-action and provided a copy of the contract. The daughter filed a verified answer in which she claimed that the contract was invalid because it recited no consideration or because any consideration failed.\textsuperscript{86} The trial court refused to admit the will to probate and also held that the wife could not take the property under the contract. The court of appeals held that the contract was testamentary in nature and that it failed as a testamentary instrument for lack of attestation.\textsuperscript{87} The court found that the contract did not fall under the provisions of section 450(a)(3) of the \textit{Probate Code},\textsuperscript{88} which provides that certain instruments that pass property to a designated person on the death of the person executing the instrument are nontestamentary.\textsuperscript{89} The court held that the legislature did not intend for instruments under this section to become substitutes for wills.\textsuperscript{90} The court beneficiary without her consent rendered the designation invalid. The court determined that Steere properly completed and filed the designation, so that any benefits that would not be paid to Mrs. Steere should be paid to Steere's estate. \textit{Id.}

\textsuperscript{83} \textit{Id.} The court was unable to determine which of three types of statutory plans the qualified preretirement survivor annuity plan was, so the court ordered the Profit Sharing Plan to make the determination and inform the court so the court could determine the value of the annuity. \textit{Id.} at 596.

\textsuperscript{84} 735 S.W.2d 924 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

\textsuperscript{85} \textit{Id.} at 926. The contract, which was typewritten, recited that the decedent's daughter had received her share of her mother's estate from her father and that the daughter had additionally taken more of the community property than she was entitled to take by entering her father's home while he was gone. The contract then purported to give the decedent's estate to his second wife if they were married at the time of his death. The decedent and his second wife both signed the contract. The contract recited no testamentary intent and it was not witnessed.

\textsuperscript{86} The daughter also amended her probate application in order to probate an executed duplicate will, which, she claimed, was either an executed copy or a duplicate original of her father's will.

\textsuperscript{87} 735 S.W.2d at 926. The court also agreed with the trial court that the contract fell under Texas Probate Code section 59A(a), which provides as follows: "(a) A contract to make a . . . devise, or not to revoke a . . . 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." \textit{Tex. Prob. Code Ann.} \textsection{} 59A(a) (Vernon 1980).

\textsuperscript{88} \textit{Tex. Prob. Code Ann.} \textsection{} 450(a)(3) (Vernon 1980).

\textsuperscript{89} 735 S.W.2d at 927.

\textsuperscript{90} \textit{Id.} The court stated as follows:

\textquote[\textit{Id.}] We conclude that the legislature did not intend for this statutory language to validate agreements allowing testamentary disposition of a person's entire estate, including real property, without the requirements of a will or the formalities of will execution. Section 450 allows nontestamentary transfers of "property," "money," or "other benefits," but does not allow nontestamentary transfers of a person's entire estate.
also ruled that the trial court did not err in failing to submit the issue of the validity of the will to the jury.\(^9\)

**Bank Accounts.** Courts decided three cases involving bank accounts during the Survey period.\(^9\) In *Isbell v. Williams* the Texarkana court of appeals affirmed the trial court's judgment that two accounts were trust accounts established for the benefit of individuals named on the signature cards.\(^9\) The court of appeals held in the first appeal that the printed and handwritten language created an ambiguity, so extrinsic evidence could be introduced to clarify the ambiguity.\(^9\) The appellees did not plead ambiguity on retrial, and appellants did not object to the failure of appellees to plead ambiguity or to the presentation of extrinsic evidence. The only witnesses called on retrial were officers of two banks who testified that the account cards established trust accounts through the modification of the cards by the handwritten language. The court held that the appellants could not raise failure to plead ambiguity after failing to object to the extrinsic evidence at trial.\(^9\) The court also found that the testimony of the bank officers and the stipulated evidence were sufficient to support the jury's finding that the two accounts were trust accounts.\(^9\)

In *Stauffer v. Henderson*\(^9\) the court affirmed the trial court and held that the signature card for a joint account did not provide for rights of survivorship.\(^9\) The signature card specified that the account was a “Joint Account—Payable to Either or Survivor.”\(^9\) Marian Henderson opened the

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\(^9\) *Id.*

\(^9\) *Id.* The trial court removed the case from the jury after both sides had presented their evidence. The court of appeals found that the proponent of the will produced no evidence that would overcome the presumption that the testator had revoked the will by destroying it. *Id.*


\(^9\) 738 S.W.2d at 25. The court had heard a previous appeal of this case, in which it reversed and remanded the case. Isbell v. Williams, 705 S.W.2d 252 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.). The jury in the original trial had found that the decedent intended for the money in the two accounts to pass to other individuals named on the signature cards. The appeals court held that an ambiguity existed between the printed language and the handwritten language on the signature cards, and that the issue to be resolved was whether the form of the account and the deposit agreement was sufficient to create a trust account under Tex. Prob. Code Ann. § 436(14) (Vernon 1980). 705 S.W.2d at 256.

The account cards contained printed language establishing joint tenancy accounts with rights of survivorship. The decedent signed both cards. Someone also handwrote, at the top of each card, “Annie Isbell TR/for Brenda Schell Williams and Mark Schell.”

\(^9\) 705 S.W.2d at 256.

\(^9\) 738 S.W.2d at 23.

\(^9\) *Id.* at 24. The appellants raised a total of 32 points of error, many of which had to do with instructions to the jury and failure of the trial court to admit evidence. The court found that none of the points of error that the appellants raised constituted reversible error. See *id.* at 23-25.

\(^9\) 746 S.W.2d 533 (Tex. App.—Amarillo 1988, writ granted).

\(^9\) *Id.* at 536.

\(^9\) The signature card also stated:

and . . . upon the death of either of us any balance in said account or any part thereof may be withdrawn by, or upon the order of the survivor. It is especially
joint account with her community property funds. Mary Stauffer, the other co-tenant, admittedly did not contribute any funds to the account. Following Mrs. Henderson's death, Stauffer withdrew all funds in the account. Mrs. Henderson's husband, acting as Executor of her estate and individually, brought a cause of action against Stauffer for conversion of the funds. The trial court entered partial summary judgment for Henderson and ordered Stauffer to return the funds, plus interest, to Henderson. The appeals court examined statutory and case history of joint accounts and whether extrinsic evidence could be introduced to determine the intent of the parties at the time the account was created. The court determined that the legislature had intended specific, precise language creating survivorship rights before property could pass outside of a testamentary instrument and that the language found in the account agreement at issue in this case was insufficient to allow the property to pass outside Mrs. Henderson's will.

III. HEIRSHIP

Ineffective Disclaimer. In Tate v. Siepielski a disclaimer, that attempted agreed that withdrawal of funds by the survivor shall be binding upon us and upon our heirs, next of kin, legatees, assigns, and personal representatives...

746 S.W.2d at 534.

100. Id. at 534-36. Prior to the time the legislature enacted the Nontestamentary Transfers chapter of the Texas Probate Code, courts generally allowed parol evidence to determine the intent of the parties at the time the account was established, even if the parol evidence directly contradicted the express terms of the signature card or other account agreement. See Otto v. Klement, 656 S.W.2d 678, 681 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); William Marsh Rice Univ. v. Birdwell, 624 S.W.2d 661, 663 (Tex. App.—Houston [14th Dist.] 1981, no writ); Griffin v. Robertson, 592 S.W.2d 31, 33 (Tex. Civ. App.—Texarkana 1979, no writ); Estate of Reynolds v. Reynolds, 443 S.W.2d 601, 603 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

The legislature enacted TEX. PROB. CODE ANN. § 439(a) (Vernon 1980) in 1979. Act of June 11, 1979, ch. 713, § 31, 1979 Tex. Sess. Law Serv. 1740, 1756 (Vernon). Section 439(a) provided, at the time the bank account involved in this case was established, in part, as follows:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party or parties. A survivorship agreement will not be inferred from the mere fact that the account is a joint account.

Id. This section was amended in 1987 to provide a statutory example of language creating a right of survivorship. Act of June 11, 1987, ch. 297, § 1, 1987 Tex. Sess. Law Serv. 3829, 3829 (Vernon). Language sufficient to create a right of survivorship would substantially state the following: “On the death of one party to a joint account, all sums in the account on the date of death vest in and belong to the surviving party as his or her separate property and estate.”


