1990

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Recommended Citation
Lynne McNiel Candler, Wills and Trust, 44 Sw L.J. 301 (1990)
https://scholar.smu.edu/smulr/vol44/iss1/12

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WILLS AND TRUST

by

Lynne McNiel Candler*

This Article reviews legislative and case law developments in the areas of wills, nontestamentary transfers, heirship, estate administration, guardianships, and trusts. The Survey period covers decisions published between November 1, 1988, and October 31, 1989, as well as changes to the Probate Code and the Property Code enacted by the Seventy-First Texas Legislature.

I. WILLS

Will Construction. In White v. Moore1 the supreme court reversed and remanded the case because it determined that the language in the will was ambiguous.2 Mattie Moore left her property to her six children, whom she named in the will, and to the survivor or survivors of the children at her death.3 One of Moore's children predeceased her, leaving a daughter and a granddaughter. The trial court, affirmed by the court of appeals,4 had entered a summary judgment that the daughter and granddaughter of the deceased child could not take under the terms of the will. The supreme court further considered whether, if Moore were found to have intended a class gift to her surviving children, the antilapse statute5 would take precedence over the class gift.6 The court held that the antilapse statute does not override the testator's intent when the testator desires only surviving members of a class to take under his or her will.7 The dissent stated that the language of

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1. 760 S.W.2d 242 (Tex. 1988).
2. Id. at 243, 244. The court found that the meaning of the language was so unclear that the trial court would have to hear evidence on the testator's intent. Id. at 244.
3. The pertinent language in the will is set forth id. at 243.
5. TEX. PROB. CODE ANN. § 68 (Vernon 1980).
6. 760 S.W.2d at 244.
7. Id. The court noted that the Texas Legislature could have included language in § 68 of the Probate Code to apply the antilapse statute to class gifts, but it did not do so. Id. The court stated as follows: We perceive no statutory basis in Texas for holding that a testator may not validly require survivorship as a condition to taking under his will, even if the class devisees would otherwise come within the coverage of section 68 of the Texas Probate Code. Furthermore, we find no public policy interest sufficient to invalidate survivorship provisions so intended.
the will was unambiguous and noted that the court should not consider the issue of ambiguity on appeal because the issue was not presented to the trial court in writing.\textsuperscript{8}

In \textit{Hancock v. Krause}\textsuperscript{9} the Houston court determined that the term “heirs” as used in a holographic will meant the specific legatees rather than its usual meaning.\textsuperscript{10} The testator left a life estate in his property to his wife, with specific devises and bequests of the estate following his wife’s death. The testator stated that his heirs would receive their “bequested inheritance” only upon the death of his wife. The testator did not leave any property to his three children by his first wife, who brought suit for declaratory judgment construing the will. The trial court, in a summary judgment, found that the use of the term “heirs” did not provide any rights to his heirs at law because he spoke of the heirs’ bequested inheritance. The appeals court agreed.\textsuperscript{11} The appellate court further found that an interlineation made by the testator at a later date was valid.\textsuperscript{12} They determined, however, that the trial court erred in determining that the term “loose monies” meant all legal tender because the term is ambiguous.\textsuperscript{13}

The San Antonio court in \textit{Sharp v. Broadway National Bank}\textsuperscript{14} considered whether a testator intended to include adopted children in his definition of “relatives of the whole blood and/or their issue.”\textsuperscript{15} At the time the testator executed his will he had several whole brothers and sisters and one half-brother living. One of the testator’s whole brothers had died, survived by four children, two of whom had adopted children. The testator’s property passed into trust for the benefit of his relatives of the whole blood on his death. One of the deceased brother’s children who had adopted children died in 1984. The trustee bank refused to distribute her former share of income to her two adopted children. The bank filed an action for declaratory judgment construing the will and the trial court granted summary judgment, finding that the testator unambiguously excluded any beneficiary’s adopted children from taking an interest in the testamentary trust. The appeals court considered the wording of the Texas adoption statute in effect at the time the

\textsuperscript{8} \textit{Id. at 245} (Kilgarlin, J., dissenting). The dissent noted that an issue not presented to the trial court in writing could not be considered as grounds for reversal on appeal per \textit{TEx. R. Civ. P. 166a(c)}. \textit{Id.}

\textsuperscript{9} 757 S.W.2d 117 (Tex. App.-Houston [1st Dist.] 1988, no writ).

\textsuperscript{10} \textit{Id. at 120}.

\textsuperscript{11} \textit{Id. The testator also stated in the specific bequests that the named legatees “and heirs” would take the devised and bequeathed property. The court construed “heirs” as used in the specific bequests to mean the heirs of the named beneficiaries, not the testator’s heirs. \textit{Id.}}

\textsuperscript{12} \textit{Id. at 121. The will and the interlineation were both holographic.}

\textsuperscript{13} \textit{Id. The ambiguity presents a factual issue, thus precluding summary judgment. The court also found that the term “MMCD(6)” was ambiguous despite the contention that the term meant “Money Market Certificate of Deposit.” \textit{Id. at 122. The inventory in the estate listed five certificates of deposit and no evidence existed that the testator had a sixth that he closed prior to his death.}}

\textsuperscript{14} 761 S.W.2d 141 (Tex. App.—San Antonio 1988, no writ).

\textsuperscript{15} \textit{Id. at 143.}
testator executed his will, but stated that the statute did not control when the testator clearly intended otherwise.17

In Disabled American Veterans v. Mullin the San Antonio court found that the testator left his wife his community interest in their residence in fee simple.19 The testator’s wife died some years after her husband and left the residence to her siblings. The court stated that in the absence of a clear intention to convey a lesser estate, a will conveys a fee simple estate.20 The court found that the wife made full disposition of the residence in her will, thus leaving no residuary interest in the residence for the Disabled American Veterans to take under the testator’s will.21

The Amarillo court in Roberts v. First State Bank construed the wills of a husband and wife to provide that only their children who survived them could take under their wills.23 The couple’s wills, which had identical provisions, provided for a trust for the surviving spouse for life with the remainder to be divided into as many equal shares as there were children surviving the first spouse to die. The wills also provided that if the other spouse predeceased the testator, the testator’s estate would be divided into as many equal shares as there were children living upon the testator’s death. Finally, the wills contained a provision for distribution of the share of a child who survived the first spouse to die, but who predeceased the death of the surviving spouse, to that child’s descendants. After the execution of their wills, but prior to the death of the first of them to die, two of their children died. All of the couple’s other children survived both of them. The husband predeceased his wife, and the bank trustee of the testamentary trust and executor of the estate of the wife sought a declaratory judgment as to whether the trust and estate should be distributed only to the children who survived the couple or to the surviving children and the children of deceased children. The trial court entered a declaratory judgment that the testators intended to divide their estates among their children who survived at their respective deaths. The appeals court found that each of the seven children who survived the husband was entitled to a one-seventh share of the marital trust upon the wife’s death, and that if one of the seven surviving children had predeceased the wife his or her share would have passed to his or her de-

17. 761 S.W.2d at 144. The court further found that the trial court erred in allowing the bank’s attorney to testify as an expert witness when the attorney failed to designate himself as an expert prior to thirty days before trial as required by former TEX. R. CIV. P. 166b(5) (now TEX. R. CIV. P. 166b(6)). 761 S.W.2d at 146-47. This error, however, was not reversible error.
18. 773 S.W.2d 408 (Tex. App.—San Antonio 1989, no writ).
19. Id. at 411. The testator left all of his property to his wife “with full power to sell or dispose of same as to her may seem best.” Id. at 409. The testator provided, however, that if his wife died without disposing of their residence he wished it to go to their granddaughter if she met certain conditions or, if the granddaughter did not meet those conditions, to the Disabled American Veterans.
20. Id. at 410.
21. Id. at 411.
22. 774 S.W.2d 415 (Tex. App.—Amarillo 1989, writ granted).
23. Id. at 416.
scendants. Further, each of the seven children who survived the wife was entitled to a one-seventh share of her estate.

In Perkins v. Damme the Corpus Christi court found that the testator did not intend to include the value of property passing to his brothers by joint tenancy with rights of survivorship in determining the value of a bequest to his spouse's relatives of a "like amount in value." The court based its holding on the testamentary gift to his brothers of real and personal property located in Kansas and real property located outside of Texas. The court found that property held as a joint tenancy with rights of survivorship passes automatically to the survivors on the death of a joint tenant and does not pass pursuant to the terms of the deceased joint tenant's will. Thus, the value of the property passing pursuant to the joint tenancy could not be included in determining the value of the property passing to the brothers under the terms of the will.

In McGill v. Johnson the Austin court found that the testator's will created a contingent remainder interest for the testator's two sisters in property placed in trust for his son's benefit. The testator's will established a trust that required the trustee to distribute all of the personal property in the trust to the son on his thirty-fifth birthday, with distribution of the real property as well if the son then had a living biological child born in wedlock. If the son did not have a living child when he attained the age of thirty-five and thereafter no child was born to him during marriage, the trustee was to distribute the real property to the testator's two sisters or their issue. One sister had a daughter, but the other sister had no living issue. When the sister with no children died, the son claimed that the gift to that sister lapsed and that he took her interest in the real property by intestacy. The court agreed.

