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Wills and Trusts

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I. WILLS

Construction. The cases dealing with construction of wills that were decided during the period under review demonstrate the necessity for great care on the draftsman's part in describing precisely what the testator intended. In Griffin v. Nehls the testatrix provided for a life estate in her husband and then stated: "Should my husband and I die in a common calamity, irrespective of the order of our death, . . . I make the following specific bequests . . . [naming the plaintiffs]." Upon the death of the testatrix, her surviving husband chose to elect against the will and take under the laws of descent and distribution. Plaintiffs, the mother, nephews, niece, and brother of the testatrix, contended that the above language created a remainder interest in their favor. The court construed the quoted language as operative only in the event of a common calamity. The husband and wife did not die in a common calamity. Therefore, the court reasoned that the wife left a life estate to the husband and failed to provide for an unconditional bequest of the remainder of her estate. Accordingly, the husband was entitled to his wife's estate under the statutes of descent and distribution.

In Petsch v. Slator the testator provided for certain bequests to his wife with the express instructions that "after the delivery of the specific bequests" and "exclusive of [such bequests]" the residue was to be divided among those named as remainder beneficiaries. The testator's wife predeceased him, and, as a result, the gifts to her in the will lapsed. Following the testator's death certain heirs not named in his will contended that, because of the above language in the testator's will, the bequest to the wife did not lapse and pass into the residue, but instead passed by intestacy. The court rejected the heirs' contention, invoking the familiar general presumptions that one who makes a will intends to dispose of all his property and that, taking the will as a whole, such construction as avoids intestacy is to be preferred over one that permits intestacy. In the instant case the court relied on language in the residuary clause as reflecting the testator's
intent to dispose of all that he had to his named beneficiaries.\(^6\)

In *Stahl v. Shriner's Hospital for Crippled Children*,\(^7\) another case concerning the presumption against intestacy, the court subordinated such presumption to what it regarded as the testatrix’s intent from a reading of the whole will. The formal will and two codicils were extensive and detailed in their terms. The testatrix left her home place to designated close relatives, and after other provisions, left her residuary estate to “the Masonic Home or Homes for Crippled Children, to be used only in Texas.” She further provided that a lapsed bequest should fall into the residue. Shortly before her death she sold the home place for cash and a vendor’s lien note, which became part of her estate at death. The trial court found that the specific devise of the home place was “adeemed, revoked, and became inoperative” and thus passed into the residuary estate.\(^8\) Although there was not a Masonic Home for Crippled Children, the trial court found that the Texas Scottish Rite Hospital in Dallas and the Shriners’ Hospital in Houston were the intended beneficiaries.

The court of civil appeals agreed that the devise was adeemed and that it was proper to exclude any testimony regarding the testatrix’s intention that it should be otherwise.\(^9\) In an unusual holding, however, the court determined that the testatrix’s intention, as reflected in the entire will, overrode the specific direction in the will that lapsed bequests should become part of her residuary estate.\(^10\) The court stated: “The construction of the will placing the [vendor’s lien] note in the residuum disinherits testatrix’s four surviving heirs . . . and passes the bulk of testatrix’s estate to the residuary legatee. Clearly, that intention was not intended by testatrix, and would result in an unintended windfall to the residuary beneficiary.”\(^11\) The court finally concluded that the vendor’s lien note passed by intestacy to the testatrix’s heirs under the laws of descent and distribution.

*Read v. Gee*\(^12\) involved a holographic will in which the testatrix left all her property to her “sister, Laura Freeland, if deceased, to Ruth Gee, her daughter, nephews & nieces, namely . . . .”\(^13\) There was a question as to whether the punctuation following the word “daughter” was a period or a comma. In a later provision the testatrix made specific bequests to “Laura Freeland, if deceased, to Ruth Gee $2,000,—Thos P Read Jr—200 acres of Johnson place”\(^14\) and so on to others. The trial court construed the first provision as leaving the testatrix’s entire estate to her sister, and if she did

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6. 573 S.W.2d at 853. The court stated that if a will contains a residuary clause, every presumption will be made against intended intestacy.


8. *Id.* at 231.

9. *Id.* at 235.

10. The court recognized that its holding was contrary to the general rules of construction that the law disfavors partial intestacy, and that execution of a will raises a presumption against intended intestacy. The court ruled that these presumptions must yield to a contrary expression contained in the will, even where the will contains a residuary clause. *Id.* at 236.

11. *Id.* at 237.


13. *Id.* at 433.

14. *Id.*
not survive, then to her sister's daughter and other nieces and nephews. The later provision was construed as essentially surplusage. On appeal, the court of civil appeals held that there was too much ambiguity for the court to construe the instrument on its face; accordingly, the case was remanded for the introduction of parol evidence to aid in the construction of both of the provisions.

Anderson v. Dubet involved a formal will prepared by an attorney and a holographic codicil prepared by the testatrix who was an elderly woman with little education. Although the codicil lacked words of testamentary intent and seemed to be in the nature of a set of instructions to her attorney, it was admitted formally to probate and no appeal was perfected. It therefore was treated as a testamentary document with only its construction in issue, and extrinsic evidence was admissible to enable the court to determine the testatrix's intent. For this purpose her attorney was allowed to testify as to a telephone conversation he had with the testatrix just two days after she had prepared the holographic codicil and only a few days before her death. The court found that the codicil effectively changed a bequest to a single beneficiary in the original will to a bequest to be divided among three beneficiaries.

In Wortham v. Baxter the court was presented with the question of whether certain interests were vested or contingent. The testatrix's will created three testamentary trusts: one trust was for the benefit of her sister, Charlie, for life with remainder to Charlie's son, Archie; a second trust was for the benefit of another sister, Willie, for life with remainder to Willie's son; and the third trust was for the benefit of her sister, Tiny, for life with remainder one-half to the trust for Charlie and one-half to the trust for Willie. Charlie predeceased the testatrix, and pursuant to the testatrix's will the assets that would have constituted the corpus of Charlie's trust passed in fee simple to Charlie's son, Archie. Archie died leaving his property to his wife, Mildred; subsequently, Tiny died. The question involved distribution of the assets of Tiny's trust: whether the one-half interest in Tiny's trust passed to Charlie's trust, as if it were in existence, and then to Archie's estate outright; or because Charlie's trust never came into existence, whether it could not receive a vested interest at Tiny's death and such interest therefore would pass to the trust for the benefit of the other surviving sister, Willie.