The court noted that two cases have considered whether language on the signature card or in the account agreement such as “payable to either or to the survivor” created rights of survivorship. 746 S.W.2d at 535. In the first of the two cases, Chopin v. InterFirst Bank Dallas, 694 S.W.2d 79 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), the court held that the “payable to either or to the survivor” language did not create a right of survivorship. Id. at 84. The court in the second case, Sawyer v. Lancaster, 719 S.W.2d 346 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), held that the “payable to” language does not create survivorship rights, but that it is sufficient to create a rebuttable presumption of intent to establish a joint tenancy with right of survivorship. Id. at 349. The Sawyer court then held that extrinsic evidence would be admissible to determine the intent of the parties at the time of creation of the account.

101. 746 S.W.2d at 536.

102. 740 S.W.2d 92 (Tex. App.—Fort Worth 1987, no writ).
to assign the disclaimed property to a named person failed in the assignment, but did not fail as a disclaimer. Carole Siepielski's father died intestate in 1979. Siepielski executed a document entitled “Affidavit of Disclaimer, in Accordance with Section 37A of the Texas Probate Code” in 1980. In the affidavit, Siepielski attempted to assign her interest to her mother. Siepielski had a minor child at the time of her father's death. The probate court held that the disclaimer was ineffective to assign Siepielski's interest to her mother because a disclaimer can only pass the estate of the decedent on to the decedent's other heirs as of the time of the decedent's death. The probate court, therefore, found that the ineffective disclaimer served to pass Siepielski's share of the estate to her minor child just as if Siepielski had predeceased her father. The court of appeals affirmed the probate court and held that a trial court does not have to construe a document as an assignment of interest to a specific person if the document otherwise meets the statutory requirements of a disclaimer.

Intestate Succession. The Austin court of appeals held in *Kirkpatrick v. Estate of Kane* that the sole heir-at-law of an intestate decedent, who was a maternal cousin of the decedent, was entitled to take the decedent's entire estate under Texas Probate Code section 38(a)(4).

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A disclaimer, evidenced as provided herein, shall be effective as of the death of decedent and the property subject thereof shall pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent . . . .

Failure to comply with the provisions hereof shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting the disclaimer died prior to the decedent.

*Id.*

104. The affidavit included the following language:

I am making this disclaimer, in behalf of my mother and widow of Merrill D. Tate; namely, Louise Bish Tate . . . .

This disclaimer is made for the purpose of vesting any and all title which I may have inherited through the death of my father in my mother, Louise Bish Tate, who is the widow of Merrill D. Tate, my father.

*740 S.W.2d* at 93.

105. *740 S.W.2d* at 94.


If there be none of the kindred aforesaid, then the inheritance shall be divided into two moiety, one of which shall go to the paternal and the other to the maternal kindred, in the following course: To the grandfather and grandmother in equal portions, but if only one of these be living, then the estate shall be divided into two equal parts, one of which shall go to such survivor, and the other shall go to the descendant or descendants of such deceased grandfather or grandmother. If there be no such descendant, then the whole estate shall be inherited by the surviving grandfather or grandmother. If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendents, and so on without end, passing in like manner to the nearest lineal ancestors and their descendents.

*Id.*
and that the other one-half of the estate, the paternal moiety, should be administered by the administratrix of the estate. The cousin appealed the trial court's decision concerning the paternal moiety, contending that she was entitled to take the entire estate. The appeals court noted that Probate Code section 38(a)(4)\textsuperscript{108} does not provide a method for distributing an intestate's estate when heirs exist on only the paternal or the maternal side of the family.\textsuperscript{109} If no heirs exist on one side of the intestate decedent's family, and if the heirs on the other side of the decedent's family are precluded from inheriting the moiety of the side with no heirs, that moiety would eventually escheat to the state under section 427 of the Probate Code.\textsuperscript{110} The appeals court found the analysis and decision in \textit{State v. Estate of Loomis}\textsuperscript{111} persuasive and held the entire estate should pass to the decedent's sole surviving heir.\textsuperscript{112} Because the sole heir was entitled to both moieties, none of the decedent's property remained unclaimed to escheat to the state under section 427 of the Probate Code.\textsuperscript{113}

**IV. ESTATE ADMINISTRATION**

\textit{Jurisdiction}. An estate is not a legal entity, so it cannot be sued.\textsuperscript{114} Heirs are indispensable parties who must be joined in a suit that involves the title to real property that is brought against the personal representative of an estate in that person's representative capacity.\textsuperscript{115} District courts lack jurisdiction to consider applications to probate wills in counties that have statutory courts with probate jurisdiction unless the legislature specifically provides otherwise.\textsuperscript{116}

\begin{footnotesize}
\begin{enumerate}
\item 108. TEX. PROB. CODE ANN. § 38(a)(4) (Vernon 1980).
\item 109. 743 S.W.2d at 372.
\item 110. TEX. PROB. CODE ANN. § 427 (Vernon 1980).
\item 111. 553 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, writ ref'd). The \textit{Loomis} case involved a situation in which the decedent left surviving heirs on only one side of the family. The \textit{Loomis} court examined the legislative history and intent underlying the intestacy provisions of the probate code as well as the analysis found in Bailey, \textit{Intestacy in Texas: Some Doubts and Queries}, 32 TEX. L. REV. 776, 791-804 (1954). 553 S.W.2d at 169. The \textit{Loomis} court determined that the legislature intended to favor a decedent's heirs over the state, so that the paternal moiety should pass to the heirs on the maternal side of the family. \textit{Id.}
\item 112. 743 S.W.2d at 373.
\item 113. TEX. PROB. CODE ANN. § 427 (Vernon 1980).
\item 114. Henson v. Estate of Crow, 734 S.W.2d 648, 649 (Tex. 1987). The suit in question originated prior to Crow's death. The plaintiff, after learning of the death, amended his petition and named the Estate of Crow as defendant. The attorney who had represented Crow in the action amended the answer, but no evidence existed that the attorney represented the personal representative of Crow's estate.
\item 115. Love v. Woerndell, 737 S.W.2d 50, 52 (Tex. App.—San Antonio 1987, writ denied). The plaintiffs filed suit in order to remove a cloud from the title to property that the decedent had deeded to them many years before her death. About three years before her death, the decedent had attempted to revoke the deed. Both the deed and the attempted revocation had been filed. The court found that "[a] suit to remove a cloud from the title to real estate is a suit involving title, and heirs are necessary party defendants." \textit{Id.} at 51. The court found that the trial court could not grant the summary judgment in favor of the plaintiffs since the heirs were not parties to the suit. \textit{Id.} at 52.
\item 116. Stroud v. Lindsey, 473 S.W.2d 776, 777 (Tex. App.—Fort Worth 1988, no writ). Stroud filed an application for probate in the constitutional county court of Wise County. Another will proponent also filed an application for probate in the constitutional county court.
\end{enumerate}
\end{footnotesize}
was located had jurisdiction over the determination of title to the real property, even though the probate of the estate of the decedent who owned the property was in a county court in another county.\(^{117}\) The probate court does not have jurisdiction over estate administrators' claims in a shareholders' derivative action.\(^{118}\)

**Venue.** The Corpus Christi court of appeals, in *Striba v. Bowers*, held that the filing of a will for probate is not part of a cause of action for construction of the will for the purposes of determining venue.\(^{119}\) Kate Bowers died in

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\(^{117}\) Goodwin v. Kent, 745 S.W.2d 466, 469 (Tex. App.—Tyler 1988, no writ). Both courts potentially had jurisdiction over the case. The probate was filed in the county court of Smith County in 1974, and the determination of title to the property was a matter incident to the estate. The district court in the county in which the land was situated also had jurisdiction to determine title to the property. Usually, the first court in which a suit is filed has dominant jurisdiction if more than one court has potential jurisdiction. Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974). The court found that the issue in controversy in this matter was first raised in the district court in the county in which the land was situated, so that court had dominant jurisdiction. 745 S.W.2d at 469.

\(^{118}\) Qwest Microwave, Inc. v. Bedard, 756 S.W.2d 426, 437 (Tex. App.—Dallas 1988, no writ). Dorothy Warren, a minority shareholder in two closely held corporations, died in 1983. The other shareholders in these two corporations formed five new corporations and pledged assets in the two original corporations to secure a large loan made for purposes of the new corporations. The administrators of Warren's estate determined that the value of the estate's stock in the two original corporations declined as a result of the pledge of the corporate assets. The administrators brought a shareholders' derivative action against the five new corporations in the probate court. The probate court determined that it had jurisdiction because the administrators brought the action as representatives of Warren's estate. The defendants filed for a writ of mandamus in the court of appeals, which determined that mandamus was an appropriate remedy. *Id.* at 434. The appeals court then determined that the probate court does not have jurisdiction under *Tex. Prob. Code Ann.* § 5A(b) (Vernon Supp. 1989) to hear "claims brought by the administrators in their capacity as shareholders and therefore nominal plaintiffs in a derivative action." 756 S.W.2d at 437. The appeals court ordered both Judge Bedard, the presiding judge over the probate court in which the action was filed, and Judge Gregory, who as presiding judge of the statutory probate courts in Texas had assigned himself to preside over the case when Judge Bedard requested the assignment of a visiting judge, to enter orders for dismissal of the case for want of jurisdiction. *Id.* at 441.