Testamentary Capacity. In Alldridge v. Spell the Texarkana court held that the jury's finding that the testator did not have testamentary capacity was not against the weight and preponderance of the evidence. The testator's daughter offered a will for probate and the testator's widow contested the probate because of undue influence and lack of testamentary capacity.

24. Id. at 417-18.
25. Id. at 418.
27. Id. at 766.
28. Id. at 767.
29. Id.
30. Id. The court also found that no genuine issue of fact existed concerning the valuation placed on the property passing to the brothers under the will. Id. at 768.
31. 775 S.W.2d 826 (Tex. App.—Austin 1989, writ requested).
32. Id. at 831. The court first found that the remainder gift of the trust property to the testator's two sisters was a specific bequest, not a class gift. Id. at 829.
33. Id. at 832. The court also determined that the open mine doctrine applied not only to oil and gas leases included in the trust estate that the testator executed during his life, but also to oil and gas leases executed by the trustee pursuant to the right given to the trustee to execute mineral leases. Id. at 833. The life tenant thus was entitled to all of the proceeds from the leases, not just the interest earned on royalties and bonuses. Absent the application of the open mines doctrine, the royalties and bonuses would have been included as trust corpus.
34. 774 S.W.2d 707 (Tex. App.—Texarkana 1989, no writ).
35. Id. at 710.
Both the daughter and the widow introduced evidence concerning the testator’s testamentary capacity, but the jury determined that the testator lacked capacity. The court also found that the testator’s daughter was not entitled to attorney’s fees because she did not request a jury finding of whether she offered the will for probate in good faith.\textsuperscript{36}

In \textit{Campbell v. Groves} the El Paso court found that the testator had testamentary capacity on the day he executed his will.\textsuperscript{37} Direct evidence existed that the testator knew the objects of his bounty and the extent and nature of his estate when he executed his will.\textsuperscript{38} Other testimony existed that the testator occasionally hallucinated, was disoriented and felt persecuted, but these occasions occurred other than on the date he executed his will.

In \textit{Jones v. LaFargue} the Houston court found that substantial evidence supported the jury’s finding that the testator lacked testamentary capacity.\textsuperscript{40} The testator’s nieces and nephews, his nearest relatives, contested a will admitted to probate that benefitted three individuals who were not members of the testator’s family. The contestants, who had the burden of establishing the testator’s lack of capacity since the will had already been admitted to probate, introduced medical evidence that the testator suffered from dementia, a degenerative disease, prior to the date he purportedly executed the will.

The appeals court found that the evidence concerning decedent’s lack of testamentary capacity was both factually and legally sufficient to support the jury’s finding that the testator lacked testamentary capacity.\textsuperscript{42}

\section*{II. Nontestamentary Transfers}

The Beaumont court in \textit{Grey v. Bertrand} examined a joint tenancy bank account that did not provide for rights of survivorship. The decedent opened an investment account in his name, the names of his three sons, and his wife’s name. Two days after the decedent’s death, the three sons contacted the bank and requested payment of any funds held in any bank accounts in their names. The bank officer contacted by the sons informed them that the bank held no accounts in their names. The bank paid the funds in the account to the decedent’s widow two days later. The sons sued the bank and the bank officer, alleging that the defendant bank and bank officer had fraudulently concealed the sons’ interest in the account. The jury found that the decedent had not made a gift of any portion of the funds in

\begin{itemize}
  \item \textsuperscript{36} \textit{Id.} at 711.
  \item \textsuperscript{37} 774 S.W.2d 717 (Tex. App.—El Paso 1989, writ denied).
  \item \textsuperscript{38} \textit{Id.} at 719.
  \item \textsuperscript{39} \textit{Id.} The court also stated as follows: "[a] person could appear bizarre or absurd with reference to some matters and still possess the assimilated and rational capacities to know the objects of his bounty, the nature of the transaction in which he was engaged and nature and extent of his estate on a given date." \textit{Id.}
  \item \textsuperscript{40} 758 S.W.2d 320 (Tex. App.—Houston [14th Dist.] 1988, writ denied).
  \item \textsuperscript{41} \textit{Id.} at 326. For a discussion of other issues in this case, see \textit{infra} notes 92-93 and accompanying text.
  \item \textsuperscript{42} \textit{Id.} at 327.
  \item \textsuperscript{43} 767 S.W.2d 498 (Tex. App.—Beaumont 1989, no writ).
\end{itemize}
the account to his sons during his life, but that the defendant bank and bank officer defrauded the sons by not revealing information about the account to the sons when they requested payment. The jury further awarded the sons exemplary damages from the bank and the bank officer. The trial court disregarded the jury's finding that the funds in the account were not the subject of an inter vivos gift and awarded actual damages with prejudgment interest plus the exemplary damages determined by the jury. The appeals court found that the decedent did not intend the funds in the account to be a gift to his sons; thus title to the funds would devolve under the terms of the decedent's will.44 The sons could not prove an interest in the funds in the account, so they could not recover actual damages for fraud or exemplary damages.45

III. HEIRSHIP

Social Security Benefits for Illegitimate Children. In two cases,46 the Fifth Circuit determined that natural children of deceased wage earners are entitled to Social Security benefits because the children stand to inherit from the decedent under the Texas intestacy statute.47 A minor entitled to take a decedent wage earner's personal property under the intestacy laws of the state in which the decedent wage earner was domiciled at the time of death may obtain Social Security survivor's benefits.48 In Smith v. Bowen49 the court, interpreting Texas law, found that the minor was the natural child of the decedent, thus entitling the minor to survivor's benefits.50 The court

44. Id. at 500.
45. Id. The court held that exemplary damages cannot be awarded in the absence of actual damages. Id.
47. 883 F.2d at 20; 862 F.2d at 1168.
49. 862 F.2d 1165 (5th Cir. 1989).
50. Id. at 1168. The court noted that it was bound by the law of Texas at the time that the application for benefits was originally made in determining the minor's eligibility to receive the benefits. Id. at 1166 (citing Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982)). The minor's mother originally applied for benefits for the child in 1981, at which time the child could inherit from his natural father under three theories: "(1) the child was born or conceived before or during the marriage of his father and mother; or (2) was legitimated by Chapter 13 of the Texas Family Code; or (3) the father executed a statement of paternity as provided by § 13.22" of the Family Code. Id.; TEX. PROB. CODE ANN. § 42(b) (Vernon 1980). The child's parents were never married, nor did the decedent execute a statement of paternity. In 1981 chapter 13 of the Family Code provided that a court determination of paternity must be filed within one year of the child's birth, but the child was over two when his mother first applied for benefits without receiving a judicial determination of paternity. In 1982, however, the United States Supreme Court, in Mills v. Habluetzel, 456 U.S. 91 (1982), held that the Texas statute's requirement that a judicial determination of paternity be initiated within one year of the child's birth was unconstitutional because it denied illegitimate children equal protection under the law. Id. at 100-01. The Smith v. Bowen court determined that because the child in this case had no remedy available to him because the statute of limitations for bringing an action seeking a judicial determination of paternity was unconstitutionally short when he sought benefits, the court must examine the evidence presented to the administrative law judge to determine whether a Texas court would find that the child was the natural child of the decedent. 862 F.2d at 1167-68. The court found that the child was the decedent's natural child and was thus eligible for survivor's benefits. Id. at 1168.
held, in *Garcia v. Sullivan*, that a final decree of paternity entered in state court entitled a minor child to survivor's benefits.\(^5\)

**Intestate Succession.** The Tyler court, in *Henson v. Jarmon*,\(^5\) held that the trial court did not err in applying section 42(b) of the Probate Code\(^5\) as it was amended after the decedent's death, to a determination of heirship proceeding brought by the decedent's two natural daughters.\(^5\) The decedent, who died intestate, was not survived by a spouse or legitimate children. The decedent's heirs other than the two natural daughters consisted of his siblings and some nephews and a niece. The jury found that the two daughters were in fact the decedent's natural daughters and the trial court ordered that the two natural daughters would each inherit one-half of the decedent's estate. The other heirs appealed, contending that the decedent died prior to the enactment of the 1987 amendment to section 42(b)\(^5\) and the court's application of the amendment to the case denied them of their statutory inheritance rights. Section 37 of the Probate Code provides that inheritance rights immediately vest in a person's heirs when that person dies intestate. The appeals court relied on *Reed v. Campbell*\(^5\) to find that the failure to apply the 1987 amendment to section 42(b), even though the decedent died prior to its enactment, would have resulted in deprivation of the daughters' equal protection under the fourteenth amendment.\(^5\)