15. The court of appeals stated that, in contrast to the trial court's construction of the will, an equally plausible construction would be that the testatrix devised her entire estate jointly to her sister, to Laura Freeland, and to her nephews and nieces. Id. at 435. Under this construction, taking under the will by Laura Freeland and the testatrix's nieces and nephews would not be contingent upon the death of the testatrix's sister.
16. 580 S.W.2d 404 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.).
17. The codicil, if challenged, would have lacked the requisites of a testamentary document; it read in part: "Joyce keep $2,000. give $2,000 to Marjorie Reese ph-4326187 also give Cecelia Graham $1,000. Margie's sister. I want it. that way. Please do this for me. Thank you Sophie Mylynczak." Id. at 409.
18. Id. at 409-10.
19. 571 S.W.2d 539 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).
The court of civil appeals affirmed the trial court's finding that the testatrix's intention, expressed by her will as a whole, was that if Charlie did not survive her, then whatever would have been part of Charlie's trust, had it come into existence, would pass to Archie. Accordingly, one-half of Tiny's trust would have passed to Charlie's trust and then to Archie. Because Charlie's trust did not come into existence, the interest vested directly in Archie. Generally, the difference between a vested and contingent remainder is that a vested remainder requires the identification of a person in existence in whom the remainder may vest. In the instant case the court found that because Archie was in existence at the death of the testatrix, she intended him to succeed to whatever interest would have passed to his mother if she had survived and her trust had come into existence. The decision may be viewed as effecting an equitable result, but a strict reading of the provisions of Nettie's will makes it difficult to understand how a trust that never came into existence could be a beneficiary of a distribution from another trust that terminated. In these situations, the draftsman may wish to consider a provision that if the trust fails to come into existence because the trust beneficiary predeceases the testator, then the trust shall be deemed to have come into existence and then terminated.

In another construction case the court in Harper v. Springfield construed the language, "to my beloved niece . . . and to the heirs of her body" as creating a life estate and remainder. In Hayes v. Snoddy, the testatrix's will provided that the price for property to be sold to one designated in the will was $25,000, and in the event the property had increased in value by more than twenty-five percent, it was to be sold at its fair market value. There was ample evidence to support a finding that, whether the reference was to "price" or "value," the property had increased in value by more than twenty-five percent and was, therefore, to be sold at its fair market value.

In Terrell v. Graham the Supreme Court of Texas considered an interesting case of first impression involving the construction of two warranty deeds that were intended to take effect at the death of the respective grantors. Two brothers, each owning an undivided one-half interest in a tract of land, simultaneously executed and recorded reciprocal instruments that purported to convey the entire fee to the other at death. The court held that the instruments were deeds, not wills, and that, in accordance with the intent of the two brothers, on the death of one the survivor was vested with

20. Id. at 544.
22. 578 S.W.2d 824 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.).
25. 576 S.W.2d 610 (Tex. 1979).
a fee simple in the whole tract. The court reasoned that the deed of the brother who died first conveyed both his half-interest and his expectancy in the other half; the deed of the surviving brother was then of no further force and effect.

**Execution and Proof.** In *Tucker v. Hill* the testatrix left a document consisting of two unnumbered, typewritten pages. The first page disposed of decedent's assets and concluded with her signature at the bottom. The second page referred to the "foregoing instrument" and contained the signatures of the witnesses at the conclusion. The contestant contended that the will consisted of the first page signed only by the testatrix and that the second page's reference to the first page as the "foregoing instrument" made the second page a separate and incomplete document. The contention, therefore, was that the requirements of section 59 of the Texas Probate Code had not been met. Nevertheless, the court held that the two pages taken together made a valid will with the testatrix's signature on one page and the attestation clause and witnesses' signatures on the second.

In *Estate of Morris* the testatrix died in 1975. She had executed a will in 1965 leaving her property to her husband and naming him as independent executor. That will was admitted to probate. Over two years later a daughter filed an application for probate of a missing will dated in 1968 that left her mother's property to her and her brother. She alleged that the 1968 will was destroyed after her mother's funeral because it might upset her father. At a jury trial it was found that the daughter and her brother had agreed not to offer the 1968 will for probate and that such agreement was for the benefit of their father. The trial court set aside the 1965 will but refused to admit the 1968 will to probate. On appeal, the court of civil appeals recognized the validity of the family settlement doctrine under which all the heirs and beneficiaries have the right to contract with reference to the decedent's property in lieu of probating the will. The court found that under the facts in the instant case, however, the son and daughter merely agreed to suppress the later will and did not agree on the disposition of the estate. The 1968 will, therefore, was validly offered and should have been admitted to probate.

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26. *Id.* at 612. The court noted that the instruments were not witnessed as wills and did not have any indicia of wills.
28. 577 S.W.2d 321 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).
29. *TEX. PROB. CODE ANN.* § 59 (Vernon Supp. 1980) requires the signatures of two witnesses affixed to the will. In the instant case, the court noted that § 59 does not require that all the signatures appear on the same page. 577 S.W.2d at 322.
31. 577 S.W.2d 748 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).
32. *Id.* at 755; *see* Salmon v. Salmon, 395 S.W.2d 29 (Tex. 1965); Stringfellow v. Early, 40 S.W. 871 (Tex. Civ. App. 1897, no writ).
33. 577 S.W.2d at 756.
34. *Id.* at 757.
Joint and Mutual Wills. In Stevens v. Novak a husband and wife made a joint will in 1968. The husband died, and his wife probated the will. After the wife died, a granddaughter made application for probate of the 1968 will under which she was named executrix and sole beneficiary. A surviving sister of the deceased wife made application for the probate of a 1976 will under which she was named executrix and primary beneficiary. The trial court admitted the 1976 will to probate and refused to impose a constructive trust on the estate for the benefit of the granddaughter. The court of civil appeals held that the 1976 will was valid in all respects and that it effectively revoked the 1968 will. The court further held, however, that the trial court in a probate matter did not have jurisdiction to rule on the constructive trust issue; that if the granddaughter as the proponent of the 1968 will could show in a court of competent jurisdiction that the execution of the 1968 will was a contract for her benefit, then a constructive trust could be imposed on the estate.