\(^{119}\) 756 S.W.2d 835, 838 (Tex. App.—Corpus Christi 1988, no writ).
1966 and her will was probated in Calhoun County. Bowers left some of her property, which consisted partly of real estate in Calhoun County, to her daughter and some of her property in trust for the benefit of her grandson. The daughter died in Harris County in 1984, where her will was probated. The grandson filed suit in Calhoun County district court against the executor of his mother's estate for declaratory judgment construing the terms of Bowers' will and for an accounting of the trust estate and other assets of Bowers' estate. The day after the grandson filed suit in Calhoun County he brought similar actions in both the Harris County district court and the probate court in which his mother's estate was pending. The executor filed a plea in abatement and to the jurisdiction in Calhoun County as well as a motion to transfer venue. The district court denied both. The appeals court first found that the judgment entered by the trial court was a final judgment. The appeals court then considered whether the act of probating a will constitutes part of the cause of action for will construction for purposes of the general rule of venue. The court then determined that, since the primary purpose of the suit was for construction of the will and the effect of quieting title to or recovering any real property was only a secondary purpose, the mandatory venue provision did not apply.

Statute of Limitations. The appeals court held in Neill v. Vet that the two-year statute of limitations governs a cause of action alleging fraud and tortious interference with inheritance, and the statute of limitations bars a suit brought more than two years after a will was admitted to probate. The testator died on May 8, 1981. The testator's granddaughter attended his funeral, although she was not close to her grandparents. The testator's wife offered his will for probate on May 27, 1981, and the county sheriff posted notice of the application for probate. The court admitted the will to probate

120. Id. at 836.
121. Id. at 837. The court in its judgment construed the will in favor of the grandson, ordered the accounting that the grandson had requested, and denied the grandson all other relief. The appeals court noted that the inclusion of the phrase, “all relief not expressly granted is denied,” renders any judgment a final judgment. Id. (citing Houston Health Clubs v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986); Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982); North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 898 (Tex. 1966)).
122. 756 S.W.2d at 837-38. The general rule is found at TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 (Vernon 1986). The court found that the probate process is part of the legal process through which the validity of the will is established. The party or parties that have possession of the will at the time of the testator's death have an obligation to file the will with the proper court in the county in which the testator resided at the time of death. The court stated as follows:

To say that admitting a will to probate is a part of the cause of action for its construction is like saying that the plaintiff’s act of filing a petition in the county of suit is a part of his cause of action because it is a necessary prerequisite to his asserting his rights under the cause of action.

756 S.W.2d at 838.
123. Id. at 840. TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon 1986) contains the mandatory venue provision, which is strictly construed by courts. See Scarth v. First Bank & Trust Co., 711 S.W.2d 140, 142 (Tex. App.—Amarillo 1986, no writ); First Nat'l Bank v. Pickett, 555 S.W.2d 547, 551 (Tex. Civ. App.—Corpus Christi 1977, no writ).
124. 746 S.W.2d 32, 36 (Tex. App.—Austin 1988, writ denied).
on July 9, 1981. More than three years later, the granddaughter filed suit contesting the validity of the will, requesting an imposition of a constructive trust on the estate in favor of those who would take the estate under intestacy laws, and alleging that her grandmother and others tortiously interfered with her inheritance expectancy. The trial court determined that service was adequate because it was in compliance with section 128 of the Probate Code.\textsuperscript{125} The trial court then granted summary judgment under section 93 of the Probate Code.\textsuperscript{126} The appeals court found that the granddaughter did not prove that her grandmother or any other defendant took an action that induced the granddaughter not to contest the will or prevented her from filing an action contesting the will prior to the time that she filed her contest, so the granddaughter did not prove fraud.\textsuperscript{127} The appeals court also found that the granddaughter did not have any inheritance expectancy and that she did not establish the elements for her tortious interference claim.\textsuperscript{128} Finally, the appeals court found that the statute of limitations on the causes of action that the granddaughter alleged began to run at the time the court admitted the will to probate.\textsuperscript{129}

In \textit{Knesek v. Witte} the appeals court held that an action for the imposition of a constructive trust over the assets of an estate based on a contractual will is not an action to admit the will to probate, so it is not subject to the two-year statute of limitations for contesting the validity of a will.\textsuperscript{130} The decedent executed a reciprocal will with her then husband in 1975. The husband died in 1977, and the decedent inherited his entire estate under the terms of his will. The decedent remarried and later executed two new wills. The decedent's last will was admitted to probate following her death. The beneficiaries of the 1975 will did not find that will until late 1984. The beneficiaries of the 1975 will filed a petition for declaratory judgment creating a constructive trust under the 1975 will in late 1984, shortly after they found the 1975 will. The appeals court noted that the beneficiaries of the 1975 will did not delay in filing their action so that the statute of limitations had not run at the time they filed their action.\textsuperscript{131} The court further held that suffi-

\textsuperscript{125} \textit{Id.} at 33-34, citing to TEX. PROB. CODE ANN. § 128(a) (Vernon 1980), which provides that the citation to persons interested in an estate shall be served by posting.

\textsuperscript{126} 746 S.W.2d at 34, citing to TEX. PROB. CODE ANN. § 93 (Vernon 1980), which provides a two-year statute of limitations for contesting the validity of a will unless the validity of the will is contested on the basis of forgery or fraud, in which case the two-year statute of limitations begins at the time the forgery or fraud is discovered.

\textsuperscript{127} 746 S.W.2d at 35.

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.} at 36. The court noted that the granddaughter received constructive notice of the contents of her grandfather's will at the time it was admitted to probate and that "she should have begun her investigation of facts surrounding the execution of the will upon receiving such notice." \textit{Id.}

\textsuperscript{130} 754 S.W.2d 814, 815 (Tex. App.—Houston [1st Dist.] 1988, no writ).

\textsuperscript{131} \textit{Id.} at 816. The court further held that even if the statute of limitations had not begun when the beneficiaries found the will, but instead began to run at the time the decedent's last will was admitted to probate, the statute of limitations would still not bar the imposition of a constructive trust because the beneficiaries had originally instituted an action within two years of the time the will was admitted to probate. \textit{Id.} The beneficiaries amended their pleadings after they found the 1975 will to raise an additional ground for recovery on the same cause of
cient evidence existed that the decedent executed the 1975 reciprocal will and that the trial court did not err in admitting the statements of the decedent's first husband concerning the contractual nature of the wills into evidence.

Evidence. The preponderance of the evidence is the standard for determining the sufficiency of the evidence in overcoming the presumption of revocation of a will last seen in the decedent's possession or within the decedent's ready access. The testimony of a decedent's granddaughter that the decedent told her on the day that he died that he was leaving one-half of his estate to her was uncorroborated by any other evidence and should be excluded under rule 601(b) of the Texas Rules of Civil Evidence, according to the Fort Worth court of appeals. Rule 601(b) of the Texas Rules of Civil Evidence does not apply to testimony in a proceeding for the appointment of a personal representative and for determination of heirship.
Finality of Judgment. In Christensen v. Harkins the court held that a partial summary judgment finding that a specific bequest of certain real property was adeemed and that the action for declaratory judgment for construction of the will was not a will contest and was a final appealable judgment. One of the decedent's daughters brought suit for a declaratory judgment on four issues. Two of the issues were based on construction of the will. The daughter filed a motion for partial summary judgment on two issues, and the probate court determined that no genuine issue of material fact existed on these two issues and granted a partial summary judgment. The executors sought to appeal the partial summary judgment, but the daughter argued that the judgment was interlocutory and not appealable. The appeals court examined cases concerning the appealability of probate orders and determined that the probate court's order granting partial summary judgment was final and appealable.