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51. 883 F.2d 18 (5th Cir. 1989).
52. Id. at 20. The child's mother and father were engaged to be married when the mother became pregnant. The father died shortly thereafter. In the mother's original application for survivor's benefits for the child, she asserted that the father was contributing to her support at the time of his death. The mother apparently attempted to claim benefits for her child under 42 U.S.C. § 416(h)(3)(C)(ii)(Supp. 1987), which allows benefits if the decedent wage earner contributed to the minor's support at the time of death. The administrative law judge denied benefits, reasoning that the decedent was not contributing to the minor's support at the time of his death since the minor was unborn. The district court affirmed. Some years later the mother obtained the decree of paternity on behalf of her child in a proceeding notified to all interested parties. The decedent's parents represented him and consented to the entry of the judgment. Following the entry of the order, the mother applied for, but was denied, benefits under 42 U.S.C. § 416(h)(2)(A)(Supp. 1987). The court held that the Secretary of Health and Human Services should have followed the state court's ruling in the paternity proceeding and should have allowed the minor survivor's benefits. 883 F.2d at 20.
53. 758 S.W.2d 368 (Tex. App.—Tyler 1988, no writ).
54. TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1989).
55. 758 S.W.2d at 371.
56. Prior to the 1987 amendment, an illegitimate child could inherit from his or her father if the child were born or conceived before or during the parents' marriage, if a court entered a decree of legitimation pursuant to chapter 13 of the Family Code, or if the father executed a statement of paternity in conformity with Family Code § 13.22. TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1987). The 1987 amendment provided a fourth method by which the child could claim paternal inheritance rights by allowing the child to prove that he or she was the father's biological child. TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1989).
59. 758 S.W.2d at 371. The court found that no legitimate state interest would be affected by the application of the amended statute in making the determination of whether the women were the natural daughters of the decedent. Id. The daughters filed their application for heirship within two months after the decedent's death, prior to the distribution of any of the estate to the other heirs. Thus, the court's order did not affect the legitimate interests that the state has in the orderly administration and distribution of the estate. Id.
In *Palmer v. State* the Houston court reversed a guilty verdict of criminal trespass. The appellant's father died intestate in 1983, survived by his second wife and his daughter. The second wife died in 1986 and left her interest in real property to two other individuals, one of whom was executrix of her estate. The executrix listed the real property on the inventory as the second wife's separate property and then deeded the real property to herself by an Executrix's Warranty Deed. The executrix placed a notice on the property that anyone, including the appellant, who attempted to enter the premises would be liable in criminal trespass. The appellant continued to visit the premises and was prosecuted for criminal trespass. The appellate court held that the appellant could not have committed criminal trespass since the property did not belong to another because the appellant's interest in the property vested immediately upon her father's death. The court noted that tenants in common have equal rights to possession of the real property. The court accordingly reversed the trial court and ordered acquittal on the criminal trespass charge.

**Proof of Intestacy.** In *Guajardo v. Chavana* the San Antonio court reversed the trial court's holding that the decedent died intestate and held that, as a result, the court's determination of heirship was premature. The decedent's widow, a son from a prior marriage, and two women who claimed to be his natural daughters survived him. The son, appointed the temporary administrator of his father's estate, filed an application for determination of heirship seeking to have the widow and himself declared the sole heirs. The son then filed a motion for summary judgment on the application for declaration of heirship. The affidavit filed in support of his motion stated that his father died intestate, but contained no evidence supporting that statement. The trial court entered an order finding that the decedent died intestate and that the widow and son were the sole heirs. The appeals court held that the son did not prove conclusively that the decedent died intestate. The son had admitted in a deposition that his father had told him that he had a will. Additionally, uncontested evidence indicated that the son did not search for a will among his father's papers. A summary judgment on the issue was thus inappropriate. The appeals court also noted that the son failed to follow the order of temporary administration because he did not collect his father's papers from his stepmother in order to protect the estate for the

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60. 764 S.W.2d 332 (Tex. App.—Houston [1st Dist.] 1988, no pet.)  
61. *Id.* at 336.  
62. *Id.* at 334. Tex. Prob. Code Ann. § 37 (Vernon Supp. 1989) provides that an intestate decedent's property immediately vests in his or her heirs upon the decedent's death. The elements of criminal trespass include the provision that a person enter or remain on the property of another with notice that his or her entry is forbidden or notice that he or she is to depart the premises. Tex. Penal Code Ann. § 30.05 (Vernon 1989).  
63. 764 S.W.2d at 335.  
64. *Id.* at 336.  
65. 762 S.W.2d 683 (Tex. App.—San Antonio 1988, writ denied).  
66. *Id.* at 684.  
67. *Id.* at 685.  
68. *Id.* at 684.  
69. *Id.* at 685.
benefit of the decedent's creditors and heirs.\textsuperscript{70} Finally, the court noted that the reversal of an in rem proceeding, such as the administration of a person's estate, applies to all persons interested in the decedent's estate.\textsuperscript{71}

\section*{IV. ESTATE ADMINISTRATION}

\textbf{Jurisdiction.} In \textit{Erbs v. Bedard}\textsuperscript{72} the Dallas court found that the probate court had no subject matter jurisdiction to hear several causes of action that were essentially shareholder derivative actions.\textsuperscript{73} The court, however, refused to rule on another cause of action, asserted for the first time in the third amended petition, because the probate court had never had the opportunity to rule on its jurisdiction.\textsuperscript{74} In \textit{Elliott v. Hamilton}\textsuperscript{75} the Beaumont court found that the trial court had jurisdiction to enter judgment in the absence of written pleadings.\textsuperscript{76} The Dallas court of appeals in \textit{Gaynier v. Ginsberg}\textsuperscript{77} found that the district court should have continued to exercise its jurisdiction when the pleadings showed that the statutory probate court did not have adequate jurisdiction to grant the full relief requested.\textsuperscript{78}

\textbf{Evidence.} The Corpus Christi court in \textit{In re Estate of Plohberger}\textsuperscript{79} found that the trial court did not commit reversible error by failing to exclude prejudicial evidence when the evidence to which the appellant objected had

\textsuperscript{70. Id.}

\textsuperscript{71. Id. One of the two alleged natural daughters did not pursue the appeal. The other requested that the findings of the appeals court apply to both of them.}

\textsuperscript{72. 760 S.W.2d 750 (Tex. App.—Dallas 1988, no writ).}

\textsuperscript{73. Id. at 752. The personal representatives of a decedent's estate brought these causes of action in their capacity as shareholders rather than in their capacity as personal representatives of the estate.}

\textsuperscript{74. Id. at 753. This new cause of action was brought in the name of the decedent's estate and alleged that the defendant had made tortious acts that harmed the estate itself, not just the estate as a shareholder in a corporation. The court also found that a visiting probate judge who had assigned himself to this case did not have an unambiguous statutory duty to disqualify himself. Id. at 755. The judge thus did not abuse his discretion for refusing to do so. Id. For a discussion of an earlier appeal of this case, see Candler, 1989 Annual Survey, supra note 4, at 321 n.118.}

\textsuperscript{75. 767 S.W.2d 262 (Tex. App.—Beaumont 1989, writ denied).}

\textsuperscript{76. Id. at 263. One of the decedent's daughters filed an application to probate his will after the original application to probate the same will had been contested. The daughter announced at the commencement of a jury trial that she had settled with the contestants. After trial to the jury, with the jury answering all questions in favor of the will proponents, the trial court entered an order admitting the will to probate. The will contestants appealed, asserting that the trial court had no jurisdiction to enter judgment in the absence of written pleadings. The appeals court noted that the daughter did not withdraw her application to probate, nor did she file a nonsuit or dismissal. Id. The appeals court also noted that the contestants did not object to the absence of pleadings prior to their motion for new trial and that the will proponents would have been bound by res judicata had the jury answered its issues adversely to them. Id.}

\textsuperscript{77. 763 S.W.2d 461 (Tex. App.—Dallas 1988, no writ).}

\textsuperscript{78. Id. at 463. The court noted that \textit{Tex. Prob. Code Ann. § 5A(b) (Vernon Supp. 1990)} does not fully divest the district court's jurisdiction if the probate court cannot grant the relief requested. Id. One remedy sought in this case was the removal of a trustee, which, at the time the case was filed, only the district court had jurisdiction to grant. Because the probate court could not grant this relief, the appeals court held that the district court should have continued to exercise jurisdiction. Id.}

\textsuperscript{79. 761 S.W.2d 448 (Tex. App.—Corpus Christi 1988, writ denied).}
previously been submitted to the jury with no objection. The evidence consisted of the medical records that were entered to show the decedent's state of mind. The appellant did not object to the entry of the medical records themselves, but did object when enlarged copies of some of the medical records were introduced. The court noted that the appellant's failure to object when the evidence was first introduced rendered harmless any error for allowing the introduction of prejudicial evidence. The court also found that the will admitted to probate was a valid will even though the testator had signed on one page and the witnesses had signed on another. Finally, the court found that a will executed under undue influence was void and could not serve to revoke a previous will.

