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# WILLS AND TRUSTS

by

Michael V. Bourland\*  
and Lynne McNeil Candler\*\*

**T**HIS Article reviews case law and legislative developments in the areas of wills, nontestamentary transfers, heirship, estate administration, guardianships, and trusts. The Survey period covers decisions published between October 15, 1986, and October 15, 1987, as well as changes to the Probate Code and the Trust Code enacted by the seventieth Texas Legislature.

## I. WILLS

*Will Construction.* The court in *Diemer v. Diemer*<sup>1</sup> examined a will to determine whether the term "issue" included adopted adults. The court construed B.P. Diemer's will as well as the will and codicil of his wife, Dora Diemer. The court affirmed the trial court's judgment that, under the facts of this case, "issue" does not include adopted adults.<sup>2</sup>

B.P. Diemer executed his will on February 7, 1956. He died in 1959. Diemer left life estates in his real property to his children, with the remainder passing to his children's descendants. One of his children, Ted, had no children at the time B.P. Diemer executed his will. Diemer provided in his will that Ted would receive a life estate in certain real property, with the remainder passing to Ted's descendants. Diemer also provided, however, that if Ted died without issue, the property would pass to the issue of each of Diemer's other children. Diemer made no mention of issue in reference to the distribution of remainder interests to the descendants of the other children.

The court determined that, because he substituted the word "issue" for "descendants" in reference to Ted's share, B.P. Diemer intended to include only Ted's blood relatives in the class of remainder beneficiaries.<sup>3</sup> The court noted that the ordinary meaning of the word "issue" connotes consanguinity and that it is a word of limitation.<sup>4</sup> The court then held that B.P. Diemer

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1. 717 S.W.2d 160 (Tex. App.—Houston [14th Dist.] 1986, no writ).

2. *Id.* at 161.

3. *Id.* at 162.

4. *Id.*

used the word "issue" to exclude adopted children from the class of remainder beneficiaries.<sup>5</sup>

Dora Diemer's will was identical to that of her husband. Following his death, however, Dora executed a codicil to her will. The codicil provided that the remainder interest following Ted's life estate would pass to Ted's children, per stirpes. Dora's codicil also specifically stated that the term "child" or "children" included legally adopted children. Dora Diemer died in 1963. In 1964 Ted married for the second time, and in 1968 Ted legally adopted his second wife's adult son. The court held that Dora intended to include legally adopted adults in her definition of legally adopted children because she did not specify that she wished only to include legally adopted minor children.<sup>6</sup>

Another court examined whether a testatrix intended to create a life estate in funds she had on deposit at certain financial institutions.<sup>7</sup> In her will Mary Elizabeth Srubar left a life estate in her Galveston residence to her friend, Christian Joswiak. Srubar left the remainder interest in her residence and her residuary estate to her niece. Srubar later executed a codicil in which she made a bequest of all funds that she had on deposit in two financial institutions to Joswiak. Srubar directed Joswiak to use these funds to maintain the residence, including the payment of taxes and insurance. Joswiak contended that he received a fee simple conditional estate in the funds. The niece contended that Srubar did not intend to include certificates of deposit in the term "funds on deposit." The trial court found that Srubar intended the funds to be used to create a trust for the benefit of Joswiak as life tenant of the property. The trial court also concluded that "funds on deposit" included certificates of deposit and that the certificates of deposit at these two financial institutions constituted part of the trust corpus.

The appeals court held that the trial court did not err in determining that Srubar intended Joswiak to have access to the funds for maintaining and preserving the residence, as he was obligated to do as life tenant.<sup>8</sup> The court noted that the law does not favor life estates in personal property, but that courts will enforce a testator's intent to create a life estate in personal property if that intent is clearly ascertainable.<sup>9</sup> The court upheld the trial court's decision to place the funds in the hands of a trustee because a court has discretion to place a life estate in personalty in trust in order to preserve the value of the remainder interest.<sup>10</sup> The court also held that the term "funds

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5. *Id.*

6. *Id.* at 163. The court stated that further proof of Dora's intent could be found through her use of "children" to describe her own children, who were all adults at the time she executed her will. *Id.*

7. *In re Estate of Srubar*, 728 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1987, no writ).

8. *Id.* at 439.

9. *Id.*; see also *Bridges v. First Nat'l Bank*, 430 S.W.2d 376, 382 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (life estates in personalty are not prohibited and will be upheld when the clear intent of the testator is to establish such life estate and the intent is ascertainable from the language of the will).

10. *Id.*; see also *Abbott v. Wagner*, 108 Neb. 359, 188 N.W. 113, 121 (1922) (a court not

on deposit" includes certificates of deposit, which are within the ordinary meaning of the term.<sup>11</sup>

*Community Property.* The Texas Supreme Court, in *Estate of Hanau v. Hanau*,<sup>12</sup> determined that the quasi-community property rule announced in *Cameron v. Cameron*<sup>13</sup> does not apply to probate matters.<sup>14</sup> Robert and Dorris Hanau resided in Illinois when they married in 1974. They moved to Texas in 1979. After moving to Texas, Robert executed a will in which he left his separate property to his children from a previous marriage and his community property to Dorris. Robert and Dorris each had substantial separate property interests when they married and they maintained those interests in their own names following their marriage. Robert acquired additional shares of stock with his separate property after the marriage but while the couple still resided in Illinois. Under Illinois law this property was Robert's separate property.<sup>15</sup> Robert died in 1982. Dorris, the executor under Robert's will, claimed that all stocks Robert acquired during the marriage, whether the couple was residing in Illinois or in Texas when he acquired the stocks, were community property. Robert's children stipulated that any stocks bought while the couple resided in Texas were community property, but they insisted that stocks Robert acquired while the couple remained in Illinois were separate property. The trial court determined that all of the stocks acquired during the marriage, whether acquired in Texas or in Illinois, were community property.<sup>16</sup> The Corpus Christi court of appeals affirmed in part and reversed in part.<sup>17</sup>

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only has the power but is under a solemn duty of requiring adequate security or appointing a trustee).

11. *Id.*

12. 730 S.W.2d 663 (Tex. 1987).

13. 641 S.W.2d 210 (Tex. 1982). *Cameron v. Cameron* involved the division in a divorce proceeding of marital property acquired prior to the couple's move to Texas.

14. 730 S.W.2d at 666. See *Allard v. Frech*, 735 S.W.2d 311 (Tex. App.—Fort Worth 1987, writ granted), in which the court examined whether the "terminable interest rule" applies to terminate a nonemployee spouse's interests in the other spouse's retirement benefits at the death of the first spouse to die. *Id.* at 313-15. The court declined to apply the "terminable interest rule," and specifically left the decision to add the rule to Texas law to either the legislature or the Texas Supreme Court. *Id.* at 315. The court also examined the rule announced in *Valdez v. Ramirez*, 574 S.W.2d 748 (Tex. 1978), that an employee spouse's benefits were her separate property after the death of her husband, to determine the applicability of the *Valdez* rule to this case. *Allard*, 735 S.W.2d at 313-15. The court distinguished *Valdez* because the employee in *Valdez* was a federal employee whose benefits were determined under federal law. *Allard*, 735 S.W.2d at 314-15. The court reasoned that the Texas Supreme Court specifically failed to apply the *Valdez* rule to Texas law and implied that a retirement plan under state law would possibly be considered community property. *Allard*, 735 S.W.2d at 314-15 (citing *Valdez*, 574 S.W.2d at 753). For a discussion of other issues in *Allard v. Frech*, see *infra* notes 113-17 and accompanying text.

15. *Estate of Hanau*, 730 S.W.2d at 664 (additional shares purchased with separate property during marriage remain separate property under Illinois common law).

16. The trial judge stated, "the Texas Supreme Court in *Cameron v. Cameron* could not have intended to limit its new characterization of common law marital property to divorce proceedings, but rather intended that said characterization to be [sic] applied to any situation where the issue arose, including probate proceedings." *Estate of Hanau*, 730 S.W.2d at 665.

17. 721 S.W.2d 515, 518 (Tex. App.—Corpus Christi 1986). The court held that the property acquired while the couple resided in Illinois was Robert's separate property and that

The supreme court noted the rule that property retains the characterization that it had when it was acquired; thus, property acquired in a common law jurisdiction would retain its separate character after the owner moved to Texas.<sup>18</sup> The court examined the three bases for the holding in *Cameron*<sup>19</sup> and concluded that these bases were not applicable in the probate context.<sup>20</sup> First, other community property jurisdictions that have applied quasi-community property principles to probate proceedings have done so under statutory authority.<sup>21</sup> Second, the Texas Legislature specifically provided for the consideration of quasi-community property in a property distribution during a divorce, but the legislature has not mandated such a consideration within a probate situation.<sup>22</sup> Third, a trial court should have the discretion to make an equitable distribution of marital property in a divorce situation, but a beneficiary has no comparable right to an equitable distribution of a decedent's estate.<sup>23</sup> The court therefore concluded that the adoption of the *Cameron* rule in the probate context would "make a shambles of 150 years of Texas probate law."<sup>24</sup>

The supreme court reversed the court of appeals' holding that the TransWorld stock that Robert Hanau purchased after moving to Texas was community property.<sup>25</sup> The parties stipulated that Robert owned 200 shares of Texaco stock at the time he and Dorris married. After the marriage but before the couple moved to Texas, Robert sold the Texaco stock and bought 200 shares of City Investing stock for approximately the amount of the proceeds of the Texaco stock and on the same day that he sold the Texaco stock. After the couple moved to Texas, Robert sold the City Investing stock and on the same day bought 200 shares of TransWorld stock for approximately the amount of the City Investing stock sale proceeds. The court

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the separate property passed to Robert's children. *Id.* The court noted that the reclassification of the separate property acquired while the couple resided in Illinois into community property would not only go against Texas law but would also defeat the testator's intent to give this property to his children. *Id.* The court upheld the trial court's characterization of TransWorld stock that Robert acquired while living in Texas as community property. *Id.*

18. *Estate of Hanau*, 730 S.W.2d at 665.

19. *Id.* at 665-66. The *Cameron* court first compared the laws of other community property states. 641 S.W.2d at 220-21. The court then examined TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1988). 641 S.W.2d at 221-22. Finally, the court examined the trial court's equitable powers in determining a distribution of marital property. *Id.* at 222-23.

20. *Estate of Hanau*, 730 S.W.2d at 666.

21. *Id.* at 665-66; see CAL. PROB. CODE § 66 (West Supp. 1987) (defining quasi-community property for use in Probate Code); IDAHO CODE § 15-2-201 (1979) (providing disposition of and defining quasi-community property).

22. See *Estate of Hanau*, 730 S.W.2d at 666. The *Cameron* court analyzed the adoption of section 3.63 of the Texas Family Code. 641 S.W.2d at 221-22. Section 3.63 provides that a trial judge may make a "just and right" division of the marital property, including property that would have been community property if acquired while the spouses were domiciled in Texas, but that was instead acquired while the spouses were domiciled in a common law state. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1988).

23. 730 S.W.2d at 666. The court noted that a valid will should be enforced despite the equity of the property distribution planned by the testator. *Id.* Further, a statutory formula dictates the distribution of an intestate's property, so a probate court has no need to make equitable decisions. *Id.*

24. *Id.*

25. *Id.* at 667.

of appeals held that the stipulations did not provide enough evidence to overcome the community presumption.<sup>26</sup> The supreme court, however, noted that the couple maintained separate accounts for their separate property and that they did not commingle funds.<sup>27</sup> The supreme court held that the court of appeals erred in holding that the TransWorld stock was community property because it was not adequately traced from separate funds and the supreme court consequently reversed and rendered judgment that the stock should be transferred to Robert's son.<sup>28</sup> Justice Spears concurred in the court's opinion, but urged the legislature to adopt a Probate Code section similar to Texas Family Code section 3.63 in order to provide for a quasi-community property characterization in probate proceedings as well as divorce proceedings so that equitable results might be achieved for surviving spouses.<sup>29</sup>

*Joint Wills.* The Texas Supreme Court in *Henderson v. Parker*<sup>30</sup> held that the phrase "surviving children of this marriage,"<sup>31</sup> used in William and Lillie Parker's joint will, meant children who were alive when the couple executed the will rather than children who survived the couple.<sup>32</sup> The Parkers had three sons alive when they executed their joint will in 1971. The will contained three alternative dispositive schemes. The first two schemes contained mirror provisions devising the entire estate to the surviving spouse, depending upon which spouse died first. The third scheme provided for disposition of the estate if both spouses died within sixty days of each other. Basically, this disposition divided the couple's real property equally among their three sons, who were named in the will. The couple died within four days of each other. They were survived by two of their three sons and by their predeceased son's two daughters.

The trial court determined that the two daughters of the predeceased son took their father's share under the anti-lapse statute.<sup>33</sup> The court of appeals reversed and rendered judgment, in which it divided the real property equally among the two surviving sons.<sup>34</sup> The supreme court noted that the survivorship language was a general statement followed by specific devises to

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26. 721 S.W.2d at 518. The court of appeals, quoting *Latham v. Allison*, 560 S.W.2d 481, 485 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.), stated that "[w]hen tracing separate property, it is not enough to show that separate funds *could have been* the source of the subsequent deposit of funds." 721 S.W.2d at 518. The court felt that Robert's children failed to meet the burden of overcoming the community presumption because they only conjectured that all stock purchases in this chain of transactions were made from separate property. *Id.*

27. 730 S.W.2d at 667.

28. *Id.*

29. *Id.* (Spears, J., concurring).

30. 728 S.W.2d 768 (Tex. 1987).

31. *Id.* at 769, 770.

32. *Id.* at 770.

33. *Parker v. Henderson*, 712 S.W.2d 224, 225 (Tex. App.—Houston [14th Dist.] 1986), *rev'd*, 728 S.W.2d 768, 771 (Tex. 1987); see TEX. PROB. CODE ANN. § 68 (Vernon 1980).

34. *Parker v. Henderson*, 712 S.W.2d 224, 227-28 (Tex. App.—Houston [14th Dist.] 1986). The appeals court determined that the language used in the will created a class gift to the children who survived the testators; since only two of the sons survived the testators, they received equal shares in the entire estate. *Id.* at 227.

each of the three sons, and stated that specific provisions carry greater weight than general provisions.<sup>35</sup> The supreme court determined that the survivorship language meant children who were surviving at the time the couple executed the will because testamentary intent is determined as of the time the testator executes the will.<sup>36</sup> The court found support in the specific bequests, which contained no survivorship language.<sup>37</sup> The supreme court thus reversed the court of appeals and affirmed the judgment of the trial court.<sup>38</sup>

In *Jones v. Jones*<sup>39</sup> the court affirmed the trial court's judgment that a joint will was contractual and mutual as a matter of law.<sup>40</sup> Homer and Edna Jones executed a joint will in 1967 in which the first to die left his or her estate entirely to the survivor and the survivor then left his or her estate to their three children in equal shares. In 1975 Homer Jones died. Edna Jones made a new will in 1977 in which she favored one of the couple's three children more than the other two. In 1982 Edna Jones died. The daughter favored under the 1977 will offered it for probate. The other two children contested the admission of the 1977 will to probate and applied for probate of the 1967 joint will. The trial court admitted the 1977 will to probate, but imposed a constructive trust on the estate in favor of the two children who contested the admission of the 1977 will to probate. The trial court reasoned that the 1967 will was, as a matter of law, contractual and mutual. The daughter favored under the 1977 will appealed the trial court's judgment.