Partition Agreement. The Fort Worth court of appeals in Collins v. Collins affirmed the probate court's order to the executor of an estate to amend the Inventory, Appraisement and List of Claims to show certain property as community property rather than separate property. The executor contended that the decedent and his spouse entered into valid partition agreements under Family Code section 5.54 by signing joint income tax returns in which they listed the income of certain assets as community or separate property. The court of appeals found that merely signing a joint income tax return that listed the income of various assets as community or separate property did not constitute a valid partition agreement since the income tax return did not include specific language stating that it was a partition agreement. The court of appeals also found that the requirements of the statute of frauds do not apply to partition agreements under this section of the code.

writ). The trial court entered judgment finding that Faye Todd Whitlock was the common law wife of the decedent and naming her the administratrix of his estate. The court allowed Faye Todd Whitlock and the decedent's father to testify about statements the decedent made concerning his relationship with Ms. Whitlock. Id. The appeals court held that TEX. R. CIV. EVID. 601(b) did not apply because this proceeding was not an action by or against executors or administrators. 741 S.W.2d at 530. The court noted that rule 601(b) excludes uncorroborated evidence but that the evidence introduced here was corroborated. Id. The court also found that the evidence was sufficient to establish that a common-law marriage existed between the decedent and Faye Todd Whitlock, and that the trial court did not err in appointing Faye Todd Whitlock the administratrix of the estate. Id.
the Family Code. Finally, the court ruled that parol evidence of a partition agreement is inadmissible and would render section 5.54 of the Family Code meaningless.

Claims Against the Estate. An accountant who provided services to an estate did not have to follow the statutory procedure for presentment of claims to the estate's administrator since the claim for the services rendered to the estate accrued after letters of administration were granted. The court of appeals found that the accountant could present his claim directly to the court since the court would determine the reasonableness of the claim. The appeals court noted that the probate court never ruled on the accountant's claim and that the probate court had jurisdiction over the claim. The court reversed and remanded the case to the probate court.

In Flournoy Drilling Co. v. Walker the court found that Flournoy Drilling Company properly perfected a statutory lien against certain mineral properties in a decedent's estate and that the lien was enforceable against those properties. The decedent hired Flournoy Drilling Company to drill for oil and gas, but the decedent died before he paid Flournoy in full. Follows. 

147. 752 S.W.2d at 637.
148. TEX. FAM. CODE ANN. § 5.54.
149. 752 S.W.2d at 638.
150. TEX. PROB. CODE ANN. § 294(a) (Vernon Supp. 1989) provides for publication of notice to creditors within one month after a personal representative receives letters testamentary or letters of administration. The personal representative must give secured creditors notice by registered mail within four months of receiving the letters. Id. § 295 (Vernon 1980). Creditors must support all claims by affidavit. Id. § 301. The personal representative must allow or reject all or part of the claim in writing within thirty days of presentment of the claim, id. § 309, or the claim is deemed to be rejected. Id. § 310. Once a claim has been wholly or partially allowed, the clerk places the claim on the probate claim docket, id. § 311, and the court must approve or reject the claim within ten days; if the court approves the claim, it must classify the claim. Id. § 312. If the personal representative rejects all or part of the claim, the creditor must sue on the claim within ninety days or the claim is barred. Id. § 313.
151. Ulrich v. Estate of Anderson, 740 S.W.2d 481, 485 (Tex. App.-Houston [1st Dist.] 1987, no writ). TEX. PROB. CODE ANN. § 317(d) (Vernon 1980) provides as follows: "The foregoing provisions relative to the presentment of claims shall not be so construed as to apply to . . . any claim that accrues against the estate after the granting of letters for which the representative of the estate has contracted." Id.
152. 740 S.W.2d at 483. The court made this decision based upon TEX. PROB. CODE ANN. §§ 242, 317 (Vernon 1980). Section 242 provides that personal representatives, after satisfactory proof to the court, shall be entitled to all necessary and reasonable expenses incurred in preserving the estate. Id. § 242. Section 317(c) provides the manner in which the court dockets and acts upon the personal representative's claim for necessary and reasonable expenses. Id. § 317(c). The court determined that the accountant could make the claim directly to the court since ultimately the court would act upon the claim and since the claim was a necessary and reasonable expense of administration. 740 S.W.2d at 483.
153. 740 S.W.2d at 485. The court found that the ninety-day statute of limitations for actions on claims not allowed by the personal representative of an estate does not apply to remove the claim from the probate court's jurisdiction since this was not a claim that the personal representative could allow or disallow. Id.
154. Id. at 486. The court noted that the original claim was still pending in the probate court, and that the suit on the claim also would be pending in the probate court following remand, so that a judgment either on the claim or in the suit on the claim will be "appealable, and will be res judicata to the other." Id.
155. 750 S.W.2d 911 (Tex. App.—Corpus Christi 1988, writ denied).
156. Id. at 913.
allowing the decedent’s death, but within the time frame for securing a lien under section 56.021 of the Property Code,157 Flournoy complied with the statutory procedure for securing its lien on certain mineral property that the decedent had owned. The executor of the decedent’s estate rejected the claim, and Flournoy brought suit. The trial court found that the claim was invalid because Flournoy failed to comply with the statutory procedure for securing the lien prior to the death of the decedent. The court of appeals reversed because the legislature has specifically provided the method for securing a lien on mineral properties and Flournoy complied fully with that method.158

Adverse Possession. The three-year statute of limitations for recovering real estate “held by another in peaceable and adverse possession under title or color of title”159 does not apply when those in occupation of the property do not have title or color of title.160 The decedent, under whom both parties claimed title, died in 1970. Her common-law husband survived her and continued to live in the residence that was the subject of this suit. The probate court entered an order declaring that the common-law husband was the decedent’s sole heir in 1976. The common-law husband died in 1979 and left all of his property to his two children from a previous marriage. A holographic will executed by the decedent in 1967 was admitted to probate as a muniment of title in 1980, following the death of her common-law husband. The beneficiaries of the 1967 will brought a trespass to try title action against the husband’s two children, and the trial court found that the husband’s children had title under the three-year statute of limitations. The court of appeals reversed and rendered.161 The court of appeals found that neither the husband nor his children had title or color of title to the property and, therefore, the three-year statute of limitations did not apply.162

Executors and Administrators. In Weatherly v. Martin the Amarillo court of

157. TEX. PROP. CODE ANN. § 56.021 (Vernon 1984). This section provides as follows:
   (a) Not later than six months after the day the indebtedness accrues, a person claiming the lien must file an affidavit with the county clerk of the county in which the property is located.
   (b) Not later than the 10th day before the affidavit is filed, a mineral subcontractor claiming the lien must serve on the property owner written notice that the lien is claimed.

Id.

158. 750 S.W.2d at 913. The court noted the policy behind the statutory provision was “to promote and encourage the important oil and gas industry and facilitate the development of our mineral resources by providing contractors and subcontractors a lien . . . in the land itself. To permit the debtor’s death to terminate the six-month time period would defeat the purpose.” Id.

159. TEX. CIV. PRAC. & REM. CODE ANN. § 16.024 (Vernon 1986).


161. 747 S.W.2d at 23.

162. Id. at 23-24. The court reasoned that the 1967 will vested the property in the will’s beneficiaries immediately upon the decedent’s death, even though the will was not admitted to probate until approximately ten years after her death. Id. The court also stated that it did not consider any issues relating to the five- and ten-year statutes of limitation. Id. at 24.
appeals affirmed the trial court's finding that executors' and attorneys' fees were excessive. The two beneficiaries of the estate filed an action against the co-executors individually, and not as representatives of the estate, in district court. The co-executors stipulated prior to trial that the district court had jurisdiction to hear the case. The trial court found that the co-executors jointly were entitled to no more than the statutory five percent of the estate and also found that the attorneys' fees were excessive. The court of appeals first found that the district court had jurisdiction over an action against the co-executors in their individual capacities. The appeals court next found that some evidence existed to support the trial court's finding that the executors were entitled to only the statutory fee. Finally, the court of appeals determined that the evidence clearly showed that the co-executors did not establish the reasonableness of the attorneys' fees.