In Evans v. Evans the Texarkana court examined the language of a release of lien and parol evidence concerning the recitation of consideration in the release. The decedent conveyed some real property to one of her sons, who executed a promissory note and deed of trust. After the son made his first annual payment under the note, the decedent executed a release of lien, reciting that the underlying indebtedness had been paid in full. The son continued making annual payments on the note until the decedent's death, when he filed the release of lien. The estate sued the son, alleging that he obtained the release of lien by undue influence and that the underlying indebtedness on the property still existed. The jury found that the son did not exert undue influence on the decedent and that the decedent did not intend to release the underlying indebtedness. The appeals court noted that parol evidence is admissible to show that the consideration recited in a document was not actually paid. All parties testified that the note was never fully paid, so the burden shifted to the son to prove that the decedent intended to release the full amount of the indebtedness despite his failure to pay the note in full. The court found that, since the son did not meet this burden, the estate did not have a lien on the real property. Rather, the son owed the full amount outstanding on the note to the estate.

Necessary Parties, Standing, and Capacity to Sue. In Migura v. Dukes the supreme court found that a devisee under a will is not a necessary party to an action brought to establish a lien against real property included in the
decedent's estate. In Jones v. LaFargue the Houston court found that the trial court could proceed to judgment in a will contest brought by the decedent's heirs even though the court made no finding that all of the decedent's heirs were joined in the suit. In Estate of Hill the Amarillo court held that since the trial court conducted an in limine proceeding to determine the contestant's standing prior to the time that the jury was sworn, the standing issue was presented for the court's decision prior to the time that the issue of the will contest was heard on its merits. The Fort Worth court, in Shiffers v. Estate of Ward, held that a verified denial of plaintiff's capacity to sue, filed after a hearing on the merits, resulted in waiver of the right to complain of the plaintiff's lack of capacity to sue. In Morrison v. Brewster & Mayhall the El Paso court found that a person who unsuccessfully sought the probate of a will under which that person was named executor could not sue as executor since he was not the executor.

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91. Id. at 569. The court noted that title to the property was not in issue. Id. Only the personal representative of the estate was a necessary party. Id. The supreme court reversed the decision of the court of appeals and affirmed the trial court. Id. The court of appeals based its decision on its determination that the suit involved title to the property. 758 S.W.2d 831, 835 (Tex. App.—Corpus Christi 1988).

92. 758 S.W.2d 320 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

93. Id. at 324. The court found that the potential absence of necessary parties did not deprive the trial court of its jurisdiction because the appellants did not file a verified plea in abatement. Id. The heirs who contested the will proved in an in limine proceeding that they had standing to contest the will as the decedent's nieces and nephews, because the decedent died unmarried and without issue and had no surviving parent or siblings. For a discussion of other issues in this case, see supra notes 40-42 and accompanying text.

94. 761 S.W.2d 527 (Tex. App.—Amarillo 1988, no writ).

95. Id. at 531. The determination of whether a party is an interested party and has standing to bring a will contest must be determined in a preliminary in limine proceeding before the court without the jury. See Sheffield v. Scott, 620 S.W.2d 691, 693 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). In this case, the contestant had accepted benefits under the will prior to entering her contest. The trial court found in the in limine proceeding that she was, therefore, not an interested person who could bring a will contest. The appeals court determined that the rule that a trial commences when the jury is sworn should apply to both criminal and civil cases. 761 S.W.2d at 531.

96. 762 S.W.2d 753 (Tex. App.—Fort Worth 1988, writ denied).

97. Id. at 755. The plaintiff, who was appointed administrator of her husband's estate pending filing a bond and taking the oath, filed suit in her representative capacity prior to the time that she filed the bond and oath. A hearing on the merits of the suit was held prior to the time both that she filed her bond and oath and the defendant filed his verified denial of her capacity to sue. The appeals court stated that even if the defendant had filed his verified denial in a timely manner, it would have only served to abate the proceeding until the plaintiff qualified as administrator. Id. The court also held that the plaintiff did not have to be joined in her individual capacity to recover on her community one-half of the amount in controversy since she could have qualified as community administrator under Tex. Prob. Code Ann. § 161 (Vernon 1980). 762 S.W.2d at 757.

98. 773 S.W.2d 607 (Tex. App.—El Paso 1989, no writ).

99. Id. at 608. The decedent attempted to execute a will naming his nephew as a primary beneficiary and executor, but the decedent failed to sign the will on the execution line, although he signed the first two pages of the will and the self-proving affidavit. The witnesses signed only the self-proving affidavit. The decedent attempted to execute the will at the Government Employees Credit Union. After the decedent's death, the nephew attempted to probate the will, but the court denied probate. The nephew consulted with his attorneys, who advised him that his cause of action against the credit union for improperly overseeing the execution of the will would expire two years from the date the will was denied probate. The nephew, individually and as executor, sued the credit union and his former attorneys for negli-
Claims Against the Estate. In Estate of Nelson v. Neal the Texarkana court held that the appointment of a temporary administrator in the estate of a nonresident decedent, with the later conversion of the temporary administration to a limited permanent administration, was within the probate court’s discretion. The appeals court further found that the appointment could continue until either the necessity for administration no longer existed or the executor of the decedent’s estate became qualified to serve as a full or ancillary executor in Texas. The decedent and others aboard his airplane died in a crash in Bowie County on December 31, 1985. One year following the accident the widow of one of the passengers on the airplane filed suit in federal district court against the decedent’s estate and others for damages resulting from her husband’s death. Almost two years after the accident the widow’s attorney filed an application for the appointment of a temporary administrator in the decedent’s estate in the probate court of Bowie County. The widow sought appointment of a temporary administrator for the sole purpose of having a person to serve with process in the tort action within the two-year statute of limitations. The court appointed a temporary administrator in the estate and limited the temporary administrator’s duties “to receiving service of process in suits filed against the estate, to making demands on any insurance company which may be liable in claims against the estate, and to forwarding process and tendering defense to such insurance company.” The decedent’s son contested the appointment of the temporary administrator as improper under section 131A of the Probate Code because the decedent had a will that was duly admitted to probate in California, and an executor had been appointed and letters testamentary had been issued in the decedent’s estate. The probate court determined that the temporary administration should be continued and later changed the temporary administration to a permanent administration. The decedent’s son appealed. The court of appeals first determined that no proof of a pending will contest is necessary under section 131A of the Probate Code. Thus, the fact that no one contested the will had no bearing in the appointment of the administrator. The court next found that the probate court could appoint an administrator despite the fact that the decedent died testate and that an administration of the decedent’s estate existed in another state. Finally, the

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100. 764 S.W.2d 322 (Tex. App.—Texarkana 1988, writ granted).
101. Id. at 327.
102. Id.
103. Id. at 324. The application alleged that the applicant did not know whether the decedent had a will and that the necessity for administration existed because of the claims that the widow and her children had against the estate.
105. 764 S.W.2d at 325.
106. Id.
107. Id. at 325-26. An application for temporary administration under Probate Code
court found that venue was proper in Bowie County because the decedent died in Bowie County, the tort claims arose in Bowie County, and the existence of the tort claims made the administration of the estate a necessity.\textsuperscript{108}

In *San Antonio Savings Association v. Beaudry*\textsuperscript{109} the Dallas court held that administrative expenses incurred in connection with the preservation and maintenance of property subject to a secured claim shall be paid prior to the payment of the secured claim itself.\textsuperscript{110} The decedent died intestate with an insolvent estate. The decedent's property included his residence, which had two liens created under deeds of trust in excess of its value. The trial court allowed the claims of both lienholders as preferred liens and found that San Antonio Savings, which held the first lien on the residence, had a superior lien to the second lienholder. The administrator of the estate claimed administrative expenses, mostly for legal services rendered by the administrator and his law firm, incurred in connection with preserving and selling the residence. San Antonio Savings attempted to have the proceeds of the sale of the residence exempted from any claims for administration expenses. The administrator cross-claimed for the expenses. The administrator's records showed expenses for maintenance of the property, including utilities, repairs, and lawn service; closing costs due on the sale of the property; and attorney's fees, including the ongoing fees incurred in connection with pursuing the administrator's claim. The administrator incurred some of the attorney's fees in connection with obtaining a lower appraised value for the property for ad valorem taxes. The appeals court found that the closing costs and the expenses incurred in maintaining the property should be paid prior to payment to the preferred lienholder.\textsuperscript{111} The court also de-

\section*{Footnotes}
\begin{itemize}
\item[\textsuperscript{108}] 764 S.W.2d at 327. The court also found that the decedent's liability insurance policy was an asset of the estate sufficient to support the necessity of administration. *Id.*
\item[\textsuperscript{109}] 769 S.W.2d 277 (Tex. App.—Dallas 1989, writ denied).
\item[\textsuperscript{110}] *Id.* at 278, 280. In order to be paid out of the sales proceeds prior to the secured claim, the administrative expenses must be "directly related to preserving, maintaining, and selling the property" subject to the preferred lien. *Id.* at 280.
\item[\textsuperscript{111}] *Id.* at 280-81. Without the payment of the expenses for maintaining the property, the court reasoned, the property would have further decreased in value, thus resulting in less re-
terminated, however, that the attorney's fees incurred in determining the priority of the two liens or collecting payment of administrative expenses did not result in the preservation or maintenance of the property.\textsuperscript{112}