In another joint and mutual will case, Watson v. Watson, the court construed the language of the document executed by a husband and wife as leaving the surviving wife a fee simple title in all the properties; whatever was left at the wife’s death passed to their sons in equal shares. During her lifetime, the wife had the unrestricted right to sell any of the property, including a bargain sale of part of the estate to one of the sons and thus prefer him over the others.

Testamentary Capacity. In Gayle v. Dixon the testator executed a will in 1971 leaving his entire estate to his grandchildren by both of his daughters. In 1975 he revoked all prior wills and left his entire estate to only one of his daughters and her family. He recited in his will that he was omitting the other daughter because of loans made to her and her husband and to their son. Contestants, children of the omitted family, unsuccessfully contended that, due to an automobile accident in 1963, the testator was not of sound mind or memory and that he was unduly influenced by his daughter who was the beneficiary under the 1975 will. The contestants argued that

35. 583 S.W.2d 669 (Tex. Civ. App.—Eastland 1979, no writ).
36. Id. at 670.
37. Id. at 671; see Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621 (1957). The case on the will contest was transferred to the district court in compliance with Tex. Prob. Code Ann. § 5 (Vernon Supp. 1980), but that court, in the posture of the case before it, was not competent to hear the probate matter. There were no pleadings to establish a constructive trust.
39. The pertinent provision of the will was:
   "Paragraph IV
   "In the event my wife . . . survives me . . . she shall have and take all of my estate and property of whatsoever kind or character and wheresoever located and in such event I do hereby will, bequeath and demise all of my said estate and property unto my said wife . . . in fee simple."
   Id. at 469.
40. Id. at 469. The rights of the remaindermen were limited to whatever estate remained in the survivor of her death.
41. 583 S.W.2d 648 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.).
it was reversible error not to have given the "long form" definition of unsound mind. The "short form" definition consists of jury findings as to the following elements of testamentary capacity: ability to understand the business in which the testator is engaged, sufficient ability by the testator to understand the effect of his act in making the will, capacity to know the objects of his bounty and the capacity to "understand the general nature and extent of his property." The "long form" definition would have required a finding as to an additional element, namely, that the testator had a "memory sufficient to collect in his mind the elements of the business to be transacted, and to hold him long enough to perceive, at least their obvious relation to each other, and to be able to form a reasonable judgment as to them." Because there was nothing in the record that was indicative of the testator's mental inability on the dates of execution of the wills, the court of appeals affirmed the trial court's use of the short form.

Undue Influence. The court held in Rust v. Childre that the mere opportunity to exert any undue influence was not sufficient to set aside a will. Thomas Childre and Mary Childre were married in 1944. At that time Mr. Childre had three children by a previous marriage, including Jan Iona. In 1955 Mrs. Childre executed a will, and in 1969 she filed suit for divorce against Thomas Childre. In 1976 Mrs. Childre executed a second will, and during this period she lived at the home of Jan Iona. In 1977 she went to Houston and again filed for divorce against her husband. She died in February 1977. The second will provided that Jan Iona was to be independent executrix, and the principal of Mrs. Childre's estate was left to her. The court reviewed the relationship between the decedent and her husband, the details as to the preparation and execution of her will, including the self-proving affidavit, and concluded that there was no undue influence. Important to these findings was the detailed testimony of the attorney who observed the execution of the will, questioned the testatrix as to her intent, and confirmed that in all respects the will was executed pur-
suant to the formalities required by law. The court stated that the opportunity to exert influence, without more, will not support an inference that influence was exerted unduly.46

Administration. In Lipstreau v. Hagan,47 the testatrix died in 1972 leaving a will in which Hagan and Grett were named as independent executors. Grett died in 1976 and, up to the time of his death, rendered substantial services for the estate. Through his efforts, a sale of a ranch belonging to the estate was effected for a price of $1,700,000; however, Grett died before any payments were made and his heirs claimed his statutory executor's fee under Texas Probate Code section 241.48 The court of civil appeals denied recovery on the grounds that the statute allows the percentage compensation only on amounts actually received in cash by the executor. Accordingly, the court held that Grett's death prior to the receipt of any cash cancelled his right to the statutory compensation on the sale.49

Furr v. Young50 involved a family feud among members of the Adam Furr family. Adam died intestate, leaving two sons, a daughter, and his wife, Fannie Belle, who became community administratrix. Fannie Belle, both in her capacity as community administratrix and in her individual capacity, deeded certain property to her daughter without consideration. In an action to try title, brought by the sons, final judgment was entered upholding the validity of the deed. Fannie Belle subsequently died, and the two sons filed claims against her estate, contending that the property deeded to the daughter should have been considered part of Adam's estate. The court held that since the claims had not been presented to Fannie Belle as administratrix and were not timely presented to her estate, the sons were barred both by Texas Probate Code section 29851 and the general two-year statute of limitations of article 5526.52 The court further held that the claims were barred because the judgment validating the deed was res judicata.53

In Kelly v. Dorsett54 certain heirs sued an independent executrix for

46. 571 S.W.2d at 561.
47. 571 S.W.2d 36 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).
49. 571 S.W.2d at 38.
50. 578 S.W.2d 532 (Tex. Civ. App.—Fort Worth 1979, no writ). This is the latest in a series of cases involving the same family. Furr v. Furr, 440 S.W.2d 367 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.); Furr v. Furr, 403 S.W.2d 866 (Tex. Civ. App.—Fort Worth 1966, no writ); Furr v. Furr, 346 S.W.2d 491 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.).
51. "No claims against a decedent . . . on which a suit is barred by a general statute of limitation . . . shall be allowed by a personal representative." TEX. PROB. CODE ANN. § 298 (Vernon 1956).
52. "There shall be commenced . . . within two years . . . : 4. Actions for debt where the indebtedness is not evidenced by a contract in writing." Tex. Rev. Civ. Stat. art. 5526 (1925). The 66th Legislature amended this article, and now the appropriate provision is found at TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon Supp. 1986), which provides for a four-year limitation of actions on debt.
53. 578 S.W.2d at 538.
54. 581 S.W.2d 512 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).
fraud. She defended, alleging that the statute of limitations had run because the fraud should have been discovered when the final accounting was filed in 1971. According to this timetable, the present suit should have been filed in 1975, four years from the date of the final accounting, whereas it actually was filed in 1977. The court of appeals remanded the case to the trial court to determine as a question of fact at what time the plaintiffs knew or reasonably should have known of the fraud, since the statute would run from the date of discovery, which could be later than 1971.