V. Guardianships

Statutory Guardian's Fee. A court determined that when real property owned by an estate is sold for cash, the cash remains as corpus of the estate and is not considered as income for determination of the guardian's fee. The guardian of the estate sold real property belonging to the estate in 1983 for a down payment and a promissory note providing for equal monthly payments of the balance of the purchase price. The guardian applied to the court and received a fee of five percent of the down payment amount at the time it was made. The purchaser paid off the balance of the note, with interest and penalties, in 1985, and the guardian applied to receive a fee of five percent of the cash received in 1985. The trial court denied the request, holding that the sale proceeds did not constitute "gross income" from which the guardian was entitled to a statutory fee. The court of appeals affirmed

163. 754 S.W.2d 790, 794-95 (Tex. App.—Amarillo 1988, writ denied).
164. Id. at 791, citing to TEX. Prob. Code Ann. § 241(a) (Vernon Supp. 1989), which provides that a personal representative of an estate may receive a commission of five percent of all monies received by the estate and paid out of the estate, not to exceed in the aggregate a total of five percent of the gross fair market value of the estate.
165. 754 S.W.2d at 791. The estate paid a total of $71,442.43 in attorneys' fees. One of the co-executors was also an attorney for the estate. One witness testified at trial that the reasonable fees for representing an estate of this size and in the matters in which the attorneys had represented the estate would be $30,000. The trial court allowed $56,303.26 in attorneys' fees despite the testimony as to reasonable fees. No one attacked the trial court's allowance of the excess over $30,000, so the appeals court did not lower the amount. Id. at 794-95.
166. Id. at 792.
167. Id. at 794. The court stated as follows:
[In considering the evidence, the [trial] court reasonably could determine that the executors undertook their representation willingly, chargeable with notice of the formula for their compensation. Further, the [trial] court reasonably could determine that the work performed by the executors did not enhance the value of the estate, but merely was within their assumed duty to properly administer the estate.

168. Id.
170. Id. at 435, citing to TEX. Prob. Code Ann. § 241(b) (Vernon Supp. 1989), which
the trial court.171

Jurisdiction. In Pearson v. K-Mart Corp.172 the court held that the probate court had proper jurisdiction over an action for personal injuries suffered by the ward.173 Pearson, guardian of the person and estate of Ernest Ramos, brought an action in the probate court in which the guardianship was pending against K-Mart for the personal injuries that rendered Ramos incompetent. The probate court dismissed the action, finding that the district court had proper jurisdiction for unliquidated personal injury claims. The appeals court analyzed the statutes that give probate courts their jurisdiction,174 with special emphasis on the 1985 amendment to section 5A(b) of the Probate Code.175 The appeals court held that the statutory probate court had jurisdiction over the personal injury action because the personal representative of the guardianship brought the action and because the action was not a wrongful death or survival action.176
The probate court did not have jurisdiction over a guardianship proceeding when a suit affecting the parent-child relationship was pending in district court.\footnote{Rowland v. Willy, 751 S.W.2d 725, 727 (Tex. App.—Houston [14th Dist.] 1988, no writ).} Jack and Carol Rowland were divorced in 1977. At the time of their divorce, they had two minor children, one of whom was severely retarded. The divorce court ordered Jack Rowland to pay his former wife child support payments until the children reached eighteen years of age. Shortly before the retarded child reached eighteen, Carol Rowland Gross filed in district court a motion that sought to extend the child support payments beyond the child's eighteenth birthday. The district court entered a temporary order extending the payments and stated, in the order, that the purpose for doing so was to retain jurisdiction over the matter until the court could hold a complete hearing. Several months after the court entered the temporary order and while the suit was still pending, Gross filed an application in the probate court to be appointed guardian of the retarded child. Rowland contested the application on the basis that the district court had exclusive jurisdiction over the matter. The probate court nevertheless issued an order appointing Gross guardian of the person of the retarded child. Rowland applied for writ of mandamus seeking to have the court of appeals set aside the probate court’s order. The court of appeals determined that both the district court and the probate court could have jurisdiction over the matter, but that the district court had exclusive continuing jurisdiction.\footnote{Id. at 726. The court based this determination on TEX. FAM. CODE ANN. § 11.05(a) (Vernon 1986), which provides, in part, as follows: [W]hen a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing, exclusive jurisdiction of all parties and matters . . . in connection with the child. No other court of this state has jurisdiction of a suit affecting the parent-child relationship with regard to that child except on transfer as provided in . . . this code. Id. § 11.05(a).} The appeals court conditionally granted the writ of mandamus, allowing the probate court the opportunity to vacate its order before the writ would be issued.\footnote{751 S.W.2d at 727.}

Support Payments. The El Paso court of appeals held in \textit{Adkins v. Adkins}\footnote{743 S.W.2d 745, 746-47 (Tex. App.—El Paso 1987, writ denied).} that a parent guardian may obtain support payments from the other parent under section 423 of the Texas Probate Code.\footnote{TEX. PROB. CODE ANN. § 423 (Vernon 1980). This section determines who should support and maintain an incompetent person. The father or mother has an obligation to support an incompetent if he or she has the means to do so. \textit{Id.} § 423(b).} Fitzhugh and Patricia Ad-
kins, the parents of a retarded adult son, divorced in 1984. The divorce decree ordered Fitzhugh to pay monthly support payments for the support of the son. Fitzhugh appealed the award, and the court of appeals, in an unpublished opinion, held that a court could not order a parent to pay support payments for a child over the age of eighteen. Patricia became guardian of the son and filed suit seeking support under Probate Code section 423.182 The trial court found that Patricia was capable of supporting the son and that the son had a small estate of his own. The trial court declined to order Fitzhugh to make support payments. The appeals court reversed and remanded the case since the trial court made no finding that Fitzhugh was unable to provide support to his son.183

VI. TRUSTS

Charitable Trust. In Martinez v. State184 the court found that an express trust failed for lack of a beneficiary and a trust purpose.185 The appellant's parents conveyed certain real property to the appellant and two other individuals as trustees for the Gospel Tabernacle in 1973. At approximately the same time, the members of the Gospel Tabernacle agreed to build a new church building on the property, and the trustees secured a loan to purchase supplies for the construction. Members donated the labor for the project. The new building on the property enhanced the property's value. After a few years, church attendance declined and the trustees considered selling the property and using the proceeds for religious purposes. Appellant executed a deed conveying the property from the trustees to himself, individually, in 1981. Appellant admitted that he had his sixteen-year-old son forge the name of one of the other trustees on the deed. Appellant sold the property shortly afterwards for $100,000. Sometime later a grand jury investigated the appellant's actions and indicted him on two counts of misapplication of fiduciary property, two forgery counts, and one felony theft count. Due to procedural irregularities the state dismissed the two forgery counts, and appellant was tried and found guilty on the felony theft count and the two misapplication of fiduciary property counts.186 The case was appealed to the Texas Court of Criminal Appeals, which remanded the case to the court of appeals.187 On remand the court of appeals found that the original deed to

182. Id. § 423.
183. 743 S.W.2d at 747. The appeals court directed the trial court to order some support payments from each parent, provided that each parent could provide support. Id. The appeals court also determined that the language in § 423 that imposes liability for support if the incompetent has no estate actually means that the incompetent has "no adequate estate." Id.
184. 753 S.W.2d 165 (Tex. App.—Beaumont 1988, no pet.).
185. Id. at 167.
186. Id. at 166, citing to TEX. PEN. CODE ANN. § 32.45(b) (Vernon 1974), which provides the five elements of the offense of misapplication of fiduciary property:

(b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

Id.
the three trustees created an express charitable trust. The court found that the express trust failed, however, for lack of a beneficiary or a trust purpose since the congregation had ceased holding services on the church property. The court stated that the trust purpose could not be achieved under the cy pres doctrine since this charitable trust had a specific rather than a general intent. The court then reversed the appellant’s convictions under the two charges of misapplication of fiduciary property. The dissent, in a lengthy opinion, disagreed with the majority’s opinion that the express trust failed and that the cy pres doctrine did not apply.

Constructive Trusts. The Waco court of appeals reversed and remanded a constitutional county court’s imposition of a constructive trust on funds in a decedent’s profit-sharing plan in *Ragland v. Ragland*. Lee Ann Ragland was convicted and sentenced to forty years in prison for the murder of her husband. The husband had named Lee Ann as the beneficiary of his profit-sharing plan in the event of his death. His employer placed the decedent’s account balance in the constitutional county court in an interpleader action in the probate proceeding. The constitutional county court found that Lee Ann had willfully caused her husband’s death and, in order to prevent Lee Ann from benefitting from her wrongful act, awarded the decedent’s community one-half of the funds to his estate and Lee Ann’s community one-half to her, but with a constructive trust impressed in favor of the decedent’s estate. The court of appeals reversed and remanded the case because section 5A(b) of the Probate Code provides that only district courts and statutory probate courts have jurisdiction to impose constructive trusts. The court also held that a court cannot impose a constructive trust on property that belonged to Lee Ann prior to the death of her husband, but could instead impose a constructive trust only on the decedent’s community one-half interest in the funds.