The Dallas court, in \textit{Texas Department of Mental Health \& Mental Retardation v. Crawford},\textsuperscript{113} held that the decedent's estate owed the state for costs of hospitalization in a state hospital on three occasions.\textsuperscript{114} The state was, as a matter of law, entitled to a money judgment for those amounts.\textsuperscript{115} The state apparently never billed the decedent or anyone else for the costs of the decedent's first hospitalization. The decedent's daughter, who was also her guardian and independent executrix of the decedent's estate, paid the amount the state billed for the second hospital stay. The state sent bills for the final admission to the decedent's daughter. The daughter did not pay these bills and the state turned them over to a claims officer for collection following the decedent's death. The claims officer determined that the decedent's estate owed the state for the full amount of the first hospitalization, and for parts of the second and third hospitalizations. On trial, the jury found that the decedent was not indigent, that the state had waived its right to recover for amounts owing from the first and second admissions, and that the state could only recover partially on the final admission. The trial court found that the payments and credits exceeded the portion that the jury found was due and entered a take nothing judgment for the state. The appeals court found that the executrix failed to file a sworn denial of the state's verified claim, so that the verified claim was prima facie evidence of the amount due the state.\textsuperscript{116}

\textbf{Characterization of Community and Separate Property.} In \textit{Martin v. Martin}\textsuperscript{117} the Houston court held that the surviving spouse should reimburse the community estate for amounts spent by the community in reducing the indebtedness against the surviving spouse's separate property.\textsuperscript{118} The dece-
dent owned two lots in Houston at the time of the marriage. Following the marriage, the couple erected a new building on one of these lots and bought a third lot. Approximately two years before the decedent’s death, the couple sold the three lots for cash and a promissory note. The decedent’s daughter claimed that the promissory note should be characterized as her father’s separate property rather than as community property, as characterized on the inventory. Both the probate court and the appeals court found that the daughter did not clearly trace the amount of the sales proceeds that should be allocated as her father’s separate property. Further, the sales proceeds were so commingled that the separate portion of the proceeds could not be clearly identified.

**Successor Fiduciaries.** In *Estate of Touring* the Houston court reversed and remanded and instructed the probate court to issue letters testamentary to a successor fiduciary. MTrust Corp was substituted as a successor co-executor under the Substitute Fiduciary Act and applied for revised letters testamentary. The probate court denied the application for the letters testamentary and held that the Substitute Fiduciary Act was unconstitutional and that MTrust had not complied with the Probate Code provisions allowing the appointment of a successor fiduciary. The decedent’s will named his wife and Bank of the Southwest as independent co-executors. MBank Houston succeeded Bank of the Southwest and qualified as co-executor. The probate court admitted the decedent’s will and first codicil to probate, and the clerk issued letters testamentary to the decedent’s wife and MBank Houston as co-executors. MBank Houston and MTrust Corp, both subsidiaries of MCorp, agreed to substitute MTrust Corp as successor independent co-executor through the execution of a written substitution agreement pursuant to the provisions of the Substitute Fiduciary Act. MTrust Corp filed an application for grant and issuance of letters testamentary and an amended application for probate. The probate court denied both applications, finding that the Substitute Fiduciary Act violates both substantive and procedural due process and the Texas Constitution. The probate court found that the Substitute Fiduciary Act violates substantive due process because “no social necessity exists which is sufficient to justify the restrictions the Act places upon the rights and liberties of testators, beneficiaries and the court.” The probate court found that the Act violated procedural due process because “it permits substitution of a fiduciary without the requirement of any notice other than the filing of the agreement with the Texas Banking Commissioner which does not constitute sufficient notice.” The probate court found that the Substitute Fiduciary Act violates Tex. Const. art. II, § 1, because a substitute fiduciary can act without the approval of a court, allowing an intrusion of the legislative branch of government into the judicial branch.
that MTrust failed to comply with the provisions of the Probate Code relating to the appointment of a successor independent executor. The appeals court first determined that the Substitute Fiduciary Act does not violate substantive due process because it is neither arbitrary nor unreasonable. The court next determined that the Act does not violate procedural due process because it provides sufficient notice of the substitution of fiduciaries. The court also found that the Act does not violate the Texas Constitution provision for separation of powers. The court found that, although a substitution of a successor fiduciary occurs automatically under the Substitute Fiduciary Act, the probate court has no discretion to refuse to direct the clerk to issue letters testamentary. Finally, the court held that sections 145 and 154A of the Probate Code do not apply to the substitution of a successor fiduciary under the Substitute Fiduciary Act.

V. GUARDIANSHIPS

In a mandamus proceeding the Houston court, in Portanova v. Hutchison, considered the propriety of guardianship accountings. The guardian of the person sought relief from providing a new guardian of the estate with accountings for some $18,000,000 distributed over several years to the guardian for the ward's support. The court found that a successor guardian of the estate may demand an accounting from the guardian of the person. The court further found that the fact that the prior guardian of the estate

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126. TEX. PROB. CODE ANN. §§ 88(e), 145, 154A (Vernon 1980).
127. 775 S.W.2d at 44. The court included a lengthy analysis of the Act under the tests for determining whether substantive due process has been violated, Id. at 42-44, and concluded as follows: "[i]t is evident that the Act's purpose is rationally related to its means. The legitimate state interest in ensuring maximal investment opportunities for estates outweighs its minimal effect on a testator's personal and property rights." Id. at 44.
128. Id. at 44, 45. The Act requires that, prior to the substitution, the fiduciaries provide written notice to any beneficiary, each co-fiduciary, and other persons interested in the estate. TEX. REV. CIV. STAT. ANN. art. 548h, § 2(b)(1) (Vernon Supp. 1989); see 775 S.W.2d at 44. Additionally, in this case, notice of the substitution was posted pursuant to TEX. PROB. CODE ANN. § 33(f)(2) (Vernon 1980).
129. 775 S.W.2d at 45. The court noted that the legislature, not the constitution, granted authority over probate proceedings to the probate courts. Id. The court also noted that the probate court has a mandatory duty to admit a will to probate if the executor is not disqualified by law to serve and that the probate court has no discretionary powers over the appointment of the executor. Id.
130. Id. at 47. The court noted that third parties with whom the fiduciary must deal look to letters testamentary as the authority for a fiduciary's actions and that, if a successor fiduciary is qualified to serve, the successor is entitled to letters testamentary. Id. at 46.
132. 775 S.W.2d at 47. The dissent would have held that the Substitute Fiduciary Act violates substantive due process, Id., unconstitutionally violates a person's right to contract under TEX. CONST. art. 1, § 16, 775 S.W.2d at 47, and unconstitutionally "offends the long standing case law which states that a person of sound mind has the legal right to dispose of his own property as he sees fit and to prescribe the terms upon which his bounty should be enjoyed." Id. at 48 (Brown, J., dissenting).
133. 766 S.W.2d 856 (Tex. App.—Houston [1st Dist.] 1989, no writ).
134. Id. at 857. The Probate Code requires a successor guardian to account for all property of the ward over which the predecessor guardian had control and provides that a court enter any necessary orders to ensure delivery of the estate to the successor. TEX. PROB. CODE ANN. § 224 (Vernon 1980). Additionally, the successor guardian was a party interested in the
had previously approved of the accountings of the guardian of the person did not prevent an examination of those prior accountings on the final account. Because the Probate Code does not limit the time period for which a successor guardian of the estate of a ward is liable for accounting for assets that came into the hands of the predecessor guardian, no statute of limitations applies. The court also found that, because the successor guardian has the responsibility to account fully for the estate of the ward during the guardianship, the production of records relating to distributions to the guardian of the person for the benefit of the ward was not unduly burdensome and harassing to the guardian of the person.