The appeals court first noted that the fact that the couple made a joint will does not prove that the couple made the will under a contract.<sup>41</sup> Next, the court cited the analysis of the court in *Fisher v. Capp*,<sup>42</sup> in which the *Fisher* court studied Texas Supreme Court cases holding that joint wills were contractual. The court then summarized the themes found by the *Fisher* court in determining which joint wills are contractual.<sup>43</sup> The common themes in the cases, according to the court, are that the survivor receives a conditional gift upon the death of the first to die and that the entire estate is "treated as a single estate and jointly disposed of by both testators in the secondary dispositive provisions of the will" upon the death of the second to die.<sup>44</sup> The court held that Homer and Edna Jones intended to grant the survivor of them a conditional estate and to unite the estates upon the death of the second to die to effectuate a common dispositive scheme, thus creating a binding contract.<sup>45</sup>

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35. 728 S.W.2d at 770.

36. *Id.*

37. *Id.*

38. *Id.* at 771.

39. 718 S.W.2d 416 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

40. *Id.* at 418.

41. *Id.*

42. 597 S.W.2d 393, 398-99 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

43. 718 S.W.2d at 418.

44. *Id.*

45. *Id.* In *Jones v. Chamberlain*, 733 S.W.2d 276 (Tex. App.—Texarkana 1987, no writ), the court similarly affirmed a trial court's finding that an earlier joint will was contractual so that, although one party's subsequent will was admitted to probate, the assets were subject to

The court in *Alviar v. Gonzalez*<sup>46</sup> construed a joint will, which Enrique and Librada Alviar had executed in 1980. They both died in 1981, with Enrique Alviar predeceasing his wife by five months. Enrique owned some real property prior to their marriage that comprised the bulk of their estate. The will provided that the survivor should take all of their property at the death of the first to die, "to be used, occupied, enjoyed, conveyed, and expended by *and during the lifetime of such survivor*, as such survivor shall desire."<sup>47</sup> No provision was made for distribution of the estate after the death of the second to die. Enrique and Librada Alviar each had children from previous marriages, but no children together. Enrique Alviar's heirs sought to have the court construe the will as creating a life estate in the surviving spouse, so that they would take title to the property. Librada Alviar's heirs contended that Enrique Alviar conveyed a fee simple interest to his wife upon his death, so that they would take title to the property as her heirs. The trial court found that the will gave the real property to Librada Alviar in fee simple. Enrique Alviar's heirs appealed.

The court of appeals held that the will conveyed a life estate coupled with the right to consume or transfer the property.<sup>48</sup> The additional right to consume or transfer property did not serve to convert a life estate into a fee simple interest.<sup>49</sup> The court also held that since the couple made no provision for disposition of the estate upon the death of the second to die, the estate would pass by intestacy to the heirs of both Enrique and Librada Alviar.<sup>50</sup> One justice dissented to the court's holding, stating that the will was unclear as to whether it conveyed a life estate or a fee simple estate to the survivor.<sup>51</sup> Because of the ambiguity in the will's language the dissent applied legal presumptions to reach a decision different from the majority. The dissent first applied the rule that the law favors gifts of the largest estate possible under a will unless the testator clearly states a contrary intent.<sup>52</sup> The dissent next applied the presumption against partial intestacy; the majority's holding resulted in the passage of the remainder interest under intestacy, which is contrary to this presumption.<sup>53</sup>

*Self-Proving Affidavits.* In *Cutler v. Ament*<sup>54</sup> the court held that the invalidity of a self-proving affidavit did not invalidate the will.<sup>55</sup> Constance Cutler executed a will in January 1979 and a second will in March 1982. The self-

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the constructive trust imposed by the joint will. *Id.* at 277. The crux of this appeal concerned the appellant's failure to prove the affirmative defense of laches. *Id.* at 277-78.

46. 725 S.W.2d 297 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

47. *Id.* at 298 (emphasis by the court).

48. 725 S.W.2d at 299.

49. *Id.*

50. *Id.* at 300.

51. *Id.* (Dorsey, J., dissenting).

52. *Id.*

53. *Id.*; see also *Zint v. Crofton*, 563 S.W.2d 287, 290 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (there is a positive presumption against intestacy and when a will is ambiguous it will be given a construction that will prevent intestacy).

54. 726 S.W.2d 605 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

55. *Id.* at 607.



proving affidavit attached to the second will was defective because it stated that the witnesses to the will "subscribed and acknowledged"<sup>56</sup> that they witnessed the execution of the will. The Probate Code provides for self-proving wills if each witness states on oath that he or she signed the will at the testator's request in the testator's presence.<sup>57</sup> Instead, this affidavit provided that the testator swore to the will and that the witnesses acknowledged the will. The court held that the effect of the defective self-proving affidavit was the same as if no affidavit had been attached and remanded the case to the trial court for a determination of the validity of the second will.<sup>58</sup> The court reasoned that the self-proving affidavit is not part of the will but is instead a separate and distinct document that serves only an evidentiary function.<sup>59</sup>

*Noncupative Wills.* The court in *Kay v. Sandler*<sup>60</sup> determined that an alleged noncupative will did not meet the Probate Code requirements<sup>61</sup> for a noncupative will.<sup>62</sup> Jack Kay, while in the hospital suffering from coronary artery disease, discussed a new will with his attorney. No one else was present during this discussion, and Kay did not declare his intent to make an oral will to his attorney. The attorney prepared a draft of a new will within the next few days. Kay left the hospital and returned to work. On the day that the attorney arrived to deliver the new will to Kay, the attorney learned

56. *Id.* at 606.

57. TEX. PROB. CODE ANN. § 59 (Vernon 1980). Section 59 provides an example of a self-proving affidavit. The jurat found at the end of the example clearly states "subscribed and sworn to before me by the said . . . witnesses." *Id.*

58. 726 S.W.2d at 606.

59. *Id.* at 607. The leading case in interpreting self-proving affidavits is *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966). The testator in *Boren* signed his one-page will and the attached self-proving affidavit, but the witnesses signed only the self-proving affidavit. The court, in a literal interpretation of § 59, held that the will was inadmissible to probate because it was not witnessed. *Id.* at 729-30. The court stated that the self-proving affidavit only serves to allow the admission of a will to probate without a subscribing witness's testimony. *Id.* at 729. Texas courts have continued to interpret strictly self-proving affidavits as evidentiary documents only. See, e.g., *Orrell v. Cochran*, 695 S.W.2d 552, 552 (Tex. 1985) (self-proving provisions of a will are not part of the will but concern only the matter of proof); *Wich v. Fleming*, 652 S.W.2d 353, 355 (Tex. 1983) (will and self-proving affidavits are separate and distinct documents; the self-proving provisions only concern proof); *Hopkins v. Hopkins*, 708 S.W.2d 31, 33 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (purpose of the self-proving affidavit is to eliminate the need for testimony of the subscribing witness when the will is offered for probate).

60. 718 S.W.2d 872 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

61. TEX. PROB. CODE ANN. § 65 (Vernon 1980) provides the requisites for a valid noncupative will:

No noncupative will shall be established unless it be made in the time of the last sickness of the deceased, at his home or where he has resided for ten days or more next preceding the date of such will, except when the deceased is taken sick away from home and dies before he returns home; nor when the value exceeds Thirty Dollars, unless it be proved by three credible witnesses that the testator called on a person to take notice or bear testimony that such is his will, or words of like import.

*Id.* The Probate Code also specifies the manner of proof of a noncupative will. TEX. PROB. CODE ANN. § 86 (Vernon 1980). If the estate value is greater than thirty dollars, the proponent of the noncupative will must bring forward three credible witnesses who will testify that the testator called on them to take notice of his will. *Id.* § 86(c).

62. 718 S.W.2d at 875.

that Kay had suffered a heart attack and was unconscious. Kay never regained consciousness. Kay's estate was well in excess of thirty dollars. The appellee offered Kay's 1983 written will to probate, but the appellant claimed that the alleged noncupative will revoked the written will. The trial court entered summary judgment admitting the 1983 written will to probate.

The court noted that the noncupative will that the appellant wished to have probated was actually the draft prepared by the attorney.<sup>63</sup> The court found that the record indicated that only the attorney could offer testimony about what Kay said regarding the disposition of his estate.<sup>64</sup> The other two affiants could only testify that Kay told them, after he had spoken with his attorney, that he was making a new will. The court held that three credible witnesses could not give testimony supporting as Kay's noncupative will the dispositive scheme set out in the will draft, so, as a matter of law, the will offered by the appellant failed to meet a requirement of Probate Code section 65 and it could not be probated as a valid will.<sup>65</sup>

*Developments in Tort Law.* Cases sometimes arise in the tort context that contain valuable lessons for the estate practitioner. During the Survey period two such cases arose.<sup>66</sup>

The appeals court in *Berry v. Dodson, Nunley & Taylor, P.C.*<sup>67</sup> held that in the absence of privity of contract an attorney owes no duty to third parties, including potential beneficiaries of a new will.<sup>68</sup> Henry Berry hired the attorney to prepare a new will for him while he was hospitalized with terminal cancer. Berry had executed a will in 1977 in which he left his estate to his second wife and the children of his first marriage. Berry decided to change the distribution of his estate, to change the trustees of the trust he wished to establish for the benefit of his children, and to provide for his wife's children from a previous marriage in the same manner as and equally with his own children. Berry died about two months after he first consulted with the attorney. The attorney had prepared a draft of the new will, but it was not executed prior to Berry's death. Berry's 1977 will was admitted into probate and his estate was distributed under its terms. Mrs. Berry and her children sued the attorney and his firm. The law firm moved for summary judgment based on lack of privity, and the trial court granted summary judgment. Mrs. Berry and her children appealed, claiming that privity existed and that the law firm owed them a duty.

The court of appeals affirmed the summary judgment.<sup>69</sup> The court stated that only the decedent and the attorney were involved in an attorney-client

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63. *Id.* at 875.

64. *Id.*

65. *Id.* The court had earlier noted that a noncupative will must meet all requirements of § 65 in order to be admitted to probate. *Id.* at 874.

66. *Berry v. Dodson, Nunley & Taylor, P.C.*, 717 S.W.2d 716 (Tex. App.—San Antonio 1986), *remanded for entry of judgment pursuant to settlement agreement*, 729 S.W.2d 690 (Tex. 1987); *King v. Acker*, 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ).

67. 717 S.W.2d 716 (Tex. App.—San Antonio 1986).

68. *Id.* at 719.

69. *Id.*

relationship despite Mrs. Berry's testimony that the attorney gave her legal advice and that she initiated the contacts between her husband and the attorney.<sup>70</sup> The court next examined whether the attorney owed Mrs. Berry a duty in the absence of privity.<sup>71</sup> The court noted that Texas follows the majority view that persons not privy to the attorney-client relationship do not have a cause of action for any injuries they might suffer as a result of the attorney's breach of a duty to the client.<sup>72</sup> The court noted the trend in a minority of jurisdictions away from the majority rule, especially when the persons claiming a cause of action are intended beneficiaries under a will that the attorney negligently prepared or that was improperly executed.<sup>73</sup> The court declined to hold contrary to Texas law and consequently determined that the attorney owed no duty to the intended beneficiaries when no privity of contract existed.<sup>74</sup>

The Texas Supreme Court granted writ in the case, but prior to deciding the case the court granted the joint motion of the parties to set aside the judgments of the trial court and the court of appeals and to remand the case to the trial court for entry of judgment under the terms of a settlement agreement between the parties.<sup>75</sup> The result of the supreme court's action is unclear. Because the court was willing to grant writ in the case, the court may be willing in the near future to overturn the majority rule in this state. Estate planning practitioners should consequently be aware that they may be held accountable to the intended beneficiaries under a will.

In *King v. Acker*<sup>76</sup> the court of appeals considered tortious interference with inheritance. Fred King was admitted to the hospital in January 1982 suffering from an aneurysm. He was alert on January 4, 1982, when a doctor examined him. The next day he underwent surgery on the aneurysm.

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70. *Id.* at 718.

71. *Id.*

72. *Id.*

73. *Id.* The court noted that California courts have made the most significant inroads to the majority view. *Id.* See, e.g., *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 167, 74 Cal. Rptr. 225, 231 (1969) (attorney owes separate and distinct duty of care to intended beneficiaries); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 687, 15 Cal. Rptr. 821, 823 (1961), *cert. denied*, 368 U.S. 987 (1962) (lack of privity between attorney and beneficiaries does not preclude cause of action if harm to beneficiaries was foreseeable); *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16, 18 (1958) (notary who prepared will was liable for invalid attestation). The court also listed decisions in other states that protected intended beneficiaries of wills. *Berry*, 717 S.W.2d at 719 (citing *Stowe v. Smith*, 184 Conn. 194, 441 A.2d 81, 83 (1981) (beneficiary had a cause of action in contract as a third-party beneficiary); *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983) (intended beneficiary could bring malpractice action despite lack of privity); *McAbee v. Edwards*, 340 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1976) (testator's child could bring malpractice action for attorney's negligence in advising testator); *Ogle v. Fuiten*, 102 Ill. 2d 356, 466 N.E.2d 224, 227 (1984) (beneficiaries could bring breach of contract action as third-party beneficiaries); *Tuttle v. Schlater* (Succession of Killingsworth), 292 So. 2d 536, 542 (La. 1973) (legatees were third-party beneficiaries); *Jaramillo v. Hood*, 93 N.M. 433, 601 P.2d 66, 67 (1979) (beneficiary could bring malpractice action); *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744, 751 (1983) (third-party beneficiary can recover based upon RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979)); *Auric v. Continental Casualty Co.*, 111 Wis. 2d 507, 331 N.W.2d 325, 329 (1983) (lack of privity does not bar negligence action against attorney)).

74. 717 S.W.2d at 719.

75. 729 S.W.2d 690 (Tex. 1987).

76. 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ).

Approximately a week after surgery King lapsed into a coma from which he never regained consciousness. He died about a month after he was first admitted to the hospital. While King was in the coma, his second wife, Lorraine, attempted to assign shares of stock in Petro-Chem Technical Services from King to herself under a power of attorney that King supposedly executed in her favor on January 4, 1982. After King's death, Lorraine and her attorney filed a will for probate that King supposedly also executed on January 4, 1982. King had executed a will in 1977, which was admitted to probate after the probate court heard evidence on the validity of the purported 1982 will. The probate court appointed a temporary administrator while awaiting the determination of which will should be admitted to probate. The temporary administrator recovered the Petro-Chem stock from Lorraine and sold it during the period of temporary administration. The stock sale resulted in a \$20,000 commission for the temporary administrator. King's two children from his first marriage incurred over \$76,000 in legal fees and \$8,275 in fees for a document examiner who examined the 1982 will in fighting against the admission of the 1982 will to probate. The two children were named co-independent administrators when King's 1977 will was admitted to probate.

The children and King's mother, who also was a beneficiary under the 1977 will, brought this action against Lorraine, her attorney, and others, who purportedly witnessed the 1982 will. The court severed the cause of action against Lorraine from that against the other defendants. The jury found that King did not execute the power of attorney on January 4, 1982, and that he did not sign the will dated January 4, 1982. The jury additionally found that Lorraine maliciously interfered with the plaintiffs' inheritance, that she conspired to interfere tortiously with their inheritance, and that the plaintiffs suffered actual damages of \$28,275 and exemplary damages of \$76,096.82, which equalled the amount of their legal fees. The trial court entered judgment against Lorraine in the amount of \$104,371.82, plus interest. Lorraine appealed.

The court of appeals held that the jury finding that King did not execute the power of attorney provided sufficient evidence that Lorraine tortiously interfered with the testamentary scheme under King's 1977 will.<sup>77</sup> The court additionally held that sufficient evidence existed to support the jury finding that Lorraine acted with malice in transferring the stock to herself since the jury found that King did not execute the power of attorney.<sup>78</sup> The court held that a cause of action for tortious interference with inheritance exists in Texas.<sup>79</sup> The court noted that the estate would not have incurred the expense of the \$20,000 commission to the temporary administrator for the sale of the stock but for Lorraine's actions, so the court held that the jury properly considered the commission in determining the plaintiffs' actual

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77. *Id.* at 753.