In *Davis v. Sheerin* the court affirmed a trial court’s imposition of a resulting trust, although the court discussed the differences between a result-

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188. 753 S.W.2d at 167.
189. *Id.* The court stated that the congregation had “ceased all of its regular functions of work and worship for approximately three years,” prior to the time appellant conveyed the property to himself. *Id.*
190. *Id.*
191. *Id.* at 168.
192. 753 S.W.2d at 170, 172-74, 177-81.
193. *Id.* at 170, 174.
194. 743 S.W.2d 758, 759 (Tex. App.—Waco 1987, no writ).
196. 743 S.W.2d at 759. *TEX. PROB. CODE ANN.* § 5A(a) (Vernon 1980) applies to probate proceedings in constitutional county courts and statutory county courts at law. This section includes no mention of constructive trusts. The court examined the language of the statute and concluded as follows: “[c]onsidering the express reference to constructive trusts in subsection (b) and the absence of such an express reference in subsection (a), one can reasonably infer that the legislature must have intended to limit jurisdiction to impose a constructive trust to either the statutory probate court or district court.” 743 S.W.2d at 759.
197. 743 S.W.2d at 759. The court noted that under *TEX. PROB. CODE ANN.* § 41(d) (Vernon 1980) a criminal does not forfeit her estate as the result of a conviction.
198. 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied).
ing trust and a constructive trust.\textsuperscript{199} William Davis and James L. Sheerin had a long course of business dealings together, including a partnership that owned some real property. The real property was held in Davis's name only, rather than in the name of the partnership or in both names, although Sheerin contributed his share of funds for acquiring the property. The business relationship between the two parties deteriorated over the years and, in 1985, Sheerin filed suit against Davis, alleging, among other things, that Davis breached his fiduciary duty in connection with the partnership. After a jury trial the trial court imposed a resulting trust on the real property. Sheerin had prayed for the imposition of a constructive trust and for other general relief. The appeals court stated that a court may impose a resulting trust when a party has prayed for general relief.\textsuperscript{200} The court noted the confusion between resulting trusts and constructive trusts, both of which are implied trusts that courts impose to prevent unjust enrichment.\textsuperscript{201} The court noted that the effect of the imposition of either type of implied trust would be the same, and that, even if the imposition of a resulting trust were incorrect, the imposition of a constructive trust would be proper.\textsuperscript{202}

**Resulting Trust.** The Dallas court of appeals held that the burden of proof for finding a resulting trust is clear and convincing evidence.\textsuperscript{203} Allen and Gertrude Bogart purchased a lot in 1960 and paid for the purchase entirely from their own funds. The Bogarts placed record title to the property in the name of their son-in-law, Joseph Somer. The Bogarts owned a lot adjacent to the lot held in Somer's name, and they paid all maintenance expenses and taxes on both lots until their deaths. The Bogarts also retained the original deed to the property until the time of their deaths. The beneficiaries under the wills of the Bogarts, who were the two children of the Bogarts, other than the daughter married to Somer, and Mrs. Bogart's sister, disputed the ownership of the lot held in Somer's name. The probate court awarded title to the property to the Bogart beneficiaries under a resulting trust. The burden of proof included in the jury instruction was preponderance of the evidence. The court of appeals first noted that the type of resulting trust involved was a purchase money resulting trust,\textsuperscript{204} but that this type of re-

\textsuperscript{199} Id. at 387.
\textsuperscript{200} Id.
\textsuperscript{201} Id. For a discussion of the distinctions between the two types of implied trusts, see Mills v. Gray, 147 Tex. 33, 38, 210 S.W.2d 985, 987-88 (1948). A resulting trust is implied at the moment that title to property passes if title is taken in the name of someone other than one who pays the purchase price or part of the purchase price of the property. See Nolana Dev. Ass'n v. Corsi, 682 S.W.2d 246, 250 (Tex. 1984); Estate of Lee v. Ring, 734 S.W.2d 123, 126 (Tex. App.—Houston [1st Dist.] 1987, no writ); Bybee v. Bybee, 644 S.W.2d 218, 221 (Tex. App.—Fort Worth 1982, no writ). A constructive trust is imposed in order to prevent a person from benefitting from his or her own wrongdoing, including the breach of fiduciary duty. See Omohundro v. Matthews, 161 Tex. 367, 371, 341 S.W.2d 401, 405 (1960).
\textsuperscript{202} 754 S.W.2d at 387. The court also noted that Davis did not challenge the reformation of the deeds to reflect Sheerin's undivided ownership interest in the real property within ten days, so the court's order had "the effect and operation at law and in equity of such a reformation." Id.
\textsuperscript{203} Somer v. Bogart, 749 S.W.2d 202, 205 (Tex. App.—Dallas 1988, writ denied).
\textsuperscript{204} Id. at 204. A purchase money resulting trust can be found when "one takes a deed to
resulting trust may not arise when a presumption of gift arises, such as when parents pay for the property and place title in the child’s name. The court held that a son-in-law is a natural object of the bounty of his parents-in-law and that a presumption of gift arises when the parents-in-law pay for the property and place record title in their son-in-law’s name. Once a presumption of gift is rebutted, however, a resulting trust will arise. The burden of proof for establishing a resulting trust is clear and convincing evidence, but the burden of proof for rebutting the presumption of a gift is preponderance of the evidence. The court determined that since rebutting the presumption of a gift would lead to the imposition of a resulting trust “the principle of equality dictates that the same higher quality of evidence be required in the latter instance as in the former.” The court held that the burden of proof in overcoming the presumption of gift in this case was clear and convincing evidence.

Spendthrift Trusts. The two cases that examined spendthrift or antialienation provisions in trusts during the Survey period both involved pension plans. The Fifth Circuit found that a medical doctor’s interest in a profit-sharing plan constituted part of his bankruptcy estate. Brooks practiced medicine as one of thirty-two doctor-owners of a professional association. Because of losses from investments Brooks filed for bankruptcy under chapter 11 of the Bankruptcy Code in 1985. Brooks claimed his state exemptions from bankruptcy and attempted to avoid inclusion of his vested interest in the professional association’s qualified profit-sharing plan in his bankruptcy estate. Each year the association had allocated $30,000, the maximum available, to the plan for each doctor. Brooks had a substantial vested interest in the plan at the time he filed for bankruptcy. Under the terms of the plan, each participant could direct the trustee to make certain investments in his own name, but the purchase money is provided by another.”

property in his own name, but the purchase money is provided by another.” Id. (citing to Grasty v. Wood, 230 S.W.2d 568, 572 (Tex. Civ. App.—Galveston 1950, writ ref’d n.r.e)).

205. Id. A resulting trust does not arise unless the presumption of gift is rebutted. Id.

206. Id.

207. Id. See RESTATEMENT (SECOND) OF TRUSTS § 443 (1977).


210. 749 S.W.2d at 205 (citing to Hall v. Barrett, 126 S.W.2d 1045, 1048 (Tex. Civ. App.—Fort Worth 1939, no writ)). The court also noted that other jurisdictions require clear and convincing evidence for rebutting the presumption of a gift when a resulting trust will be imposed if a gift is not found. 749 S.W.2d at 205. The court cited many examples, including D’uva v. D’uva, 74 So. 2d 889, 891 (Fla. 1956); Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888, 892 (1966); Mims v. Mims, 305 N.C. 41, 44, 286 S.E.2d 779, 790 (1982).

211. 749 S.W.2d at 205.


213. In re Brooks, 844 F.2d at 264.

ment options with the funds contributed. The plan provided that the trustee could make loans to a participant up to a given percentage of that participant's vested interest in the plan upon proof of hardship. The plan also provided that a participant would be entitled to his vested interest in the plan upon termination of employment if the participant were employed by the association for a minimum of three years before terminating employment.

The Fifth Circuit noted that Texas law concerning spendthrift trusts would apply since Brooks elected to claim his exempt property under Texas law. The court determined that Brooks was a settlor of the profit-sharing plan because he was an owner of the professional association and his earnings contributed to funding the trust. The court examined the policy behind spendthrift trusts, which is one that prevents a settlor from shielding his or her assets from creditors merely through the creation of a trust with antialienation provisions, and determined that the profit-sharing plan in which Brooks participated did not meet the purposes of a spendthrift trust. The court determined that perhaps even more important than Brooks's control over his interest in the plan as a beneficiary was his control over the plan as an owner of the professional association.