VI. TRUSTS

Fiduciary Duties. The Austin court in 183/620 Group Joint Venture v. SPF Joint Venture found that an injunction is a proper remedy when an equitable title holder seeks to enforce the fiduciary duty of the legal title holder. SPF Joint Venture and others turned over a large amount of money to 183/620 Group Joint Venture for 183/620 to use in making improvements to real property, including road construction and water and sewer facilities. A dispute arose between the parties, and the appellant used some of the funds entrusted to it by the property owners to defend the resulting lawsuit. SPF Joint Venture, the appellee, asked the court for a temporary injunction to prevent the appellant from utilizing the funds to defend the suit. The trial court entered an injunction restraining the expenditure of any additional funds entrusted to the appellant for costs of defending the lawsuit, although the court did not address the return of funds previously expended. The appellant appealed, claiming, among other things, that the appellee had an adequate remedy at law. The appeals court held that proof that a remedy at law is inadequate has no relevance in a proceeding concerning the enforcement of fiduciary duties because courts of law do not enforce fiduciary duties.

estate of the ward, under section 3(r) of the Probate Code, who could seek a final accounting of the prior guardian under section 406 of the Probate Code. 766 S.W.2d at 857.
135. Id. 766 S.W.2d at 858.
137. 766 S.W.2d at 858.
138. 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dism'd w.o.j.).
139. Id. at 903.
140. Id. The court also noted that a legal remedy, even if available, would be inadequate because the funds would not be available for the purposes for which the property owners entrusted them to the appellant if spent for litigation expenses. Id. at 904. Thus, an injunction to prevent further expenditure of the funds was appropriate despite the fact that 183/620 Group Joint Venture could pay damages at the conclusion of the litigation. Id. The court also found that the trial court correctly entered the injunction because the appellee had shown that it had a "probable right to recover." Id. Further, the court found, an injunction is an appropriate remedy when the wrongful act is ongoing, such as spending the entrusted funds for legal fees and other costs of litigation. Id. at 904-05. Finally, the court found that the trial court had an affirmative duty to issue the injunction in order to maintain the status quo and preserve its jurisdiction because any final judgment entered by the trial court would have no effect to the extent of the expenditure of the funds for costs of litigation. Id. at 905.
Adverse Possession. In Pierce v. Gillespie the Corpus Christi court examined claims of adverse possession in a trust situation arising from an appeal of a trespass to try title suit. The testator, who died in 1965, left a will under the terms of which he left certain personal property and a marital deduction gift outright to his wife, with the residue of his estate passing in trust for the benefit of his wife during her life with remainder to his heirs. The wife, who served as co-executor of his estate, conveyed an undivided one-half interest in a farm that was the husband’s separate property to a trust for her benefit in 1971. The wife granted the deed in her individual capacity, not in her capacity as co-executor. The deed recited that the wife took the interest in the farm as part of her marital deduction gift under her husband’s will. The jury found that no interest in the farm passed to the wife as part of the marital deduction gift because other assets satisfied that gift. The appeals court held that the jury’s finding was not against the weight of the evidence.

Because the testator did not make a specific bequest of the farm in his will, the farm passed to the residuary trust and ultimately to his heirs. The appeals court next considered whether the wife’s heirs could claim any part of the farm property by adverse possession under the three-, five-, or ten-year statute of limitations. The court first determined that adverse possession did not occur under the three-year statute of limitations because the wife’s heirs could not prove a chain of title from the sovereignty. The court next determined that no adverse possession occurred under the five-year statute of limitations because the parties did not provide evidence that the wife or her trustee paid taxes for five years. Finally, the court determined that no adverse possession occurred under the ten-year statute of limitations because the wife’s heirs did not establish possession and use of the property for ten consecutive years.

In order to establish adverse possession as a matter of law, the claimant must show by undisputed evidence his actual peaceable and adverse possession of the property continuously for the appropriate time period. Also, the claimant must submit undisputed and conclusive evidence of probative force on each essential element of adverse possession.

No dispute existed concerning the chain of title from the sovereign to the testator. The jury found that no interest in the farm passed to the wife under her husband’s will. Thus, the deed under which the wife’s heirs claimed title was made without the legal power to convey the property. Thus, her heirs did not hold the property under “title or color of title.” Tex. Civ. Prac. & Rem. Code Ann. § 16.024 (Vernon 1986).

Under the five-year statute of limitations a person must prove that those in possession had a claim to the property under a registered deed, paid property taxes, and cultivated or used the property. Tex. Civ. Prac. & Rem. Code Ann. § 16.025 (Vernon 1986).

The elements of proof under the ten-year statute of limitations are as follows: “the claimant must show 1) possession of the land; 2) cultivation, use or enjoyment thereof; 3) an adverse or hostile claim; and 4) an exclusive domination over the property and an appropriation of it for his own use and benefit for 10 years.” Id.; Tex. Civ. Prac. & Rem. Code Ann. § 16.026 (Vernon 1986). The wife could not adversely possess the farm because,
Constructive Trust. The Dallas court imposed a constructive trust over a
45.9-acre tract of land conveyed to a joint venture pursuant to a power of
attorney in Smiley v. Johnson. The principal, prior to a judicial declara-
tion of incompetence, had executed two powers of attorney, one of which
was a special power of attorney specifically authorizing the sale of the real
property, in favor of his son. The son sold the real property to a joint ven-
ture in which he owned a one-third interest. Approximately five months
after the son conveyed the property the principal’s daughter applied for ap-
pointment as guardian and brought suit to reclaim the real property, alleging
that the son breached his fiduciary duty by engaging in self-dealing. The
probate court found that the principal was incompetent and appointed
 guardians of the person and estate. The guardian of the estate first made an
application for approval of the sale. After investigation, however, the guard-
ian determined that the son had sold the property for less than one-third of
its value and withdrew the application. The probate court found that the
son had breached his fiduciary duty under the power of attorney by selling
the property to the joint venture, but also found that the terms of the sale
were reasonable. The probate court imposed a constructive trust in favor of
the ward’s estate over the son’s one-third interest in the property through his
ownership interest in the joint venture and ordered the ward’s estate to sell
the constructive trust interest to the other two joint venturers. The daughter
appealed the probate court’s orders. The appeals court first found that the
probate court did not err by finding that the ward was not incompetent when
he executed the two powers of attorney. The court found that the probate
court erred in approving the sale of the property to the joint
venture.

In Tripp Village Joint Venture v. MBank Lincoln Centre the Dallas
court determined that a constructive trust cannot be imposed in the absence

as co-executor and co-trustee under her husband’s will, she would have to provide notice to
each of his heirs that she was repudiating the testamentary trust, which she did not do. Fol-
lowing her death, the bank co-executor and co-trustee likewise could not repudiate the trust
without first informing the husband’s heirs. Thus, neither the wife nor the bank made an
adverse or hostile claim to the property in the period following the date of the 1971 deed.

147. 763 S.W.2d 1 (Tex. App.—Dallas 1988, writ denied).
148. Id. at 3. Although some evidence existed that the ward had suffered some deteriora-
tion in his mental ability when he executed the two powers of attorney, no evidence clearly
established the point at which he became incapable of handling his affairs.
149. Id. The other two joint venturers met with the principal and had actual knowledge of
his deteriorating mental condition. They also knew that the son, as the principal’s agent under
the powers of attorney, owed a fiduciary duty to his father. The court found that the other two
joint venturers benefitted from the sale of the property just as the son did and that, since they
had actual and imputed knowledge of the fiduciary duty and of the principal’s mental condi-
tion, they were liable for the son’s breach of fiduciary duty. Id.
150. Id. at 4. The court found that the approval of the sale was inconsistent with the
finding that the son breached his fiduciary duty. Id.
151. 774 S.W.2d 746 (Tex. App.—Dallas 1989, no writ).
of a wrongful act. In Donovan v. Rankin the court found that a constructive trust existed over assets that a corporation fraudulently transferred to its shareholders. In Teve Holdings Ltd. v. Jackson the court affirmed the imposition of a constructive trust over a condominium that the appellants acquired following notice of lis pendens. 

**Evidence.** In Bogart v. Somer the supreme court held that the standard of proof for rebutting the presumption of a gift is clear and convincing evidence. The decedents purchased some real property and placed title to the property in their son-in-law’s name. The decedents’ heirs, other than the daughter married to the son-in-law who held title to the property, attempted to have title to the property transferred to them under a constructive trust argument. The trial court submitted to the jury the issue of whether the decedents intended a gift to their son-in-law by placing title in his name. The court set the standard of proof for disproving donative intent as a preponderance of the evidence. The appeals court found that the proper burden of proof to disprove the presumption of a gift was clear and convincing evidence.

**VII. LEGISLATIVE UPDATE**

**Charitable, Religious, and Educational Organizations.** The legislature, in response to concerns raised by the probate judges, amended the Probate Code to require the personal representative of an estate to provide notice to any charitable beneficiary of that estate. New section 3(kk) and section

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152. *Id.* at 750. In the absence of a wrongful act one can neither profit from a wrong nor be unjustly enriched. The underlying facts in this case involved a bank’s attempts to sell collateral pledged under a security agreement executed pursuant to a joint venture agreement. The joint venture agreement gave the venture manager authority to execute security agreements and provided that third parties could be confident that the venture manager’s execution of a security agreement was authorized by the joint venture agreement.


154. *Id.* at 444. The shareholders continued doing business at the same location and under the same name as the corporation except that they deleted the “Inc.” at the end of the name of the business. The shareholders did not file articles of dissolution nor did they notify creditors of the change in proprietorship.

155. 763 S.W.2d 905 (Tex. App.—Houston [1st Dist.] 1988, no writ).

156. *Id.* at 908. The appellant acquired the property in January 1987 and the appellees filed the notice of lis pendens on October 10, 1985. The appellees filed the notice of lis pendens in connection with a lawsuit against a third party alleging fraud and violation of the Deceptive Trade Practices Act and seeking the imposition of a constructive trust over the condominium. The final judgment, entered in favor of the appellees on October 13, 1985, ordered the third party to sell the condominium and pay the appellees proceeds from the sale proportionate to their constructive trust interest in the property. The third party entered a three-year lease on the property following the entry of the judgment, then conveyed the property to the appellant herein. The appellees subsequently purchased the property at a court-ordered sale. The appeals court found the lis pendens proper and that the appellant had valid notice when it purchased the property. *Id.* at 909.