78. *Id.*

79. *Id.* at 754. The court cited *Tippett v. Hart*, 497 S.W.2d 606 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.), and *Pope v. Garrett*, 204 S.W.2d 867, 871 (Tex. Civ. App.—Galveston 1947), *rev'd on other grounds*, 211 S.W.2d 559 (Tex. 1948), for this holding.

damages.<sup>80</sup> The court also upheld the award of exemplary damages because the jury found that Lorraine acted with malice.<sup>81</sup> The court reduced the actual damages to \$20,000, but affirmed the judgment of the trial court in everything else.<sup>82</sup>

## II. NONTESTAMENTARY TRANSFERS

*Life Insurance.* In *Crawford v. Coleman*<sup>83</sup> the Texas Supreme Court overruled its previous interpretation<sup>84</sup> of Insurance Code article 21.23.<sup>85</sup> Cornelius Shoaf stabbed and killed his wife, Sandra, in 1979. Sandra had four insurance policies on her life. All four of the policies named Cornelius as the primary beneficiary. Cornelius obtained two of the policies through his job; his son from a previous marriage, Cornell, was the contingent beneficiary under these two policies. Cornelius could not receive benefits under the policies since he willfully killed Sandra. The trial court awarded the proceeds of two of the policies to Sandra's parents, the Crawfords, who were the contingent beneficiaries under the latter two policies. The trial court awarded the benefits under the two policies Cornelius obtained through his employment to his son, who was the contingent beneficiary under those policies. The court of appeals affirmed.<sup>86</sup>

The Crawfords contended that they should receive the policy benefits awarded to Cornell Shoaf because they were Sandra's nearest relatives. The court held in *Deveroex v. Nelson* that insurance proceeds are paid to the nearest relative under Insurance Code article "21.23 only if *all* of the beneficiaries, primary and contingent, are disqualified from receiving such proceeds."<sup>87</sup> The court based this holding on the belief that distributing life insurance benefits to beneficiaries who were not statutorily disqualified from receiving the benefits would accomplish both the insured's intent and the legislature's goal of denying benefits to the person or persons who willfully brought about the insured's death.<sup>88</sup> The *Crawford* court discarded this reasoning because the holding clearly contradicted the language of the statute.<sup>89</sup> The statute clearly provides that the benefits are to be paid to the decedent's

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80. 725 S.W.2d at 755. The court held, however, that the jury should not have included the costs associated with handwriting experts since these costs are litigation expenses, which cannot be recovered. *Id.*

81. *Id.* The court noted that although attorney's fees usually are not considered in computing actual damages, they may be considered in computing exemplary damages. The court held that the trial court's instruction to the jury that they may consider attorney's fees in computing exemplary damages was proper. *Id.* at 757.

82. *Id.*

83. 726 S.W.2d 9 (Tex. 1987).

84. See *Deveroex v. Nelson*, 529 S.W.2d 510, 513 (Tex. 1975).

85. TEX. INS. CODE ANN. art. 21.23 (Vernon 1981). Article 21.23 provides:

The interest of a beneficiary in a life insurance policy or contract heretofore or hereafter issued shall be forfeited when the beneficiary is the principal or an accomplice in willfully bringing about the death of the insured. When such is the case, . . . the nearest relative of the insured shall receive said insurance.

86. *Crawford v. Coleman*, 701 S.W.2d 79, 85 (Tex. App.—Fort Worth 1985).

87. 529 S.W.2d at 513.

88. *Id.*; see 726 S.W.2d at 10.

89. 726 S.W.2d at 10-11.

nearest relative.<sup>90</sup> The court held that, under the statute, when any beneficiary willfully causes the insured's death, the benefits of the policy are to be paid to the insured's nearest relative, and the court therefore reversed the court of appeals and rendered judgment that the Crawfords take the policy proceeds as Sandra's nearest relatives.<sup>91</sup> Justice Kilgarlin, joined by Justice Campbell, concurred in part and dissented in part.<sup>92</sup>

*Joint Tenancy Accounts.* Five decisions interpreted joint tenancy language during the Survey period.<sup>93</sup> The court in *Sawyer v. Lancaster*<sup>94</sup> held that affidavit testimony that a joint account was established as a convenience for the decedent, who was an invalid before his death, was admissible, but was legally insufficient to rebut the presumption of survivorship rights under a joint account.<sup>95</sup> The bank signature card did not specifically provide that the account was intended to be a joint tenancy with rights of survivorship. The co-depositor clause stated that the funds were to be paid to either of the co-depositors or to the survivor of them. The court held that this language, while insufficient to meet the requirements of Probate Code section 439(a) for creating a joint tenancy with rights of survivorship,<sup>96</sup> created a presumption of survivorship.<sup>97</sup> The court noted that every Texas decision since the enactment of section 439(a) has held that extrinsic evidence of the deceased joint tenant's intent is not admissible to alter the unambiguous survivorship language of the signature card.<sup>98</sup> The court held, however, that if only a

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90. See *supra* note 84.

91. 726 S.W.2d at 11. The court specifically noted that its holding is not to be construed as an implication that Cornell fell under the corruption-of-blood doctrine. *Id.*

92. *Id.* at 11-14 (Kilgarlin, J., concurring in part and dissenting in part). Justice Kilgarlin agreed that the Crawfords were entitled to the proceeds of one of the insurance policies in issue because he felt that they were entitled to the proceeds under the policy's terms. *Id.* at 12. Justice Kilgarlin opposed the overruling of the *Deveroex* holding, however, because he felt that the insured's intentional designation of a contingent beneficiary would be defeated should the primary beneficiary willfully cause the insured's death. *Id.* at 13.

93. *Tuttle v. Simpson*, 735 S.W.2d 539, 543-45 (Tex. App.—Texarkana 1987, no writ); *Allard v. Frech*, 735 S.W.2d 311 (Tex. App.—Fort Worth, writ granted); *Dickerson v. Brooks*, 727 S.W.2d 652 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *McCarty v. First State Bank & Trust Co.*, 723 S.W.2d 792 (Tex. App.—Texarkana 1987), *rev'd on other grounds*, 730 S.W.2d 656 (Tex. 1987); *Sawyer v. Lancaster*, 719 S.W.2d 346 (Tex. App.—Houston [1st Dist.] 1986, no writ). For a survey of legislative changes to joint tenancy accounts, see *infra* notes 273, 275-77 and accompanying text.

94. 719 S.W.2d 346 (Tex. App.—Houston [1st Dist.] 1986, no writ).

95. *Id.* at 350.

96. TEX. PROB. CODE ANN. § 439(a) (Vernon 1980). Section 439(a) provides, in part: Sums remaining on deposit at the death of a party to a joint account belong to the surviving party . . . against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party . . . . A survivorship agreement will not be inferred from the mere fact that the account is a joint account.

97. 719 S.W.2d at 349.

98. *Id.* (citing *Chopin v. InterFirst Bank of Dallas, N.A.*, 694 S.W.2d 79 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Otto v. Klement*, 656 S.W.2d 678 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); *Sheffield v. Estate of Dozier*, 643 S.W.2d 197 (Tex. App.—El Paso 1982, writ ref'd n.r.e.)). The court noted that the cases, with the exception of *Chopin*, state the rule that extrinsic evidence that an account was established as a joint account for mere convenience cannot alter papers that establish the account as a joint tenancy with survivorship rights. 719 S.W.2d at 349. The court specifically disagreed with the holding in *Chopin* that language

presumption of survivorship is raised, extrinsic evidence is admissible to determine the true nature of the account.<sup>99</sup>

The appeals court in *McCarty v. First State Bank & Trust Co.*<sup>100</sup> reached a different conclusion than did the court in *Sawyer v. Lancaster*.<sup>101</sup> In *McCarty* the court held that extrinsic evidence, in the form of an affidavit signed by the deceased depositor and two witnesses a few days after the decedent deposited funds in the bank, was inadmissible to determine the nature of the account.<sup>102</sup> The affidavit specifically stated that the decedent wished the funds to be placed in a joint account with rights of survivorship. The bank signature card did not provide for survivorship rights. The court held that the affidavit, although signed by the decedent, was really the affidavit of the two witnesses, and that the affidavit merely expressed the decedent's intent in establishing the account.<sup>103</sup> The appeals court reversed the trial court's judgment.<sup>104</sup> The supreme court reversed in part and remanded.<sup>105</sup> The supreme court based the reversal on the fact that the court of appeals failed to consider the bank's indemnity claim against the surviving joint tenant. The bank had paid the survivor the money in the account based on the affidavit. The bank's third-party claim against the survivor became moot when the trial court found that the account was a joint account with rights of survivorship. The court of appeals failed to consider the bank's claim against the survivor when it reversed the trial court's judgment. The supreme court held that the court of appeals rendered judgment in violation of rule 81 of the Texas Rules of Appellate Procedure.<sup>106</sup>

In *Dickerson v. Brooks*<sup>107</sup> the court held that the facts that two savings certificates did not specify that they were held as joint accounts with survivorship rights and that the decedent did not sign either certificate were irrelevant in determining that the accounts were held as joint tenancies with

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directing that funds on deposit are to be payable to the survivor do not create a survivorship account. *Id.* The court noted that language directing that the funds on deposit be paid to the survivor instead creates a rebuttable presumption of survivorship rights, and that extrinsic evidence is admissible to establish the nature of the account if the language signed by the depositor is ambiguous. *Id.*

99. *Id.* at 349-50.

100. 723 S.W.2d 792 (Tex. App.—Texarkana), *rev'd on other grounds*, 730 S.W.2d 656 (Tex. 1987). For a discussion of the supreme court opinion, see *infra* notes 174-78 and accompanying text.

101. See *supra* notes 94-99 and accompanying text.

102. 723 S.W.2d at 794-95.

103. *Id.* at 795. The court stated that the Probate Code provides that the depositor's intent should not be considered. *Id.* The court noted that the affidavit was inadmissible hearsay, although no hearsay objection was made, and that the affidavit was not relevant and thus the trial court erred in overruling a relevancy objection. *Id.* Finally, the court noted that the affidavit did not meet the requirements of a written notice to a financial institution under TEX. PROB. CODE ANN. § 440 (Vernon 1980) because it was not the statement of the depositor and because it was not addressed to the bank. 723 S.W.2d at 795.

104. 723 S.W.2d at 795.

105. *First State Bank & Trust Co. v. McCarty*, 730 S.W.2d 656, 657 (Tex. 1987).

106. *Id.* at 657. TEX. R. APP. P. 81(c) provides that the court of appeals may render judgment when it reverses the trial court "except when it is necessary to remand to the court below for further proceedings."

107. 727 S.W.2d 652 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

rights of survivorship.<sup>108</sup> The signature cards and applications for the two accounts stated that the accounts were joint accounts with rights of survivorship and that the joint tenants held not as tenants in common but as joint tenants with rights of survivorship. All three tenants, including the decedent, signed the signature cards. The court also examined a promissory note, which provided that in the event the payee died the note was payable to her named heirs. The court found that the promissory note met the provisions of Texas Probate Code section 450<sup>109</sup> and that the promissory note was a nontestamentary transfer.<sup>110</sup> The dissent noted that in order not to be considered testamentary in character a promissory note must fall within one of three exceptions provided in section 450.<sup>111</sup> The dissent stated that the promissory note should state clearly and unambiguously who shall receive the payments on the payee's death, and that this promissory note did not provide this information clearly and unambiguously.<sup>112</sup>

In *Allard v. Frech*<sup>113</sup> the court determined that funds in a bank account designated as a joint tenancy with rights of survivorship were community funds despite the designation.<sup>114</sup> The couple deposited community funds into the account. The surviving husband argued that the couple's designation of the account as a joint tenancy with survivorship rights indicated that the couple intended to partition the property before establishing the account. The court noted that the signature card contained no partition language.<sup>115</sup>

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108. *Id.* at 654.

109. See TEX. PROB. CODE ANN. § 450 (Vernon 1980). *Id.* § 450(a) provides that provisions in a promissory note, among other instruments, that state that money shall be paid after the payee's death to specified persons are nontestamentary.

110. 727 S.W.2d at 654.

111. *Id.* at 654, 655 (Dunn, J., dissenting). TEX. PROB. CODE ANN. § 450(a) (Vernon 1980) provides that an instrument is deemed to be nontestamentary when:

(1) that money or other benefits theretofore due to, controlled, or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

112. *Id.* The dissent also felt that the majority should not have classified one of the saving accounts as a joint tenancy with rights of survivorship. *Id.*

113. 735 S.W.2d 311 (Tex. App.—Fort Worth 1987, writ granted). For a discussion of the community property issue in this case, see *supra* note 14.

114. 735 S.W.2d at 317; see also *Tuttle v. Simpson*, 735 S.W.2d 539, 544-45 (Tex. App.—Texarkana 1987, no writ) (court held that, in absence of partitioning language on certificate of deposit, community funds deposited as joint tenancy with rights of survivorship remained community property). For a further discussion of *Tuttle v. Simpson* see *infra* notes 187-93 and accompanying text.

115. *Id.* at 316. The Texas Constitution permits spouses to partition community property into separate property. TEX. CONST. art. XVI, § 15. The Family Code provides that a partition must be in writing signed by both spouses. TEX. FAM. CODE ANN. § 5.44 (Vernon Supp. 1988). The Probate Code provides for joint tenancies with survivorship rights between spouses. TEX. PROB. CODE ANN. § 46 (Vernon Supp. 1988). Section 46(b) specifically addresses joint tenancies with survivorship rights between spouses:

A written agreement between spouses and a bank . . . may provide that existing



The court thus decided that the partition was fictional<sup>116</sup> and held that couples must actively partition community funds prior to establishing a joint tenancy with rights of survivorship.<sup>117</sup>

### III. HEIRSHIP

Two cases examined the inheritance rights of illegitimate children during the Survey period.<sup>118</sup> In *Stafford v. Little*<sup>119</sup> the court reversed the trial court's judgment that the descendants of Lilly Holley Kelly, found by the trial court to be the recognized natural daughter of Henry Holley, were not heirs-at-law of Henry Holley because they did not prove that Lilly's mother and Henry Holley were ever married.<sup>120</sup> Henry Holley died intestate in 1925. Henry owned approximately 100 acres of land in Smith County that eventually passed to his grandson, Bob Holley. The descendants of Henry and Susan Holley filed two affidavits of heirship in 1940. The affidavits asserted that Henry Holley was married only once, to Susan Holley. In 1980 Lilly Holley Kelly's descendants filed suit to determine their heirship rights. Kelly's family alleged that Henry Holley had also married Easter Smith, Kelly's mother, and that Kelly was Henry Holley and Easter Smith's natural, recognized daughter.<sup>121</sup> The trial court found that Kelly's descendants

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funds or securities on deposit and funds and securities to be deposited in the future and interest and income thereon shall by that agreement be partitioned into separate property and may further provide that the property partitioned by that agreement be held in joint tenancies and pass by right of survivorship.

*Id.* § 46(b). The court noted that the spouses must actually partition the property before they can create a joint tenancy with survivorship rights. 735 S.W.2d at 316. Since the court decided this case, the public voted in the November 3, 1987, general election to amend the Texas Constitution to allow spouses to create joint tenancies with survivorship rights without first partitioning community property. TEX. CONST. art XVI, § 15 (1948, amended 1980, amended 1987). See *infra* note 277 and accompanying text for further discussion of this constitutional amendment and the resulting statutory change.

116. 735 S.W.2d at 316.

117. *Id.* at 317. The court went on to examine the character of certain items contained on the Inventory, Appraisalment, and List of Claims and to examine the merit of certain court orders. *Id.* at 317-20.

118. *Stafford v. Little*, 730 S.W.2d 162 (Tex. App.—Tyler 1987, no writ); *Seyffert v. Briggs*, 727 S.W.2d 624 (Tex. App.—Texarkana 1987, writ ref'd n.r.e.).

119. 730 S.W.2d 162 (Tex. App.—Tyler 1987, no writ).