_Aston v. Lyons_ reached a similar result. A handwritten will was admitted to probate in 1965, and in 1973 certain family members brought suit to set the will aside on the basis that it was a forged instrument. In a case of first impression, the court of civil appeals interpreted Probate Code section as permitting a contest in a forgery case within two years after the discovery of the forgery or within two years from the time the contestant acquires such knowledge as would lead to the discovery of the forgery by the exercise of reasonable diligence.

_Wilder v. Mossier_ involved the interpretation of several sections of the Texas Probate Code with respect to the settlement of law suits and other matters. Jacques Mossier died and his sons, Christopher and Daniel, filed two suits against their adoptive mother in district court. One suit charged that Mrs. Mossier acted wrongfully as executrix of the estate of Jacques Mossier and as trustee of certain testamentary trusts created under his will. The other suit charged that she acted wrongfully in conducting the affairs of a corporation in which she owned a controlling interest and in which the two sons had a minority interest. Mrs. Mossier died while the suits were pending and a temporary administrator was appointed who filed an application with the probate court for authority to settle the suits of Daniel and Christopher.

Ruth Wilder, an heir who, along with other heirs, entered into a proposed settlement agreement as to Daniel Mossier's claims, filed a demand for a jury trial of the claims made by Christopher Mossier but not with respect to the temporary administrator's application to settle the suits. She did not, however, challenge the probate court's jurisdiction to authorize settlement. The probate court authorized the administrator to settle the law suits with both plaintiffs. The temporary administrator rejected Chris-

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57. "[A]ny interested person may institute suit in the proper court to cancel a will for forgery or other fraud within two years after the discovery of such forgery . . . ." _Tex. Prob. Code Ann._ § 93 (Vernon 1956).
58. 577 S.W.2d at 519.
topher Mossler's claims but proceeded, on authority of the court order, to settle the law suits.

Ruth Wilder contended that the probate court was without jurisdiction to settle the lawsuits after the claims had been rejected by the temporary administrator and that the claimant had failed to institute action under Texas Probate Code section 313.60 The court of civil appeals held that the Mossler tort actions were not the kind of claims referred to in section 313 because the tort claims did not constitute claims for money of the kind that must be first presented to the administrator for approval as provided in section 298.61 In any case, Christopher originally filed suit in the district court and later joined the temporary administrator as one of the defendants. Under Texas Probate Code section 5(a),62 which places original control and jurisdiction over administrators in the district court, Mossler's action was within ninety days of the administrator's rejection and effectively preserved his claim.

Wilder also contended that when Christopher Mossler proceeded in the district court, the probate court lacked authority to permit settlement of the suits. The court of civil appeals held that Texas Probate Code section 234(a)(4)63 authorizes the temporary administrator, upon written application, to make settlements in litigation as to matters pending in any court and that section 313 permits suits on rejected claims to be filed in the court in which the estate is pending or in any other court of proper jurisdiction.64

Wilder urged that in accordance with section 21 and 312,65 she was entitled to a jury trial. The court, however, pointed out that, under section 10,66 if she objected to the settlement of the lawsuits, she should have filed written objections, which she had not done. Moreover, Wilder was not a party to the lawsuits that the administrator had settled and therefore, under section 21, she could not claim a jury trial.

In Kennedy v. Draper,67 the widow sued the independent executrix of her husband's estate to have certain exempt property—an automobile and some household wares—set apart to her under the provisions of Probate Code section 271,68 or in the alternative a reasonable sum in lieu thereof, under section 273,69 and a $5,000 family allowance under the provisions of

60. "When a claim . . . has been rejected by the representative, the claimant shall institute suit thereon in the court of original probate jurisdiction . . . or in any other court of proper jurisdiction within ninety days . . . ." TEX. PROB. CODE ANN. § 313 (Vernon Supp. 1980).
61. Id. § 298.
62. Id. § 5(a).
63. Id. § 234(a)(4).
64. 583 S.W.2d at 667.
66. Id. § 10 (Vernon 1956).
68. "[T]he court shall . . . set apart for the use and benefit of the widow . . . all such property to the estate as is exempt from execution or forced sale by the constitution and laws of the state." TEX. PROB. CODE ANN. § 271 (Vernon 1956).
69. "In case there should not be . . . [any exempt property], the court shall make a reasonable allowance in lieu thereof, to be paid to such widow . . . ." Id. § 273 (Vernon Supp. 1980).
Prior to the hearing the parties agreed that the widow should have an automobile and certain furniture set aside, and thereafter, upon a hearing, the widow was awarded $6,000. Sections 286 and 287 provide for the family allowance, but section 288 precludes such allowance if the widow has separate property adequate for her maintenance. On the evidence the court of civil appeals held that it was appropriate to set aside a widow's allowance but that such amount could not be greater than she requested; that is, $5,000, not $6,000. The widow contended that the additional $1,000 was in lieu of other property. Nevertheless, because she agreed to the stipulations setting aside particular properties before the hearing on her allowance, the $6,000 allowance was specifically related to section 286 and therefore could be no greater than the amount she sought.

_Harris v. Ventura_ dealt with the question of sorting out community and separate property in an estate. The husband and wife were married in 1968. He died in 1975, leaving a will naming as beneficiaries his children by a former marriage. The question was whether the children of the decedent husband had shown sufficient tracing and identification of separate property to overcome the presumption that various assets and bank accounts were community property. Detailed tracing supported the exclusion from the community estate of portions of the husband’s separate property. Several bank accounts that had been set off to the widow as her separate property clearly had community income in them. The court of appeals stated that where a checking account contains both community and separate funds, it is presumed that community funds are drawn out first. Relying on this rule, the court reversed as to one checking account and, citing insufficient evidence, remanded for further findings on the other accounts.