157. 762 S.W.2d 577 (Tex. 1988).

158. *Id.*


160. The probate judges from around the state worked on preparation of a bill, HB-570, that revised various sections of the Probate Code.

add the definitions of “charitable organization” and “governmental agency.” 162 Section 81 of the Probate Code now provides that the application for probate must state whether the will names the state, a governmental agency, or a charitable organization as a beneficiary in the will. 163 The personal representative of the estate must give notice to the named beneficiary by registered or certified mail no later than thirty days after the date the will is admitted to probate. 164 The notice must include copies of the application, order, and will. Additionally, the personal representative must file a copy of the notice with the court. 165 Section 222(b) now refers back to section 128A 166 so that any interested person can complain and have an executor removed if the executor fails to provide notice to the state, governmental agency, or charitable organization named in a will. 167 Section 149(c) now provides that failure to file notice is grounds for removal of any personal representative and that the court can remove a personal representative on its own motion. 168 Section 10A now provides that an institution of higher education as defined in section 61.003 of the Education Code, 169 or a private institution of higher education, is a necessary party to a will contest if the institution is named as a beneficiary in the contested will. 160

Powers of Attorney. The legislature revised section 36A of the Probate Code, which relates to durable powers of attorney. 171 A major change, and one that appears to be retroactive, is that a durable power of attorney does not lapse due to passage of time unless the instrument creating the power contains a time limitation. 172 Effective September 1, 1989, a durable power of attorney must be signed by two witnesses and filed in the county records of the county in which the principal resides. 173 Section 36A(d) provides that a third party must accept an agent’s authority if the instrument contains language authorizing the agent to indemnify the third party. 174 Section 36A(f), which applies to powers created prior to September 1, 1989, provides the process for revoking a durable power of attorney. 175

The legislature also created a new type of durable power of attorney, the durable power for health care, but this type of power of attorney has not been assigned a section in the Probate Code. 176 The purpose of the durable power of attorney for health care is to ensure that one would have his or her wishes honored in the event of later incapacitation. This new power of attor-
nery differs from directives to physicians because directives are limited to the terminally ill or those with life-threatening conditions. Section 2 of the Act provides that the durable power for health care becomes effective when the attending physician certifies that the principal lacks capacity to make health care decisions. Treatment may not be given or withheld if principal objects. For this reason the physician must make reasonable attempts to inform the principal of the treatment or its withdrawal. The agent is to make decisions in accordance with his or her understanding of the principal's wishes, including religious and moral beliefs, or, if the agent has no understanding, with the agent's assessment of the principal's best interests. Section 4 of the Act provides that the durable power for health care must be signed by two disinterested witnesses and contain an affirmation of the principal's ability to execute the document. This section of the Act also provides an alternative for execution if the principal is physically unable to sign. Section 5 of the Act provides that the durable power for health care can be revoked by notification to the agent or health care provider, either in writing or by another act evidencing the principal's intent to revoke. A subsequently dated power revokes an earlier power and divorce automatically revokes a power naming an ex-spouse. Section 6 provides that a durable power for health care is not automatically revoked upon appointment of a guardian. The probate court must consider the principal's preferences in determining whether to suspend or revoke the agent's authority. Section 10 provides that the agent and health care provider are not liable for good faith health care decisions made under terms of the power of attorney. If both a durable power of attorney for health care and a directive to physicians exist, the document executed later in time controls if the principal becomes terminally ill. Sections 14 and 15 provide that the principal must sign a disclosure statement prior to executing the durable power of attorney for health care for the power to be effective. The Act contains an example disclosure statement. Section 16 provides a form of the durable power of attorney for health care. Section 17 of the Act contains a procedure for near relatives or responsible adults directly interested in the principal to contest and revoke a power of attorney in district court.

177. Id. § 2, at 1669-70.
178. Id. at 1670.
179. Id.
180. Id.
181. Id. § 4, at 1670-71.
182. Id.
183. Id. § 5, at 1671.
184. Id.
185. Id. § 6.
186. Id.
187. Id. § 10, at 1672.
188. Id. § 12.
189. Id. §§ 14-15, at 1672-74.
190. Id.
191. Id. § 16, at 1674-75.
192. Id. § 17, at 1675.
two grounds for contesting are that, at the time of execution, the principal (1) was not of sound mind or (2) was under duress, fraud, or undue influence.

The Texas "Natural Death Act". The legislature has revised article 4590h, sections 2(4), (7), (8), and (9) of the "Texas Natural Death Act" to amend the definitions of "life sustaining procedure" and "terminal condition" and to add definitions for "competent" and "incompetent." In addition, employees of a health care facility in which the declarant is a patient may not be a witness, and the instrument must contain a statement to that effect.

Illegitimacy and Presumptions of Paternity. The standards and burdens of proof in establishing the relationship between a child and its father have not changed, but the amendments to the Probate Code and Family Code replace references to legitimacy or illegitimacy with references to a child's "biological" relationship with the father. The legislature revised the following sections of the Probate Code: section 3(b), which provides the definition of "child"; section 40, which provides for inheritance by and from an adopted child; and section 42, which provides for the inheritance rights of children.

The Pretermitted Heir Statute. The legislature attempted to resolve some discrepancies that existed under former section 67 of the Probate Code, which deals with pretermitted heirs. The statute as revised provides that a pretermitted child for whom no provision was made in the will shall take an intestate share of all of the estate not devised or bequeathed to the parent of the pretermitted child.

Guardianships. The legislature has amended section 113A of the Probate Code to require a judge to appoint an attorney ad litem to represent any person for whom a permanent guardianship is sought. The legislature added new subsection (i) to section 131, which provides that the Texas Department of Human Services shall not be appointed as a temporary guardian except as a last resort. The language in new section 131(i) tracks the language in section 1301. The legislature also amended Probate Code section 131A(e) to provide that the clerk issue letters to a temporary guardian or representative within three days after the appointee qualifies, rather than within three days after the appointee files the bond, as section 131A(e) previously provided.

Section 111(a)(3) now provides that an application for guardianship for a

193. Id.
195. Id. at 2983.
197. Id. §§ 33-35, at 1485-86.
199. Id.
200. Act of June 18, 1989, ch. 1261, § 1, 1989 Tex. Sess. Law Serv. 5082 (Vernon). This section previously applied only to guardianships of persons who were not minors.
201. Id. § 2.
person sixty years of age or older must include, to the best of the applicant's knowledge, the names of the proposed ward's spouse, siblings, and children. The applicant must swear to the portion of the application that states the names and addresses of the proposed ward's spouse, siblings, and children. Section 130(e) provides that the spouse, siblings, and children of the proposed ward must be served with notice of the proceeding by registered or certified mail. Section 111 now requires, in addition to the requirement that the applicant swear to the portion of the application relating to family members of a proposed ward over the age of sixty years, that the applicant must swear to all applications for appointment of a permanent guardian. New section 111(c) requires that an application for appointment of a permanent guardian for a minor must include a statement of whether the minor has been the subject of a legal or conservatorship proceeding within the preceding two-year period, and, if so, the nature of the proceedings, the court involved, and the final disposition, if any.

New subsection (d) of Probate Code section 109 sets out a presumption of what constitutes the best interest of the ward in determining who shall be appointed as guardian. Effective September 1, 1989, the appointment of a guardian who has been convicted of "any sexual offense, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, abandoning or endangering a child, or incest" is presumptively not in the best interest of the ward. The convicted applicant has the burden to show that the best interest of the ward would for some reason be served by the appointment in spite of the conviction.

Section 236(b) of the Probate Code provides that, if securing prior court approval is inconvenient, the guardian may now apply for subsequent approval of amounts up to $5,000 per year expended from the ward's estate for support and maintenance of the ward. On application for subsequent approval, the guardian must show clear and convincing proof that the expenditures were reasonable and proper. The legislature has also amended Probate Code sections 144 and 404(c) to provide for a unified method for holding monies belonging to a minor or incapacitated person in the registry of the court.