120. *Id.* at 163.

121. An illegitimate child could not inherit from his or her natural father's estate at the time Holley died in 1925 unless the child's natural parents later married and the father recognized the child as his own. TEX. REV. CIV. STAT. art. 2581 (Vernon 1925), *repealed by* Act of Apr. 4, 1955, ch. 55, § 434, 1955 Tex. Gen. Laws 88, 214. The Act of Apr. 4, 1955, codified art. 2581 into § 42 of the Texas Probate Code. TEX. PROB. CODE § 42, Act of Apr. 4, 1955, ch. 55, § 42, 1955 Tex. Gen. Laws 88, 102, *amended by* Act of May 28, 1977, ch. 290, § 1, 1977 Tex. Gen. Laws 762, 762-63, *amended by* Act of Mar. 22, 1979, ch. 24, § 25, 1979 Tex. Gen. Laws 35, 40, *amended by* Act of June 13, 1979, ch. 713, § 5, 1979 Tex. Gen. Laws 1740, 1743, *amended by* Act of June 17, 1987, ch. 464, § 1, 1987 Tex. Sess. Law Serv. 4085, 4086 (Vernon). See *infra* note 282 and accompanying text for a discussion of the statutory change to this section of the Probate Code. Following 1977 the legislature made changes in § 42 of the Probate Code in order to make the provisions of this section comply with the United States Supreme Court decision in *Trimble v. Gordon*, 430 U.S. 762 (1977). The Supreme Court held in *Trimble* that a state cannot statutorily mandate that illegitimate children absolutely cannot inherit from their natural fathers unless the natural parents later legitimate the child by marrying. *Id.* at 776. Following *Trimble* the Texas Legislature amended section 42(b) to provide:

did not prove that Henry Holley and Easter Smith were married. The court of appeals held that the trial court based its judgment on an unconstitutional statute and reversed and remanded the case for a new trial.<sup>122</sup>

The court in *Seyffert v. Briggs*<sup>123</sup> held that a child who failed to allege that she had been legitimated by her father under the provisions of Texas Probate Code section 42(b) did not have a justiciable interest in contesting the appointment of an administrator of an estate.<sup>124</sup> H.W. Briggs and his only wife, who predeceased him, had no children. Briggs left a valid will, but the executors he named in the will were unable to serve in that capacity. Briggs's nephew offered the will to probate and applied to the court to be named administrator with will annexed. Sandra Seyffert, who alleged that she was the recognized natural daughter of H.W. Briggs, challenged the appointment of the nephew because as Briggs's daughter she should have priority to be appointed administrator. The trial court struck Seyffert's pleadings because she failed to allege a justiciable interest, and she appealed.

The court of appeals examined Seyffert's pleadings to ascertain whether she alleged a justiciable interest.<sup>125</sup> Seyffert alleged that she was Briggs's daughter and that before January 1, 1974, Briggs had acknowledged that she was his daughter in a written statement. Seyffert cited Texas Family Code section 13.24<sup>126</sup> to show the validity of Briggs's statement. Seyffert contended that because Briggs made a written acknowledgment of paternity prior to January 1, 1974, the writing satisfied section 42(b) of the Probate Code.<sup>127</sup> The court concluded that the words "valid and binding" found in section 13.24 of the Family Code mean valid and binding as evidence, which can be rebutted, that the child is the writer's child.<sup>128</sup> The court added that section 42(b) of the Probate Code uses statements executed pursuant to chapter 13 of the Family Code to establish inheritance rights conclusively

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For the purpose of inheritance, 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 or is legitimated by a court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1988). The Supreme Court specifically applied the *Trimble* holding to the former statute in *Reed v. Campbell*, 106 S. Ct. 2234, 90 L. Ed. 2d 858 (1986).

122. 730 S.W.2d at 163.

123. 727 S.W.2d 624 (Tex. App.—Texarkana 1987, writ ref'd n.r.e.).

124. *Id.* at 628.

125. *Id.* at 626-28.

126. TEX. FAM. CODE ANN. § 13.24 (Vernon 1986) provides:

A statement acknowledging paternity or an obligation to support a child which was signed by the father before January 1, 1974, is valid and binding even though the statement is not executed as provided in Section 13.22 of this code and is not filed with the Texas Department of Human Services or with the court.

127. See TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1988).

128. 727 S.W.2d at 627. The court noted that "[t]he purpose of Chapter 13 of the Family Code is to establish a court procedure for determination of paternity." *Id.* •

rather than to serve as prima facie evidence of paternity.<sup>129</sup> The court noted that the legislature did not include Family Code section 13.24<sup>130</sup> in the provisions of Probate Code section 42(b), and that the legislature must have excluded a reference to section 13.24 intentionally.<sup>131</sup> The court then noted that Seyffert did not allege that she had been legitimated.<sup>132</sup> Further, the court stated that the fact that Briggs "recognized" Seyffert as his daughter did not meet the requirements of section 42(b), which other courts have held to be the only means through which an illegitimate child may inherit from his or her father.<sup>133</sup> The court concluded that Seyffert did not have standing because she failed to allege a justiciable interest and that the trial court should have dismissed the suit rather than merely striking Seyffert's pleadings.<sup>134</sup>

#### IV. ESTATE ADMINISTRATION

*Jurisdiction.* In *Bowen v. Hazel*<sup>135</sup> the court determined that a district court had properly dismissed a case for lack of jurisdiction after a county court, sitting in probate, had entered a final judgment on the same issue.<sup>136</sup> The court did not overrule the possibility of an appeal of the probate court's judgment.<sup>137</sup> The executor of an estate filed an inventory, appraisal, and list of claims in the probate court. The inventory did not include several certificates of deposit and bank accounts, which the executor concluded were not probate assets since they were joint accounts with right of survivorship. The executor was also the joint tenant who had survivorship rights in each of these accounts. The beneficiaries under the decedent's will challenged the inventory because they felt that the accounts actually should have been included in the probate estate. The probate court ordered the executor to return some of the funds to the estate. The executor filed for declaratory judgment on this matter in the district court, which found that it lacked jurisdiction because the order of the probate court was a final order that could be appealed in the court of appeals.

The court of appeals first noted that probate matters are different from other matters in that a probate court's order may be appealed if the order "finally adjudicates some substantial right [although it] does not fully and

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129. 727 S.W.2d at 627.

130. TEX. FAM. CODE ANN. § 13.24 (Vernon 1986).

131. 727 S.W.2d at 627-28.

132. *Id.* at 628. The court indicated that Seyffert could have brought a paternity suit and proven paternity using Briggs's statement, which would have legitimated her by court decree. *Id.* Through this legitimation procedure, Seyffert could then have inherited from Briggs. *See id.*

133. *Id.* *See, e.g., In re Estate of Castaneda*, 687 S.W.2d 465, 466 (Tex. App.—San Antonio 1985, no writ); *Mills v. Edwards*, 665 S.W.2d 153, 155 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Batchelor v. Batchelor*, 634 S.W.2d 71, 73 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

134. 727 S.W.2d at 628. The court dismissed the cause without prejudice. *Id.*

135. 723 S.W.2d 795 (Tex. App.—Texarkana 1987, no writ).

136. *Id.* at 797.

137. *Id.*

finally dispose of the entire probate proceeding.”<sup>138</sup> The court determined that the probate court’s order here finally adjudicated a substantial right and that the district court properly dismissed the case.<sup>139</sup> The concurring opinion stated that the district court lacked jurisdiction irrespective of whether the county court’s order was final because a county court exercising probate jurisdiction has exclusive jurisdiction over all matters incident to the estate.<sup>140</sup>

The court in *DeBlanc v. Renfrow*<sup>141</sup> determined that the district court had jurisdiction to hear a cause of action after the county court had sustained a plea in abatement against the claim the plaintiffs first brought in that court.<sup>142</sup> The plaintiffs, two of the decedent’s surviving sisters, alleged that the decedent established two joint tenancy with right of survivorship accounts with them. The defendant, a niece of the decedent, was appointed independent executor of the estate and the estate entered independent administration.<sup>143</sup> The plaintiffs filed their claim in the county court, but the county court sustained the defendant’s plea in abatement because it reasoned that the plaintiffs’ claim was not a claim against the decedent’s estate. The plaintiffs then brought an action in the district court. The defendant made a plea to the jurisdiction of the court in which she alleged that the district court did not have jurisdiction and that the plaintiffs had already appeared in county court on this matter. The district court dismissed the cause without prejudice because it found that the court did not have jurisdiction.

The appeals court first noted that the plaintiffs would not have a forum since the county court abated their claim and the district court dismissed the cause for lack of jurisdiction.<sup>144</sup> The court then analyzed the jurisdiction of

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138. *Id.*

139. *Id.* The court also noted that the district court was correct in dismissing the case because the county court, sitting in probate, had exclusive jurisdiction until such time as a party to the proceeding or the county court itself moved to transfer the proceeding to the district court pursuant to TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1988). 723 S.W.2d at 797. The district court also could have dismissed the case for lack of jurisdiction because of the action pending in the county court, involving the same parties and the same issues, at the time the action was filed. *Id.*

140. 723 S.W.2d 797-98 (Grant, J., concurring). TEX. PROB. CODE ANN. § 5(d) (Vernon 1980) provides: “All courts exercising original jurisdiction shall have the power to hear all matters incident to an estate.” The concurrence noted that whether an asset is part of the probate estate is necessarily a matter incident to the estate, and that the legislature codified the policy of settling all matters incident to the estate in one proceeding. 723 S.W.2d at 798 (Grant, J., concurring).

141. 728 S.W.2d 409 (Tex. App.—Beaumont 1987, writ ref’d n.r.e.).

142. *Id.* at 411.

143. *Id.* at 410.

144. TEX. PROB. CODE ANN. § 145(h) (Vernon 1980) provides:

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

The county court sustained the plea in abatement because the estate had entered an independent administration.

the county court and the district court.<sup>145</sup> The court concluded that with certain exceptions the district court has original probate jurisdiction, and that the district court here had jurisdiction to hear the plaintiffs' case.<sup>146</sup>

In *Graham v. Graham*<sup>147</sup> the court determined that the constitutional county court properly exercised jurisdiction over the heirs and the subject matter in an intestacy probate proceeding.<sup>148</sup> The court noted that a constitutional county court has general probate jurisdiction under the Probate Code,<sup>149</sup> but "that jurisdictional power is dormant jurisdiction until it is awakened in the correct manner."<sup>150</sup> The court found that the county court rendered a judgment without apparent defect, reciting that the plaintiff had activated jurisdiction,<sup>151</sup> which means that only a direct attack may set aside the judgment.<sup>152</sup> The court determined that the service of process satisfied due process considerations.<sup>153</sup> The court held that the county court also had subject matter jurisdiction, even though the county court had to determine title to land in the proceeding, which normally is reserved to the district court.<sup>154</sup>

*Standing.* Three courts examined the issue of standing during the Survey period.<sup>155</sup> In *Klein v. Dimock*<sup>156</sup> the court determined that beneficiaries under a will that was not admitted to probate had no standing to bring a trespass to try title suit against the beneficiaries of the will that was admitted to probate.<sup>157</sup> The court found that the appellants had no interest in the property to give them standing.<sup>158</sup> The decedent had executed a deed conveying land to the appellees in 1973, but he neither delivered the deed to the appellees nor recorded it. Shortly after his death the deed was found. In 1961 the decedent executed a joint will under which the appellants would have taken the land involved in the trespass to try title action.<sup>159</sup> The decedent executed a new will in 1981, which was subsequently admitted to pro-

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145. 728 S.W.2d at 410-11.

146. *Id.* at 411.

147. 733 S.W.2d 374 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.).

148. *Id.* at 378.

149. *Id.* at 377; see TEX. PROB. CODE ANN. § 4 (Vernon 1980).

150. 733 S.W.2d at 377. In order to activate the court's jurisdiction, "persons or property over which the court has potential jurisdiction must be brought before the court by service of process that (1) is consistent with due process and (2) follows, with reasonable strictness, the procedure designed by the state for notification of the pending action." *Id.*

151. *Id.* at 378.

152. *Id.* at 377 (citing *Akers v. Simpson*, 445 S.W.2d 957, 959 (Tex. 1969)).

153. *Id.* at 378.

154. *Id.* The Probate Code provides that "courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate." TEX. PROB. CODE ANN. § 5(d) (Vernon 1980).

155. *Seyffert v. Briggs*, 727 S.W.2d 624 (Tex. App.—Texarkana 1987, writ ref'd n.r.e.); *Klein v. Dimock*, 719 S.W.2d 410 (Tex. App.—Fort Worth 1986, writ diss'd); *InterFirst Bank v. Estate of Henderson*, 719 S.W.2d 641 (Tex. App.—El Paso 1986, no writ). For a discussion of *Seyffert v. Briggs*, see *supra* notes 123-34 and accompanying text.

156. 719 S.W.2d 410 (Tex. App.—Fort Worth 1986, writ diss'd).

157. *Id.* at 412.

158. *Id.*

159. The appeals court had previously affirmed the trial court's decision not to admit the 1961 joint will to probate because the two-year statute of limitations had run since the 1981

bate, in which he left the real property to the appellees. The appellees also filed the 1973 deed after the appellants filed the trespass to try title suit. The appeals court determined that the probate of the 1981 will eliminated the possibility that the appellants had any interest in the property, thus the appellants had no standing to bring a trespass to try title action.<sup>160</sup>

In *InterFirst Bank v. Estate of Henderson*<sup>161</sup> the court considered the issue of whether the trustee of a testamentary trust is an interested person with standing to contest the probate of a will.<sup>162</sup> The court stated that an interested person entitled to contest the probate of a will is normally considered to be a person with a pecuniary interest, whether as an individual or as a fiduciary, that the court's action in admitting the will to probate or refusing to admit the will to probate will affect.<sup>163</sup> The court noted that other jurisdictions had considered the issue of whether a trustee under a testamentary trust had standing to contest the probate of a subsequent will and that these jurisdictions had determined that the testamentary trustee had substantially more interest than a named executor, especially if the trustee represented the interests of beneficiaries adversely affected by the subsequent will.<sup>164</sup> The court reversed and remanded the cause for transfer to the district court for a determination of whether the trustee is an interested person with standing to contest the probate of the subsequent will.<sup>165</sup>

**Burden of Proof.** The Fort Worth court of appeals, in *Mahon v. Dovers*,<sup>166</sup> affirmed the trial court's judgment that the proponent of a will failed to meet her burden of proof that the document she offered for probate was the decedent's validly executed will.<sup>167</sup> Leon Mahon executed a will on May 21, 1985. Three witnesses and a notary public signed the will. Mahon signed the bottom of each page of the will. The proponent offered a will for probate as the will Mahon executed in May 1985. The trial court found that Mahon had validly executed a will in May 1985 but that he had made changes in the will without the requisite formalities and the court therefore denied pro-

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will had been admitted to probate. *Klein v. Dimock*, 705 S.W.2d 405, 407-08 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

160. 719 S.W.2d at 412.

161. 719 S.W.2d 641 (Tex. App.—El Paso 1986, no writ).

162. *Id.* at 643. The court also determined that the trial court erred in dismissing the will contest after providing written notice that the hearing would be for the consideration of the motion to transfer probate proceedings to district court. *Id.* at 642. The court noted that the trial court must have provided the parties with notice that the hearing would consider the dismissal of the will contest in order to satisfy due process requirements. *Id.*

163. *Id.* at 643; see *Logan v. Thomason*, 146 Tex. 37, 41, 202 S.W.2d 212, 215 (1947); *Appleby v. Tom*, 170 S.W.2d 519 (Tex. Civ. App.—El Paso 1942, no writ).