_Jurisdiction._ In _Taylor v. Lucik_ a widow had been incapacitated for several years prior to her husband's death, during which time she alleged that he carried on an illicit affair with Taylor. Both the widow and Taylor offered wills for probate, and at the same time the widow sought a temporary restraining order to prevent Taylor from dealing in any way with the

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70. "[T]he court shall fix a family allowance for the support of the widow and minor children of the deceased." _Id._ § 286 (Vernon 1956).
71. "Such [family] allowance shall be an amount sufficient for the maintenance of such widow . . . for one year from the time of the death of the testator or intestate." _Id._ § 287.
72. "No such allowance shall be made for the widow when she has separate property adequate to her maintenance . . . ." _Id._ § 288.
73. 575 S.W.2d at 629.
74. _Id._ at 630.
75. 582 S.W.2d 853 (Tex. Civ. App.—Beaumont 1979, no writ).
76. All property possessed by a husband and wife when their marriage is dissolved is presumed to be community property. _Id._ at 855; see McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973); Tarver v. Tarver, 394 S.W.2d 780 (Tex. 1965); _Tex. Fam. Code Ann._ § 5.02 (Vernon 1975).
77. 582 S.W.2d at 855-56.
78. 584 S.W.2d 503 (Tex. Civ. App.—Dallas 1979, writ granted).
assets of the deceased. The probate court granted the temporary injunction. The court of civil appeals found that the widow’s action was for her own benefit and not for that of the estate. Thus, the probate court acted beyond its jurisdiction under Texas Probate Code section 5(d) in granting the temporary injunction.

In *Eubanks v. Hand* 80 a series of proceedings took place in the county court by which the trial judge admitted a will to probate, then vacated the order, and then again admitted the will to probate on April 15, 1976. Finally, in 1977, the trial judge entered a series of orders that resulted in the denial of probate. The court of civil appeals held that the 1976 order, valid on its face, was final and in accordance with rule 329b(5) of the Texas Rules of Civil Procedure. 81 The trial court therefore lost jurisdiction of the matter thirty days after the order was rendered.

In another jurisdictional case, *Beeson v. Beeson*, 82 both parties moved to transfer a will contest from county court to district court. The court of civil appeals held that the parties could not confer jurisdiction on the district court by consent. Under Texas Probate Code section 5(c), which is applicable to “Group II Counties”—counties with statutory probate courts or county courts at law—all applications must be filed and heard in the probate court, county court at law, or in the constitutional county court rather than the district court. 83 *Finger v. School Sisters of the Third Order of St. Francis* 84 held that, in a will construction case in which there is a charitable trust, failure to join the attorney general of Texas is fundamental error. 85

**Heirship.** In *Finke v. Wheatfall* 86 a husband and wife, Mary Jane and Dan Gaston, both died intestate. They had fifty acres of land that they owned in community. Certain of the husband’s heirs sought to partition the fifty acres, naming his other heirs as defendants and citing by publication all his unknown heirs. A receiver was appointed who sold the property and distributed the proceeds to the husband’s heirs. The heirs of the wife moved for a new trial on the grounds that they were neither parties to nor had notice of the original suit. The Texas Supreme Court ruled that the partition and sale were valid only as to the husband’s heirs; the wife’s

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79. “All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate.” TEX. PROB. CODE ANN. § 5(d) (Vernon Supp. 1980). The court stated that “incident to an estate” applies to those matters in which the controlling issue is the settlement, partition, or distribution of an estate. 584 S.W.2d at 505; see Sumaruk v. Todd, 560 S.W.2d 141 (Tex. Civ. App.—Tyler 1977, no writ). See also Benson v. Benson, 573 S.W.2d 272 (Tex. Civ. App.—Waco 1978, no writ) (injunction denied; no probable harm).
80. 578 S.W.2d 515 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.).
82. 578 S.W.2d 517 (Tex. Civ. App.—El Paso 1979, no writ).
83. Id. at 518; TEX. PROB. CODE ANN. § 5(c) (Vernon Supp. 1980).
84. 585 S.W.2d 357 (Tex. Civ. App.—Austin 1979, no writ).
85. Id. at 359; TEX. REV. CIV. STAT. ANN. art. 4412a (Vernon 1976).
86. 581 S.W.2d 152 (Tex. 1979).
heirs, however, were entitled to recover only their one-half interest. 87

Retirement Benefits and Insurance. Valdez v. Ramirez 88 presented a question of first impression. The wife worked as a United States Civil Service employee for 352 months prior to her retirement in 1971. For 340 of those 352 months she had been married to Tomas Valdez. In 1973 her husband died leaving two children from a prior marriage. The children sued to recover a portion of the wife’s retirement benefits based on their father’s community interest, which the trial court determined to be one-half of $340/352 of the total value. The issue was whether the interest of a spouse who died prior to any division or divorce should pass to his heirs under section 45 of the Probate Code 89 or whether the interest should be paid to the living and earning spouse in accordance with a joint survivorship option that the wife had exercised under the Federal Civil Service Retirement Act. 90 The supreme court held that the retirement benefits were the wife’s special community. When her husband predeceased her, she succeeded to the entire benefits pursuant to federal statute that preempted conflicting state laws. 91

In Redfearn v. Ford 92 a wife contended that her husband’s changing the beneficiary of his life insurance policy from herself to her son was a fraud on her community property rights. The court rejected this contention, holding that there was no unfairness or fraud because the wife had been provided for in certain other policies in the amount of $25,000. The court of appeals stated that the fact their infant son was the beneficiary of $73,000 was not unfair considering the wife’s moral and legal obligation to provide support for the child. 93

Guardianship. In Barkouskie v. Lahrmann 94 a mother tried to enjoin two daughters from acting as her co-guardians on the ground that Texas Probate Code section 116 provides that only one person can be appointed guardian. 95 Because she failed to prove that the order of appointment was void, the court of civil appeals could not find that the trial court abused its discretion in denying the temporary restraining order. 96