In *Brock v. Lindemann* the Northern District of Texas held that a pension and profit-sharing plan trustee may offset the interest of a trust beneficiary against a judgment awarded to the trustee against the beneficiary for the beneficiary's knowing collaboration with the breach of fiduciary duty by a previous trustee of the plan. After a nonjury trial, the court found that a beneficiary of the plan knowingly engaged in misconduct with a former

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215. 844 F.2d at 261. Texas law allows spendthrift trusts, but a grantor cannot protect his interest in a trust from his creditors. TEX. PROP. CODE ANN. § 112.035(d) (Vernon 1984) provides that "[i]f the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest does not prevent his creditors from satisfying claims from his interest in the trust estate." *Id.*

At the time Brooks filed for bankruptcy vested interests in qualified plans were not exempt from the bankruptcy estate under Texas law. The legislature amended the Property Code in 1987 to add an exemption for interests in qualified plans under federal tax law. Act of June 16, 1987, ch. 376, § 1, 1987 Tex. Sess. Law Serv. 3735, 3735 (Vernon), now codified at TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1989).

216. 844 F.2d at 262.

217. *Id.* at 262-63. Because Brooks and the other participants in the plan could direct the manner of investments, borrow from his share in the plan, and receive his entire vested interest in the plan by resigning from the professional association and then rejoining the association a short time later, the court determined that the plan conflicted with the policy behind spendthrift trusts. *Id.* at 263.

218. *Id.* As an owner of the 32-member association, Brooks could vote to withhold or reduce association contributions to the plan, to amend the rules allowing the beneficiaries access to their interests in the plan, or to abolish the plan altogether. The court stated as follows: Collectively, then, the 32 doctors are "the settlor," and they may not, by pooling their earnings and channeling them through a professional association, accomplish what they are forbidden to accomplish individually. They may not set aside part of what they earn, under terms and restraints of their own choosing, and shield such earnings from their creditors.

trustee of the plan. The court entered judgment in excess of one million dollars against the beneficiary. Some years prior to the trial in which judgment was awarded against the beneficiary, he and his wife were divorced, and she was awarded one-half of his plan benefits in the divorce decree. The trustee of the plan sought to enforce the judgment against the interest of the beneficiary and against the interest of the beneficiary's former wife. ERISA imposes duties upon fiduciaries of qualified plans, as well as liability for breach of those duties. A major purpose of ERISA is to "protect . . . the interests of participants in employee benefit plans and their beneficiaries." Accordingly, ERISA includes antialienation provisions as well as the imposition of liability for breach of fiduciary duty of those responsible for handling trust funds. Both the beneficiary and his former wife argued that his and her respective interests could not be reached to satisfy the judgment. The court analyzed the two interests separately. Because the beneficiary himself participated in the former trustee's misconduct, the court found that the "equitable offset remedy is available against a nonfiduciary who is jointly and severally liable for the knowing participation in a fiduciary's breach." Under these facts the court held the antialienation provision of ERISA does not prevent the present trustee of the plan from offsetting the beneficiary's plan benefits against the judgment. The court held that the trustee could not offset any benefits payable to the beneficiary's former wife under either Texas law or ERISA.

220. Id. at 680.
221. Id.
223. Id. § 1104.
224. Id. § 1109(a) provides as follows:
   Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to other equitable or remedial relief as the court may deem appropriate.
225. Id. § 1001(b).
226. Id. § 1056(d)(1). One exception to the antialienation provision is found in id. § 1056(d)(3)(A), which allows assignment of a beneficiary's interest pursuant to a qualified domestic relations order.
227. 689 F. Supp. at 682. The court cited Crawford v. La Boucherie Bernard Ltd., 815 F.2d 117, 122 (D.C. Cir.), cert denied sub nom. Goldstien v. Grawford, 108 S. Ct. 328 (1987), in which the D.C. Circuit held that offsetting a beneficiary's interest in a plan over which the beneficiary served as fiduciary was appropriate when the beneficiary breached his fiduciary duty.
228. 689 F. Supp. at 682.
229. Id. at 682-83. The court noted that under Texas law the community property of the couple was severed upon divorce and the community property interest retained by a former spouse became that spouse's separate property. Id. at 683. A person's separate property cannot be reached to satisfy a judgment against his or her former spouse unless both former spouses are parties to the suit. See Stewart Title Co. v. Huddleston, 598 S.W.2d 321, 323 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.). Additionally, separate property cannot be reached to satisfy a judgment on a community debt if the judgment is not entered until after the divorce is final and if the former spouse had no knowledge of, did not participate in, and did not benefit from the community debt. See Miller v. City Nat'l Bank, 594 S.W.2d 823, 826 (Tex. Civ. App.—Waco 1980, no writ).

The court then examined the provisions of ERISA and determined that the beneficiary's
Trusts and Trustees. The court in *InterFirst Bank v. Risser* held that a corporate trustee breached its fiduciary duty through bad faith and self-dealing, but substantially reduced the amount of the punitive damages awarded by the trial court. *InterFirst Bank* was named successor trustee of trusts established under the will of Dr. Joe Risser, Sr. The original trustee died prior to the time Dr. Risser's estate was fully distributed, and Interfirst did not succeed as trustee until a final account was approved in the estate. A major asset of the estate, which was to be divided evenly between the testamentary trusts, was a 32.28% ownership, represented by 968.5 shares of stock, in Southwest Pump Company. The bank had had considerable business dealing with Southwest Pump Company, which Dr. Risser's father founded, for over forty years at the time the bank became trustee. A short time after becoming trustee, the bank sold the shares in Southwest Pump Company to the company for $500,000, which was $516.26 per share. The stock was valued at $200 a share on Dr. Risser's estate tax return and at $185 a share on the estate's final account. The beneficiaries claimed that the bank violated its duty of loyalty through self-dealing in the stock sale and that the bank sold the stock to Southwest Pump Company for less than its worth. The jury, after hearing a number of experts testify about the value of the stock, determined that the bank had sold the stock for less than its value and that the bank had breached its fiduciary duty in the sale of the stock. The trial court awarded actual damages, damages in the amount of the interest that the trusts lost by not receiving full value for the stock sale, the return of all trustee fees plus interest, and punitive damages. The bank appealed. The court of appeals first found that liability for breach of trust under the terms of the will could only be found if the trustee engaged in "self-dealing, bad faith, or intentionally adverse acts or reckless indifference toward the interest of the beneficiary." The court next determined, after a lengthy review of the expert witnesses' testimony on stock valuation, that the jury had sufficient evidence to determine the market value of the stock at the time of the sale. The court then examined the Texas Trust Act provision prohibiting the trustee's sale of trust property to itself or to a business associate and determined that the bank and Southwest Pump Company were not business associates within the meaning of the statute. The court held that former wife received her interest in the plan under a qualified domestic relations order and that her interest was protected by the antialienation provision. 689 F. Supp. at 683. No evidence existed that the former wife had any knowledge of her former husband's misconduct in connection with the plan. The court accordingly held that the former spouse's interest could not be reached to satisfy the judgment. *Id.* 230. 739 S.W.2d 882 (Tex. App.—Texarkana 1987, no writ). 231. *Id.* at 905. 232. *Id.* at 909. 233. *Id.* at 888. 234. *Id.* at 895. 235. TEX. REV. CIV. STAT. ANN. art. 7425b-12, repealed by Act of June 19, 1983, ch. 567, art. 1, § 15, 1983 Tex. Sess. Law Serv. 3269, 3332 (Vernon). This provision is now codified at TEX. PROP. CODE ANN. § 113.053(a) (Vernon Supp. 1989). Act of June 19, 1983, ch. 567, art. 2, § 2, 1983 Tex. Sess. Law Serv. 3269, 3354-55 (Vernon). 236. 739 S.W.2d at 896. The court found that the course of business dealings between the
the combination of three facts gave the jury sufficient evidence to find that the bank engaged in self-dealing and acted in bad faith: first, the bank did not sell the stock at its market value; second, the bank made no effort to market the stock, obtain an independent appraisal of the value of the stock, inform the beneficiaries of its intent to sell the stock, or otherwise obtain the highest possible price for the stock; and finally, the bank ensured that Southwest Pump Company would have a better chance of repaying outstanding loans to the bank if the bank sold the company the stock for less than its market value.237 The court turned its attention to the amount of the punitive damages.238 The court applied the five factors for determining the reasonableness of the amount of punitive damages enumerated by the supreme court in Alamo National Bank v. Krause239 and determined that the amount awarded by the trial court in this case was excessive.240 The dissent disagreed with the majority that sufficient evidence existed that the bank acted in bad faith and with the imposition of punitive damages.241