164. 719 S.W.2d at 643 (citing *O'Leary v. McGuinness*, 140 Conn. 80, 98 A.2d 660, 663 (1953); *Johnston v. Willis*, 147 Md. 237, 127 A. 862, 864-65 (1925); *Kuburich v. Popovich (In re Estate of Maricich)*, 140 Mont. 319, 371 P.2d 354, 356 (1962); *In re Rogers' Estate*, 15 N.J. Super. 189, 83 A.2d 268, 275 (Essex County Ct., Prob. Div. 1951)).

165. 719 S.W.2d at 643. The bank was named both executor and trustee of the testamentary trust. The appeals court limited the district court's consideration of whether the bank is an interested party to consideration of the bank's role as trustee. *Id.*

166. 730 S.W.2d 467 (Tex. App.—Fort Worth 1987, no writ).

167. *Id.* at 470.

bate.<sup>168</sup> The appeals court noted that the proponent of a will always has the burden of proving that a will offered for probate was executed with the necessary requisites.<sup>169</sup> The appeals court found that the trial court concluded that it could not determine if the offered document was the same will that Mahon executed in May 1985 based on evidence, so the appeals court concluded that the trial court's finding of fact was not against the great weight and preponderance of evidence.<sup>170</sup>

*Appellate Procedure.* In *Grounds v. Lett*<sup>171</sup> the Dallas court of appeals determined that the trial court interlocutorily denied a motion to transfer venue, overruled a plea to jurisdiction, and granted a motion to transfer a case pending in another county.<sup>172</sup> The Corpus Christi court of appeals held that an appellant's failure either to file a transcript within sixty days of perfection of a writ of error or to file a motion for extension of time in which to file the transcript would result in dismissal of the appeal.<sup>173</sup> The supreme court reversed the Texarkana court of appeals in *First State Bank & Trust v. McCarty*<sup>174</sup> and remanded the case to the trial court.<sup>175</sup> The court of appeals had rendered a verdict in the case,<sup>176</sup> but failed to consider the bank's claim against a third party in reversing and rendering the judgment for the McCartys. The supreme court held that the rendition by the court of appeals violated rule 81 of the Texas Rules of Appellate Procedure<sup>177</sup> and reversed and remanded the case to the trial court for the bank to litigate its claim against the third party.<sup>178</sup>

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168. The trial court heard testimony that Mahon would unstaple his will, remove pages and retype them with the changes he wished to make, then restaple the document. He signed the bottom of each new page. A documents examiner testified that the paper and type were consistent throughout the will and that he thought Mahon signed each page at the same time. The documents examiner admitted, however, that Mahon's signature did not change significantly from the time he executed the will in May 1985 until shortly before his death. The trial court found that the various pages of the document had different numbers of staple holes in them.

169. 730 S.W.2d at 468; see also *In re Estate of Rosborough*, 542 S.W.2d 685, 688 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); *Hogan v. Stoepler*, 82 S.W.2d 1000, 1002 (Tex. Civ. App.—Austin 1935, no writ). Once a proponent has made a prima facie case that a will was validly executed, the burden of proof shifts to the contestant to prove that the will was not validly executed. 730 S.W.2d at 468; see *Jones v. Whiteley*, 533 S.W.2d 881, 885 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); TEX. PROB. CODE ANN. § 88 (Vernon 1980).

170. 730 S.W.2d at 470. The appeals court affirmed the trial court's judgment. *Id.*

171. 718 S.W.2d 38 (Tex. App.—Dallas 1986, no writ).

172. *Id.* at 39. The court noted that none of these orders affected any party's substantial rights and that further hearings were necessary before the dispute could be adjudicated. *Id.*

173. *Migura v. Migura*, 730 S.W.2d 18 (Tex. App.—Corpus Christi 1987, no writ).

174. 730 S.W.2d 656, 657 (Tex. 1987).

175. *Id.*

176. *McCarty v. First State Bank & Trust*, 723 S.W.2d 792 (Tex. App.—Texarkana), *rev'd*, 730 S.W.2d 656 (Tex. 1987). For a discussion of the court of appeals opinion, see *supra* notes 100-06 and accompanying text.

177. See TEX. R. APP. P. 81. Rule 81(c) provides that "[w]hen the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary to remand to the court below for further proceedings." *Id.* 81(c).

178. 730 S.W.2d at 657.

*Evidence.* The Texas Supreme Court interpreted the Dead Man's Statute<sup>179</sup> in *In re Estate of Watson*.<sup>180</sup> The decedent's will named her sister as independent executor and primary beneficiary, while the will excluded other relatives. The excluded relatives contested the probate of the will, alleging that the decedent did not have testamentary capacity and that the named executor exerted undue influence on the decedent. The named executor attempted to introduce many letters written over several years to show the close relationship between the two sisters, but the trial court ruled that the letters were inadmissible because of the Dead Man's Statute. The jury found that the decedent had testamentary capacity, but that the named executor had exerted undue influence, so the court refused to probate the will and the estate passed under the intestacy provisions of the Probate Code.<sup>181</sup> The court of appeals affirmed the judgment of the trial court in an unpublished opinion.

The supreme court first noted that the purpose of the Dead Man's Statute is to ensure fairness, since the death of the speaker prevents the speaker from rebutting the testimony.<sup>182</sup> The court stated that the focus of the Dead Man's Statute is on the witness's capacity to testify rather than on the admissibility of evidence of a transaction.<sup>183</sup> The named executor offered the letters at trial for the purpose of proving the decedent's affection for her sister, who was the named executor and primary beneficiary. The supreme court stated that the trial court should not have excluded the letters under the Dead Man's Statute because the named executor did not testify about the letters.<sup>184</sup> The court further held that the proponent, the named executor, could authenticate the letters because this authentication is merely identification of handwriting rather than testimony about contents.<sup>185</sup> The court held that the failure to admit the letters into evidence was reversible error, and the court reversed and remanded the case for a new trial.<sup>186</sup>

The Texarkana court of appeals in *Tuttle v. Simpson*<sup>187</sup> examined a will to determine if it were ambiguous so that a party could introduce extrinsic evidence to explain the ambiguity.<sup>188</sup> The court also decided on the applicabil-

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179. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926), *repealed by* Texas Rules of Evidence, eff. Sept. 1, 1983, by order of the Texas Supreme Court under Rules of Practice Act, ch. 25, § 1, 1939 Tex. Gen. Laws 201, 201, *repealed by* Act of June 12, 1985, ch. 480, § 26(1), 1985 Tex. Gen. Laws 1720, 2048. This rule of evidence is now found in TEX. R. EVID. 601(b).

180. 720 S.W.2d 806 (Tex. 1986).

181. TEX. PROB. CODE ANN. § 38 (Vernon 1980).

182. 720 S.W.2d at 807.

183. *Id.*

184. *Id.* The court added that no hearsay problem existed because the named executor did not offer the letters to prove the truth of any matter asserted within them. *Id.* The court stated that letters showing an affectionate relationship may properly be used to rebut evidence that the parties did not have a good relationship. *Id.*

185. *Id.* at 807-08. The court noted that the rules of evidence provide other methods of authentication. *Id.* (citing TEX. R. EVID. 901(b)).

186. *Id.* at 808.

187. 735 S.W.2d 539 (Tex. App.—Texarkana 1987, no writ). For a discussion of the joint tenancy with rights of survivorship issue, see *supra* note 114.

188. 735 S.W.2d at 541-42.



ity of the Dead Man's Statute to testimony heard in the case.<sup>189</sup> The trial court determined that the description of property left to a beneficiary under the will was ambiguous.<sup>190</sup> The appeals court noted that a court may allow the admission of extrinsic evidence to clarify ambiguities.<sup>191</sup> The court then examined the words of the will, determined that more than one twenty-acre strip could exist in the northern part of the acreage, and held that the trial court correctly found that the will was ambiguous.<sup>192</sup> The beneficiary of the twenty acres and another witness testified as to the location of the twenty acres at trial, but the appeals court found that the Dead Man's Statute applied to testimony of that sort.<sup>193</sup>

*Family Settlement Agreements.* In *Leon v. Keith*<sup>194</sup> the Waco court of appeals determined that an heir can enter a family settlement agreement with the sole beneficiary under a will even though the heir was not a beneficiary under the will.<sup>195</sup> The decedent died in California in 1983 leaving a holographic will that named one of the decedent's two surviving sisters as the sole beneficiary. The decedent's niece, the daughter of the decedent's deceased sister, also survived. The niece alleged that the sole beneficiary of the will entered into a family settlement agreement with the niece and the other surviving sister under which the will would be probated but the estate would be divided equally between the three. The niece alleged that the three entered the agreement prior to the decedent's death and that they reconfirmed the agreement following the decedent's death. The court noted that heirs have a well-established right to enter into family settlement agreements in Texas.<sup>196</sup> The court overruled *Manning v. Sammons*<sup>197</sup> to the extent that the *Manning* court held that only beneficiaries named in a will can enter a family settlement agreement.<sup>198</sup> The court also held that the niece's suit for breach of the alleged family settlement agreement is not a collateral attack on the probate decree but is instead a different cause of action.<sup>199</sup>

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189. *Id.* at 542-43.

190. The will described the land as a "20 acres strip on the north end" of a 97.85 acre tract in the E.A. Merchant Survey of Harrison County." *Id.* at 541.

191. *Id.* (citing *Kelley v. Martin*, 714 S.W.2d 303, 305 (Tex. 1986); *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687, 689 (Tex. 1984)).

192. 735 S.W.2d at 542.

193. *Id.* Although the court found that the Dead Man's Statute applies to this type of testimony, the court found that it only applied to the beneficiary witness because of her adversarial position. *See id.* The statute did not apply to the other witness, and the court held that his testimony was proper. *Id.* at 543. The court also addressed other issues, specifically including the survivorship rights on an account designated as a joint tenancy account. *Id.* at 543-45; *see supra* note 114.

194. 733 S.W.2d 372 (Tex. App.—Waco 1987, writ ref'd n.r.e.).

195. *Id.* at 373.

196. *Id.* (citing *Salmon v. Salmon*, 395 S.W.2d 29, 32 (Tex. 1965); *Cook v. Hamer*, 158 Tex. 164, 167, 309 S.W.2d 54, 56 (1958); *Franke v. Cheatham*, 157 Tex. 397, 399-401, 303 S.W.2d 355, 357-58 (1957); *Wade v. Wade*, 140 Tex. 339, 344, 167 S.W.2d 1008, 1010 (1943)).

197. 418 S.W.2d 362 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

198. 733 S.W.2d at 374.

199. *Id.* at 373, 374. The court also rejected the part of the *Manning* opinion that held that a suit against the beneficiary of a will for violating an alleged family settlement agreement is a collateral attack on the decree admitting the will to probate. *Id.* at 374.

In another family settlement agreement case a person named successor independent executor in a will challenged the agreement; the Amarillo court of appeals, however, found that he did not have standing to contest the family settlement agreement.<sup>200</sup> The decedent left a will in which she specifically disinherited one of her daughters and directed the executor and beneficiaries of her will to oppose the disinherited daughter's attempts to attack the validity of the will. The decedent also ordered that any beneficiary under the will who initiated an attack on the will be disinherited. The disinherited daughter brought a will contest, in which she alleged that her mother was not competent to make a will and that others exerted undue influence over her mother. The person named independent executor died while the will contest was pending. Rather than naming the successor independent executor named in the will as temporary administrator of the estate, the trial court named the daughter who was not disinherited. Shortly before the will contest went to trial, the family entered a family settlement agreement, under which the disinherited daughter would receive a share of the estate and the estate would be freed to pay creditors. The named successor executor objected to the family settlement agreement and insisted that the court should probate the will as it was written and that he should be named independent executor. The probate court held that the successor independent executor had no standing to object to the family settlement agreement. The probate court approved the family settlement agreement. The named successor executor appealed.

The appeals court first noted that the law looks with favor on family settlement agreements.<sup>201</sup> The court also noted that an executor who has no interest in the estate in any capacity other than that as executor does not have standing to contest a family settlement agreement.<sup>202</sup> The court held

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200. *In re Estate of Hodges*, 725 S.W.2d 265, 267 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.).

201. *Id.* The court stated that the property immediately passed to the named beneficiaries when the decedent died. *Id.* The beneficiaries could thus agree to distribute the property among themselves as they wished without waiting for the actual distribution of the property from the estate. *Id.*

202. *Id.* at 268. For a discussion of standing, see *supra* notes 155-65 and accompanying text. The named successor executor asserted that he had standing because he had a duty to enforce the will's forfeiture clause. The court noted that courts should strictly construe forfeiture clauses and should avoid enforcement of the clauses if possible. *Id.* The court determined that the forfeiture clause here was inapplicable because the family requested a declaratory judgment from the probate court on whether the family settlement agreement would result in forfeiture, which is a will construction question, not in itself an attack on the will. *Id.* Thus, the successor executor had no duties under the forfeiture clause of the will. *Id.* The court additionally noted that the named successor executor had no action to take under the forfeiture clause because if the beneficiaries forfeited their interests under the will by entering the family settlement agreement, the estate would pass by intestacy, after which the two daughters of the decedent would have a contractual obligation to distribute the estate under the terms of the family settlement agreement. *Id.* The court also quickly discarded the notion that the named successor independent executor had standing because he received a pecuniary interest under the will for compensation for his services. *Id.* at 268-69. The court noted that the compensation clause did not appear to apply to a successor independent executor, but instead only to the named independent executor. *Id.* at 269. Finally, the court noted that the will was admitted to probate as a muniment of title for limited purposes only, so the named successor independent executor was not needed in the capacity of executor. *Id.* at 270-71.

that no reason existed for issuing letters testamentary to the named successor executor and affirmed the judgment of the probate court.<sup>203</sup>

*Temporary Administration.* The Beaumont court of appeals held in *Moser v. Norred*<sup>204</sup> that a probate court has wide latitude to appoint a temporary administrator of an estate if the court finds that the estate needs the immediate attention of an administrator.<sup>205</sup> The probate court first granted letters of temporary administration to the decedent's nephew, who stated in his application that the estate required immediate attention and that the applicant expected a will contest. The application for appointment as temporary administrator had attached to it a copy of the decedent's alleged holographic will. The decedent's surviving spouse shortly thereafter filed a contest against the appointment of the nephew as temporary administrator and alternatively applied for appointment of himself as temporary administrator in lieu of the nephew. The court sitting in probate noted that a will contest was pending, discharged the nephew as temporary administrator, and appointed a disinterested third party as temporary administrator. The decedent's husband appealed. The appeals court stated that the trial court's statements and order showed the existence of a suit to determine the validity of the alleged holographic will; the appointment of a disinterested third party as a temporary administrator therefore was proper.<sup>206</sup>

*Executors and Administrators.* The Amarillo court of appeals imposed damages, payable to heirs of a deceased testatrix, on the executor and trustees of a trust, the corpus of which was comprised of the decedent's estate, established by the executor.<sup>207</sup> The court of appeals noted that this appeal was the third arising from proceedings involving this estate.<sup>208</sup> Following the second appeal the trial court amended the final account and ordered the executor to distribute the estate. The executor and the trustees of the trust

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203. *Id.* at 271.

204. 720 S.W.2d 869 (Tex. App.—Beaumont 1986, no writ).

205. *Id.* at 871.

206. *Id.*

207. *In re Estate of Diggs*, 733 S.W.2d 681, 688 (Tex. App.—Amarillo 1987, no writ).