Federal Estate Tax. In Estate of Elkins v. United States 97 the decedent

87. Id. at 153.
88. 574 S.W.2d 748 (Tex. 1978).
89. TEX. PROB. CODE ANN. § 45 (Vernon 1956).
91. 581 S.W.2d at 573; see Free v. Bland, 369 U.S. 663 (1962).
92. 579 S.W.2d 295 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.).
93. Id. at 297; see Givens v. Girard Life Ins. Co. of America, 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972, writ ref’d n.r.e.). See also Reynolds v. American-Amicable Life Ins. Co, 591 F.2d 343 (5th Cir. 1979) (insured’s stepdaughter who was accessory after the fact in helping to conceal murder of insured by insured’s wife was not precluded from claiming as policy beneficiary).
94. 573 S.W.2d 600 (Tex. Civ. App.—Waco 1978, no writ).
95. TEX. PROB. CODE ANN. § 116 (Vernon 1956).
96. 573 S.W.2d at 600-01.
died in 1972 leaving a substantial estate. His will provided that his executors and trustees should pay any debts due his sons without regard to any statute of limitations. Prior to his death, the decedent's sons had loaned him sums of money and, although they did not press him for repayment, the evidence clearly indicated that they intended to be repaid. Although the debts may have been barred by the statute of limitations, the executors were prevented by the will from asserting limitations as an affirmative defense. The debts, therefore, were enforceable under local law and deductible for federal estate tax purposes as debts against the taxable estate.

II. TRUSTS

Creation. In *Frost National Bank v. Stool* a grandfather converted a savings account in his name into three separate accounts for the benefit of each of his grandsons, designating himself as trustee. Upon the death of the grandfather, the grandchildren contended that the trusts terminated and that each was entitled to the corpus. The question was whether the grandfather intended to create presently operative trusts. On all the evidence, the court held that present trusts were intended and were valid under the Texas Trust Act.

In *Muhm v. Davis* Perry McNeill conveyed his interest in certain land to "Cleveland Davis, Trustee." Davis, as trustee, then conveyed the interest to McNeill's children and grandchildren. Plaintiff sought to set aside both deeds on the grounds that the deeds were an attempt to create an express parol trust and were invalid. Although an oral express trust in real property is invalid under the Texas Trust Act, the rule is subject to an exception in cases in which a confidential relationship exists and the conveyance is made in reliance on an oral promise to convey to others. In this case the confidential relationship did exist between the parties as Davis was McNeill's attorney. Had Davis not carried out his fiduciary responsibility, a constructive trust could have been imposed in favor of the intended beneficiaries. Moreover, parol evidence was admissible to show the circumstances of the relationship between the parties to arrive at a proper result.

*Citizens National Bank v. Allen* presented a similar set of facts. Mrs. Katey Mueller purchased a certificate of deposit that recited that she held

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98. *Id.* at 878. The district court found the loans were bona fide, arm's length transactions that served valid business purposes.

99. 575 S.W.2d 321 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.). *See also* Egenbacher v. Barnard, 575 S.W.2d 630 (Tex. Civ. App.—Eastland 1978, no writ) (grandfather's attempt to change joint and survivor savings accounts was precluded because of his diminished mental condition; grandchildren were third party beneficiaries under original contract between grandfather and savings association).


103. 580 S.W.2d at 103.

104. 575 S.W.2d 654 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).
it as trustee for one Allen. After Mrs. Mueller's death her executor took possession of the certificate and deposited the proceeds into the estate bank account. The district court awarded Allen the proceeds of the certificate of deposit and sustained the bank's claim over against the executor. The court of civil appeals first addressed the question of whether the Totten or tentative trust doctrine existed in Texas. Such a doctrine holds that a bank account taken by one as trustee for another does not create an irrevocable trust but only a tentative trust revocable at will until the depositor dies or completes the gift. At the depositor's death, however, the presumption arises that the balance on hand is subject to an absolute trust for the benefit of the designated beneficiary. The court held that, although the Totten doctrine has not been adopted in Texas, if there is a present intent to create a trust, then the Texas Trust Act provides that such trust is revocable unless expressly made irrevocable. Upon the trustor's death, such trust would then become irrevocable. Because the trial court's instructions did not adequately deal with the question of intent, the cause was remanded for findings as to whether Mrs. Mueller intended to create a revocable trust when she purchased the certificate of deposit.

Construction. In Kelly v. Lansford Mildred Giraud left a holographic will in which she left one-half of the remainder of her estate to her sister, Polly "for . . . life . . . [with] full and unrestricted power to sell, convey, dispose of, . . . but at her death . . . any undisposed . . . portion of my estate then remaining shall pass to [certain designated residuary beneficiaries]." Polly received the assets in which she had a life interest and conveyed them to an irrevocable trust for certain beneficiaries. During her lifetime the trustee delivered the income to Polly and at her death the trustee administered the trust for the other beneficiaries. The residuary beneficiaries under Mildred Giraud's will contended that Polly, as life ten-
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Ant, attempted to thwart the comprehensive estate plan of her benefactor and that the creation of the irrevocable trust went beyond the powers granted her. The trial court and court of civil appeals both approved the creation of the irrevocable trust. The words "power to sell, convey, dispose of..." were to be taken in their ordinary meaning. Polly had the right to convey the properties to a trust and defeat the interests of the residuary beneficiaries under Mildred Giraud's will.

Constructive Trust. In *Kelley v. Kelley*\(^\text{110}\) three brothers each received an undivided one-sixth interest in certain property at the death of their mother. Their father owned the other half. The father was in need of funds and one brother agreed to purchase his half interest in the property, provided the other brothers would convey him title to their portions to enable him to get a loan. When the purchasing brother refused to reconvey the interests deeded to him by his brothers, they brought suit. He contended that there was no oral agreement to reconvey and that the statute of frauds and statute of limitations barred the suit. The trial court concluded and the court of civil appeals affirmed that a constructive trust existed, that the statute of frauds was not available as a defense, and that the statute of limitations did not begin to run until the two brothers knew that the purchasing brother was repudiating the trust. The court of civil appeals approved the admission of parol evidence, for only by such admission could the trial court find that there was a constructive trust that does not fall within the prohibition of the statute of frauds. The court quoted from *Mills v. Gray*,\(^\text{111}\) addressing agreements to reconvey:

"A constructive trust arises where a conveyance is induced on the agreement of a fiduciary or confident [sic] to hold in trust for a reconveyance or other purpose, where the fiduciary or confidential relationship is one upon which the grantor justifiably can and does rely and where the agreement is breached, since the breach of the agreement is an abuse of the confidence, and it is not necessary to establish such a trust to show fraud or intent not to perform the agreement when it was made. The tendency of the courts is to construe the term 'confidence' or 'confidential relationship' liberally in favor of the confider and against the confidant, for the purpose of raising a constructive trust on a violation or betrayal thereof. A parent and child, grandparent and child, or brother and sister relationship is not intrinsically one of confidence, but under circumstances involves a confidence that abuse of which gives rise to a constructive trust in accordance with the terms of an agreement or promise of a grantee to hold in trust or to reconvey."\(^\text{112}\)

In *Marut v. Collier*\(^\text{113}\) one Eastham was a member of a rice growers' association and acted as its attorney, and one Collier acted as its comptroller and general manager. Two rice farmers, Bofysil and Segelquist, were

\(^{110}\) 575 S.W.2d 612 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

\(^{111}\) 147 Tex. 33, 210 S.W.2d 985 (1948).

\(^{112}\) 575 S.W.2d at 617.

\(^{113}\) 583 S.W.2d 682 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).
members of the association. The association did not purchase lands for farming nor did it have the power or funds to do so. In a series of transactions, Eastham and Collier acquired certain lands. Bofysil and Segelquist asked Collier to assist them in acquiring some interests in the same land. Bofysil and Segelquist contended that Collier owed fiduciary duties to them and that Collier and Eastham were in breach of these duties when they concealed their ownership in a certain lot and refused to convey mineral interests to them. The jury found that a confidential relationship did exist. The trial court nevertheless granted motions for judgment in favor of Eastham and Collier notwithstanding the verdict. The court of civil appeals held that there was no evidence of a fiduciary or confidential relationship. All were members of the same association but such relationship did not bind either Eastham or Collier to a fiduciary duty to Bofysil or Segelquist in their individual land acquisitions.

In Hedley v. duPont geologists who located property suitable for oil and gas drilling were to receive a one-fourth interest in the properties after “payout” had been reached. The plaintiffs’ action to recover an interest in the properties was dismissed. After appeal to the court of civil appeals and upon review by the supreme court on writ of error, the case was remanded. Upon dismissal by the trial court, the case was once again before the court of civil appeals. Although the plaintiffs failed to prove that they were acting as dealers in real estate under the Texas Real Estate Licensing Act, the court of civil appeals held that they were entitled to attempt to recover under the constructive trust doctrine. Moreover, plaintiffs were entitled to an accounting on certain properties in order to determine whether payout had been achieved and thus whether plaintiffs were entitled to their percentage share.


114. Id. at 685. The court stated that one party’s subjective trust and faith in another party does not in itself establish a confidential relationship.


116. “Payout” is the point at which all expenses involved in acquiring the lease and drilling the well are recouped.

117. See DuPont v. Hedley, 570 S.W.2d 384 (Tex. 1978).

118. TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1980).

119. 580 S.W.2d at 666.

120. Id. at 666-67. Other constructive trust cases include: Panama-Williams, Inc. v. Lippsey, 576 S.W.2d 426 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.) (fact that fiduciary relationship may have existed was material fact and ground for reversal to determine extent of oral joint venture); Anglo Exploration Corp. v. Grayshon, 576 S.W.2d 151 (Tex. Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.) (geologist imposed constructive trust on overriding royalty interests arising out of fiduciary relationship). See also Canada v. Ezer, 584 S.W.2d 568 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); Anglo Exploration Corp. v. Grayshon, 577 S.W.2d 742 (Tex. Civ. App.—San Antonio 1979, writ ref’d n.r.e.).

121. 581 S.W.2d 222 (Tex. Civ. App.—Corpus Christi 1979, no writ). See also Bering v. Republic Bank, 581 S.W.2d 806 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.) (sale by substitute trustee was valid).
defaulted, and a sale under the deed of trust followed. After the sale, Valley International and one Bass brought suit, alleging that the trustee had conspired to prevent purchasers from attending the sale and that the trustee had breached his fiduciary duty by advertising that the sale would be for cash only whereas Brownsville Savings & Loan actually extended credit to Los Campeones, purchaser of the properties at the sale. Although Valley International did not have the capacity to purchase the property at the trustee's sale, it raised material facts in its pleadings and by affidavit on the claim for breach of fiduciary duty in the conduct of the trustee's sale to require reversal and retrial.

In Nolan v. Bettis\(^\text{122}\) the testator left his estate to his two sons by a former marriage. His second wife contested admission of the will into probate; this contest, however, was determined in favor of the sons. The order admitting the will to probate provided that the executor make monthly payments to the wife in an amount equal to the mortgage payments due on a ranch purchased by Bettis before their marriage. She permitted the note to fall into default, arranged for the purchase of the mortgage, and upon default appointed a substitute trustee to sell the land, which he did at eighty-seven cents an acre, a price grossly under the market. The jury found that the second wife had acted deliberately and maliciously and that she should be subject to exemplary damages of $25,000. The trial court therefore cancelled the sale and assessed damages. The court of civil appeals held that it was proper to award exemplary damages in an equitable action and that the amount awarded was not excessive.\(^\text{123}\)

### III. LEGISLATIVE AMENDMENTS

House Bill No. 329, passed by the Sixty-sixth Legislature, to be effective August 27, 1979, effected a number of revisions to the Probate Code.

Section 3 was amended by adding subsections (ii) and (jj). Subsection (ii) defines "statutory probate courts" as those whose jurisdiction is limited to the general jurisdiction of a probate court. County courts at law are not in this class unless their statutorily designated name includes the word "probate." "Next of kin," defined in subsection (jj), includes an adopted child or his or her descendants and the adoptive parent.