205. Id. Section 111 has also been amended, in another bill, to provide that every application for the appointment of a permanent guardian must be sworn. Act of June 16, 1989, ch. 1164, § 1, 1989 Tex. Sess. Law Serv. 4782 (Vernon).
208. Id.
210. Id.
211. Id.
212. Act of June 16, 1989, ch. 1035, § 12, 1989 Tex. Sess. Law Serv. 4162, 4168 (Vernon). The amount previously available for expenditure without prior court approval was $2,000. TEX. PROB. CODE ANN. § 236(b) (Vernon 1980).
214. Act of June 16, 1989, ch. 1035, § 9, 1989 Tex. Sess. Law Serv. 4162, 4166-67 (Vernon). Section 144(a) allows a debtor of a minor or incapacitated person to deposit money with the clerk of the county in which the minor or incapacitated person resides if the minor or
Executors and Administrators. The legislature has expanded the grounds for removal of executors and administrators.\textsuperscript{215} Section 149C(a) now provides that the county court, statutory probate court, and any other court with probate jurisdiction may, on its own motion, as well as on the motion of any interested person, following a show cause hearing, remove an independent executor for any of the reasons enumerated, including the failure to file notice to charitable beneficiaries in a timely manner.\textsuperscript{216} Section 222(b) now also provides that grounds for removal include failure to file notice to charitable beneficiaries in a timely manner.\textsuperscript{217}

The legislature has amended section 352 with a technical correction.\textsuperscript{218} Subsection (a) formerly stated that a personal representative could not purchase property of the estate sold by the personal representative except as provided in subsection (b).\textsuperscript{219} Since subsection (c) also provided an instance in which the personal representative could purchase property of the estate, the legislature amended subsection (a) to refer to subsections (b) and (c).\textsuperscript{220} Additionally, the legislature amended subsection (c) for clarification purposes.\textsuperscript{221}

Joint Tenancies with Right of Survivorship in Community Property. The legislature has revised Probate Code section 46(b) to refer to new part 3 of chapter XI of the Probate Code as governing agreements between spouses regarding rights of survivorship in community property.\textsuperscript{222} The legislature added part 3 to chapter XI of the Probate Code, \textit{Community Property with Right of Survivorship}.\textsuperscript{223} New section 451 replaces the 1987 version of section 46(b)\textsuperscript{224} and provides that spouses may agree that all or part of their community, whether then existing or to be acquired in the future, shall become the property of the surviving spouse on the death of the first spouse to die.\textsuperscript{225} Section 452 provides that an agreement creating a right of survivorship in an incapacitated person is without a guardian. \textit{Id.} The amount that may be so deposited with the county clerk has been reduced from $30,000 to $25,000 in order to conform with other Code sections. \textit{Id.} Section 144(a) also permits the former guardian of a ward for whom the guardianship has been terminated to deposit the guardianship estate with the county clerk if the funds are less than the $25,000 statutory ceiling. \textit{Id.} Section 144(b) permits the debtor of a nonresident minor or incompetent who has no guardian in Texas to pay to the guardian of the nonresident minor or incompetent creditor or to the county clerk of any Texas county in which the minor or incompetent owns real property sums equal to or less than $25,000 owing as a result of a transaction within Texas. \textit{Id.} at 4167. Section 404(c) now provides that the guardianship of the estate of a minor ward may be terminated and the funds in the hands of the guardian be deposited with the county clerk, if the estate consists of cash or its equivalent in the amount of $25,000 or less. The amount previously was limited to $15,000. \textit{Id.} § 15, at 4169.

\textsuperscript{215} \textit{Id.} §§ 10-11, at 4167-68.

\textsuperscript{216} \textit{Id.} § 10.

\textsuperscript{217} \textit{Id.} § 11, at 4168.

\textsuperscript{218} Act of June 14, 1989, ch. 651, § 1, 1989 Tex. Sess. Law Serv. 2151 (Vernon).


\textsuperscript{221} \textit{Id.}

\textsuperscript{222} Act of June 14, 1989, ch. 655, § 1, 1989 Tex. Sess. Law Serv. 2159 (Vernon).

\textsuperscript{223} \textit{Id.} § 2, at 2159-62.


\textsuperscript{225} Ch. 655, § 2, at 2159.
ship must be in writing and signed by both spouses.\textsuperscript{226} Property subject to a survivorship agreement remains community property during the marriage.\textsuperscript{227} The agreement does not affect the rights of spouses concerning management, control, and disposition of the property unless the agreement provides otherwise, per section 453.\textsuperscript{228} Section 454 provides that a transfer of community property to the surviving spouse as the result of an agreement is not a testamentary transfer.\textsuperscript{229} Section 455 provides that an agreement may be revoked in accordance with the terms of the agreement.\textsuperscript{230} If the agreement does not provide for revocation, however, it may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse.\textsuperscript{231} Sections 456 and 457 provide that an agreement that meets the requirements of chapter XI is effective without adjudication, although a surviving spouse may apply for an order adjudicating the validity of the document.\textsuperscript{232} Section 458 states that an order adjudicating the validity of an agreement constitutes conclusive authority that the property belongs to the surviving spouse.\textsuperscript{233} The surviving spouse with such an order may enforce his or her right to payment or transfer of the property to him or her.\textsuperscript{234} Sections 460 and 461 state the rights of third parties and creditors.\textsuperscript{235} The Act applies retroactively to agreements executed since the effective date of the 1987 amendment to the Texas Constitution\textsuperscript{236} and also to all agreements that comply with the provisions of the Act that were entered prior to the effective date of the 1987 amendment.\textsuperscript{237}

\textbf{Non-Tax Due Certificates.} The legislature has repealed the provisions of Probate Code section 410 that required, if no inheritance tax is due to the state, an instrument in writing stating that fact and approved by the State Comptroller of Public Accounts be filed with the final papers closing the

\textsuperscript{226} Id. Section 453 includes suggested language, but without limitation, for creating survivorship rights.

\textsuperscript{227} Id.

\textsuperscript{228} Id.

\textsuperscript{229} Id.

\textsuperscript{230} Id.

\textsuperscript{231} Id. at 2159-60.

\textsuperscript{232} Id. Sections 456 and 457 give the requirements for an application, proof, and the recording of the order. Id. at 2160.

\textsuperscript{233} Id.

\textsuperscript{234} Id. An adjudication of the validity of an agreement may well be necessary to settle the estate. The requirements of proving the validity of an agreement under § 456(b)(3) are substantially the same as the proof of a written will, so that these agreements usually would have no advantages over a will.

\textsuperscript{235} Id. at 2161-62. These provisions protect third parties acting without notice of an agreement, including personal representatives without actual knowledge of the agreement and purchasers without notice of the agreement. Because recordation provides notice, third parties are protected if they check county records and the agreement is not recorded. A personal representative must prove no actual knowledge of the existence of an agreement to avoid liability for selling or disposing of the decedent's interest in any property covered by the agreement.

\textsuperscript{236} Tex. Const. art. XVI, § 15.

\textsuperscript{237} Ch. 655, § 3, 1989 Tex. Sess. Law Serv. 2159, 2163 (Vernon). Thus, an agreement previously invalid because it attempted to create a survivorship interest in community property without first partitioning the property may now be valid, even if the parties believe that it is invalid.
Probate Court Jurisdiction. The legislature amended section 5 of the Probate Code by adding new subsection (d) to provide concurrent jurisdiction for a statutory probate court and a district court in "actions by or against a person in that person's capacity as a personal representative . . .." The last sentence of section 5A(b) has been moved to new subsection (c), which tracks the language in section 5(d). The legislature also added new subsections (d) and (e) to section 5A in an effort to clarify statutory probate court jurisdiction in matters that may not appertain or be incident to an estate currently under administration. The amendments to sections 5 and 5A apply to causes of action accruing on or after September 1, 1989. The legislature amended section 25.2293 of the Government Code to allow the judge of a Travis County Probate Court to transfer a cause of action in which the personal representative of an estate pending in the probate court is a party.

Trust Companies and Powers of Trustees. The legislature amended section 113.110 of the Property Code, addressing the sale of unproductive trust property, in response to Perfect Union Lodge v. InterFirst Bank. The amendment to section 113.110 clarifies rules for distribution of the proceeds of unproductive property if the trustee is required by other rules of law to convert the unproductive property. Section 113.053(f), as amended, provides that a financial institution may split out different parts of its trust services and delegate some of those parts to an affiliate or division that would charge separate fees for performance of the service delegated. The provisions for the distribution of the net proceeds apply only if the trustee must sell or dispose of the property under other provisions of the Trust Code, the governing instrument, or common law.

The corporate fiduciary must disclose the amount charged by the affiliate or division, and this amount must not exceed the customary or prevailing charge for comparable services.
Juries in Probate Matters. New section 25.0025 of the Government Code provides that laws and rules applying to district court juries shall be followed in actions pending in the statutory probate courts over which the district court would have concurrent jurisdiction. If all parties agree, however, a six-person jury may be used.

Probate Judges as Magistrates. The legislature amended article 2.09 of the Code of Criminal Procedure to provide that judges of statutory probate courts qualify as magistrates and may be charged with the duty “to preserve the peace . . . ; to issue all process intended in aid of preventing and suppressing crime; to cause the arrest of offenders.”

Pension Plans as Exempt Property. The legislature amended section 42.0021 of the Property Code to provide that any profit-sharing, pension, Keogh plan, annuity, or similar contract purchased with assets distributed from other profit-sharing, pension, Keogh plans, annuities, or similar contracts and any retirement annuity or account described by section 403(b) of the Internal Revenue Code of 1986 are exempt from seizure from an unsecured creditor. Thus, the statute exempts from seizure during the sixty-day period rollovers nontaxable under the Internal Revenue Code of 1986.

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251. Id. at 4170.
255. Id. at 4628. The statute does not prohibit a participant or beneficiary from granting an enforceable security interest in the assets to a secured creditor. Id. This amendment was effective September 1, 1989. Id. § 2.