208. *Id.* at 683. The executor first appealed when the trial court determined that the deceased's holographic will named co-executors, but did not provide for the disposition of her estate. The trial court ordered that the estate should pass by intestacy to the decedent's heirs at law. The executors argued that they had the right to distribute the estate as they wished. The appeals court affirmed the trial court's judgment. *Preston v. Preston*, 617 S.W.2d 841 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). Following this first appeal one executor created a trust using estate funds. The beneficiaries of this trust included a church, a library, a museum, and a person who was not an heir at law of the decedent. The trust also provided that the trustees could, in their discretion, provide distributions to themselves and to heirs at law. The heirs applied for a final accounting and distribution of the estate, and the trial court determined that the executor had no authority to establish the trust, ordered the executor to file the final accounting, and ordered the executor to distribute the estate to the heirs at law by a specific date. The executor appealed the judgment and asserted that the property passed to the two named executors for them to distribute as they wished. The other named executor had resigned as executor by the time of the second appeal. The appeals court affirmed the trial court in an unpublished opinion. The appeals court held that this matter had previously been resolved on the first appeal when the appeals court affirmed the judgment that the property passed by descent and distribution to the heirs at law.

established by the executor appealed, listing fifty points of error. The appeals court noted that the appellants listed no authority for many of these points of error.<sup>209</sup> The court overruled every point of error,<sup>210</sup> then addressed the matter of the executor's refusal to distribute the estate as the trial court had ordered.<sup>211</sup> The court found that the appellants had sought this appeal merely for the purpose of delay; the court expressed its concern that the unnecessary appeal was a waste of valuable time during which the court of appeals could have considered meritorious appeals.<sup>212</sup>

In *Rivera v. Morales*<sup>213</sup> the court held that an executory contract for the sale of land is the same as a mortgage for probate purposes in that both are "money claims."<sup>214</sup> The decedent died intestate in February 1983. At the time of his death he had made all monthly payments through the January payment. The decedent's spouse, who married the decedent after he had entered the sales contract, was named administrator of his estate in April 1983. The decedent's spouse tendered the May payment, which the sellers refused. The administrator had not made the February through April payments, and the sellers decided to cancel the sales contract under the forfeiture clause contained in the contract. The trial court found that the forfeiture clause was effective, and the administrator appealed, contending that the sellers should have presented a claim to the probate court.<sup>215</sup> The court of appeals reversed the judgment of the trial court and rendered judgment disallowing the forfeiture.<sup>216</sup>

The Dallas court of appeals held that the probate court has jurisdiction over a cause of action by the estate of a deceased shareholder against the

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209. See *Diggs*, 733 S.W.2d at 684-86. The appellants also failed to follow the format for an appeals brief, and inundated the appeals court with lengthy and unnecessary motions. See *id.* at 687.

210. *Id.* at 686-87.

211. *Id.* at 687. The court noted that the executor and the trustees refused to recognize the authority of the court. The court included testimony of one of the trustees, in which the trustee stated that the opinion of the appeals court "does not have the force of law, and it is not law." *Id.* The court noted in a footnote that it found the appeal strange when the appellants did not respect the opinion of the court of appeals. *Id.* n.3.

212. *Id.* at 687. The court therefore awarded damages to the appellees to compensate for the unnecessary delay on the part of the executor and the trustees. *Id.* at 687-88.

213. 733 S.W.2d 677 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

214. *Id.* at 678-79. The court noted the distinction between the two for purposes of transfer of title and the right of forfeiture and repossession, but determined that no distinction existed between the two for the purpose of presentment of claims to the estate of the deceased purchaser. *Id.* at 679.

215. The Probate Code defines a claim to "include liabilities of a decedent which survive, including taxes, whether arising in contract or tort or otherwise . . ." TEX. PROB. CODE ANN. § 3 (Vernon 1980). The creditor has six months to present the claim after the personal representative of the estate qualifies. *Id.* § 298. The secured creditor has the option of having "the claim allowed and approved as a matured secured claim to be paid in due course of administration" or having the claim treated "as a preferred debt and lien against the specific property securing the indebtedness and paid according to the terms of the contract which secured the lien . . ." *Id.* § 306(a).

216. 733 S.W.2d at 679. The concurring opinion stated that since evidence existed that the decedent intended to use this property as a residence, the sellers should have additionally had to comply with the provision requiring sellers to give purchasers sixty days' notice of an intent to enforce a forfeiture clause in an installment land contract. See TEX. PROP. CODE ANN. §§ 5.061-.063 (Vernon 1983).

other two shareholders in a closely held corporation.<sup>217</sup> The three shareholders incorporated in 1981 for the purpose of selling oilfield equipment. None of the shareholders, who were equal owners of the business, made contributions to the corporation in exchange for his stock. The decedent served as president of the corporation from the date of incorporation until his death in 1982. After the decedent's death the other two shareholders began the process of winding up the business. They distributed assets of the corporation to themselves, but made no distributions to the decedent's estate. They did not formally dissolve the corporate shell. The successor executor of the estate brought an action to compel the two shareholders to contribute the decedent's share of the business assets, determined as of the date of his death, to his estate. The trial court entered judgment for the estate and found that the corporation was the alter ego of the two shareholders, which meant that the estate could recover from them individually. The court of appeals affirmed the trial court<sup>218</sup> and reformed the judgment only to the extent of one item of damages, which was counted twice.<sup>219</sup>

The Waco court of appeals held that a trial court properly could take judicial notice of the murder conviction of the decedent's husband when appointing an administrator in an estate when the same judge signed the applicant's murder conviction.<sup>220</sup> The decedent's husband applied for appointment as administrator of the estate. The trial judge made a fact finding that the husband had been convicted of murder in the same court and appointed another to serve as executor. The husband appealed, asserting that the record made no mention of his murder conviction, which was under appeal at that time. The court of appeals found that under these circumstances the trial court could take judicial notice of its own judgment.<sup>221</sup>

## V. GUARDIANSHIPS

In *Hernandez v. Borjas*<sup>222</sup> the court affirmed an order that denied the ap-

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217. *Francis v. Beaudry*, 733 S.W.2d 331, 336 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

218. *Id.* at 335. The court of appeals found that not only did the estate have a cause of action against the shareholders in their individual capacities on the alter ego theory, but that it also had a cause of action against them on a theory known as "denuding the corporation." *Id.* The court cited *World Broadcasting System, Inc. v. Bass*, 160 Tex. 261, 266-67, 328 S.W.2d 863, 866 (1959) for this theory. In the *World Broadcasting* decision the supreme court held that the shareholders who stripped a corporation of its assets were liable to the corporation's creditors to the extent they benefitted. 160 Tex. at 266-67, 328 S.W.2d at 866.

219. 733 S.W.2d at 337, 338.

220. *Bryan v. Blue*, 724 S.W.2d 400, 402 (Tex. App.—Waco 1986, no writ). The husband was convicted of murdering his wife, the decedent here. The Probate Code provides that "[n]o person is qualified to serve as an executor or administrator of an estate who is . . . a convicted felon . . . unless such person has been duly pardoned, or his civil rights restored, in accordance with law." TEX. PROB. CODE ANN. § 78(c) (Vernon 1980). Further, a trial court may refuse to appoint any person the court finds unsuitable to serve as executor. *Id.* § 78(f).

221. 724 S.W.2d at 402. The court of appeals noted that a person convicted of a felony whose conviction is under appeal still is unable to serve as a personal representative of an estate. *Id.* at 402 (citing *Smith v. Christley*, 684 S.W.2d 158, 160 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)).

222. 734 S.W.2d 776 (Tex. App.—Fort Worth 1987, no writ).

plication for the removal of a court-appointed guardian.<sup>223</sup> The court appointed Jenaro Borjas the guardian of his sister's four minor children when she died. Approximately six years later the two children who were still minors moved in with Manuel Ventura Hernandez. The two children then filed a "Selection of Guardian" with the court, pursuant to section 118(b) of the Probate Code,<sup>224</sup> in which they requested that the court name Hernandez as their guardian. Hernandez filed an application for the court to remove Borjas as guardian, alleging that Borjas had forced the children from his home and had not helped to support the children from the guardianship estate since that time. The trial court heard only the application for removal and determined that no cause existed for removal. The trial court did not hear the children's request for selection of guardian. The court of appeals noted that the application for removal of guardian and the "Selection of Guardian," while similar in result, are different actions.<sup>225</sup> In order for the court to grant an application for removal the applicant must prove that the current guardian has failed in his duty in some manner defined in the Probate Code.<sup>226</sup> The court must only find that the person the minor requests to be named guardian in a "Selection of Guardian" is suitable and competent in order for the court to name the requested person guardian.<sup>227</sup> The appeals court noted that evidence existed to support the positions of both Borjas and Hernandez.<sup>228</sup> The point of error Hernandez raised on appeal did not state whether it was raising factual insufficiency, but the appeals court determined that this was the intent.<sup>229</sup> The appeals court found that sufficient evidence existed to support the trial court's implied factual findings that no cause existed for the removal of Borjas as the children's guardian.<sup>230</sup>

The court determined in *Baumann v. Willis*<sup>231</sup> that the guardian of a person who had been adjudicated incompetent does not have the right to possess the ward's will when no evidence exists that the ward intends to destroy the will or that the guardian needs the will to administer the guardianship.<sup>232</sup> The appellee in this case had represented the ward, Mrs. Rauh, for many years prior to the declaration of incompetency. Mrs. Rauh's daughter, who was later named guardian, had attempted to secure possession of the will prior to the declaration of her mother's incompetency. Mrs. Rauh directed the attorney not to deliver the will to her daughter or to anyone else, nor to disclose the contents of the will, prior to her death. Mrs. Rauh was declared incompetent in 1981. In 1985 her guardian attempted to force the

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223. *Id.* at 780.

224. TEX. PROB. CODE ANN. § 118(b) (Vernon 1980). This section allows minors who have reached fourteen years of age to request the court to select a guardian of the child's choosing if the court finds that the requested guardian is suitable. *Id.*

225. 734 S.W.2d at 778.

226. See TEX. PROB. CODE ANN. § 222 (Vernon 1980).

227. See *id.* § 118.

228. 734 S.W.2d at 779.

229. *Id.*

230. *Id.* at 780.

231. 721 S.W.2d 535 (Tex. App.—Corpus Christi 1986, no writ).

232. *Id.* at 538.

attorney to deliver the will to her. The trial court concluded that the guardian "had failed to show a legal right to take physical possession of her ward's last will and testament."<sup>233</sup> The appeals court determined that a will is not property as the Probate Code defines the term.<sup>234</sup>

## VI. TRUSTS

*Charitable Corporations.* In *Blocker v. State*<sup>235</sup> the court affirmed the trial court's judgment that imposed a constructive public charitable trust upon the assets of a dissolved charitable corporation under the *cy pres* doctrine.<sup>236</sup> In the 1930s the Hammond family created a charitable corporation, the Houston Conservatory of Music (HCM), with the purpose of teaching music and associated arts. Mozart B. Hammond gave land in Houston to HCM in 1941. HCM acquired another location in 1950 and subsequently sold the land Hammond gave it. In 1963 HCM sold the property it acquired in 1950 and bought property on Milford Street in Houston, which housed HCM until 1984. Mozart B. Hammond died in 1982. Hammond left all of his property equally to three devisees. Following Hammond's death all three of these devisees and their mother became directors of HCM. The directors determined that the only assets of the corporation were the Milford Street property and the musical instruments HCM owned. The directors decided to dissolve the corporation, pay any liabilities, and distribute the assets to Hammond's estate. The directors then deeded the Milford Street property to Hammond's estate. The attorney general brought this action to void the conveyance of the property. The trial court concluded that the deed was void. The trial court additionally awarded the Milford Street property and personalty to a newly created charitable corporation that had a similar purpose to HCM's under the *cy pres* doctrine. The directors appealed from the trial court's judgment, asserting that they followed the provisions of article 1396-6.02A of the Texas Non-Profit Corporation Act<sup>237</sup> in dissolving HCM.

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233. *Id.* at 536.

234. 721 S.W.2d at 537-38; see TEX. PROB. CODE ANN. §§ 3(z), 3(cc), 230(b)(1), 232, 233 (Vernon 1980). The court affirmed the trial court's judgment. 721 S.W.2d at 538. The court also determined that the guardian was not entitled to attorney's fees because these fees are not within the meaning of costs to the estate. *Id.*

235. 718 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1986, no writ).

236. *Id.* at 416. The *cy pres* doctrine allows a court the equitable power to carry out the purpose of a charitable trust or charitable corporation as closely as possible to the particular intent of the person or persons who established the trust or corporation, even though the particular purpose cannot be fulfilled for some reason. *Id.* at 415 (citing *Wooten v. Fitzgerald*, 440 S.W.2d 719, 725 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.); *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269, 285 (Tex. Civ. App.—Houston [1st Dist.] 1966, writ ref'd n.r.e.); BLACK'S LAW DICTIONARY 349 (5th ed. 1979)).

237. See TEX. REV. CIV. STAT. ANN. art. 1396-6.02A (Vernon 1980), amended by Act of June 15, 1985, ch. 682, § 1, 1985 Tex. Gen. Laws 2464, 2464-65. This article applies to the application and distribution of the assets of a dissolved nonprofit corporation. The directors must first apply the assets to satisfy all liabilities. *Id.* art. 1396-6.02A(1). The directors must then return or convey any assets that the corporation holds that must be returned or conveyed at the time the corporation is dissolved. *Id.* art. 1396-6.02A(2). The directors must next transfer any assets that the corporation holds that must be applied for a limited charitable purpose so that they can continue to be used for that purpose. *Id.* art. 1396-6.02A(3). The directors may then distribute any other assets in accordance with provisions in the articles of incorpora-

The appeals court first determined that neither the stipulated facts nor the trial record showed that HCM had any liabilities or debts at the time it was dissolved.<sup>238</sup> The court discounted the idea that the distribution of the real estate to Hammond's estate served as posthumous compensation for his years of dedicated service to HCM, thus falling within the scope of a corporate obligation that must be paid under the dissolution provisions of the Non-Profit Corporation Act.<sup>239</sup> The court next determined that the directors improperly attempted to distribute HCM's real property to Hammond's estate under the statutory provision that allows distributions to specified persons or organizations under a statutory distribution plan.<sup>240</sup> The court held that all property that HCM received over the years, including the gift of real estate Hammond deeded to HCM, were gifts given with the understanding that they would be used for the charitable purposes detailed in HCM's articles of incorporation.<sup>241</sup> The court held that the attorney general is the appropriate representative of the state to bring an action for the imposition of a constructive trust.<sup>242</sup>

*Constructive Trusts.* In *Jackson v. Timmins*<sup>243</sup> the court held that the trial court properly imposed a constructive trust in a one-half interest in land three children inherited from their parents.<sup>244</sup> A father and one of his sons purchased a tract of land that contained timber. The title to the land was taken in the father's name. Two of the children argued that the land passed in equal shares to all three children when the father died intestate. The brother who bought the land with his father contended that he owned one-

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tion or the bylaws. *Id.* art. 1396-6.02A(4). Finally, if any assets remain, the directors may then distribute them to any persons or organizations as specified in a distribution plan adopted under the terms of the Texas Non-Profit Corporation Act. *Id.* art. 1396-6.02A(5). The appellants here asserted that HCM's assets fell under subsections (1) and (5), and that they permissibly distributed the real estate to Hammond's estate. The attorney general contended that the provisions of subsection (3) applied, that the property must be distributed to an organization with a similar charitable purpose.

238. 718 S.W.2d at 413.

239. *Id.* (analyzing TEX. REV. CIV. STAT. ANN. art. 1396-6.02A(1) (Vernon 1980)). The court suggested that continuing the charitable trust to which Hammond devoted so much time would perhaps be a more appropriate posthumous reward for his efforts. *Id.*

240. *Id.* (analyzing TEX. REV. CIV. STAT. ANN. art. 1396-6.02A(5) (Vernon 1980)). The court noted that this provision applies only when the preceding four paragraphs have been satisfied. *Id.* The court also determined that neither art. 1396-6.02A(2) nor art. 1396-6.02A(3) applied. *Id.*

241. 718 S.W.2d at 415. The court also held that by accepting donations HCM established a charitable trust just as effectively as if the donors expressly limited the use of their donations. *Id.* As such, the directors had an express statutory duty to distribute HCM's assets to charitable organizations established for purposes similar to those of HCM. *Id.* The court paid particular attention to the fact that three of the directors would directly benefit from the distribution of the real property to Hammond's estate. *See id.* The court noted the policy reasons against interpreting art. 1396-6.02A(3) in a manner that would allow directors of charitable corporation to dissolve the corporations in order to benefit personally. *Id.* at 415-16.