Section 5 was amended to provide that where there is a statutory probate court or a court exercising the jurisdiction of a probate court, all matters affecting probate shall be filed in such court rather than in the district court. In contested matters the judge of the constitutional county court may on his motion, and shall on the motion of any party to the proceeding, transfer the matter to the court exercising probate jurisdiction. When a

\(^{122}\) 577 S.W.2d 551 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

\(^{123}\) Id. at 556. Bush v. Gaffney, 84 S.W.2d 759 (Tex. Civ. App.—San Antonio 1935, no writ), held that exemplary damages may not be awarded in an equitable action, but in International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963), the Supreme Court of Texas declined to follow the Bush-Gaffney holding. See also Livingston v. Gage, 581 S.W.2d 187 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (action started as one for constructive trust and concluded in judgment for actual damages and exemplary damages).
surety is called on to perform in place of an administrator or guardian, the court exercising original probate jurisdiction may award judgment against the personal representative in favor of the surety in the same suit.

The legislature added section 5A, broadly defining the terms “appertaining to estates” and “incident to an estate” to include all matters pertaining to the “settlement, partition and distribution” of estates.

Section 37A was amended to provide instructions for making effective disclaimers. These new rules are intended to harmonize with the disclaimer provisions of Internal Revenue Code section 2518.

The inheritance rights of legitimated children were clarified by an amendment to section 42. The statute now provides that a child is the legitimate child of his mother, and he and his issue inherit from his mother and maternal kindred in all degrees. A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother, is legitimated by court decree, or is acknowledged by his father in an executed statement of paternity. Further, the issue of null marriages are nevertheless legitimate. Under these provisions such child is entitled to homestead rights, distribution of exempt property, and family allowances.

Section 47 provides that an heir who fails to survive a decedent by 120 hours is deemed to have predeceased the decedent. If times of death cannot be established, then it is deemed that the person failed to survive for the required period. In the case of a husband and wife with community property, if either fails to survive the other by 120 hours, then each one’s half of the community property shall be distributed as if he or she were the survivor. The 120-hour rule applies to devisees and beneficiaries unless the will provides otherwise.

In the case of joint tenancies the 120-hour rule is applied in a manner similar to that of community property; that is, if neither joint tenant survives the other by 120 hours then each is presumed to be the survivor. In the case of more than two joint owners if all have died within 120 hours, the property is divided among the group as if each one was the survivor. A beneficiary of life or accident insurance who fails to survive the insured by 120 hours is deemed to have predeceased the insured. In all survivorship situations the foregoing rules will not apply if wills, trust instruments, deeds, or contracts provide otherwise.

Section 49 was amended to provide specific rules for the institution of proceedings to declare heirship.

Section 50 was amended to provide clarifying rules for personal service and service by publication.

The legislators amended section 55(a) to provide that any heir not served may have the judgment corrected by a bill of review within four years of such judgment or, upon showing of actual fraud, after the passage of any length of time.

Section 59A was added to provide that contracts to make a will or devise
or not to revoke a will or devise, if executed after September 1, 1979, can be established only by provisions in the will stating that the contract exists.

Section 69 was changed to make clear that if the testator is divorced after making a will, all references to the divorced spouse are null and void unless such person, as a result of remarriage, is married to the decedent at the time of death.

Section 77 now provides that in granting letters testamentary or of administration, the order of qualification shall be: (a) the person named as executor, (b) the surviving spouse, (c) the principal beneficiary, (d) any beneficiary, (e) next of kin in the order of descent and distribution, (f) a creditor, (g) any person of good character residing in the county, and (h) any other person not disqualified. In the case of persons of equal rank, the court may select the better qualified or may grant letters to any two or more of such applicants.

Section 82, as amended, sets forth the details that must appear in an application for letters of administration when no will exists.

Section 137 was amended to provide for the collection of small estates by distributees, under certain conditions, upon affidavit filed with and recorded by the county clerk.

Amended section 144 provides for payment of claims to minors and incompetents where there is no guardian. Generally, such payments may be made to the county clerk of the county in which such person resides. The clerk acting under orders of the probate court may disburse the money for the use and benefit of such minor or incompetent to the custodian of such person upon the filing of proper bond or to the state institution responsible for his care.

Section 145 was amended to require bonds of independent executors.

The legislature revised section 148 to clarify the rules requiring bonds of heirs and distributees where creditors' claims remain unsatisfied.

Section 149B was added to provide that in lieu of the right to an accounting provided by section 149A, at any time twelve months after all federal and state taxes are paid or three years from the date the independent administration was created, a person interested in the estate may petition for an accounting and distribution.

Section 149C was added to provide the procedures for the removal of an independent executor.

Amendments to section 150 clarify the rules for partition and distribution of an estate or sale of property incapable of division in cases in which either there was no will or the will did not distribute the entire estate.

Section 151 was amended by adding subsection (c), which provides that an independent executor's affidavit closing the administration shall constitute sufficient authority for the payment of money or transfer of property to those named in the will without additional administration.

Section 152 provides additional rules clarifying the closing of an independent administration by a distributee.

Subsections (a) and (h) of section 154A were amended to provide for the
appointment of a successor independent executor upon application of all the estate distributees and for the posting of bond by such successor.

Section 193 was amended to clarify the rules for fixing the amount of bond for a guardian of the person.

Section 194 was amended to clarify the rules for fixing the penalty of the bond.

The legislature added section 339A to provide for the sale of a minor's property by a parent without being appointed guardian. Subsections (b) through (g) of section 341, dealing with the procedures by which a parent may sell property of a minor without being appointed guardian, were repealed.

Section 343 was amended to clarify the rules for setting a hearing on an application for the sale of real estate, and section 350 was amended to clarify the rules for private sales of real estate.

Section 407 provides additional instructions for citation by the county clerk upon the presentation of the final account by personal representatives of the estates of decedents or wards or of the persons of wards.

Chapter XI, sections 436-450, entitled Nontestamentary Transfers, is added to the Texas Probate Code. Generally, these new rules apply to joint accounts, P.O.D. accounts, or trust accounts, and should put to rest some of the matters regarding these accounts, which have been the subject of increasing litigation.

Other provisions affected are as follows: Texas Revised Civil Statutes article 1994124 was amended to provide detailed instructions for the handling of "next friend" cases for minors, lunatics, idiots, or non compos mentis persons who have no legal guardian. Article 2327125 is amended to provide for the appointment of a certified shorthand reporter by the judge in a county court or county court at law upon application of either party in a civil case.

125. Id. art. 2327 (Vernon 1971).