Procedure. In Steph v. Scott242 the Fifth Circuit affirmed the district court and held that res judicata barred the claims of the plaintiffs since a state court had previously adjudicated the claims in an action involving all the parties.243 Patricia Scott Steph, who died in 1971, established a testamen-
tary trust for the benefit of her children. The co-trustees of the trust sued Steph's husband for her wrongful death in 1983, and the co-trustees and the husband entered a settlement agreement that ended the suit in that same year. In 1977 Steph's husband petitioned the Tom Green County district court to approve the settlement agreement and an accounting of the trust assets. The state court found that it had jurisdiction, that all necessary parties had received citation of service, and that the necessary parties appeared before the court. The minor beneficiary was represented by a guardian ad litem and by his natural guardian, his father. The court approved the resignation of the trustees, the appointment of successor trustees, the transfer of trust assets to a bank in another part of the state, and an accounting of the trusts. The court discharged the co-trustees from liability before July 1, 1977. Finally, the court accepted the 1973 settlement agreement. Steph's husband sued the former co-trustees and the banks in which the trust funds were kept in federal district court in 1983. In his suit Steph's husband alleged that the defendants had misappropriated trust funds and had mismanaged the trusts. The federal district court granted the defendants motion for summary judgment based on res judicata. The Fifth Circuit found that the Tom Green County district court's judgment might be voidable, not void, if all of the allegations made by Steph's husband were true and that, as such, the voidable judgment could not be collaterally attacked in federal court.244 The Fifth Circuit also held that Steph's husband's request for an accounting of the trust property is a case that should be heard in state court.245

The Texas Supreme Court reversed the decisions of the court of appeals and the trial court in Blieden v. Greenspan.246 Hyman Blieden died testate in 1969. Two trusts were created under the terms of his will. The co-trustees of one of the trusts were the testator's wife, his brother, and Arthur Greenspan. The brother died in 1970 and the wife died in 1983. After the wife's death the beneficiaries requested an accounting from Greenspan, who did not provide the accounting. The beneficiaries then brought an action for an accounting. Greenspan failed to provide an accounting after the trial court ordered him to do so. Prior to a show cause hearing, Greenspan submitted a signed document that purported to be an account in which he claimed trustee and attorney's fees. The beneficiaries objected to the accounting and asked the court to remove Greenspan as trustee. The court

244. Id. at 270. The court stated that, under Texas law, a state court judgment may be collaterally attacked in federal court in only four circumstances:
1) if the state court lacked jurisdiction over the party or his property; 2) if the state court lacked jurisdiction over the subject matter of the suit; 3) if the state court lacked jurisdiction to enter the particular judgment rendered; or 4) if the state court lacked the capacity to act as a court.

Id. See Austin Indep. School Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973). The federal district court was bound by the jurisdictional recitals that the Tom Green County district court made concerning its personal and subject matter jurisdiction over all parties to the suit and the state court judgment thus could not be subject to collateral attack in the federal court system. 840 F.2d at 270.

245. 840 S.W.2d at 271. The Fifth Circuit stated that its decision in this case does not preclude Steph's husband from pursuing an accounting in state court. Id.

246. 751 S.W.2d 858 (Tex. 1988) (per curiam).
found that Greenspan failed to provide the accounting and ordered Greenspan to resign as trustee. Greenspan then filed a motion for summary judgment asserting that he never became trustee. The district court granted the summary judgment and the court of appeals affirmed. The supreme court found that fact issues concerning whether Greenspan accepted the trust existed and that a summary judgment was improper.

In *Corum Management Co. v. Aguayo Enterprises* the court found that a trial court did not err in rendering judgment for a plaintiff that had failed to notify trust beneficiaries within the time frame provided in section 115.015 of the Texas Property Code when the reason the plaintiff failed to do so was the trustee's delay in providing the names of the beneficiaries to the plaintiff. The plaintiff brought suit under the Texas Deceptive Trade Practices Act (DTPA) for alleged misrepresentation of the terms of a lease. The trust owned the premises that were the subject of the lease. The plaintiff first requested in writing that the trustee provide it with the names of the trust beneficiaries on March 4, 1987. The plaintiff made several subsequent requests, but the trustee did not provide the list of beneficiaries until May 27, 1987. The hearing at which the trial court rendered judgment was on July 24, 1987. The trustee contended that the judgment was improper and should be reversed because the beneficiaries did not receive adequate notice under section 115.015 of the Property Code. The trustee failed to

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247. 742 S.W.2d 93, 98 (Tex. App.—Beaumont 1987, no writ), rev'd per curiam, 751 S.W.2d 858 (Tex. 1988).

248. 751 S.W.2d at 859-60. Greenspan signed warranty deeds in which he conveyed the testator's property as trustee, filed claims for trustee fees, and tendered his resignation as trustee, all of which tend to show that he accepted his trust. Greenspan argued that the beneficiaries admitted that he never accepted his trust in their list of contested fact issues, in which they alleged that the "evidence will show that Defendant never accepted the trust." *Id.* at 859. The supreme court held that this language was not an admission by the beneficiaries that Greenspan did not accept his trust but was instead poor wording. *Id.* at 859.

249. 755 S.W.2d 895 (Tex. App.—San Antonio 1988, writ denied).

250. *TEX. PROP. CODE ANN.* § 115.015 (Vernon 1984). This section provides as follows:

(a) A court may not render judgment in favor of a plaintiff in an action on a contract executed by the trustee or in an action against the trustee as representative of the trust for a tort committed in the course of the trustee's administration unless the plaintiff proves that before the 31st day after the date the action began or within any other period fixed by the court that is more than 30 days before the date of the judgment, the plaintiff gave notice of the existence and nature of the action to:

(1) each beneficiary known to the trustee who then had a present or contingent interest; or

(2) . . .

(b) The plaintiff shall give the notice required by Subsection (a) of this section by registered mail or by certified mail, return receipt requested, addressed to the party to be notified at the party's last known address. The trustee shall give the plaintiff a list of the beneficiaries or persons having an interest in the trust estate and their addresses, if known to the trustee, before the 11th day after the date the plaintiff makes a written request for the information.

(c) The plaintiff satisfies the notice requirements of this section by notifying the persons on the list provided by the trustee.

251. 755 S.W.2d at 901.


comply with its statutory time frame for providing the names of the beneficiaries. The appeals court stated that granting relief to the trustee under a statute the trustee itself violated would be "manifestly unjust."254

In another case the court held that a default judgment against a trustee for breach of fiduciary duty is a final, appealable judgment rather than an interlocutory judgment.255 The beneficiaries of a trust that under its terms should terminate no later than December 13, 1985, sued the trustee, both in his fiduciary and individual capacity, for failure to distribute the trust assets and for an accounting. The trustee did not answer the suit. The beneficiaries proved the damages, and the trial court awarded a default judgment on June 19, 1986. The trustee made a motion to the trial court to set aside the default judgment on December 12, 1986. The trial court ruled on December 17, 1986, that it no longer had jurisdiction. The appeals court noted that a final judgment is one that disposes of all issues and all parties256 and that the trial court disposed of all parties even though it did not address the two capacities, fiduciary and individual, in which the defendant was sued.257 The court of appeals reformed the trial court's award of damages by reducing it by $2,005.258

254. 755 S.W.2d at 901. The court also noted that the trustee had failed to preserve the error and had actually sought the ruling that the trustee contended was erroneous on appeal. Id.
256. Id. (citing to Houston Health Clubs, Inc. v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986); Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982); North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966)).
257. Id. The trial court's judgment stated that the trustee "breached his fiduciary duties and violated the trust agreement by failing to distribute or account for trust funds." Id. The judgment thus addresses the defendant's actions in his fiduciary capacity. The beneficiaries proved the amount of their damages and the trial court entered judgment for precisely that amount. Id. As such, the court of appeals reasoned, no reason existed for considering the cause of action against the trustee in his individual capacity. Id. at 739.
258. Id. The beneficiaries provided testimony in which the value of the trust assets were estimated by using interest rates and information concerning the average return on investments for the 10 years preceding the trial. The trial court entered judgment for $2,005 more than the estimate. The court of appeals accordingly reduced the judgment by the $2,005 excess over the amount of the estimate. Id.

The court of appeals also found that, although the defendant may not have received proper notice under Tex. R. Civ. P. 239a, any noncompliance with the rule did not result in reversible error. 742 S.W.2d at 740. The court further held that the spelling of the defendant's name, "MCDONOUGH" rather than "McDONOUGH," did not render the citation defective. Id.