242. *Id.* at 416. The court found that HCM contracted with the state through the articles of incorporation, which stated the charitable purpose of the corporation; the Hammonds thus established HCM as a public charitable trust, which would continue in perpetuity, and which the state through the attorney general could enforce as it can any public charitable trust. *Id.*

243. 733 S.W.2d 355 (Tex. App.—Texarkana 1987, no writ).

244. *Id.* at 356.



half the land outright as his property and another one-sixth under intestate succession. The jury found that a confidential relationship existed between the father and the son with whom the father purchased the property. The appeals court found that sufficient evidence existed to support the jury's finding<sup>245</sup> and that this evidence established the elements of a constructive trust.<sup>246</sup>

A typical banking relationship between a bank and a customer, however, is not a confidential relationship, and one court refused to impose a constructive trust based upon a banking relationship.<sup>247</sup> W.H. McWilliams was a director and employee of Consolidated Bearing & Supply Company, a closely held corporation. Consolidated issued McWilliams a stock certificate for 7500 shares in 1976. The face of the certificate contained a notice of a restriction on the transfer of the stock. In 1979 McWilliams, who was still employed by Consolidated, borrowed a large sum of money from the bank and pledged the stock certificate as collateral. McWilliams then used the money to engage in business in direct competition with Consolidated. The bank did not inform Consolidated of McWilliams's pledge of the stock certificate. Consolidated learned of McWilliams's outside business ventures approximately one year after McWilliams pledged the stock certificate. Shortly thereafter, Consolidated terminated McWilliams's employment. McWilliams subsequently died and left a large portion of the loan unpaid. The bank then foreclosed and had the sheriff sell the 7500 shares of stock. Consolidated attempted to have the sheriff's sale set aside, based either upon the restriction on transferability or upon a constructive trust theory. Consolidated alleged that the bank owed Consolidated a fiduciary duty because of the banking relationship between Consolidated and the bank to inform Consolidated when McWilliams pledged his stock certificate. The trial court found that no confidential relationship existed between Consolidated and the bank and that the bank did not owe Consolidated a fiduciary duty. The appeals court noted that a party must prove more than a prior business relationship in order to prove that a confidential relationship existed.<sup>248</sup> The court concluded that an ordinary banking relationship such as existed be-

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245. *Id.*

246. *Id.* at 357. The evidence showed a confidential relationship between the purchasing son and his father, and that the son relied on the confidential relationship in agreeing that his father would take title to the property in his name. The father died without deeding the son's interest in the property to him as promised. A constructive trust thus protects the son's interest. The court also mentioned that although the other two children were innocent, their title was subject to the constructive trust brought about by their father's failure to convey the property as he had promised. *Id.*; see also *Pope v. Garrett*, 147 Tex. 18, 24-25, 211 S.W.2d 559, 562 (1948) (policy against unjust enrichment supports the imposition of a constructive trust because the innocent defendants would not have inherited any interests in the property but for the wrongful acts of a third party).

247. *Consolidated Bearing & Supply Co. v. First Nat'l Bank*, 720 S.W.2d 647, 650 (Tex. App.—Amarillo 1986, no writ).

248. *Id.* at 649. The court stated that a confidential relationship arises from a fiduciary relationship or from "informal social, moral or personal relationships." *Id.* One party may establish that a confidential relationship existed between businesses if that party can prove that the relationship had been continuous and lengthy and that the party had a justified expectation that it could rely on the other party to act in its best interests. *Id.*

tween the bank and Consolidated did not give rise to a confidential relationship.<sup>249</sup>

**Resulting Trust.** In *Estate of Lee v. Ring*<sup>250</sup> the court held that letters that a decedent wrote to one of his creditors, in which the decedent stated that he was conveying his interest in land to the creditor in exchange for the release of his debt, constituted some evidence that no resulting trust existed.<sup>251</sup> The decedent had been employed by a real estate development company, and he was entitled to receive property in exchange for his services. The decedent arranged with his employer to have the employer deed the property directly to his creditor. The employer did so, and the letters the decedent wrote the creditor indicated that the transfer was made in partial satisfaction of the debt. The court noted that a resulting trust arises at the moment that title passes if title is taken in the name of someone other than one who pays the purchase price for the property or if an express trust fails.<sup>252</sup> The court determined that some evidence existed that the decedent intended to convey the land to the creditor in satisfaction of his debt, and that the decedent's administrator failed to carry her burden of proving that the decedent and the creditor intended a resulting trust at the time title was conveyed to the creditor.<sup>253</sup>

**Spendthrift Trusts.** The Fifth Circuit Court of Appeals, in *Phillips v. MBank Waco, N.A. (In re Latham)*<sup>254</sup> applied Texas law concerning both spendthrift trusts and garnishment. Lucylle Latham guaranteed a loan that a bank made to her daughter. Two years later Latham created an irrevocable trust under the terms of which she was to receive the income for her life, with the remainder to pass to named contingent beneficiaries at her death. The trust instrument gave the trustee discretion to invade the trust corpus to make distributions to Latham for her support and maintenance. The trust instrument also contained a spendthrift clause. Approximately one year after Latham created the trust the bank from which her daughter borrowed money obtained a judgment against Latham as guarantor of the loan. The bank shortly thereafter served a writ of garnishment based on the judgment against the trustee. The bank then received a declaratory judgment that it could reach the trust assets. Within six weeks after the bank received the declaratory judgment Latham filed for chapter 7 bankruptcy. The bank asserted that its lien against the trust assets attached when it served the writ of garnishment on the trustee, which was prior to the ninety-day preference period. The bankruptcy court agreed, and the United States district court

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249. *Id.* at 650. The court also noted that McWilliams did not violate the restriction on transferability when he pledged the stock to secure his loan and that the bank did not violate the restriction when it bought the stock at the sheriff's sale. *Id.* at 651.

250. 734 S.W.2d 123 (Tex. App.—Houston [1st Dist.] 1987, no writ).

251. *Id.* at 126.

252. *Id.*

253. *Id.*

254. 823 F.2d 108 (5th Cir. 1987).

affirmed the bankruptcy court's decision.<sup>255</sup>

The Fifth Circuit noted that under Texas law, which determines the date of perfection of a lien through garnishment, a lien attaches to assets on the date the writ is served.<sup>256</sup> The court also noted that a spendthrift clause does not protect a settlor from his or her creditors under Texas law.<sup>257</sup> The court held that the bank perfected its lien prior to the preference period and that it should receive full satisfaction of the lien, thus affirming the district court.<sup>258</sup>

A Texas court held that a mother could reach the current income of a spendthrift trust of which her ex-husband was an income beneficiary to satisfy a judgment she obtained against her ex-husband for unpaid child support.<sup>259</sup> The ex-husband had failed to pay over \$25,000 in child support while his children were under age eighteen. The mother obtained a judgment against the ex-husband for the deficiency, which he failed to pay. The mother then sought to obtain payment from the trust. The ex-husband had a beneficial interest only in the net income of the trust, although he was a contingent beneficiary of the corpus. The trial court found that the mother could collect the net income of the trust until she collected the full amount of her judgment. The appeals court affirmed, finding that a spendthrift clause does not protect a beneficiary from support obligations to his children.<sup>260</sup> The court held that the mother could recover from the trust income even though the youngest child was over age eighteen.<sup>261</sup>

*Trusts and Trustees.* A direction to the trustee to divide income equally among beneficiaries was insufficient to override the statutory allocation of principal and interest in mineral royalties,<sup>262</sup> according to one court.<sup>263</sup> The

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255. *Id.* at 109.

256. 823 F.2d at 110. The court noted that the latter order of the bankruptcy court granting the bank relief from the automatic stay did not determine when the lien attached but instead only determined the validity of the lien. *Id.* at 110-11.

257. *Id.* at 111. See TEX. PROP. CODE ANN. § 112.035(d) (Vernon 1984), which provides that "[i]f the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest does not prevent his creditors from satisfying claims from his interest in the trust estate."

258. 823 F.2d at 111.

259. First City Nat'l Bank v. Phelan, 718 S.W.2d 402, 406 (Tex. App.—Beaumont 1986, no writ).

260. *Id.* at 406. The court noted that this result stems from public policy. *Id.* See G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 224 (rev. 2d ed. 1979); 1 A. SCOTT, THE LAW OF TRUSTS § 157.1 (1939).

261. 718 S.W.2d at 406.

262. TEX. PROP. CODE ANN. § 113.107(d) (Vernon 1984). This subsection provides:

If the proceeds are received as a royalty, overriding or limited royalty, or bonus or from a working interest, net profit interest, or any other interest in minerals or other natural resources, proceeds . . . shall be apportioned on a yearly basis in accordance with this subsection . . . . Twenty-seven and one-half percent of the gross proceeds, but not to exceed 50 percent of the net, after deducting the expenses and carrying charges on the property, is principal, and the balance is income.

*Id.* The trust instrument may override the statutory scheme by specifying the allocation of principal and interest. See *id.* § 113.101.

263. InterFirst Bank v. King, 722 S.W.2d 18, 22 (Tex. App.—Tyler 1986, no writ).

testator established a trust in his will under which he directed the trustee to continue operation of certain oil wells and to "divide the income equally"<sup>264</sup> between the beneficiaries. The income beneficiaries contended that the trustee could distribute net production revenues to the income beneficiaries without following the statutory allocation formula. The executor of the estate of one of the remainder beneficiaries contended that the terms of the will did not demonstrate the testator's intent that the trustee should distribute all net revenue from production as income. The trial court concluded that the testator intended that the net revenue should be distributed. The appeals court reversed and rendered.<sup>265</sup> The appeals court found that the language in the will did not provide a basis for overriding the statutory allocation.<sup>266</sup>

The Corpus Christi court of appeals upheld a trial court's removal of a trustee for engaging in undue influence and improper actions.<sup>267</sup> The trustee served as fiduciary of a trust for her brothers' benefit. The trustee's parents established the trust from the remainder interest in their farm; the parents retained a life estate. The parents conveyed their retained interest to their daughter in 1981. In 1983 the parents brought this action in which they sought to remove their daughter as trustee and to recover their life estate in the farm by setting aside the 1981 conveyance. The jury found that the daughter had used undue influence to obtain the 1981 conveyance. The daughter admitted in her testimony that she had, among other things, taken money from her parents' bank account and used it for her own purposes. The trial court found that the trustee had tricked her parents into conveying their life estate to her in 1981. The court accordingly set aside the 1981 conveyance. The trial court also removed the daughter as trustee. The appeals court affirmed the trial court's judgment in both matters.<sup>268</sup>

*Standing.* A father has no standing to sue co-trustees for an alleged breach of their fiduciary duties, either in his own right as a contingent beneficiary of the trust or as next friend for his children, the beneficiaries of the trust.<sup>269</sup> Howard Davis's mother created a trust for the benefit of his children in 1981. She named Davis's wife and a bank co-trustees of the trust. Davis and his wife divorced in late 1982. Davis received custody of the children in the divorce decree, but the decree named his ex-wife managing conservator. Davis brought suit against the co-trustees for allegedly wasting the trust's assets.<sup>270</sup> The trial court found that Davis had no standing to contest the co-trustees' actions, whether in his own right as a contingent beneficiary or as

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264. *Id.* at 19.

265. *Id.*

266. *Id.* at 21.

267. *Novak v. Schellenberg*, 718 S.W.2d 822, 825 (Tex. App.—Corpus Christi 1986, no writ).

268. *Id.* at 825.

269. *Davis v. Davis*, 734 S.W.2d 707, 709-10 (Tex. App.—Houston [1st Dist.] 1987, no writ).

270. Davis asked the court to remove the co-trustees, appoint a successor trustee, require an accounting and reimbursement from the co-trustees to the trust corpus, and enjoin the co-trustees from disposing of other trust assets. Davis also alleged in a second cause of action that the co-trustees had libeled him.

next friend for his sons, the beneficiaries.<sup>271</sup> The court of appeals affirmed the trial court's summary judgment.<sup>272</sup>

## VII. LEGISLATIVE DEVELOPMENTS

*Nontestamentary Transfers.* The Seventieth Texas Legislature modified statutes concerning joint tenancy accounts<sup>273</sup> and anatomical gifts.<sup>274</sup> The legislature amended Probate Code section 439(a) to add an example of language sufficient to establish a joint account with rights of survivorship.<sup>275</sup> The legislature amended section 445 to provide that banks that pay funds from a joint account to a surviving party under the terms of a written agreement as provided in section 439(a) will not be liable for paying the funds to the heirs, devisees, or beneficiaries of the decedent's estate.<sup>276</sup> The legislature also amended section 46 of the Probate Code, with the amendment contingent upon the passage of the constitutional amendment allowing spouses to agree to provide survivorship rights in community property.<sup>277</sup>

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271. The trial court made this finding as a matter of law because Davis's ex-wife was managing conservator under the divorce decree. The managing conservator has the right and responsibility to represent the children in legal actions, whereas the possessory conservator has no such right. Under the Family Code the managing conservator "retains all the rights, privileges, duties, and powers of a parent to the exclusion of the other parent, subject to the rights, privileges, duties, and powers of a possessory conservator . . ." TEX. FAM. CODE ANN. § 14.02(a) (Vernon 1986). The possessory conservator has the duty to care for and discipline the children, the duty to provide food, clothing, and shelter, and the power to authorize emergency medical treatment. *Id.* § 14.02(a). Additionally, the possessory conservator has the right to inspect "medical, dental, and educational records of the child to the same extent as the managing conservator." *Id.* § 14.04(c). Since the managing conservator has all the duties, rights, and responsibilities except those reserved for the possessory conservator, the managing conservator has the "power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child." *Id.* § 12.04(7). Section 12.04 of the Family Code defines the rights, privileges, duties, and powers of a parent.

272. 734 S.W.2d at 712.

273. Act of June 11, 1987, ch. 297, §§ 1, 2, 1987 Tex. Sess. Law Serv. 3289, 3289-90 (Vernon); Act of June 18, 1987, ch. 678, § 2, 1987 Tex. Sess. Law. Serv. 5063, 5068-69 (Vernon).

274. Act of Apr. 22, 1987, ch. 28, §§ 1, 2, 1987 Tex. Sess. Law Serv. 125, 125-27 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. arts. 4590-2(2)(j), -2(8A) (Vernon Supp. 1988)).

275. Act of June 11, 1987, ch. 297, § 1, 1987 Tex. Sess. Law Serv. 3289, 3289 (Vernon). The legislature provided that language in an agreement signed by the party who died, sufficient to confer a right of survivorship, would substantially state the following: "'On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate.'" *Id.* By providing this statutory example the legislature should eliminate much of the litigation concerning whether an account established survivorship rights. See *supra* notes 93-117 and accompanying text.

276. Act of June 11, 1987, ch. 297, § 2, 1987 Tex. Sess. Law Serv. 3289, 3290 (Vernon).

277. Act of June 18, 1987, ch. 678, §§ 1, 2, 1987 Tex. Sess. Law Serv. 5063, 5068-69 (Vernon). The changes to § 46(a) were minor modifications substituting gender neutral language and providing a clearer meaning. *Id.* § 1, at 5068. The legislature deleted existing subsection (b), however, and substituted a new subsection (b) providing that "[s]pouses may agree in writing that all or part of their community property which is titled or held with indicia of title becomes the property of the surviving spouse on the death of a spouse." *Id.* § 2, at 5068-69. The legislature conditioned the effective date of the changes to Probate Code § 46 on the passage of the constitutional amendment permitting spouses to provide survivorship rights in community property. This amendment passed in the general election of November 3, 1987. TEX. CONST. art. XVI, § 15 (1948, amended 1980, 1987). See *supra* notes 113-17 and accompanying text for a discussion of cases involving this issue during the Survey period. The legis-

Because of the public concern about the availability of donor organs, the legislature amended the Texas Anatomical Gifts Act.<sup>278</sup> The amendment defines more clearly what is a qualified organ or tissue procurement organization.<sup>279</sup> In addition, the amendment places responsibility on hospitals to identify suitable donors and to solicit, in a tactful manner, donation of body organs and tissues from the family of a decedent who had not previously signed an organ donation card.<sup>280</sup>

*Heirship.* Since the amendment to Probate Code section 42(b)<sup>281</sup> became effective September 1, 1987, persons claiming to be illegitimate children may inherit from their purported fathers if the probate court finds that the purported father is the father of the child.<sup>282</sup> The legislature also added chapter 26 to the Property Code.<sup>283</sup> This chapter concerns the property rights in a decedent's name, voice, signature, photograph, or likeness.<sup>284</sup> Section 26.005 provides for the succession of the property rights following the individual's death.<sup>285</sup>

*Estate Administration.* The legislature amended Probate Code section 149B(a) to provide that an interested person may petition the probate court for an accounting and distribution at any time after two years, rather than the former three years, from the date the court granted the independent administration.<sup>286</sup> An amendment to section 149(b) provides both that the court shall order the independent executor to distribute the estate, or any

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lature also adopted the Uniform Premarital Agreement Act in the Act of June 18, 1987, ch. 678, § 1, 1987 Tex. Sess. Law Serv. 5063, 5063-68 (Vernon) (codified at TEX. FAM. CODE ANN. §§ 5.41-.56 (Vernon Supp. 1988)). The adoption of the Uniform Premarital Agreement Act supersedes the former provisions concerning premarital and partition agreements.

278. TEX. REV. CIV. STAT. ANN. art. 4590-2 (Vernon 1976 & Supp. 1988).

279. Act of Apr. 22, 1987, ch. 28, § 1, 1987 Tex. Sess. Law Serv. 125, 125 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 4590-2(2)(j) (Vernon Supp. 1988)).

280. *Id.* § 2, at 125-27 (codified at TEX. REV. CIV. STAT. ANN. art. 4590-2(8A) (Vernon Supp. 1988)). This Act became effective on January 1, 1988.

281. TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1988).

282. Act of June 17, 1987, ch. 464, § 1, 1987 Tex. Sess. Law Serv. 4085, 4086 (Vernon). The legislature added a provision to existing § 42(b) that provides:

A person claiming to be an illegitimate child, or claiming inheritance through an illegitimate child, may petition the probate court for a determination of right of inheritance. If the court finds by clear and convincing evidence that the purported father was the father of the child, the child is legitimate for the purpose of inheritance and he and his issue may inherit from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue. This section does not permit inheritance by a purported father of an illegitimate child, whether recognized or not, if the purported father's parental rights have been terminated.

*Id.* at 4086. This addition to § 42(b) reflects the equal protection concerns about paternal inheritance by illegitimate children. See *supra* notes 118-34 for a discussion of cases decided in this Survey period under the language of section 42(b) prior to this change.

283. Act of May 21, 1987, ch. 153, § 1, 1987 Tex. Sess. Law Serv. 2551, 2551-57 (Vernon) (codified at TEX. PROP. CODE ANN. §§ 26.001-.015 (Vernon Supp. 1988)).

284. *Id.* at 2551.

285. *Id.* at 2552-53. The succession of the property right is similar to the rules of intestate succession found in TEX. PROB. CODE ANN. § 38 (Vernon 1980).

286. Act of June 19, 1987, ch. 760, § 1, 1987 Tex. Sess. Law Serv. 5432, 5432 (Vernon).

portion of the estate that the court finds is no longer subject to administration, and that the court shall order partition and distribution or, if the property cannot be fairly partitioned and distributed, sale of the property.<sup>287</sup> The legislature amended Probate Code section 37A to add a definition of "beneficiary" and to substitute "beneficiary" for wordier language throughout the section; this amendment also adds the ability of a guardian ad litem to disclaim the interests of unborn or unascertained persons.<sup>288</sup> The legislature added new sections to the Probate Code dealing with apportionment of taxes in the absence of testamentary direction for apportionment,<sup>289</sup> priority of liability of property for the decedent's debts other than estate tax,<sup>290</sup> and satisfaction of pecuniary bequests.<sup>291</sup> The legislature added two provisions allowing for the recovery of costs, including reasonable attorney's fees, to parties contesting the admission of a will to probate<sup>292</sup> and to parties who seek removal of an independent executor appointment without bond.<sup>293</sup>

Temporary administrations of decedents' estates are more clearly defined and separated from temporary guardianships after the seventieth legislature. The legislature removed mention of a temporary administration of a decedent's estate from Probate Code section 131(a)<sup>294</sup> and added new section 131A<sup>295</sup> to provide for the appointment of temporary administrators. An amendment to existing section 132(a)<sup>296</sup> provides that the court's power to appoint a temporary administrator during a contest over admitting a will to probate or issuing letters of administration is in addition to the power to appoint a new administrator under new section 131A.<sup>297</sup> The legislature also included temporary administrators in the class of people permitted to accept a commission-based compensation for their services in administering an estate.<sup>298</sup>

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287. Act of June 18, 1987, ch. 565, § 1, 1987 Tex. Sess. Law Serv. 4484, 4484 (Vernon). Rather than ordering the court to make distribution of all or part of the estate or to partition or sell assets of the estate, the former language was permissive.

288. Act of June 17, 1987, ch. 467, § 2, 1987 Tex. Sess. Law Serv. 4092, 4093-96 (Vernon). The legislature amended Probate Code section 34A to allow a probate court to appoint a guardian ad litem for unborn or unascertained persons in any probate proceedings. *Id.* § 1, at 4092.

289. Act of June 20, 1987, ch. 742, § 1, 1987 Tex. Sess. Law Serv. 5323, 5323-27 (Vernon) (codified at TEX. PROB. CODE ANN. § 322A (Vernon Supp. 1988)).

290. *Id.* § 2, at 5328 (codified at TEX. PROB. CODE ANN. § 322B (Vernon Supp. 1988)).

291. Act of June 19, 1987, ch. 1110, § 1, 1987 Tex. Sess. Law Serv. 7664, 7664-65 (Vernon) (codified at TEX. PROB. CODE ANN. § 378A (Vernon Supp. 1988)).

292. Act of June 17, 1987, ch. 462, § 3, 1987 Tex. Sess. Law Serv. 4081, 4081 (Vernon) amended Probate Code § 243 by adding that any beneficiary of a will or alleged will of an administrator with the will or the alleged will annexed who in good faith and with just cause defends or prosecutes the admission of the will or alleged will to probate may recover costs from the estate.

293. Act of June 20, 1987, ch. 719, § 1, 1987 Tex. Sess. Law Serv. 5191, 5191 (Vernon) (codified at TEX. PROB. CODE ANN. § 149C(d) (Vernon Supp. 1988)).

294. Act of June 17, 1987, ch. 461, § 1, 1987 Tex. Sess. Law Serv. 4074, 4074 (Vernon).

295. *Id.* § 2, at 4076-78 (codified at TEX. PROB. CODE ANN. § 131A (Vernon Supp. 1988)).

296. TEX. PROB. CODE ANN. § 132(a) (Vernon 1980).

297. Act of June 17, 1987, ch. 460, § 3, 1987 Tex. Sess. Law Serv. 4074, 4078 (Vernon).

298. Act of June 20, 1987, ch. 919, § 1, 1987 Tex. Sess. Law Serv. 6240, 6240 (Vernon) amended TEX. PROB. CODE ANN. § 241(a) (Vernon Supp. 1988). The legislature further revised § 241(a) to provide that a court may disallow all or part of a commission if the court

The legislature attempted to clarify responsibilities between the district court and the county court at law in counties without statutory probate courts.<sup>299</sup> Amendments to the Government Code impact Harris County statutory probate courts.<sup>300</sup> An amendment to Probate Code section 8(c)(2) clarifies ambiguous language pertaining to transfer of an estate to the proper court in another county.<sup>301</sup> The legislature amended statutes relating to notice to certain creditors<sup>302</sup> and service of process on estates of nonresident decedents.<sup>303</sup> All applications for probate and applications for issuance of letters of administration now must contain the social security numbers of the applicant and the decedent.<sup>304</sup>

*Guardianships.* An application for the appointment of a permanent guardian must now include the social security numbers of both the applicant and the person for whom a guardianship is sought.<sup>305</sup> An application for the appointment of a temporary guardian must also include the social security number of the applicant and the respondent.<sup>306</sup> A temporary guardian may also receive compensation in the form of a commission if the court finds that the temporary guardian has properly managed the estate.<sup>307</sup> A parent may now sell his or her child's real or personal property up to a value of \$15,000

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finds that the executor or administrator has not prudently managed the estate or if the executor or administrator has been removed under the provisions of the Probate Code. Act of June 20, 1987, ch. 919, § 1, 1987 Tex. Sess. Law Serv. at 6241.

299. Act of June 17, 1987, ch. 459, § 4, 1987 Tex. Sess. Law Serv. 4071, 4073-74 (Vernon) amended TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1988). The amendment provides that the district court will hear contested matters while the county court will continue to exercise jurisdiction over the ongoing administration of the estate. After the district court decides the contested issue or issues, the district court will transfer the matter back to the county court for further consistent proceedings. *Id.* at 4073.

300. Act of June 17, 1987, ch. 465, § 1, 1987 Tex. Sess. Law Serv. 4090, 4090-91 (Vernon) amended TEX. GOV'T CODE ANN. § 25.1034 (Vernon Supp. 1988).

301. Act of June 19, 1987, ch. 786, § 1, 1987 Tex. Sess. Law Serv. 5548, 5548 (Vernon).

302. Act of June 17, 1987, ch. 461, § 1, 1987 Tex. Sess. Law Serv. 4079, 4079 (Vernon) amended TEX. PROB. CODE ANN. § 295(b) (Vernon Supp. 1988). This Act also amended TEX. PROB. CODE ANN. § 320(a) to provide that funeral expenses and expenses of the decedent's last illness up to \$5000 shall receive the first priority of payment from the estate. Act of June 17, 1987, ch. 461, § 2, 1987 Tex. Sess. Law Serv. 4079, 4079-80 (Vernon).

303. Act of May 25, 1987, ch. 158, § 1, 1987 Tex. Sess. Law Serv. 2572, 2572-73 (Vernon) amended TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (Vernon Supp. 1988) to add new subsections (c) and (d); Act of May 25, 1987, ch. 158, § 2, 1987 Tex. Sess. Law Serv. 2572, 2573 (Vernon) amended TEX. CIV. PRAC. & REM. CODE ANN. § 17.045 (Vernon Supp. 1988) to add new subsection (e).

304. Act of June 17, 1987, ch. 463, § 1, 1987 Tex. Sess. Law Serv. 4082, 4083 (Vernon) amended TEX. PROB. CODE ANN. § 81(a) (Vernon Supp. 1988); Act of June 17, 1987, ch. 463, § 2, 1987 Tex. Sess. Law Serv. at 4084 amended TEX. PROB. CODE ANN. § 82 (Vernon Supp. 1988).

305. Act of June 17, 1987, ch. 463, § 3, 1987 Tex. Sess. Law Serv. 4082, 4084 (Vernon) amended TEX. PROB. CODE ANN. § 111 (Vernon Supp. 1988).

306. Act of June 17, 1987, ch. 460, § 1, 1987 Tex. Sess. Law Serv. 4074, 4075 (Vernon) amended TEX. PROB. CODE ANN. § 131(b) to provide that the application for a temporary guardian must identify the danger to the person or property that necessitates the appointment of the temporary guardian as well as to require social security numbers of the applicant and the respondent.

307. Act of June 20, 1987, ch. 919, § 1, 1987 Tex. Sess. Law Serv. 6240, 6241 (Vernon) amended TEX. PROB. CODE ANN. § 241(b) (Vernon Supp. 1988).



without seeking appointment as guardian of the child, which is \$5000 more than previously allowed.<sup>308</sup> The legislature also amended Probate Code section 329(a)(6) to provide that a guardian may borrow money if the probate court finds that borrowing would serve the best interests of the ward; the probate court may authorize a guardian to borrow money for the purchase of a residence for the ward.<sup>309</sup> Probate Code section 34A now provides that a probate court may appoint a guardian ad litem for unborn or unascertained persons.<sup>310</sup> The amount a debtor of a minor, a person legally adjudged to be incompetent, or a former ward of a guardianship terminated under Probate Code section 404(c) can pay to the county clerk of the county of the residence of the creditor minor, incompetent, or former ward, or to the county clerk of a county in which a nonresident creditor, incompetent, or former ward owns real property, has increased from \$15,000 to \$30,000.<sup>311</sup>

*Trusts.* The disclaimer provisions relating to trusts now allow "the personal representative of an incompetent, deceased, unborn, or unascertained, or minor beneficiary, with court approval" to disclaim the beneficiary's interest.<sup>312</sup> The legislature made minor modifications to Property Code sections concerning conveyances of trust property by trustees and liability of trust property.<sup>313</sup> The legislature also amended various sections of the Property Code to include references to individual retirement accounts, pension plans, and other employee death benefits.<sup>314</sup>

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308. Act of June 19, 1987, ch. 759, § 1, 1987 Tex. Sess. Law Serv. 5431, 5431 (Vernon) amended TEX. PROB. CODE ANN. § 339A(a) (Vernon Supp. 1988).

309. Act of June 20, 1987, ch. 766, § 1, 1987 Tex. Sess. Law Serv. 5483, 5484 (Vernon).

310. Act of June 17, 1987, ch. 467, § 1, 1987 Tex. Sess. Law Serv. 4092, 4092 (Vernon).

311. Act of June 17, 1987, ch. 465, § 1, 1987 Tex. Sess. Law Serv. 4087, 4087-90 (Vernon) amended TEX. PROB. CODE ANN. § 144(a), (b) (Vernon Supp. 1988).

312. Act of June 17, 1987, ch. 467, § 3, 1987 Tex. Sess. Law Serv. 4092, 4096-98 (Vernon) amended TEX. PROP. CODE ANN. § 112.010 (Vernon Supp. 1988).

313. Act of June 18, 1987, ch. 684, § 3, 1987 Tex. Sess. Law Serv. 5078, 5080-81 (Vernon) amended TEX. PROP. CODE ANN. § 101.001 (Vernon Supp. 1988) to change the heading, to remove the designation of subsection (a), and to change former subsection (b) to new section 101.002 and TEX. PROB. CODE ANN. § 114.082 to remove the designation of subsection (a) and to change former subsection (b) to new section 114.0821.

314. Act of June 20, 1987, ch. 741, § 1, 1987 Tex. Sess. Law Serv. 5319, 5319-20 (Vernon) amended TEX. PROP. CODE ANN. § 111.004 (Vernon Supp. 1988) to add definitions relating to employee benefit plans and individual retirement accounts; Act of June 20, 1987, ch. 471, § 2, 1987 Tex. Sess. Law Serv. at 5320 amended TEX. PROP. CODE ANN. § 111.004(12) (Vernon Supp. 1988); Act of June 20, 1987, ch. 471, § 3, 1987 Tex. Sess. Law Serv. at 5320-21 amended TEX. PROP. CODE ANN. § 121.051(a) (Vernon Supp. 1988); Act of June 20, 1987, ch. 471, § 4, 1987 Tex. Sess. Law Serv. at 5321-22 amended TEX. PROP. CODE ANN. § 121.052(a) (Vernon Supp. 1988); Act of June 20, 1987, ch. 471, § 5, 1987 Tex. Sess. Law Serv. at 5322 amended TEX. PROP. CODE ANN. § 121.054 (Vernon Supp. 1988).